2019

The Regulatory Accountability Act and the Future of APA Revision

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Since the Republicans recovered control of Congress in 2011, the Senate and House of Representatives have considered a series of bills that would dramatically reshape the administrative process. These bills have not resulted in legislation. Now that the Democrats have recaptured the House in the 2018 elections, it seems likely that the latest wave of "regulatory reform" proposals will come to an end, at least in their present form. The present moment, therefore, is a propitious occasion on which to take stock of these initiatives and to ask what lessons the experience of the past eight years holds for the future.

The bills reflect a mood of disenchantment with the administrative state. Among them are the Regulations from the Executive in Need of Scrutiny Act (REINS Act),[1] which would require an agency to obtain affirmative consent from Congress before promulgating the most important of their regulations; the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act (SCRUB Act),[2] which would establish an independent commission to select regulations for fast-track elimination; and the Separation of Powers Restoration Act (SOPRA),[3] which would greatly curtail the courts' practice of deferring to administrators' views on issues of law.[4] Each of these bills was passed by the House of Representatives, but never made progress in the Senate (although all were introduced there). The lack of indications that the bills could actually become law did not seem to deter House leaders from continuing to press them, perhaps

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1. H.R. 3765, 111th Cong. (2009).
2. H.R. 4874, 113th Cong. (2014).
3. H.R. 76, 115th Cong. (2017).
4. I have written critically about each of these bills. *See generally* Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446 (2015); Ronald M. Levin, *Congress Considers Creating Independent Commission for Retrospective Rule Review*, 39 ADMIN. & REG. L. NEWS 7 (Spring 2014); *Separation of Powers Restoration Act of 2016: Hearing on H.R. 4768 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 63 (2016) (statement of Ronald M. Levin).

because the bills were pursued at least in part for the sake of the political message that their endorsement would send.

This article focuses on the Regulatory Accountability Act (RAA).[5] This bill (or, more precisely, set of bills) proposed a broad set of changes to the rulemaking and judicial review provisions of the Administrative Procedure Act (APA). The RAA always seemed to fall into a different category from the other measures just mentioned. In the first place, its legislative prospects appeared to be better.[6] The objective of bringing the seventy-year-old APA up to date seemed, on its face, a logical and appropriate task for Congress to consider. It was reasonable to think that this objective would be attractive to many legislators, at least in principle, and that the RAA might well serve as at least a starting point for such efforts. At the same time, its contents were a mixed bag of proposals, ranging from widely acceptable provisions to highly controversial ones. Thus, the RAA is relatively challenging to evaluate, but an assessment of its strengths and weaknesses would seem to be in order, regardless of when Congress next deliberates about APA revision.

As just noted, one should not think of the RAA as only one bill. It has gone through multiple iterations over the past eight years.[7] An initial version was introduced in the House of Representatives in 2011 as H.R. 1030. This was the most radical of the RAA versions, reflecting the self-confidence of the then-incoming Republican majority. The current version of the House bill, H.R. 5, is largely the same. On the Senate side, RAA bills went through multiple iterations. The last in this series, S. 951, known as Portman-Heitkamp, is significantly less drastic than its House counterpart and has acquired a reputation for moderation. It has been described by Professor Christopher Walker as "the type of thoughtful, common-sense, bipartisan legislation needed to modernize the APA."[8] Cass Sunstein has

5. H.R. 3010, 112th Cong. (2011) (later H.R. 5, tit. 1, 115th Cong. (2017)); S. 951, 115th Cong. (2017). H.R. 5 in the 115th Congress was actually an omnibus package that combined six different bills. This article discusses only Title I of that package, which corresponds to the original RAA that was introduced as H.R. 3010 in the 111th Congress.

6. Tim Devaney, *GOP lays out regulatory reform wish list*, THE HILL (Apr. 16, 2017), https://thehill.com/regulation/328934-gop-lays-out-regulatory-reform-wish-list [https://perma.cc/FQ2Y-WSGV] ("[M]any believe [the RAA] is more likely to win bipartisan support than other items on [the Republicans'] wish list.").

7. For more details about various versions of these bills, see *infra* Part I.

8. Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 632 (2017).

called it "an intelligent, constructive, complex, imperfect bill . . . that deserves careful attention."[9]

The basic thrust of this essay is that these assessments have been too upbeat. To be sure, both bills, especially the Senate bill, contain provisions that would be salutary, or at least not very troubling. However, some of the most consequential items in both bills—proposals that have given them the most propulsive force and political potency—have been decidedly worrisome. On the whole, therefore, I do not regret their failure to result in enacted legislation.

In journalistic outlets and public debate, the principal charge lodged against the RAA bills has been that they would impede the issuance of regulations that protect the public's health, safety, and other substantive interests.[10] Although I rely on administrative burden arguments to some extent, my principal submission will be that a number of the most transformative proposals in the bill have been weakly supported on their own terms. Many aspects of the bill were much less fully thought out than one would hope to see in a bill that has already been reported favorably out of committee (like the Senate bill) or even passed by a full chamber (like the House bill).

In Part I of this article, I will briefly summarize the history of the RAA bills to date. Part II discusses aspects of the bills that, considered by themselves, would have been worthwhile or at least plausible as amendments to the APA.

Part III presents a more negative side of this picture. It contains detailed criticisms of some of the most contentious and significant aspects of the bill. They include (1) proposals that "major" rules must be preceded by public hearings modeled on the trial-type procedures written into the APA; (2) requirements that agencies must consider specified issues during ordi-

9. Cass R. Sunstein, *A Regulatory Reform Bill That Everyone Should Like*, BLOOMBERG VIEW (June 22, 2017), https://www.bloomberg.com/opinion/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like [https://perma.cc/9NN5-72DY].

10. *See, e.g.*, William W. Buzbee, *Regulatory 'Reform' That Is Anything But*, N.Y. TIMES (June 15, 2017), https://www.nytimes.com/2017/06/15/opinion/regulatory-reform-bills-congress-trump.html [https://perma.cc/FW94-WL8H]; Martha Roberts, *The Misguided Regulatory Accountability Act*, REGBLOG (Mar. 29, 2017), https://www.theregreview.org/2017/03/29/roberts-misguided-regulatory-accountability-act/ [https://perma.cc/JHB4-3BVT]; *Progressive Community Opposes the Regulatory Accountability Act of 2017 (S. 951)*, COALITION FOR SENSIBLE SAFEGUARDS (May 16, 2017), https://sensiblesafeguards.org/outreach/progressive-community-opposes-raa-s951/ [https://perma.cc/7ZTD-5J6A]; Letter from 42 administrative law academics to Lamar Smith, House Judiciary Committee Chair, and John Conyers, Jr., House Judiciary Committee Ranking Member (Oct. 24, 2011), *reprinted in Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 281 (2013), https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/LawReg111024.pdf [https://perma.cc/97GE-H32W] [hereinafter *2013 House Hearing*] (opposing H.R. 3010).

nary rulemaking, backed up by judicial review if the agency did not adequately consider them; (3) mandatory cost-benefit analysis for major rules, including those issued by independent agencies, and again policed through judicial review; and (4) proposed alterations in the scope of judicial review of agency action, including a rollback in the deferential standards of review applied to agency legal interpretations, as well as the imposition of substantial evidence review upon fact findings underlying at least some major rules.

Part IV considers, in a tentative and somewhat speculative fashion, reasons why the recent APA revision efforts have not made more progress. I suggest political and ideological factors that may have induced the sponsors to include measures that had not been analyzed as thoroughly as they deserved. Looking toward the future, I raise the question of whether the impending return of a divided government will terminate APA revision efforts for the short run, or, instead, will create conditions that would be conducive to continuation and possibly success of such efforts.

I should add a few words about the origins of some of the positions that this article takes. The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA) submitted lengthy comments on the particular bills that are the subject of this article, including a 2011 comment on the initial House version of the RAA[11] and another letter in 2014 that evaluated a forerunner of the current Senate bill.[12] The letters praised some provisions in the respective bills and were critical of other provisions. In addition, the ABA and the Section have, over the years, adopted recommendations of their own regarding possible revisions to the APA. Many of these proposals were combined into a lengthy APA revision resolution that the Section proposed, and the ABA House of Delegates endorsed, in February 2016.[13]

This article frequently uses these ABA positions (and also recommendations by the Administrative Conference of the United States (ACUS)) as baselines for analysis of many RAA provisions. The reader obviously might regard some of these institutional recommendations as being them-

11. Am. Bar Ass'n Section of Admin. Law & Regulatory Practice, *Comments on H.R. 3010, the Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619 (2012) [hereinafter *2011 Section Comments on H.R. 3010*].

12. Letter from Anna Shavers, Chair, ABA Section of Administrative Law & Regulatory Practice, to Sens. Thomas Carper & Tom Coburn (Dec. 16, 2014), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.pdf [https://perma.cc/8D8K-9DRF] [hereinafter *2014 Section Comments on S. 1029*].

13. Resolution 106B, Am. Bar Ass'n (Feb. 8, 2016), https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_106B.docx [https://perma.cc/6JXT-MYNK] [hereinafter 2016 ABA Resolution].

selves misguided—either too resistant to the congressional proposals or not resistant enough. Regardless, insofar as the article relies on ABA or ACUS policy positions, it undertakes to defend those positions on their merits, instead of simply assuming that they must be well founded by virtue of their provenance.

I participated personally in the creation of the Section letters on the RAA bills and the 2016 House of Delegates resolution. I also have expressed individual views on some of the bill provisions in congressional testimony,[14] short published essays, blog posts, and correspondence. Inevitably, I will be repeating some of that material in the following pages. One reason for doing so is that the article will make some of these past analyses more accessible to a wide audience. Another reason is that, by restating and expanding on views that I have stated briefly in the past, I can expound some of the arguments with a level of detail and precision that is best suited to discussion in a law review. Of course, despite my references to group pronouncements, this article does not purport to speak for anyone but myself.

Finally, I should note that, with minimal exceptions, the RAA included only provisions to amend the rulemaking and scope of review provisions of the APA. The RAA did not address the APA's provisions on adjudication, disclosure of information, and access to judicial review. Thus, any lessons that one might draw from the RAA experience would not necessarily be applicable in relation to these latter provisions.

I. THE EVOLUTION OF THE RAA BILLS

In the 112th Congress, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee held a series of four hearings in February through May regarding possible revisions to the APA.[15] The House's RAA bill itself, H.R. 3010, was introduced on September 22 and an additional legislative hearing was held on October 25.[16] The bill was favorably reported out of the Judiciary Committee on November 3, making only minimal changes from the text of the bill as originally introduced. The committee provided a substantial report on November 22 to explain the background and purposes of the bill.[17] The House passed the bill on December 2 on a nearly party-line vote: The bill had the support of

14. *See 2013 House Hearing*, *supra* note 10, at 91 (statement of Ronald M. Levin).

15. *See* H.R. REP. NO. 112-294, at 12–13 (2011) [hereinafter 2011 HOUSE REPORT] (listing these hearings).

16. *Id.* at 13.

17. *Id.*

234 Republicans (with none opposed), but only 19 Democrats (with 167 opposed).

Up to a point, one can say that the House sponsors compiled a substantial legislative record to support their bill. Hearings and reports are a standard means by which Congress justifies its work products. On the other hand, as the bill traveled through the committee process in only six weeks' time, the committee left itself little time to respond to criticisms of the bill's provisions, and for the most part did not respond to those criticisms. Nor were any significant responses forthcoming in later Congresses. The subcommittee did hold an additional hearing in 2013,[18] but it did not result in significant amendments to the bill. Indeed, although the House again passed versions of the RAA in the 113th, 114th, and 115th Congresses, these versions were almost the same as the initial one.[19] The lack of much reconsideration and revision of the bill following its initial introduction could be faulted as bespeaking very little interest in interacting with practitioners, executive officials, or scholars who might have offered proposals for improvement. However, a more generous evaluation could be that the House proponents of the RAA simply decided to wait for Senate reactions to the RAA before undertaking to rethink or polish their own bill.

On the Senate side, the initial Senate version of the RAA was virtually identical to the House version,[20] but the bill did not remain static. As successive versions were introduced in successive Congresses,[21] the Senate Committee on Homeland Security and Governmental Affairs proceeded mostly behind the scenes. A subcommittee of that committee held hearings on general problems of administrative law,[22] but no hearing on the RAA in particular. At length, Senators Rob Portman, Heidi Heitkamp, Orrin Hatch, and Joe Manchin—two Republicans and two Democrats—introduced S. 951 on April 26, 2017. Three weeks later, on May 17, the Committee proceeded to a vote and reported the bill out of committee. Accompanying it

18. *See 2013 House Hearing*, *supra* note 10.

19. *See* H.R. 5, 115th Cong. tit. 1 (2017); H.R. 185, 114th Cong. (2015); H.R. 2122, 113th Cong. (2013).

20. S. 1606, 112th Cong. (2011).

21. *See* S. 2006, 114th Cong. (2015); S. 1029, 113th Cong. (2013).

22. *See, e.g.*, *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 1 (2015) (statement of Senator James Lankford, subcommittee chairman) ("This is the second in a series of hearings the Subcommittee will hold examining the issues and solutions surrounding Federal regulations.").

was a relatively brief report that offered much less explanatory material than the House report had.[23]

As should be evident from this short account of the bills' history, neither the House nor Senate sponsors adhered very assiduously to all of the traditional norms of legislative deliberation. It is tempting to speculate that some mistakes could have been avoided if the sponsors had allowed more time for public debate about the specifics of the bills before the committees finished work on them. Ultimately, however, there is no way to know how much difference such steps would have made. Probably they would have been somewhat helpful, but one must also recognize that adherence to traditional norms of legislative procedure has, in general, declined in recent years.[24] Having noted this possibility, I will put it aside for the present and let my various critiques of the draftsmanship of the bills speak for themselves.

II. DECLARATORY AND MINOR REPAIRS PROVISIONS

The House and Senate reports,[25] as well as other RAA proponents,[26] have said that the RAA is intended to "modernize" the APA, but that term can have multiple meanings. It could mean simply bringing the legislation up to date by codifying post-1946 developments and resolving uncertainties and difficulties that have developed within the interstices of current practice but may be beyond the capacity of courts to fix on their own. The RAA does contain some provisions of that sort, which I will discuss in this Part. "Modernization" can also be used to mean introducing fundamentally new approaches in order to rectify claimed inadequacies in the law as it has developed up to now. RAA provisions that supposedly fit this description are discussed in Part III.

23. S. REP. NO. 115-208 (2017) [hereinafter 2017 SENATE REPORT]. The report provided five pages of background information and four pages of discussion as to the need for the bill. *Id.* at 2–9. The report's section-by-section analysis summarized the bill's provisions individually but did not undertake to justify them. *Id.* at 10–16.

24. *See, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006); BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2016); Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

25. 2011 HOUSE REPORT, *supra* note 15, at 12, 27; 2017 SENATE REPORT, *supra* note 23, at 2, 9.

26. Walker, *supra* note 8; Lydia Wheeler, *Regulatory Accountability Act reintroduced in House*, THE HILL (Jan. 7, 2015), https://thehill.com/regulation/228809-regulatory-accountability-act-reintroduced-in-house [https://perma.cc/43AH-2LET] (quoting description by U.S. Chamber of Commerce).

I do not try to take a stand, or even describe, every provision in the RAA bills. Some are narrow and would hold little interest for more than a few readers. The 2011 and 2014 ABA Section comment letters[27] did provide comprehensive critiques of earlier versions of the House and Senate bills. They predated the current Senate bill, but Christopher Walker has published a thorough summary of that bill's provisions.[28] I see no reason to try to cover all of the same ground myself.

Thus, the limited purpose of this part is to explain, with brief, concrete illustrations, that the RAA contained a good deal of material that would likely be broadly acceptable to administrative lawyers and could form the nucleus of a worthwhile set of APA amendments. I will focus on the 2017 Senate bill, which, as noted, was the most moderate version of the proposed legislation.

Some provisions of the Senate bill corresponded directly to items in the ABA's own 2016 legislative proposal. For example, the bill would require that, at the notice of proposed rulemaking stage, "all studies, models, scientific literature, and other information developed or relied upon by the agency . . . shall be placed in the docket for the proposed rule and made accessible to the public."[29] This measure would, in effect, codify the so-called *Portland Cement* doctrine.[30] The doctrine is already widely observed in administrative practice, but, as the ABA pointed out, "the requirement is not explicit in the current APA and is still occasionally called into question in the courts."[31] Judge Brett Kavanaugh was one of these doubters.[32] In view of Justice Kavanaugh's elevation to the Supreme Court, the case for legislative action to alleviate the doubts has become more timely than ever.

In addition, the RAA would authorize an incoming presidential administration to delay for up to ninety days the effective date of a rule adopted by the previous administration.[33] The purpose of the delay would be to consider, and obtain public comment, as to how the agency should

27. *2011 Section Comments on H.R. 3010*, *supra* note 11; *2014 Section Comments on S. 1029*, *supra* note 12.

28. Walker, *supra* note 8, at 648–69. For another overview of the bill, with a more critical perspective, see James Goodwin, *Anything but Moderate: The Senate Regulatory Accountability Act of 2017*, CPR BLOG (May 2, 2017), http://progressivereform.org/CPRBlog.cfm?idBlog=B6B0B417-E50E-5626-FCB79F4E27E24532 [https://perma.cc/3FW6-PSMT] (section-by-section analysis of S. 951 by Center for Progressive Reform).

29. S. 951, 115th Cong. § 3 (2017) (proposed § 553(c)(2)(A)).

30. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–94 (D.C. Cir. 1973).

31. 2016 ABA Resolution, *supra* note 13, at 1.

32. *See* Am. Radio Relay League v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

33. H.R. 5, tit. 1, 115th Cong. § 3 (2017) (proposed § 553(f)(5)); S. 951, § 3 (proposed § 553(f)(5)).

react to its predecessor's "midnight rule." Recent presidential administrations of both parties have followed procedures of this kind, but, again, their legality is unclear, so explicit authorization is desirable. The RAA, like the ABA, based its legislative proposal on a recent recommendation by the Administrative Conference.[34]

Also, the Senate bill would supplement the existing APA right to file rulemaking petitions[35] by requiring agencies, "on a continuing basis, [to] invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal."[36] Taken almost verbatim from the ABA's resolution, this procedure would function as a relatively mild means of facilitating retrospective review. Some agencies already accept and respond to informal suggestions from interested persons for modifications of their rules;[37] this proposal would make a similar process available to the public at large, probably without additional strain on agencies' finite resources.

The Senate bill would also institute various ABA or ACUS policy positions that were not included within the 2016 House of Delegates resolution. The bill would, for example, replace the words "interpretative rules" and "general statements of policy" with the generic term "guidance."[38] The Section has endorsed this change, which would bring the APA into conformity with common usage among administrative lawyers.[39] Also, the bill would effectively validate the courts' practice of "remand without vacatur." The existing language of § 706 provides that a court "shall . . . set aside" an agency action that violates the review standards codified in that section. The bill would revise that language to say that the court "shall set aside, or, when appropriate, remand a matter to an agency without setting aside," the action. This measure would effectively ratify the status quo, because the courts of appeals do, without exception, uphold the practice of remand without vacatur despite its seeming conflict with the current APA statutory language.[40] In addition, the bill would provide that when an agency deter-

34. *See* ACUS Recommendation 2012-2, Midnight Rules, 77 Fed. Reg. 47,802 (Aug. 10, 2012).

35. 5 U.S.C. § 553(e) (2012).

36. S. 951, § 3 (proposed § 553(i)(2)).

37. Wendy E. Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017).

38. S. 951, § 3 (proposed §§ 551(15), 553(g)(2)).

39. *2014 Section Comments on S. 1029*, *supra* note 12, at 2. I have recently argued that the exemption from rulemaking procedure for "interpretative rules" should be applied according to approximately the same principles as now govern "general statements of policy." Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 269 (2018). The proposed change in APA terminology would be consistent with, if it did not actually compel, this approach to the exemption.

40. *See* ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272 (Dec. 17, 2013); STEPHANIE J. TATHAM, THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR (2013),

mines that an APA rulemaking exemption applies because notice-and-comment procedure on a rule would be "unnecessary,"[41] it should adopt the rule by utilizing direct final rulemaking.[42] ACUS has previously recommended that agencies should voluntarily follow this procedure.[43]

The Senate bill contained a few additional provisions that were similar to ABA proposals, though not quite the same. In these instances, administrative lawyers might not immediately support the Senate committee's approaches, but one could imagine them being satisfied with possible compromise solutions growing out of the bill's provisions. For example, the bill would require that when agencies issue a major rule, they must formulate a preliminary plan for retrospective review of the rule in future years. The Section criticized a similar provision in the House bill, arguing that an agency cannot anticipate, at the time of promulgation, all the issues that would be germane to a reevaluation a decade hence.[44] But the Section did conclude—and the ABA agreed—that at the time of promulgation the agency should at least be required to make a plan for gathering data over time that would be useful to a subsequent retrospective review.[45] There could well be a viable middle ground between these poles.[46]

The ABA set forth a specific set of principles for the composition of the administrative record in rulemaking,[47] and the Senate bill is not as explicit. The subject is, however, a complex one,[48] so it is possible that the more general approach of the bill, which in effect would leave details to be worked out by individual agencies over time, is reasonable if not preferable.

https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf [https://perma.cc/J2RW-PQEV] (consultant's report for the ACUS recommendation); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003) (endorsing this judicial practice).

41. *See* 5 U.S.C. § 553(b)(B) (2012).

42. *See* S. 951, § 3 (proposed § 553(g)(3)(B)).

43. ACUS Recommendation 95-4, Procedures for Expedited and Noncontroversial Rulemaking, 60 Fed. Reg. 43,110 (June 15, 1995). *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

44. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 659–60.

45. 2016 ABA Resolution, *supra* note 13, at ¶ 6(a).

46. This proposal may be due for reassessment, however, in view of a recently published study of agencies' practices regarding revision of existing rules. The study suggests that agencies voluntarily reassess their rules more frequently than has generally been believed, possibly obviating or mitigating the need for legislative intervention. *See* Wagner et al., *supra* note 37.

47. 2016 ABA Resolution, *supra* note 13, at ¶ 2.

48. ACUS Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,352 (July 10, 2013).

One other area that might be harder to resolve concerns interim rules. The APA permits agencies to adopt a rule without notice and comment if its issuance is urgent.[49] In this situation, agencies often designate the regulation as an "interim rule" and invite post-promulgation comments. Sometimes, however, the agency never gets around to revisiting the rule, which stays on the books indefinitely. The House bill sought to resolve this problem by forcing an agency to rescind an interim rule if it did not complete a full rulemaking process to reconsider it within 270 days (18 months in the case of a major or high-impact rule).[50] The Section acknowledged the problem but questioned the need for a fixed expiration date. It added that, if such a date were imposed, it should be extended to three years.[51] The drafters of the Senate bill, however, moved in the opposite direction, shortening the deadline for such a reconsideration to 180 days.[52] Thus, although one could say in the abstract that there would be room to split the difference between the two sides in this debate, the disagreement has as yet resulted in impasse.[53]

Finally, I should mention a few ABA-endorsed minor repairs proposals that Congress never included in the RAA but that would deserve consideration in future APA revision deliberations. First, administrative lawyers have recognized for decades that the APA's definition of the word "rule" is poorly drafted.[54] According to the main clause in the current definition, a rule is "the whole or a part of an agency statement of general or particular applicability and future effect."[55] This language is entirely out of synch with ordinary usage. Under a literal reading of the definition, a deportation order is a rule (because it has particular applicability and operates only in the future), but a retroactive regulation may be issued without notice-and-comment procedure (because it lacks "future effect" and thus is not a "rule" for APA purposes). These anomalous implications could be

49. 5 U.S.C. § 553(b)(B) (2012) (exempting rules for which notice and comment would be "impracticable" or "contrary to the public interest").

50. H.R. 5, tit. 1, 115th Cong. § 3 (2017) (proposed § 553(g)(2)). For definitions of these types of rules, see *infra* notes 69, 70.

51. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 660.

52. S. 951 (proposed § 553(g)(3)(C)(ii)).

53. *See 2014 Section Comments on S. 1029*, *supra* note 12, at 13–14 (objecting to a similar provision in an earlier Senate bill).

54. *See* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1079 (2004) [hereinafter Levin, *Rule Definition*] ("[T]he drafting problems with the definition have caused consternation almost from the moment the APA was adopted.").

55. 5 U.S.C. § 551(5) (2012).

avoided if the words "or particular" and "and future effect" were deleted from the definition, and that is what the ABA has recommended.[56]

It may be thought that Congress does not need to act because the weaknesses in the definition have not caused many practical problems.[57] To the extent that this is true, it is only because administrative lawyers routinely ignore the definition. If, however, one goal of APA revision is to bring the text of the Act into line with administrative law practice, the definition of "rule" should be a prime target.

Second, the ABA and ACUS have advocated for decades that the rulemaking exemptions for grants and benefits[58] and for military and foreign affairs[59] should be narrowed if not repealed outright.[60] Many agencies have adopted regulations that waive reliance on the grants and benefits exemption.[61] In 2013, however, the argument for legislative action gained new urgency when the Department of Agriculture rescinded its waiver, so that important agriculture-related rules may now be issued without ordinary rulemaking procedure.[62] As for the military and foreign affairs exemption, it's understandable that Congress has been hesitant to intrude into defense and diplomatic matters.[63] However, public discourse about how to amend this provision has continued to evolve,[64] generating new options that Congress could consider when APA revision next makes its way onto the legislative agenda.

56. 2016 ABA Resolution, *supra* note 13, at 4–5. For a full analysis of the proposal, see Levin, *Rule Definition*, *supra* note 54.

57. *But see* Levin, *Rule Definition*, *supra* note 54, at 1083–92 (explaining how the definition has caused confusion in past cases).

58. 5 U.S.C. § 553(a)(2) (2012).

59. *Id.* § 553(a)(1).

60. 2016 ABA Resolution, *supra* note 13, at 10–11.

61. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 54 (5th ed. 2012).

62. 78 Fed. Reg. 64,194 (Oct. 28, 2013). *See* William F. Funk, *U.S. Department of Agriculture's Revocation of 40+-Year-Old Policy on Engaging in Notice-and-Comment Rulemaking*, 39 ADMIN. & REG. L. NEWS 15, 15 (Wint. 2014).

63. The chairman of the Senate's regulatory reform subcommittee has, however, urged that "Congress should work with the Administration to tighten the foreign affairs exemption." SENATOR JAMES LANKFORD, FEDERAL FUMBLES: HOW THE GOVERNMENT DROPPED THE BALL 97 (2015), https://www.lankford.senate.gov/imo/media/doc/Federal_Fumbles_2015.pdf#page=97 [https://perma.cc/WZ46-GS3G].

64. *Compare* Bernard W. Bell, *Revisiting APA Section 553*, 36 YALE J. ON REG.: NOTICE & COMMENT (Nov. 30, 2016), http://yalejreg.com/nc/revisiting-apa-section-553-by-bernard-w-bell/ [https://perma.cc/59MN-DQC4], *with* Ronald M. Levin, *APA Revision, Continued*, 36 YALE J. ON REG.: NOTICE & COMMENT (Dec. 21, 2016), http://yalejreg.com/nc/apa-rulemaking-revision-continued-by-ronald-m-levin/ [https://perma.cc/4YM6-BY9U].

III. TRANSFORMATIVE PROVISIONS

I now take up a group of provisions in the bills that I consider troublesome and that contribute to my conclusion that the RAA should not have been enacted. Again, the coverage here will be selective. The ABA Section's comment letters have covered the terrain more comprehensively. The discussion here is limited to areas that I believe can be illuminated through the kind of analysis that best lends itself to treatment in a law review.

A. Trial-Type Rulemaking

A particularly controversial aspect of the RAA bills has been the fact that they would require "formal" or trial-type procedures in certain types of rulemaking proceedings. Indeed, one of the most ironic aspects of the bill has been its proponents' claim that they were seeking to "modernize" the APA by reviving a regulatory technique that has been discredited for decades.

The two bills are not entirely alike in this regard. The House bill relies directly on the formal rulemaking provisions of the APA.[65] The Senate bill does not, but its provision on "public hearings"[66] is nevertheless clearly modeled on the APA. I will discuss the House provision first and then examine how the Senate bill offered a less far-reaching alternative to it.

In each bill, the provision for public hearings would apply to most, if not all, "high-impact" rulemakings[67] and at least some "major" rulemakings.[68] Roughly speaking, high-impact rules would be rules that would have a billion-dollar impact on the economy;[69] for "major" rules, the threshold would be a $100 million impact.[70] The proponents' basic claim is that the formal rulemaking system was designed to provide a higher level of deliberativeness and accountability than the APA's informal or notice-and-comment model affords. On the face of the APA, the latter model re-

65. H.R. 5, tit. 1, § 3 (proposed § 553(e)). *See* 5 U.S.C. §§ 556–557 (2012) (APA formal rulemaking provisions).

66. S. 951, § 3 (proposed § 553(e)).

67. H.R. 5, tit. 1, § 103 (proposed § 553(e)); S. 951, § 3 (proposed § 553(e)(1)(B)).

68. H.R. 5, tit. 1, § 105 (proposed § 556(g)); S. 951, § 3 (proposed § 553(e)(1)(C)). To obtain a hearing in a major rulemaking proceeding, a participant would need to petition for it, but the agency would have to grant the petition unless it *reasonably* determined that the hearing would be unproductive or would unreasonably delay completion of the proceeding. As the Administrative Law Section noted, the ambiguity in these criteria "would make judicial review highly unpredictable and would put much pressure on an agency to 'play it safe' and grant a hearing." *2014 Section Comments on S. 1029*, *supra* note 12, at 11.

69. H.R. 5, tit. 1, § 102 (proposed § 551(16)); S. 951, § 2 (proposed § 551(16)).

70. H.R. 5, tit. 1, § 102 (proposed § 551(15)); S. 951, § 2 (proposed § 551(18)).

quires little more than that agencies announce proposed rules and solicit and consider public comment before they can become final rules.[71] Proponents of the RAA favor a return to the formal system of rulemaking, at least in limited circumstances, in order to counteract what they take to be out-of-control regulation.

There is abstract appeal to the idea that rules of greatest consequence should be subject to the most demanding procedural expectations; but this premise does not mean that mandatory trial-type hearings should be included among those expectations.

1. The Retreat from Formal Rulemaking

The magnitude of the provisions' departure from current administrative practice should not be minimized. In the past four decades, Congress has never required any agency to make rules using APA formal rulemaking or an equivalent. In fact, it has rescinded some of the mandates that existed as of the 1970s.[72] The most recent instance occurred in 2016 when Congress enacted a major overhaul of the Toxic Substances Control Act (TSCA).[73] This legislation was adopted with overwhelming support in each chamber. The legislative reports in the House and Senate contained detailed, sophisticated explanations of the substantive changes to TSCA.[74] But they did not even discuss the elimination of hearings with cross-examination rights in proceedings to ban chemical substances,[75] presumably because Congress considered the obsolescence of those provisions too self-evident to require explanation.

Kent Barnett has argued[76] that § 1044(c) of the Dodd-Frank Act of 2010[77] requires the Office of the Comptroller of the Currency (OCC) to use formal rulemaking when it decides whether to preempt state consumer protection laws. Closer scrutiny reveals, however, that his reading of the statute is untenable. That provision prohibits preemption "unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding . . . preemption . . . in accordance with the legal standard of [a 1996 Supreme Court case]." As Barnett recognizes, the APA invites

71. 5 U.S.C. §§ 553(b)–(c) (2012).

72. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 650–51.

73. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (amending Toxic Substances Control Act, 5 U.S.C. § 2601 et seq.).

74. S. REP. NO. 114-67, at 16–19 (2015); H.R. REP. NO. 114-176, at 23–28 (2015).

75. For the now-repealed provision, see 15 U.S.C. § 2605(c)(3)(A)(ii) (2012).

76. Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 4 (2017).

77. 12 U.S.C. § 25b(c) (2012).

Congress to use the term "made on the record after opportunity for an agency hearing," or a near equivalent, when it wishes to specify that a statutory hearing shall be formal rather than informal.[78] Section 1044(c), however, seems to have nothing to do with any on-the-record *hearing*. Rather, despite some awkward wording, its evident purpose is simply to ensure that OCC may not preempt a state law unless it makes a solid factual case, well-documented *in the record* of the administrative proceeding. It's true that the provision also uses the term "substantial evidence," which has historically been associated with formal proceedings. But Congress also sometimes uses that term in contexts in which it clearly does not contemplate trial-type procedures—even city council meetings.[79]

The possibility that the drafters of Dodd-Frank decided to revive a long-disfavored rulemaking procedure in this context is hard to believe on its own terms. Even more implausible, however, is the idea that they might have done this *without telling anyone*. As best I can discover, no one but Barnett discerns a formal rulemaking mandate in § 1044(c). The authors of the Senate report on the Act described the section in much more modest terms:

> Prior to making a determination under the [Supreme Court's] *Barnett* standard, OCC must follow certain procedures . . . . After consulting with the [Consumer Financial Protection] Bureau, the OCC must make a written finding that a federal law provides a relevant substantive standard that would protect consumers if the State law was to be preempted.[80]

The relevant passage makes it abundantly clear that the authors never dreamed that formal rulemaking might be involved.[81] Admittedly, judicial reliance on legislative committee reports is out of fashion these days. Yet even the arch-foe of such reliance, Justice Scalia, considered it "entirely appropriate to consult all public materials, including . . . legislative history . . . to verify that what seems to us an unthinkable disposition . . . was indeed unthought of."[82] The Senate report on Dodd-Frank is instructive for precisely that reason.

Other "public materials," to use Scalia's term, are consistent with the Senate report's perspective. Law review commentators other than Barnett

78. 5 U.S.C. § 553(c) (2012).

79. *See* T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808, 815 (2015) (applying such a statutory provision in the Telecommunications Act).

80. *See* S. REP. NO. 111-176, at 176 (2010). No comparable report was filed on the House side.

81. *Id.*

82. Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1990) (Scalia, J., concurring in the result).

have not suggested that § 1044(c) raises any issue of formal rulemaking.[83] Nor has OCC, which, in a post-Dodd Frank proceeding to examine preemption issues, utilized *notice-and-comment rulemaking*.[84] And, most importantly, Barnett's interpretation is not even shared by the groups that, according to his account, were the intended beneficiaries of the formal rulemaking mandate. His theory is that Congress "required formal rulemaking to further a longstanding progressive policy goal—to limit federal preemption of state banking and consumer-protection laws."[85] Presumably, the constituents that would have benefited from such a requirement, and would have been at the legislative bargaining table asking for it, would have included groups such as state attorneys general and consumer advocacy organizations. Yet these groups, in their comments in the rulemaking proceeding just mentioned, made no mention of the extraordinary legislative victory they supposedly had achieved the preceding year.[86] It is not easy to believe that they simply forgot about it.

In light of all this evidence, I doubt that a court would be receptive to Barnett's novel interpretation of Dodd-Frank, even if the Supreme Court had not established a strong presumption against reading formal rulemaking mandates into enabling statutes—as of course it has.[87]

2. The Evolution of Notice-and-Comment Rulemaking as a Substitute

The practical burdens associated with formal rulemaking undoubtedly constitute one reason why the technique has been in retreat in recent decades, and they also help to account for the public protest about the RAA provisions on trial-type hearings.[88] Indeed, it seems self-evident that preparing for a trial would be a far more difficult endeavor than preparing written comments. Proponents of the RAA and other defenders of formal

83. *See, e.g.*, Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 352–53, 358, 361 (2012); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 931 (2011).

84. Office of Thrift Integration; Dodd-Frank Implementation, 76 Fed. Reg. 43,549 (July 21, 2011) [hereinafter Preemption Rulemaking].

85. Barnett, *supra* note 76, at 23.

86. *See* Preemption Rulemaking, *supra* note 84, at 43,557 (responding to various procedural objections advanced by commenters—none of whom, apparently, suggested that formal rulemaking was required). *See also* Comments of Nat'l Ass'n of Attorneys Gen. to John Walsh, Acting Comptroller (June 27, 2011), https://www.naag.org/assets/files/pdf/signons/20110628.OCCNoticeandComment-FINAL.pdf [https://perma.cc/PB9Q-W8WE] (not mentioning the issue); Comments of Ctr. for Responsible Lending, et al. to John Walsh, Acting Comptroller (June 27, 2011), https://www.responsiblelending.org/es/node/7177 [https://perma.cc/ZS2D-EJ8Z] (same).

87. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 236–38 (1973).

88. *See* sources cited *supra* note 10.

rulemaking have argued that the costs of the proposed procedure could be effectively contained through effective management. I think this view is mistaken, but other scholars have rebutted it elsewhere,[89] and I will not discuss that point here. Instead, I will focus on some implications of the fact that trial-type procedure in rulemaking has steadily lost favor over the course of four decades.

The history is important, because during this period the judicial and executive branches have dramatically elaborated on the standard notice-and-comment model, in part to fill the gap created by the demise of formal rulemaking. Today, when agencies engage in rulemaking, they are expected to maintain a systemic record,[90] to disclose the evidence on which their factual claims rest,[91] and to respond to significant public comments.[92] Moreover, executive agencies conduct intensive cost-benefit analysis of their major rules under the supervision of the Office of Information and Regulatory Affairs. In addition, all agencies must engage in "reasoned analysis" that can survive judicial review under the arbitrary-and-capricious standard of the APA. In major rulemaking proceedings, today's courts apply that standard in a probing and demanding fashion known as the "hard look" approach.[93] All of these developments have served to enhance the rigor of notice-and-comment rulemaking to an extent never contemplated during the heyday of formal rulemaking.

The prevailing opinion among regulatory practitioners is that, in light of the methods that the administrative law system has created to promote rigorous analysis and careful development of the facts, trial-type procedures in significant rulemaking proceedings are simply not necessary. As

89. *See, e.g.*, William Funk, *Requiring Formal Rulemaking is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017), https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/ [https://perma.cc/6EJX-GM3Z]; Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015); Richard J. Pierce, Jr., *A Good Effort, With One Glaring Flaw*, REG. REV. (May 8, 2017), https://www.theregreview.org/2017/05/08/pierce-good-effort-glaring-flaw/ [https://perma.cc/57W3-98RK].

90. *See* ACUS Recommendation 2013-4, *supra* note 48.

91. *See* Am. Radio Relay League v. FCC, 524 F.3d 227, 236–37 (D.C. Cir. 2008).

92. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

93. Judge Patricia Wald noted a direct connection between the decline of trial-type rulemaking and the rise of hard look review:

> The cumbersomeness of rulemaking "on the record" and its attendant delays prompted increased provision for the more flexible and expedient "notice and comment" rules in areas in urgent need of regulation. . . . The sheer massiveness of impact of the urgent regulations issued under the new rulemaking provisions and the diffidence of judges in the face of highly technical regulatory schemes prompted the courts to require the agencies to develop a more complete record and a more clearly articulated rationale to facilitate review for arbitrariness and caprice.

Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451–52 n.126 (D.C. Cir. 1980).

the ABA Section wrote in its comments opposing the hearings procedures in the House version of the RAA:

> The collective repudiation of formal rulemaking reflects widespread recognition that trial-type methods are usually unsuitable in generalized rulemaking proceedings. . . . Even in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice-and-comment rulemaking. Such proceedings allow for rigorous analysis, but the participants usually join issue over scores of interconnected questions through a continuing exchange of documents over a period of weeks or months. Live confrontation is largely beside the point in such proceedings.[94]

The Section also pointed out that ACUS has called for the elimination of statutory requirements of on-the-record rulemaking[95] and that, as of the date of those comments, "[w]e have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking." More recently, however, this gap in the academic literature has been filled—most ambitiously, by a full-length article by Aaron Nielson.[96]

The proponents of the public hearings provisions in the RAA take a more positive view of the potential value of the hearings process and the benefits of cross-examination. For example, Nielson writes: "It is hard to imagine how cross-examination could be wholly ineffective. If nothing else, it surely at least has 'a healthy disciplining effect.'"[97] He acknowledges that the benefit of cross-examination in making credibility determinations will not always matter in a rulemaking context, because "[w]ith technical fields . . . a written exchange of ideas can often do the trick."[98] But, he continues, "cross-examination surely could help the evaluation process in *some* instances, especially for decisions that are more value-laden than the agency would like to admit."[99]

94. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 651.

95. ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4669, 4670 (Feb. 1, 1994).

96. Aaron Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014). Professor Nielson tells me that he wrote his article precisely in order to rise to the challenge implied by the Section's comments. I commend his enterprising spirit, but not his conclusions.

97. *Id.* at 261.

98. *Id.* at 262. For present purposes, this is no small concession. Under the Senate bill, the right to public hearings would extend *only* to "specific scientific, technical, economic or other complex factual issues." *See infra* note 105 and accompanying text.

99. Nielson, *supra* note 96, at 262. Nielson goes astray, however, when he adds that "[w]here an agency's rationale is not . . . clear, . . . having an opportunity to probe that rationale by asking questions and then follow-up questions could help." *Id.* The agency's rationale would depend on the views of the ultimate decisionmaker (probably the agency head) expressed months after the formal hearing.

I do not argue that this view, or similar ones, should be dismissed simply because formal rulemaking has passed out of general use. In light of the many years in which our system has relied on other modes of inquiry, however, the onus should be on these proponents to justify a reversion to long-abandoned procedures. And here is the crux of the matter: They have made no serious effort to carry that burden.

As best I can discover, the proponents of this provision have yet to identify even one rulemaking proceeding conducted in the past forty years in which, *according to them*, regulated parties were unable to make their case (or contest the government's case) using existing notice-and-comment procedures but could have been more successful using trial-type procedure. Legislative reports,[100] congressional testimony,[101] law review articles,[102] and commentaries[103] all appear to be bereft of modern, concrete examples that supposedly demonstrate the need for this reversion to the decisional methods of an earlier generation. If proponents were to cite such examples, interested observers could debate their cogency, but in the absence of a factually based account of purported problems with today's procedures, we are left with mere assertions rooted in the assumptions of a bygone era.

It is troubling that the public hearings requirements in the RAA bills have advanced so far in the legislative process without a serious effort to justify a need for them (to say nothing of the burdens and resource costs associated with that alternative).

It is true, as Walker notes,[104] that the Senate bill is drafted to apply to a narrower range of circumstances than the House bill would. Under the Senate bill, participants in high-impact or major rulemaking proceedings could obtain a hearing only on "specific scientific, technical, economic or other complex factual issues that are genuinely disputed" and material to

100. *See* 2011 HOUSE REPORT, *supra* note 15, at 34–36.

101. *See, e.g.*, *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts, Commercial and Administrative Law*, 112th Cong. 38–39 (Feb. 28, 2011) (testimony of Jeffrey A. Rosen); *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts, Commercial and Admin. Law*, 112th Cong. 175 (May 31, 2011) (testimony of Noel J. Francisco) [hereinafter Francisco Testimony].

102. In addition to Nielson's article, see, e.g., Walker, *supra* note 8, at 656–62.

103. *See, e.g.*, *Statement of the U.S. Chamber of Commerce on Hearing on Midnight Regulations: Examining Executive Branch Overreach*, U.S. CHAMBER OF COMMERCE (Feb. 10, 2016), https://www.uschamber.com/sites/default/files/documents/files/2.11.16_statement_for_the_record_on-hearing_on_midnight_regulations_-_examining_executive_branch_overreach.pdf [https://perma.cc/4BWF-BVJS].

104. Walker, *supra* note 8, at 660–62.

the rulemaking.[105] But that provision is still too broad. It allows participants to obtain hearings on those issues without any showing that an opportunity for cross-examination is necessary in light of the available alternatives. The ABA Administrative Law Section has opposed the Senate provision for exactly that reason.[106] Indeed, the fact that the proponents have not managed to cite even one modern proceeding as to which they claim that condition *would* have been satisfied is reason enough for Congress to reject the measure.

3. Participation and Transparency

Proponents of a revival of trial-type procedure in rulemaking via the RAA (or otherwise) do not rest their case entirely on the supposed virtues of that procedure as a means of resolving factual disputes. They also discern more intangible benefits. Barnett, for example, asserts that formal rulemaking "prioritizes participation by affected parties, reasoned decisionmaking with a closed record, and transparency." Other advocates also cite "transparency" as one of the advantages of public hearings.[107]

This line of argument is puzzling, because transparency and openness to broad public participation are hallmarks of modern notice-and-comment rulemaking. The electronic age has facilitated some truly remarkable innovations. The emerging model is one in which individuals can submit comments online and can read and respond to comments filed by others.[108] Thus, anyone can participate in the proceeding by sending a comment or writing a letter. Although agency practice is not uniform, the RAA clearly contemplates that agencies should implement these methods in major rulemaking proceedings; to that end, it would codify existing best-practice recommendations by providing for an electronic docket in such proceedings.[109] The administrative record—which generally includes not only the submitted comments, but other materials considered by the agency[110]—

105. S. 951, § 3 (proposed §§ 553(e)(1)(B)(i)(I), 553(e)(1)(C)).

106. *2014 Section Comments on S. 1029*, *supra* note 12, at 10–11.

107. GARY S. LAWSON, REVIVING FORMAL RULEMAKING: OPENNESS AND ACCOUNTABILITY FOR OBAMACARE 3–4 (2011), https://www.heritage.org/health-care-reform/report/reviving-formal-rulemaking-openness-and-accountability-obamacare [https://perma.cc/NR49-CW28]; Nielson, *supra* note 96, at 241; Francisco Testimony, *supra* note 101, at 175.

108. *See generally* ACUS Recommendation 2018-6, Improving Access to Regulations.gov's Rulemaking Docket, 84 Fed. Reg. 2143 (Feb. 6, 2019) (describing the government's online site for rulemaking dockets).

109. S. 951, § 3 (proposed § 553(d)(1)(A)).

110. ACUS Recommendation 2013-4, *supra* note 48.

would be accessible on the Internet, which would seem to be decidedly "transparent."

In contrast, whatever enhancements to participation might accrue from trial-type rulemaking would be available *only* to the small number of persons who can engage counsel, enter appearances, and participate in the live proceedings. This limitation would undoubtedly favor regulated interests to the disadvantage of public interest advocates. The contrast between these two rulemaking models is dramatic. There can be no question about which of the two would be the more democratic and participatory.

Apparently, when RAA advocates claim that public hearings would promote transparency, what they really mean is that such hearings would be accompanied by a closed hearing record, a ban on ex parte contacts, or both.[111] The House bill, which incorporates the APA formal rulemaking provisions, would indeed result in an ex parte contacts ban, but to my mind the idea that this could be a positive development is further evidence of the anachronism of their project. Their line of argument sounds like a throwback to the now-discredited decision in *Home Box Office, Inc. v. FCC*.[112] I would have thought that this case's attempt to import the APA ex parte contacts prohibition into notice-and-comment rulemaking had been completely discredited by the D.C. Circuit's subsequent decision in 1981 in *Sierra Club v. Costle*.[113] Judge Wald's words from that case still resonate:

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. . . . Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.[114]

In the wake of *Sierra Club*, not a single case—state or federal—has ever followed the holding of *Home Box Office*. In short, the general understanding among administrative lawyers is that, in the context of broad policy-

111. LAWSON, *supra* note 107; Nielson, *supra* note 96, at 270.
112. 567 F.2d 9 (D.C. Cir. 1977).
113. 657 F.2d 298 (D.C. Cir. 1981).
114. *Id.* at 400–01.

making, informal contacts between rulemaking officials and affected persons should be welcomed, not feared.[115]

A more specific objection to a ban on ex parte communications in this context is its capacity to interfere with political oversight. As the ABA Administrative Law Section wrote: "The ban on external oral contacts would apparently also extend to OIRA. . . . Yet exclusion of OIRA from consultation with the agency regarding the terms of a *major rule* would be unwise and difficult to reconcile with the emphasis elsewhere in the bill on expansion of OIRA's role."[116] Similarly, members of Congress would apparently also be barred from calling an agency head to voice concerns about a pending major rule—an implication that the congressional supporters of the RAA would probably consider startling once they stop to think about the issue.

As I said in the preceding section, reformers should not have to treat conventional wisdom as sacrosanct; but fleeting references to "transparency," without any attention to the historical debate that has resulted in general acceptance for ex parte communications in major rulemaking proceedings are not persuasive.[117]

The Senate bill, having avoided direct reliance on the APA formal rulemaking model, would not forbid ex parte contacts, but it does provide that the record generated in the "public hearings" procedure shall be exclusive.[118] Of course, as I have said, a defined *administrative* record is a familiar feature of notice-and-comment rulemaking, and the rule must be justified on the basis of that record. That record includes rulemaking comments, which anyone may submit. Principles of hard look review serve to

115. One recent reform proposal would subject ex parte communications in notice-and-comment rulemaking to disclosure requirements, similar to those now imposed by the Clean Air Act. DANIEL A. FARBER, LISA HEINZERLING, & PETER M. SHANE, REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST 5–7 (2018), https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf [https://perma.cc/L2PS-UJFP]. But these authors do not endorse banning such contacts, let alone doing so through the revival of trial-type procedures.

116. *2011 Section Comments on H.R. 3010, supra* note 11, at 653–54.

117. Nielson also argues that in notice-and-comment rulemaking an agency may conceal its real motivations or explain itself obscurely, but formal rulemaking is less susceptible to such pathologies, because "there is a live hearing. If the rule is not justified based on evidence presented there, it cannot stand. Nor can the agency brush aside a party's proposed findings—it must respond." Nielson, *supra* note 96, at 269 (citing 5 U.S.C. §§ 556(e), 557(c)). As I noted above, however, courts have imposed these same expectations in informal rulemaking cases. *See supra* notes 90–93 and accompanying text. Nielson cites no evidence indicating that courts enforce these duties more vigilantly when they review rulemakings to which the explicit APA provisions apply than they do when those provisions do not apply.

118. S. 951, § 3 (proposed § 553(e)(3)(C)).

induce agencies to pay close attention to these submissions.[119] The RAA, however, contemplates a closed *hearing* record for matters litigated at the public hearings. This raises the same objections that the trial-type procedure as a whole does, because of the practical constraints on the number of interested persons who can participate in creating the record and in contesting submissions filed by others.

B. Required Findings and Analysis in Rulemaking

Both the House and Senate versions of the RAA would amend § 553 of the APA to specify a variety of "considerations" that agencies must take into account in preparing their notices of proposed rulemaking and also their final rules.[120] Some of these obligations would apply to all rulemaking proceedings (unless an exemption from notice and comment is available). I will discuss those provisions in this section. However, some specified "considerations" in the Senate bill would be applicable only to major and high-impact rules. I will discuss those more narrowly applicable ones in the following section.

1. Ordinary Notice-and-Comment Rulemaking

Under the House bill, the range of "considerations" that agencies would have to take into account in day-to-day rulemaking would be lengthy and, therefore, onerous. For example, under § 553(b) the agency must consider "the degree and nature of risks the problem [addressed in the rule] poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction" as well as "the countervailing risks that may be posed by alternatives for new agency action."[121] In addition, the agency must address "[a]ny reasonable alternatives for a new rule or other response identified by the agency," including "potential regional, State, local, or tribal actions" and "potential responses that specify performance objectives [or] establish economic incentives to encourage desired behavior," "provide information upon which choices can be made by the public," or "other innovative alternatives."[122] Further, the agency must consider, "[n]otwithstanding any other provision of law, the potential costs and benefits associated with potential alternative rules and other respons-

119. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency.").

120. H.R. 5, § 103 (proposed §§ 553(b), 553(d)); S. 951, § 3 (proposed §§ 553(b), 553(f)(2)(B)).

121. H.R. 5, § 103 (proposed § 553(b)(3)).

122. *Id.* (proposed § 553(b)(5)).

es [considered per the above,] including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs), wages, economic growth, innovation, economic competitiveness, and impacts on low income populations."[123] Some of the considerations in this list—which is not exhaustive—would be germane to a wide variety of rules; others would have very tenuous relevance or no relevance to many and perhaps most rulemaking proceedings.

In its comments on the House bill in 2011, the Section objected to the proposed "considerations" requirements on the basis that they were "insufficiently attentive to the costs of investigation."[124] More specifically, "[t]he task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures."[125]

The ABA Section also made two related arguments in raising doubts about this portion of the House bill. First, the problem is compounded by judicial review. The unpredictability of appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion of any item on the statutory list.[126] This dynamic would set the stage for a considerable increase in delay in getting needed protections onto the books. Other rules may not be proposed at all because of the resources that the agency would be forced to devote to preparing the regulatory analyses required by such interpretations in connection with the rules the agency does pursue. Among the most persistent themes in modern administrative law scholarship has been concern about the perils of "ossification" of the rulemaking process, due to the accretion of manifold procedural requirements, including those prescribed by courts. The extent to which that development has already served to hobble the rulemaking process is a matter of debate,[127] but surely Congress should be wary of heightening the risks of such impairment even further.

123. *Id.* (proposed § 553(b)(6)(A)). Some of the items in this list of required considerations did not appear in the original 2011 bill.

124. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 631.

125. *Id.* at 632.

126. *Id.* at 634–35. Justice Rehnquist made a similar point effectively in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 539–40 (1978).

127. *Compare* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (a classic articulation of the ossification thesis), *with* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012) (expressing skepticism).

Second, the proposed APA requirements would prove unnecessary, because the rulemaking system is largely self-regulating:

> [W]here particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. As noted, agencies often consider issues of the kind just mentioned on their own initiative. If they do not, those issues are frequently raised in comments by interested members of the public. Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a recognized duty to respond to material and significant comments.[128]

This argument has, if anything, gained additional force since the time when these comments were submitted, because the Supreme Court has now expressly confirmed, for the first time, that a rulemaking agency has a duty to respond to significant public comments.[129]

The drafters of the Senate bill seemingly heeded this objection to some extent, because its list of required "considerations" is shorter than the corresponding list in the House bill. In my view, however, they did not shorten it enough. The Senate bill continues to require a rulemaking agency to give consideration to factors that do not, on their face, seem essential to rational decisionmaking.

A few examples will help to make this point. The Senate bill would require a rulemaking agency to address "whether a rulemaking is required by statute or within the discretion of the agency."[130] As the Section argued, however, if the agency *wants* to rely on authority that the statute at least permits it to use, there is no functional justification for forcing it to discuss the counterfactual question of whether it could have declined to use that authority if it had preferred otherwise.[131]

The bill also would require a rulemaking agency to examine "[w]hether existing Federal laws or rules have created or contributed to the problem the agency may address with a rule and, if so, whether those Federal laws or rules could be amended or rescinded to address the problem in whole or in part."[132] This is a good example of the kind of issue that does not belong in across-the-board legislation such as the APA. Such an issue might be important in a small minority of cases but would be a distraction

128. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 633–34.

129. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015). *See also* Encino Motor Cars LLC v. Navarro, 136 S. Ct. 2117, 2126–27 (2016) (citing agency's failure to justify policy change in light of reliance interests involved, as alleged in an industry comment).

130. S. 951, § 3 (proposed § 553(b)(1)).

131. *See 2011 Section Comments on H.R. 3010*, *supra* note 11, at 634 n.26.

132. S. 951, § 3 (proposed § 553(b)(3)).

most of the time. Especially dubious is the requirement to inquire whether *statutes* should be amended to solve the problem addressed by the proposed rule. The agency has no power to induce a statutory amendment. If the agency wants to raise that issue with the relevant oversight committee, or if the committee wants to raise it with the agency (perhaps at the behest of an interested constituent), it has readily available channels for accomplishing that task. In the meantime, however, the agency should be able to proceed with the rulemaking without having to speculate about that eventuality. Similarly, some of the rules that might have "created or contributed to the problem" would be rules issued by other agencies, which the rulemaking agency would have no authority to alter.

The Senate bill also stated that a notice of proposed rulemaking must consider "[a] reasonable number of alternatives for a new rule that meet the statutory objective, *including* substantial alternatives or other responses identified by interested persons, with the consideration of 3 alternatives presumed to be reasonable."[133] In context, "including" implies "but not limited to"—and that implication is puzzling. If commenters suggest eight substantial alternatives, the agency should discuss all eight, but I do not see the value of requiring, in every rulemaking, that an agency must identify and rebut options that nobody has suggested.

Against the background of these arguments, one must ask why the RAA proponents have sought to prescribe "considerations" that agencies would have to discuss in any notice-and-comment rulemaking. The basic answer that emerges from the congressional reports seems to be that the factors are drawn directly from existing presidential oversight orders, particularly Executive Order 12,866,[134] the foundational document that sets the terms of executive oversight of rulemaking through OIRA. Thus, the goal is to put these extant directives into statutory form.[135] Part of the rationale, according to the Senate report, is that, "without codification, any President may change the process at any time through a new executive order, which inherently creates uncertainty in the current process."[136] However, if this modest objective were the main point, Congress could have avoided a good deal of controversy by simply providing that, like the executive orders themselves, agency compliance or noncompliance with the principles would be judicially unreviewable. To my knowledge, no RAA proponent has suggested such a solution. Judicial enforceability is the main point, or

133. S. 951, proposed §§ 553(b)(4) (emphasis added).
134. Exec. Order No. 12,866, 3 C.F.R. § 638 (1994).
135. 2011 HOUSE REPORT, *supra* note 15, at 22–25; 2017 SENATE REPORT, *supra* note 23, at 6–7.
136. 2017 SENATE REPORT, *supra* note 23, at 6.

at least a critical element of the proposals. The objective is to induce agencies to comply with the directives more consistently by turning them into binding obligations.

This objective misconceives the nature of the regulatory principles in the order. The order itself states that it "is intended only to improve the internal management of the Federal Government" and creates no enforceable rights. The entire order should be understood in that light. More specifically, the substantive principles that the RAA would codify are based on § 1(b) of the order. As the Section explained in its comments on the House bill:

> [T]hese executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases. Moreover, compliance with the order is not judicially reviewable. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and OIRA, but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them.[137]

Adding judicial review to the equation would, therefore, give the principles greater force than they ever were intended to have. They were not designed for maximum compliance. One could also add that the RAA would even make those principles enforceable with respect to *non-significant* rules—i.e., rules that OIRA has determined it does not need to discuss with the agency at all.[138]

In the abstract I could imagine an argument that, no matter what the order itself contemplated, the principles that the RAA would codify are so important that they deserve to be enforced as fully as other enforceable duties. However, I have shown above that some of them would likely be relevant to only a relative handful of rules, so that their applicability to notice-and-comment rulemaking proceedings in general would be extravagant. As with formal rulemaking, however, the more basic point to be made is that the proponents of the Act simply did not offer a factual case to show a need to alter the status quo. They had the burden to justify revising a system that seems to be working satisfactorily, and they did not make a serious effort to do so. Putting aside the issue of cost-benefit analysis, which I will discuss in the next section, I am unaware of any commentary in the legal

137. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 634.

138. *See* Exec. Order No. 12,866, *supra* note 134, §§ 3(f) (defining "significant" rules), 6(b)(1) (stating that OIRA may review only significant rules as so defined).

scholarship that has argued for such an innovation.[139] As with the public hearings provision, the Senate version can be defended with the argument that it is less far-reaching than the House counterpart. But in the absence of a good reason to change the status quo at all, this crude pragmatism is not persuasive.

I should add that, in order to obviate or ameliorate any problems that the RAA "considerations" provisions might bring about, the drafters of the Senate bill included what is informally known as a "savings clause." According to this provision,

> If a rulemaking is authorized under a Federal law that requires an agency to consider, or prohibits an agency from considering, a factor in a manner that is inconsistent with, or that conflicts with, the requirements under this section, for the purposes of this section, the requirement or prohibition, as applicable, in that other Federal law shall apply to the agency in the rulemaking.[140]

In light of the concerns I have raised in this section about the "considerations" requirements, I appreciate the impulse behind the savings clause, but I suspect that it could give rise to significant confusion. *Most* enabling statutes contain a framework of analysis that, either as drafted or as judicially construed, would seem to be "saved" by this provision. If a statute says to "take action on the basis of A, B, and C," this impliedly means that the agency should not take account of D also. It doesn't mean "consider A, B, and C, and anything else not expressly disavowed." It is apparent that the sponsors of the bill do not seek to override existing law; indeed, I take it that the purpose of the savings provision is to avoid doing so. On that premise, however, one has to wonder how the savings provision can be prevented from swallowing up the "considerations" provision altogether.

Realistically, one must assume that courts would try to find some reconciliation between the "considerations" language and the savings clause that would avoid rendering either provision superfluous. But I foresee no obvious way in which this could be accomplished, so the combination of

139. As I discuss in the next section, the House report relied on testimony from two economists based at the Mercatus Center. They had conducted studies indicating that agencies often give short shrift to regulatory analysis obligations or use such studies to justify preconceived conclusions reached on other grounds. *See infra* notes 154–157 and accompanying text. However, their studies pertained only to "economically significant" rules, a term that roughly corresponds to what the RAA bills call major rules. With regard to those rules, the Mercatus studies raise serious issues, which the next section undertakes to address. Surely, however, those studies cannot provide a foundation for revising the ground rules for the vastly broader domain of ordinary notice-and-comment rulemaking.

140. S. 951, § 3 (proposed § 553(g)(1)(A)). A parallel provision contains another savings clause that purports to prevent the RAA from overriding *procedural* provisions in an agency's enabling legislation. *Id.* (proposed § 553(g)(1)(B)). The critique set forth in the above text seems equally applicable to both provisions.

provisions would give rise to enormous uncertainty. For reasons I have set forth, I think a better solution would be not to adopt the "considerations" language in the first place.

2. Major Rulemaking by Executive Agencies

I now turn to the RAA bills' requirements regarding findings and analyses that must accompany the promulgation of "major" rules.[141] More precisely, this section focuses on the Senate bill, which would apply certain requirements exclusively to major rules. The findings and analytical provisions of the House bill apply equally to major and non-major rules; thus, I have already evaluated those provisions in the preceding section. Nevertheless, the concerns that I will express in this section about the Senate bill would apply just as strongly, or more strongly, to the House bill.

Under the Senate bill, an agency that intends to promulgate a major rule would be obliged to "consider, . . . unless prohibited by law, the potential costs and benefits associated with potential alternative rules, . . . including quantitative and qualitative analyses of the direct costs and benefits, the nature and degree of risks . . . [and] countervailing risks[,] . . . [and,] to the extent practicable, the cumulative and indirect costs and benefits."[142] The notice of proposed rulemaking would have to discuss those same factors, including "reasons why the agency did not propose an alternative considered [as per the above]."[143] In adopting the final rule, the agency would be required to choose, from among these alternatives, "the most cost-effective rule that would meet the relevant statutory objectives," unless "the additional benefits of the more costly rule justify the additional costs" and "the agency specifically identifies each [such] additional benefit [and cost]" and explains why it chose that rule instead of the most cost-effective one.[144]

141. In discussing this set of requirements, I will use the term "major rules" to include what the RAA bills call "high-impact" rules, because the bills treat both categories of rules the same way in this regard. This usage is consistent with the statutory definitions, because any high-impact rule (imposing a billion-dollar cost on the economy) would also have to be a "major" rule (imposing at least $100 million dollar cost on the economy). *See* S. 951, § 2 (proposed §§ 551(16), 551(18)).

142. *Id.* § 3 (proposed § 553(b)(5)).

143. *Id.* (proposed § 553(c)(1)(E)).

144. *Id.* (proposed § 553(f)(1)).

a. Background

These requirements are loosely based on principles articulated in Executive Order 12,866.[145] That order prescribes detailed regulatory analysis requirements[146] for "economically significant regulatory actions," a category of rules that is largely coextensive with "major rules" as the RAA would define that term.[147] The inquiry required by the order is also commonly known as cost-benefit analysis or benefit-cost analysis. The order currently applies to executive agencies but not to independent regulatory agencies.[148] The APA, however, applies to both kinds of agencies. Thus, enactment of the RAA would have the effect of extending the scope of regulatory analysis obligations to encompass rulemaking by independent agencies. This section evaluates the proposed changes insofar as they would apply to executive agencies; the next section examines their implications for independent agencies. I should note that I am, in general, a supporter of cost-benefit analysis as it is practiced pursuant to EO 12,866. My focus here is on how the RAA would depart from that baseline.

Even with respect to executive agencies, the RAA provisions would bring about a sharp departure from longstanding practice, because they would empower courts to invalidate a rule because of an agency's failure to comply with them, just as the courts do in remedying other APA violations. The executive order expressly disavows any intention to create judicial review rights,[149] and the courts have respected this disavowal.[150] This foreclosure of judicial review is a stable part of contemporary regulatory practice and has met with wide acceptance. Both the ABA and ACUS have

145. For simplicity of exposition, I will compare the RAA with Exec. Order No. 12,866 alone, omitting discussion of various other presidential oversight orders that also bear on regulatory analysis. *See, e.g.*, Exec. Order 13,563, 3 C.F.R. § 215 (2011) (a supplemental order issued by President Obama). The latter orders are important, but the analysis in this section could readily be extrapolated to apply to them.

146. Exec. Order No. 12,866, *supra* note 134, § 6(a)(3)(C).

147. *See id.* § 3(f)(1). Rules that fall into clause (1) of this subsection are informally known as "economically significant rules," although that term does not appear in the order itself. Such rules comprise a subset of the category of "significant regulatory actions," which the order does define in § 3(f).

148. *Id.* § 3(b) (exempting independent agencies). C*f.* Exec. Order No. 13,579, 3 C.F.R. § 256 (2011) (urging independent agencies to participate in retrospective review program but not purporting to require them to do so).

149. *See* Exec. Order No. 12,866, *supra* note 134, § 10.

150. Air Transp. Ass'n of Am. v. FAA, 169 F.3d 1, 8 (D.C. Cir. 1999); Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) (declining to allow judicial review under EO 12,291, the predecessor of EO 12,866); All. for Nat. Health U.S. v. Sebelius, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011).

taken the position that the process of executive oversight should not be reviewable in court.[151]

In another sense, however, the current executive order does facilitate some judicial supervision of agency rulemaking, because regulatory analysis documents are routinely added to the administrative record and are considered by the court as it decides whether the rule is arbitrary and capricious.[152] In an extensive and sympathetic survey of cases in which courts have examined the adequacy of cost-benefit analysis while evaluating the merits of agency rules, Caroline Cecot and W. Kip Viscusi found that the courts' review tends to be probing but deferential:

> Generally speaking, if an agency relies on a BCA [benefit-cost analysis], the court will evaluate whether the BCA is reasonable. But the reviewing court will generally not reverse "simply because there are uncertainties, analytic imperfections, or even mistakes in the pieces of the picture petitioners have chosen to bring to [the court's] attention," but rather "when there is such an absence of overall rational support as to warrant the description 'arbitrary or capricious.'" Upon finding a defect in the analysis, courts look to the seriousness of the flaw and the likelihood that correcting the error will change the agency's ultimate decision. Courts also consider the persuasiveness of the BCA as part of the evidence before the agency to determine whether the agency's chosen regulatory action was reasonable in light of this evidence.[153]

This assessment sounds broadly similar to the "reasoned decisionmaking" review that courts typically utilize when they evaluate the discretionary component of agency explanations for their rules. Note that, in nearly all of these cases, courts were considering whether particular rules were arbitrary and capricious—they were not judging the rules in relation to procedural statutes that directly prescribed the elements of cost-benefit analysis, as the RAA would do.

b. The RAA challenge

The question then becomes why the proponents of the RAA have sought to depart from this established, and seemingly reasonable, state of affairs. In its report, the House committee relied on testimony by two econ-

151. ABA Recommendation 302, 115-3 ABA Ann. Rep. 41 (Aug. 1990) ("[T]he presidential review process should not be judicially reviewable."); ACUS Recommendation 88-9, Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207 (Feb. 2, 1989) ("The presidential review process should be designed to improve the internal management of the federal government and should not create any substantive or procedural rights enforceable by judicial review.").

152. Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *Thomas*, 805 F.2d at 188–89.

153. Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 591–92 (2015).

omists from the Mercatus Centre, Jerry Ellig and Richard Williams. They had "examine[d] how well the executive-branch regulatory agencies do what presidents have been telling them to do for more than three decades."[154] Their conclusion from this research was that "agency regulatory analysis is often incomplete and seldom used in decisions."[155] The committee cited with apparent approval Ellig's comment that "[r]egulatory analysis needs to be legislatively required for all Federal agencies, including independent agencies."[156] The Senate report was terser on this point but apparently based on similar reasoning.[157]

To the extent that this explanation rests on the idea that agencies' noncompliance with the executive order, *as such*, is a reason to change the law, it is vulnerable to some of the same criticisms that I advanced in the preceding section. The order is best viewed as a management tool, as its language[158] and actual implementation indicate; thus, imperfect fulfillment of its principles is not necessarily a problem that needs a solution. Undoubtedly, however, the RAA proponents' main point is that regulatory analysis, and specifically cost-benefit analysis, is intrinsically beneficial, and amendments to the APA's rulemaking provisions would be an effective method of eliciting fuller and more serious use of this decisional technique. I will discuss their proposal primarily on that basis.

Congress's consideration of this issue did not begin with the current wave of APA revision bills. Essentially the same questions were at issue in the debate over regulatory reform bills in the middle to late 1990s. These bills would have imposed broad requirements for cost-benefit analysis and risk analysis upon federal agency rulemaking, and the role of the courts in such potential legislation was vigorously debated. In 1995, a bill originating from the Judiciary Committee would have authorized reviewing courts to conduct significant judicial review of contentions by challengers that an agency had not properly applied the bill's regulatory analysis requirements. A series of Democratic filibusters prevented this bill from being enacted.[159]

154. 2011 HOUSE REPORT, *supra* note 15, at 23.

155. *Id.*

156. *Id.*

157. 2017 SENATE REPORT, *supra* note 23, at 7 n.38 (citing to S. REP. NO. 114-342, at 2–3 (2016), which had in turn relied on similar findings by the Government Accountability Office).

158. *See* Exec. Order No. 12,866, *supra* note 134, § 10 (the order is "intended only to improve the internal management of the executive branch and does not create any right . . . enforceable against the United States").

159. Fred Anderson et al., *Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL. L. & POL'Y F. 89, 99 (2000); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 281–82 (1996) [hereinafter Sunstein, *Constitutional Moments*].

Arguably, this outcome teaches a political lesson—but if it does, the RAA sponsors have evidently not yet heeded it.

Meanwhile, the Committee on Governmental Affairs—the predecessor of the committee that reported S. 951 in the current Congress—endorsed language that approximately embodied the more constrained position that I have described above as the modern status quo. Under this language, the agency's compliance or lack of compliance with procedural obligations in the bill would not itself be reviewable (unless the agency did not perform the analysis at all), but the documents created through such analysis would become part of the record and considered by the court in an appeal from the issuance of the rule.[160] A bill that the committee sponsored in the following Congress contained similar language.[161]

Since neither the Judiciary nor the Governmental Affairs bill was enacted, one obviously cannot say that one of them was more politically viable. However, there was a difference in the respective bases of their support. In the following Congress, the Governmental Affairs bill became a vehicle for discussions of a deal that would have drawn significant support from members from both parties and also was acceptable to the Clinton administration.[162] The Judiciary bill, however, did not have the same degree of bipartisan support. This model was closer to the one that the RAA proponents have chosen to follow.

c. Some criticisms

It appears that the judicial role under the Senate RAA bill (and a fortiori the House counterpart) would be dramatically different from the deferential role courts now tend to play when they review cost-benefit analyses as part of their evaluation of the merits of a major rule. Judicial review of the procedural requirements of the APA is normally de novo—i.e., not deferential at all.[163] The RAA contains no language that would disavow

160. *See* Anderson et al., *supra* note 159, at 106–08. The bill reported by the committee in 1995 would have allowed a court to vacate a rulemaking in which a required regulatory analysis was "wholly omitted"; but if the analysis were performed, "the court shall not review to determine whether the analysis or assessment conformed to the particular requirements of this chapter." S. 291, 104th Cong. § 623(d) (1995), *as reported in* S. REP. NO. 104-88, at 78 (1995). At the same time, "any regulatory analysis for such agency action shall constitute part of the whole administrative record . . . and shall, to the extent relevant, be considered by a court in determining the legality of the agency action." *Id.* § 623(e).

161. S. 981, 105th Cong. (1998).

162. *See* Anderson et al., *supra* note 159, at 100.

163. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 235–36 n.6 (1973); Mid-Continent Nail Corp. v. United States, 846 F.3d 1364, 1373 (Fed. Cir. 2017) (relying on Collins v. NTSB, 351 F.3d 1246, 1252 (D.C. Cir. 2003)); Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 796 (5th Cir. 2000).

that standard assumption. It does not say, for example, that an agency must *reasonably determine* what the direct costs and benefits of a proposed or hypothetical alternative rule would be, nor what risks these alternatives would respectively entail. Rather, the court would apparently make its own judgment about what those costs, benefits, and risks would be.

Furthermore, the bill provides that the rulemaking agency must "consider" these and other variables, but the extent of the required "consideration" is not well defined. So far as one can discern from the text, the courts might undertake to decide whether one or more factors were *adequately* considered.[164] After all, the APA now provides in § 553(c) for "consideration of the relevant matter presented" to the agency during a rulemaking proceeding, and courts sometimes put teeth in that requirement. Recently, for example, in *Encino Motor Cars LLC v. Navarro*,[165] the Court said that "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."[166] Even though the agency in that case claimed that, "in reaching its decision, it had 'carefully considered all of the comments, analyses, and arguments made for and against the proposed changes,'" the Court concluded that the agency had not sufficiently explained the distinctions it drew, nor how the rulemaking comments supported the outcome.[167]

No matter what deference principles may emerge, the RAA's expansion of the courts' role would likely prove daunting, because so many of the bill's terms are vague, and application of these terms would call for sophisticated judgments that generalist judges are not well qualified to perform.[168] If anything, the experiences of the past twenty years have increasingly brought the complexities of cost-benefit analysis into view.[169] Among the salient challenges are the difficulties of incorporating valuations of human life into the cost-benefit calculus, applying appropriate discount rates to future costs and benefits, and considering the extent, if

164. Note that the 1995 Governmental Affairs bill, in contrast to the RAA, did contain such limiting language. *See supra* note 160.

165. 136 S. Ct. 2117 (2016).

166. *Id.* at 2125.

167. *Id.* at 2126–27.

168. *See, e.g.*, *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts, Commercial and Admin. Law*, 112th Cong. 20 (May 4, 2011) (testimony of Sally Katzen) ("I would ask you whether the Federal courts is [sic] really the proper forum for sifting through the cost-benefit analysis and deciding whether it has been properly used in formulating rules. Dr. Graham talked about the non-quantified aspects. Fairness was one. Justice might be another. Disparate impacts. How do you have Federal courts deciding?").

169. *See generally* Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 22–36 (2017) [hereinafter Sunstein, *Arbitrariness*].

any, to which worldwide repercussions of U.S. regulations should be taken into account. Moreover, even aside from the potential ramifications of judicial review, the RAA language would to some extent make the agency's assignment even more of a challenge than EO 12,866 now requires. The executive order provides that a regulatory analysis shall quantify costs and benefits "to the extent feasible," but that limitation does not appear in the RAA. Thus, the RAA would greatly magnify the inherent artificiality of attaching numbers to elusive variables such as fairness, equity, and human dignity. The prospect of directing judges to resolve the ensuing perplexities is sobering.

Compounding the difficulties of administering the cost-benefit analysis requirements would be the challenge of administering an additional, more outcome-oriented requirement in the RAA. The Act would require as a default matter that a major rule must be, among all options considered, "the most cost-effective rule . . . that meets relevant statutory objectives"[170]—not merely that the agency must reasonably determine that it is. The term "cost-effectiveness" is known to professional policy analysts,[171] but courts have little if any experience with it. Legislative adoption of the term as a governing standard would inject immediate and perhaps lasting uncertainty into most if not all major rulemaking proceedings. This default requirement would be overcome only if the agency explains its failure to adopt the most cost-effective rule in a discussion that "specifically identifies" the benefits and costs involved.[172] Again, the language suggests that the court, not the agency, is responsible for deciding whether "the additional benefits of the more costly rule justify the additional costs of that rule."[173]

Meanwhile, the inherent practical disadvantages of subjecting the process of regulatory analysis to judicial review, which I discussed in the preceding section, would recur in this context as well. As discussed above, risk-adverse agencies will have strong incentives to comply with any and all judicial interpretations of the RAA requirements. It is often easier to go along with stringent interpretations, even dubious ones, in order to avoid the disruptions that a judicial remand would cause.

170. S. 951, § 3 (proposed § 553(f)(1)(A)).

171. *See* OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 10–14 (2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf [https://perma.cc/T3ZF-7XXG].

172. S. 951, § 3 (proposed §§ 553(f)(1)(B)(ii)–(iii)).

173. S. 951, § 3 (proposed § 553(f)(1) (B)(i)).

d. Academic perspectives

I said in the preceding section that the scholarly literature on administrative law contains little if any significant support for the RAA provisions that I discussed there, i.e., APA amendments that would require agencies to take account of a new set of "considerations" as they conduct regular notice-and-comment rulemaking. I could not make so categorical a statement about the RAA provisions on analysis and findings requirements for major rulemaking (specifically, those in the Senate bill). There is a body of academic opinion that maintains that regulatory impact analyses (including cost-benefit analysis) in major rulemaking should be subject to robust judicial review, and that this judicial role should perhaps be strengthened through legislative action.[174] As I will discuss, however, these commentaries afford less support for the specific measures in the RAA than one might at first suppose.

As mentioned above, the House committee relied in its report on empirical findings in studies by Jerry Ellig and Robert Williams. Notably, however, Ellig's recent work has developed in a somewhat different direction. This evolution can be seen in a recent article that Ellig coauthored with Reeve Bull.[175] The article surveys the case law and concludes that, at their best, courts can handle the challenges of reviewing cost-benefit analyses and spotting weaknesses in agency performance.[176] However, the authors say, the courts' performance is inconsistent, sometimes verging into excessive deference, and therefore Congress should act to regularize their function.[177] That description is essentially similar to Ellig's testimony several years ago, but the proposed solution is different: an amendment to the *judicial review* section of the APA.[178] The authors' proposed statute would require a rulemaking agency to incorporate any regulatory impact analysis that it prepared into the administrative record. On review, a court would be expected to measure the agency's analysis against certain listed factors, including whether the agency identified a significant problem and its cause,

174. There is, of course, a vast literature on cost-benefit analysis as a general matter. Many observers who favor extensive use of the technique as administered by OIRA would nevertheless reject the idea that those procedures should generally be subject to judicial review. *See, e.g.*, Sunstein, *Constitutional Moments*, *supra* note 159, at 287; PHILIP A. WALLACH, AN OPPORTUNE MOMENT FOR REGULATORY REFORM 6–9 (2014), https://www.brookings.edu/research/an-opportune-moment-for-regulatory-reform/ [https://perma.cc/QBB4-GQHS].

175. Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725 (2017).

176. *Id.* at 766–84.

177. *Id.* at 787–91.

178. *Id.* at 792–93.

considered a reasonable range of alternatives, analyzed costs and benefits, and relied on the best available evidence.[179]

This proposal sounds similar to the RAA, but the authors differentiate between the two. They say that their article "does not address any external requirement to prepare an RIA or attempt to specify how an agency should use the results of such an analysis." They refer to the RAA and other pending proposals that do impose an RIA requirement, but they say that "there has been some uncertainty concerning whether courts are equipped to conduct judicial review of rules relying on the findings of an RIA and what such review might look like in practice."[180] Consequently, they say, the article "focuses solely on illustrating how to design a successful judicial review regime." In substance, it seems to be an effort to regularize best practices in hard look review of the merits. In this regime, the listed factors would perhaps be functionally comparable to pronouncements of the ABA or ACUS. The authors maintain that courts should not set aside (or remand) the action unless the agency's error in preparing those documents would have a material influence on the outcome.[181] The system is, therefore, inherently linked to the court's function of conducing substantive review.

One could debate whether amending the APA is the best way to regularize judicial review. There is a potential for confusion as to how binding the criteria would be. And perhaps the authors overstate the benefits of cost-benefit analysis. They appear to approve of each and every decision in which courts have reversed agencies for mishandling the analysis; the authors do not even address the possibility that some of these holdings may have been overly critical, based on misapprehensions, or excessively influenced by the judges' own value judgments. But, regardless, their proposed regime seems very different from the RAA, which would amend § 553, is unambiguously procedural, and would deploy the factors as rules of law, such that a breach of any of them would itself be a basis for reversal. It seems clear that Bull and Ellig do not endorse the latter.[182]

179. The authors contemplate that the court would decide whether the agency used the best available information by examining the evidence *in the record*, a task that they compare with "weighing evidence proffered by litigating parties." *Id.* at 792. It is not clear that the RAA contemplates that the agency may limit its decision to information supposed by parties, as opposed to evidence that it might be expected to search out on its own. In fact, the word "available" implies otherwise. *See generally 2011 Section Comments on H.R. 3010*, *supra* note 11, at 638–39 (suggesting for several reasons that the similar "best reasonably obtainable . . . evidence" mandate in H.R. 3010 was too open-ended).

180. Bull & Ellig, *supra* note 175, at 792.

181. *Id.* at 794.

182. In a follow-up draft paper, the same authors conclude that specificity in statutory economic analysis requirements would promote rigor and consistency in the application of those requirements, but they remain noncommittal as to the extent, if any, to which Congress actually should adopt such

Within the domain of legal academe, probably the most forceful supporters of judicial review as a means to strengthen the quality of cost-benefit analyses are Jonathan Masur and Eric Posner.[183] The principal thrust of their article *Cost-Benefit Analysis and the Judicial Role* is that agency rules should be permissible only if cost-justified, and courts are capable of enforcing that norm. They say, for example, that agencies should not rely on benefits without assigning quantitative values to them—even those commonly left unquantified at present. If such assessments cannot be made immediately, the agency can make a reasonable estimate and then revisit the issue after better information becomes available.[184] One of the authors' main contentions is that the case law is evolving toward a general principle that all agency rules must be cost-justified.[185] They discern support for this thesis in precedents such as *Michigan v. EPA*.[186] This may or may not occur, but to whatever extent this principle does ultimately take hold, courts could be expected to enforce it as they review particular rules on their merits. Even if it does not occur, courts can, as these authors advocate, hold a rule arbitrary and capricious under current doctrine when an agency's cost-benefit analysis is demonstrably shoddy.[187]

Of course, not all scholars have as high a regard for the virtues of cost-benefit analysis as Masur and Posner have.[188] To the extent that one lacks confidence in the technique itself, one is unlikely to favor the strong boost that the RAA would give to that technique. For the sake of argument, however, I will assume that the law is capable of working out an appropriate role for cost-benefit considerations for purposes of judicial review of the merits of major rules. The question then is whether the kind of *procedural* cost-benefit requirements that the Senate RAA would institute should also be part of the courts' arsenal.

Masur and Posner say they believe so. Indeed, they write that "[e]ven if courts were to enforce only the procedural requirements of CBA, they

measures. Reeve T. Bull & Jerry Ellig, *Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis*, 70 ADMIN. L. REV 873, 887, 946 (2018).

183. Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935 (2018).

184. *Id.* at 945.

185. *Id.* at 970–81.

186. 125 S. Ct. 2699 (2015). *See also* MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219 (D.D.C. 2016).

187. Masur & Posner, *supra* note 183, at 950.

188. *See, e.g.*, Amy Sinden, *A "Cost-Benefit State"? Reports of its Birth Have Been Greatly Exaggerated*, 46 ENVTL. L. REP. 10933 (2016).

would improve the performance of agencies."[189] However, they devote relatively little space to that aspect of their exposition. Moreover, their argument in that regard appears to envision a different procedural regime from the one that the RAA would institute. They write:

> Judicial review of CBA can be divided into two components, one procedural and the other substantive. In reviewing procedure, the court verifies that the regulator has quantified all the costs and benefits of the regulation and translated them into comparable units (dollars), and that the quantified benefits exceed the quantified costs. . . . [This] is an accounting procedure that any judge can undertake. It is no harder than verifying that the deadlines for notice-and-comment rulemaking have been obeyed.[190]

This optimistic assessment may be well taken as a description of some procedural regimes, but the detailed prescriptions of the RAA would, as I have argued, call for a good deal more than an "accounting procedure."

More generally, the crucial question should be whether the authors give proper weight to the costs as well as the benefits of judicially enforced cost-benefit analysis procedures. As Cecot and Viscusi write:

> Proper assessment of whether there should be an expanded role of the judiciary [in overseeing BCA] requires a comprehensive BCA of its own. What is the extent of the regulatory failures that need to be fixed? To what extent is an expanded regulatory oversight effort either unable or unlikely to be able to address these problems? And, if judicial review is enhanced, would the principal effect be to overturn regulations that are not in society's best interests, or would it delay or overturn beneficial regulations? The answers to these questions often hinge on the specific nature of the regulatory reform legislation.[191]

Masur and Posner are not oblivious to cost factors, such as delay and resource costs, as well as error costs if judges make mistakes in conducting their review.[192] They maintain that the weakness of cost-benefit practice by agencies is such that stricter judicial review will almost certainly be net-

189. Masur & Posner, *supra* note 183, at 950. Although this was not a direct endorsement of the RAA, Masur has elsewhere praised the Senate RAA bill itself. He says that, despite some imperfections, it "represents a significant and positive step in the direction of rational and cost-justified regulations." He adds that its "cost-benefit mandates . . . are likely to improve regulatory outcomes across a wide range of agencies and regulations." Jonathan Masur, *The Regulatory Accountability Act, Or: How Progressives Learned to Stop Worrying and Love Cost-Benefit Analysis*, 36 YALE J. ON REG.: NOTICE & COMMENT (May 4, 2017), http://yalejreg.com/nc/the-regulatory-accountability-act-or-how-progressives-learned-to-stop-worrying-and-love-cost-benefit-analysis-by-jonathan-masur/ [https://perma.cc/S3DU-DPKP].

190. Masur & Posner, *supra* note 183, at 949–50.

191. Cecot & Viscusi, *supra* note 153, at 607.

192. Masur & Posner, *supra* note 183, at 951–53.

beneficial.[193] However, the above analysis suggests that this may be too sanguine a prediction.

Masur and Posner's discussion of the well-known case of *Corrosion Proof Fittings v. EPA*[194] provides a context in which we can assess some of these issues on a more tangible level. In *Corrosion Proof*, the Fifth Circuit reviewed EPA rules that banned the sale of numerous consumer products containing asbestos. The rules had been issued pursuant to § 6(a) of the Toxic Substances Control Act.[195] At the time, that statute allowed the EPA to ban or regulate toxic substances that were already on the market, but only if they presented "an unreasonable risk of injury to health or the environment," and only "to the extent necessary to protect adequately against such risk using the least burdensome requirements." The court of appeals interpreted the last-quoted language of § 6(a) to mean that the agency must not merely "consider" alternatives to its proposed rule; rather, it must prepare a rigorous cost-benefit analysis of each such alternative.[196] The court found that the agency's cost-benefit analysis was deficient and remanded the rule for further proceedings for this reason among others.[197]

Masur and Posner write in support of the court's decision, although they acknowledge with admirable candor that academic opinion preponderates strongly in the opposite direction.[198] The authors argue at length that the case was correctly decided, because the agency's cost-benefit analysis was poorly prepared. At the same time, they acknowledge that the court's legal premise was debatable.[199] As others have argued,[200] the statute could have been read as not requiring in the first place that the agency must subject every alternative to a cost-benefit analysis. Masur and Posner treat this weak spot as a side issue,[201] in view of the deficiencies of the regulatory analysis document.

Actually, however, the legal ruling turned out to be profoundly important. The court's interpretation essentially terminated EPA's ability, or at least willingness, to use § 6(a) to force the withdrawal of toxic substances from the market. During the ensuing twenty-five years, EPA only invoked § 6(a) a handful of times, some of which resulted from express

193. *Id.* at 941.
194. 947 F.2d 1201 (5th Cir. 1991).
195. 15 U.S.C. § 2605(a) (2012).
196. *Corrosion Proof*, 947 F.2d at 1217.
197. *Id.*
198. Masur & Posner, *supra* note 183, at 954–55.
199. *Id.* at 956, 959, 960.
200. *See, e.g.*, Sunstein, *Arbitrariness*, *supra* note 169, at 24.
201. Masur & Posner, *supra* note 183, at 960.

statutory directives.[202] Eventually, in 2015, Congress overhauled TSCA with bipartisan legislation that abandoned the requirement of cost-benefit analysis of all alternatives. The Fifth Circuit's holding in *Corrosion Proof* was still being cited at that time as a principal culprit in having hamstrung the EPA's capabilities during the intervening period.[203]

Masur and Posner have some persuasive criticisms of the EPA cost-benefit study, and I will not quarrel with their conclusion that the document's deficiencies were significantly grave to discredit the rule under review. Standing alone, the court's holding to this effect would have been a significant setback for the agency's asbestos control initiative and would also have served a cautionary function in future rulemaking proceedings, but it would not have undermined the entire functioning of the statute. The legal ruling, on the other hand, stood as a continuing deterrent to commencement of any proceedings. This is the kind of problem that the RAA might invite with some frequency.

The conclusion that I would draw from the points I have made in this section is that review of the merits of a rule should remain the primary means by which courts will review the adequacy of agencies' regulatory analyses. When a court decides whether a given rule is arbitrary and capricious, the ultimate touchstone is whether any deficiencies in the analysis document cast doubt on the reasonableness of the agency's ultimate choice. That focus gives the courts some latitude to avoid creating excessive proceduralization of the rulemaking process. They have not always succeeded in avoiding that shoal, but at least this method compares favorably with a statutory regime that would render a rule unlawful if the court disagrees with an agency's application of any of the multiple intermediate inquiries required by the RAA. The latter would be much less conducive to judicial self-restraint when that virtue is in order.[204]

In short, statutory codification of cost-benefit analysis procedures in the APA, accompanied by all the judicial review implications that this step would entail, is fraught with potential problems. The support for this ap-

202. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CHEMICAL REGULATION: OPTIONS EXIST TO IMPROVE EPA'S ABILITY TO ASSESS HEALTH RISKS AND MANAGE ITS CHEMICAL REVIEW PROGRAM 27–29 (2005), https://www.gao.gov/new.items/d05458.pdf [https://perma.cc/6MS9-H95K].

203. *See, e.g.*, S. REP. NO. 114-67, at 4 (2015); John M. Broder, *New Alliance Emerges to Tighten Chemical Rules*, N.Y. TIMES (May 24, 2013), https://www.nytimes.com/2013/05/25/us/politics/lautenbergs-chemical-safety-bill-gains-momentum.html [https://perma.cc/M7K4-EJN3].

204. Although the doctrine of harmless error can serve to mitigate the severity of procedural review to some degree, its utility in this particular context would be quite limited. Harmless error would typically apply if a court finds that a particular error did not prejudice the opposing party at all. It is less apposite if the thrust of the government's defense is that the agency reached a reasonable decision even if it did not comply with all of the analytical steps prescribed in the RAA.

proach in the scholarly literature is limited and may be declining. Most importantly, the RAA proponents do not seem to have seriously faced up to these hazards, if they have considered them at all.

3. Major Rulemaking by Independent Agencies

The legislative reports on the RAA have highlighted the fact that it would require independent agencies to comply with the same cost-benefit and other regulatory analysis requirements as the bill would impose on executive agencies.[205] Business interests, and lawyers who represent them, refer to this aspect of the bill as among its most important features from their point of view.[206] By the same token, the extension has been resisted by commentators who are generally skeptical of the merit of cost-benefit analysis or who suggest that such analysis does not readily comport with the structure or missions of the independent agencies.[207] Regardless of which normative position one prefers, it must be evident that the proposed extension would be a major departure from the status quo, in which independent agencies are exempt from the rulemaking obligations set forth in the executive order.[208]

ACUS and the ABA have long been on record as supporting, in principle, the extension of the executive order to most independent agencies.[209] In line with that position, the ABA Administrative Law Section's comment letter on the House RAA bill in 2011 said that the Section would "strongly support" the bill insofar as it "would effectively extend a degree of OIRA oversight to rulemaking by independent agencies."[210]

A recent legislative development, however, has put this issue into a new light. Beginning in 2012, Senator Portman, who is also a lead sponsor of the RAA, has introduced a series of bills that would institute an alternative solution to the same objective.[211] This legislation, if enacted, would be known as the Independent Agency Regulatory Analysis Act (IARA Act). In

205. 2017 SENATE REPORT, *supra* note 23, at 7; 2011 HOUSE REPORT, *supra* note 15, at 24–25.

206. *See, e.g.*, *Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 43–51 (2011) (testimony of C. Boyden Gray); 2013 House Hearing, *supra* note 10, at 52, 62–63 (statement of Jeffrey A. Rosen).

207. *See, e.g.*, Buzbee, *supra* note 10.

208. *See* Exec. Order No. 12,866, *supra* note 134, § 3(b) (exempting independent regulatory agencies). The regulatory planning sections of the order do apply to the independent agencies. *See id.* §§ 4(b), 4(c).

209. Am. Bar Ass'n, Resolution 302 (1990), https://www.americanbar.org/content/dam/aba/directories/policy/1990_am_302.authcheckdam.pdf [https://perma.cc/P87M-MMWY]; ACUS Recommendation 88-9, Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207 (Feb. 2, 1989).

210. *2011 Section Comments on H.R. 3010*, *supra* note 11, at 648.

211. S. 1448, 115th Cong. (2017); S. 1607, 114th Cong. (2015); S. 1173, 113th Cong. (2013); S. 3468, 112th Cong. (2012).

carefully chosen language, it would "affirm" the President's authority to extend OIRA oversight to independent agencies.[212] The theory behind the bill is that a major reason why presidents have refrained from taking that step on their own has been the likelihood of congressional objections. Enactment of this bill would represent congressional acquiescence in such an extension, effectively removing the political obstacle.

The IARA Act would make a concession to the traditional autonomy of the independent agencies by providing that OIRA may not actually prevent an agency from issuing a rule with which it disagrees.[213] Taken as a whole, however, the bill seems to be a reasonable compromise measure that has considerable potential to resolve a longstanding impasse over the scope of executive oversight. The ABA has endorsed the bill in principle,[214] and I myself have publicly endorsed it in a letter signed by twelve administrative law professors.[215]

For present purposes, the salient point is that the bill would put independent agencies into roughly the same position as executive agencies now occupy. The bill states that "[t]he compliance or noncompliance of an independent regulatory agency with the requirements of an Executive order issued under this Act shall not be subject to judicial review."[216] At the same time, "any determination, analysis, or explanation produced by the agency [or the Office of Information and Regulatory Affairs] pursuant to an Executive Order issued under this Act, shall constitute part of the whole record of agency action in connection with [judicial] review."[217] The expectation is that the inclusion of OIRA recommendations in the record would exert considerable influence over the agency, because a reviewing court would expect an agency to justify its failure to accept OIRA's findings and advice.

The analysis in the preceding section of this article suggests that the IARA Act is far preferable to the RAA, because it eschews judicially enforceable procedures for cost-benefit analysis. Given the availability of this alternative bill, which also seems more likely to be politically salable to

212. S. 1448, preamble.

213. *Id.* § 3(c)(2) ("nonbinding assessment").

214. Letter from Thomas M. Susman, Director, ABA Governmental Affairs Office, to Senators Johnson and Carper (July 23, 2015), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015july23_independentagencyreg_l.authcheckdam.pdf [https://perma.cc/G7M7-2WXC].

215. Press Release, Senator Rob Portman, Portman, Warner Introduce Legislation to Provide Regulatory Relief, (June 18, 2013), https://www.portman.senate.gov/public/index.cfm/press-releases?ID=dd889275-da52-4764-b2c9-f02ab26fc881 [https://perma.cc/3QCN-6JYP] (linking to letter).

216. S. 1448, § 4(a).

217. *Id.* § 4(b).

Congress, the goal of extending OIRA review to the independent agencies does not constitute a good reason to support the RAA.

C. Scope of Review Provisions

Each of the APA revision movements in Congress during the past four decades has included proposals to revise § 706 of the Act, which prescribes or recognizes the scope of judicial review. Between 1979 and 1982, the so-called Bumpers Amendment provoked enormous controversy.[218] Its purpose was to curtail judicial deference to agencies' views on issues of law, especially as regards "jurisdictional" issues. In 1995, the Senate considered prescribing a new standard for review of the facts in informal rulemaking, as well as a revised version of the Bumpers Amendment, adapted to fit the *Chevron* era.[219] A current initiative in this same vein is a bill called the Separation of Powers Restoration Act.[220] This bill would provide that a court shall exercise independent judgment on questions of law, statutory interpretation, and rule interpretation. The evident purpose is to abolish *Chevron*[221] and *Auer*[222] deference.

The House RAA bill also contains some provisions that would drastically curtail judicial deference.[223] For example, a court would be instructed not to defer to any agency guidance (presumably not even to statements of general policy), nor to determinations made in the adoption of an interim rule. Despite the provocative nature of these proposals, they have engendered little public debate.[224] This relative silence may suggest a general perception that these changes are not being actively pursued.

In this section I will discuss two measures that have been more visible. One is a provision in the Senate bill that would modify *Auer* deference but not abolish it. The other measure, which appears in substance in both the House and Senate bills, would codify a definition of the substantial evidence test and provide that judicial review of high-impact rules shall be conducted pursuant to it.

218. *See* RONALD M. LEVIN, JUDICIAL REVIEW AND THE BUMPERS AMENDMENT (1979), https://www.acus.gov/publication/judicial-review-and-bumpers-amendment [https://perma.cc/9LCR-L4HN] (consultant's report for the Administrative Conference)

219. *See* Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647, 649–55 (1996) [hereinafter Levin, *Lessons of 1995*].

220. H.R. 76, 115th Cong. (2017); H.R. 5, tit. 2, § 202 (2017); S. 1577, 115th Cong. (2017).

221. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

222. Auer v. Robbins, 519 U.S. 452 (1997).

223. *See* H.R. 5, tit. 1, § 107 (proposed § 706(c)).

224. *But see 2011 Section Comments on H.R. 3010*, *supra* note 11, at 667–69 (criticizing a prior version).

In 1996, following one of these earlier controversies, I wrote a law review article maintaining that Congress should, in general, refrain from enacting scope-of-review legislation, because the doctrinal issues are complex and subtle, and the relevant concepts are difficult to express in statutory language.[225] In the context of measures like SOPRA, that perspective may seem irrelevant, because the whole point of such a bill would be to repudiate principles to which the courts are committed. But in the context of proposals like the RAA provisions, which express doctrinal principles that are not far removed from ones that the courts now apply or might foreseeably choose to apply on their own, the earlier thesis is more apposite. For reasons I will explain, the RAA proposals offer, in my judgment, fresh evidence that my thesis was correct.

1. *Auer* Deference

The Senate bill would add the following language as a new paragraph (e) of § 706:

> (e) AGENCY INTERPRETATION OF RULES.—The weight that a reviewing court gives an interpretation by an agency of a rule of that agency shall depend on the thoroughness evident in the consideration of the rule by the agency, the validity of the reasoning of the agency, and the consistency of the interpretation with earlier and later pronouncements.

As most readers of this article probably know, standard doctrine provides that an agency's interpretation of its own legislative regulation is "controlling" on a reviewing court unless the interpretation is "plainly erroneous or inconsistent with the regulation."[226] This principle was formerly known as *Seminole Rock* deference and is now more often called *Auer* deference.

It is also well known that *Auer* is now under serious challenge in the Supreme Court. On December 10, 2018, the Court granted certiorari in *Kisor v. Wilkie*[227] in order to consider overruling it. Although Justice Scalia, who launched this insurrection against the traditional doctrine,[228] has passed away, at least five of the current Justices have indicated some level of support for the reassessment that Justice Scalia sought.[229]

225. Levin, *Lessons of 1995*, *supra* note 219, at 664–66.

226. *Auer*, 519 U.S. at 461; Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 414 (1945).

227. 139 S. Ct. 657 (2018) (granting certiorari).

228. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., dissenting).

229. Garco Constr., Inc. v. Speer, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., joined by Alito, J., concurring) (stating that *Auer* should be reexamined in a properly briefed case); Patrick Gregory,

I myself have taken a stand in favor of the *Auer* standard.[230] I have taken issue with what is probably the most prominent argument against the doctrine—that it creates an incentive for agencies to adopt vague regulations, so that they may later wield broad freedom to interpret those rules in questionable self-serving manner without facing the rigors of the notice and comment process. A serious problem with that objection, as I wrote a few years ago,[231] is that no one has ever pointed to evidence that any agency actually has yielded to this incentive. I know of no one who has risen to this challenge since then. On the contrary, Daniel Walters has recently posted a careful empirical study that further rebuts the critics' argument against *Auer*.[232]

The literature on pros and cons of *Auer* deference is vast,[233] and this article is not the place to deal comprehensively with the deference issue. Instead of taking on that feat, I will develop a different point: Regardless of whether Congress agrees with whatever ruling develops out of *Kisor*, a legislative fix like that of the RAA is not the best solution. The ABA Administrative Law Section, which has members who span the philosophical gamut, subscribed to the substance of the same critique.[234] The following discussion borrows from and elaborates on that analysis.

The most obvious reason for Congress to refrain from coming to grips with the *Auer* issue is the likelihood that the Supreme Court will hand down a significant, if not altogether definitive, ruling in *Kisor*. This is not to say that Congress should, in general, act only where no alternative is available. Rather, the point is that development of deference doctrine through a case-by-case process lends itself well to experimentation, because the courts can correct overstatements and dubious statements rela-

Kavanaugh: 3 Scalia Dissents Will Become Law of Land, BLOOMBERG LAW (June 9, 2016), https://www.bna.com/kavanaugh-scalia-dissents-n57982073854/ [https://perma.cc/5CHQ-6TBZ] (reporting on then-Judge Kavanaugh's prediction, with apparent approval, that *Auer* deference will be rejected).

230. *See Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 36–47 (2015) (testimony of Ronald M. Levin). *See also supra* note 4 (citing SOPRA testimony).

231. Ronald M. Levin, *Auer and the Incentives Issue*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), http://yalejreg.com/nc/auer-and-the-incentives-issue-by-ronald-m-levin/ [https://perma.cc/G8ZH-4PQS].

232. Daniel Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 COLUM. L. REV. 85 (2019).

233. *See, e.g.*, Aaron Nielson et al., *Reflections on* Seminole Rock*: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 23, 2016), http://yalejreg.com/nc/category/symposia/reflections-on-seminole-rock-and-the-future-of-judicial-deference-to-agency-regulatory-interpretations/ [https://perma.cc/G264-WQ9T] (online symposium with contributions by twenty-seven scholars).

234. *2014 Section Comments on S. 1029*, *supra* note 12, at 17–18.

tively easily. With a statute, however, imprecise language is much harder to overcome.

Here is an example: In opposing the proposal in the Senate bill to replace the *Auer* standard, the Section drew attention to an overbreadth problem. It noted that, even if some applications of the proposed statute could be defended on the basis of the argument that *Auer* deference gives agencies an incentive to draft rules that circumvent the discipline of the notice-and-comment process, other applications could not: "Presumably, [the bill's revised scope of review provision] would also apply to regulatory interpretations that agencies develop in the course of formal adjudication, which does entail a decision making process that induces rigorous deliberation."[235]

Another illustration would be a situation involving a regulation that was properly adopted without notice and comment because the APA exempts it from that obligation. For example, regulations relating to a military or foreign affairs function of the United States may validly be issued without APA procedure.[236] It would seem that an agency that drafts such a regulation could not possibly have an incentive to write it vaguely in order to escape the burdens of notice and comment.[237] Arguably, therefore, an interpretive rule that construes such a regulation should in any event remain subject to *Auer* deference. If deference remains a case law doctrine, a court could easily carve out a special decisional principle for situations of this kind, but a statutory provision that supersedes *Auer* would presumably leave less room to make such exceptions.

Finally, the Senate bill illustrates the hazards of legislating to establish a standard of review to replace *Auer*. As I mentioned above, the proposed replacement would provide that "[t]he weight that a court shall give an interpretation by an agency of its own rule shall depend on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." That phrasing is similar to the well-known review standard of *Skidmore v. Swift & Co.*,[238] but it is not quite the same, because it omits additional language that is part of the clas-

235. *Id. See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force," such as with formal adjudication).

236. 5 U.S.C. § 553(a)(1) (2012).

237. *Cf.* City of New York v. Permanent Mission of India to U.N., 618 F.3d 172 (2d Cir. 2010) (upholding, under *Chevron*, State Department rule protecting foreign missions to the United Nations from local property taxes, although the rule was validly issued without notice and comment).

238. 323 U.S. 134, 140 (1944).

sical *Skidmore* formula: "and all those factors which give it power to persuade, if lacking power to control."[239] The Section was critical of that deletion: "We believe the adoption of multiple incarnations of the *Skidmore* test may prompt confusion as to whether they have independent meanings or the same meaning as the evolving interpretations of *Skidmore*. Surely the world does not need a 'rule interpretation *Skidmore*' that is different from the 'statutory interpretation *Skidmore*.'"[240] Inasmuch as the committee's "rule interpretation *Skidmore*" has no track record of having previously been applied by any court or codified in any statute,[241] one would have hoped for the report to have provided an explanation as to why that standard was adopted, how it would operate, or how, if at all, it would differ from the "statutory interpretation *Skidmore*." It did not.[242] If the committee was under the impression that the language that the RAA would codify encompasses all factors that courts have considered relevant in *Skidmore* review, it was mistaken.[243]

One could speculate that the drafters omitted the concluding language in the traditional formula because they felt that it was too vague and elastic to fit comfortably into an APA. If so, a better choice would have been not to undertake to codify *Skidmore* at all.

An adjacent provision, which would become a new subsection (d) of § 706, contains an even more puzzling drafting choice. It reads: "REVIEW OF CERTAIN GUIDANCE.—Agency guidance that does not interpret a statute or rule may be reviewed only under subsection (a)(2)(D)."[244] The subsection referenced in this provision would be the same as § 706(2)(D) of the current APA. Apparently, therefore, the amended § 706 would mean that agency guidance that does not interpret a statute or regulation—i.e., a statement of policy as opposed to an interpretive rule—would be reviewa-

239. *Id.*

240. *2014 Section Comments on S. 1029*, *supra* note 12, at 18.

241. The only provision in the United States Code that undertakes to codify the *Skidmore* formula quotes it in full. *See* 12 U.S.C. § 25b(b)(5)(A) (2012).

242. Possibly the discrepancy between the two *Skidmore* standards is simply the result of inadvertence. According to the Senate committee report, "New subsection 706(e) states that when reviewing an agency interpretation of its own rule, a court will give weight to that interpretation according to factors *such as* the thoroughness of the rule's consideration, the agency's reasoning, and degree of interpretive consistency." 2017 SENATE REPORT, *supra* note 23, at 16 (emphasis added).

243. *See* United States v. Mead Corp., 533 U.S. 218, 235 (2001) (stating that "expertness" can deserve weight in a *Skidmore* analysis); Michael Herz, *Judicial Review of Statutory Issues Outside of* Chevron, *in* ABA SECTION OF ADMIN. L. & REGULATORY PRACTICE, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 129, 141–42 (2d ed. 2015) (citing cases that have considered, among such additional factors, contemporaneousness of the interpretation, implicit congressional approval, and agency expertise); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1281–91 (2007) (similar).

244. S. 951, § 4 (proposed § 706(d)).

ble only for procedural error. I am at a loss to understand why Congress—especially members who are advocates for "regulatory accountability"—would wish to restrict judicial review in this way. For example, in *United States v. Texas*,[245] the recent Supreme Court case concerning the validity of the Department of Homeland Security's deferred action program, the plaintiffs challenged a policy statement on the grounds that it was unauthorized by the Immigration Act, violated the Take Care Clause of the Constitution, and should have been adopted through APA rulemaking procedure. I cannot conceive of a reason why Congress would want to allow only the third ground, not the other two, to be litigated in court. In any event, the subsection is unnecessary. Presumably, it was inserted into the bill in order to ensure that the prohibition on *Auer* deference would not apply to guidance that does not interpret a statute or regulation. However, the prohibition is itself worded to avoid that result, because it would cover only *interpretations* by an agency of its own rules.

In short, even if one agrees with the general thrust of Justice Scalia's critique of *Auer* deference, the inherent difficulty of trying to specify all the considerations that should be taken into account suggests that Congress should leave this quite narrow and specialized dialogue to the litigation process, in which the Court can work out answers over time in response to litigants' briefs and commentators' scholarship.

2. Substantial Evidence

The House and Senate RAA bills seek to clarify the meaning of "substantial evidence" by adopting explicit definitions of that term. They also would require the courts to apply that test during judicial review of high-impact rules. In this section I will discuss these two aspects of the bills separately.

a. Clarification?

The House bill would add to the APA a new § 706(b)(3), defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever fairly detracts from the weight of the evidence relied upon by the agency to support its decision." The Senate bill's definition would be the same but would omit the language following the comma. These two formulations appear to be identical in substance,

245. 136 S. Ct. 2271 (2016), *aff'g by equally divided Court* 809 F.3d 134 (5th Cir. 2015).

because the phrase "considered as a whole" logically subsumes the meaning of the language the Senate committee deleted.

The Senate committee report gave no reasons for adopting this amendment, so I will rely here on the explanation in the House committee report.[246] According to that report, the purpose of proposed § 706(b)(3) is to clarify the meaning of the substantial evidence test. The sponsors' aspiration is ironic, however, because one would be hard pressed to think of a judicial review doctrine in administrative law that is in *less* need of clarification. The case law on review of legal issues, including the *Chevron* and *Skidmore* doctrines, is complex and ambiguous, and the "arbitrary and capricious" test has acquired a cornucopia of disparate meanings, but the substantial evidence test is generally recognized as continuing to mean what Justice Frankfurter said it meant in 1952, in his opinion for the Court in *Universal Camera Corp. v. NLRB.*[247]

In explaining the meaning of substantial evidence in that case, Justice Frankfurter harked back to the definitional language of earlier decisions:

> [We have] said that '[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . .' *Consolidated Edison Co. v. NLRB*. Accordingly, it 'must . . . be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board Columbian Enameling & Stamping Co*.[248]

The Court then went on to discuss whether the APA had altered this definition. During deliberations on the APA, members of Congress voiced great frustration about what they viewed as the courts' too-lax implementation of substantial evidence review. A particular focus of this dissatisfaction was their belief that courts were prone, in many instances, to uphold agency decisions on the basis of evidence *supporting* the government's action, without considering other evidence that militated *against* that action. Without resolving whether this belief was well founded, the Court declared that such one-sided treatment must be avoided in the future. This admonition was reflected in the APA language that, to this day, provides that, in applying judicial review criteria, "the court shall review the whole record or those parts of it cited by a party."[249]

246. 2011 HOUSE REPORT, *supra* note 15, at 28.
247. 340 U.S. 474 (1952).
248. *Id.* at 477 (internal citations omitted).
249. 5 U.S.C. § 706 (2012). *See Universal Camera*, 340 U.S. at 482 n.15, 488.

All of this is well known and uncontroversial. The opinion arguably became more ambiguous, however, when the Court turned to "the question whether enactment of [the APA] has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents." On this issue, Justice Frankfurter stated that, in order to respect the legislative will, "courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past."

In the abstract, this remark could be interpreted in more than one way. The House committee report on the RAA, relying on a commentary by Professor Gary Lawson, evidently understood Justice Frankfurter to mean that the pre-Act doctrinal formulas defining the substantial evidence test were too weak and had to be replaced by a more stringent test.[250] But this is not the only possible reading. Justice Frankfurter may instead have meant that, prior to the passage of the Act, some courts had been applying the prescribed test *less* stringently than they should have—but in the future they must strive to apply the *same* doctrinal test more conscientiously. This second reading has, in fact, significant support in the legislative debates as discussed in the opinion.[251]

There is no need to quibble about the ambiguity in Justice Frankfurter's wording, however. Whatever he may have meant, subsequent cases in the Supreme Court[252] and lower courts[253] have overwhelmingly favored the second reading. These cases have gone right on relying on the pre-Act doctrinal formulas quoted in the *Universal Camera* opinion, eschewing any notion that the Court had actually replaced them with some alternative

250. 2011 HOUSE REPORT, *supra* note 15, at 28; GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 386 (5th ed. 2009).

251. *See, e.g.*, *Universal Camera*, 340 U.S. at 483–84 ("On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing 'substantial evidence' test. But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard."); *id.* at 484 n.17 (quoting charge by Senate Judiciary Committee that "'[a]s a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence.'"); *id.* at 489 ("The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized.").

252. Dickinson v. Zurko, 527 U.S. 150, 162 (1999); Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 149 (1997); Richardson v. Perales, 402 U.S. 389, 401 (1971); Ill. Cent. R.R. v. Norfolk & W. Ry. Co., 385 U.S. 57, 66 (1966).

253. Among countless examples, see, e.g., Duggan v. Dep't of Defense, 883 F.3d 842, 846 (9th Cir. 2018); FLRA v. Mich. Army Nat'l Guard, 878 F.3d 171, 176 (6th Cir. 2017); Oak Harbor Freight Lines, Inc. v. NLRB, 855 F.3d 436, 440 (D.C. Cir. 2017); Dana Container, Inc. v. Sec'y of Labor, 847 F.3d 495, 499 (7th Cir. 2017); Siemens Energy, Inc. v. United States, 806 F.3d 1367, 1369 (Fed. Cir. 2015).

test.[254] Thus, I see no need for Congress to "clarify" the substantial evidence test by disavowing an interpretation of it that courts do not actually endorse. And if such a relatively stringent *post-APA* version of the test did exist in current law, the RAA surely would not express that message very effectively by writing into law the language of one of the doctrinal formulas dating from the *pre-APA* period.

The committee report seems to suggest, however, that even if the "evidence [that] a reasonable mind might accept" formulation of *Consolidated Edison* remained good law after *Universal Camera*, courts have gone wrong by continuing to rely on the "directed verdict" formulation drawn from *Columbian Enameling*. The suggestion that there is anything wrong with this reliance seems odd, because Justice Frankfurter surely did not say that courts should draw any distinction between these two verbal formulas. On the contrary, as one can see from the above quotation, he referred to them in tandem. Many subsequent cases have continued to equate them.[255] Indeed, when a court decides whether to grant or deny a directed verdict motion in a civil trial, it asks whether a "reasonable jury" could find in favor of the adverse party[256]—an inquiry that sounds very much like the *Consolidated Edison* test of substantial evidence that the RAA would codify.

It is true that substantial evidence review plays out somewhat differently in the administrative law context than in civil procedure.[257] An agency—unlike a jury—is expected to write a reasoned decision supporting its action. The agency must "articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[258] The advent of hard look review has amplified the disparity. Thus, courts apply substantial evidence review differently in the two contexts because of fundamental differences between these two remedial systems, not because of any demand for greater stringency that Congress wrote into the APA in 1946. But this contrast does not mean that the sub-

254. Lawson sees *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), as a case that perversely followed pre-Act authority instead of the "new" test, LAWSON, *supra* note 250, but a simpler explanation would be that *Universal Camera* never did adopt a "new" test, or at least has not generally been interpreted as having adopted one.

255. Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966); Merck & Cie v. Gnosis S.P.A., 820 F.3d 432, 437 (Fed. Cir. 2016); NLRB v. Ky. May Coal Co., 89 F.3d 1235, 1241 (6th Cir. 1996); Yellow Freight Sys., Inc. v. NLRB, 37 F.3d 128, 130 (3d Cir. 1994).

256. FED. R. CIV. P. 50(a)(1).

257. This is a point made in *Chen v. Mukasey*, 510 F.3d 797, 801–02 (8th Cir. 2007), a case cited by Lawson.

258. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156 (1962)).

stantial evidence test of reasonableness is itself stricter in administrative law than in civil procedure. Both depend on the quantum of evidence that a reasonable person could find persuasive.

In sum, codification of the *Consolidated Edison* test would probably do no harm, but nothing in the House report suggests a need for Congress to enact such a "clarification."

b. High-impact rules

The Senate bill would add a new subsection to the APA, providing that a reviewing court shall, "with respect to the review of a high-impact rule, . . . determine whether the factual findings of the agency issuing the rule are supported by substantial evidence."[259] The drafters of the House bill—and also the original Senate bill—did not need to include such a provision in their bills, because they were proposing to subject high-impact rules to APA formal rulemaking procedure, which would automatically have the effect of triggering substantial evidence review.[260] However, these two approaches were alternative routes to similar judicial review destinations.[261] Thus, although the following discussion focuses on the current Senate provision, it would apply in roughly the same way to any of these bills.

When they introduced the original versions of the RAA bills in 2011, the House and Senate sponsors issued a press release declaring that application of the substantial evidence test in such proceedings would cause the ensuing rules to "be reviewed under a slightly higher standard in court."[262] In its subsequent formal report accompanying the bill, the House committee seemed less sure of that proposition. It remarked that the question of whether the substantial evidence standard differs in content from the arbitrary and capricious standard is "unsettled," adding that eminent judicial authorities consider the two standards "substantively equivalent." As I will explain here, the proposition that the two standards are "substantively equivalent" is by far the preferable view. Although the idea that substantial

259. S. 951, § 4 (proposed § 706(b)(3)).

260. *See* 5 U.S.C. § 706(2)(E) (2012).

261. Under the House bill, APA formal procedures (and therefore substantial evidence review) would also apply to a major rulemaking proceeding if the agency granted a petition requesting such treatment. *See supra* note 68.

262. Press Release, Senators Rob Portman & Mark Pryor & Representatives Lamar Smith & Collin Peterson, Regulatory Accountability Act of 2011: Key Provisions (Sept. 22, 2011), http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc [https://perma.cc/N9BT-Q3QH]. *See also* Francisco Testimony, *supra* note 101, at 178 (stating that the "'substantial evidence' standard is also deferential—though less so than the 'arbitrary and capricious' standard").

evidence is a more rigorous standard than arbitrary and capricious was widely accepted in earlier times,[263] it has become obsolescent in the modern era. Consequently, the sponsors' apparent intention to subject high-impact rules to a "slightly higher" standard of review was misconceived.

Congress came to grips with a very similar question years ago during its consideration of the Clean Air Act Amendments of 1977. The House sponsors of that bill proposed to institute substantial evidence review of Clean Air Act rulemaking. The House-Senate conferees, however, changed the standard back to "arbitrary and capricious," explaining that there may be little practical difference between the two. They cited to Judge Henry Friendly's observation that the two tests "tend to converge."[264] This was, I believe, a correct disposition of the issue. Unfortunately, the RAA sponsors do not seem to have caught up yet to the insight that some of their predecessors achieved four decades ago.

Indeed, since 1977 the courts' recognition of the "convergence" has proceeded apace, to put it mildly. A focal point for discussion has been *Ass'n of Data Processing Service Organizations v. Board of Governors*.[265] Then-Judge Scalia wrote for the D.C. Circuit in that case, declaring that "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter."[266] This has remained the view of the D.C. Circuit.[267] Moreover, *every one* of the other federal courts of appeals has cited *Data Processing* favorably or has otherwise acknowledged the equivalency of the two review standards.[268] The Supreme Court, too, has cited to *Data Processing* with seeming approval.[269]

263. Am. Paper Inst. v. Am. Elect. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983).

264. H.R. REP. NO. 95-564, at 178 (1977) (Conf. Rep.) (citing Associated Indus. of N.Y. State, Inc. v. Dep't of Labor, 487 F.2d 342 (2d Cir. 1973)).

265. 745 F.2d 677 (D.C. Cir. 1984).

266. *Id.* at 683.

267. *See, e.g.*, United Steel Workers Union v. PBGC, 707 F.3d 319, 325 (D.C. Cir. 2013); Butte Cty. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010); Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 422 (D.C. Cir. 1986).

268. Arranged in numerical order by circuit, relevant decisions include: Cruz v. Brock, 778 F.2d 62, 63–64 (1st Cir. 1985); Lee v. Bd. of Governors of Fed. Reserve Sys., 118 F.3d 905, 914 (2d Cir. 1997); Sevoian v. Ashcroft, 290 F.3d 166, 174 (3d Cir. 2002); GTE S., Inc. v. Morrison, 199 F.3d 733, 745 n.3 (4th Cir. 1999); Tex. World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 n.3 (5th Cir. 1991); Maple Drive Farms Ltd P'ship v. Vilsack, 781 F.3d 837, 881 n.22 (6th Cir. 2015); Cent. States Enters., Inc. v. ICC, 780 F.2d 664, 674 n.10 (7th Cir. 1985); Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005); Ursack, Inc. v. Sierra Interagency Black Bear Grp., 639 F.3d 949, 958 n.4 (9th Cir. 2011); Zen Magnets, LLC v. CPSC, 841 F.3d 1141, 1148 n.8 (10th Cir. 2016); Bd. of Water, Light & Sinking Fund Comm'rs v. FERC, 294 F3d 1317, 1329 (11th Cir. 2002); Consol. Bearings Co. v. United States, 412 F.3d 1266, 1269 (Fed. Cir. 2005).

269. Dickinson v. Zurko, 527 U.S. 150, 158 (1999).

Occasionally, it is true, one can still find cases that assert that the substantial evidence test is a stricter standard than the arbitrary-and-capricious test.[270] Thus, although the courts have not arrived at one hundred percent uniformity, it seems safe to conclude that the congressional sponsors who called the substantial evidence test a "slightly higher" standard were overstating the reality. No court of appeals in the country acknowledges such a difference with any consistency, and a majority expressly *deny* the existence of such a difference.

The reluctance of most courts to draw a distinction between the two standards in terms of stringency is understandable, because it is difficult to perceive any reason in principle why the distinction *should* be preserved. Traditionally, the two standards were regarded as inevitably different because substantial evidence review occurred on a "record."[271] Today, however, informal action is also reviewed on an administrative record.[272] The reviewing court examines the material in the record—including public comments, studies, and other information considered by the agency—to determine whether the agency "offered an explanation for its decision that runs counter to the evidence before the agency."[273] This inquiry is not materially different from what it would be if the court were conducting substantial evidence review in a formal proceeding. In addition, as agencies have increasingly used rulemaking and informal means of deciding matters that would have been addressed through formal adjudication in an earlier era, courts have responded by adapting conventional substantial evidence analysis to "arbitrary and capricious" analysis.[274] For example, the judicial "hard look," originally enunciated in the context of substantial evidence review,[275] is now a fundamental aspect of rulemaking review. Logically, there is no reason for judges to give a particular factual finding less critical

270. *See, e.g.*, *In re* Gartside, 203 F.3d 1305, 1312–13 (Fed. Cir. 2000); Color Pigments Mfrs. Ass'n v. OSHA, 16 F.3d 1157, 1160 (11th Cir. 1994); Aqua Slide & Dive Corp. v. CPSC, 569 F.2d 831, 837 (5th Cir. 1978). It has been argued that *Gartside* is more authoritative in the Federal Circuit than *Consolidated Bearings* on this issue because it was the earlier precedent. Consol. Fibers, Inc. v. United States, 535 F. Supp. 2d 1345, 1352–54 (Ct. Int'l Trade 2008). By that first-in-time reasoning, however, *Gartside* should have been controlled on this issue by the even earlier decision in *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 170 (C.C.P.A. 1980) ("[T]here appears to be no real difference between such standards."). Although that case was decided by the former Court of Customs and Patent Appeals, the Federal Circuit adopted all CCPA case law as binding precedent when it came into existence through a merger of that and other courts. S. Corp. v. United States, 690 F.2d 1368, 1370–71 (Fed. Cir. 1982) (en banc).

271. Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 143 (1967).

272. The RAA would expressly recognize the practice of maintaining such a record. *See* S. 951 (proposed §§ 553(c)(2), 553(d)(1)(A), 553(f)(4)).

273. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

274. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 36 n.75 (D.C. Cir. 1976).

275. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

scrutiny when it underlies a regulation than they would have given if it were a predicate for an adjudicative order.[276]

To my knowledge, the courts that have continued to assert that substantial evidence review is more stringent than arbitrary and capricious review have not offered reasons why such a distinction *should* be maintained. To some degree they may simply be repeating the teachings of older authorities without pausing to consider whether the traditional distinction continues to make sense in today's world. And certainly the congressional committees that are sponsoring the RAA bills have not offered reasons to justify the distinction. If anything, as noted above, the House committee seemed to throw cold water on the notion that it expected substantial evidence review to lead to different results from the ones that arbitrary and capricious review would have brought about.[277]

The Senate bill's special review standard for high-impact rules seems poorly conceived for one additional reason that I have not yet mentioned. As I have said, the presence of this provision in the bill indicates that the sponsors expect that such rules will be reviewed more intensively than other rules. At the same time, however, the bill would codify the traditional understanding that substantial evidence means evidence that could persuade a reasonable person. That result would be fine (from their point of

276. Ass'n of Data Processing v. Bd. of Governors, 745 F.2d 677, 685 (D.C. Cir. 1984). The discussion in the text is not inconsistent with the established doctrine that an agency does not always need complete factual support in the record when it makes "predictions, within its area of special expertise, at the frontiers of science," Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983), or "forecast[s] of the direction in which the future public interest lies," FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978). *See generally* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011) (discussing this line of cases). This doctrine usually comes into play during arbitrary or capricious review, but it also applies, with the same level of scrutiny, when the governing standard of review is substantial evidence. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 656 (1980) (plurality opinion); *id.* at 705–06 (Marshall, J., dissenting); FPC v. Fla. Power & Light Co., 404 U.S. 453, 463–69 (1972); Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

277. One other basis on which some courts have defended the proposition that substantial evidence review is more rigorous than arbitrary and capricious review is that in certain regulatory statutes Congress has specifically prescribed the former in lieu of the latter. For example, the Fifth Circuit endorsed this reasoning regarding judicial review of TSCA rules in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213–14 n.13 (5th Cir. 1991). However, the court read too much into this legislative decision. What Congress did was to provide that courts must review TSCA rules using the substantial evidence standard. It legislated nothing at all regarding the arbitrary and capricious test; and its *opinion* about the strength of that test as of 1976 says little if anything about whether the test was significantly different from the substantial evidence test as of 1991, let alone 2019. More specifically, the House-Senate conferees who agreed on the final TSCA language said that they "adopted the 'substantial evidence' test because they intend[ed] that the reviewing court focus on the rulemaking record to see if the Administrator's decision is supported by that record." H.R. REP. NO. 94-1679, at 96 (1976). Today, arbitrary and capricious review is also "focused" on the rulemaking record, so the assumptions that Congress made about that test forty years ago are not very illuminating.

view) as regards high-impact rules, which would thereafter be governed by this reasonableness standard, but it would also unmistakably imply that a rule that is *not* high-impact might not be arbitrary and capricious even if the facts on which it rests are *not* sufficient to persuade a reasonable person. That's the last thing that proponents of "regulatory accountability" should want Congress to say!

Thoughtful judges are no longer willing to uphold rules under the arbitrary or capricious test unless the factual premises of those rules are supported by evidence that a reasonable person could believe.[278] For proponents of "regulatory accountability" to espouse language that would cast doubt on the viability of that development would be highly self-defeating.

IV. LESSONS

The foregoing survey of key provisions in the RAA hopefully sheds some light on the merits of those provisions. Now I will turn to considering what implications this eight-year episode may offer about the prospects for APA revision in the future. Because my appraisal of the RAA has been decidedly critical of several of its most salient provisions, the reader will not be surprised to discover that the lessons I discern put more emphasis on "mistakes to avoid" than on "successes to emulate."[279] From my point of view, the sponsors went overboard in a few respects that I will summarize briefly.

Two decades ago, I wrote an essay that discussed the similarities between the APA revision bills that Congress considered in 1981 and 1995.[280] Referring to an appraisal that Professor Antonin Scalia had written about the 1981 bill,[281] I noted that some of his observations might just as easily have been applied to the 1995 effort. One of those observations was that "the impetus behind the current [i.e., 1981] reform movement is less dis-

278. *See, e.g.*, United Steel Workers Union v. PBGC, 707 F. 3d 319, 323–24, 325 (D.C. Cir. 2013) (stating, in a case governed by arbitrary and capricious review, that "the question for the court is whether there is 'such relevant evidence as a reasonable mind might accept as adequate to support' the agency's finding . . . . (Although that is a description of the 'substantial evidence' standard, 'in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.')") (citations omitted).

279. As previously noted, the RAA is basically designed to alter APA provisions on rulemaking and the scope of judicial review. The lessons suggested here do not necessarily apply to other APA provisions, including those relating to adjudication procedure, information policy, and access to judicial review.

280. Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at This Jubilee?*, 10 ADMIN. L.J. AM. U. 55 (1996) [hereinafter Levin, *Jubilee*].

281. Antonin Scalia, *Chairman's Message*, 33 ADMIN. L. REV. [xxxi] (1981).

tinctively legal, and more commercial or economic, than it was in 1946."[282] Indeed, the deliberations did not revolve around any "ABA bill." To the contrary, much of the initiative for the pending movement had come from business associations. He did not think this shift in leadership was necessarily an encouraging development: "The interest of the laity in administrative process, which now seems so flattering, may prove to be a bane."[283]

Justice Scalia's comments were also prophetic in relation to the RAA. The effort to revive trial-type procedures in major and high-impact rulemaking must be seen as designed to benefit regulated entities; in practice, those would overwhelmingly be business interests. The same is true of the proposals to codify numerous analytical steps in the rulemaking process, transforming duties that derive from executive management tools into judicially enforceable rights. Of course, a bill that aims to benefit business groups would not have to be, by definition, radical or extravagant. In the foregoing pages, however, I have tried to make a case that several of the most transformative features of the RAA bills were, indeed, too one-sided in the way they sought to resolve the inherent tensions between regulated persons and the regulators (or, to put the matter another way, between business interests and consumer or citizen interests).

The sponsors' focus on APA revision as a weapon against perceived overregulation was ironic. One might have thought that the most straightforward means that Congress could use in pursuit of that end would be to scale back parts of agencies' enabling legislation that it considered excessive. In vain did critics of the RAA argue that the rulemaking process actually operates fairly well at present and should not be reshaped to fulfill a fundamentally substantive agenda. Business groups have discovered that, in Scalia's words, "the politically simplest way to alter substance is to alter process."[284] In typically colorful fashion, he elaborated: "Early in this century, Sir Henry Maine called attention to the fact that substantive law is sometimes 'secreted in the interstices of procedure.' It is a profound insight—and perhaps as dangerous as the Knowledge of Good and Evil."[285] Even when legislative crusades to revise administrative procedures do not succeed, they can have political payoffs. In their study of regulatory reform initiatives in the states, political scientists Stuart Shapiro and Debra Borie-Holtz have pointed out that "political control of the legislature correlates much better with the number of regulations adopted in a state than does any

282. *Id.* at [xxxv].
283. *Id.* at [xxxvi].
284. *Id.*
285. *Id.*

aspect of regulators' procedural environment." Nevertheless, they continue, "business owners *believe* that regulations hinder their profit margins." Consequently, "elected officials find it politically efficacious to implement regulatory reforms." While "repealing [substantive] laws entails a political cost . . . , procedural reform provides a way for politicians to appear to be addressing concerns about too much regulation—all without actually doing much of anything."[286]

Although the Republican Congress did not repeal many substantive regulatory statutes during 2011–18, the business world's political priorities did come to fruition in a different manner when Donald J. Trump was elected to the presidency. He himself, as well as administrators he has appointed, have gone far to roll back substantive policies that were the targets of objections during the Obama years.[287] His election also created the necessary conditions for Congress to nullify more than a dozen individual Obama-era regulations using the Congressional Review Act.[288]

In the late stages of previous waves of APA revision efforts during the 1970s and 1990s, the election of Republican presidents—Ronald Reagan and George W. Bush, respectively—led would-be reformers to reconsider their commitments to curbing the power of the executive branch. At least in the short run, *their* party's administrators would be the ones to bear the burdens of whatever restraints would be imposed.[289] It is interesting that this dynamic did *not* seem to operate in that manner in 2017–18. One reason may be that the Trump administration was itself committed, at least nominally, to "deconstruction of the administrative state,"[290] a brand of

286. Stuart Shapiro & Debra Borie-Holtz, *The Politics of Regulatory Reform*, REG. REV. (Oct. 21, 2013), https://www.theregreview.org/2013/10/21/21-shapiro-borie-holtz-2/ [https://perma.cc/E2BU-29CD]. For elaboration, see STUART SHAPIRO & DEBRA BORIE-HOLTZ, THE POLITICS OF REGULATORY REFORM (2013).

287. *See, e.g.*, Philip Bump, *What Trump has undone*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/politics/wp/2017/08/24/what-trump-has-undone/?noredirect=on&utm_term=.cc7fb6ba16e8 [https://perma.cc/99L7-HTYS].

288. Stephen Dinan, *GOP rolled back 14 of 15 Obama rules using Congressional Review Act*, WASH. TIMES (May 15, 2017), https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/ [https://perma.cc/9ZRR-7GYG].

289. *See generally* Antonin Scalia, *Regulatory Reform—The Game Has Changed*, 5 REG. 13 (1981) (elaborating on the rationale for such reconsideration, from a Republican point of view).

290. Philip Rucker & Robert Costa, *Bannon vows a daily fight for 'deconstruction of the administrative state'*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?noredirect=on&utm_term=.466e6f09dd2a [https://perma.cc/NLJ8-7RX9].

rhetoric that was largely compatible with the premises of RAA proponents.[291]

The apparent absence of objection to the RAA from the Trump administration can also be seen as a reminder that the impetus for the current pressure for legislative restructuring of the administrative process has not been solely a matter of appealing to business interests. It has also had an ideological flavor, reflecting libertarian or "antiadministrativist" impulses.[292] The sponsors' mood of mistrust of administrative agencies is particularly evident from their consideration of proposals for legislative revision in the scope of judicial review of agency action. The RAA language that would curtail *Auer* deference is one illustration of this, and SOPRA is an even clearer example.

As should be apparent from the foregoing account, some of the forces driving the RAA's most controversial provisions mirror longstanding differences in political perspectives between the Republican and Democratic parties. Inevitably they have led to the partisan divisions that, for the most part, have separated supporters of the bills from opponents of it.[293] Indeed, those divisions can be seen as a reflection of the larger patterns of polarization that have prevailed in Congress and the electorate over the past several years.[294] The basic story is familiar: External groups press members to take ideologically polarizing positions. Members are under pressure to accede to pressures from external interest groups or else face challenges in primaries from more ideologically pure opponents. Centrist politicians accede to relatively inflexible or ideological stances or leave the legislature altogether. With forces of this kind operating in policy fights that grab the headlines, such as in health care, immigration, and taxation, one should not be sur-

291. *See* NEOMI RAO, THE ADMINISTRATIVE STATE AND THE STRUCTURE OF THE CONSTITUTION (2018), https://www.heritage.org/sites/default/files/2018-06/HL1288_0.pdf [https://perma.cc/PV5D-H6AE] (an explication of the Trump administration's deregulation program, written by its OIRA administrator).

292. *See generally* Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

293. The Senate bill was actively promoted as "bipartisan." *See, e.g.*, Christopher J. Walker, *The Regulatory Accountability Act Is a Model of Bipartisan Reform*, REG. REV. (May 18, 2017), https://www.theregreview.org/2017/05/18/walker-model-bipartisan-reform/ [https://perma.cc/G449-F26X] (calling the bill "bipartisan" eight times in an essay of about 1200 words). This label was more than a little argumentative, however, because the bill had only two Democratic sponsors.

294. *See, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012); Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015); Christopher Hare et al., *Polarization in Congress has risen sharply. Where is it going next?*, WASH. POST (Feb. 13, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/?utm_term=.091c6450f06c [https://perma.cc/WV9N-SZGB].

prised to find parallels in the less visible arena of disagreements over the future of administrative procedure.[295]

I do not want to overstate the polarization in this debate. As Part II of this article summarizes, the bills included some provisions that had no particular partisan valence. Moreover, at least on the Senate side, Republican drafters consulted with Democratic members and staff, made some changes to accommodate positions emanating from that side, and got a few Democrats to cosponsor what became known as the Portman-Heitkamp bill.[296] But this level of accommodation was not enough. On key provisions such as the measures examined in Part III, the lead sponsors were evidently committed to APA amendments that by their nature were more likely to appeal to the Republican base than to a broad segment of the electorate. If the sponsors had been sufficiently interested in getting more widely acceptable APA amendments onto the statute books, they could have dropped these relatively provocative provisions, or revised them into forms that would be more compatible with current administrative law practice. But they did not, perhaps because they would then have lost support from colleagues who were less interested in compromise. There has been a history of APA revision bills that were designed to appeal to centrists in each party, at the possible price of foregoing support from legislators at both ends of the political spectrum,[297] but this legislative strategy did not seem to emerge in the RAA controversy.

Many provisions in the RAA bills had little to no support from (or were opposed outright by) broadly based organizations like ACUS and the ABA and its Administrative Law Section. Those organizations are far from perfect, but they can at least claim that their recommendations have survived scrutiny from a broad segment of administrative lawyers, including private practitioners, government lawyers, and academics. If the proponents had been willing to work within parameters outlined by such groups, they might have arrived at a more defensible package.

295. The principal committee reports in the House and Senate included spirited dissents by committee Democrats. 2011 HOUSE REPORT, *supra* note 15, at 70–106 (dissenting views); 2017 SENATE REPORT, *supra* note 23, at 21–27 (minority views). For a broader critique by House Democrats of Republican regulatory reform proposals, see Congressmen John Conyers, Jr., et al., *The Dangers of Legislating Based on Mythology: The Serious Risks Posed by the Anti-Regulatory Agenda of the 115th Congress and the Trump Administration*, 54 HARV. J. ON LEGIS. 101 (2017).

296. *See* Cheryl Bolen, *Regulatory Accountability Act Introduced With New Twist*, BLOOMBERG ENV'T (Apr. 26, 2017), https://news.bloombergenvironment.com/environment-and-energy/regulatory-accountability-act-introduced-with-new-twist [https://perma.cc/9E5U-9KZU] (quoting Senator Heitkamp as calling the "savings clause" in S. 951 a "new twist that [the] sponsors hope will attract more support from Democrats than in the past").

297. *See supra* note 162 and accompanying text (discussing the bills sponsored by the Senate Governmental Affairs Committee in the 1990s); Anderson et al., *supra* note 159, at 99–101 (same).

In addition to arguing that some of the RAA proposals were too ambitious or misdirected in their thrust, this article has pointed out instances in which some of the bill's provisions fell short in terms of careful analysis, factual support, and precise drafting. To be sure, the RAA enactment process was never completed, and it is typical for draft legislation to have some rough spots. But these bills progressed very far through the legislative process. The House passed the RAA in each of the past four Congresses. The Senate Homeland Security and Governmental Affairs approved its version, teeing it up for floor action. One ordinarily would think that, by the time it gets this far, a bill should be in nearly final shape. I do not dismiss the difficulty of getting agreement for changes to a bill—particularly a complex one with numerous discrete provisions—from a wide range of stakeholders. But it is hard to escape the feeling that the bills were pushed forward before they were ready. One should bring high expectations of care to the formulation of permanent framework legislation.

As we look ahead to the 116th Congress, with its turnover of control of the House to the Democrats, we can expect that APA revision will either shift into a more bipartisan mode, or else become quiescent for a while. Presumably, the most controversial features of the RAA will make no further progress any time soon, but this assumption leaves room for uncertainty about the fate of the larger project of APA revision. A bearish scenario would be that, without the allure of hot-button reform measures, the more mainstream features of the bills will not command enough support in Congress to travel very far. Such good-government proposals have often failed to attract interest in the eternal competition for legislators' attention.[298]

A more bullish scenario can also be imagined, however. Perhaps congressional leaders will retain a desire to take advantage of the time and effort that many have invested in the project of APA revision. The idea that this seventy-year-old statute needs updating may prove to be a cause that a truly bipartisan coalition could embrace. We might see continued life for some of the ideas in the RAA, and perhaps more progressively-oriented proposals[299] would get consideration as well.

298. *See* Levin, *Jubilee*, *supra* note 280, at 62.

299. *See* Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong. (2018) (bill introduced by Senator Elizabeth Warren, including "Rulemaking Reform" in title III); James Goodwin, *Warren's Bill Presents Progressive Vision for Rulemaking Reform*, REG. REV. (Nov. 5, 2018), https://www.theregreview.org/2018/11/05/goodwin-warrens-bill-presents-progressive-vision-rulemaking-reform/ [https://perma.cc/K6NH-6YHQ] (endorsing the Warren bill); FARBER, HEINZERLING, & SHANE, *supra* note 115 (package of reform proposals by progressive scholars). *See also* William Funk, *The Future of Regulatory Reform—A Review and Critique of Two Proposals*, 94 CHI.-KENT L. REV. (forthcoming 2019) (critiquing these two sets of proposals).

Regardless of when the next chapter of APA revision is written, legislators—including those who think of themselves as "conservative"—should be cautious about the radical experimentalism that pervades much of the RAA. Because of the APA's government-wide reach, the potential for unanticipated consequences is high. I hope that Congress will engage closely with the critiques of the RAA presented in this article and elsewhere. An inclusive decisional process is essential if Congress is to produce a revised APA that will be realistic, workable, and durable.