Prepared Testimony of

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Before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives, 112th Congress

Tuesday, March 8, 2011
Hearing on the
Regulations from the Executive in Need of Scrutiny ("REINS") Act

Introduction

Chairman Coble, Ranking Member Cohen, and members of the Subcommittee: Thank you very much for inviting me to testify. I am honored that the members of the House Judiciary Subcommittee on Courts, Commercial and Administrative Law think my testimony may be instructive as they consider the Regulations of the Executive in Need of Scrutiny ("REINS") Act.

The REINS Act is of first importance because it implicates a fundamental feature of our form of government. Although Congress has many responsibilities over domestic affairs, three deserve pride of place over the others: to tax, to spend on programs properly within the national government's jurisdiction, and to make general laws regulating the affairs of individual Americans on topics also within that jurisdiction.[1] Congress has guarded the two powers associated with the purse vigilantly ever since the Founding. Sadly, however, since the New Deal, Congress has gradually fallen into the habit of writing regulatory statutes that are not models of clarity. Since the Great Society, Congress has granted to many new federal agencies power to promulgate binding legislative rules—I would prefer to say "laws"—and it has acquiesced in already-established agencies' asserting the same powers.

The REINS Act proposes to make Congress take stronger responsibility for enacting the specific and binding legal rules that regulate the conduct of American citizens, firms, and other associations for "major rules" as defined in the Act. The REINS Act strengthens several important features of republican and constitutional government—most of all, the connection between legislation, electoral politics, and ordered liberty.

In the following testimony, I offer background on the political theory most relevant to the REINS Act. I hope to clarify two fundamental political issues for Congress to consider:

> First, according to the natural-rights principles informing the Declaration of Independence and the Constitution of 1787, why may Congress conclude it is no longer necessary and proper for federal administrative agencies to promulgate what the REINS Act calls "major rules" by administrative rulemaking?
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> Second, what motivated previous Congresses or specialists in administrative governance to insist that "legislative rules," which are for most practical purposes *laws*, be promulgated by agencies—and not through the legislative process laid out in Article I of the U.S. Constitution?

Before proceeding, please allow me to explain my qualifications to testify on these questions. I clerked for the Honorable William Rehnquist, Chief Justice of the United States. My scholarship has focused on the influence of natural-rights/natural-law political theory and

Progressive political theory on American government. I rely substantially here on two academic articles I have written contrasting the Founders' theory of separation of powers and leading Progressive and New Deal theorists' justification for centralized administrative governance.[2] I have taught Administrative Law, which covers the separation of powers doctrines most relevant to the REINS Act. At George Mason University School of Law, I am currently developing with two other professors a course titled "Constitutional Law: The Founding." In this course, a mandatory first-year course, we teach George Mason law students the history and political theory that informed the drafting of the Constitution of 1787, and we also cover how the New Deal significantly transformed the operations of the federal government. (Of course, my testimony reflects my own considered opinions as a scholar, not any official policy of George Mason University School of Law or any course it offers.) Last but definitely not least, from 1989-91, before attending law school, I served this House as a legislative assistant to the Honorable Ronald Packard (Oceanside, CA).

I. The Constitutional Basis for the REINS Act

Let me begin by recounting briefly why the Constitution authorizes Congress to enact the REINS Act. In this Part, I testify as a lawyer and law scholar predicting the likely outcome if a litigant adversely affected by the REINS Act were to challenge its constitutionality in court. For reasons that should become clear in subsequent parts of my testimony, I do not necessarily agree in my capacity as a scholar with all the judicial precedents or institutional practices I follow in this part as a lawyer.

The Necessary and Proper Clause, article I, section 8, clause 18 of the Constitution, confers on Congress wide discretion to authorize agencies to make policy choices in the course of administering organic statutes over which they have jurisdiction. Among other things, Congress may authorize agencies to promulgate legislative rules. On the basis of new evidence as it comes to light, however, Congress may decide that it is no longer necessary or proper that federal agencies promulgate such rules. The REINS Act embodies just such a judgment, for rules with more than $100 million impact on the U.S. economy or other specified conditions. Since no other provision of the Constitution creates a general obstacle to Congress's exercising such judgment, the REINS Act constitutes a legitimate exercise of Congress's authority.

The REINS Act implicates three main constitutional provisions. First, the Article I Vesting Clause, article I, section 1:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Second, the Article II Vesting Clause, article II, section 1, clause 1:

> The executive power shall be vested in a President of the United States of America….

Last, the Necessary and Proper Clause, article I, section 8, clause 18:

> The Congress shall have power … to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department thereof.

Administrative agencies cannot promulgate legislative rules until this Congress exercises "legislative power" authorizing them to do so. Because "Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States,' it permits no delegation of those powers." Instead, Congress must "confer[] decisionmaking authority upon agencies," and do so by "'lay[ing] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[3]

After Congress confers such authority, the agency enjoys executive power, namely power to administer policy within the parameters and using the tools Congress designated by statute. In many different agency organic statutes, Congress has authorized federal administrative agencies to execute congressional policies in many different ways. Different organic statutes give agencies powers to investigate, to inspect, to issue citations, to buy and sell property, and so forth. The most potent of these powers are the power to adjudicate disputes involving the organic statute and—central here—the power to promulgate a legislative rule. A legislative rule is a statement made by an agency, of general and prospective applicability, the violation of which provides sufficient grounds for penalizing a party violating the rule.[4] An agency may not exercise any of these powers, however, unless the Constitution enumerates a power authorizing Congress to give the agency such powers. Congress supplies agencies with rulemaking and other powers pursuant to the Necessary and Proper Clause—because and to the extent that the power to investigate, adjudicate, or make rules is "necessary and proper for carrying into execution" some other enumerated constitutional power.[5]

Against this backdrop, the REINS Act simply reflects a legislative judgment to recalibrate the rulemaking powers Congress has granted different agencies previously in their organic statutes. The Act prevents certain legislative rules from taking effect unless and until a

joint resolution is enacted, pursuant to Article I, section 7's bicameralism and presentment requirements, approving of those rules. The rules covered are what proposed 5 U.S.C. § 804 calls "major rules"—simplified slightly, rules determined by the Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management in Budget to result in at least $100 million in effect on the U.S. economy or significant increases in prices for consumers or industries. Proposed 5 U.S.C. § 801 embodies a determination that, when agencies carry into execution their organic statutes and the constitutional powers those statutes implement, it is no longer necessary or proper that they do so by promulgating legislative major rules. Section 2, the Act's statement of purpose, identifies legitimate reasons why it may no longer be necessary or proper for agencies to promulgate legislative major rules without congressional approval—more carefully drafted legislation, a better regulatory process, and more accountability. In the rest of my testimony, I will suggest other reasons supporting the same determination. In short, since federal agencies need statutory decisionmaking authority from Congress to promulgate *any* legislative rules, Congress has power to retract authority from agencies to promulgate *some* such rules, major rules as defined in the REINS Act.

In her testimony before this Subcommittee on January 24, 2011, Sally Katzen suggested that the REINS Act creates the prospect of "fundamentally changing the constitutional structure of our government." Ms. Katzen makes two arguments: that the REINS Act creates bicameralism and presentment problems under *INS v. Chadha* (1983), and that it threatens core Article II prerogatives of the President. I had the pleasure and honor to work with Ms. Katzen when she taught at George Mason University 2007-08, and I am grateful to have been her colleague. With all due respect and collegial affection, however, neither argument has force.[6]

In *Chadha*, the Supreme Court declared unconstitutional a legislative veto. Federal immigration law required officers of the Immigration and Naturalization Service (INS) to deport foreign nationals who overstayed their U.S. visas. Another provision of the law (§ 244(a)(1) of the Immigration and Naturalization Act) gave the INS discretion to suspend the deportation if certain statutory factors were met. If either House of Congress enacted a resolution disapproving of the suspension, however, the suspension ceased to have legal effect and the INS was required to deport the foreign national. The Court characterized the resolution of disapproval as a legislative act because it tried to alter the legal rights and powers of Chadha and executive officers who otherwise would have had legal power to suspend Chadha's deportation. Yet a

legislative act was not valid under the Constitution, the Court concluded, unless the act was enacted consistently with the requirements of bicameralism and presentment set forth in Article I, section 7.[7]

The REINS Act accords with what *Chadha* requires of Congress. Under proposed 5 U.S.C. § 801(b)(1), no major rule may take effect unless it is approved by a joint resolution as specified in proposed 5 U.S.C. § 802. The determination whether any legislative rule is a "rule" (under the Administrative Procedure Act) or a "major" rule (under the REINS Act) is an executive function. That function is carried out by an officer of the executive, the Administrator of OIRA. There is nothing constitutionally problematic about the OIRA Administrator's making an executive determination, under criteria set forth by one valid statute, limiting the power of another executive officer (the officer of an agency vested with power to promulgate a legislative rule) to execute a function entrusted to him by another valid statute. (In this respect, the REINS Act mirrors the interplay by which the executive function of suspending deportations limited the previous exercise of the executive function of *ordering* deportations—an interplay which *Chadha* assumed to be perfectly legitimate.) Once the agency's rulemaking power has been limited by OIRA's determination under the REINS Act, the agency then lacks statutory authority to promulgate the major legislative rule in question. The REINS Act then provides a way for such authority to be restored—if Congress approves the rule by a joint resolution. By requiring Congress to act through a joint resolution, the REINS Act avoids all the problems *Chadha* identified with the legislative veto. By definition, a "joint" resolution satisfies Article I, section 7's bicameralism requirement. Separately, the House and Senate both construe a "joint resolution" to require presentment to the President except when the resolution recommends an amendment to the Constitution.[8] In reasonable context, the REINS Act incorporates this construction by reference and accordingly satisfies Article I, section 7's presentment requirement.

Ms. Katzen doubts this analysis. If an agency recommends a rule, and one house fails to approve that rule, she asks, "Can this easily be distinguished from *Chadha*?"[9] Yes—in fact, *Chadha* suggests how. In *Chadha*, the Supreme Court acknowledged that, if Congress did not like how the INS was using its discretion in suspension cases, it could have amended, revised, or repealed § 244(a)(1), the statute which gave the INS power to suspend deportation. Here, if Congress has concerns about how agencies are now using their rulemaking powers in

economically-significant regulatory disputes, it may revise amend the grants of rulemaking authority—as long as the revisions are enacted in "a statute duly enacted pursuant to Art. I, §§ 1, 7."[10] The REINS Act will satisfy that proviso if it is passed by both Houses of Congress and signed or enacted after a veto override. No constitutional problem arises because the REINS Act (Ms. Katzen's words) "amend[s] the underlying delegation of rulemaking authority to require explicit approval of any major rules by Congress and the President" in one fell swoop, rather than doing so one statute at a time.[11] Congress has the same constitutional power to revise, expand, or limit agency authority whether it does so on a case-by-case basis or globally. Congress may do the former in organic statutes or the latter by amending or adding provisions parallel to the Administrative Procedure Act. The Congressional Review Act imposed such an across-the-board limitation, and the REINS Act proposes to do so as well.[12]

Separately, citing *Morrison v. Olson* (1987), Ms. Katzen suggests that the REINS Act may unduly diminish the President's Article II executive powers. On its face, *Morrison* seems far removed from the REINS Act. *Morrison* considered and rejected a challenge to a federal law authorizing the creation of an independent counsel who investigated allegations of wrongdoing by executive-branch officers, without supervision by the President or the Department of Justice.[13] The prosecution of offenses against the laws of the United States is an inherently executive function, because it is part of the Article II power "to take care that the laws be faithfully executed."[14] In addition, the act authorizing independent counsels stripped the President of this power and transferred it to an officer outside the executive, the independent counsel. The REINS Act is different on both grounds. The power to promulgate legislative rules is not inherently executive, as the power to prosecute is. Rulemaking cannot be executive if "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress."[15] Nor does the REINS Act strip any executive officer of power and transfer it to a non-executive officer. Again, an executive officer, the Administrator of OIRA, makes the determination whether a legislative rule is a major rule, pursuant to general legislative criteria set forth in the REINS Act.

To be sure, *Morrison* does contain language suggesting that Article II separation of powers challenges be judged by whether the congressional act under challenge imposes "restrictions … of such a nature that they impede the President's ability to perform his constitutional duty."[16] Perhaps Ms. Katzen is reading this language to suggest that the President

cannot do his constitutional duty if Congress scales back the powers of all agencies to promulgate major legislative rules. If that is the suggestion, it represents an aggressive and far-fetched reading of vague opinion language. Because the possibility *Morrison* held out in this passage was not robust enough to provide a reason for voiding the independent counsel statute, it should not be read to ground strong separation of powers arguments in the future. In addition, the executive's prerogatives are much narrower in relation to legislative rulemaking than they were in relation to the prosecuting power at issue in *Morrison*. Even after *Morrison*, because of the Take Care Clause the prosecutorial power is relatively close to the core of the President's executive powers in domestic affairs. The power to promulgate legislative rules is not. As *Youngstown Sheet & Tube Co. v. Sawyer* (1952) confirms, in domestic affairs, the federal executive's power is ordinarily limited to executing "a congressional policy … in a manner prescribed by Congress."[17] If Congress decides to limit the "manner" by which the President makes policy by rescinding agencies' powers to promulgate one subset of legislative rules, Article II does not gives the President any grounds for complaint. And it makes no difference that Congress is limiting this authority across the board rather than in one organic statute at a time. The President has no power of the purse—and he could not complain on constitutional grounds if Congress cut the funds of the executive branch by half in one bill as opposed to doing so in 300 or 1000 bills. The same principle applies to the REINS Act.

In short, under controlling precedent and practices, Congress has constitutional authority to enact the REINS Act if it concludes in its discretion that the power to promulgate legislative rules by agency rulemaking is less necessary or proper for carrying constitutional powers into execution than it seemed when such power was conferred in different agency organic statutes. Neither Article I, section 7 nor Article II stands in the way; the REINS Act limits major rulemaking consistently with both.

II. <u>The Founders' Theory of Natural Rights Encourages *Legislators* to Write Laws</u>

This Subcommittee, however, should pause to consider Ms. Katzen's charge that the REINS Act "would change dramatically the constitutional structure of our government," and her assertion that agencies have "traditionally engaged" in rulemaking.[18] Although these claims state a weak legal argument, they illustrate a strongly-held policy commitment, shared among many elite lawyers and policy-makers: Rulemaking, by seemingly-impartial and -expert agencies, is so central to American government that it should not be scaled back. The power to

prosecute has been an executive power ever since the Founding; depending on how one counts, the power to promulgate legislative rules has been a regular feature of American government for only 40 to 80 years. To Ms. Katzen, however, the power to promulgate legislative rules is so time-honored and desirable that it *ought* to be constitutionally protected even if it is not.

This commitment explains much of the likely opposition to the REINS Act. Morally, *if* this commitment is true, American government is retrograde or delinquent unless it establishes broad rulemaking by agencies insulated largely from partisan and legislative politics. Distributively, if this commitment is true, two sets of citizens deserve to be treated as leading citizens: lawyers who specialize in public administrative law, and public-policy experts who specialize in industrial, labor, health, safety, the environment, or many other similar fields.

In the course of deciding whether the REINS Act constitutes an appropriate exercise of Congress's constitutional discretion, Congress should engage these moral and distributive questions. To help this Subcommittee start the process of doing so, I offer in the remainder of my testimony a survey of the relevant political theory. In this Part, I begin that survey by explaining why legislative rulemaking *strains* the best elements of the United States' political and constitutional tradition. The REINS Act legislates on a fundamental issue in American government—delegation. Is it legitimate for Congress to write blank checks to agencies, or should Congress write into those checks as many terms as it can specify? Little or nothing was said about delegation in the Philadelphia Convention. Early Congresses considered a few delegation issues in detail, but not often. All the same, if one understands the political theory that informs the Declaration of Independence and *The Federalist*, it is fairly obvious why the phrase "legislative power" presumes a non-delegation principle.

The Declaration of Independence may be understood to restate principles understood to count as common political and moral knowledge among American citizens as of 1788. The Declaration holds the following propositions to count as self-evident truths:

> [A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights.—That to secure these rights, Governments are instituted among Men, deriving their powers from the just consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

These truths were assumed to set criteria by which the Constitution of 1787 should be judged. Madison, for instance, writing as Publius, the author of the *Federalist*, argued for replacing the Articles of Confederation with the Constitution by appealing to "the transcendental and precious right of the people," as proclaimed in the Declaration, "to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'"[19]

The Constitution of 1787 attempts to secure natural rights while confronting a basic problem in human nature. As *Federalist* No. 51 explains:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must enable the government to control the governed; and in the next place oblige it to control itself.[20]

Let me illustrate the problems Publius identifies by working out the possibilities that follow if and when a federal agency decides to regulate benzene. (I choose this example because the Supreme Court considered and found deficient a proposed benzene rule in a leading administrative law case. This case illustrates vividly many important problems agencies routinely face when promulgating rules.) Benzene is used in motor fuels, solvents, detergents, and other organic chemicals, and it is also a by-product from refining petroleum. It is lethal when inhaled at extremely high concentrations (20,000 parts per million (ppm)), and it may cause nausea, leukemia, or blood disease at lower concentrations (above 25 ppm) above ordinary background levels (0.5 ppm or lower). The U.S. Occupational Safety and Health Administration promulgated a legislative rule barring benzene at levels of 1 ppm or higher in the late 1970s.[21]

Benzene's uses and its medical risks create challenges for regulators. Let me frame those challenges in terms of individual liberty, the framework *Federalist* No. 51 presumes. Ordinarily, businesses deserve the liberty to decide how to run their affairs, and workers deserve the liberty to decide for what sorts of employers and in what sorts of conditions they want to work. From those liberties follow more specific liberties to engage in specific productive activities (refining, or the manufacture of organic chemicals) that generate benzene as a by-product. Even if benzene can be toxic, the activities generate genuine benefits for customers. Even though these activities jeopardize the liberties of employees (by threatening their health), the employer, employees (plant or station workers), and insurance companies can normally process the toxicity risks, through some combination of wages, insurance, or changes to plant working conditions.

Yet these liberties may be abused. Because men are not angels, firms, workers, and insurers cannot always be trusted to work out ideal working arrangements with adequate respect for the legitimate interests of other parties. There are two competing risks. On one hand, in the absence of government, some individuals in a community will be tempted to prey on others. Some employers may turn a blind eye to the facts that their workplaces have high levels of benzene and thus expose their employees to significant health threats. Government should regulate against that possibility, to protect the workers' natural rights to their lives.

On the other hand, once a community institutes law and government, it creates another risk. Instead of trying to profit by doing their own work, firms or workers may try to profit by co-opting government processes to extract benefits. In contemporary legal and economic scholarship, this phenomenon goes under the name of the "theory of economic regulation," but *The Federalist* was aware of it as well. As *Federalist* No. 10 warns, because "[t]he regulation of … various and interfering interests, forms the principal task of modern legislation," it necessarily "involves the spirit of party and faction in the necessary and ordinary operations of government."[22] Thus, private-employee unions might lobby a law-making body to impose a benzene rule even when the health risks of benzene were not significant. By getting such a rule instituted, the union would give workers an employment benefit for which they normally would have needed to bargain, and it would restrain the employers' natural rights to bargain over all legitimate conditions of employment. Alternatively, petroleum companies, organic-chemical-making companies, or other companies might acquiesce in the imposition of a benzene-safety rule even when such a rule was not strictly necessary. They might do so if the rule made it harder for start-up companies to enter their industries and compete with them. If benzene were not dangerous enough that a minimum-benzene-level rule were strictly necessary, labor unions and companies already in the regulated industries would then be co-opting the legislative process to raise the costs to outsiders to enter those industries. Such regulation would then restrain the liberties of potential new entrants into the petroleum industry, of other industries handling benzene, and of would-be workers in those industries.

In short, government faces a choice between errors of omission and errors of commission. Leading Founding Era statesmen and theorists understood the Constitution to reconcile those risks through two main solutions.

One consists of a series of structural features slowing down the process of making laws. Article II assigns all of the Constitution's executive power to the President, and Article III confers on the U.S. Supreme Court supreme authority over the Constitution's judicial power. By contrast, because Article I creates a bicameral Congress, it bifurcates the legislative power between the House and the Senate. Article 1, section 7 slows down the legislative process even further by instituting the requirement that bills be presented to the President and then either signed or overridden by concurrent two-thirds supermajorities.[23] Although bicameralism and presentment establish structural rules, they have a substantive effect. They protect individual liberty by winnowing out rights-threatening bills. If a bill manages to survive bicameralism and presentment, its survival provides some proof that the bill may really claim legitimate authority to limit the liberties of people covered by it. If the bill's claims on behalf of the public interest were weak, factions threatened by the bill should have been able to persuade at least one of the House, the Senate, or the President to prevent its passage.

The Constitution institutes a separate safeguard—elections for legislative representatives. The Constitution assigns national "legislative powers" only to the House and the Senate, and members of those bodies must (after the Seventeenth Amendment) stand for election regularly. Elections institute and embody the Declaration's expectation that a just government depends on "the consent of the governed." If Congress passes a bad law, the citizenry may rectify the law's wrongs by forcing a referendum election on the law, firing the representatives who voted for it, and then replacing them with new representatives committed to repealing the law.

Neither of these safeguards will work very well, however, unless Congress abides by the non-delegation principle—that is, Congress writes tolerably specific and clear laws. John Locke provided the most seminal articulation of this principle. "The *Legislative*, or Supream authority," he insisted, "cannot assume to its self a power to Rule by extemporary Arbitrary Decrees, but *is bound to dispense Justice*, and decide the Rights of the Subject by *promulgated standing Laws*." By requiring *legislators* to enact the "standing laws," Locke's theory of natural rights prevents the legislators from avoiding responsibility (and avoiding being replaced) for making laws that turn out to be bad laws:

> The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others…. And when the People have said, We will submit to rules, and be govern'd by *Laws* made by such Men, and in such Forms, no Body else can

> say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorised to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.[24]

Textually, the non-delegation principle flows from Article I's references to "legislative power"; structurally, the principle performs precisely the function Locke described. Without such a principle, actors in the national government can easily circumvent bicameralism, presentment, and electoral accountability. If Congress assigns to agencies the power to make regulatory laws, citizens cannot fire the officers most responsible for making laws the citizenry finds contrary to the public interest. Consider again the Occupational Safety and Health Act and the benzene standard. If Congress had needed to pass the standard, companies and workers injured by it could have lobbied against the standard, or voted later against the members of Congress who ignored their lobbying. By contrast, citizens cannot replace the Administrator of OSHA nearly as easily as they can their own Senators and Representative.

Similarly, if federal laws and institutions do not track the non-delegation principle, regulators and factions can circumvent the fences bicameralism and presentment erect to secure individual rights. In the benzene dispute, assume that the relevant scientific, economic, and other evidence does not clearly justify requiring a 1 ppm benzene workplace safety standard. If Congress had needed to pass the standard, bicameralism and presentment would have given opponents at least three opportunities to prevent the standard's passage. The Occupational Safety and Health Act's rulemaking enabling provision eliminates those choke points. Partisans in favor of an unnecessary workplace regulation only need to convince OSHA staff to promulgate the rule.

My argument thus far has a few qualifications, to be sure. Under current law, opponents of legislative rules are not totally lacking in protection. U.S. administrative law gives them rights to submit comments in responses to notices of proposed rulemakings, and to sue in federal court to block the implementation of rules that adversely affect their interests. (For example, these protections were robust enough to convince the Supreme Court to send the benzene standard back for further findings by OSHA.) Under controlling law, however, federal courts must uphold agency legislative rules if they are based on plausible readings of agency enabling

statutes and have enough factual support not to be "arbitrary and capricious." (For example, OSHA and the Secretary of Labor later promulgated a benzene standard with the same basic features discussed so far.[25]) Individuals have greater opportunity to protect their rights in robust legislative and electoral processes than they do in judicial proceedings with these deferential features.[26]

Separately, supporters of broad legislative rulemaking may argue that rulemaking does not eliminate government by consent. After all, administrative agencies are responsible to political officers—to the President, through the organizational blueprint of the federal executive; and to Congress, through investigations, oversight, and appropriations review. Nevertheless, when Congress authorizes agencies to make policy following indeterminate statutory language, the indeterminacy and the authorization substantially dilute government by consent. In practice, it is very, very difficult for electoral coalitions to dislodge agency officers or change agency policies. If the legislative process requires Congress and the President (or a supermajority in both Houses) to agree to enact a new policy, parties threatened by new legislation only need to persuade one of three institutions to stop it. By contrast, when Congress authorizes broad agency policy-making, agency policy remains controlling law unless opponents convince all three institutions to change the agency's mandate.

In this respect, Congress should consider the country's experience with the Congressional Review Act. That Act reduced the procedural burdens opponents needed to surmount to challenge a legislative rule, by instituting procedures by which disapproval resolutions could go to a floor vote if they were bottled up in committees of jurisdiction. Even so, as of 2008, the Congressional Research Service reported that agencies had promulgated 731 legislative rules to which the Act could have applied, only 47 joint resolutions of repeal had been introduced (in relation to 35 rules), only 3 were passed by at least one house of Congress, and only one, relating to an OSHA ergonomics standard, was disapproved and made void.[27]

Morally, when Congress writes detailed and specific regulatory laws, bicameralism, presentment, and elections all secure ordered liberty. Our constitutional structure then works to secure two distributive results. It distributes to citizens the rights to which they are already entitled by what the Declaration calls "the laws of nature and nature's God": the greatest liberty they may have to determine and pursue their own legitimate life priorities consistent with the equal rights of others to do the same. Our constitutional structure also distributes honor and

pride of place to members of this House and the Senate. Lay citizens owe a debt of gratitude to members of Congress for making difficult choices in the course of writing the laws that order the liberty of American citizens. Members of Congress, however, must *earn* that honor and gratitude—by making tough-minded trade-offs, writing specific laws implementing those trade-offs, and submitting to regular elections judging those trade-offs and their consequences.

III. Legislative Rulemaking Emerged from Political Theories Hostile to Individual Liberty

It is harder to identify the precise grounds on which contemporary supporters justify broad grants of statutory discretion for agencies to set policies. Many common arguments in favor of such grants are not persuasive. For example, supporters commonly argue that federal agencies should have broad discretion to make legislative rules and otherwise set policy because agencies have more subject-matter expertise than members of Congress do. Yet Congress may incorporate expertise into the traditional three branches of government without blurring the boundaries between branches as much as legislative rulemaking does. In Article III, Congress may and has created courts with subject-matter expertise—like the Federal Circuit, which has specialized jurisdiction over patents, trademarks, and international-trade disputes. As it decides how to exercise its Article I powers, Congress may also solicit expert advice from agencies. For example, Congress established the National Institute for Occupational Safety and Health to "make recommendations" to the Secretary of Labor and OSHA "concerning new or improved occupational safety and health standards." Congress could easily restructure NIOSH to make those recommendations to Congress. In Article II, Congress may also structure executive-branch agencies to focus on particular regulatory problems whose execution requires the application of expertise. The REINS Act moves partially towards such a result. If the REINS Act passes, then for major rules, OSHA and other agencies will act first as legislative advisory boards to Congress, and then as specialized Article II executive agencies, enforcing the rules passed by Congress.[28]

Similarly, supporters of broad agency policy-making sometimes argue that conditions change too quickly for Congress to pass rules regulating individual conduct. This argument is unpersuasive, however, because Congress manages to write quite-specific legislative language quite often—even in acts with other provisions conferring broad discretion on agencies. For example, in 2008, Congress enacted the Troubled Asset Relief Program ("TARP"). TARP authorizes the Secretary of the Treasury to purchase "troubled assets from any financial

institution, on such terms and conditions as are determined by the Secretary, and in accordance" with policies including "restor[ing] liquidity and stability to the financial system of the United States," "protects home values, college funds, retirement accounts, and life savings;" "preserv[ing] homeownership and promotes jobs and economic growth;" "maximiz[ing] overall returns to the taxpayers of the United States;" and "provid[ing] public accountability for the exercise of such authority." In this language, Congress left extremely broad discretion to the Secretary of Treasury to decide which assets to buy or refrain from buying. Yet TARP was part of a package deal. Other parts of the package included amendments to the tax laws. For example, one provision excluded child toy arrows from a tax on arrows, by specifying that the tax

> shall not apply to any shaft consisting of all natural wood with no laminations or artificial means of enhancing the spine of such shaft (whether sold separately or incorporated as part of a finished or unfinished product) of a type used in the manufacture of any arrow which after its assembly--
>
> (i) measures 5/16 of an inch or less in diameter, and
>
> (ii) is not suitable for use with a bow described in [*the existing provision*].[29]

I do not mean to suggest that the REINS Act affects the administration of either TARP or this toy-arrow tax exemption. TARP authorizes case-by-case asset purchases, not the major rulemaking the REINS Act covers. My point is this: In the same enactment, the 100th Congress showed it knew how to write both determinate and indeterminate legislative language. It used *in*determinate language in the course of creating a new administrative power over troubled assets, and extremely precise language in the course of exercising a tax power over arrows. It is reasonable to suspect that this and future Congresses could pass regulatory laws as precise as tax laws—if they really wanted to. So if previous Congresses have used vague and indeterminate language to structure the mandates of federal administrative agencies, it is probable that they did so because some theory of government legitimized their doing so. Specifically, that theory of government must have deemed it a good thing for agencies to have broad and indeterminate mandates—so agencies may make controversial policy choices *substantially insulated from the electoral and institutional restrictions the non-delegation principle would impose on Congress if it were to make those same choices*.

Supporters of broad agency policy-making may make other arguments to fill in this gap. Historically, however, federal agencies now enjoy the power to promulgate legislative rules thanks to innovations by political scientists in the Progressive Era and legal scholars and public lawyers during the New Deal and the Great Society. Progressive political scientists propounded a theory of vigorous centralized administration consciously in opposition to the natural-rights constitutionalism they saw in Articles I through III of the Constitution. Charles Merriam was a political scientist at the University of Chicago. In a history of American political thought, he summarized the general intentions and accomplishments of leading Progressives by stating that "[t]he present tendency . . . is to disregard the once dominant ideas of natural rights and the social contract." Progressives, in Merriam's recounting, criticized natural-rights principles for thinking of "the function of the state in a purely individualistic way; this idea modern thinkers have abandoned, and . . . have taken the broader social view." A "social view" meant a statist view: The state deserved a freer hand than the Declaration suggested to intervene in and impose the preferences of the controlling political group on private affairs. As Merriam explained, when the Progressives established "that there are no 'natural rights' which bar the way" to state action, each policy question became "one of expediency rather than of principle. . . . [E]ach specific question must be decided on its own merits, and each action of the state justified, if at all, by the relative advantages of the proposed line of conduct."[30]

Because the Progressives prioritized state action over individual liberty, they found the Constitution's basic separation of powers unworkable. They decided the Constitution, at least as understood circa 1900, needed to be delegitimized. Frank Goodnow was a professor of administrative law at Columbia University and the first president of the American Political Science Association. In his diagnosis:

> [S]pecial care was taken [in the Constitution] to secure the recognition of the fact that the new government was one only of enumerated powers, and that powers not granted to such government were reserved to the states or to the people.
>
> For one reason or another the people of the United States came soon to regard with an almost superstitious reverence the document into which this general scheme of government was incorporated ....
>
> The question naturally arises before those who have no belief in a static political society or in permanent political principles of universal application[:] Is the kind of political system which we commonly believe our fathers established one which can with advantage be retained unchanged in the changed conditions

which are seen to exist?[31]

As an alternative to traditional constitutionalism, leading Progressives proposed "living Constitutionalism." Before he became President of Princeton University, Governor of New Jersey, and then President, Woodrow Wilson also authored pioneering scholarship on administration. He frequently insisted that "[l]iving political constitutions must be Darwinian in structure and in practice." Because constitutions are living things, statesmen do not need and should not try to follow their texts: "[A]round even a written constitution there grows up a body of practices which have no formal recognition or sanction in the written law, which even modify the written stipulations of the system in many subtle ways and become the instrument of opinion in effecting a slow transformation. If it were not so, the written document would become too stiff a garment for the living thing."[32]

Applying living constitutionalism, Progressives hoped to institute a new and (or so they thought) more fundamental distinction than that among the three branches—the distinction between politics and administration. While Goodnow described separation of powers as a "somewhat attractive political theory," he concluded that in practice it had proven to be "an unworkable and unapplicable rule of law." Goodnow appealed to a superior conception of government by observing that "[t]he state abstractly considered is usually likened to an organism." An organism has muscles, for action, and brain, for decision. Similarly, Goodnow reasoned, "the action of the state as a political entity consists either in operations necessary to the expression of its will or in operations necessary to the execution of its will." Expression was the realm of politics; execution was the realm of administration. Goodnow thus envisioned a class of administrators with training, to acquire "considerable technical knowledge," and tenure "reasonably permanent in character," to acquire the "wide and varied knowledge" they would need to regulate complicated affairs. These administrators would apply general legislative standards in a "quasi judicial manner," acting substantially like judges to apply standards to particular cases.[33] Similarly, tacitly comparing the United States to nineteenth-century Prussia, Wilson acknowledged "[i]t is better to be untrained and free than to be servile and systematic. Still there is no denying that it would be better yet to be both free in spirit and proficient in practice." As a result, Wilson concluded that "we have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making."[34]

On that basis, Goodnow and Wilson propounded a theory of government in which politics and administration were largely kept separate. Politicians were supposed to identify broad social trends and to pass broad declaratory laws identifying social problems; administrators would then implement specific policies to fix those declared programs. But politics and administration needed to be kept separate. "[A]dministration lies outside the proper sphere of *politics*," Wilson insisted. "Although politics sets the tasks for administration, it should not be suffered to manipulate its offices." When politicians meddled with administration, Goodnow warned, "the spontaneous expression of the real state will tends to become difficult and the execution of that will becomes inefficient."[35]

Because agencies were supposed to implement specific policies, they needed to partake of all three of the branches of government as specified in Articles I through III of the Constitution. If and to the extent the non-delegation principle reinforced tripartite and separated government, the Progressives concluded, too bad for the non-delegation principle. Elihu Root, a leading lawyer, U.S. Senator, and Cabinet Secretary to two Republican Presidents, found

> inevitable … the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority.

Before Progressive agencies like the Interstate Commerce Commission, the Federal Trade Commission, and state public utility agencies, Root pronounced, "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[36]

During the New Deal, leading law professors, members of the Roosevelt administration, and Congress all relied on the Progressives' theory of administration to develop a new wave of federal agencies. *The Administrative Process*, by James Landis of Harvard Law School, is now regarded as a representative restatement of the reasons why New Deal leaders supported centralized administrative governance. In contrast with the Progressives, Landis justified his theory of administration not with Hegelian historicist political theory or with Darwinian analogies to animals, but rather with utilitarian arguments. An increase in "social interests," he argued, is "simply a rationalization of the growing interdependence of individuals in our civilization and the consequent necessity of insisting upon the observation of rules of conduct. It

is the fact of interdependence that is the warp for such rationalization, and it is that fact rather than the weft of rationalization that accounts today for the administrative process." With the Progressives, however, he agreed that government required a statist orientation: "a view which conceives it to be a function of government to maintain a continuing concern with and control over the economic forces which affect the life of the community." With the Progressives, he also agreed that, "[i]n terms of political theory, the administrative process springs from the inadequacy of a simply tripartite form of government to deal with modern problems." He concluded that modern government required "expertness," which

> springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem. With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.

Landis acknowledged that New Deal agencies created tension with pre-1900 separation of powers law. Nevertheless, he concluded that "intelligent realism" required government to concentrate its powers as energetically as big businesses did, and that he was "not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization."[37]

Now, neither the Progressives nor New Dealers argued generally for legislative rulemakings, on the scales covered by the REINS Act. Most early agencies made policy by declaring the meanings of their organic statutes in the course of case-by-case adjudication; rulemaking was reserved for a few core topics, especially ratemaking. Congress started broadening the scope of rulemaking on a wide scale only in the 1960s, during the start of the Great Society. When Congress started enacting such powers, however, it did so using the same basic rationale that Landis laid out in 1938. Indeed, Landis illustrates. In 1960, in response to a request by President-elect Kennedy, Landis complained that agencies had proven themselves not as effective as he had expected they would be when he had written *The Administrative Process* in 1938: "A prime criticism of the regulatory agencies is their failure to develop broad policies in the areas subject to their jurisdiction." As a solution, he proposed that agencies switch from slow, incremental case-by-case adjudication to "other methods of policy planning"—especially rulemaking, for "policy also emanates from rule-making where forward-planning is possible." In

response to encouragement like Landis's, agencies already in existence responded by reading their enabling statutes aggressively to find grants of rulemaking power. As Congress created a new wave of agencies during the 1960s and 1970s, it vested them with explicit legislative-rulemaking powers.[38]

I should not be misunderstood to be suggesting that, in 2011, supporters of broad agency policy-making (or, in other words, likely opponents of the REINS Act) subscribe to every principle espoused by Merriam, Wilson, Goodnow, Landis, or other figures I have treated in this section. My points are more general. First, all of these seminal figures opposed the Declaration of Independence, the Constitution, and our constitutional order as it was administered circa 1900. If contemporary supporters believe broad agency policy-making consistent with the Declaration and the Constitution's basic tripartite structure, the burden lies on them to explain why Goodnow, Landis, and the others thought broad delegations *in*consistent with those organic documents and our pre-1900 order. Second, it is striking that all the figures just treated were extremely optimistic that, if given broad legislative authorization and substantial autonomy from Congress, administrators and administrative lawyers could divine how to regulate particular problems consistent with public opinion and sound policy without getting derailed by political opposition. Third, whether they justified their beliefs on historicist, utilitarian, or other normative foundations, all of these figures assumed statist views. As a result, fourth, even if contemporary supporters do not embrace every feature of the arguments just recounted in favor of broad delegations to agencies, it is reasonable to suspect the REINS Act's opponents want government to be more interventionist than earlier American statesmen expected and hoped.

And last, arguments like the ones just recounted explain the distributive agenda of supporters of broad agency policy-making. Again, the Founders' political program proposes to distribute back to individual citizens freedom the Declaration of Independence already declares they have, and that program gives pride of place to legislators who actually legislate. In contrast, because the Progressive/New Deal program assumes interventionist political priors, it seeks to distribute much of the freedom that would otherwise go to private individuals, worker associations, and firms to regulators. And that program gives political pride of place to those regulators—administrators and administrative lawyers. Members of Congress have a helpful role to play by writing broad enabling language into agency organic statutes—but the administrative theory of government expects them to leave the administrative process alone once

they have created it. As Wilson put it, "as superintending the greater forces of formative policy alike in politics and administration, public criticism is altogether safe and beneficent, altogether indispensable." Yet "[t]he problem is to make public opinion efficient without suffering it to be meddlesome. Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling of delicate machinery." Goodnow warned that "[p]olitical control over administrative functions is liable . . . to produce inefficient administration in that it makes administrative officers feel that what is demanded of them is not so much work that will improve their own department, as compliance with the behests of the political party."[39]

Previous Congresses relied on the Progressives' theory, or Landis's, or other theories justifying similarly-broad agency powers to write organic statutes. However, this Congress need not be bound by the political judgments of previous Congresses. This Congress may reasonably conclude that the foregoing theories are too hostile to the Declaration of Independence, the idea of limited government under a written constitution, government by representation hedged by popular consent, or individual liberty. If this Congress agrees, then it must conclude that legislative rulemaking is less necessary or proper than it seemed to previous Congresses. Congress may reasonably enact the REINS Act to prevent agencies from limiting the liberties of American citizens in the most economically-consequential rulemakings.

IV. The Founders' Theory of Natural Rights Anticipates Important Problems with Rulemaking

Finally, thanks to four decades and more of experience with rulemaking, this Congress knows things that earlier Congresses did not. Even more striking, *The Federalist Papers* anticipate and provide a helpful framework for interpreting most of those new data. If the country's collective experience has been that broad agency rulemaking powers have been problematic in some respects, this Congress may reasonably decide to strike a balance different from previous Congresses' between broad agency power on one hand and liberty and electoral accountability on the other. To be sure, it is not easy to gather and consider that collective experience. Difficult institutional choices can invite debates in which disputants present conflicting case examples with no easy way to settle which case examples are most compelling. Nevertheless, as long as controlling law leaves Congress with discretion to decide how to structure federal administrative government, Congress must use its political judgment to

determine which institutions are most in the country's interest--even in the absence of complete and harmonious information.

A. Agencies Do Not Have Expertise or Information to Justify Rulemaking Without Legislation

First, after four decades of experience, agency claims of expertise seem less persuasive than they did mid-twentieth century. Supporters of broad agency rulemaking insist that, by virtue of their expertise, agency administrators have better information for promulgating rules than Congress does to make laws. Alternatively, if members of Congress and administrators have the same information, supporters argue, administrators' expertise qualifies them better to interpret the information to divine the correct rule. These arguments assume that agency administrators have considerable knowledge about factors directly relevant to the practical concerns that arise in regulatory politics. According to *Federalist 37*, however, this claim seems unrealistic. According to *No. 37*, statesmen must "perceive the necessity of moderating … our expectations and hopes from the efforts of human sagacity." People must be most moderate in relation to the study of human affairs—"the institutions of man"—including especially politics and law. In those and other fields of human action, "obscurity arises as well from the object itself"—that is, the variability and ambiguity of human nature—"as from the organ by which it is contemplated"—that is, the fact that we understand very little about how the human mind comprehends and makes intelligible things in the external world.[40]

And in administrative practice, there are good reasons for suspecting that agency administrators propose major rules with far less science or other authoritative information than Progressive or New Deal theorists claimed. Here, the benzene rule discussed in Part II provides an extremely representative case study. When OSHA promulgated the 1 ppm benzene rule, it had available the following statistical evidence: In Turkey, twice as many shoe workers (13/100,000 instead of 6/100,000) contracted leukemia when exposed to benzene vapors between 150 and 650 ppm in badly ventilated conditions. In Italy, workers who made glue or ink contracted leukemia at abnormally high rates when exposed for long periods of time to solvents with benzene in concentrations between 200-500 ppm. Persistent exposures above 25 ppm were correlated with blood deficiencies and a fatal form of anemia. Other carcinogens had triggered leukemia in mice or rats exposed to the compounds at 1 ppm; it was suspected that benzene also triggered leukemia at the same levels, but previous mice and rat tests had neither confirmed nor refuted those suspicions.[41]

From one perspective, these studies provide an extremely thin factual record on which to justify a 1 ppm limitation on benzene in workplaces. From another perspective, however, legislators and regulators must make decisions all the time on the basis of information this incomplete. If the factual record is so thin, however, it hardly seems compelling to say that administrators are better qualified than legislators to make the trade-offs. First, if the available data can identify medical dangers to humans from benzene exposure between 25 and 500 ppm, but not at 1 ppm, how should regulators extrapolate from the data they have to gauge the medical risks of benzene at 1 ppm? Different chemicals pose different risks or benefits to people at different levels, and regulators must make extremely tentative and subjective forecasts to fill in the parts of a risk/exposure curve for which they do not have concrete data. Second, assuming a regulator extrapolates the risk/exposure curve, how feasible is it technologically for the industry to reduce benzene below different exposure levels? And third, assuming regulators can settle these two questions, how should the extrapolated health benefits from reducing benzene be traded off against the economic costs of doing so? The second and third considerations are not scientific; they are transparently political. Yet even the first consideration is political. Scientific method and experience may rule out *some* risk/exposure extrapolations, but they cannot settle on *only one* acceptable curve. If scientists have discretion to decide which of several plausible curves best extrapolates the risk of benzene exposure at 1 ppm, the scientists have yet another political choice.

Every major rulemaking forces similar tradeoffs, involving technology, economic consequences, and impact on health, safety, environment, or morals. Given the country's track record over the past four decades with rulemaking, Congress may reasonably conclude that it has been expecting too much from administrators by expecting them to use science or expertise to settle the tradeoffs. Since such tradeoffs are inescapably political, it is well within Congress's discretion to determine that it is no longer necessary and proper that federal agencies make such tradeoffs for economically consequential legislative rules.

B. Agency Rulemaking Encourages Special-Interest Politics More than Legislation Does

Another common argument in favor of broad legislative rulemaking is the "capture" argument: Congress is more likely to be captured by the special interests seeking to influence politics than administrative agencies are. Here, too, however, *The Federalist* anticipates a general theoretical problem. This capture argument is persuasive only if one is certain that an

agency enabling statute can create a firewall between special interests and the agencies charged with implementing administrative policy. *The Federalist* suggests that it is unrealistic, even naïve, to suggest that any institutional arrangement could ever insulate government from political pressure. "The latent causes of faction are … sown in the nature of man," especially because from the existence of different species of property "ensues a division of the society into different interests and parties."[42]

The Federalist considered how faction influences the process of making laws most memorably in *Federalist* No. 62. During the Revolutionary Era, state legislatures overhauled the laws of their states frequently, usually because the membership in those legislatures turned over frequently. When they overhauled basic property and commercial laws, Publius complained, these legislatures undermined "every rule of prudence," which required that laws be "fixed rule[s] of action; but how can that be a rule, which is little known and less fixed." Publius identified two major problems with changing rules. First, the changes threaten liberty by

> poison[ing] the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow….

Second, changing laws confer an

> unreasonable advantage … to the sagacious, the enterprising, and the monied few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said, with some truth, that laws are made for the few, not for the *many*.[43]

Here, we must extrapolate a little, because the specific problem Publius was criticizing differs in important institutional details from the problems created by agency legislative rulemaking. At a minimum, however, agency rulemaking looks dubious simply because it proceeds under the authority of broad and indeterminate legislative enabling language. Take OSHA again: In the benzene rulemaking, OSHA acted pursuant to statutory language (among other relevant authorizing phrases) to set a benzene standard that "most adequately assure[d], to

the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."[44] To put it mildly, this language is "little known and less fixed."

Separately, lawmaking has grown extremely complex in the modern era, in ways that threaten liberty. Special interests can exploit insiders' advantages over rank-and-file citizens more effectively in a political regime with both legislation and rulemaking than in a regime with legislation only. Bruce Yandle describes how special interests influence agency policy-making in terms of "a theory of regulation [he] call[s] 'bootleggers and Baptists.'" Idealistic legislators and regulators—the Baptists—institute a new regulatory program to tackle a public problem. The regulated industry and workers—the bootleggers—then co-opt the laudatory public aims of the regulatory program for anticompetitive ends:

> [W]hat do industry and labor want from the regulators? They want protection from competition, from technological change, and from losses that threaten profits and jobs. A carefully constructed regulation can accomplish all kinds of anticompetitive goals of this sort, while giving the citizenry the impression that the only goal is to serve the public interest.[45]

To take one of many examples: It was documented that, between 1994 and 2008, more than 3600 people died, 6500 people were injured, and more than $1.5 billion of property damage was caused by fires involving flammable furniture. Many of these fires were caused when cigarette smokers fell asleep with lighted cigarettes on beds or furniture, or when cigarette smokers carelessly left cigarettes on or close to furniture. This problem is difficult to solve by federal regulation of the makers of cigarettes or furniture, because it is difficult for national law to reach into homes and stop smokers from being careless. Assuming that federal regulatory law must respond to the problem, however, there are two possible solutions: Compel cigarette companies to make self-extinguishing cigarettes, or compel furniture manufacturers to make non-flammable beds and furniture.

Cigarette companies anticipated the possibility that the Consumer Products Safety Commission (CPSC) might lobby Congress for jurisdiction to require self-extinguishing cigarettes. (By statutory exemption, the CPSC lacked jurisdiction over cigarettes.) Peter Sparber, a vice president of the Tobacco Institute, gave out hundreds of thousands of dollars to local fire departments and courted their support for the National Association of Fire Marshals (NAFM). Later, Sparber left the Tobacco Institute and lobbied in his own name. He "volunteered" as the NAFM's lobbyist while he continued to lobby extensively for the Tobacco

Institute. Not coincidentally, the NAFM then petitioned the CPSC to institute legislative rulemaking to require furniture makers to make upholstered furniture flame-retardant enough not to burn if ignited by a smoldering cigarette. Later, the manufacturers of brominated fire retardant chemicals, whose chemicals furniture makers would need if CPSC approved NAFM's petition, lent their support to that petition. (Conveniently, the chemical makers were also represented by Sparber).

Furniture makers responded similarly: They appealed to health and environment concerns to frustrate CPSC's acting on NAFM's petition. Brominated fire retardants have been correlated with thyroid disease, impaired brain development, and impaired reproductive functions in animals. Furniture makers' lobbyists persuaded concerned members of Congress to attach a rider to an appropriations bill blocking further action on the CPSC rulemaking until the National Institute of Health could study the health and environmental effects of fire-retardant chemicals.[46] After these studies were completed, CPSC finally issued the notice of proposed rulemaking in 2008—fourteen years after the NAFM petitioned for a rule. As of fall 2010, CPSC still had not yet issued a final rule.[47]

Regardless of what one thinks of the merits of the CPSC's rulemaking, the regulatory process confirms vividly how accurate Yandle's Baptist-bootlegger metaphor is. The tobacco and flame-retardant chemical industries let the NAFM act as the Baptist fronting their bootlegger agendas, and the furniture industry used health and environmental advocates as Baptists in the same way. Separately, the politics of the cigarette/furniture dispute illustrate how byzantine contemporary regulatory politics are. At different points, the dispute involved regulatory and appropriating committees in Congress, the CPSC, the National Institutes of Health, and several other agencies. The "industrious and uninformed mass of the people" have no chance in a process this complicated—not unless they hire "sagacious" lobbyists just as "the monied few" do—the cigarette, chemical, and furniture companies.

CPSC Commissioner Ann Brown complained about the furniture rulemaking petition: "I never felt any of the companies I worked with in this had the interest of the consumers at heart…. It was a hundred fingers pointing in a hundred different directions."[48] Following Publius, however, one might say that Commissioner Brown made the wrong diagnosis from the right symptoms. In a free society, furniture makers, cigarette makers, and retardant-chemical makers have every right to advocate their interests to government officials. If they are going to

participate in the processes of setting health, safety, and environment standards, however, the better solution is to force them to persuade members of Congress to write the standards as legislation. That way, rank-and-file voters, workers, and firms have slightly better odds of participating in the standard-setting process—and someone to blame squarely if the process generates bad results. On the basis of examples like the cigarette/furniture dispute, Congress may reasonably conclude that special-interest processes are *especially* threatening in major rulemakings—in which case such rules are less necessary and proper than they seemed 40 years ago.

C. Agency Rulemaking Invites Congressional Pressure without Congressional Accountability

The Federalist anticipated another evident problem in the model for agency rulemaking: the relation between agencies and Congress. Supporters defend broad rulemaking power on the ground that agencies can set policy freer from political pressure than Congress can. According to *The Federalist*, however, this expectation is naive. As *Federalist* 48 warns, "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[49] It is therefore realistic to expect members of Congress to pressure agencies. For that reason, agency rulemaking worsens the quality of federal law and often increases the politicization of law. Members of Congress may use oversight powers, the power of the purse, and other tools to influence the output of agency rules—but then claim plausible deniability if constituents or regulated groups object to the final content of those rules.

This phenomenon certainly played a role in the cigarette/furniture dispute discussed in the last section. For better or worse, Congress delayed the CPSC's rulemaking by almost a decade using an appropriations rider to force further scientific study. The same phenomenon probably influenced the making of OSHA's benzene rule—here, almost certainly for the worse. In the late 1970s, roughly 1.4 million workers were exposed to benzene at levels higher than ordinary background levels: about 800,000 working at gas stations, and the rest in petroleum refineries, coking plants, chemical plants, rubber-making plants, benzene transporters, and laboratories. When OSHA settled on the 1 ppm benzene standard, it structured the standard not to apply to the storage, sale, or use of gasoline after discharge from bulk terminals—i.e., at gas stations.[50] If the benzene rule had taken effect, it would have excluded almost 800,000 workers—more than half of the workers whose safety justified having the rule in the first place. It is reasonable to suspect that gas stations were an influential political force in Congress, and

that OSHA excluded gas stations from the rule's coverage to make it less likely that Congress would interfere with OSHA's policy-setting for benzene everywhere else. However the intervention occurred, it made the benzene rule extremely arbitrary and politicized.

On the basis of this and other similar examples, this Congress may reasonably conclude that the risks of backdoor congressional influence are unreasonably high for major rules. On that basis, this Congress may conclude that it is less necessary and proper than current law allows that agencies be allowed to promulgate major rules.

D. Agency Rulemaking Encourages Agencies to Defy Electoral Mandates

The Federalist, however, did not and could not anticipate one further feature of agency rulemaking. *The Federalist* assumes that federal law-making and –administration will focus primarily on brokering disputes between *private* interests. Publius assumed that "[t]he regulation of … various and interfering interests" of "those who are creditors, and those who are debtors … [a] landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests," "forms the principal task of modern legislation."[51] Thanks to the Progressives, the New Deal, and the Great Society, however, the federal administrative bureaucracy now claims another seat at the table—asserting its *own* competing interest or interests. This fact creates a problem that was not as apparent when legislative rulemaking was legitimized in the 1960s and 1970s. Agencies may now become a reactionary force. If public opinion changes on an issue, administrative lawyers and policy-makers may resist, defy public opinion and Congress on the ground that they are (Woodrow Wilson's words) "meddlesome" or a "clumsy nuisance," and use rulemaking powers to forge ahead in pursuit of what agency staff *know* to be the *true* public interest.

This phenomenon is occurring more and more frequently. For example, the House of Representatives passed a cap-and-trade environmental bill in the 111th Congress, but the debate provoked opposition substantial enough that the Senate Majority Leader dropped the bill and let it die.[52] Politically, it is reasonable to construe that fact and the results of the November 2010 election as a signal that the public is strongly opposed for the time being to further environmental energy restrictions as too expensive and anti-growth. In December 2010, however, just six weeks after the November 2010 election, the Environmental Protection Agency announced it had set a plan for using its rulemaking authority under the Clean Air Act to set greenhouse gas standards for petroleum refineries and fossil-fuel power plants.[53] The Clean Air Act's

rulemaking powers give EPA the right and prerogative to promulgate rules implementing the Act—even if the American people and this Congress make a political judgment that EPA staff are overvaluing the benefits of eliminating greenhouse gases and undervaluing the economic costs.

On the basis of this behavior by the EPA and other similar behavior by other agencies, Congress may reasonably conclude that the federal government's current organization hardwires old policies too much and provides too little room for public opinion to take federal law in different directions. If so, Congress may find it no longer necessary and proper for the carrying into execution of their legitimate mandates that agencies continue to have the power to promulgate major rules.

Conclusion

In short, federal agencies have power to promulgate legislative rules only to the extent Congress supplies them with such power pursuant to an act of Congress conferring such power as necessary and proper for carrying into execution powers the U.S. Constitution enumerates for the U.S. government. By the same token, Congress may decide at a later date to scale back agencies' powers to promulgate legislative rules if it decides those powers are less necessary or proper than they seemed when originally granted.

The REINS Act already states purposes justifying why such a scale-back is necessary and proper, but in my testimony, I hope to have identified additional reasons why it is less necessary or proper than it has previously seemed why federal agencies should promulgate major rules. First, as Locke, the Declaration of Independence, and *The Federalist Papers* all warned, politics secure liberty more effectively if legislative rules are enacted by legislators. Bicameralism and presentment provide two important hedges against liberty-threatening laws, and regular elections provide a third. Yet contemporary administrative practice circumvents these hedges by letting administrative agencies promulgate what are for all practical purposes "laws." Second, as enamored as previous Congresses may have been by political theories that justify lawmaking by administration, this Congress may reasonably disagree and decide such theories are too hostile to individual liberty. Finally, because our country has now had at least four decades of experience with administrative rulemaking, this Congress may decide on the basis of that experience to limit legislative rulemaking only to economically-inconsequential rules. The *Federalist Papers* warned about the dangers of legislating with incomplete information, special-interest politics,

and congressional bullying of agencies … and in these respects the *Federalist* anticipated important problems legislative rulemaking has encountered in practice.

Thank you again for the opportunity to testify, and I am happy to answer any questions members of this Subcommittee may have.

ENDNOTES

[1] See U.S. Const. art. I, sec. 8, cls. 1 (taxing, and perhaps spending), 3 (regulation of interstate commerce), 11 (declaring war), 18 (spending).
[2] See Eric R. Claeys, "The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Theory," in *Modern America and the Legacy of the Founding*, Ronald J. Pestritto & Thomas G. West eds. (2007): 35-74; "Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts," *Constitutional Commentary*, 21, no. 2 (2004): 405-44.
[3] Whitman v. American Trucking Ass'n, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).
[4] See 5 U.S.C. § 551(4) & (5) (2010); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974).
[5] See National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).
[6] Statement of Sally Katzen before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary on "The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations," at 2, 8 (citing U.S. Const. art. II sec. 3).
[7] 462 U.S. 919, 952-53 (1982).
[8] See http://www.house.gov/house/Tying_it_all.shtml; http://www.senate.gov/reference/glossary_term/joint_resolution.htm.
[9] Katzen Statement, p. 8.
[10] *Chadha*, 462 U.S. at 952, 954-55 n.16.
[11] Katzen Testimony, p. 8.
[12] See 5 U.S.C. §§ 551-59, 701-06 (2010).
[13] 487 U.S. 654 (1988).
[14] U.S. Const. art. II, sec. 3.
[15] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).
[16] *Morrison*, 487 U.S. at 691.
[17] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).
[18] Katzen Statement, at 8.
[19] U.S. Declaration of Independence para. 2; see Alexander Hamilton et al., *The Federalist: The Gideon Edition*, ed. George W. Carey & James McCellan (2001), no. 40, at 205.
[20] *Federalist* No. 51, at 269.
[21] Industrial Union, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 614-16 (1980). The figures used in text are the figures the Supreme Court reported as standard in its opinion.
[22] *Federalist* No. 10, at 44. See George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Management and Science* 2 (1971): 3.
[23] See U.S. Const. art. I, secs. 1, 2, 3, 7, art. II, sec. 1, art. III, sec. 1; *Federalist* No. 51, at 269; *Federalist* No. 73, at 380-84.
[24] John Locke, *Two Treatises of Government*, ed. Peter Laslett (1960) (1689), v. II, § 136, at 358, § 141, at 362-63. See *Industrial Union Department*, 448 U.S. at 672-73 (Rehnquist, J., dissenting) (citing § 141 of the *Two Treatises*).
[25] See 29 C.F.R. § 1910.1028 (2010).
[26] See 5 U.S.C. §§ 553, 702, 706 (2010); *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984).

[27] Morton Rosenberg, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade" (May 8, 2008), p. 6, http://assets.opencrs.com/rpts/RL30116_20080508.pdf.
[28] 29 U.S.C. § 671 (2010).
[29] 12 U.S.C. § 5201, 5211; 26 U.S.C. § 4161 (2010).
[30] Charles Edward Merriam, *A History of American Political Theories* (1924), 306, 311, 322.
[31] Frank J. Goodnow, *Social Reform and the Constitution* (1911), 9-11.
[32] Woodrow Wilson, *Constitutional Government in the United States* (1911), 22, 57.
[33] Frank J. Goodnow, *Politics and Administration: A Study in Government*, intro. John A. Rohr (2003) (1900), 8-9, 21, 75-76. Page citations are to the 2003 edition.
[34] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (1887): 197, reprinted in *American Progressivism: A Reader*, ed. Ronald J. Pestritto & William J. Atto (2008), 191, 198, 199.
[35] Wilson, "The Study of Administration," 201; Goodnow, *Politics and Administration*, 18, 72.
[36] Elihu Root, *Addresses on Citizenship and Government* (1916), 535.
[37] James M. Landis, *The Administrative Process* (1938), 1, 6-8, 11-12, 23-24.
[38] Staff of Senate Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary, 86th Congress, Report on Regulatory Agencies to the President-Elect (Committee Print 1960) (written by James M. Landis), 22, 18; Thomas W. Merrill & Kathryn Tongue Watts, "Agency Rules with the Force of Law: The Original Convention," *Harvard Law Review* 116 (2002): 467.
[39] Wilson,"The Study of Administration," 205; Goodnow, *Politics and Administration* 82-83.
[40] *Federalist* No. 37, at 182.
[41] *Industrial Union, AFL-CIO*, 448 U.S. at 617, 618 n.9, 619 n.12, 657 n.64.
[42] *Federalist* No. 10, at 43.
[43] *Federalist* No. 62, at 323-24.
[44] 29 U.S.C. § 655(b)(5) (1980), cited in *Industrial Union*, 448 U.S. at 612.
[45] Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *Regulation* (May/June 1983), 12, 13.
[46] Annys Shin, "Fighting for Safety: Your Couch Is Caught in a Flammable Regulatory Battle Between the Chemical and the Furniture Industries," *Washington Post*, January 26, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012503170_pf.html.
[47] 73 Fed. Reg. 11702 (Mar. 4, 2008); http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3041-AB35.
[48] Shin, "Fighting for Safety."
[49] *The Federalist* No. 48, at 257.
[50] *Industrial Union, AFL-CIO*, 448 U.S. at 615-16 & n.6, 628.
[51] *Federalist* No. 10, at 44.
[52] Gail Russell Chaddock, "Harry Reid: Senate Will Abandon Cap-and-Trade Energy Reform," *Christian Science Monitor*, July 22, 2010, http://www.csmonitor.com/USA/Politics/2010/0722/Harry-Reid-Senate-will-abandon-cap-and-trade-energy-reform.
[53] EPA, "EPA to Set Modest Pace for Greenhouse Gas Standards," December 23, 2010, http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d2f038e9daed78de8525780200568bec!OpenDocument.