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Achieving Real Regulatory Reform

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The world is in the midst of two profound regulatory changes. First, there is a trend toward deregulation of heavily regulated industries and privatization of state-owned enterprises.[1] In many of the former communist countries, for example, privatization has become a central feature of reform.[2] In the United States, deregulation remains a major policy concern, as evidenced by recent movements to promote competition in the telecommunications[3] and electricity industries.[4]

Second, as politicians find it more difficult to satisfy constituency demands through budgetary means, there has been a growing interest in rethinking how governments administer social regulation, particularly in the areas of health, safety, and environmental protection.[5] Here, economic analysis is likely to play a more prominent role in both setting and achieving goals. For example, the United States recently enacted a number of laws aimed at increasing legislative and agency accountability for the benefits and costs of regulation and controlling unfunded mandates imposed by the federal government on the private sector

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[1] Organization for Economic Co-operation and Development, *Regulatory Reform, Privatization, and Competition Policy* 47-123 (OECD 1992); Dennis J. Gayle and Jonathan N. Goodrich, *Privatization and Deregulation in Global Perspective* (Quorum 1990).

[2] Roman Frydman, et al, *The Privatization Process in Central Europe* (CEU 1993); Roman Frydman, et al, *The Privatization Process in Russia, Ukraine, and the Baltic States* (CEU 1993).

[3] Telecommunications Act of 1996, Pub L No 104-104, 110 Stat 56, codified at 47 USC § 151 et seq (1994 & Supp 1996).

[4] Peter Coy and Gary McWilliams, *Electricity: The Power Shift Ahead*, Business Week 78 (Dec 2, 1996).

[5] See Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard 1993); Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (Free Press 1992); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard 1990); David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison-Wesley 1992); Philip Howard, *The Death of Common Sense: How Law is Suffocating America* (Random House 1994).

and state and local governments.[6] Similar efforts are underway in Mexico.[7]

Both of these trends have been fueled by a variety of factors, including changes in technology, prices, and interest group pressures. For example, telecommunications deregulation was to some extent driven by interest groups and consumers that could benefit greatly from relaxing entry barriers in the local phone service market. In the case of social regulation, governments are facing increased political pressure to supply greater environmental, health, and safety protection as societies become wealthier. Because it is becoming harder to meet the demand for social regulation, there is political pressure to search for less costly and more effective alternatives.

In the United States, perhaps the most profound change is that people are beginning to understand that regulations have costs as well as benefits. Philip Howard, in his recent best-seller *The Death of Common Sense*, makes a strong case that many regulations are ill-conceived and lead to perverse outcomes.[8] This finding is consistent with recent scholarship that calls for a rethinking of the regulatory state,[9] a central element of which is to allow for the explicit consideration of costs in regulatory decisionmaking.[10] Fortunately, consideration of costs is becoming more prominent in regulatory debates both on the national

[6] Small Business Regulatory Enforcement Fairness Act of 1996, Pub L No 104-121, 110 Stat 847, 868-74, codified at 5 USC § 551 et seq (1994 & Supp 1996); Unfunded Mandates Reform Act of 1995, Pub L No 104-4, 109 Stat 48; Food Quality Protection Act of 1996, Pub L No 104-170, 110 Stat 1489, 1513-36, codified at 7 USC §136, 21 USC §§ 321, 331(j), 342(a), 346(a) (1994 & Supp 1996); Safe Drinking Water Act Amendments of 1996, Pub L No 104-182, 110 Stat 1613, 1621-25, codified at 42 USC § 300g-1(b) (1994 & Supp 1996); Accountable Pipeline Safety and Partnership Act of 1996, Pub L No 104-304, 110 Stat 3793, 3794-3800, codified at 49 USC § 60102(a) (1994 & Supp 1996); Omnibus Consolidated Appropriations Act, 1997, Pub L No 104-208, 110 Stat 3009-1, 3009-1088-89.

[7] *House Cleaning*, The Economist S18 (Feb 13, 1993); Secretaria De Comercio Y Fomento Industrial, *Economic Deregulation in Mexico* (Dec 1996).

[8] Philip Howard, *The Death of Common Sense: How Law is Suffocating America* 3-53 (Random House 1994).

[9] Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in Robert W. Hahn, ed, *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* 208 (Oxford 1996). See also note 5.

[10] Kenneth J. Arrow, et al, *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* 6 (AEI 1996).

and state level.[11] Indeed, it would be fair to say that cost is no longer a "four-letter word" in the political lexicon.

While the benefits and costs of regulation are receiving increased attention in the policy debate, there is a parallel effort underway to develop better information on the subject.[12] This Article assesses the benefits and costs of several major environmental, health, and safety regulations passed since 1990; it suggests ways in which regulatory analysis can be improved in the future; and it proposes changes in the regulatory process.

At the outset, let me say that some regulations may be desirable from a social point of view, even if the economic benefits fall short of the costs. For example, providing medical assistance and food for society's poor may not increase economic efficiency, but it may be the right thing to do for moral reasons. Similarly, helping to reduce discrimination may be desirable in principle regardless of its effect on economic efficiency.

But, if the bulk of new regulations have an adverse impact on the economy, either through the direct cost of implementing them or through their adverse impact on innovation and productivity, their cumulative effect can have major consequences for society.[13] Moreover, some individual businesses that are especially hard hit by regulations are likely to close down or move overseas.[14] Thus, even when non-economic considerations justify certain policies, their economic impact should be assessed so that they can be implemented in the most effective manner possible.

If Congress is interested in developing regulation that will better help the average citizen, it has two basic levers it can control. First, it can pass "smarter" laws that carefully weigh the economic benefits and costs of proposed actions. Second, it can make sure that regulations promulgated under those laws are crafted in ways that enhance economic welfare.

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[11] See note 6; Susan Eckerly, *Virginia's Deregulatory Challenge: A Promising Start*, 19 Regulation 63 (No 2, 1996); Dana Joel, *Rhetoric vs. Reality: New Jersey Regulatory Reform*, 19 Regulation 53 (No 2, 1996).

[12] For a number of studies, see Breyer, *Breaking the Vicious Circle* at 3-29 (cited in note 5).

[13] Brian Goff, *Regulation & Macroeconomic Performance* 9-22 (Kluwer 1996); Paul MacAvoy, *Industry Regulation and the Performance of the American Economy* 24 (W.W. Norton 1992); Gregory Christiansen and Robert Haveman, *Public Regulations and the Slowdown in Productivity Growth*, 71 Am Econ Rev 320, 324-25 (May 1981); Robert W. Hahn, *A Preliminary Estimate of Some Indirect Costs of Environmental Regulation* (AEI working paper, Feb 1995).

[14] Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 Yale L J 2039, 2084-86 (1993).

Congress should change the way it does business to take more careful account of the benefits and costs of regulation it imposes on state and local governments, the private sector, and ultimately, the American consumer. Congress should begin by taking a closer look at the economic impacts of the laws it passes and it should also allow for costs to be considered in the development of all standards and regulations. Currently, the balancing of benefits and costs is prohibited in parts of several statutes, including the Clean Air Act[15] and the Occupational Safety and Health Act.[16] Congress should not be bashful about asking the agencies it has created to examine more closely how their rules and regulations affect the quality of life of the average citizen.

I. THE BENEFITS AND COSTS OF RECENT REGULATIONS[17]

Regulations typically have one of two effects on the size of the economy. They either expand or shrink the economic pie.[18] Although the experience of the last twenty years has been mixed, most new regulations now under consideration would shrink the size of the economic pie.[19] This is especially true in the areas of health, safety, and the environment—even when the economic benefits of those regulations are taken into account.[20] It is also true in areas of traditional price regulation, such as cable television.[21]

Below, I present a study representing the most comprehensive analysis of benefits and costs of recent environmental, health, and safety regulations. Based on over ninety Regulatory Impact Analyses ("RIAs") of environmental, health, and safety rules from 1990 to mid-1995, the study lends insight into the

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15 42 USC § 7409(b) (1994).

16 29 USC §§ 652(8), 655(b)(5) (1994).

17 The next two sections draw on research presented in Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in Robert W. Hahn, ed, *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* 208 (Oxford 1996). I am currently expanding this analysis to include a wider array of regulations over a longer time period.

18 Regulations also have an important impact on the distribution of resources. See, for example, Richard A. Posner, *Regulation by Taxation*, 2 Bell J Econ & Mgmt Sci 22 (1971); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ & Mgmt Sci 3 (1971); Roger Noll, *Reforming Regulation: An Evaluation of the Ash Council* 40 (Brookings 1971).

19 Hahn, *Regulatory Reform* (cited in note 17).

20 Id.

21 Robert Crandall and Harold Furchtgott-Roth, *Cable TV: Regulation of Competition* 69-83 (Brookings 1996).

relative benefits and costs of various regulations as well as the process by which various agencies evaluate these regulations.[22]

Table 1 presents an overview of the major rules reviewed for this study.[23] The table shows the number and percentage of regulations for which some part of benefits and costs were quantified by the agency. It also shows the fraction of regulations that would pass a benefit-cost test based on the agency's dollar estimates of benefits and costs. While costs were estimated for almost all rules, benefit estimates were incomplete. Agencies quantified health benefits for just over half of the rules and quantified monetized benefits for only one-fourth. In less than 20 percent of the rules, agencies showed that quantified monetary benefits would exceed quantified costs.

This overview of agency analyses suggests that there is considerable variation in the types of analysis agencies perform for individual rules. There is also considerable variation in the assumptions, methodology, and overall quality of these analyses. For example, the discount rate used varies across regulations.[24] In addition, agencies often present benefits and costs in particular years rather than presenting the full stream of benefits and costs.

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[22] According to the requirements of the relevant Executive Orders by President Reagan (Executive Order No 12,291, 3 CFR 127 (1981)) and President Clinton (Executive Order No 12,866, 3 CFR 638 (1993)), RIAs are prepared by agencies for all major rules (Reagan) or significant regulatory actions (Clinton) and reviewed by the Office of Information and Regulatory Affairs ("OIRA"). Under the Clinton order, a "significant regulatory action" is one having an annual effect on the economy of $100 million or more or otherwise adversely affecting the economy, creating a serious inconsistency or otherwise interfering with another agency's actions, materially altering the budgetary impact of a program or the rights and obligations of recipients, or raising novel legal or policy issues. § 3(f), 3 CFR at 641-42. Under the Reagan Order a major rule was one likely to result in an annual effect on the economy of 100 million or more, a major price or cost increase, or significant adverse effects on competition, employment, investment, innovation, or international competitiveness. § 1(b), 3 CFR at 127-28. I examined all available rules from the Environmental Protection Agency ("EPA"), the Occupational Safety and Health Administration ("OSHA"), the National Highway Traffic Safety Administration ("NHTSA"), and the Mine Safety and Health Administration ("MSHA") over the time period. In addition, I examined one rule from the Consumer Product Safety Commission ("CPSC"), an independent agency exempt from the requirements of the Executive Orders, that would likely have been considered major.

[23] Hahn, *Regulatory Reform* at 222 (cited in note 17).

[24] The discount rate used generally ranged between 3 and 10 percent. In some cases, agencies did not discount future benefits or account for latency periods.

Table 1

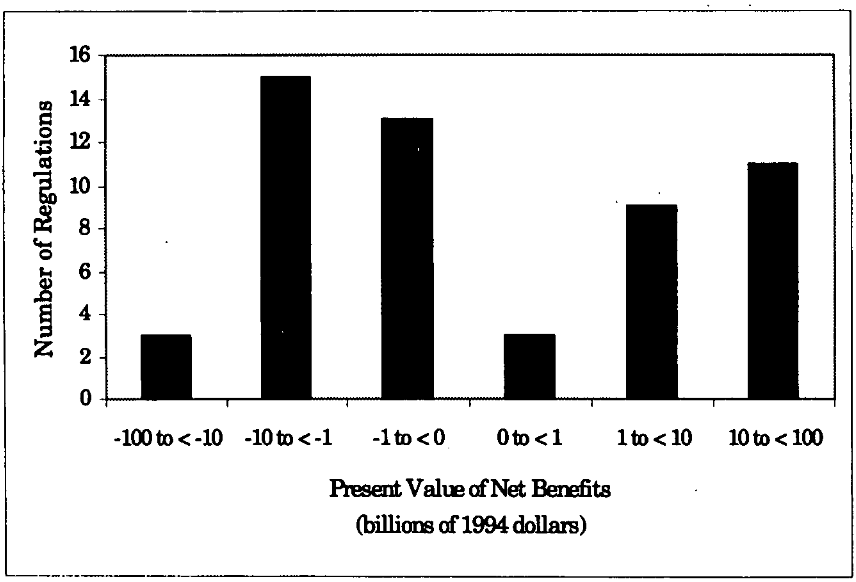
Regulatory Scorecard, 1990 to Mid-1995

	All	Final	Proposed	CPSC	MSHA	NHTSA	OSHA Health	OSHA Safety	EPA
Number of Regulations Reviewed	92	58	34	1	1	6	9	5	70
Costs/Savings Assessed	91 (99%)	57 (98%)	34 (100%)	1 (100%)	1 (100%)	6 (100%)	9 (100%)	5 (100%)	69 (99%)
Benefits Quantified	80 (87%)	48 (83%)	32 (94%)	1 (100%)	1 (100%)	6 (100%)	9 (100%)	5 (100%)	58 (83%)
–Health	51 (55%)	33 (57%)	18 (53%)	1 (100%)	1 (100%)	6 (100%)	9 (100%)	5 (100%)	29 (41%)
–Pollution Reduction	41 (45%)	24 (41%)	17 (50%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	41 (59%)
Benefits Monetized	23 (25%)	11 (19%)	12 (35%)	1 (100%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	22 (31%)
Agency Finding that Monetized Benefits Exceed Costs	17 (18%)	9 (16%)	8 (24%)	1 (100%)	0 (0%)	1 (100%)	1 (100%)	1 (100%)	13 (19%)

The RIAs suffer from a lack of consistency across and within agencies. To make the analysis consistent across different programs and regulations, I converted dollar estimates to 1994 dollars and introduced a common discount rate as well as a consistent set of values for reducing health risks.[25] Several conclusions emerge from my analysis. First, government agency data suggest that there is a present value of about $280 billion in net benefits to government regulation since 1990. Yet, as Figure 1 shows, over half the final rules would not pass a benefit-cost test, even when we use agency numbers.[26] Aggregate net benefits are positive because many of the rules that do pass benefit-cost analysis have substantial benefits. The agencies' analyses suggest that a substantial number of their own regulations should not be promulgated if benefit-cost analysis were the sole criterion for judgment. Eliminating final rules that would not pass a benefit-cost test could increase the present value of net benefits by more than $115 billion.

Figure 1

Distribution of Net Benefits of Fifty-Four Final Regulations 1990 to Mid-1995



[25] All dollar figures have been adjusted to 1994 dollars using implicit price deflators for the gross domestic product, as reported in Council of Economic Advisers, *Economic Report of the President* 341-352 (GPO 1995). A five percent real discount rate is used in the base case.

[26] Hahn, *Regulatory Reform* at 220 (cited in note 17)

Without a detailed evaluation of each rule, it is difficult to say how individual analyses are likely to be biased. However, there are reasons *not* to take the agencies' numbers at face value. While economic arguments are ambiguous, both political theory and empirical evidence suggest that agencies are likely to overstate substantially the aggregate numbers for net benefits.[27] For example, agencies with a single objective (for instance, protecting the environment or improving safety in the workplace) have an incentive to overstate the benefits of their program relative to the costs so they can better meet the demands of interest groups or so they can expand their regulatory reach.

In addition, I found some marked discrepancies between agency estimates and what neutral economists projected in terms of benefits and costs. The 1990 Clean Air Act Amendments provide an instructive example.[28] As a participant in the formulation of that Act, I conducted a benefit-cost analysis for the Council of Economic Advisers ("CEA"). That analysis suggested that the amendments, when fully implemented, would result in substantial net costs to the economy—on the order of $10 billion to $20 billion annually.[29] Those estimated net costs are hard to square with the government's estimated $50 billion in net present value benefits.[30]

II. HOW TO IMPROVE THE QUALITY OF THE ANALYSIS

If benefit-cost analysis is to play a greater role in agency decisionmaking, the quality of the analysis must be improved dramatically. Changes that would improve the quality of analysis include making key assumptions explicit—something that current regulatory impact analyses frequently fail to do;[31] using best estimates and appropriate ranges to reflect uncertainty; providing estimates of the net present value of benefits and costs; and summarizing sensitivity analyses and base-case results.[32]

[27] Id at 224-225.

[28] Clean Air Act Amendments of 1990, Pub L No 101-549, 104 Stat 2399, codified at 42 USC § 7401 et seq (1994).

[29] Robert W. Hahn, *U.S. Environmental Policy: Past, Present and Future*, 34 Nat Resources J 305, 320-21 (1994). See also Paul R. Portney, *Policy Watch: Economics and the Clean Air Act*, 4 J Econ Persp 173, 179 (Fall 1990).

[30] Hahn, *Regulatory Reform* (cited in note 17).

[31] Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in Robert W. Hahn, ed, *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* 208 (Oxford 1996).

[32] See generally, Kenneth J. Arrow, et al, *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* (AEI 1996) (detailing these and

Some of those changes were embodied in regulatory reform bills considered by the 104th Congress.[33]

Agencies could improve the quality of their overall analysis by using a common set of economic assumptions, as I did in my analysis. This would make it easier to compare results for different regulations. Variables for which common assumptions should be used include: the social discount rate, the value of reducing risks of death and accidents, the value of reducing different kinds of pollution, and the value associated with improvements in health. A single agency, such as the Office of Management and Budget ("OMB") or the Congressional Budget Office ("CBO"), should be given the responsibility for developing key values for different variables based on the best economic and scientific evidence available.[34] The use of a common set of assumptions should not preclude the introduction of other values as variables where appropriate.

An agency such as the OMB or CBO should also develop a standard format for presenting results in a clear and succinct manner. A good summary and clear analysis will make it easier for policymakers and interested parties to evaluate results. In addition, transparency is necessary if such analysis is to enjoy broad public support.

Agencies should also do more peer review to improve the quality of analysis, but the nature of this review needs to be carefully designed. One problem is that many academic reviewers often receive government support from agencies whose rules require review. This was the case, for example, in the EPA study on the benefits and costs of the Clean Air Act regulations.[35] If

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other reform proposals); Hahn, Regulatory Reform (cited in note 31).

[33] Risk Assessment and Cost Benefit Act of 1995, HR 1022, 104th Cong, 1st Sess (Feb 23, 1995), in 141 Cong Rec H 2261 (Feb 27, 1996); Regulatory Reform Act of 1995, S 291, 104th Cong, 1st Sess (Jan 27, 1995), in 141 Cong Rec S 1711 (Jan 27, 1995); Comprehensive Regulatory Reform Act of 1995, S 343, 104th Cong, 1st Sess (Feb 2, 1995), in 141 Cong Rec S 9261 (June 28, 1995); Regulatory Procedures Reform Act of 1995, S 1001, 104th Cong, 1st Sess (June 19, 1995), in 141 Cong Rec S 9481 (June 30, 1995).

For example, HR 1022 specified principles for risk assessment and characterization. For an insightful critique of one of the regulatory reform bills, see Edward Warren, *Reforming Regulatory Reform: Doing Better with Less*, in Robert W. Hahn, ed, *Reviving Regulatory Reform* (forthcoming 1997). The author presents a simpler alternative that would modify the Administrative Procedure Act, effectively requiring agencies to do "more good than harm" when regulating.

[34] OMB has published comprehensive guidelines for preparing economic analyses. *OMB Document on 'Best Practices' for Preparing Economic Analyses of Regulatory Action*, Daily Envir Rep (Jan 22, 1996). However, it is not clear that OMB will actually enforce these guidelines.

[35] U.S. Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act,*

government support for research can bias the opinions of individuals, then it may be necessary to identify some reviewers with expertise who do not receive agency support. It would also be helpful to preserve some degree of anonymity for the reviewers.[36] A second problem with peer review as currently practiced is that agencies often select the reviewers. To address this problem, an agency more interested in economic efficiency, such as OMB or CEA, should have more say in selecting reviewers of regulations. A final problem is that academic experts may not have a strong enough incentive to peer review studies that require a very large time commitment, such as that required by the EPA Clean Air Act study. The solution to this problem is to change the nature of the process—either by providing them with staff support or asking them to focus on important issues that were not considered adequately in the original analysis.

III. SUGGESTIONS FOR REFORMING THE PROCESS

The critical question for regulatory reform is how best to hold regulators and legislators more accountable for regulations. Below, I offer ten specific suggestions for regulatory reform. While many of the suggestions would require additional resources, the resources would be well spent if they led to a more reasoned evaluation of the benefits and costs of regulations.[37]

First, Congress should come clean on the economic benefits and costs of regulation to the American public. Currently, costs tend to be hidden from view. For example, the consumer is rarely aware of the several hundred dollars paid for pollution control equipment on a new car,[38] or the costs associated with recent proposals to improve airline safety.[39] Indeed, my recent research shows that the regulatory agencies have failed to measure systematically the costs they impose on the private sector.[40] A re-

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1970 to 1990 (EPA 1997).

[36] Complete anonymity may be desirable to enhance objectivity. There may also be some value in drawing reviewers from a pool of experts, where the pool members are publicly known, but the specific reviewers are not. I am indebted to Randy Lutter for this suggestion.

[37] Likewise, the uncertainty inevitable in rigorous benefit-cost analysis, although problematic, does not justify abandoning such analysis altogether.

[38] Robert Crandall, et al, *Regulating the Automobile* 27-43 (Brookings 1986).

[39] Peter Passell, *Economic Scene: In Airline Safety, Too Much Vigilance Can Be a Bad Thing*, NY Times D2 (Sept 5, 1996); Robert W. Hahn, *The Economics of Airline Safety and Security: An Analysis of the White House Commission's Recommendations*, 20 Harv J L & Pub Pol (forthcoming Spring 1997).

[40] Robert W. Hahn, ed, *Reviving Regulatory Reform* (forthcoming 1997).

cent survey of regulatory agencies conducted by Congressman Thomas J. Bliley confirms this result.[41] These regulatory costs should be reported in a "regulatory budget" that goes to Congress each year. Similarly, estimates of the benefits of regulation should be reported where they can be quantified. While the estimates are likely to be quite uncertain in some cases, even crude estimates of benefits and costs can be beneficial in the policy debate. The recent regulatory accountability provision, which requires OMB to report on the benefits and costs of regulatory programs by September 1997, represents a step in the right direction.[42]

Second, Congress should introduce a binding regulatory budget on an experimental basis.[43] The design of this budget is critical. Such a budget should have three key features. First, Congress should set expenditure limits for different kinds of regulation. This could be done by statute, by program, by agency, or for all regulatory agencies. Second, a neutral scorer should determine if the expenditure limits are met. My preference would be to have an independent agency modeled after the Federal Reserve, but short of that, I would look to the CBO, which already does scoring for the budget and which has a reputation for impartiality. If the expenditure limits are exceeded, the President could submit a request to Congress for an increase in the regulatory budget authority or Congress could choose to increase the budgetary authority on its own. Third, the budget would apply only to those rules for which the expected costs exceed the expected benefits. Rules that would pass a benefit-cost test would be exempted. The regulatory budget would thus increase accountability, but would not stop rules that were expected to improve the well-being of the average citizen from going forward.[44]

Third, Congress should provide an additional incentive for agencies to balance benefits and costs carefully by enacting a law

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[41] Letter from Thomas J. Bliley, Congressman to Regulatory Agencies (Mar 5, 1996) (on file with author); Harold Furchtgott-Roth, *Neglect of Costs in Federal Regulation: Benign or Malignant?*, presented at Regulatory Reform: Making Costs Count (American Enterprise Institute Conference, Dec 9, 1996).

[42] Omnibus Consolidated Appropriations Act, 1997, Pub L No 104-208, 110 Stat 3009-1, 3009-1088-89.

[43] I spell out this proposal in greater detail in Hahn, *Reviving Reform* (cited in note 40).

[44] The primary difficulty with a regulatory budget lies in estimating the relevant benefits and costs. There may be large uncertainties around even the most narrow definitions of costs, such as "end of pipe" costs. These uncertainties could be reduced over time as experience is gained with benefit and cost estimation procedures.

that requires such balancing. Such a law is likely to have more force than the Executive Orders issued by recent Presidents for two reasons.[45] First, it could apply to a broader range of regulations and agencies. It could reach independent agencies whose status is thought to preclude excessive Presidential control, as well as regulations promulgated under statutes that preclude benefit-cost balancing.[46] Second, lawyers serving in government are more likely to comply with a law that requires careful balancing than with an executive order, particularly in cases where the majority party in either the House or the Senate helps to assure compliance with the law.[47]

The proposed law should apply prospectively to both new laws and regulations. Specifically, Congress should highlight the importance of using benefit-cost analysis in the development of regulations, the need to identify and evaluate realistic alternatives, and the importance of selecting alternatives that maximize expected net benefits. While it should not require that every regulation pass a strict economic benefit-cost test, the new law should shift the burden of proof so that fewer regulations impose major net costs on the average American consumer.[48] As a first step toward taking economic analysis of regulations more seriously, Congress could pass a version of one of the recent executive orders on regulatory oversight. Such a law would have more force than an executive order for the reasons mentioned above.

Fourth, Congress should encourage the courts to review regulations based on a kind of benefit-cost criterion by stating that this criterion should be a *primary* factor in developing regulations. Several scholars have argued that the courts are moving

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[45] Executive Order No 12,291, 3 CFR 127 (1981) (establishing regulatory analysis); Executive Order No 12,498, 3 CFR 323 (1985) (establishing regulatory planning process); Executive Order No 12,866, 3 CFR 638 (1993) (establishing regulatory planning and review); See Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy* 107-11, Supp 5-18 (Little, Brown 1992 & Supp 1996).

[46] Major independent agencies include the Federal Communications Commission, the Federal Trade Commission, and the Nuclear Regulatory Commission. Note that independent agencies are covered to a limited extent by the Clinton Order. § 4(b), (c), 3 CFR 638, 642-42 (cited in note 43). See notes 15 and 16 for examples of statutes precluding benefit-cost balancing.

[47] In 1982, the Senate unanimously passed such a bill, suggesting that some kind of sensible regulatory reform is feasible. Regulatory Reform Act, S 1080, 97th Cong, 1st Sess (July 17, 1981), in 128 Cong Rec S 5297 (Mar 24, 1982).

[48] One way of shifting the burden of proof would be to make the economic analysis on which the administrative decision rests subject to judicial review, as was contemplated in the Comprehensive Regulatory Reform Act of 1995, S 343, 104th Cong, 1st Sess (Feb 2, 1995), in 141 Cong Rec S 9261 (June 28, 1995).

in this direction.[49] Edward Warren and Gary Marchant argue that courts should judge the legality of regulations in the context of doing "more good than harm"—which is a kind of layman's benefit-cost test.[50] In other words, the Administrative Procedure Act, which calls for invalidation of agency actions that are "arbitrary, capricious or an abuse of discretion,"[51] should be read to create a strong preference for economic efficiency.[52]

Fifth, Congress should expand the capacity of OMB and CBO to review important laws and regulations. For example, CBO could assess the expected benefits and costs of proposed laws as well as "score" regulations if a regulatory budget were enacted. At the same time, OMB could review major regulations that were proposed as a result of the laws. After the review is complete, the head of the Office of Information and Regulatory Affairs ("OIRA") should sign a statement accompanying the executive summary of the RIA, stating his or her approval of that analysis.[53]

This recommendation is consistent with the technocratic thrust of Justice Breyer's book, *Breaking the Vicious Circle*.[54] OMB currently has a very small staff of economists and policy analysts; thus, it can do only a cursory review of only the most important regulations.[55] In the short term, Congress should allocate more resources to OMB for hiring scientists and economists who would improve the quality and scope of the regulatory review process. Similarly, CBO's staff should be increased to deal with new demands placed on it to provide timely information on the development of laws that have important regulatory impacts. A new division in CBO, similar to the OIRA within OMB, may need to be created.

Sixth, Congress should consider vesting the power for regulatory review in an *independent* agency patterned after the Federal

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[49] See, for example, Cass R. Sunstein, *The Cost-Benefit State*, in Hahn, ed, *Reviving Reform* (cited in note 40).

[50] Edward W. Warren and Gary E. Marchant, *More Good Than Harm: A First Principle for Environmental Agencies and Reviewing Courts*, 20 Ecol L Q 379, 405-08 (1993).

[51] Administrative Procedure Act, 5 USC § 706(2)(A) (1994).

[52] Warren and Marchant, 20 Ecol L Q at 407 (cited in note 50).

[53] In addition, the head of the OIRA could be allowed to note any important deficiencies in the RIA. The point of having the head expressly note their approval would be to hold them more accountable for the analysis contained therein. This accountability would be even more important if statutes allow for judicial review.

[54] Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59-61 (Harvard 1993).

[55] In 1996, the OIRA employed only 41 professionals. Full-time equivalent employment at federal regulatory agencies is more than 130,000. P. Wayne Walker, ed, *1996 Federal Staff Directory* (CQ Fall 1996).

Reserve. A relatively autonomous, independent agency is likely to be more insulated from political pressures. It would be in a better position to make difficult decisions on promoting more effective and efficient regulation. Such an agency would need to be designed with a clearly stated objective (for example, to perform analyses that attempt to maximize the net economic benefits from regulation) and with a group of professionals that would be able to gain legitimacy.[56]

Seventh, Congress should introduce sunset requirements so that agencies and their missions would have to be re-evaluated periodically.[57] While sunset provisions and retrospective assessments can consume valuable time and resources, they can benefit the public by inducing agencies to ask serious questions about the quality and costs of the services they are trying to deliver. They can also induce Congress to revisit the enabling statutes.

Eighth, Congress needs to address existing regulations as well as new regulations. It should direct OMB and relevant agencies to review at least ten major existing regulations each year, with an eye toward modifying them to ensure that they are producing benefits in excess of costs or eliminating those that do not pass such a test. In addition, regulations should be modified so that they are implemented in the most cost-effective manner possible. OMB would be required to issue a report on its review, together with the information it provides to Congress in its regulatory budget.[58]

Ninth, Congress should move away from the one-size-fits-all approach. Instead of requiring specified technical fixes for smokestacks, or uniform standards regulating food safety, flexibility should be encouraged so long as the overarching social goals are achieved. Congress and the regulatory agencies should define the overall objectives but allow individuals and businesses the flexi-

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[56] In his book, Justice Breyer suggests developing a technocratic elite that would rotate through agencies to gain expertise. Breyer, *Breaking the Vicious Circle* at 59-61 (cited in note 54). While it would be advantageous for some members of an independent agency to have a good working knowledge of different regulatory agencies, I do not think all professional members of the independent agency should necessarily be required to take part in the rotation. Furthermore, there is a danger that bureaucrats overseeing the process could be co-opted by particular agencies, depending on their incentives.

[57] A "sunset" provision requires periodic review and approval of a law for the law to remain in effect. *Black's Law Dictionary* 1436 (West 6th ed 1990).

[58] It is not necessary, and is potentially counter-productive, to allow anyone to petition the relevant agency or OMB to review any existing rule, as Congress considered in its last legislative session. Such a provision could paralyze the regulatory process and needlessly polarize the debate over regulatory reform.

bility to achieve these goals in the least expensive way, thus promoting innovation. For example, Congress is using a market-based approach to achieve a ten million ton reduction in sulfur dioxide emissions.[59] This more flexible approach is expected to save over $13 billion relative to an approach that requires particular technologies.[60]

Furthermore, there are several cases where more flexibility could help achieve social objectives while reducing cost. For example, Amoco's Yorktown Refinery was required to spend $31 million to reduce a small amount of benzene from its wastewater treatment plant, when it could have reduced five times as much benzene elsewhere in the refinery at a cost of only $6 million.[61] Unfortunately, Amoco was not given the flexibility to make the more prudent investment, despite the fact that it would have cost less and improved the environment at the same time.

Finally, if Congress is truly serious about changing the nature of regulation, it should revisit the statutes that it has enacted over the last two decades with an eye toward promoting greater flexibility and economic efficiency. For some programs, such as Superfund,[62] Congress may want to move responsibilities back to the states. For other laws, such as those governing airport safety, Congress will want to allow for the economic costs of legislation to be weighed against the benefits of the law. For economic regulation, such as in the banking and electricity industries, Congress should allow greater competition. Finally, laws that no longer serve a useful social purpose, such as the Davis-Bacon Act,[63] should be eliminated.

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[59] Clean Air Act, 42 USC § 7651(b) (1994).

[60] Robert Hahn, *The Politics and Religion of Clean Air*, 13 Regulation 21, 22 (No 1, 1990); ICF, *Regulatory Impact Analysis of the Final Acid Rain Implementation Regulations* ES4-ES7, Prepared for EPA (Oct 19, 1992).

[61] Amoco and U.S. Environmental Protection Agency, *Amoco/US EPA Pollution Prevention Project: Project Summary* (1992). The report did not give the year dollar, so I have not updated those figures to 1994 dollars. See also Keith Schneider, *Unbending Regulations Incite Move to Alter Pollution Laws*, NY Times A1 (Nov 29, 1993).

[62] Comprehensive Environmental, Response, Compensation, and Liability Act, 42 USC § 9601 et seq (1994).

[63] 46 Stat 1494 (1931), codified at 40 USC § 276a(a) (1994). The Davis-Bacon Act both increases the cost of government contracts and is biased against minority hiring. Timothy J. Pendolino, *The Davis-Bacon and Service Contract Acts: Laws Whose Time Has Passed?*, 147 Milit L Rev 218, 249-52, 253-55 (1995).

CONCLUSION

Congress has a unique opportunity to reform the federal regulatory process. These reforms can be best achieved by carefully examining how the existing regulatory process is working. My analytical review of recent regulations suggests that the process is not working as well as it could be.

I have suggested several ways in which the regulatory process could be improved. The most important steps that can be taken in the near term are: making the process more transparent to the public by annually publishing more detailed information on the benefits and costs of proposed and final regulations; improving the quality of economic analysis of proposed and final regulations; passing laws that encourage civil servants and administrators to be more sensitive to the benefits and costs they impose on the public; developing "smarter" regulations that harness the power of the marketplace to achieve social objectives at lower cost; and rethinking the appropriate scope of federal regulation when the substantive statutes are rewritten.