The Questionable History of Regulatory Reform since the APA

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Abstract

We review four major regulatory reform statutes passed since the legal enshrinement of the regulatory state by the Administrative Procedure Act in 1946. None of the four statutes can be said to have accomplished its substantive goals (which usually involved reducing the burden of regulation). We recount the debate that accompanied the passage of these statutes and find that passage required the support of legislators and presidents who favored strong regulation. The statutes, therefore, all gave considerable discretion to regulatory agencies. Regulatory agencies have used this discretion to ensure that the regulatory reform statutes do not curb their ability to make their preferred regulatory decisions. We conclude that as long as the cooperation of political actors who support strong regulation is necessary, reforms to the regulatory process are likely to have minimal effects on regulatory substance.

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The Questionable History of Regulatory Reform since the APA

Stuart Shapiro and Deanna Moran

The Administrative Procedure Act (APA) was passed in 1946[1] and enshrined in law the modern administrative state in the United States. It was passed in reaction to the growth of executive branch policymaking and was the result of countervailing impulses both to rein in administrative agencies and to cement their place in American governance. The statute's chief accomplishments—the creation of informal rulemaking for writing regulations, the due process protections put in place for agency formal administrative adjudication, and the standards set for all administrative actions—make it one of the most important and least heralded statutes of the 20th century.

The same cannot be said of many of the statutes that have attempted to reform the regulatory process created by the APA. These statutes have come in two waves, and we may be about to experience a third wave. The stagflation period of the late 1970s saw the passage of the Paperwork Reduction Act[2] and the Regulatory Flexibility Act (RFA).[3] The recession of the early 1990s and the takeover of Congress by Republicans in 1995 yielded the Unfunded Mandates Reform Act (UMRA)[4] and amendments to the RFA, including the Congressional Review Act (CRA).[5] Currently Congress continues to consider many bills that would reform the regulatory process.[6] Regulatory reform at the state level has followed a similar pattern.[7]

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[1] Pub. L. No. 79-404, 60 Stat. 237 (1946).
[2] Pub. L. No. 96-511, 94 Stat. 2812 (1980).
[3] Pub. L. No. 96-354, 94 Stat. 1164 (1981).
[4] Pub. L. No. 104-4, 109 Stat. 48 (1995).
[5] Pub. L. No. 104-121, 110 Stat. 857 (1996).
[6] See "Regulatory Reform Bills, 113th Congress," Regulatory Studies Center, Columbian College of Arts & Sciences, George Washington University, accessed November 26, 2014, http://research.columbian.gwu.edu/regulatorystudies/regreform.
[7] Stuart Shapiro and Debra Borie-Holtz, *The Politics of Regulatory Reform* (New York: Routledge, 2013).

None of these statutes has had an effect that comes close to that of the APA. On some level, this result is to be expected. The APA was establishing a legal process for executive branch agency policymaking. The statutes passed since then were attempting to modify an existing process. However, many have argued that these statutes have not lived up to the claims of their proponents. Whether mitigating the paperwork burden of regulations, lessening their impact on small businesses or other units of government, or increasing congressional oversight of regulatory decisions, few of the ostensible goals of these statutes have been achieved.

And yet policymakers keep turning to regulatory reform. The 113th Congress proposed more than 20 bills that would alter the regulatory process.[8] Before proceeding further with regulatory reform, policymakers need to better understand the problems that have beset the statutes that have (largely) unsuccessfully tried to change regulatory output in the past. The purpose of this article is to explore what it means for a regulatory reform statute to "work." We outline several definitions of success for regulatory reform and then weigh the efforts at statutory regulatory reform over the past several decades against those standards.

The efforts at regulatory reform since the APA have largely had minimal substantive effects. In part, this results from weaknesses in the statutes that give discretion to regulatory agencies. These weaknesses are not accidental, however; they were necessary to ensure passage of the statutes in a divided government. To gain the support of presidents (and in some cases congressional majorities) who support agency protections of public health, agencies have been given considerable discretion to interpret these statutes. Despite this substantive failure, the statutes have often served an important political purpose. They have allowed incumbent politicians to claim credit for addressing economic ills during economy-

[8] See "Regulatory Reform Bills, 113th Congress," George Washington University.

wide downturns. They may also provide information for legislators to better oversee the executive branch agencies.

This article proceeds as follows. In the next section, we review the history of the APA and discuss the various definitions of what it means for regulatory reform statutes to be effective. Sections II and III discuss the various efforts at regulatory reform since the APA. We describe first the legislative histories of these statutes and then their implementation. Section IV and the conclusion of this article discuss the findings and their possible implications.

I. What Does It Mean for Regulatory Reforms to "Work"?

All regulatory reforms start with a familiar rhetorical flourish: something is broken in the regulatory process, and it needs to be fixed. Often the perception that regulations are "broken" comes from the regulated community. Those that are regulated by the government usually object, in particular, to the costs of government regulation (although they often voice other concerns, such as the impact on employment, countervailing risks caused by government action, and unintended consequences of regulation). Indeed, the passage of many of the statutes considered in this article was accompanied by speeches about reduced burden either on the general public or on a particular constituency (such as small businesses). One way to judge the success of these statutes is by assessing whether regulations become more cost-effective or less burdensome to a particular group after their passage.

A similar concern animated the debate over the APA. The debate also raised other critical questions, however. From the dawn of the regulatory state, another issue has been debated in parallel with the substantive concern often voiced by the regulated community. Regulations are produced by executive branch agencies and independent commissions. These agencies are effectively creating law without being located in the legislative branch. The APA was motivated in part by the New Deal, which involved a large expansion of policymaking in the executive branch.

The APA was the product of more than a decade of work. Beginning with recommendations by the American Bar Association to rein in New Deal agencies and protect regulated parties,[9] the work progressed to a more bipartisan goal of creating a management structure and political accountability for what was then a new administrative state. President Franklin D. Roosevelt instructed his attorney general in 1939 to study existing administrative practices and procedures. By 1945, President Harry Truman's attorney general, Tom Clark, was indicating executive branch support for legislation. When the APA passed in 1946, it did so unanimously.[10]

As the first statute passed with the sole intent of governing agency policymaking, the APA has been described as "more like a constitution than a statute."[11] This characteristic differentiates the APA from the later statutes discussed in this article. The APA (though motivated by attempts to gain political oversight over agency adjudications) created the regulatory process. Administrative law scholar Walter Gellhorn, who was involved in the debates over the APA, notes, "For the most part, the new statute was declaratory of what had already become the general, though not universal, patterns of good behavior."[12] The statute was written in sufficiently general terms to have gained broad acceptance. Unlike later attempts at regulatory

[9] Alan B. Morrison, "The Administrative Procedure Act: A Living and Responsive Law," *Virginia Law Review* 72, no. 2 (1986): 253–70.
[10] Walter Gellhorn, "The Administrative Procedure Act: The Beginnings," *Virginia Law Review* 72, no. 2 (1986): 219–33.
[11] Morrison, "Administrative Procedure Act: A Living and Responsive Law," 253.
[12] Gellhorn, "Administrative Procedure Act: The Beginnings," 232.

reform, talk of amending the APA has been rare.[13] The Supreme Court noted that the APA has settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[14]

The APA was also a hard-fought compromise between political forces. Indeed, when administrative reform was first considered in the 1930s, it was justifiably seen as an attack on New Deal policies and the executive branch. The APA only became law once supporters of the New Deal felt sufficiently comfortable that the agencies created during the 1930s were safe from judicial review (because of a judicial branch that was now staffed with Roosevelt appointees), and the constraints on adjudication were leavened by a new procedure, rulemaking,[15] in which agencies were supreme.[16] The APA effectively enshrined the idea of the administrative state in law. Attempts at regulatory reform since then can be seen as attempts to continue the negotiation that preceded the APA over the objections of regulatory supporters who were quite happy with the outcome in that statute.[17]

Despite the "coming to rest," cited in *Vermont Yankee*,[18] debates over regulation and the regulatory process have hardly ceased. As in the years before passage of the APA, these debates

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[13] William H. Allen, "The Durability of the Administrative Procedure Act," *Virginia Law Review* 72, no. 2 (1986): 235–52.
[14] Vermont Yankee Nuclear Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), at 523.
[15] The APA contains provisions for two types of rulemakings, informal rulemaking (the type everyone is familiar with today) and formal rulemaking, which is conducting using adjudication-like procedures, such as cross-examination. However, formal rulemaking proved very burdensome (Robert W. Hamilton, "Rulemaking on a Record by the Food and Drug Administration," *Texas Law Review* 50 [1972]: 1132–94), and the Supreme Court ruled that "informal" notice-and-comment rulemaking was sufficient to satisfy requirements in organic agency statutes for a hearing (United States v. Florida East Coast Ry. Co., 410 U.S. 224 [1973] and United States v. Storer Broadcasting Co., 351 U.S. 192 [1956]). See also Glen O. Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform," *University of Pennsylvania Law Review* 118, no. 4 (1970): 485–539 (on the decision between rulemaking and adjudication as policymaking tools).
[16] Martin Shapiro, "The APA: Past, Present, and Future," *Virginia Law Review* 72, no. 2 (1986): 447–92. See also McNollgast, "The Political Origins of the Administrative Procedure Act," *Journal of Law, Economics, and Organization* 15, no. 1 (1999): 180–217.
[17] Shapiro, "APA: Past, Present, and Future."
[18] Vermont Yankee Nuclear Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), at 523.

are not merely motivated by the substance of regulatory decisions. The political accountability of regulatory decisions continues to be a concern, particularly for members of Congress. Therefore, a second way of judging the success of regulatory reforms is by examining the degree to which they increase the accountability of executive branch decision makers.

Political scientists have argued that procedures imposed on regulators serve this purpose. They can facilitate "fire alarm" oversight by giving interest groups that are unhappy with a decision made by a regulatory agency additional capacity to inform sympathetic congressional representatives.[19] Procedures can also "stack the deck" by creating a decision-making environment for regulators that closely mirrors the one faced by the enacting coalition of legislators, thereby increasing the likelihood that regulators will make decisions that reflect the preferences of this coalition.[20] These arguments have their critics as well.[21]

Does regulatory reform lead to regulatory decisions that are more responsive to the preferences of elected officials? We do not need to agree that increased responsiveness is a good thing to assess the more positive question of whether agencies are more or less responsive. However, we do need to think about whether the success of a regulatory reform is measured by responsiveness to the coalition that passed the regulatory reform or to later coalitions that then use the reform to oversee agencies.[22]

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[19] Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28, no. 1 (1984): 165–79.

[20] Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3, no. 2 (1987): 243–77. See also Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," *Virginia Law Review* 75 (1989): 431–82.

[21] Murray J. Horn and Kenneth A. Shepsle, "Commentary on 'Administrative Arrangements and the Political Control of Agencies': Administrative Process and Organizational Form as Legislative Responses to Agency Costs," *Virginia Law Review* 75 (1989): 499–508.

[22] Ibid.

Some scholars have argued that another political motivation for regulatory reform statutes could be the desire to claim credit for addressing the economic concerns of constituents. Proponents of regulatory reform in Congress may have gotten elected by promising to do something about the economy. The fact that regulatory reform statutes seem to peak during economic slowdowns is likely not coincidental. Regulatory reform (regardless of whether it is actually effective) is a way for such political actors to claim to be "fixing" the economy without actually repealing popular regulations or taking other more controversial measures.[23]

In a study of the notice-and-comment process, William West evaluates the role of public comment and describes three possible influences it can have on regulatory decision making.[24] The first two correspond with the categories described above. He asks whether comments have a substantive effect on decisions (and answers mostly no), and whether they facilitate political oversight (possibly yes).[25] West adds a third category that public comments, and hence all regulatory reforms, can play. They can fill a symbolic role.[26] In the case of public comment, this role can mean allowing interested parties to get the sense that they are participating in decisions that affect them. Other statutory reforms can have the same effect (e.g., the RFA gives small businesses an additional voice in regulatory decisions), or the statute can make clear that efficiency, federalism, or representativeness are important values.

Before we turn to the regulatory reform statutes since the APA, discussing evaluations of the notice-and-comment process created in the APA is instructive. As described previously, West conducted one such examination and found that public comments mostly fulfill the role of

[23] Shapiro and Borie-Holtz, *Politics of Regulatory Reform*.
[24] William F. West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis," *Public Administration Review* 64, no. 1 (2004): 66–80.
[25] Ibid.
[26] Ibid.

facilitating fire alarm oversight by congressional overseers.[27] In a study of 11 rulemakings, Marissa Golden also was skeptical that public comments had much weight with regulatory agencies, except when commenters across the ideological spectrum agreed on a potential change.[28] Several other studies are similarly dubious about the role of public comment.[29]

Susan Yackee has performed perhaps the most sophisticated examinations of the role of public commenting, and she is considerably more positive than many other scholars about the attentiveness of agencies to public comments. In a study of 40 rulemakings across four regulatory agencies, she concludes that “interest group comments can and often do affect the content of final government regulations.” She acknowledges that she studies only low-salience regulations and that her conclusion may not be generalizable to regulations with a higher political profile.[30] Stuart Shapiro, looking at a larger dataset of more than 900 regulations promulgated during the Clinton and George W. Bush administrations, finds that agencies make changes in response to comments nearly half the time, but also frequently do not receive comments or use direct or interim final rules to bypass the public comment process.[31]

Yackee has also done several studies with coauthors, examining the question of which comments get the most attention from regulatory agencies. Using the same dataset (of lower-salience regulations), she finds that when comments are submitted on both sides of an issue, the side that submits more substantive comments often is more likely to gain agency changes in its

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[27] McCubbins and Schwartz, “Congressional Oversight Overlooked.”
[28] Marissa Martino Golden, “Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?,” *Journal of Public Administration* 8, no. 2 (1998): 245–70.
[29] Steven Balla, “Administrative Procedures and Political Control of the Bureaucracy,” *American Political Science Review* 92, no. 3 (1998): 663–73; Stuart Shapiro, “Presidents and Process: A Comparison of the Regulatory Process under the Clinton and Bush (43) Administrations,” *Journal of Law and Politics* 23 (2007): 393–418.
[30] Susan Webb Yackee, “Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking,” *Journal of Public Administration Research and Theory* 16 (2006): 119.
[31] Shapiro, “Presidents and Process.”

direction.[32] Not surprisingly, she finds that businesses are more likely to gain changes from agencies than are other types of interest groups.[33] This conclusion is supported by another recent study of 90 Environmental Protection Agency (EPA) air-toxicity regulations, which finds that changes in final rules from initial proposals are four times as likely to favor businesses as other parties.[34] A study of the Securities and Exchange Commission, however, finds little evidence for businesses having more influence than other parties.[35] Still, a rough consensus exists that organized interests tend to dominate the public comment process and have the best chance of being heard at most agencies.[36]

Although the academic literature is divided on the substantive role of public comment, agreement exists that organized interests use the procedure most effectively. Organized interests are also the groups that can most easily pull "fire alarms" and alert Congress to issues of concern raised by agency proposals.[37] Although some researchers are cynical about the predominance of business interests in the notice-and-comment process[38] and few would argue that the process has lived up to the hopes of its most grandiose proponents,[39] enough evidence exists that it makes a

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32 Amy McKay and Susan Webb Yackee, "Interest Group Competition on Federal Agency Rules," *American Politics Research* 35, no. 3 (2007): 336–57.

33 Jason Webb Yackee and Susan Webb Yackee, "A Bias towards Business? Assessing Interest Group Influence on the US Bureaucracy," *Journal of Politics* 68, no. 1 (2006): 128–39.

34 Wendy Wagner, Katherine Barnes, and Lisa Peters, "Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards," *Administrative Law Review* 63, no. 1 (2011): 99–158. See also Wendy Wagner ("Administrative Law, Filter Failure, and Information Capture," *Duke Law Journal* 59 [2010]: 1321–447), who argues that the business community, because it has the capacity to overwhelm agencies with information, has dominated the public comment process and thereby corrupted its original intent.

35 David C. Nixon, Robert M. Howard, and Jeff R. DeWitt, "With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission," *Journal of Public Administration Research and Theory* 12, no. 1 (2002): 59–76.

36 William F. West and Connor Raso, "Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control," *Journal of Public Administration Research and Theory* 23, no. 3 (2013): 495–519.

37 McCubbins and Schwartz, "Congressional Oversight Overlooked."

38 Wagner, Barnes, and Peters, "Rulemaking in the Shade." See also Wagner, "Administrative Law, Filter Failure, and Information Capture."

39 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).

difference in agency decision making to declare it at least a partially successful regulatory reform. The APA as a whole, including the creation of notice-and-comment rulemaking, has clearly been a deeply influential statute. How have attempts to shape regulation through statutory changes to the regulatory process compared with this experience?

II. History and Intent of Regulatory Reform Statutes

Since the passage of the APA, two[40] major waves of regulatory reform have arisen (before the current fascination with regulatory reform). The first occurred during the late 1970s and early 1980s. Amid rising concerns about high inflation and high unemployment,[41] Congress passed and President Carter signed the Regulatory Flexibility Act and the Paperwork Reduction Act.[42] The second wave occurred in the mid-1990s with the Republican takeover of Congress after the 1994 election. Congress amended the Regulatory Flexibility Act and passed the Unfunded Mandates Reform Act, and these bills were signed by President Clinton. In this section, we review the histories of these statutes and attempt to discern the intentions of their supporters. In the next section, we assess whether these goals have been realized.

Regulatory Flexibility Act

President Carter signed the RFA[43] on September 19, 1980. The original version of the bill (S. 1974) was introduced in 1977 to the 95th Congress, under the same name, and was sponsored by

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[40] There have been a few failed attempts to revise the APA, including an effort by the American Bar Association in the 1960s and a movement in the Senate to direct courts to be less deferential to agencies in the early 1980s. Sidney Shapiro, "A Delegation Theory of the APA," *Administrative Law Journal* 10 (1996): 89–109.
[41] Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," *Administrative Law Review* 63 (2011): 37–69.
[42] The beginning of the Reagan administration was also a high point for regulatory reform, but this mostly centered on the executive branch with the adoption of Executive Order 12291.
[43] Pub. L. No. 96-511, 94 Stat. 2812 (1980).

Sen. Gaylord Nelson (D-WI) and Sen. John Culver (D-IA). At the time, Nelson was the chairman of the Senate Small Business Committee and acted as an advocate for the needs of small businesses.[44] The bill was amended and introduced again to the 95th Congress, one year later, as S. 3330. The revised version of the bill incorporated changes that were a culmination of the suggestions and recommendations of federal agencies and public witnesses during various hearings. Specifically, S. 3330 broadened the scope of the legislation to include smaller communities and rural areas and offered a wider range of regulatory strategies. This version of the bill, titled the Regulatory Flexibility and Reform Act, was passed in the Senate but ultimately died in the House. In December 1979, Culver reintroduced the bill to the 96th Congress, first as S. 2147 (which called for the establishment of a Regulatory Policy Board) and then as S. 299 (which was ultimately enacted). S. 299 was unanimously reported to the full committee, which adopted revisions to the bill's language regarding judicial review.[45]

In addition to these Senate bills, several House bills addressing regulatory reform emerged at the same time. Particularly noteworthy was H.R. 4660—known as the Smaller Enterprise Regulatory Improvement Act Bill (an expansion of the earlier Small Business Regulatory Flexibility Bill)—which was considered and favorably reported by the House Small Business Committee. In contrast to S. 299, this bill amended the Small Business Act, not the APA. The Senate version of the bill was criticized in comparison to the House bill for being less encompassing in its judicial review provision.[46] Also, the House bill relied heavily on a specific list of methods for reducing regulatory burdens on small businesses, whereas the

[44] Paul Verkuil, "A Critical Guide to the Regulatory Flexibility Act," *Duke Law Journal* 1982, no. 2 (1982): 213–76.
[45] Ibid.
[46] 126 Cong. Rec. H8472 (September 8–9, 1980). But see Verkuil, "Critical Guide to the Regulatory Flexibility Act," 228. Verkuil claims that the House bill did not have judicial review provisions.

Senate bill only required agencies to list their own methods and explain their rejection of alternatives.[47]

The final bill clearly states that the regulatory flexibility analyses that the RFA requires agencies to conduct when they issue a rule that has a "significant impact on a substantial number of small entities" are not subject to judicial review. However, the contents of the analyses may be available and examined by the court when the validity of the rule itself is called into question. After much debate over the judicial review provisions, the final bill sought to strike a balance between enforceability and preventing unnecessary delays in the regulatory process.[48] This lack of judicial review of the RFA itself, however, would play a prominent role in its implementation.

Hearings demonstrated widespread dissatisfaction and frustration with regulatory and reporting requirements, emphasizing the differences between entities of smaller size and the inability of individuals to have their opinions heard on the issue. Various individuals spoke on behalf of the RFA in terms of economic theory. Milton Kafoglis—a professor of economics at the University of Florida and then a member of the Council on Wage and Price Stability—stated that a uniform standard of regulation imposes large fixed costs on small firms, thereby resulting in an uneven playing field among firms of different sizes. In this regard, uniform application is not "neutral," because it creates barriers to entry for small firms, imposes economies of scale, and arbitrarily increases the size of the firm that can effectively compete in the marketplace. Kafoglis testified that, in his opinion, these issues could develop into larger concerns over business concentration, the viability of competition in the market, and thereby the level of prices.[49] Alfred

[47] Verkuil, "Critical Guide to the Regulatory Flexibility Act."
[48] 126 Cong. Rec. H8459 (September 8–9, 1980).
[49] *Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on S.104, S.262, S.299, S.755, and S.1291, June 21 and August 8, 1979*, 96th Cong. (1979) (statement of Milton Kafoglis).

Dougherty from the Bureau of Competition[50] (a subagency of the Federal Trade Commission) further addressed the issue of perceived "neutrality" in the law, stating that uniform regulations are indeed not neutral if they have differential impacts on firms of different sizes.[51]

During consideration of the RFA, several prominent issues arose that remained relevant throughout its debate. Among these concerns were (a) whether the agencies would be required to compromise the underlying statutes that authorize their rulemaking, (b) whether administrative costs would increase for each agency whose rules were subjected to review, and (c) whether increased oversight powers would lead to litigation over small business impact and subsequently cause excessive delays in the regulatory process.[52]

In response to these concerns, a report by the Senate Judiciary Committee asserted that the bill would not alter regulatory goals and carefully stipulates that agencies can consider only alternatives to a proposed rule that are in accordance with the objectives of underlying statutes authorizing rulemaking for that agency. Proponents argued that if an agency could not consider alternative regulatory rules without compromising the legally mandated goals of the statute underlying rulemaking, it could summarize this factor in the regulatory analyses as a reason for rejecting alternatives.[53] This argument would later become a common refrain from agencies when explaining their rejection of alternative regulatory options discussed under the

[50] The main role of the bureau is to jointly enforce antitrust laws in the United States with the Antitrust Division of the Department of Justice (DOJ). The bureau typically focuses on civil enforcement, whereas the DOJ handles criminal enforcement (although the DOJ is authorized to take on civil enforcement as well). However, the bureau's role is more investigative, whereas the DOJ seeks to act against defendants. The bureau monitors any attempts to prevent competition through actions such as monopolistic or attempted monopolistic conduct, conspiracies to restrain trade practices, and all other anticompetitive business practices. See Federal Trade Commission, "About the Bureau of Competition," Washington, DC, accessed November 24, 2014, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/about-bureau-competition.
[51] *Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on S.104, S.262, S.299, S.755, and S.1291, June 21 and August 8, 1979*, 96th Cong. (1979) (statement of Alfred Dougherty).
[52] 126 Cong. Rec. S10937 (August 6, 1980).
[53] Committee on the Judiciary Report of the Regulatory Flexibility Act, S. Rep. No. 96-878 (1980).

RFA.[54] The committee also asserted that no unwarranted delays would result because of litigation and that the bill did nothing to expand or alter the process for legal action against an agency by an individual or business.[55] The Government Accountability Office (GAO) (then known as the General Accounting Office) stated that it did not believe the language of the bill threatened regulatory goals or compromised the underlying and mandated statutes of rulemaking.[56]

Senator Culver also personally addressed criticisms of the statute. He stated that in certain cases, where the use of flexible regulations would inhibit an agency's ability to protect environmental, health, and safety concerns, such alternatives might be legally impermissible. An agency in this situation would simply use the Initial Regulatory Flexibility Analysis (which accompanies a notice of proposed rulemaking) and the Final Regulatory Flexibility Analysis to summarize why uniform regulation is necessary for a particular rule and how alternative strategies or exemptions would be harmful and have therefore been rejected.[57]

Numerous representatives also expressed concerns about the efficacy of the RFA that would prove prescient. Rep. Elliott Levitas (D-GA) stated that he did not believe the bill was a solution in the long run because of its failure to establish a strict and effective enforcement mechanism.[58] Similarly, Rep. Tom Kindness (R-OH) stated that despite its requirement that agencies undergo regulatory analyses, the bill did not mandate that agencies act on the

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[54] See, for example, the Occupational Safety and Health Administration (OSHA) standard for 4,4-methylenedianiline exposure. The standard was set at 10 parts per billion, but an alternative of 20 parts per billion was rejected because it did not meet OSHA's requirement for adequately protecting workers. US Department of Labor, OSHA, "Occupational Exposure to 4,4' Methylenedianiline (MDA)," August 10, 1992, accessed November 17, 2014, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=982.
[55] Pub. L. No. 96-511, 94 Stat. 2812 (1980).
[56] Committee on the Judiciary Report of the Regulatory Flexibility Act, 10.
[57] 126 Cong. Rec. S10937 (August 6, 1980).
[58] 126 Cong. Rec. H8461 (September 8–9, 1980).

conclusions of those analyses, thus rendering them useless.[59] Rep. Carlos Moorhead (R-CA) expressed concern about the lack of congressional oversight, stating that failing to give either one- or two-house veto power on regulations was unfair to the American public because it was giving complete control over regulation to unelected officials.[60]

Several interesting themes emerge from the statutory history of the RFA. Clearly, sponsors wanted to help small businesses in what they saw as a regulatory process that was systematically biased against them. However, sponsors also had symbolic goals, such as giving small businesses a voice, and a clear enthusiasm existed across party lines for proclaiming support for small businesses during difficult economic times. It was also clear that unless critics were assured that the statute would not undermine existing regulatory statutes, the likelihood of passage was smaller—and perhaps negligible. Numerous provisions in the statute, particularly the provision that allows agencies to assert that their regulations will not have a significant impact on a substantial number of small entities, as well as the limited role of judicial review, were the product of mollifying supporters of strict regulation.

The Paperwork Reduction Act

The amount of paperwork imposed on the public by the government has long been a concern. The first serious attempt to manage government information came with the Federal Reports Act (FRA) of 1942.[61] The FRA was widely seen as toothless, and in 1974 Congress created a Commission on Federal Paperwork. The commission completed its work in 1977[62] and argued that the FRA was

[59] Ibid at H8460.
[60] Ibid at H8462.
[61] 56 Stat. 1078.
[62] The commission's final report was 68 pages and contained many recommendations. Commission on Federal Paperwork, "Report of the Commission on Federal Paperwork: Final Summary Report," Washington, DC, October 3, 1977.

flawed. The flaws cited included the exemption of the Internal Revenue Service, insufficient funding for FRA supervision, and placement too late in the decision-making process to make a difference. After the GAO reported that the commission's recommendations were being carried out too slowly, legislators began work on the Paperwork Reduction Act (PRA).[63]

An earlier version of the PRA was introduced in the House as H.R. 3570, the Paperwork and Redtape Reduction Act of 1979, accompanied by the companion bill, S. 1411, in the Senate. The House bill was sponsored by Rep. Frank Horton (R-NY) and Rep. Jack Brooks (D-TX), while the Senate bill was sponsored by Sen. Lawton Chiles (D-FL), Sen. Lloyd Bentsen (D-TX), and Sen. John Danforth (R-MO). One year later, Horton—who previously acted as the chairman of the Commission on Federal Paperwork—and Brooks reintroduced their bill as H.R. 6410 as a new companion to the Senate bill.[64]

Hearings held specifically on PRA legislation took place in the Senate before the Committee on Governmental Affairs, Subcommittee on Federal Spending Practices and Open Government, during November 1979 and in the House before the Committee on Government Operations, Subcommittee on Legislation and National Security, during February 1980.

Because no interest group benefits from tedious and burdensome paperwork requirements, this legislation enjoyed strong and consistent bipartisan support. However, some government and independent agencies testified to advocate for an exemption (or partial exemption) under the proposed clearance and review processes.[65] Hearings on the PRA included

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[63] Pub. L. No. 96-354, 94 Stat 1164 (1981); Stuart Shapiro, "The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform," Report to the Administrative Conference of the United States, Washington, DC, June 2012.

[64] 126 Cong. Rec. S14687 (November 19, 1980).

[65] These agencies included the Federal Reserve, the Securities and Exchange Commission, and the Environmental Protection Agency. None of the agencies received exemptions. House Committee on Government Operations, Subcommittee on Legislation and National Security, *Paperwork Reduction Act of 1980*, 96th Cong., 2nd sess., H.R. 6140, 26 Feb. Appendix E, 322–50.

testimony from various federal, state, and local officials as well. Noteworthy associations that supported legislative efforts included the Citizens Committee on Paperwork Reduction, the Association of Records Managers and Administrators, and the Business Advisory Council on Federal Reports. Testimony at each of the hearings drew consensus that the processes for collecting and disseminating information by the federal government were inefficient and burdensome. Support for the PRA also included members of the business community and state and local governments.[66]

The PRA created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to supervise implementation of the act. Senator Chiles argued that one of the intentions behind creating a new office was to increase the visibility of the oversight process and therefore the accountability of agencies that wished to collect information from the public.[67] Furthermore, he stated that concerns over the authority of OMB endangering the independent status of regulatory agencies were unfounded. He cited various provisions in the bill that were specifically developed to protect against this eventuality, including an override mechanism that would allow an independent agency to call for a majority vote of its members to overturn a disapproval by OMB of an information collection request. In addition, he pointed out that the language of the bill did not actually affect the existing authority of OMB with respect to substantive policies and programs of agencies and departments.[68]

When signing the law, President Carter echoed many of the justifications given during the debate in Congress:

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[66] Id. at 40.
[67] *Paperwork and Redtape Reduction Act of 1979: Hearing Before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, on S. 1411 . . . November 1, 1979*, 96th Cong. (1980) (statement of Sen. Lawton Chiles).
[68] Ibid.

> This legislation, which is known as the Paperwork Reduction Act of 1980, is the latest and one of the most important steps that we have taken to eliminate wasteful and unnecessary Federal paperwork and also to eliminate unnecessary Federal regulations. . . . This legislation is another important step in our efforts to trim waste from the Federal Government and to see to it that the Government operates more efficiently for all our citizens.[69]

As with the RFA, the PRA had a clear substantive goal. Members of the enacting coalition stated over and over that they wanted to reduce the burden of providing information to the government for businesses and other constituents. From a political perspective, the act had widespread support (few people are pro-paperwork), but it was particularly attractive to businesses, large and small. Also, as for the RFA, the statute's sponsors took pains to note that the statute would not weaken existing regulatory statutes. Unlike the RFA, the PRA had a goal that was relatively easy to measure: reducing the paperwork burden on the American public. With an easy-to-measure goal, it is harder to argue that the PRA serves a symbolic purpose if that goal is not achieved.

The Unfunded Mandates Reform Act

Throughout the 1970s and 1980s, the number of intergovernmental mandates imposed on state and local governments increased substantially. The continued growth and cost of these mandates into the 1990s, including the establishment of complex statutes such as the Americans with Disabilities Act and the Clean Air Act, sparked opposition from various government officials, interest groups, and associations.[70]

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[69] President Jimmy Carter, "Paperwork Reduction Act of 1980 Remarks on Signing H.R. 6410 into Law," December 11, 1980.
[70] House Comm. on Government Reform and Oversight, *Report on Unfunded Mandates Reform Act of 1995,* 141 Cong. Rec. H906 (1995).

During the 102nd (1991–1992) Congress, 22 bills were introduced addressing in some way the issue of unfunded federal mandates; however, none was successfully reported out of committee. During the 103rd (1993–1994) Congress, Sen. John Glenn (D-OH) and Sen. Dirk Kempthorne (R-ID) introduced S. 993, the Federal Mandate Accountability and Reform Act. Testimony from various state and local officials, as well as from individuals from the private sector, revealed a strong sentiment that federal mandates had resulted in unreasonable and unmanageable fiscal burdens. Several county commissioners spoke about their budget deficits and their inability to cut services or raise taxes to pay for mandate provisions. Larry Kephart, executive director of the Pennsylvania Association of County Commissioners, testified that Pennsylvania county governments relied on local property tax revenue to fund their mandates, a practice that disproportionately affects the elderly and the poor.[71]

Although several of the provisions contained in this version of the bill were later included in UMRA,[72] including the addition of the private sector, the Senate failed to vote on the Federal Mandate Accountability and Reform Act before the session adjourned. Many of the floor debates that took place for earlier bills on unfunded mandates featured Democratic Party concerns that the legislation would impede the federal government's ability to protect public health.[73]

Senators Glenn and Kempthorne introduced a revised version of the bill, which ultimately became UMRA, in the 104th Congress in January 1995. One major amendment made to the bill included the addition of private-sector cost impact statements for legislation in excess of $100 million. Hearings were subsequently held before the Senate Committee on Governmental Affairs and the Senate Budget Committee on January 5 and 9, 1995. The

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[71] Robert Jay Dilger and Richard S. Beth, "Unfunded Mandates Reform Act: History, Impact, and Issues," Congressional Research Service 7-5700, Washington, DC, November 17, 2014.
[72] Pub. L. No. 104-4, 109 Stat. 48 (1995).
[73] Dilger and Beth, "Unfunded Mandates Reform Act."

Unfunded Mandates Reform Act of 1995 was passed by the Senate on January 27, 1995, and passed by the House, with amendment, on February 1, 1995. Conferences in both the House and the Senate took place to resolve debates before UMRA was subsequently signed into law by President Clinton on March 22, 1995.[74]

Among the associations that took an interest in this issue were the National League of Cities, the US Conference of Mayors, and the National Association of Counties. In 1993, these groups organized a National Unfunded Mandates Day to gain support for their cause. In addition to initiating a media flurry, National Unfunded Mandates Day helped the movement gain wide media coverage as well as public and congressional awareness. The following year, these same groups organized a National Unfunded Mandates Week, which further raised support for their cause. Senator Glenn commented in a congressional hearing on UMRA that National Unfunded Mandates Week had succeeded in bringing to light the concerns about unfunded mandates.[75]

The act also attracted the support of various business organizations and the US Chamber of Commerce, which were opposed to the imposition of mandates by the federal government on the private sector. Pro-business attitudes were especially evident at hearings, with testimony by representatives from a multitude of companies and industries. Ken Mease, president of Ken-Tex Corporation, testified that federal mandates like the Clean Air Act were unreasonable, stating that government intervention was unnecessary and solutions to the problem could be more readily found in the market. He stated that this and other cases of "legislative overkill" would result in bankruptcy for many businesses.[76]

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[74] Ibid.
[75] Dilger and Beth, "Unfunded Mandates Reform Act."
[76] House Comm. on Government Reform and Oversight, *Report on Unfunded Mandate Reform Act of 1995.*

One issue that persisted throughout consideration of UMRA legislation concerned the definitions of key terms, including *federal mandate*. Sen. Judd Gregg (R-NH) objected to the lack of a precise definition of what constitutes a federal mandate, arguing that this lack would result in litigation, debate, and ultimately noncompliance. Although many agreed that *federal mandate* was a term in need of a clear, succinct definition, various opinions led to subsequent disagreements over what the definition looked like. Ultimately, the definition that passed was not as clear as what state and local governments had advocated for.[77] The final language defined a *federal intergovernmental mandate* as “any provision that imposes an enforceable duty on State, local, or tribal governments or any provision in legislation, statute or regulation that relates to a then-existing Federal program under which $500 million or more is provided annually to State, local, and tribal governments under entitlement authority.” Various exemptions and stipulations to these two categories exist, such as noninclusion of provisions that are a condition of federal assistance or a duty arising from participation in a voluntary program.[78]

In particular, Sen. Frank Lautenberg (D-NJ) was among those who opposed the act, stating that the federal government had an obligation to set national standards that protect the environment and quality of life. He was concerned that agencies such as the EPA and the Occupational Safety and Health Administration (OSHA), unable to enforce standards across states, would be unable to fulfill their duties and that states would have a “patchwork” of differing standards.[79]

Arguments also arose over the issue of exemptions and exclusions under the act. State and local governments were particularly wary of exemptions, stating that the overall

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[77] Dilger and Beth, “Unfunded Mandates Reform Act,” 3.
[78] Ibid.
[79] Ibid.

effectiveness of the act would be reduced and that exemptions would limit implementation. For example, under the Clean Air Act, primary air-quality standards are health based, and the courts have ruled that the EPA cannot take cost into consideration. This underlying statute effectively exempts the EPA from undertaking a benefit-cost analysis. This and other loopholes were feared as allowing many agencies to avoid compliance with UMRA.[80] Indeed, research has indicated that the benefit-cost analyses conducted under UMRA have differed little from those conducted under Executive Order 12866, where statutory requirements like those under which the EPA operates have reduced the effectiveness of analytical requirements.[81] Also, like Executive Order 12866, UMRA does not cover independent agencies and exempted final rules that were not preceded by notices of proposed rulemaking.

The passage of UMRA has numerous parallels with the passage of the RFA 16 years earlier. A vocal constituency (states and localities versus small businesses) was upset with regulatory burdens. Big businesses provided support. Supporters of protections for public health ensured that the statute had numerous exemptions, and the requirements were watered down. Although the legislation had substantive goals (reduced regulatory burdens), they were not as easily measurable as those of the PRA. Both the RFA and UMRA also had a clear symbolic purpose, giving a voice to an important constituency. However, statutes with purely symbolic purposes have been criticized in the literature as unworkable.[82]

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[80] Ibid.
[81] Stuart Shapiro and John F. Morrall III, "The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience," *Regulation and Governance* 6, no. 2 (2012): 189–206.
[82] John P. Dwyer, "The Pathology of Symbolic Legislation," *Ecology Law Quarterly* 17, no. 2 (1990): 233–318.

Amendments to the Regulatory Flexibility Act

In addition to passing UMRA, the 104th Congress made significant changes to the Regulatory Flexibility Act. The Small Business Regulatory Enforcement Fairness Act (SBREFA)[83] was enacted on March 29, 1996, and signed into law by President Clinton as a part of the Contract with America Advancement Act. SBREFA forms title II of the Contract with America Advancement Act, and contained within this title, under subtitle E of the act, is the Congressional Review Act (CRA).

Similar to the foundation of the RFA, SBREFA was motivated by the 1995 meeting of the White House Conference on Small Business. Tasked with exploring the weaknesses of the regulatory process under the RFA, the conference ultimately recommended the implementation of amendments and provisions that would strengthen the legislation.[84] Resolutions of the 1995 White House Conference on Small Business that were particularly prominent included requests for sunset legislation as well as for reevaluation of all existing regulations every five years using the same standards as for new regulation.[85] Although SBREFA included no sunset provision, the sentiment was cited as part of the justification for the CRA.

SBREFA, along with the CRA contained therein, was intended to address the weaknesses of the RFA with regard to congressional power over regulatory processes as well as the consideration of regulatory impact on small businesses.[86] The stated purpose of SBREFA was to (a) implement various recommendations of the White House Conference on Small Business of 1995, (b) amend the RFA by incorporating judicial review into the regulatory process and by

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[83] Pub. L. No. 104-121, 110 Stat. 857 (1996).
[84] Jody Wharton, "The White House Conferences on Small Business, 1980–1995," Small Business Advancement National Center, University of Central Arkansas, Conway, June 3, 2004.
[85] *S. 917 and S. 942: Implementing the White House Conference on Small Business—Recommendations on Regulations and Paperwork: Hearing Before the Committee on Small Business, United States Senate, February 28, 1996*, 104th Cong. (1996).
[86] Ibid.

increasing accountability among regulators by providing more opportunities for redress, (c) encourage small business participation in the regulatory process through simplification of language and increased accessibility of information, and (d) create a more cooperative environment by lessening punitive action against small businesses that seek redress.[87]

Many of the hearings that took place for the original bill (S. 942) revealed extreme dissatisfaction with the RFA and the ability to enforce its provisions. Ultimately, the key objective of the RFA was to encourage “self-reform” on the part of the individual agencies, and critics described it as more suggestive than anything else.[88] SBREFA legislation was partially intended to correct deficiencies in the RFA and to prevent circumvention of its legislative intent.[89]

Among the many proponents of the legislation were the US Chamber of Commerce, the Small Business Administration (SBA), the National Association for the Self-Employed, the National Association of Towns and Townships, and the Small Business Legislative Council. Hearings took place throughout 1995 and 1996, at which many small business owners, legislative sponsors, and organizations testified on the ineffectiveness of the RFA and the need for reform.[90] In particular, witnesses recognized the need for the addition of judicial review to the RFA to make the act more enforceable. The SBA chief counsel for advocacy and the SBA administrator were among those who expressed their support for RFA reform.

Although the CRA was a provision added late into the SBREFA, it enjoyed bipartisan support in Congress. One of the main purposes of the CRA was to shift power from the executive branch to the legislative branch. Many claim that the CRA legislation was inspired by the 1983

[87] Pub. L. No. 104-121, 110 Stat. 857 (1996).
[88] Thomas Sargentich, “The Small Business Regulatory Enforcement Fairness Act,” *Administrative Law Review* 49, no. 1 (1997): 123–37.
[89] Eric D. Phelps, “The Cunning of Clever Bureaucrats: Why the Small Business Regulatory Enforcement Fairness Act Isn’t Working,” *Public Contract Law Journal* 31 (2001): 123–42.
[90] 142 Cong. Rec. S1640 (March 7, 1996).

Supreme Court case of *Immigration and Naturalization Service v. Chadha.*[91] The case resulted in the ruling that one-house vetoes in Congress were a constitutional violation of the separation of powers and left many in Congress feeling as though their oversight powers had been diminished. Sen. Don Nickles (R-OK), Sen. Harry Reid (D-NV), and Sen. Ted Stevens (R-AK) stated, “This legislation will help to redress the balance [between the branches], reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.”[92]

Subtitle E of the act outlines the provisions of the CRA, a mechanism within the law that allows Congress to review and disapprove of all federal agency rules. The CRA allows Congress to bypass normal procedures (including the filibuster in the Senate) to pass a resolution of disapproval within 60 days of the publication of a final rule. This resolution effectively vetoes the regulation and prohibits the passage of any regulation that is “substantially similar.” A resolution can be vetoed by the president. As with any bill, a two-thirds majority vote is required to override a presidential veto.[93] Therefore, other than the changes to the filibuster, the CRA gave Congress no powers besides those it already possessed (the ability to overturn a regulation with a vetoable law).

The other provision of SBREFA that most directly affects the regulatory process was the creation of small business panels to review regulations before their proposal. These SBREFA panels were required only for the EPA and OSHA[94] and only for regulations that have a significant economic impact. The panels of small business owners review and comment on the

[91] 462 U.S. 919 (1983).
[92] Quoted in Michael Kolber, “The Mysteries of the Congressional Review Act,” *Harvard Law Review* 122, no. 8 (2009): 2166.
[93] Pub. L. No. 104-121, 110 Stat. 857 (1996).
[94] This requirement was later expanded to include the Consumer Financial Protection Bureau.

agency proposals under the guidance of the promulgating agency, the SBA's Office of Advocacy, and OIRA.

Although the bill was said to have attracted bipartisan support, some disagreement took place along party lines, with Republicans claiming that Democrats in Congress had refused to consider the bill or allow it to reach the floor. Some accused Democratic Party members of attempting to filibuster the legislation.[95] Senator Tom Daschle (D-SD) addressed these accusations, stating that there was no objection to the substance of the bill but that the understanding of some "technical details" remained to be resolved. He defended the Democratic Party's resistance to considering S. 942, claiming, "The dilemma is that the bill will very likely be used as the vehicle for another very big debate, unlimited debate, over the whole issue of comprehensive regulatory reform."[96] We can infer that Democrats' reluctance to wholeheartedly embrace the statute can be traced to some of the limitations within this bill, including the limited nature of the CRA and limited changes to agency discretion under the RFA to determine the act's applicability.

The passage of SBREFA and the CRA is instructive both in its own right and in reflection regarding the RFA. Clearly the RFA was not achieving its stated goals in the eyes of supporters of SBREFA. We return to this subject later. The substantive goals of SBREFA were roughly the same as those of the RFA. One important addition was the goal of increasing congressional power in the regulatory process as embodied in the CRA. As with the other statutes described here, supporters of the bill had to make concessions to ensure its passage, and these concessions inevitably weakened the bill. Also as with the other bills, SBREFA has a clear symbolic goal (supporting small businesses), and "credit claiming" could have been a

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[95] 142 Cong. Rec. S1640 (March 7, 1996).
[96] Ibid. (statement of Sen. Tom Daschle), 1633.

major motivation for the bill, particularly in the wake of the 1995 Republican takeover of Congress.[97]

III. Regulatory Reform Statutes in Practice

The four statutes previously described all had numerous goals. The passage of each was accompanied by strong rhetoric about the need to reduce the burden of regulations. In that sense, they all had a clearer substantive agenda than did the APA. In looking at their success or failure, we must ask whether they met these substantive goals. In the case of the PRA, this is a question of examining the amount of time that the American public spends providing information to the government. In the cases of the RFA (and its amendments) and UMRA, we need to grapple with the harder questions of whether the economic burden was reduced on small businesses and state and local governments.

The academic literature (and to a lesser degree the statutory histories) point us toward other goals of these regulatory reform statutes. Have the statutes served the purpose of facilitating "fire alarm" oversight by the political branches of government as the APA seems to have done?[98] Or did they solve the more immediate problem for politicians of responding to a perceived economic crisis?[99] If they accomplished none of these goals, we are left with the conclusion that the statutes performed a merely symbolic function.[100]

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[97] David R. Mayhew, *Congress: The Electoral Connection*, 2nd ed. (New Haven, CT: Yale University Press, 2004).
[98] McCubbins and Schwartz, "Congressional Oversight Overlooked."
[99] Shapiro and Borie-Holtz, *Politics of Regulatory Reform*; Mayhew, *Congress: The Electoral Connection*.
[100] West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness."

Regulatory Flexibility Act

GAO has conducted a number of studies on the RFA. GAO concluded in 1994 that "agencies' compliance with the RFA varied widely."[101] In 2001, reporting on the RFA and on subsequent amendments, GAO said that "their full promise has not been realized."[102] In particular, GAO identified the terms *significant economic impact* and *substantial number of small entities* to be of issue, leading agencies to construct their own definitions and interpretations. In the same 2001 report, GAO stated, "Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress has not acted."[103] GAO has made this point repeatedly over the years. The Congressional Research Service has echoed these concerns.[104]

Academic studies of the implementation of the RFA are limited, but they make the same point. Sarah Shive focuses on the ability of agencies to determine the act's applicability to their own regulations,[105] and Michael See notes that courts have deferred to these determinations.[106] Randall Lutter looks at a provision of the RFA, section 610, which requires agencies to retrospectively review their regulations, and finds that agencies have largely ignored it.[107] In an

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[101] US General Accounting Office, "Regulatory Flexibility Act: Status of Agencies' Compliance," Report to the Chairman, Committee on Small Business, House of Representatives, and the Chairman, Committee on Governmental Affairs, US Senate, GAO/GGD-94-105 (Washington, DC: GAO, 1994), 2.

[102] US General Accounting Office, "Regulatory Flexibility Act: Clarification of Key Terms Still Needed," Testimony before the Committee on Small Business, US Senate, GAO-01-669T, Washington, DC, April 24, 2001, 1.

[103] Ibid., 2.

[104] Curtis W. Copeland, "The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms," Congressional Research Service Report for Congress, Washington, DC, February 12, 2008.

[105] Sarah E. Shive, "If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior and How Congress Can Fix It," *Entrepreneurial Business Law Journal* 1 (2006): 153–73.

[106] Michael R. See, "Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—and Current Proposals to Invigorate the Act," *Fordham Urban Law Journal* 33, no. 4 (2005): 101–55.

[107] Randall Lutter, "Regulatory Policy: What Role for Retrospective Analysis and Review?," *Journal of Benefit-Cost Analysis* 4, no. 1 (2013): 17–38. The causes for the limited role of section 610 likely include lack of an enforcement mechanism in the RFA to ensure the quality of the retrospective reviews required in the statute. See also US General

overview of the act, Robert Bird and Elizabeth Brown say that "small businesses continue to suffer disproportionately from the cost of regulations."[108] In other words, the chief substantive goal of the act has not been achieved.

A different story comes from the Office of Advocacy, the office within the SBA that is charged with ensuring RFA compliance.[109] That office, empowered in the RFA to ensure implementation of the statute, claims the act saved small businesses $2.4 billion in 2013.[110] This statement comes after a history of very bold assertions regarding the office's performance and, by extension, the RFA's. A 2008 report claimed that small businesses had saved more than $70 billion because of the RFA.[111]

The Office of Advocacy is hardly an unbiased source of estimates; its justification for existence depends largely on its ability to demonstrate that the RFA is working. Its estimates are contrary to the external assessments of the RFA given previously. In part, this difference may be because changes to agencies' regulations from proposal (or first conception) to finalization are likely caused by a number of factors. Whether the changes for which the Office of Advocacy credits the RFA are thanks to the statute or are owing to public comments, OIRA review, or agencies' "overproposing" their regulations so they can make concessions and still reach their preferred outcome is unclear.[112]

Accounting Office, "Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary," Report to the Chairman, Committee on Small Business, US Senate, GAO/GGD 99-55, Washington, DC, April 2, 1999.

[108] Robert C. Bird and Elizabeth Brown, "Interactive Regulation," *University of Pennsylvania Journal of Business Law* 13.4 (2011): 838. See also Phelps, "Cunning of Clever Bureaucrats."

[109] The Office of Advocacy was created four years before the passage of the RFA in the Small Business Export Development Act (Pub. L. No. 94-305, § 201, 90 Stat. 668 [1976]). The office was subsequently given greater powers in both the RFA and the 1996 amendments to the RFA.

[110] Office of Advocacy, "Report on the Regulatory Flexibility Act, FY 2013," Small Business Administration, Washington, DC, February 2014, https://www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports.

[111] Office of Advocacy, "Report on the Regulatory Flexibility Act, FY 2008," Small Business Administration, Washington, DC, January 2009, http://www.sba.gov/advo/laws/flex/08regflx.html.

[112] Stuart Shapiro, "Defragmenting the Regulatory Process," *Risk Analysis* 31, no. 6 (2011): 893–901.

In the 2013 report, the Office of Advocacy cites changes to seven rules and claims that all the reduced costs for the changes stem from the work of the Office of Advocacy.[113] The descriptions of the changes within the text of the report make clear that public comment or other factors may have also played a role. The largest of the changes was a categorization of certain solid wastes as nonhazardous by the EPA. The Office of Advocacy claimed that its work led to $690 million of savings for small businesses. In addition to it being impossible to discern the actual cause of the EPA's change categorization, the Office of Advocacy relies on an industry estimate for the magnitude of the savings.

The comparatively neutral reports by GAO and the Congressional Research Service all raise significant questions about the RFA's role in the regulatory process. Even conceding some of the examples cited by the Office of Advocacy as lowering costs on small businesses, the RFA's impact has been significantly less than was touted at the time of its passage. Indeed, if the act had been a success in alleviating the concerns of small businesses, advocates for small business would have made little demand for its amendment in 1995 or today.[114]

The sources of the RFA's failure seem to be threefold, according the reports and articles cited previously. Regulatory agencies retain control of the process for determining when the RFA applies. Terms within the act, particularly *significant impact* and *substantial number of small entities*, were sufficiently vague to allow agencies to credibly claim that the RFA did not apply to some of their regulations. Finally, courts have been deferential toward agencies in their

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[113] Office of Advocacy, "Report on the Regulatory Flexibility Act, FY 2013."

[114] One could argue that demand for its amendment is not sufficient to diagnose failure in the RFA. Indeed, there have been numerous movements to amend the APA as well (see note 40). However, the demand for amendment to the RFA specifically focuses on the burden of regulation on small businesses, the very problem the RFA was intended to address.

interpretations of the applicability of the RFA.[115] All these issues came up during the debate on the RFA, and many were foretold by those who criticized the statute as too weak.[116]

The Paperwork Reduction Act

Evaluating the PRA has also largely been the province of GAO. Reports by GAO repeatedly highlight the increasing burden of information collection on the American public, the dominance of a small number of collections by the Internal Revenue Service in making up the total burden, repeated violations of the act by agencies, and the lack of resources at OIRA to exercise more effective oversight. The theme of the reports is largely that the PRA has been ineffective in changing government information collection policy.[117]

OIRA must annually report to Congress on the implementation of the PRA. Among the information provided in these reports are the annual burden-hours imposed on the American public. Table 1 depicts the history of burden imposition.

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[115] Lehigh Valley Farmers v. Block, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986).

[116] 126 Cong. Rec. H8468 (September 8–9, 1980).

[117] See US General Accounting Office, "Implementing the Paperwork Reduction Act: Some Progress, but Many Problems Remain," Report to the Chairman, Committee on Government Operations, House of Representatives, GAO/GGD-83-35, Washington, DC, April 20, 1983; "Regulatory Management: Implementation of Selected OMB Responsibilities under the Paperwork Reduction Act," Report to the Chairman, Subcommittee on Oversight, Restructuring, and the District of Columbia, Committee on Governmental Affairs, US Senate, GAO/GGD-98-120, Washington, DC, July 1998; "EPA Paperwork: Burden Estimate Increasing Despite Burden Reduction Claims," Report to the Chairman, Committee on Small Business, US Senate, GAO/GGD-00-59, Washington, DC, March 2000; "Paperwork Reduction Act: Burden Increases and Violations Persist," Testimony before the Subcommittee on Energy, Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, House of Representatives, GAO-02-598T, Washington, DC, April 11, 2002; "Paperwork Reduction Act: Agencies' Paperwork Burden Estimates Due to Federal Actions Continue to Increase," Testimony before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, GAO-04-676, Washington, DC, April 20, 2004; US Government Accountability Office, "Paperwork Reduction Act: A New Approach May Be Needed to Reduce Government Burden on the Public," Report to Congressional Requesters, GAO-05-424, Washington, DC, May 2005; "Paperwork Reduction Act: New Approaches Can Strengthen Information Collection and Reduce Burden," Testimony before the Subcommittee on Regulatory Affairs, Committee on Government Reform, House of Representatives, GAO-06-477T, Washington, DC, March 8, 2006.

Table 1. Information Collection Burdens

Fiscal year	Annual burden-hours (millions)
1997	6,970
1998	6,967
1999	7,183
2000	7,361
2001	7,651
2002	8,223
2003	8,099
2004	7,971
2005	8,240
2006	8,924
2007	9,642
2008	9,711
2009	9,795
2010	8,783
2011	9,140
2012	9,470
2013	9,450

Source: These reports can be found at Office of Management and Budget, "Federal Collection of Information," accessed June 25, 2014, http://www.whitehouse.gov/omb/inforeg_infocoll#icbusg.

With the exception of a decrease of 1 billion burden-hours in 2010, which was actually a correction of a previous error,[118] the trend in information collection burden has been unmistakably upward.

Burden-hours have gone up for a multitude of reasons, most notably Congress's continued propensity to pass statutes that require agencies to collect information from the public. Possibly the burden would have increased even more in the absence of the PRA. However, no good reason exists to believe that Congress would have acted any differently without the PRA. The legislative history of the PRA makes it clear that agency supporters were consistently reassured that the act would not curb the work of the executive branch agencies.[119] Also, much of

[118] Shapiro, "Paperwork Reduction Act."
[119] *Paperwork and Redtape Reduction Act of 1979: Hearing Before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, on S. 1411 . . . November 1, 1979*, 96th Cong. (1980).

the burden comes from the Internal Revenue Service. Although the Internal Revenue Service has made efforts to reduce the information collection burden over the past decade, those efforts are hard to ascribe to the PRA.[120]

A report for the Administrative Conference of the United States argues that the PRA has had some benefits, including improving some small percentage (but perhaps a particularly important subset) of information collection and encouraging public participation in the information collection approval process. However, the PRA has also imposed significant costs, including causing delays and incentivizing agencies to abandon some beneficial types of information collection and to alter others.[121]

The stated goal of the PRA was to reduce the burden of government information collection on the American public. Unlike any of the other statutes here, there are measurements of this metric, and those measurements indicate that the act has not met its goal. External reasons may account for the goal not being met, but little evidence indicates that, absent those factors, the PRA would have led to large-scale burden reduction. The PRA may have had other effects. Indeed, some evidence indicates that it has deterred some unnecessary forms of collection and led to modifications of others.[122] However, the massive increase in burden does indicate a clear failure to achieve its most important substantive goal. In the face of these data, arguing that the PRA had symbolic value is difficult. Nor are there instances where the information collection process has acted as a "fire alarm" for congressional overseers. We are left with the possibility that the PRA allowed its sponsors to claim credit for addressing a problem perceived as critical by the public or that the sponsors were naive about how the agencies would take advantage of the lack of specificity.

[120] Shapiro, "Paperwork Reduction Act."
[121] Ibid.
[122] Ibid.

The Unfunded Mandates Reform Act

Less has been written about the implementation of UMRA than about the RFA or the PRA. This is likely because no single agency is given responsibility to ensure the implementation of UMRA (unlike the Office of Advocacy for the RFA and OIRA for the PRA). In addition, UMRA has received less academic attention than other regulatory reform statutes. The little information that exists comes from government agencies, GAO, and the Congressional Research Service.

A report released by GAO in 1998 found that UMRA had limited impact on agency rulemaking actions. Much as the vague definition of *significant impact* in the RFA was a source of agency discretion, the term *economically significant* in UMRA was largely left open to interpretation by individual agencies. Critics of the act noted that the vague definition allows agencies to evade assessments and benefit-cost analyses by determining that rules do not qualify as economically significant. GAO supported this criticism, stating that the act gives agencies too much discretion in how they can comply with requirements.[123] Much more recently, the Congressional Research Service has reported dissatisfaction with UMRA. It notes that state and local governments have consistently called for an expansion of the authority and scope of the act.[124]

The requirement for economic analysis under UMRA was basically subsumed into the economic analysis requirements under Executive Order 12866 by President Clinton shortly after passage of the act.[125] Therefore it is impossible to discern the impact of these provisions beyond the requirements in the executive order. There has been no discernible difference in the quality of

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[123] US General Accounting Office, "Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions," Report to the Committee on Governmental Affairs, US Senate, GAO/GGD-98-30, Washington, DC, February 1998. See also US General Accounting Office, "Unfunded Mandates: Analysis of Reform Act Coverage," Report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, US Senate, GAO-04-637, Washington, DC, May 2004.
[124] Dilger and Beth, "Unfunded Mandates Reform Act."
[125] See Office of Management and Budget, "Economic Analysis of Federal Regulations under Executive Order 12866," January 11, 1996, http://www.whitehouse.gov/omb/inforeg_riaguide.

regulatory impact analyses when analysis has been required under both UMRA and Executive Order 12866 and when analysis has been required under the executive order alone.[126]

Regulatory Flexibility Act Amendments

The 1996 amendments to the Regulatory Flexibility Act were intended to "fix" the RFA. In this sense, the data above regarding the lack of efficacy of the RFA also apply to the amendments. Continued concerns about the burden of regulation on small business and continued attempts to amend the regulatory process both speak to the point that, like the original RFA, the amendments have not achieved their substantive goals.

As for the particular pieces of the 1996 amendments, very little research has been done into their effects. In the case of the CRA, detailed research is not really possible. The CRA has been used exactly one time, and that was in a very particular set of circumstances. A highly controversial regulation (OSHA's ergonomics regulation) was issued at the conclusion of the Clinton administration and was overturned by a Republican Congress. The CRA resolution was then signed by the new president, George W. Bush.[127] Furthermore, reports issued by the Congressional Review Service in 2008[128] and by the Administrative Conference of the United States in 2014[129] noted that, in many cases, agencies did not even adhere to the simple requirement to submit their covered rules to Congress and to GAO. In addition, one of the enforcement mechanisms of the CRA (review of agency benefit-cost and risk analyses by GAO)

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[126] Shapiro and Morrall, "Triumph of Regulatory Politics."
[127] Adam M. Finkel and Jason W. Sullivan, "A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?," *Administrative Law Review* 63 (2011): 707–83.
[128] Morton Rosenberg, "Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade," CRS Report for Congress, Congressional Review Service*,* Washington, DC, May 8, 2008.
[129] Curtis Copeland, "Congressional Review Act: Many Final Rules Were Not Submitted to GAO and Congress," July 15, 2014, http://www.acus.gov/report/copeland-report-congressional-review-act.

was never implemented because of lack of appropriated funds.[130] None of these developments are signals of an effective statute.

Small business panels have been required for EPA and OSHA for 15 years now, but no one has examined their effectiveness.[131]

IV. Discussion

The history of regulatory reform since the passage of the Administrative Procedure Act is a messy one. From the preceding discussion, it is clear that although the statutes examined may have had some limited effects, none has lived up to the rhetoric that accompanied its passage. The number of hours Americans spend providing information to the government has continued to increase. Small businesses still feel burdened by regulations, and states and localities still complain about unfunded mandates. If the speeches that were made when these statutes were passed and the plain language of their titles reflect the goals of these statutes, then they must be deemed failures. Next, we examine why these failures have occurred and then contemplate other goals the statutes may have been intended to fulfill.

Compromise and the Courts: Sources of Substantive Disappointment

All the statutes discussed in this article were signed by Democratic presidents. The RFA and the PRA were passed by Congresses with Democratic majorities in both houses. Therefore, to become law, each of these regulatory reform efforts needed the acquiescence of political actors who also supported the substantive goals of many of the same regulatory statutes that motivated

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130 Ibid.

131 The full list of panels can be found on the SBA website, SBREFA, accessed December 3, 2014, http://www.sba .gov/category/advocacy-navigation-structure/regulatory-policy/regulatory-flexibility-act/sbrefa.

reformers to curb the power of regulatory agencies. To get this support, the statutes needed to be the product of intensive negotiation and compromise.

As a result, each of these statutes contains exceptions and vague terms that have been left to regulatory agencies to define. The RFA covers regulations that have a "significant impact on a substantial number of small entities."[132] But agencies determine which impacts are significant and how many small entities make up a substantial number. The sponsors of the PRA made clear that the goal of the statute was not to undermine existing statutes[133] and put no mechanism in the statute to enforce the reduction of paperwork burden.[134] UMRA left the term *federal mandate* vaguely defined and made it clear that existing statutory obligations must be fulfilled.[135] Finally, the CRA requires the signature of the president to veto a regulation—usually the same president who supervised its promulgation.[136]

These amendments are examples of strategic behavior by congressional representatives. Loopholes such as those in the regulatory reform statutes fall under the category of *saving amendments*—amendments that may be contrary to the purpose of the underlying bill but that are necessary to ensure its passage (or to ensure that the bill will be signed by the president). In the regulatory reform context, these saving amendments allow the bill to be passed but then can be used by regulatory agencies to subvert the goals of the remainder of the bill.[137] Even those who

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[132] Pub. L. No. 96-511, 94 Stat. 2812 (1980).
[133] *Paperwork and Redtape Reduction Act of 1979: Hearing Before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, on S. 1411 . . . November 1, 1979*, 96th Cong. (1980).
[134] Pub. L. No. 96-354, 94 Stat. 1164 (1981).
[135] Pub. L. No. 104-4, 109 Stat. 48 (1995).
[136] Pub. L. No. 104-121, 110 Stat. 857 (1996).
[137] James M. Enelow and David H. Koehler, "The Amendment in Legislative Strategy: Sophisticated Voting in the US Congress," *Journal of Politics* 42, no. 2 (1980): 396–413.

oppose the saving amendment because it weakens the underlying statute may support it to guarantee passage of the bill.[138]

Courts could have strictly interpreted the regulatory reform statutes (emphasizing the bulk of the statute rather than the amendments) and theoretically forced agencies to view these statutes as restricting their regulatory abilities. But such an approach would run counter to judicial deference to agencies in the regulatory arena.[139] It would also contradict the legislative histories discussed previously, from which it is clear that the regulatory reform bills would not have passed had they been clearly intended to curb regulatory activity.

Congress continues to return to regulatory reform during difficult economic times. This response is fed by a combination of genuine concerns with particular regulations and media emphasis on regulation.[140] Congress does this despite the knowledge that a clear consensus to curb agency regulatory activity does not exist across the elected branches of government. This lack of consensus inevitably means that the substantive goals of regulatory reform statutes (fewer regulations affecting small businesses or state and local governments, less information collection burden on the American public) will not be met. So why persist?

The Political Goals of Regulatory Reform

Possibly Congress is happy to pass regulatory reform bills for purely symbolic purposes.[141] Giving a voice to small businesses or local governments or putting a priority on reducing

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[138] Ibid.
[139] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and Massachusetts v. EPA, 549 U.S. 497 (2007).
[140] Michael A. Livermore, Elizabeth Piennar, and Jason A. Schwartz, "The Regulatory Red Herring: The Role of Job Impact Analyses in Environmental Policy Debates," Institute for Policy Integrity, New York University School of Law, New York, April 2012.
[141] Dwyer, "Pathology of Symbolic Legislation."

paperwork is not of trivial importance.[142] Yet the legislative histories and the timing of regulatory reform statutes indicate that other forces are at work. By far, the most important of these forces is the self-interest of legislators.

The RFA and the PRA were passed during the stagflation era and burgeoning recession of 1979–1980. UMRA and the RFA amendments were passed in the wake of the economic slowdown in the 1990s and after an election campaign during which the new Republican majority in Congress had promised to relieve regulatory burdens on business. The current wave of regulatory reform proposals comes during the slow recovery from the Great Recession. Other work has shown that this same pattern of fascination with regulatory reform has occurred in the 50 states.[143]

This pattern gives us our most powerful explanation for why regulatory reform statutes pass but are designed without much regard to their effectiveness. One of the leading factors affecting the reelection prospects of a politician is the state of the economy.[144] But besides (and perhaps including) the president, few political actors can affect this key variable. However, incumbent officials feel the need to convince voters that they are addressing economic conditions. As a result, in tough economic times, politicians tend to blame regulations for poor economic outcomes (particularly job loss).[145] Once politicians have labeled regulation as the problem, regulatory reform is labeled as the solution.

Even if a regulatory reform statute were to achieve its substantive goals perfectly, years would likely be required after its passage before that success would become apparent. Sponsors,

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[142] Dwyer argues that such legislation has deleterious impacts, leaving agencies to make policy decisions without legislative guidance. However, his focus is on environmental statutes with overbroad mandates. The regulatory reform efforts achieve their symbolic goals in a different way—by actually undermining their intents with loopholes. Ibid.
[143] Shapiro and Borie-Holtz, *The Politics of Regulatory Reform*.
[144] Alan I. Abramowitz and Jeffrey A. Segal, "Determinants of the Outcomes of U.S. Senate Elections," *Journal of Politics* 48, no. 2 (1986): 433–39.
[145] One study found a 17,000 percent increase in the use of the phrase "job-killing regulations" in the media between 2007 and 2011. Livermore, Piennar, and Schwartz, "Regulatory Red Herring."

whose goal is touting regulatory reform as an antidote to economic ills, have no reason to care about how these statutes actually work. The goal is to get them passed. Hence, a statute with vague terms and exceptions[146] that passes is preferable to one that fails.[147] Passage allows the legislation's supporters to claim credit for addressing economic concerns.[148]

We have not ruled out the other political rationale for passage of regulatory reform. Political scientists have described procedural reform as performing a signaling function,[149] or serving as a "fire alarm," for legislators.[150] The implementation of the regulatory reform statutes discussed in this article provides little evidence that they have successfully performed this function. Caution should be used in overinterpreting this result, however. The lack of evidence does not indicate that such a function has not been performed in a way invisible to the outside researcher.[151] In fact, the requirement for analyses of impacts on small businesses, states, and localities; SBREFA panels; and calculations of paperwork burdens can all be seen as ways of making more information available to ease congressional oversight of regulatory agencies.[152]

Conclusion

The Administrative Procedure Act was passed in 1946. Although it largely ratified the practice of executive branch policymaking that had emerged during the New Deal,[153] cementing this practice in statute was critical. Particularly, the formal creation of the rulemaking process, even

[146] Vague terms and exceptions also leave such legislation open to saving amendments. Enelow and Koehler, "The Amendment in Legislative Strategy."
[147] Interestingly, the regulatory reform efforts currently underway have not yet borne fruit in signed legislation. Only time will tell whether the sponsors in the current Congress will be willing to make the compromises necessary to ensure passage.
[148] Mayhew, *Congress: The Electoral Connection*.
[149] West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness."
[150] McCubbins and Schwartz, "Congressional Oversight Overlooked."
[151] Research at the state level has indicated that regulatory reform can perform this signaling function. Shapiro and Borie-Holtz, *Politics of Regulatory Reform*.
[152] McCubbins and Schwartz, "Congressional Oversight Overlooked."
[153] Gellhorn, "Administrative Procedure Act: The Beginnings."

though it was constrained by notice and comment and judicial review, was a major empowerment of the federal bureaucracy. The APA made permanent a new avenue for policymaking and "permitted the growth of the modern regulatory state."[154]

And that was the intent of the New Deal liberals who supported the APA after years of opposing statutory constraints on agency policymaking. Fearing that the gains of the New Deal would be eroded by potential Republican takeovers of the executive and legislative branches, the New Deal coalition decided that using the judicial branch to constrain the bureaucracy (especially because most judges had been appointed by President Franklin D. Roosevelt) was well worthwhile rather than allowing the political branches to do so. The result was an adjudication process that was infused with greater due process and a rulemaking system that was centered on agency expertise.[155]

From a substantive perspective, regulatory reforms since the APA can be seen as attempts to walk back this deal. But constraining a government function once it is created is very hard. The coalition that supported the New Deal in the first place still exists, supplemented by supporters of the great wave of public health protection that emerged in the 1960s. These supporters will fight constraints on agency decision making and ensure that if constraints are passed, they will contain sufficient loopholes so as to be largely ineffectual. Absent the loopholes, passing the constraints is impossible.

For this fundamental reason, statutes such as the RFA, the PRA, and UMRA have been substantively ineffective. The statutes all give agencies significant discretion for their implementation. This outcome is not an accident; the legislative histories of the statutes indicate

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[154] George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwestern University Law Review* 90, no. 4 (1996): 1557–683.
[155] Shapiro, "APA: Past, Present, and Future." See also McNollgast, "Political Origins of the Administrative Procedure Act."

that this quid pro quo was necessary to ensure their passage in Congress and their signing by a Democratic president. The current wave of regulatory reform is largely restricted to the very conservative House of Representatives, which clearly has the substantive goals of reducing federal regulation. There it will stay, barring a sea change in electoral politics or a set of compromises that weaken the proposals.

But regulatory reform statutes—even with loopholes that weaken them—are not without appeal for elected officials. Particularly in times of economic distress, regulatory reform allows legislators and executives to appear to address economic concerns. With few tools to "create jobs," politicians turn to regulatory reform to give the appearance of helping the economy. Whether an unconstrained regulatory reform statute would improve economic conditions is a question beyond the scope of this study (the authors are skeptical). However, even a constrained statute, which does little to change regulatory policy, can serve the needs of self-interested incumbents. That is why, at both the federal and state levels, we will continue to see interest in regulatory reform.