

DEREGULATION

USING DELEGATION TO PROMOTE DEREGULATION

Instead of trying to restrain agencies' rulemaking power, why not create an agency with the authority and incentive to deregulate?

◆ BY MICHAEL B. RAPPAPORT

For those who favor strong limits on regulation, the last 100 years in the United States have been disappointing. During this period, regulation grew almost continually. One of the reasons for that growth is the delegation of legislative power to administrative agencies, which allows those agencies to write regulations with little oversight from elected lawmakers. To rein in regulation, advocates of limited regulation argue that Congress's delegation of its legislative authority must be restrained.

Unfortunately, reforms that attempt to eliminate or limit delegation are unlikely to be enacted. The practice of delegation has become a basic aspect of our political system. Its prevalence in the modern world is no accident. It occurs because delegation is popular with so many of the prevailing powers, including Congress, the president, the agencies, and those who favor regulation.

But proponents of limited regulation need not despair. While delegation certainly promotes regulation, it can also be used to promote deregulation. Congress could create an administrative agency that is given the power to pass deregulations—rules that either eliminate regulations or move to a system of property and markets. By employing delegation in an effort to reduce regulation, proponents of limited regulation will not be fighting against one of the fundamental forces of our modern political system, but instead be employing that force for a beneficial purpose.

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THE MOTOR OF REGULATION

The history of the American political system shows that regulation and the delegation of legislative power to regulate have gone hand in hand. In the 19th century, both regulation and delegation were fairly limited. The two then began to grow during the Progressive era, exploded during the New Deal, and have been expanding ever since.

Today, government regulation typically occurs when an administrative agency promulgates regulations pursuant to a delegation of legislative power. By contrast, the old method of Congress passing regulations in legislation, with the administrative agency simply enforcing them, is relatively rare.

There are various reasons why delegation has become the motor of regulation. First, agencies have a much greater capacity to produce regulations than does Congress. Congress can only work on a limited number of bills at a time and spends significant periods in recess. Moreover, the need for the various veto players to reach agreement—the House, the Senate (with its filibuster rule), the president, and the relevant committees—means that it takes substantial time to work out compromises.

By contrast, there are numerous agencies divided by subject matter, which allows the agencies collectively to work on an enormous number of regulations at the same time. Moreover, agencies are open for business all year long, and do not have to spend significant time working out compromises among various veto players. Executive branch agencies are generally headed by a single official, while independent agencies, though headed by bipartisan commissions, can reach decisions by simple majority vote and therefore are not burdened by veto gates.



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Another reason why delegation promotes regulation is that agencies have much stronger incentives to pass regulations than does Congress. While many members of Congress do favor strong regulation, they are subject to the political check of voter reactions. Many members are reluctant to vote for controversial regulations that might be used against them at election time.

By contrast, agencies have strong incentives to regulate. To begin with, the agencies are normally filled with personnel who vigorously support the mission of the agency. The U.S. Environmental Protection Agency, for instance, consists mainly of environmentalists, not people who believe that environmental regulation has gone too far. The Equal Employment Opportunity Commission is composed of personnel who strongly favor a civil rights agenda, not people who believe civil rights laws have become excessive.

Additional regulation also serves the narrow self interest of the agency. The more regulations an agency enacts, the more important the agency appears and the more resources it needs to enforce

When an agency enacts a politically unpopular regulation, members of Congress can always argue that they did not expect or intend for the agency to enact it.

The main limitation on delegation as a means of promoting regulation is that agency action is often subject to judicial review. But while that is an important limitation, it operates mainly to delay regulatory change, not avert it. Many challenges to regulations merely require the agency to change its procedures. And agencies enjoy significant deference from the courts as to facts, law, and policy.

EXISTING REFORM PROPOSALS

Given the strong connection between delegation and regulation, it is no surprise that the reforms proposed to limit regulation have generally attempted to do so by constraining delegation. If such reforms could limit delegation, they would probably succeed in restraining a significant amount of regulation. Unfortunately, they are unlikely to become a reality.

One possible reform is to reinvigorate the Nondelegation Doctrine, the constitutional law principle that places limits on the degree of policymaking authority that Congress may confer on agencies. While there are challenges to applying the Nondelegation Doctrine, such as determining in a principled way how much delegation is excessive, the chief problem with trying to revive this doctrine is that the U.S. Supreme Court seems to have little desire to do so. The problem is not simply that

the progressive or liberal justices show no inclination to restore it (though they don't), but that some of the more conservative justices—even Antonin Scalia—appear to be hostile to the enterprise.

Part of the reason for this hesitation may be due to the fact that restoring the doctrine would require the Court to hold unconstitutional a large number of modern statutes: the core of the modern administrative state. Such actions would not only be extremely disruptive to the status quo, but would leave the Court vulnerable to attacks by defenders of the existing system.

Given those obstacles to restoring the Nondelegation Doctrine, opponents of regulation have focused upon a legislative reform: passage of the Regulations from the Executive in Need of Scrutiny (REINS) Act. The bill would require Congress to approve or reject every new major rule proposed by the executive branch. To ensure that Congress can act expeditiously as to this large number of rules, the legislation would forbid either house from amending the proposed rule. Instead, the house would be required to take an up-or-down vote on the rule within a specified time period.

While the REINS Act would probably constrain regulation, it seems unlikely to be enacted into law. From an institutional perspective, Congress, the president, and the agencies would

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those regulations. Thus, additional regulation serves to enlarge the agency, which should lead to more resources and employees. The expanded resources and positions serve the interests of the existing personnel of the agency.

A third reason for delegation driving regulation is that agencies have significant policy and political expertise. Their policy expertise allows them to write a large number of regulations and for those regulations to appear to be desirable. Such expertise is one of the most common justifications offered for delegation. But whether or not one believes that agency expertise is adequate to enact desirable regulations, such expertise allows the regulations to at least appear desirable, even if they are not actually desirable.

Agency expertise also extends to the politics of regulation. Agencies are knowledgeable about the political players in their area so that they can avoid passing regulations that would cause enough backlash to threaten the agency or its regulations.

A final reason why delegation promotes regulation is that this process is popular with Congress.

While delegation might seem to reduce congressional power, it more than compensates by allowing members of Congress to avoid having to take responsibility for controversial decisions.

strongly oppose the proposed law. Under the REINS Act, members of Congress would have to take a position on the record for or against regulations. There would be no way for them to avoid or delay having to vote. Moreover, they would be forced to vote on the specific proposal that the agency chose and therefore not be able to blunt political criticism by voting for a different proposal that would better reflect their views. The president, as well, would be unlikely to support the bill because it would interfere with the ability of the agencies he supervises to freely enact regulations that oftentimes embody his preferred policies. And the agencies themselves, which are important political players, would also fiercely oppose this reform.

It is true that, ideologically, a Republican president and Republican members of Congress might want to approve the bill as a means of restraining regulation. But to pass the legislation, enough members (plus the president) would have to not only prefer it ideologically, but also have their ideological preferences for the statute outweigh their institutional preferences against it. Moreover, even if Congress, during a brief period of ideological salience after an election, were inclined to reduce the extent of delegation, it seems likely that Congress would either water down the REINS Act or would work to eliminate it at the first opportunity, much in the same way that the Line Item Veto Act was allowed to die after a court decision.

A DEREGULATORY AGENCY

Instead of pursuing the politically unrealistic task of attempting to constrain delegation, advocates of limited regulation should try to persuade Congress to use delegation to *further deregulation*. Congress should create an agency with the mission of eliminating undesirable regulations and promoting deregulated markets. More precisely, Congress should give the deregulatory agency all authority under the existing statutes that regulatory agencies now possess to pass deregulations. This authority would include the power to repeal existing agency regulations, as well as to establish deregulatory arrangements, such as property and market regimes, so long as the existing regulatory statutes confer this authority.

Notice that the deregulatory agency would enjoy the same advantages that have made regulatory agencies so effective. First, the deregulatory agency would have greater capacity to pass deregulations than does Congress because the agency would operate year-round and not have to reach political compromises among veto players.

The agency would also have strong incentives to pass deregulations. It would likely be staffed by people who support deregulation and market solutions. Moreover, the more deregulations the agency passes, the more responsibilities it would be seen to have and the more likely it would be to command additional resources from Congress.

The deregulatory agency would also possess significant expertise about deregulation. It would seek to identify problematic

regulations that might be modified or eliminated, and would have an expert's understanding of how the new system would operate. The agency would also have knowledge of the political landscape, so that it could determine which regulations might be politically vulnerable and able to be repealed without significant backlash.

Finally, members of Congress would tend to favor this arrangement over statutes that deregulate. The deregulatory agency would bear the political responsibility for selecting and passing the deregulations, not lawmakers. Members would not have to fear political attacks based on their votes for deregulation.

While the deregulatory agency would enjoy the various benefits of delegation, it would be subject to one important complication. Because the agency would share statutory authority with the regulatory agencies, there would inevitably be conflict with those regulatory agencies. What would happen if the deregulatory agency wanted to repeal a regulation but a regulatory agency wanted to maintain or expand it?

A method for resolving those agency conflicts would be needed. The most obvious would be for the president to make the final decision because he is the head of the executive branch. Thus, if the deregulatory agency sought to eliminate a regulation and the regulatory agency protested that decision, the president would decide the matter. If an even more deregulation-friendly approach is desired, one could provide that unless the president affirmatively agrees with the regulatory agency within a specified period, the deregulatory agency's decision is automatically approved. In this way, the president can allow deregulations without taking an explicit action to do so.

In addition to having the president resolve disagreements, procedures should exist to prevent excessive friction between the agencies. If a regulatory agency adopts a regulation, the deregulatory agency should not immediately move to eliminate the regulation. Instead, a waiting period should be required—perhaps five years—before the deregulatory agency could act. In this way, the regulatory agency's action has some time to function and is not quickly undermined. Similarly, once the deregulatory agency passes a deregulation, the same waiting period should be required before the regulatory agency could pass a new regulation in that area.

THE DEREGULATORY AGENCY'S EFFECT

One potential objection to this idea is that it may have no ultimate effect on regulatory policy. After all, if the sitting president is hostile to deregulation, why would he approve any of the agency's proposed deregulations?

But there are strong reasons to believe that the deregulatory agency would have an important effect. Administrative agencies have significant influence on administrations, causing presidents to approve or allow actions that they seemingly would not have permitted otherwise. Just as such agencies have been able to promote regulation under presidents who purport to favor less regulation, so a deregulatory agency is likely to further deregula-

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tion under presidents who generally favor additional regulation.

How would this happen? Even the most pro-regulatory president does not necessarily oppose all deregulation. President Obama, for example, issued executive orders promoting the elimination of undesirable regulations and appointed cost-benefit analysis advocate Cass Sunstein to head the Office of Information and Regulatory Affairs (OIRA). Whether a president will support a particular deregulation will depend on the policy arguments and the political support for the deregulation.

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tions that make the most sense from a policy and political perspective. By proposing deregulations that pursue policies that the president supports, the agency would greatly increase the chance that the president will approve the deregulation. The agency would also have an incentive to use its knowledge of the political environment to develop deregulations that will have political support or at least will avoid significant political backlash. Overall, then, the deregulatory agency's expertise, time, and incentives would result in it proposing many more deregulations that are likely to be approved by the president than would be proposed in the absence of the agency.

REFINEMENTS: OIRA AND INDEPENDENT AGENCIES

The establishment of a deregulatory agency would require the resolution of various matters. Here I discuss two of the most important.

OIRA / One question involves OIRA, which operates to review proposed regulations by executive branch agencies under a cost-benefit standard. In practice, the office generally attempts to block what it regards as inefficient regulations. Thus, one might view OIRA as serving a function similar to my proposed deregulatory agency and therefore question whether OIRA should be given the responsibility of being the deregulatory agency.

This is a difficult question, about which reasonable minds can differ. The advantages of giving OIRA the job is that the office could employ the expertise it already possesses in this new role. The office may also have developed political support with the president, which it could then use for both functions.

The advantage of creating a new agency is that it might be more effective to have two entities to battle against problematic

regulations. That way, they could reinforce each other's positions. One might also worry that a single agency that both reviews proposed regulations and has the authority to pass deregulations would possess too much power.

Independent agencies / The second issue involves applying the deregulatory agency to the independent agencies. Because the deregulatory agency I envision would be an executive branch agency, giving it authority over independent agencies might be thought problematic because it would give the president significant control over those agencies. There are a number of ways of addressing this issue, depending on how much of the independence of independent agencies one wants to preserve.

The most obvious method is to establish a second deregulatory agency that is independent of the president, and have it pursue deregulation of independent agencies' rules. Actions by this agency would then not compromise the independence of the independent agencies. However, this

arrangement would still require a mechanism for resolving disputes between the deregulatory independent agency and the regulatory independent agencies.

One possible solution is to allow the president to resolve such disputes. While this would compromise the independence of the independent agencies, it would be a limited compromise because the president would be choosing between the proposals of two independent agencies he otherwise could not control. One might attempt to reduce the president's authority further through procedural mechanisms. Under one possibility, if the deregulatory agency proposes a deregulation, the regulatory agency might be permitted to secure presidential review of the dispute only through a supermajority vote, such as through four-fifths of the agency's commissioners. This way, the president would have fewer opportunities to make decisions concerning the independent agencies.

To fully preserve independent agency independence, one could go further and establish a separate independent entity with the authority to resolve disputes between the deregulatory and regulatory agencies. The entity might have three commissioners, who would then resolve the disagreement.

CONCLUSION

The cause of limited regulation has not had much success in recent years. It is easy to form the impression that the system of delegation is stacked against it. But delegation need not be the enemy of limited regulation. By employing delegation in the service of deregulation, the goal of limited regulation can be pursued using the same advantages that the forces of regulation possess. R

The federal government tried to take my business using civil forfeiture.

But I did nothing illegal or wrong.

I fought to protect my rights and my property.

And I won.

I am IJ.



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