



THE QUESTIONABLE HISTORY OF REGULATORY REFORM SINCE THE APA

The 114th Congress will likely consider many regulatory reform bills. Understanding how such bills pass is important for effective policymaking. While compromise is often key to legislative success, some kinds of compromise may undermine the future success of the intended regulatory reform. If the history of regulatory reform is any indication, the success of future reform will hinge on whether reform bills maintain the substantive intent of their sponsors or are watered down until they fulfill a merely symbolic purpose.

A new study for the Mercatus Center at George Mason University examines the legislative histories and implementation of key regulatory reform statutes and finds that these bills passed after crucial but controversial provisions were weakened. Compromises included in the legislation to secure its passage have consistently undermined substantive reform objectives by maintaining broad agency discretion to interpret the law and by minimizing judicial review. To achieve regulatory reform objectives, legislators must be careful not to abandon core reform elements or history will continue to repeat itself.

To read the study in its entirety and learn more about its authors, Stuart Shapiro and Deanna Moran, please see [“The Questionable History of Regulatory Reform since the APA.”](#)

SUMMARY

Since the passage of the Administrative Procedure Act (APA) in 1946, several pieces of legislation designed to reform the regulatory process have been enacted. The legislative histories of five of the most significant statutes—the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the Small Business Regulatory Enforcement Fairness Act, and the Congressional Review Act—have never been mined with the purpose of understanding the implementation of these acts and why they were able to pass Congress.

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These laws were accompanied by strong rhetoric about the need to reduce the regulatory burden. However, none of the reforms has lived up to that rhetoric. The number of hours Americans spend providing information to the government continues to increase. Small businesses continue to be burdened by regulations. States and local governments still complain about unfunded mandates. By any measure, these reforms have failed, largely due to provisions in each reform that maximize agency discretion and minimize judicial review. Attempts to change the rulemaking process can be a very poor way to change the substance of regulations if agencies retain wide discretion to interpret the law and the judiciary has a minimal role in holding regulatory agencies accountable.

KEY FINDINGS IN THE LEGISLATIVE HISTORY

Since passage of the APA, there have been two waves of regulatory reform: first in the late 1970s and then in the mid-1990s. Each of those periods saw the passage of significant regulatory reform statutes.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act requires an agency to conduct a regulatory flexibility analysis when it issues a rule that has a significant impact on small businesses. This analysis is not subject to judicial review, however. Moreover, agencies were assured throughout the legislative process that the law would not undermine existing regulatory statutes or their goals. The law gave a voice to the interests of small businesses, which often are disproportionately affected by regulation, but was drastically weakened by the lack of judicial review and by the discretion it gave agencies to determine whether their rules have an impact on small businesses. But these provisions were likely necessary for the law's passage.

Paperwork Reduction Act of 1980

The Paperwork Reduction Act created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. OIRA was designed to oversee the implementation of the act, which creates procedures for collecting information from the public. The law had widespread support across parties and within the business community since reducing the burden of providing information was a popular goal. But the trend of information collection over the last 15 years shows that despite OIRA's existence, that burden has increased on businesses and the public—making it hard to argue that the statute has achieved its goals.

Unfunded Mandates Reform Act of 1995

A string of complex laws and regulations from the 1970s and 1980s resulted in the enactment of the Unfunded Mandates Reform Act, which required agencies to disclose the cost of new rules enforced on the private sector when a rule's cost is expected to exceed \$100 million. While the new benefit-cost analysis requirement mollified a vocal constituency—state and local governments—the effects of the reform are not easily measured. The law provides numerous exemptions for regulations related to public health and waters down other requirements, and thus appears to be largely symbolic.

Small Business Regulatory Enforcement Fairness Act and Congressional Review Act of 1996

The Small Business Regulatory Enforcement Fairness Act and the Congressional Review Act made significant changes to the Regulatory Flexibility Act. Once again, small business interests lobbied for changes to the regulatory process. The laws mandated an increase of judicial review for the regulatory process, small business participation in the process through panel review of proposed rules, and decreased punitive action against small businesses that seek redress for regulatory action. The law also included a provision for Congress to review and disapprove of federal agency rules. However, both laws are limited and provide few constraints on agency discretion.

CONCLUSION

The history of these acts shows how compromises that placed a higher value on preserving broad agency discretion than on the stated reform objectives of the underlying bills achieved the political objective of passing popular “reforms.” Such compromises, however, shifted the legislation from substantive change to mere symbolic action. Drawing on these legislative lessons, the success or failure of future reform efforts hinges on policymakers’ ability to maintain the link between their primary reform objectives and the substantive statutory provisions necessary to achieve them.