



WILL TODAY'S POLITICS UPEND SOUND REGULATION?

BY HOWARD SHELANSKI

Americans demand regulatory safeguards but also want limits on government intervention. We take for granted that our tap water is drinkable, that our air is breathable, that the products we buy will perform as advertised, and that our work and living places are safe. Hard experience shows that completely unregulated markets do not reliably or consistently deliver those things. But experience also teaches that regulation is not the answer to every problem and can have harmful consequences.

In these circumstances, those who argue either that American society does not need regulation of any kind or that government should impose a rule to address every problem have deservedly not gained much traction in actual policy making. Instead, regulation has resulted from a more pragmatic process through which government agencies use available knowledge, evidence, and models to develop workable solutions to real problems. Agencies carry out this work within a legal framework that requires them to stay within the scope of their statutory authority, to give the public notice of rulemakings, to afford the public an opportunity to comment on proposed rules, and to justify final rules with a written record subject to judicial review. Even before executive agencies can publish significant proposed and final regulations, those rules are subject to review by the White House Office of Information and Regulatory Affairs (OIRA). Because of such procedural constraints, rulemaking in practice involves incremental analysis of tradeoffs among different things society wants, not one-sided focus on only costs or only benefits; regulations result from detailed explanation and balancing of competing effects, not from overwrought, partisan conjectures. ▶▶

Howard Shelanski is professor of law at Georgetown University and a partner at Davis, Polk & Wardwell LLP. In addition to his work in academe and private practice, he has held a number of government positions since graduating from the University of California, Berkeley, with a J.D. (1992) and a Ph.D. in economics (1993). Shelanski's government work has included service as a law clerk to the Hon. Antonin Scalia, senior economist for the President's Council of Economic Advisers, chief economist of the Federal Communications Commission, director of the Bureau of Economics at the Federal Trade Commission, and, most recently (2013–2017), administrator of the White House's Office of Information and Regulatory Affairs, a position popularly called the "regulatory czar" and requiring Senate confirmation. In September 2016, he delivered Marquette University Law School's annual Robert F. Boden Lecture. This essay, which reflects only Mr. Shelanski's views, is based on his Boden Lecture.



In a nutshell, rulemaking and retail politics are different things, driven by different forces. Where nuance and detail are the essence of the former, they are barely an afterthought of the latter. Given the unlikelihood that political rhetoric will moderate any time soon, this difference is one that American society would do well to preserve.

While Republican and Democratic presidential administrations have certainly differed in their inclinations regarding regulation, neither has in the past questioned the value of a serious and rigorous process for adjusting regulation up or down to respond to market developments and social needs.

In fact, the distinction between politics and sound regulatory policy unfortunately has been diminishing, and not just at the level of rhetoric. This essay will begin by showing how the regulatory debate has become more politicized in recent years. It will then discuss how that politicization is itself compromising the regulatory process and fueling attacks on the role that science and economics play in sound policy decisions, with important consequences for regulatory quality and stability. The essay will conclude with a discussion of how regulatory reform could help restore and protect

sound rulemaking principles, even within a more politicized environment for regulation.

I. Regulatory Politics, Then and Now

Regulation does not always work out well. Virtually every regulatory program has both winners and losers: some parties bear the costs of complying with rules while others reap the benefits. When regulation works ideally, the losers are those who caused the problems that the rule curtails, the winners are those who suffered from those problems, and the benefits to the winners outweigh the costs to the losers. Sometimes, however, even the most well-meant rules have harmful, unintended consequences. In such cases, it is important to have a process that brings those problems to light and enables regulatory reform or repeal.

Similarly, markets do not always perform well. This is not to say that government intervention will necessarily help in such cases. When it comes to economic regulation, many economists would still agree with the late Cornell University economist Alfred Kahn that “society’s choices are always between or among imperfect systems, but that, wherever it seems likely to be effective, even very imperfect competition is preferable to regulation.” Such comparably effective market competition does not always exist, however, and even when it does, markets do not inexorably solve all problems related to health, safety, environmental protection, or other difficulties not directly related to prices or the typical targets of economic regulation. Accordingly, it is important to have a process that can recognize market failures and lead to sound regulatory responses to resulting problems.

That Was Then: Differences but Some Consensus

While Republican and Democratic presidential administrations have certainly differed in their inclinations regarding regulation, neither has in the past questioned the value of a serious and rigorous process for adjusting regulation up or down to respond to market developments and social needs. Thus, it was in the administration of President Jimmy Carter that the Civil Aeronautics Board (CAB), under the leadership of the same Alfred Kahn, determined that airline regulation was doing more to support high prices and prevent competition than to protect consumers. The CAB therefore not only deregulated airline routes and pricing but did so to the extent that the agency itself would go out of existence—the wholesale dismantling of a long-standing regulatory program set into motion under a Democratic administration. The famously deregulatory President Ronald Reagan, on the other hand, signed into law regulatory programs for, among other things, the disposal of nuclear waste after decades during which the industry had set its own standards and for banning firearms that could evade metal detectors or airport imaging technology. It was President Bill Clinton who signed the bipartisan and deregulatory Congressional Review Act into law. Specific deregulatory efforts, for example in financial services and the provision of welfare benefits, also occurred under Clinton, earning the president substantial criticism from many in his own party. Meanwhile, the political right criticized the Republican administration of President George W. Bush for its additions to the Code of Federal Regulations and the resulting net increase in regulatory costs.

The effort here is not to minimize the ideological differences among the Republican and Democratic administrations mentioned above. Rather, the important point is that those differences—often strongly articulated and backed up with significant policy initiatives—did not provoke from either side a sustained attack on the rulemaking process or the underlying principles of the Administrative Procedure Act (APA), enacted in 1946. It is true that President Reagan and a Republican Congress created the Office of Information and Regulatory Affairs as a means of imposing more-stringent review on significant regulations, but it is notable that every administration since, regardless of party, has reaffirmed and strengthened the executive orders under which OIRA reviews rules. If anything, the history of the creation and strengthening of OIRA emphasizes the core principles that rulemaking should be evidence-based and incorporate careful cost-benefit analysis, and it illustrates bipartisan consensus on those principles over time.

This Is Now: Growing Division and Shrinking Consensus

Rhetoric surrounding regulation entered a particularly heated cycle as the administration of President Barack Obama tried to address major challenges such as health care, greenhouse gas emissions, clean water, worker protections, and ozone standards. Such efforts prompted accusations from the right that the administration was creating health-care “death panels,” initiating a “war on coal,” and imposing a sweeping program of “job-killing” regulations. Commentators from the left, meanwhile, accused President Obama of taking too long and doing too little to regulate greenhouse gas emissions, of failing to regulate “corporate agriculture,” of insufficiently regulating big banks, and of quite literally killing people by taking too long, for example, to require rearview cameras in cars.

With such overheated rhetoric, both sides often distorted the facts and circumstances of the targeted regulations and gave especially short shrift to the analysis and evidentiary underpinnings of those rules. In attacking the controversial 2015 Environmental Protection Agency (EPA) rule that reduced the standards for atmospheric ozone, for example, the head of the American Lung Association stated that the rule “simply does not reflect what the science says is necessary to protect the public health”—not then mentioning that the EPA’s level was within the recommended range from the agency’s scientific advisory board and would prevent millions of asthma attacks per year or that the costs of

pushing the standard lower would be very high. Business interests, meanwhile, accused the EPA of putting “politics above job creation,” ignoring that the EPA was focused on not politics but respiratory health, with predicted annual health benefits of the rule quantified at roughly \$3 billion to \$6 billion, compared to quantified costs that would reach \$1.4 billion upon full implementation of the rule.

It comes as no surprise that business interests criticize regulatory costs as too high and that advocacy organizations characterize regulatory benefits as too low. Such debate and advocacy from each side are an expected political reality. They are also healthy, so long as the institutions moderating the debate through the rulemaking process retain independence to take in information from both sides and to rigorously analyze the available evidence in determining a final rule, and so long as the institutions that decide challenges to rules are beholden to do essentially the same.

Regulatory benefits often accrue far in the future and are spread broadly across millions of individuals; advocacy groups can usefully represent those diffuse interests in arguing for regulatory benefits. Regulatory costs are generally more concentrated and shorter-term, but business and other interests help ensure that society knows what it is paying for those benefits. Both criticism and advocacy become inputs into the regulatory process through public notice and comment, playing an important role in development of the administrative record and in accountability through judicial review. Whether the criticisms of regulations are fair or accurate might well affect public perceptions and the level of controversy surrounding a particular rule, but they do not fundamentally undermine regulatory institutions or the rulemaking process.

So attacks on specific regulations are a periodic and expected part of our country’s political cycles. Regulation has never been free of politics, and politicians have never ignored regulation as a target when it suits them.

What is different today is not only the scope of regulatory politicization but also the scale of broadside attacks on the key methods and premises of the modern regulatory process. In that regard, at issue are not just the scientific data used for a particular regulation, but the legitimacy of science and empirical evidence itself. Not just challenges to specific administrative records animate regulatory debates; so, too, do deliberate efforts to radically change policy without development or acknowledgment of critical facts. ▶▶

The result is a more direct line from political rhetoric to regulatory policy, without the key, buffering steps of building a factual record and analyzing likely costs and benefits. These changes represent breakdown of a decades-long consensus in which Republicans and Democrats largely respected the rulemaking process, despite regular and often vigorous disagreements about specific rules and about regulation in general. Congress's use of the Congressional Review Act (CRA)—a 1996 statute that allows expedited legislative repeal of a rule within a limited time of its publication—vividly illustrates this breakdown. Before 2017, Congress invoked the CRA only six times in 21 years, and five of those (all vetoed) were in 2015 and 2016. After January 2017, Congress successfully invoked the CRA 14 times in just five months. The broadsides against regulation have gone beyond an increase in rhetoric, to actions that undermine important processes and principles of good policy making, whether that policy is regulatory or deregulatory.

II. Politics Become Policy

Several recent developments surrounding regulation threaten critical aspects of the American regulatory process and will diminish the quality of our regulatory system. Let us consider three recent lines of attack against regulation and their implications: (1) attacks on how agencies have implemented the statutorily prescribed process of rulemaking; (2) offensives on what constitutes acceptable evidence in rulemaking; and (3) efforts to undermine or shortcut the regulatory process.

Attacks on Agency Implementation of Rulemaking Requirements

Agencies do not always do things right when they issue regulations. Sometimes their actions fall outside the legal framework established by the Administrative Procedure Act (APA) and do not give the public enough opportunity to comment or do not compile a credible or sufficient administrative record to justify a rule. Sometimes the agencies go beyond the scope of their statutory authority from Congress, and sometimes they try to bypass the APA's process altogether by cloaking regulatory obligations in the language of "guidance documents" or "policy letters."

When agencies do commit such fouls, courts have not hesitated to exercise their review authority by staying, remanding, or vacating the offending actions. The Obama administration issued thousands of regulations, as did the Bush administration. Similarly, just as the Bush administration did, the Obama administration

faced lawsuits over a very small proportion of those rules. The Supreme Court stayed the Obama EPA's regulation of carbon-dioxide emissions pending a decision on the merits of a challenge to that rule in the U.S. Court of Appeals for the D.C. Circuit. Federal courts also enjoined regulations involving clean water, overtime pay, and fracking, while rejecting challenges to rules on energy efficiency, retirement investment advice, and network neutrality. Given that the overwhelming majority of regulations never receive any kind of challenge, the evidence suggests that agencies generally adhere to substantive and procedural requirements but that judicial review is alive and well for those specific cases in which they do not.

Recent rhetoric, however, would suggest an inverse world in which agencies have run amok and ignored basic requirements to the point of lawlessness. The director of the Office of Management and Budget (OMB), the office of which OIRA is a part, is in a particularly good position to know what kind of analysis agencies do when they engage in regulation, how OIRA reviews that analysis, and what the data show on regulatory costs and benefits. It was

therefore surprising to hear the current OMB director, Mick Mulvaney, state in an interview that the Obama administration "simply imposed regulations without proper regard to the cost side of that analysis," and that "we actually plan to look at the costs of regulations . . . [W]e think the previous administration didn't do that." The public record shows that Mulvaney's statements were simply wrong. A *Washington Post* analysis found that "contrary to Mulvaney's claim, federal agencies were much more likely to only estimate costs (54 rules) than to only estimate benefits (16 rules). In the 16 rules where only benefits were estimated, 15 of them were Interior Department migratory bird hunting rules (e.g. setting duck seasons)." The article concluded that "Mulvaney's sweeping claim is not supported. Instead of ignoring costs, the Obama administration clearly considered the cost side of the equation in a majority of rules." ▶▶

The broadsides against regulation have gone beyond an increase in rhetoric, to actions that undermine important processes and principles of good policy making, whether that policy is regulatory or deregulatory.



The especially disheartening aspect of this episode is that the misleading attack came not from an interest group, but from a top executive branch official whose office is responsible for regulatory review. If those with such responsibility elevate political spin over the facts, they undermine the ability and incentive of agencies to mediate among competing interests in the rulemaking based on analysis and evidence. That the OMB director's statements were incorrect does not mean that agencies are beyond improvement. But such improvement comes from identifying real shortcomings and working toward real solutions, not from introducing a false narrative about things that the agencies are working to do well. Such rhetoric does nothing to identify real problems and only serves to cast unwarranted doubt on the general integrity of regulatory agencies and the regulatory process.

Ironically, the Trump administration itself has been turned back by the courts for taking shortcuts in making its own regulatory changes. As a matter of law, once an agency has published a rule, the agency cannot reverse course and change or repeal the rule at will. The APA requirements for changing, replacing, or repealing a rule are the same as the requirements for issuing a new rule. The administration has tried to maneuver around those requirements in the wake of President Trump's public claims that he will get rid of 75 percent of regulations and his executive order requiring agencies to identify two rules for repeal for every new rule they issue. But the U.S. Court of Appeals for the D.C. Circuit

recently blocked the administration's efforts to dodge the APA by delaying the effective date of certain methane-emissions rules. The court rejected the EPA's pretextual argument that the agency under Obama had not allowed enough opportunity for public comment to satisfy the APA, finding that "[e]ven a brief scan of the record demonstrates the inaccuracy of EPA's statements." The court then barred the agency from further delaying implementation of the rule, saying that the EPA's proposed two-year stay was "tantamount to amending or revoking a rule."

The court's ruling in the methane-emissions case is heartening in that it appears that, at least for now, the federal courts are safeguarding proper regulatory process. Process is not, however, the only dimension on which political expedience and rhetoric are affecting rulemaking. Several recent actions have been aimed much more directly at the substantive criteria and evidentiary basis for regulation.

Offensives Against Science and Economics

One of the most important requirements of the APA is that agencies have a solid factual and analytical basis for their rules. A typical element of the public comment process is criticism of an agency's record and submission of alternative or additional evidence from sources outside the agency. Agencies must have enough evidence to make a reasonable decision and may not arbitrarily disregard contrary facts or studies, regardless

of the source. There is no legal requirement—nor good policy reason—for evidence in support of a regulatory action to be perfect or unambiguous. But agencies must make reasonable judgments given the facts, studies, and analysis available, which sometimes are inadequate to justify any action at all. Thus, the Federal Communications Commission (FCC) in 1999 refused to enact what has come to be called “network-neutrality” regulation because the broadband market was too nascent and evidence of harmful conduct too speculative. By 2015, in contrast, the FCC decided that it had enough evidence to impose network-neutrality regulation, which it successfully defended in court.

The factual basis for many regulatory decisions, particularly environmental, health, and worker-safety rules, involves scientific evidence and economic data. Science rarely brings absolute certainty; it can, however, produce an accumulation of peer-reviewed, replicable studies through which a consensus emerges regarding the evidence for causal relationships and explanations for observed phenomena. This does not mean that there are no contrary results in the literature or that there are no doubters among scientists; what matters is whether there are enough scientific data, and enough consensus about what the data show, to justify an agency’s reliance on the science relevant to a regulatory decision. Scientific evidence provides a basis on which courts can separate regulatory decisions based on good policy from those based on political preference. Thus, in 2008, believing the EPA to have improperly ignored such evidence, private groups and eleven states sued the Bush administration EPA for setting the ambient ozone standard at 75 parts per billion (ppb) and rejecting scientific evidence for a lower maximum level. And in 2015, Murray Coal Company and five states sued the Obama EPA, alleging, among other things, that the EPA improperly relied on the same science to tighten the standard to 70 ppb.

Scientific data are important when estimating regulatory benefits because they can show whether a regulation is likely to achieve health, safety, or other kinds of welfare gains. But science is also important on the cost side of the regulatory ledger, especially in determining what level of compliance is technologically or scientifically feasible. It is one thing to say, for example, that companies must reduce the level of toxicity in some commercially valuable substance; it is another question altogether whether the science and technology exist to reasonably achieve that goal.

Science can therefore help determine the set of feasible regulatory alternatives. Economic data play a similar role, in assessing both the social costs of regulatory compliance and the productivity benefits of, for example, having fewer injured workers over time.

There has long been criticism of cost-benefit analysis in health and safety regulation. Advocacy groups have, to varying degrees, opposed weighing quantified, economic costs against benefits for health and safety. Cost data are, however, an essential part of understanding whether society should want a given rule, even one that is guaranteed to save lives. Despite occasional statements from advocates that we should not trade lives for lower social costs, we do it every day. A speed limit of 15 miles per hour would save thousands of lives and prevent countless injuries every year, yet society would not tolerate the costs of such a rule, and no one has seriously proposed such a policy. Understanding regulatory costs is critical. Even if it is not required (and it should not be) that a rule’s quantifiable benefits always be higher than its quantifiable costs, it is a healthy thing for society to know what it is paying for its policies and protections. Economics has therefore played an important role on both sides of cost-benefit analysis.

Recently, however, economic analysis and data have come under heavy attack. What makes the most recent attacks notable is that they come not from pro-regulatory advocates but from partisans of deregulation, and not from organizations outside government but from the government—notably the executive branch—itsself. On several occasions, President Trump and members of his cabinet have, without any explanation, criticized and rejected the economic analysis and data produced by the government itself. As a candidate, for example, Trump simply declared without basis that unemployment data from the Bureau of Labor Statistics were “totally fiction.” What one might have dismissed as over-the-top ▶▶

What makes the most recent attacks notable is that they come not from pro-regulatory advocates but from partisans of deregulation, and not from organizations outside government but from the government—notably the executive branch—itsself.

campaign rhetoric did not yield to more accurate treatment of economic evidence after Trump took office.

Consider what happened after the nonpartisan Congressional Budget Office (CBO), whose current director was appointed by the Republican-controlled Congress, first released an economic analysis showing that a Republican bill to repeal and replace the Affordable Care Act would swell the ranks of the uninsured. Health and Human Services Secretary Tom Price, with no evidence and no specifics, simply claimed that “the CBO is wrong.” OMB Director Mick Mulvaney called the CBO’s estimate “just absurd,” and the White House issued a statement saying “[t]he CBO has consistently proven it cannot accurately predict how health-care legislation will impact insurance coverage” and released a video to try to back up that claim. A *Washington Post* analysis found the video to be incorrect and misleading, and independent

reviews have shown that the CBO analysis was largely on target. Indeed, several Republican governors rejected the administration’s later attempt to use its own analysis to persuade them to support the Senate’s Affordable Care Act repeal-and-replace bill.

While denigrating or denying economic evidence that it does not like, the current administration has taken even stronger aim at the

use of science to inform regulation and public policy. As it did with the CBO, the Bureau of Labor Statistics, and other government entities, the administration has also worked to undermine the institutions that analyze and engage in scientific research. It is worth noting that a much broader phenomenon of popular rejection of science appears to be afoot, as debates over climate change, vaccines, evolution, and the teaching of science in schools suggest. While that broader phenomenon is beyond the scope of this essay, it does provide relevant context for recent events related to regulation. The politicizing of science is nothing new in public policy, tobacco being among the most historically notorious cases. The impediments to bringing science into policy

making, however, have usually come from legislative maneuvering on specific issues. It is harder to find an example of Congress’s or a regulatory agency’s calling into question not just a specific body of evidence but the value of science itself; this is the worrisome development that has recently come out of the EPA and that appears to be spreading across the federal government.

The most obvious example is the Trump administration’s treatment of the science related to climate change through greenhouse gas emissions. EPA Administrator Scott Pruitt ordered the EPA to take down its long-standing climate-science website, which contained a detailed compendium of data and scientific studies. Members of Congress have introduced bills to bar the federal government from taking the costs of greenhouse gas emissions—and therefore the full benefits of preventing such emissions—into account in rulemaking. Even if such bills never become law, President Trump, flanked by his leaders of the EPA, the Department of the Interior, and the Department of Energy, signed an executive order rescinding guidance that agencies take the social costs of carbon emissions into account when making regulatory decisions about air pollution. In the wake of that photo-op, a Department of Energy official issued an order barring staff from using the terms “climate change” or “emissions reduction,” the Department of the Interior reassigned scientists to unrelated jobs, and the EPA removed its climate-science information from public view.

There is good evidence that such actions had no other purpose than to set the stage for repealing regulations without having to acknowledge the evidence that such repeal would have real costs for Americans’ health and welfare. When EPA Administrator Pruitt appeared on the usually sympathetic Fox News to tout his planned repeal of the Obama Administration’s Clean Power Plan regulations, interviewer Chris Wallace pointed out to him that those rules were predicted, upon full implementation, to eliminate 90,000 asthma attacks, 300,000 missed school days and workdays, and 3,600 premature deaths each year. Wallace then asked Pruitt, “Without the Clean Power Plan, how are you going to prevent [such] things?”

Pruitt’s response was to resort to campaign rhetoric: “[T]he president is keeping his promise to deal with that [regulatory] overreach, Chris.”

Wallace immediately pointed out Pruitt’s dodge: “But, sir, you’re giving me a . . . political answer. You’re not giving me a health answer.”

While denigrating or denying economic evidence that it does not like, the current administration has taken even stronger aim at the use of science to inform regulation and public policy.



Howard Shelanski, delivering the Robert F. Boden Lecture in Eckstein Hall.

The key issue, beyond the consequences for emissions regulations, is the precedent that this treatment of climate science and health data sets for future uses of science in rulemaking. Climate science has two important characteristics for current purposes: (1) there has been an enormous amount of peer-reviewed research across a variety of scientific fields over many years; and (2) that research has led to a consensus in which 97 percent of scientists doing climate-related research believe that human activity is an important cause of climate change. This does not mean that every emissions regulation is a good thing. But if the EPA administrator can choose at will to reject the validity of such a large amount of research that has garnered such strong scientific consensus, then it is hard to see what would stop any agency official from declaring any collection of scientific evidence to be of inadequate quality when that science would lead to conclusions opposite to the agency head's preferences. The consequences could be costly overregulation or harmful deregulation, depending on political whim.

Indeed, the individual newly nominated to be the chief science official at the Department of Agriculture has no scientific background (he was most recently a talk radio host) and simply declared it to be his opinion that the data and research related to climate change are "junk science." When people who have been in the opinion business are appointed to oversee science of

which they have little understanding, and which they deny without any credible basis, public policy is in deep trouble. When political officials remove career scientists from agency science offices and reassign them to unrelated tasks such as accounting, those officials move beyond denigration of science to the dismantling of agencies' capacity to use or evaluate science when making decisions that can profoundly affect the lives of all Americans.

If marginal uncertainty is enough to make science insufficient to support an agency's decision, then regulation or deregulation based on carefully researched causes and effects becomes practically impossible, leaving an unhealthy vacuum. To be sure, the EPA administrator presented his rejection of climate science as a temporary freeze while the agency initiates a process for debate. But how such a debate can substitute for, or advance beyond, decades of a diffuse and widespread process of research, peer review, replication, and yet more research is unclear. At best, such an agency process will delay important regulatory activity; at worst, it will politicize science through staged debates that fail to represent the actual state of science or scientific consensus.

There is a real risk that the EPA's actions are setting the stage for a much broader undermining of scientific evidence in rulemaking. A draft bill in the Senate titled the Regulatory Accountability Act has, at the time of

this writing, a provision that would require federal agencies to grant petitions for hearings on proposed rules any time “the petition shows that the proposed rule is based on conclusions with respect to 1 or more specific scientific, technical, economic, or other complex factual issues that are genuinely disputed.” This provision may sound innocuous, until one considers the vagueness of the “genuinely disputed” standard. A

strong scientific consensus backed up by the bulk of research and data will often still have dissenters who sincerely disagree. If those dissenters petition the agency, must the hearing be granted, and, if so, to what end? At best, the hearing will delay rulemaking and impose administrative costs while the process confirms that the petitioners are

dissenters from a broader, well-supported consensus. At worst, the agency will discard the weight of the science, in favor of the petitioners, because of a misguided quest for certainty or, worse, because the petition provides cover, under the cloak of a contrived “genuine dispute,” for agencies to elevate politics or the personal views of agency officials over facts and scientific evidence. This is a real risk at a time when federal government leaders have shown a propensity to attack science and economics that are inconvenient for their political agenda. Given that the APA already requires public comment on proposed rules and grants judicial review to petitioners who challenge the record supporting final rules, it is hard to see how the scientific hearing provision of the bill would have benefits outweighing the mischief likely to result.

Delayed Rules, Bad Rules, and Regulatory Uncertainty

Evasion of established regulatory process and the denigration of science and economics will have several harmful consequences for public policy. Bad process will lead to court remands, as we saw in the EPA methane case discussed above. Such remands are good in that they maintain the integrity of the American regulatory process; but the underlying process foul takes time to be corrected and therefore delays certainty in the regulatory

environment, to the detriment of all stakeholders. Moreover, not all such procedural violations will be caught or corrected, potentially leaving in place policies worse than those they replaced.

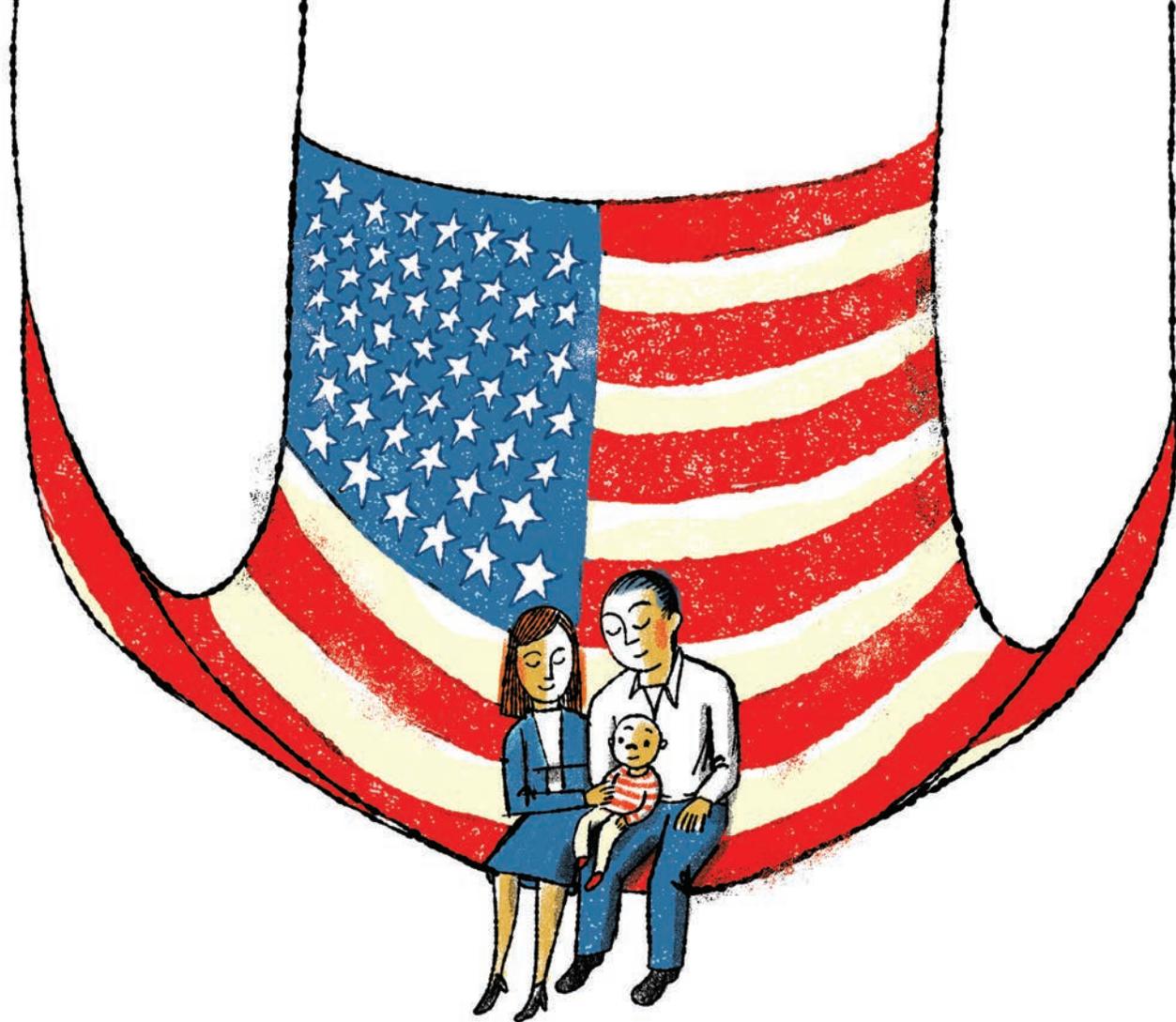
The procedural concerns become even more important when politics are undermining substantive analysis. Arbitrary limits on the science or data allowed in rulemaking and reduction in agencies’ expertise to analyze science and economics will greatly reduce the quality of federal regulation. The happenstance of who is in charge could lead to rules that are overly burdensome in costs or underachieving in benefits, either one being harmful for American society. Such bad regulatory decisions also introduce uncertainty for stakeholders because it is unclear how courts will review regulatory actions or how long the contested rules will last even if they withstand judicial review. The attacks on science, economics, and the institutional capacity to evaluate and produce such evidence therefore lead not only to bad rules but also to an unstable regulatory environment in which business planning, investment, and economic growth are more difficult.

III. Maintaining the Difference Between Policy and Politics

The fact that the U.S. regulatory system has been subject to misleading attacks does not mean that federal rulemaking is beyond criticism and improvement. Agencies have mostly done a good job with regulation, the evidence of which is contained in the publicly available records and analyses that agencies have compiled to justify their regulations. Agencies have nonetheless sometimes overreached, even in rules that have withstood judicial review. In those cases, public engagement could have been better, cost-benefit analysis could have been more rigorous, or compliance timelines could have been more realistic. In even more cases, the agencies could have done a better job of communicating with the public about a rule’s objectives and requirements. Because much of the analytic framework for rulemaking is today spelled out in executive orders and related guidance documents—all of which apply only to executive branch agencies and not to independent agencies—there is still some variation in practice across agencies that would be less likely if certain requirements were more firmly established by statute.

Salvation for sound rulemaking could therefore lie in regulatory-reform legislation strengthening

The fact that the U.S. regulatory system has been subject to misleading attacks does not mean that federal rulemaking is beyond criticism and improvement.



requirements that agencies engage in rigorous cost-benefit analysis, rely on solid data and scientific evidence, and follow a transparent, public rulemaking process. Some might find it counterintuitive to suggest that increasing such requirements could help the rulemaking process, given that they raise the hurdle for agencies working to issue rules in the first place. While heightened requirements along the lines above will in some cases make it harder for agencies to pursue regulatory proposals, they will also serve as a bulwark against the substitution of slogans for policy analysis, of opinion for facts, and of political expediency for proper process—all things that have recently been taking place. The most important criterion for regulatory reforms should not be whether they make rulemaking harder or easier for agencies. The criterion should instead be whether the reforms strengthen the separation between sound policy making and political expedience. In other words, regulatory reform should be judged according to whether it will reinforce the importance of scientific, economic, and other relevant evidence in rulemaking; reinforce and more clearly define the analysis of costs

and benefits in regulation; increase transparency and accountability; and reduce the avenues through which campaign politics, unsupported opinion, and junk data can infect the process.

To be sure, regulatory-reform legislation can go too far and gum up the works without improving regulatory quality or the rulemaking process. The risks of importing junk science into rulemaking under the banner of raising a “genuine dispute” over settled science have already been discussed. Legislative provisions that allow legal challenges to rules before they are final, or that impose too rigid or too vague a cost-benefit standard, or that introduce new layers of hearing and comment requirements could do more harm than good. But so long as regulatory reform takes the direction of reaffirming analytical rigor and the centrality of credible data, good science, and rigorous economics in rulemaking, rather than making the process more porous in those domains, the benefits for sound policy making and economic prosperity could justify stronger statutory governance of federal regulation to protect the health, security, and welfare of all Americans. ■