Cato Handbook *for* Policymakers

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1. INTRODUCTION

At the Cato Institute, we stand firmly on the principles of the Declaration of Independence and the Constitution—on the bedrock American values of individual liberty, limited government, free markets, and peace. Throughout our more than 40 years, we have been willing to criticize officials of both parties when they sought to take the country in another direction. But we have also been pleased to work with administrations and members of Congress of both parties when they seek to expand freedom, limit government, or protect the Constitution. Of course, our scholars will not hesitate to criticize unwise, imprudent, or dangerous initiatives from any source.

This *Handbook* details hundreds of policy recommendations for state and federal policymakers in some 80 chapters. But the most urgent task for our constitutional republic is to foreclose opportunities to interrupt the peaceful transfer of power after a vote of the people, as Walter Olson outlines in the chapter titled “Election Law.” In particular, Congress should clarify and tighten the poorly crafted Electoral Count Act of 1887, which lays out rules for Congress’s handling of certified electoral votes following a presidential election. State legislators should pursue best practices for both ballot security and voter convenience and ideally adopt tabulation methods that yield a substantially complete result on Election Night, to avert confusion or misrepresentation about which candidate has won. In the chapter “Congress, the Courts, and the Constitution,” Roger Pilon calls on members of Congress to examine the constitutionality of proposed laws and to summon the fortitude to tell constituents when necessary, “I have no authority to do what you want me to do.” To those tasks we might add that members must resolve not to support baseless allegations of stolen elections. We should remember something Milton Friedman used to tell us: “Freedom is fragile; we can’t take it for granted.” It is up to every citizen and especially policymakers to act in such a way as to support and defend our constitutional order.

Policy Challenges

Many chapters of the *Cato Handbook* propose big, systemic changes that would address fundamental policy problems. Other chapters, and sometimes the same ones, offer very detailed, specific ideas for policy improvement. Here I'll touch on just a few big ideas.

Peace and Security

The historical foreign policy of the United States, going back to the Founders, was expressed by Thomas Jefferson in his first inaugural address: "Peace, commerce, and honest friendship with all nations—entangling alliances with none." In the 20th century, we moved away from that historical noninterventionist stance to a policy of ongoing global intervention. For the past 30 years, we have been involved in a seemingly endless war in the Middle East. Wars that began with limited purposes—to block Saddam Hussein's takeover of Kuwait and to retaliate against al Qaeda and the Taliban in Afghanistan for the 9/11 attacks—metastasized into a regionwide campaign of regime change and nation building.

The White House and the State Department should work with Congress to undertake a comprehensive review of the foreign policy of the United States, the most secure power in world history, protected by two oceans and friendly neighbors. In an interconnected world, with terrorism and nuclear weapons, military conflicts should be kept limited and regional, not escalated through superpower involvement.

See especially chapters by Justin Logan titled "Restoring Realism and Restraint in U.S. Foreign Policy" and "Middle East Security," along with other chapters on terrorism, regional issues, and a defense budget appropriate for a constitutional republic.

Economic Growth

In a world of global markets and rapid technological progress, we struggle along with annual growth rates far below what we achieved from World War II until the mid-1970s. That trend has only worsened with the very slow growth that followed the Great Recession. We are by any measure a very wealthy country. Our gross domestic product (GDP) has risen every year, with the exception of slight drops during the recession and the COVID-19 pandemic. But Americans know that our economy is not working as well as it should. They fear that their children might not live as well as they did. This slow growth matters most to those who are not yet well-off. Policymakers should take the problem of growth more seriously and recognize that faster growth would help achieve not only higher living standards, but also stronger public finances and less ugly conflict among people who feel their well-being is at risk.

Ryan Bourne proposes reforms in his chapter “Prioritizing Economic Growth.” In other chapters, he and other authors suggest more reforms that could increase growth, such as stabilizing monetary policy; liberalizing trade; reducing the burden of taxes, borrowing, and regulations; freeing up housing markets; and reducing federal spending.

Health Care

Health care has been a major issue in American politics for many years. Dissatisfaction with the Affordable Care Act of 2010 may have played a role in several recent elections. America leads the world in medical innovation. Yet research indicates that much of what Americans spend on medical care—through both government programs and a private sector heavily dominated by government interference—offers no benefit to patients. As research also indicates, this is in large part because American health care is so often unsafe.

The fundamental problem with U.S. health care is that the consumer does not control the money spent in the sector; the system, instead, serves those who do control the money. For 80 years, government has been assuming greater control over consumers’ health care dollars, either by inducing workers to contract for medical care through their employers or by direct expenditure. When consumers lose control of their health care dollars, they lose control of their health care decisions. Consumers cease to be cost-conscious, and prices rise. Government decides what kind of health insurance we get, where we get it, and how doctors will practice medicine—and more patients end up falling through the cracks. The Affordable Care Act didn’t do anything to take us off that path.

In several chapters, Michael Cannon proposes reforms that would make health care higher quality, more affordable, and more secure by putting patients in charge of their health care dollars and decisions.

Fiscal Reform

Federal spending and the national debt have soared under our past four presidents. Trends like this are unsustainable, as Jeffrey Miron notes in “Averting National Bankruptcy.” Yet elected officials continue to promise more spending on everything from new weaponry and college tuition to very loosely defined infrastructure. The economist Herbert Stein famously said, “If something cannot go on forever, it will stop.” The question is how it will stop—through deliberate restraint and reform or through sudden crisis. Congress and the administration must find a way to rein in this profligacy. Budget-cutting ideas can be found throughout this *Handbook*.

The current rates of spending don't yet reflect the acceleration of entitlement spending that is occurring as baby boomers start to retire. Entitlements are already more than half the federal budget, and they account for two-thirds of projected spending growth. The unfunded liability of Social Security and Medicare is some $160 trillion, an unfathomably large number. Entitlement spending will accelerate as baby boomer retirement picks up in coming years and America continues to age. Congress needs to think seriously about this problem. Are members prepared to impose the taxes necessary to fund such levels of transfer payments? Do we want that many Americans dependent on a check from the federal government? Eventually, the projected level of entitlements will not be feasible. Now is the time to make changes—rationally, rather than in a panic a few years hence. Several chapters discuss health care and Social Security reform.

Trade and Immigration

Americans sense that our economy isn't working right. Too many of them look for some external force to blame, especially imports, outsourcing, and immigration. Recently, they have found plenty of candidates ready to propose policies to restrict trade and immigration. That's the wrong approach.

If economists agree on any topic, it is that free trade benefits the whole society. Free trade ensures that goods and services are produced at the lowest cost possible, benefiting consumers. It directs investors, entrepreneurs, and employees toward firms at which they can produce the most value and earn the most income. As trade barriers have come down since World War II, more people in more countries have been able to participate in the global economy and move out of poverty.

Immigration is more controversial, but it too has benefited this nation of immigrants. Immigrants move to the places where opportunities are greatest. They come as producers of goods and services for all Americans and as consumers of the things other Americans produce. Both free trade and immigration can cost particular people their jobs and investments, and that is a painful process. But so can technological development. The invention of farm machinery and the automobile destroyed millions of jobs, but it created more and better jobs. That's a continuing process. There is surely no point in the past—1900, 1950, 1975—at which we should have frozen technology and trade in an attempt to prevent future job losses. Nor is today such a point. The solution for suffering communities in the so-called Rust Belt is not the vain hope of bringing back lost jobs; the solution is to reduce tax and regulatory obstacles to business expansion and job creation.

The term "economic nationalism" has cropped up lately. It may sound good to many ears. Why wouldn't we want our nation's economy to succeed? But what does the term mean? In 2016, columnist Bret Stephens answered that question:

> In its milder form, economic nationalism means state subsidies for national-champion companies, giant infrastructure projects, targeted tariff protections for politically favored industries, "Buy American" provisions in government contracting, federal interventions against foreign takeovers of "sensitive" companies. . . .
>
> In France, it has meant bailouts for failing industrial giants like Alstom. In Japan, it has meant 800% tariffs on imported rice, decades of blowout spending on airports, roads and bridges, and chronic hostility to immigration. Russia passed more protectionist measures in 2013 than any other country, according to the *Moscow Times*.
>
> What do these and other countries that practice variants of economic nationalism have in common? France, where the state accounts for 57% of the economy, hasn't seen annual GDP growth top 3% since the turn of the millennium. Japan, which has the world's oldest population along with the highest debt-to-GDP ratio, experienced no fewer than five recessions between 2008 and 2015. Russia's GDP contracted by 40% between 2013 and 2015. Its economy is now half the size of Great Britain's.
>
> Economic nationalism, in other words, means economic ruin—along with all the political favoritism, crony capitalism and inefficiency that Americans usually associate with Solyndra, the Synfuels Corp., or the Port Authority of New York and New Jersey.

That is not a road the United States should go down. Scott Lincicome and others discuss a smarter trade policy in "International Trade and Investment Policy," and David J. Bier and Alex Nowrasteh point the way to immigration reform in the chapter "Immigration."

The Role of Federalism

Defending the life, liberty, and property of Americans is the fundamental responsibility of the federal government. Clearly, that task requires the focus of the president, federal agencies, and Congress. A government that tries to do everything will do nothing well. Members of Congress should read Article I, Section 8, of the Constitution, which lays out the powers granted to the federal government, and resolve to begin shedding tasks that are inappropriate for the federal government. A good place to begin is by shedding responsibilities that more properly belong to the several states.

Recent administrations have moved us away from our heritage as a federal constitutional republic, with a government of limited powers, and toward a centralized, national plebiscitary democracy with an essentially unconstrained national government. Some people on both the left and the right—particularly when they view themselves as dominant in national politics—seem to want the national government to run everything from our health care system and our local schools to the COVID-19 response. But many Americans still appreciate that the Constitution establishes a government of delegated, enumerated, and thus limited powers; that most political decisions should be made in the states and communities; and that liberty and federalism are still the best foundation for freedom, prosperity, and social harmony.

The philosophy of "centralized nationalism," so alien to the American Founding and our heritage, underlies much of contemporary politics. Who, it is asked, can best comprehend the general will? Why, the national government, of course, and especially the one official elected by all the people—the president of the United States. Unlike Congress, the president represents the national interest. The voters have chosen the president, we are told, and Congress should carry out his "mandate." If Congress refuses, then the president may increasingly claim the power to rule by decree, through executive orders. Such a theory would replace the constitutional safeguards against majoritarianism with a president virtually unconstrained in his ability to do good—as he sees it—for the people.

Those who claim the mantle of "liberalism" shouldn't be so quick to toss aside federalism and constitutionalism, because divided powers protect minorities against the whims of the majority. We constrain our government because we know that any of us might be the minority in some dispute and also because we know that—when we're in the majority—we might be tempted to abuse our power. We seek to keep governance close to the people, partly because local government is more responsive and, even more important, because that gives individuals the chance to leave, to vote with their feet, and to find communities that better reflect their individual needs and preferences. About 70 years ago, the need to confront the problem of racist laws in some states led to an increase in the exercise of power by the federal government. The lingering effects of that struggle discredited "states' rights" and federalism, and federal power grew beyond its necessary use to guarantee individual rights in the states. With that period behind us, centralizing the government of 330 million people in a distant capital is a tragic reversal of our liberal Founding. We should remember that the states are "laboratories of democracy" and let them make their own decisions about a wide range of policies.

Conservatives rightly charge liberals with overriding federalism to achieve their policy goals. They ask why Mississippi, New York, and Wyoming have to have the same abortion laws, the same environmental regulations, the same school bathroom rules. But in recent years, conservatives, heady with the thrill of national power, have also used that power to impose their own policy preferences. In the name of accountability and choice, the No Child Left Behind Act further centralized education. The Bush administration used its administrative powers and the federal courts to block state initiatives on medical marijuana and assisted suicide. Liberals began to see the wisdom of federalism and diversity among the states.

State courts and then state electorates led the way to marriage equality. States are now moving toward decriminalization of marijuana, while Congress ignores two-thirds of the people. Finding resistance in recent years to new federal legislation on gun control, environmental regulation, and minimum wage increases, liberals have turned to the states and cities. The beginning of wisdom on the role of the national government is to read Article I, Section 8, and the Tenth Amendment.

Federalism is not just a good idea for the side that is currently in the minority in Washington. It's the basis of the Constitution. The Founders feared concentrations of power. They believed that the best way to protect individual freedom and civil society was to limit and divide power. Thus, it was much better to have decisions made independently by 13—or 50—states, each able to innovate or to copy successful innovations in other states, than to have one decision made for the entire country. As our population grows and the country becomes more complex, and especially as the government amasses more power, the advantages of decentralization and divided power are even greater.

The Costs of Big Government

Rising numbers of Americans tell pollsters that big government is the biggest threat to America and indeed that the federal government poses "an immediate threat to the rights and freedoms of ordinary citizens." A popular desire for less government is always difficult to translate into substantive reform. It seems to be the nature of democracy that those who seek power and privilege from government are more energetic in the political arena than those who seek only to be left alone. Thomas Jefferson wrote, "The natural progress of things is for liberty to yield and government to gain ground." Economists have explained how every government program provides benefits to a few people while diffusing the costs over all taxpayers or consumers. Congress is more likely to hear from those who receive the concentrated benefits than from those who pay the diffuse costs.

But we must recognize the real costs of excessive government. One obvious cost of our gargantuan government is reduced economic growth, as previously noted. With less taxation and less regulation, we could be far wealthier. Another cost is the loss of our freedom. We still live in one of the freest countries in the world, but each new government program takes away just a little of that freedom—the freedom to spend our money as we choose, to go into the businesses we choose, to negotiate with our employers over compensation and benefits.

A related cost of big government, but one not often recognized, is the harm it does to morality and responsibility. Expansive government undermines the moral character that is necessary to civil society. The "bourgeois virtues" of work, thrift, sobriety, prudence, fidelity, self-reliance, and a concern for one's reputation developed and endured because they are necessary in a world where wealth must be produced and people are responsible for their own flourishing. Government can't do much to instill those virtues in people, but it can do much to undermine them. People should be free to make their own decisions and to bear the consequences of those choices. When we take away freedom and responsibility, we get a society characterized not by thrift, sobriety, diligence, self-reliance, and prudence but by profligacy, intemperance, indolence, dependence, and indifference to consequences.

By taking away money, liberty, and responsibility, the growth of government necessarily shrinks civil society—the whole network of relationships among people, from families and businesses to charities and nonprofit associations that are formed on the basis of consent. Communitarians who deplore the decline of community and cooperation should look to big government for an explanation.

The Role of Congress

In our system of government, Congress plays an important role, as many of the chapters of this *Handbook* point out. Too often, we assume that only the Supreme Court has the duty to uphold the law and the Constitution. In fact, every person elected or appointed to office takes an oath to "support and defend the Constitution of the United States." The first duty of every official is to act within the authority of the Constitution and ensure that other officials do so as well. Recent presidents have blithely exceeded the powers granted to them under the Constitution. But thanks to its negligence, Congress bears a significant part of the blame for presidential excesses. To live up to their oath of office, members of Congress should turn their attention to several tasks, discussed in the following sections.

Stop the Abuse of Executive Orders

Lawmaking by the president, through executive orders, is a clear usurpation of both the legislative powers granted to Congress and the powers reserved to the states. The president's principal duty under the Constitution is to "take care that the laws be faithfully executed"—not to make laws, as presidents have increasingly done. Clinton aide Paul Begala boasted: "Stroke of the pen, law of the land. Kind of cool." President Barack Obama declared: "We're not just going to be waiting for legislation. . . . I've got a pen, and I've got a phone." President Donald Trump upped the ante: "I have an Article II, where I have the right to do whatever I want as president." Supporters of President Biden urge him to rule by executive order on matters ranging from a student loan bailout to sweeping energy and climate regulation, acting once again as if Congress's unwillingness to pass the president's agenda is justification for executive fiat. Thus have presidents openly dismissed the legislative process. Both President George W. Bush and President Obama used executive orders to grant themselves extraordinary powers to deal with terrorism. No matter what agenda the president seeks to impose by executive order, Congress should stop him. The body to which the Constitution delegates "all legislative powers herein granted" must assert its authority, as Gene Healy discusses in the chapter "Emergency Powers."

Stop Delegating Lawmaking Authority to the Federal Bureaucracy

Executive orders, however, are only part of the problem. The Constitution clearly grants Congress the power to make laws and grants the executive branch the power to execute the laws. That separation of powers is a key element of the constitutional design. The Founders feared nothing more than the concentration of powers in one set of hands. But since the 1930s, Congress has gotten into the habit of passing broad laws and leaving the details to administrative agencies. Congress likes to proclaim noble goals, promise good results, and leave the rest to unelected bureaucrats—who must deal with the inevitable tradeoffs and costs of such goals. Congress cannot constitutionally delegate its lawmaking authority to any other body, nor should it want to do so. Congress should accept its responsibility for making law and cease delegating legislation to the bureaucracy, as William Yeatman explores in the chapter "Reining in the Administrative State."

Consider the Constitutionality of Every Proposed Law

Ours is a government of delegated, enumerated, and thus limited powers. If a power is not granted to Congress in the Constitution, then Congress lacks the authority to legislate in that area. For too long we have drifted toward the idea that everything from our retirement insurance to our local schools is a proper subject for federal legislation. Members of Congress must not leave it to the Supreme Court to decide whether laws are constitutional. Every member must live up to his or her oath of office by considering the constitutionality of every proposed law. Before voting for any bill, each member should ask, “Where in the Constitution is the authority to pass this law?” If the authority cannot be found, members should not vote for the bill. If Congress accepts its responsibility in this way, it will begin the renaissance of constitutional government in the United States.

Of course, the administration can play a role, too. It can stop issuing executive orders, regulations, and agency guidance that usurp Congress’s legislative function. It can rescind or withdraw lawless and imprudent rules on topics ranging from school locker rooms and unpaid internships to fracking and presidential authority to kill American citizens without judicial review.

Conclusion

Fidelity to our founding principles of respect for civil liberties and limited government may be easy when times are easy. The true test of our commitment to those principles comes when public anxiety or our own insistence may temporarily make it seem expedient to put those principles aside. The importance of paying scrupulous deference to the Constitution’s limits on federal power, of respecting its careful system of checks and balances, is greatest precisely when the temptation to flout those limits is strongest.

For those who go into government to improve the lives of their fellow citizens, the hardest lesson to accept may be that Congress should often do nothing about a problem—such as education, crime, or the cost of prescription drugs. Critics will object, “Do you want the government to just stand there and do nothing while this problem continues?” Sometimes that is exactly what Congress should do. Remember the ancient wisdom imparted to physicians: first, do no harm. And have confidence that free people, left to their own devices, will address issues of concern to them more effectively outside a political environment.

Suggested Readings

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—Prepared by David Boaz

DEFENDING OUR CONSTITUTIONAL REPUBLIC

2. LIMITED GOVERNMENT AND THE RULE OF LAW

Congress should

- live up to its constitutional obligations and cease the practice of delegating legislative powers to administrative agencies—legislation should be passed by Congress, not by unelected administration officials;
- before voting on any proposed act, ask whether that exercise of power is authorized by the Constitution, which enumerates the powers of Congress;
- pass legislation to thoroughly revise the Electoral Count Act of 1887 to clarify the proper implementation of the peaceful and authoritative transfer of executive authority, thus reducing the risk of repeating the events of January 6, 2021; and
- exercise its constitutional authority to approve only those appointees to federal judgeships who will take seriously the constitutional limitations on the powers of both the states and the federal government.

Limited government is one of the greatest accomplishments of humanity. It is imperfectly enjoyed by only a portion of the human race; and where it is enjoyed, its tenure is ever precarious. The experience of the past century—indeed, of the past decade—has made clear the insecurity of constitutional government and the need for courage in achieving it and vigilance in maintaining it.

Advocates of limited government are not anti-government, per se, as some people charge. Rather, they are hostile to concentrations of coercive power and to the arbitrary use of power against right. With a deep appreciation for the lessons of history and the dangers of unconstrained government, they advocate for constitutionally limited government, with the democratically delegated authority and means to protect our rights but not so powerful as to destroy or negate them.

The American system was established to provide limited government. The independent existence of the United States was based on certain truths:

> that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

On that foundation, the American Founders established a system of government based on delegated, enumerated, and thus limited powers.

The American Founders did not pluck those truths out of thin air, nor did they simply invent the principles of American government. They drew on their knowledge of thousands of years of human history, during which many peoples struggled for liberty and limited government. There were both defeats and victories along the way. The results were distilled in the Founding documents of the American experiment in limited government: the Declaration of Independence, the Articles of Confederation, the state constitutions, and the Constitution of the United States, as amended.

The American Founders were careful students of history. Thomas Jefferson, in his influential *A Summary View of the Rights of British America*, prepared in 1774, noted that "history has informed us that bodies of men as well as individuals are susceptible of the spirit of tyranny." Patrick Henry summed up the importance of history thus: "I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging the future but by the past." History—the lamp of experience—is indispensable to understanding and defending the liberty of the individual under constitutionally limited, representative government.

Through the study of history, the Founders learned about the division of power among judicial, legislative, and executive branches; about federalism; about checks and balances among divided powers; about redress and representation; and about the right of resistance, made effective by the legal right to bear arms, an ancient right of free persons. Liberty and limited government were not invented in 1776; they were reaffirmed and strengthened. The American Revolution set the stage for extending the benefits of liberty and limited government to all. As John Figgis, professor of modern history at Cambridge University, noted at the beginning of the 20th century:

> The sonorous phrases of the Declaration of Independence . . . are not an original discovery, they are the heirs of all the ages, the depository of the emotions and the thoughts of seventy generations of culture.

The roots of limited government stretch far back, to the establishment of the principle of the higher law by the ancient Hebrews and by the Greek philosophers. The story of the golden calf in the book of Exodus and the investigations of nature by Aristotle both established—in very different ways—the principle of the higher law. Law is not merely an expression of will or power; it is based on transcendent principles. The legislator is as bound by law as is the subject or citizen; no one is above the law.

Many strands have been entwined to form the fabric of liberty:

- The struggle between church and state, which was put into high gear in the Latin West by Pope Gregory VII in the 11th century under the motto, "freedom of the church." That movement provided the foundation for such important institutions as the rule of law and legal accountability, federalism, and the independent and self-governing associations that make up civil society.
- The growth of civil society in the self-governing chartered towns of Europe, in which the guiding principle was "city air makes one free." The independent cities of Europe were the seedbeds of modern civil society—of the market economy, of personal liberty, and of the security of person and property.
- The fixing of limits on the powers of monarchs and executives through written constitutions. To inheritors of the Anglo-Saxon political tradition, the Magna Carta of 1215 and its iterations are the most memorable of those documents. The Magna Carta included the requirement that taxes not be imposed without the consent of the "general council of the realm." That concept laid the groundwork for the English parliament, as well as other very specific limitations on the king's power, including the stipulations that no one be imprisoned or outlawed or exiled or his estate seized "except by the lawful judgment of his peers or the law of the land" and that "merchants shall have safe conduct in and out of England." That language was the precursor of the Petition of Right of 1628, the Bill of Rights of 1689, the American Declaration of Independence, and the American Constitution and Bill of Rights.

Those various movements reinforced each other in a multitude of ways. The assertion of the freedom of the church was bound up with the idea of the higher law, by which all are judged—emperor, pope, and peasant alike. As legal scholar Henry de Bracton, a judge during the reign of Henry III, noted of the royal authority: "The law makes him king. Let the king therefore give to the law what the law gives to him, dominion and power; for there is no king where will, and not law, bears rule." Were the king to consider himself above the law, it was the job of the king's council—the precursor of Parliament—to rein him in: "If the king were without a bridle, that is, the law, they ought to put a bridle upon him." Not only was the nascent Parliament above the king, but the law was above Parliament. As Sir Edward Coke noted in the 17th century, "When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

The supremacy of the law over the exercise of power is a hallmark of the Western legal tradition. The rule of law is not satisfied by merely formal or ceremonial exercises, such as the publication of edicts in barely understandable form, whether in the archaic "Law French" of the king's courts or the pages of the *Federal Register*. The laws must be understandable and capable of being followed.

Recognition of the principle of reciprocity between the holders of power and the general populace was also widespread. Rights were enumerated in constitutions and charters. Those rights were not gifts from the powerful, which could be taken away on a whim, but something on which one could take a stand. Tied up in the notion of a chartered right was the ancillary power to defend that right, even to the point of resistance with force of arms. The higher law, reciprocity and mutuality of obligations, written charters of rights, the right to be consulted on policy and to grant or refuse one's consent, and the right of resistance in defense of those rights are the foundations of constitutionally limited government. They were won over many centuries at great sacrifice.

The struggle for limited government was a struggle of liberty against power. The demands for religious liberty and the protection of property were fused in the heroic resistance of the Netherlands to the empire of Spain in its great revolt. The Dutch inspired the English to rise against the Stuart kings, who sought to fasten upon the English the absolutism that had made such headway on the continent. The American Revolution was one link in a long chain of revolutions for liberty. The historian John Lothrop Motley opened his magisterial history, *The Rise of the Dutch Republic*, by connecting the Dutch Republic with the United States of America:

> The rise of the Dutch Republic must ever be regarded as one of the leading events of modern times. . . . The maintenance of the right by the little provinces of Holland and Zeeland in the sixteenth, by Holland and England united in the seventeenth, and by the United States of America in the eighteenth centuries,

> forms but a single chapter in the great volume of human fate; for the so-called revolutions of Holland, England, and America, are all links of one chain.

Motley continued:

> For America the spectacle is one of still deeper import. The Dutch Republic originated in the opposition of the rational elements of human nature to sacerdotal dogmatism and persecution—in the courageous resistance of historical and chartered liberty to foreign despotism.

The Dutch, like the British and the Americans after them, became a shining example of what was possible when people were free: prosperity was possible without the guiding hand of the king and his bureaucrats; social harmony was possible without enforced religious conformity; and law and government were possible without an unlimited and absolute sovereign.

The story of the attempts to institute absolutism in the Netherlands and in England was well-known by the American Founders, who were, after all, British colonists. One cannot understand the American attempt to institute limited, representative government without understanding the history of England. What they were struggling against was the principle that the powers of the state are "plenary," that they fill up the whole space of power. In 1598, King James I of England (then King James VI of Scotland) wrote, "The King is above the law, as both the author and giver of strength thereto." In 1610, James made *A Speech to the Lords and Commons of the Parliament at White-Hall* in which he railed against the notions of popular consent and the rule of law and stated, "As to dispute what God may do is blasphemy . . . so it is sedition in subjects to dispute what a king may do in the height of his power."

Just how precious that heritage of limitations on power is can be seen by comparing it with the heritage of Russia, where throughout its history there has been very little reciprocity between the rulers and the ruled and no independent power able to challenge the rulers. The principality of Muscovy and its successors were highly despotic, with no charters of liberty, no power higher than the czar (or his successors, the dictatorship of the Communist Party leaders and now, for over two decades, the dictatorship of Vladimir Putin), no limits on power—in effect, no law. As Harvard University historian Richard Pipes noted in his book *Russia under the Old Regime*, "There is no evidence in medieval Russia of mutual obligations binding prince and his servitor, and, therefore, also nothing resembling legal and moral 'rights' of subjects, and little need for law and courts." The country's immense difficulties in establishing the rule of law, a system of well-defined and legally secure property, and a market economy are testimony to the great and vital importance of building on a tradition of stable, constitutionally limited government. The violently aggressive and destructive attack on a neighboring country, ordered by one man at great expense to the people of Russia, again shows the dangers of unrestrained executive power. The experience of Russia reminds us how important it is for us to maintain our heritage of limited government and the rule of law.

Unlimited powers remain attractive to holders of authority, whether legislative or executive. Every party is susceptible to the allure of power. For example, in 1995 under President Bill Clinton, the solicitor general of the United States, Drew Days, argued the case of *United States v. Lopez* before the Supreme Court; he was unable to identify a single act of Congress, other than those expressly prohibited by the Constitution, that would be impermissible under the administration's expansive view of the Commerce Clause. Days contended that the powers of Congress are plenary—that is, unlimited, unless, perhaps, specifically prohibited. Former president Donald Trump repeatedly asserted unlimited executive powers. For example, in 2019 he said, "I have an Article II, where I have to the right to do whatever I want as president."

Those assertions of unlimited power turn our heritage on its head. Limited government means that government is limited both in the exercise of its delegated powers and in the means it can employ, which must be both "necessary and proper." The English Revolution of 1640, the Glorious Revolution of 1688, and the American Revolution of 1776 were fought precisely to combat unlimited government. What Americans need is not unlimited government, as Days proposed, but limited government under law, exercising delegated and enumerated powers. That is how the equal liberties of citizens are protected.

As the philosopher John Locke—himself an active participant in the struggles for limited government in Britain and the primary inspiration of the American revolutionaries—argued in his *Second Treatise on Government*:

> *The end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*. For *Liberty* is to be free from restraint and violence from others, which cannot be, where there is no Law: But Freedom is not, as we are told, *a Liberty for every Man to do what he lists*: (For who could be free, when every other Man's Humour might domineer over him?) But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.

The American experiment in limited government generated a degree of liberty and prosperity that was virtually unimaginable only a few centuries before. That experiment revealed flaws, of course, none of which was more striking and repugnant than the toleration of slavery, or "manstealing," as it was called by its libertarian opponents, for it deprived an individual of his property in his own person. That particular evil was eliminated by the Thirteenth Amendment to the Constitution, showing the self-correcting nature and basic resilience of a constitutional system that could survive such a cataclysm as the Civil War.

Other threats to constitutional liberty have been revealed or have surfaced since. Among them are the following:

- **An erosion of the basic principles of federalism**, as the federal government has consistently encroached on the authority of the states. Federal criminalization of acts that are already criminalized by the states, for example, usurps state authority (as well as circumventing—opinions of the Supreme Court notwithstanding—the prohibition against double jeopardy in the Fifth Amendment to the Constitution: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). An even more striking contemporary example of the overreach of federal law is the continued exercise of federal controls over marijuana use even in states that have legalized the medical or recreational use of that drug. The Tenth Amendment is quite explicit on this point: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
- **Violation of the separation of powers** between the various branches of government. In Article I, Section 8, for example, the Constitution explicitly reserves the power to declare war to Congress—a power that Congress has allowed to be usurped by the executive branch and which it should retake.
- **Failure of the legislative branch to fulfill its responsibilities** when it delegates its legislative powers to administrative agencies of the executive branch, such as the Department of Labor, the Federal Trade Commission, the Environmental Protection Agency, and the Consumer Financial Protection Bureau. In addition to violating the Constitution, that failure has led to the erosion of the rule of law, as administrative agencies have burdened us with an unimaginably complex welter of edicts. The *Federal Register* ran 87,351 pages in 2020, reflecting a degree of minute control over the actions of citizens that is unreasonable and burdensome. The compliance costs alone run into the hundreds of billions of dollars, or more, and the welter of edicts and demands virtually guarantees that any citizens involved in a commercial transaction will run afoul of some part of it, no matter how well-intentioned or scrupulous they may be. This situation is an invitation to the arbitrary exercise of power, rather than the application of law. Such extensive delegation of powers is an abdication of the representative function described in the *Federalist Papers* and elsewhere by the

Founders. Members of Congress are thereby converted from representatives of their constituents into "fixers," who offer to intercede on behalf of constituents with the agencies that are illegally exercising the authority of the legislative branch. Thus, members of Congress can avoid responsibility for onerous laws but can take credit for gaining special treatment for their constituents. That system may be thoroughly congenial to the interests of the existing officeholders of both the executive and the legislative branches, but it is directly contrary to the doctrine of the separation of powers and to the very concept of representative government.

- **Excessive reliance on the goodwill of political actors to follow the law**, notably with regard to presidential election procedures. Congress should revise the Electoral Count Act of 1887 (ECA) to remove ambiguities, with a clear understanding that the ECA merely clarifies constitutionally mandated processes for the peaceful and lawful transfer of authority.
- **Inattention to the important role of the federal judiciary** as a check on arbitrary and unauthorized exercises of power. Especially since the Court-packing "constitutional revolution of 1937," the federal judiciary—and Congress, in ratifying judicial nominees—has focused too little attention on fulfilling the role of the courts in enforcing constitutional restraints on both the federal and state governments, as set out in Article III, Section 2, of the Constitution. Sections of the Constitution that have suffered from relative neglect include Article I, Section 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); Article I, Section 8 (enumerating and thus limiting the powers of Congress); Article I, Section 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts"); the Fifth Amendment ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation"); the Ninth Amendment ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"); the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"); and the Fourteenth Amendment ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). Although the First and Fourteenth Amendments have indeed been the source of significant judicial activity, the Court has not consistently applied the prohibitions of the First Amendment to either commercial speech or political speech (the latter in the context of campaign finance). Nor has the Court rectified the novel (and specious) distinction between personal liberties and economic

liberties drawn by Justice Harlan F. Stone in *United States v. Carolene Products Co.*

Those flaws can, however, be corrected. What is needed is the courage to place the health of the constitutional order and the future of the American system above short-term political gain. The American Founders were willing "to mutually pledge to each other our Lives, our Fortunes, and our sacred Honor." Nothing even remotely approaching that would be necessary for today's members of Congress to renew and restore the American system of constitutionally limited government.

In defending the separation of powers established by the Constitution, James Madison clearly tied the arrangement to the goal of limiting government power:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next instance oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

For limited government to survive in an era of populism and polarization, we need a renewal of both forces Madison describes as controls on government: dependence on the people, in the form of an informed citizenry jealous of its rights and ever vigilant against unconstitutional or otherwise unwarranted exercises of power, and officeholders who take seriously their oaths of office and accept the responsibilities they entail. As recent events indicate, both of those necessary ingredients rest on the ethos of liberty and responsibility; the people must be both jealous of their liberty and respectful of the constitutional order, and officeholders must be both respectful of the liberty of the people and committed to following their oaths of office, regardless of party, personal preference, patronage, or the allure of power.

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—Prepared by Tom G. Palmer

3. CONGRESS, THE COURTS, AND THE CONSTITUTION

Congress should

- encourage constitutional debate in the nation by engaging in constitutional debate in Congress and in public discussions, as in the nation's earlier history;
- enact nothing without first consulting the Constitution for proper authority and then debating that question on the floors of the House and Senate;
- move toward restoring constitutional government by carefully returning power wrongly taken over the years from the states and the people; and
- center judicial confirmation hearings on the principle that the Constitution is a document of delegated, enumerated, and thus limited powers.

For much of our history, the Constitution was alive in the hearts and minds of the American people and our leaders alike. We saw the document as defining us as a people animated by liberty; and we understood, albeit unevenly at times, that its basic function was to authorize and then limit the powers that were instituted through it. More often than not, therefore, measures aimed at expanding the federal government never made it out of Congress or, if they did, they were vetoed by presidents—not only on policy grounds but, more importantly, on constitutional grounds as well.

Today, however, so far have we strayed from constitutional government, especially since the dawn of the 20th century, that one hardly knows where to begin. James Madison, the principal author of the Constitution, assured us in *Federalist* no. 45 that the powers of the new government would be "few and defined." No one believes that describes Washington's powers today. Instead, Congress and the president exercise vast powers that are nowhere authorized by the Constitution as originally understood. Individuals and businesses are regulated as never before. And Congress is so indifferent to constitutional constraints on its spending that our national debt now exceeds $30 trillion and is growing, and our unfunded federal and state liability runs well over a staggering $100 trillion.

As history demonstrates, this cannot go on. If we do not begin to restore constitutional discipline—and, indeed, constitutional legitimacy—America will go the way of other nations that have ignored the basic moral, political, legal, and economic principles that our Constitution was written and ratified to secure.

Limited government is the foundation for liberty, prosperity, and the vision of equality still cherished by countless Americans, to say nothing of millions around the world. Yet many in Congress today, and many who vote for them, seem to believe that prosperity comes primarily from government programs, not from individuals acting in their private capacities in the private sector. And they believe that the Constitution authorizes Congress to enact such programs. But others in this deeply divided nation know better. They understand that government rarely solves problems as promised; in fact, it often makes problems worse. More important still, they understand that a life dependent on government is both impoverishing and impoverished. They want no part of such dependence. They want to be free to plan and live their own lives.

Reducing Government

But if we're to move toward restoring constitutionally limited government and the prosperity it encourages—toward a world in which government is no longer expected to solve our every problem, but individuals, families, firms, and communities assume that responsibility, indeed, take up that challenge—theoretical and practical questions will need to be addressed. And where better than in Congress, where we the people are directly represented? Two such questions come immediately to mind: how much to reduce government and how fast to do it.

How Much to Reduce Government

That first question might seem initially to be a matter simply of policy: What do we want the federal government to do and not do? Yet if we take the Constitution seriously, the Framers largely answered the question. Indeed, they thought long and hard about the proper role of the federal government. Drawing on fundamental moral principles about individual liberty that were first set forth in the Declaration of Independence, they outlined the proper ends of government in the Constitution, expressly enumerating—and thereby limiting—the federal government's powers.

Thus, setting aside for the moment all practical concerns, the Constitution tells us as a matter of first principle how much to reduce government. It tells us, first, what powers or ends the federal government in fact has. And second, by operation of the last of those enumerated powers, the Necessary and Proper Clause, it tells us that the federal government must employ proper means toward those ends, namely, those that respect the powers of the states and the rights of the people.

That means that if a federal power or program is not *authorized* by the Constitution, it is illegitimate. Given the present size and scope of the government, that's a sobering conclusion, to be sure. But it flows quite naturally from the document's enumeration of Congress's powers. And the Tenth Amendment, the final documentary evidence from the Founding period, states the principle explicitly: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In a nutshell, the Constitution establishes a government of delegated, enumerated, and thus limited powers. As the *Federalist Papers* make clear, the Constitution was written not only to authorize, institute, and empower the federal government but to limit it as well—and to limit also what we the people may demand of our government.

Since the Progressive Era, however, the politics of government-as-problem-solver has dominated our public discourse. And since the New Deal constitutional revolution, following President Franklin Roosevelt's infamous Court-packing threat, the Supreme Court has abetted that view by standing the Constitution on its head, turning it into a document of effectively unenumerated and hence unlimited powers.

Indeed, limits on government today, when we've had them, have come largely from political and budgetary rather than constitutional considerations. Thus, when government has failed to undertake a program in recent years, it has not been because of any perceived lack of constitutional authority but because of practical and political limits on the power of government to tax, borrow, and regulate. That is the mark of a parliamentary system, limited only by periodic elections, not of a constitutionally limited republic like ours.

The Founders could have established such a system, of course. They did not. But we have allowed those marks of a parliamentary system to supplant the system they gave us. To begin restoring truly limited government, therefore, we have to do more than define the issues as political or budgetary. We have to go to the heart of the matter and raise the underlying *constitutional* questions. We have to ask that most fundamental of constitutional questions: Does Congress or the executive branch have the *authority*, the *constitutional* authority, to do what it is doing?

How Fast to Reduce Government

As a practical matter, however, before Congress can begin restoring constitutionally limited government, it will need to take seriously the dependence of so many on the constitutionally unauthorized programs it has created since the Progressive Era began. Thus, Congress will have to move carefully and smartly, much as private companies have done in moving, for example, from defined benefit to defined contribution retirement programs for their employees and from "Cadillac" health care programs to more sustainable high-deductible insurance programs that include health savings accounts. Strictly speaking, of course, new *public* programs like those would still be constitutionally unauthorized, but they are the kinds of "transitional" moves that Congress might make toward returning private matters like retirement security and health care to private responsibility.

But another practical problem Congress faces is the present state of public opinion on such matters. After all, a substantial number of Americans have little understanding of the near-term insolvency of our major entitlement programs. And they know even less about the constitutional limits on activist government. Indeed, many Americans want even more government. For Congress to be able to do what needs doing, therefore, a proper political foundation must first be laid. At bottom, public opinion must evolve such that a sufficiently large part of the public supports the necessary changes. When enough people come forward to ask—indeed, to demand—that government be limited to its constitutional powers, thereby freeing individuals, families, firms, and communities to solve their own problems, we will know we're on the right track.

We are a long way today from the Founders' vision of limited government. To move the process along, therefore, Congress should take the lead in the following ways.

Engage in Constitutional Debate in Congress and in Public Discussions

For much of America's early history, the Constitution played a prominent role in our political discourse. Members of Congress and presidents actively debated whether proposed measures were consistent with the Constitution. Unlike so often today, they didn't simply assume that they had the authority to enact or sign any and every bill and then leave it to the courts to determine the act's constitutionality. Nor did presidents make a practice of ruling by executive order. They took seriously their oaths to uphold the Constitution. That sense of moral and constitutional responsibility needs to be revived.

Revive the Constitution Caucus

During the first year of the 104th Congress, after the realigning midterm elections of 1994, an informal 100-strong Constitution Caucus was created to reinvigorate the tradition of constitutional debate in Congress and the nation and, in time, to begin restoring constitutional government. By itself, of course, neither such a caucus nor the entire Congress is likely to fully correct the constitutional problem. Congress could, in theory, roll back its many unconstitutional programs and agree to limit itself to its enumerated powers. But to ensure that such limits are respected by future Congresses as binding *constitutional* limitations, the Supreme Court would need to reverse a substantial body of largely post–New Deal decisions and embed those restraints in "constitutional law," even though they've been in the Constitution the whole time.

Thus, the goal of a Constitution Caucus and Congress should be not just to influence Congress itself, but to encourage the *Court* to reach such decisions. True, that reverses the normal order of things: under our written Constitution, we ordinarily think of the Court as employing reason and applying law to check the will of the political branches. But history teaches that the Court does not operate entirely in a vacuum. Realistically, to some degree, public opinion is the precursor and seedbed of the Court's decisions, if only insofar as the Court's composition is determined through the political confirmation process. Thus, the more immediate goal of the caucus should be to influence the debate in the nation by influencing the debate in Congress. To do that, it is not necessary or even desirable in today's political climate that every member of Congress be a member of the caucus, however worthy that ideal might be. For after all, many in Congress will be adamantly opposed to the caucus's ends: they campaign on platforms calling for ever more government. But it *is* necessary that those who join the caucus be committed to its basic ends. And it is necessary that members establish a clear agenda for reaching those ends.

Here is the problem in a nutshell. Every day, members of Congress are besieged by requests to enact countless measures to solve endless problems. Indeed, listening to much campaign debate, one might conclude that no problem is too personal or too trivial to warrant the attention of the *federal* government no less. Yet most of the "problems" Congress spends most of its time addressing—from health care to childcare, education, housing, economic competition, and more, *albeit often created by government*—are simply the personal and economic problems of life that individuals, families, and firms—not governments—should be addressing. What is more, as a basic point of constitutional doctrine, under a constitution like ours, interpreted as ours was meant to be interpreted, there is little authority for government at any level to address such problems, save for those that *it* has created—which today, alas, are many.

Properly understood and used, then, the Constitution can be a valuable ally in the efforts of the caucus and Congress to reduce the size and scope of government. For in the minds and hearts of most Americans, it remains a revered document, however little it may be understood by many. Thus, a central purpose of congressional debate should be to bring about a better understanding of our basic legal document and to restore the idea in the minds of the people that the Constitution does not authorize the kind of government we have today. In particular, members of Congress need to tell importuning constituents, "I have no authority to do what you want me to do."

The Constitutional Vision

But if the Constitution is to be so used, Congress must candidly address the main misunderstanding surrounding it, namely, that, without further amendment, it is an infinitely elastic document that allows government to grow to meet whatever the public wants. Americans must come to see that the Founders, who were keenly aware of the expansive tendencies of government, wrote the Constitution precisely to check that kind of thinking. True, they meant for government to be our servant, not our master. But they meant it to serve us in a very limited way—by securing our rights, as the Declaration of Independence says, and by doing those few other things we have authorized it to do, as spelled out in the document, which is why it was written and ratified.

In all else, we were meant to be largely free from interference by the federal government—to plan and live our own lives, to solve our own problems. That is what freedom is all about. Some may characterize that vision as tantamount to saying, "You're on your own." But that response simply misses the point. In America, individuals, families, and organizations have never been "on their own" in the most important sense. They have always been members of communities, of civil society, where they could live their lives and solve their problems by following a few simple rules about individual initiative and responsibility, respect for property and promise, and charity toward the few who need help from others. Massive government planning and programs have upset that natural order.

Those are the issues that need to be discussed, in both human and constitutional terms. As a people, we need to rethink our relationship to government. We need to ask not what our government can do for us, but what we can do for ourselves and, where necessary, for others—not through government but apart from government, as private citizens and organizations. That is what the Constitution was written to enable. It empowers the federal government in a very limited way. It empowers people—by leaving us free—in every other way.

To proclaim and eventually secure that vision of a free people, the Constitution Caucus should rededicate itself to that end at the beginning of every Congress. The caucus should be both of and above Congress—as the constitutional conscience of Congress. Every member of Congress, before taking office, swears to support "this" Constitution. Today, that's hardly a constraining oath given the modern Court's open-ended reading of the document. Members of the caucus should dedicate themselves to the deeper meaning of that oath. They should support the Constitution the Framers gave us, as amended by subsequent generations, not as "amended" by the politically cowed New Deal Court's expansive readings of the document.

Encouraging Debate

Acting together, members committed to constitutional government could have a major impact on the course of public debate in this nation—not least by virtue of their numbers. What is more, there is political safety in numbers. As Benjamin Franklin might have put it, no single member of Congress can likely undertake the task of restoring constitutional government on his own; in the present climate, he would surely be hanged, politically, for doing so. But if the caucus hangs together, the task will be more bearable and enjoyable—and a propitious outcome more likely over time.

On the constitutional agenda, then, should be those undertakings that will best stir debate and thereby move the climate of opinion. Drawn together by shared understandings, and unrestrained by the need for serious compromise, the members of the caucus are free to chart a principled course and employ principled means, which they should do.

They might begin, for example, by surveying opportunities for constitutional debate in Congress, then make plans to seize those opportunities. Clearly, when new bills are introduced or old ones are up for reauthorization, an opportunity is presented to debate constitutional questions. But even before that, when plans are discussed in party sessions, members should raise constitutional issues. To get things going, the caucus might study the costs and benefits of eliminating clearly unconstitutional programs, the better to determine which can be eliminated most easily and quickly.

Above all, the caucus should look for strategic opportunities to employ constitutional arguments. Too often, members of Congress fail to appreciate that if they take a principled stand against a seemingly popular program—and state their case well—they can seize the moral high ground and ultimately prevail over those who are seen in the end to be more politically driven.

All of that will stir constitutional debate—which is just the point. For too long in Congress that debate has been dead, replaced by the often-dreary budget debate. America was not established by men with green eyeshades. It was established by men who understood the basic character of government and the basic right to be free. Debate centered on the Constitution needs to be revived. It needs to be heard not simply in the courts where it is twisted through modern "constitutional law" but in Congress as well.

Consult the Constitution for Proper Authority and Debate That Point in Congress

It would hardly seem necessary to require Congress, before it legislates, to cite its constitutional authority for doing so. After all, is that not part of what it means to carry out, as a member of Congress, one's oath to support the Constitution? And if Congress's legislative powers are limited by virtue of being enumerated, then presumably there are countless things Congress has no authority to do, however worthy they might otherwise be. Yet so far have we strayed from constitutional thinking that such a requirement today is followed perfunctorily—when followed at all.

The most common perfunctory citations—usually captured in boilerplate—are to the Constitution's General Welfare, Commerce, and Necessary and Proper Clauses. It is no small irony that those clauses were written not only as grants of power, but also as shields against overweening government, yet today they are simply swords of federal power.

The General Welfare Clause

The first of Congress's 18 legislative powers enumerated in Article I, Section 8, is the power to tax (and, by implication, spend) "to pay the Debts and provide for the common Defence and general Welfare of the United States." In *Federalist* no. 41 and elsewhere, Madison argued, as did Jefferson and others, that the General Welfare Clause was meant to serve as a brake on Congress's power to tax and spend in furtherance of its *other* enumerated powers or ends, all of which, he said, were subsumed under "the general welfare." Taxing and spending pursuant to those ends had to serve the *general* welfare, not the welfare of particular parties or sections of the country. Madison's view contrasted sharply with that of Hamilton, who believed that Congress had an *independent* power to tax and spend *for the general welfare*.

The problem with Hamilton's view was stated clearly in 1828 by South Carolina's William Drayton. Rising on the floor of the House, he said that it would undermine the very centerpiece of the Constitution, the doctrine of enumerated powers, rendering Congress's 17 other powers superfluous. Since money can accomplish anything, he continued, whenever Congress wanted to do something that was not listed as an enumerated power—such as, say, regulate public education—it could simply declare the act to be serving "the general welfare" and thus escape the limits imposed by enumeration. Indeed, he concluded, what was the point of enumerating Congress's other powers if it could do whatever it wanted under this sole power?

Unfortunately, in 1936, in dicta and almost in passing, the Supreme Court revisited this early debate and came down, as a practical matter, on Hamilton's side, declaring that there is an *independent* power to tax and spend for the general welfare, albeit limited by the word "general." Then in 1937, in upholding the constitutionality of the new Social Security scheme, the Court completed the job when it stated the Hamiltonian view not as dicta but as doctrine. But while it reminded Congress of the constraint imposed by the word "general," the Court added that it would not itself police that restraint but would leave it to Congress to police itself—the very Congress that was distributing money from the Treasury with ever-greater particularity. Since that time, the relatively modest redistributive schemes that preceded the New Deal have grown exponentially until today they are everywhere.

In truth, textualists must grant that this was not the most artfully written part of our Constitution. Not surprisingly, Congress, to say nothing of the courts, often found the line it draws difficult to discern and apply, even before the New Deal Congresses effectively ended fiscal discipline. Yet a middle ground between Madison and Hamilton can be found if we focus on the power of Congress to tax and spend for the *general* welfare *of the United States*, as was done during most of the pre–New Deal era, albeit less as time went on. That interpretation would allow for spending on "public goods" as defined by economists citing free-rider problems, nonexcludability, and nonrivalrous consumption—things like national defense, clean air and water, and certain infrastructure—as distinct from private goods like education and health care, for which there is no authority to spend under the Constitution.

But owing to the imprecision of this clause, it falls rather more to Congress than to the courts to exercise the discipline that is necessary to preserve the Constitution's overall structure for limited government. Congress needs to rediscover that discipline. Indeed, this is quintessentially an area where *Congress* needs to take the lead in debating the virtues of limited constitutional government as a *political* matter rather than leaving it to the courts to find lines that are difficult to find as a *legal* matter.

The Commerce Clause

The Commerce Clause of the Constitution, which grants Congress the power to regulate "Commerce . . . among the several States," was also written primarily as a shield—in this case against overweening *state* power. As Madison explained in *Federalist* no. 42, under the Articles of Confederation, to protect local merchants and manufacturers from out-of-state competitors, states had erected tariffs and other protectionist measures that impeded the free flow of commerce among the states. In fact, the need to break the logjam that resulted was one of the principal reasons for the call for a constitutional convention in Philadelphia in 1787. To address the problem, the Framers gave Congress the power to regulate—or "make regular"—commerce among the states. It was meant primarily as a power to facilitate free trade among the states. And that was how the Court read the clause in 1824 in the first great Commerce Clause case, *Gibbons v. Ogden*.

That functional account of Congress's commerce power is consistent with the original understanding of the power, the text of the clause (especially the original meaning of "regulate"), and the structural limits entailed by the doctrine of enumerated powers. Yet today, following decisions by the Court in 1937, 1942, and beyond, Congress is able to regulate anything that even "affects" interstate commerce, which in principle is everything. Far from ensuring the free flow of commerce among the states, much of that regulation, for all manner of social and economic purposes, actually frustrates the free flow of commerce. In effect, the commerce power has become a general police power of a kind that the Framers reserved to the states.

The Necessary and Proper Clause

Congress often exercises those redistributive and regulatory powers through the last of the 18 powers enumerated in Article I, Section 8, the Necessary and Proper Clause. Discussed by Madison in *Federalist* no. 44, the clause affords Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Thus, it is an *instrumental* power, providing Congress with the *means* for executing its other powers or pursuing its other enumerated ends. As such, the means it affords Congress are limited by those other enumerated powers or ends, limited simply to carrying them into execution—it is not an independent power. Moreover, not any such instrumental powers will do: they must be both necessary for their purpose and proper— "proper" in respecting the other branches, the sovereignty of the states, and the rights of the people.

Just as the explosive growth of the modern redistributive state has taken place almost entirely under the General Welfare Clause, so has the growth of the modern regulatory state taken place almost entirely under the Commerce Clause—as complemented by the Necessary and Proper Clause in both cases. That raises the fundamental question that Drayton had raised, which members of Congress need to keep in mind: If the Framers had meant for Congress to be able to do virtually anything it wanted under just those three clauses, why did they bother to enumerate Congress's other powers, or defend the doctrine of enumerated powers throughout the *Federalist Papers*? Those efforts would have been pointless.

Lopez *and Its Aftermath: A Case Study in Congressional Indifference*

Today, as previously noted, congressional citations to the General Welfare, Commerce, and Necessary and Proper Clauses usually take the form of perfunctory boilerplate. When it wants to regulate some activity, for example, Congress makes a bow to the doctrine of enumerated powers simply by claiming that it has made findings that the activity at issue "affects" interstate commerce. Given those findings, Congress then claims it has authority to regulate the activity under its power to regulate commerce among the states.

Yet in 1995, in the celebrated case of *United States v. Lopez*, the Supreme Court had before it a case in which Congress, when it passed the Gun-Free School Zones Act of 1990, hadn't even bothered to cite its authority under the Constitution, even in boilerplate. In what must surely be a stroke of consummate hubris—and disregard for the Constitution—Congress simply assumed its authority. At oral argument, the lawyer for the government belatedly pointed to the Commerce Clause, but the Court would have none of it. For the first time in 58 years, appealing to "first principles," the Court's majority ruled that Congress's power under the Commerce Clause has limits.

There followed a similar ruling in 2000 in *United States v. Morrison*. But in 2005, in *Gonzales v. Raich*, the California medical marijuana case, a divided Court went the other way, only to reverse itself in another celebrated case, *National Federation of Independent Business v. Sebelius*, the 2012 challenge to the individual mandate of the Affordable Care Act. There, five justices held that Congress lacked the power under the Commerce and Necessary and Proper Clauses to compel individuals to buy health insurance or pay a fine. (Nevertheless, Chief Justice John Roberts saved the act by treating the fine as a tax, even though he could not identify the tax as of a kind the Constitution recognizes.)

Thus, the *Lopez* line of cases has revived the doctrine of enumerated powers and its implications for limiting Congress's power. It is imperative, therefore, that Congress debate this fundamental constitutional matter. It is not enough for Congress simply to say the magic words—"General Welfare Clause," "Commerce Clause," "Necessary and Proper Clause"—to be home free, constitutionally. Not every debate will yield satisfying results, but if the Constitution is to be kept alive, there must at least be debate. Over time, good ideas tend to prevail over bad ideas, but only if they are given voice. The constitutional debate must again be heard in the Congress of the United States as it was over much of our nation's history, and it must be heard before bills are introduced, to say nothing of enacted. The American people can hardly be expected to take the Constitution and its limits on government seriously if their elected representatives do not.

Restore Constitutional Government by Carefully Returning Power Wrongly Taken from the States and the People

If Congress should enact no new legislation without grounding its authority to do so securely in the Constitution, so too should it begin repealing legislation not so grounded, legislation that arose by assuming power that rightly rests with the states or the people. To appreciate how daunting a task that will be, simply reflect again on Madison's promise that the powers of the federal government under the Constitution would be "few and defined."

But the magnitude of the task is only one dimension of its difficulty. Let's be candid: there are many in Congress who will oppose any efforts to restore constitutional government for any number of reasons, ranging from the practical to the theoretical. Some see their job as one primarily of representing the interests of their constituents, especially the short-term interests reflected in the phrase "bringing home the bacon." Others simply like big government: "enlightened" progressives, so-called national conservatives who want the government to promote families and help the working man, or those with a narrower, more cynical interest in the perquisites of enhanced power. Still others believe sincerely in a "living constitution," one extreme form of which—the "democratic" form—imposes no limits whatever on government save for those arising from periodic elections. Finally, there are those who understand the unconstitutional and hence illegitimate character of much of what government does today but believe it is too late to do anything about it. All those people and others will find reasons to resist the discrete measures that are necessary to begin restoring constitutional government. Where necessary, their views will have to be accommodated as the process unfolds.

Maintaining Support for Limited Government

Given the magnitude of the problem, and the practical implications of repealing federal programs, a fair measure of caution is in order. It's not simply a matter of returning what was taken, for much changed as a result of the taking. People have died and new people have come along. Public law has replaced private law. And new expectations and dependencies have arisen and become settled over time.

Thus, as programs are reduced or eliminated, care must be taken to do as little harm as possible—for two reasons at least. First, there is an important sense in which the federal government today, vastly overextended though it is, stands in a contractual relationship with the American people. That idea is very difficult to pin down, however, for once the real contract—the Constitution—has broken down, the "legislative contracts" that arise to take its place invariably come down to programs under which some people have become dependent on others, although neither side had much say in the matter at the outset. Whatever its merits, that contractual view is held by a good portion of the public, especially regarding so-called middle-class entitlements.

That leads to the second reason why care must be taken in restoring power to the states and the people, namely, that the task must be undertaken, as noted earlier, with the support of a substantial portion of the people—ideally, at the urging of those people. Given the difficulty of convincing people—including legislators—to act against their relatively short-term interests, it will take sound congressional judgment about where and when to move. More important, it will take keen leadership, leadership that is able to frame the issues in a way that will communicate both the rightness and the soundness of the decisions that are required.

In exercising that leadership, there is no substitute for staying on message and keeping the message simple, direct, and clear. The aim, again, is both freedom and prosperity. We need to appreciate how the vast government programs we have created over the years have actually reduced the freedom and well-being of all of us—and have undermined the Constitution besides. Not that the ends served by those programs are unworthy—few government programs are undertaken for worthless ends. But individuals, families, private firms, and communities could bring about most of those ends voluntarily and at far less cost if only they were free to do so—especially if they were free to keep the wherewithal that is necessary to do so rather than give it to governmental redistributors. If individual freedom and individual responsibility are values we cherish—indeed, are the foundations of a good society—we must come to appreciate how our massive government programs have undermined those values and, with that, the good society itself.

Redistributive Programs

Examples of the kinds of programs that should be returned to the states and the people are detailed elsewhere in this *Handbook*, but a few warrant mentioning here. There hasn't been a significant devolution of welfare programs since 1996. However flawed the final bill that President Bill Clinton signed then may have been from both a constitutional and a policy perspective, it was still a step in the right direction. Ultimately, as discussed more generally below, welfare should not even be a state program. Rather, it should be a matter of private responsibility, as it long was in America. But the process of getting the government out of the business of charity—and the federal government especially, for the Constitution grants it no such authority—was at least begun in the 104th Congress.

Eventually, that process should be repeated in every other "entitlement" area, from individual to institutional to corporate, from Social Security and Medicare to the National Endowment for the Arts (NEA) to the Department of Agriculture's Market Access Program, and on and on. One assumes that each of those programs was started for a good reason, yet each involves taking from some and giving to others—policies that are both wrong and unconstitutional, to say nothing of monumentally inefficient. Taken together, they put us all on welfare in one way or another, and we are all the poorer for it.

Some of those programs will be harder to reduce, phase out, or eliminate than others, of course. Entitlement programs with large numbers of beneficiaries, for example, will require transition phases to minimize harm and maintain public support. Other programs, however, could be eliminated with relatively little harm. Does anyone seriously doubt that there would be art in America without the NEA? Indeed, without the heavy hand of government grant making, the arts would likely flourish as they did long before the advent of the NEA—and critics would not be made to pay, through their taxes, for art they abhor.

In fact, it is the transfer programs in "symbolic" areas that may be the most important to eliminate first since they have multiplier effects reaching well beyond their raw numbers, and those effects are hardly neutral on the question of reducing the size and scope of government. As a matter of principle, does anyone seriously believe there is any constitutional authority whatever for the National Endowment for the Arts, the National Endowment for the Humanities, the Corporation for Public Broadcasting, or the Department of Education? Yet each raises concerns about free speech—to say nothing of their potential for undermining the cause of limiting government. Not a few critics have pointed to the heavy hand of government in those symbolic areas. And of equal importance is the problem of compelled speech. As Jefferson wrote, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." But on a more practical note, if Congress is serious about addressing the climate of opinion in the nation, it will end such programs not simply because they rest on no constitutional authority but because they have demonstrated a relentless tendency toward propagating ever more government. Indeed, one can hardly expect those institutions to underwrite programs that advocate less government when they themselves were brought into being and continue to exist through government.

Regulatory Redistribution

If the redistributive programs that constitute the modern welfare state are candidates for elimination, so too are many of the regulatory programs that have arisen under the Commerce Clause. Here, however, care must be taken not simply from a practical perspective but from a constitutional perspective as well, for many of those programs may be constitutionally justified. When read functionally, recall, the Commerce Clause was meant to enable Congress to ensure that commerce among the states is regular, and especially to counter state actions that might upset that regularity and commercial freedom. Think of the Commerce Clause as an early North American free trade agreement, without the heavy hand of managed trade that often accompanies the modern counterpart.

Thus conceived, the Commerce Clause clearly empowers Congress, through regulation, to override state measures that may frustrate the free flow of commerce among the states. But it also enables Congress to take such affirmative measures as might be necessary and proper to facilitate free trade, such as clarifying rights of trade in uncertain contexts or regulating the interstate transportation of dangerous goods. What the clause does not authorize, however, is regulation for reasons much beyond ensuring the free flow of commerce—the kind of managed trade, for example, that is little more than a thinly disguised transfer program designed to benefit one party at the expense of another, picking winners and losers.

Unfortunately, much modern federal regulation falls into that final category, whether it concerns employment or health care, insurance, banking, or whatever. In fact, given political and budgetary constraints on the ability of government to tax and spend—to take money from some, run it through the Treasury, and then give it to others—the preferred form of transfer today is through regulation. That puts such transfers "off budget." Thus, when an employer, an insurer, a lender, or a landlord is required by regulation to do something he would otherwise have a right not to do, or not do something he would otherwise have a right to do, he serves the party benefited by that regulation every bit as much as if he were taxed to do so, but no tax increase is ever registered on any public record. The temptation for Congress to resort to such politically "cost-free" regulatory redistribution is substantial, of course, yet the effects are both far-reaching and perverse. Natural markets are upset as incentives are changed; economies of scale are skewed as large businesses, better able to absorb the regulatory burdens, are advantaged over small ones; defensive measures, inefficient from the broader perspective, are encouraged; and general uncertainty, anathema to efficient markets, is the order of the day. Far from facilitating free trade—the commerce power's basic purpose—redistributive regulation frustrates it. Far from being justified by the Commerce Clause, it undermines the very purpose of the clause.

Federal Crimes

In addition to misusing the commerce power for the purpose of regulatory redistribution, Congress has also misused it to create federal crimes. Thus, a great deal of regulation has arisen under the commerce power that is nothing but a disguised exercise of a general police power that Congress otherwise lacks. The Gun-Free School Zones Act previously discussed is an example of legislation passed nominally under the power of Congress to regulate commerce among the states; but the actions it criminalizes are properly regulated under a *state's* general police power, the power of states to "police" or secure our rights. There is no general federal police power except as an implication of federal sovereignty over federal territory or as may be necessary and proper for carrying into execution Congress's enumerated powers or ends.

The ruse of using the commerce power to criminalize acts that are the proper jurisdiction of the states should be candidly recognized. Indeed, it is a mark of the decline of respect for the Constitution's limits on federal power that when we fought a war on liquor early in the 20th century, we felt it necessary to do so by first amending the Constitution, there being no power otherwise for such a federal undertaking; but today, when we fight a war on drugs—with as much success as we enjoyed in the earlier war—we do so without so much as a nod to the Constitution.

The Constitution lists three federal crimes: treason, piracy, and counterfeiting. No one knows how many federal statutory crimes there are today, to say nothing of crimes hiding in the *Code of Federal Regulations*, but the numbers 3,000 and 300,000, respectively, have often been given as estimates. Over the years, no faction in Congress has been immune, especially in an election year, from the propensity to criminalize all manner of activities, utterly oblivious to the lack of constitutional authority for doing so. We should hardly imagine that the Founders fought a war to free us from a distant tyranny only to establish a tyranny in Washington, in some ways even more distant from the citizens it was meant to serve.

Policing the States

The federal government has not only intruded on the police power of the states, but in the opposite direction it has too often shirked its responsibility to police the states pursuant to the Fourteenth Amendment. Here is an area where federal regulation has been, if anything, *too* restrained—yet when undertaken, often unprincipled as well.

The Civil War Amendments changed America's federalism fundamentally and very much for the better, giving citizens an additional level of protection, not against federal but against state oppression—the oppression of slavery, obviously, but much else besides. Thus, the Fourteenth Amendment, ratified in 1868, begins by defining both federal and state citizenship, making it clear that the recently freed slaves were citizens of both the United States and the states wherein they resided. It then provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Those provisions of Section 1 are self-executing, which means that *individuals* can go straight into court to see to their enforcement. And Section 5 gives *Congress* the "power to enforce, by appropriate legislation, the provisions of this article."

Unfortunately, almost from the start, confusion surrounded the interpretation and enforcement of the Fourteenth Amendment. As the debate over the adoption of the amendment makes clear, the Privileges or Immunities Clause was meant to be the principal source of substantive rights under the amendment, and those rights were meant to include the rights of free people everywhere: property, contract, personal security—in short, our "natural liberties," as William Blackstone, the eminent 18th century English jurist, had earlier understood "privileges or immunities" to mean. But in 1873, in the notorious *Slaughterhouse Cases*, a bitterly divided Supreme Court essentially eviscerated the Privileges or Immunities Clause. There followed, for nearly a century, the era of Jim Crow in the South and, for a period stretching to the present, a Fourteenth Amendment jurisprudence as contentious as it is confused.

Increasingly over the 20th century, especially in the second half, modern liberals urged that the amendment be used as it was meant to be used—against oppression by the states; but their uses were selective, often reflecting a political agenda. They also ignored or denigrated rights that were meant to be protected, like economic liberty and property and contract rights. For their part, modern conservatives, partly in reaction, chose a course of "judicial restraint" (perhaps better termed "judicial abdication"), calling for the amendment to be used far more narrowly than it was meant to be used—for fear that it might be misused, as it has been. To sort this confusion out, there is no better place to begin than with the text of the abandoned Privileges or Immunities Clause. (Judicial methodology will be discussed more fully below.)

Again, the clause says that no state shall abridge "the privileges or immunities *of citizens of the United States*" (emphasis added). We need to know, therefore, what the privileges or immunities of U.S. citizens are. And for that, we turn to the constitutional text where we find the few rights mentioned in the original Constitution; the rights enumerated in the Bill of Rights, at least as those can be applied against states by the Privileges or Immunities Clause; and the many unenumerated rights we "retained" as recognized by the Ninth Amendment and as implied by the doctrine of enumerated powers as discussed above. (Where there is no power, by implication there is a right that the exercise of such a power might otherwise have overridden.) But as the Supreme Court held in *Barron v. Baltimore* (1833), when the Bill of Rights was ratified, those rights, except as otherwise provided, were not held against the *states* but only against the federal government, the government created by the Constitution, to which the Bill of Rights was appended. With the ratification of the Fourteenth Amendment, however, that changed, and changed radically. No longer could *states* freely abridge those privileges or immunities. Again, Section 1 of the amendment was self-enforcing: individuals could go directly to court to enforce their rights. But if the courts failed to do so, Congress could legislate to protect those rights pursuant to Section 5.

That reading is perfectly consistent with the debates that surrounded not only the adoption of the Fourteenth Amendment but the prior enactment of the Civil Rights Act of 1866, which the amendment was meant to constitutionalize and which Congress reenacted in 1868, just after the amendment was ratified. All citizens, the Civil Rights Act said in part, "have the right to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property." Such were some of the "privileges or immunities" the Fourteenth Amendment was meant to secure.

Clearly, those basic common-law rights, drawn from the classic Lockean, reason-based theory of natural rights, were meant to be protected first by ordinary *state* law. But just as clearly, states often violated them, either directly or by failing to secure them against private violations, which is why the Fourteenth Amendment was needed. And states continued to violate them even after the amendment was ratified. Now, however, invoking one's *constitutional* rights against one's own state, appeal could be made to the courts, under Section 1 of the amendment, or to Congress, under Section 5, as just noted.

But once the Supreme Court eviscerated the Privileges or Immunities Clause in 1873, Fourteenth Amendment jurisprudence took a wandering turn. With the clause no longer available, courts began deciding cases under the Due Process or Equal Protection Clauses. That led in time to opposing complaints: on one hand were charges, made mainly by modern conservatives, that the more open-ended concept of "substantive due process" encouraged judges to invent "rights" nowhere to be found even among our unenumerated rights and thus to override democratic majorities; on the other hand were charges, made mainly by modern liberals, that a narrow "procedural due process" encouraged judges to defer to democratic majorities that were overriding individual rights. As the debate played out over the second half of the 20th century, it became increasingly clear that the heart of the problem was the demise of the Privileges or Immunities Clause and, with it, the theory of rights that stood behind the clause. Yet neither side seemed willing to revive the clause, much less do the serious work of discovering its true content.

That stalemate gave rise to a group of *classical* liberals and libertarians and to a call for returning to first principles, not only those of our Founding but those of our second Founding as well, when the principles of the Declaration of Independence, including equal protection, were incorporated at last into the Constitution. Classical liberals like this author urged reviving not only the doctrine of enumerated powers and the original understanding of the Ninth and Tenth Amendments but the Privileges or Immunities Clause too. Responding to objections from conservatives, we made it clear that doing so would give the courts and Congress no power to secure modern "entitlements," which are no part of the common-law tradition of life, liberty, and property, to say nothing of the natural rights tradition. Rather, the power to secure rights that would be revived would be limited by the rights that there were to be secured. To be sure, that power would now reach *intrastate* matters when states were violating the provisions of the Fourteenth Amendment. But that is exactly what the amendment was meant to do. And that is the fundamental issue that the *Slaughterhouse* majority failed to recognize.

Congress today rarely looks to Section 5 of the Fourteenth Amendment as a source of power. Instead, it usually relies on a capaciously interpreted Commerce Clause. Not only is that a misuse of its commerce power, inviting further misuses in the future, but assuming the facts warrant it, it is also a failure to use the Fourteenth Amendment as it was meant to be used, inviting future failures. The Fourteenth Amendment has been both underused and misused by Congress and misapplied by the courts. But that is no reason to ignore it. Rather, it is a reason to correct the errors and use it properly.

In its efforts to return power to the states and the people, then, Congress must be careful not to misunderstand its role in our federal system. Over the 20th century and into the 21st, Congress assumed vast powers that were never its to assume, powers that belong properly to the states and the people. Those need to be returned. But at the same time, Congress and the courts do have authority under the Fourteenth Amendment to ensure that citizens are free from *state* oppression—free from "grassroots tyranny." However much that authority may have been underused or overused, it is there to be used; and if it is properly used, objections by states about federal interference in their "internal affairs" are without merit.

Center Judicial Confirmation Hearings on the Principle That the Constitution Is a Document of Delegated, Enumerated, and Thus Limited Powers

There is a crucial difference between the Constitution and "constitutional law"—the body of Supreme Court decisions that have interpreted and applied the Constitution, correctly or not, as cases have come before the Court over the years. As noted earlier, Congress could restore constitutional government on its own initiative simply by limiting its actions to those that are authorized by the Constitution and repealing its past actions that were taken without such authority. But for those limits to become constitutional law, they would have to be recognized as such in decisions by the Supreme Court, which essentially abandoned that view of limited government during the New Deal. Thus, for the Court to play its part in the job of restoring constitutional government—or returning to rule under a properly read Constitution—it must recognize the mistakes it has made, especially following Roosevelt's Court-packing threat in 1937, and then rediscover "the Constitution."

As noted earlier, a small measure of constitutional restoration occurred in 1995 in the *Lopez* decision. Unfortunately, a decade later, in its 2005 California medical marijuana decision, *Gonzales v. Raich*, a divided Court abandoned many of the principles it had articulated in *Lopez* (and had articulated more fully in *United States v. Morrison* [2000]). But in the 2012 decision in *National Federation of Independent Business v. Sebelius*, the Court returned to principle, at least insofar as it held that there are limits on Congress's commerce and spending powers. What those and several other related decisions portend for the future of constitutional restoration by the Court is thus uncertain. At the least, however, after over eight decades of effectively unlimited government, we can say that the idea of a government of constitutionally limited powers is back in play.

But apart from its own restorative actions, Congress is not powerless to influence the Court in the direction of constitutional restoration. As vacancies arise on the Court and on lower courts, the Senate has a substantial say about who sits on those courts through its advice and consent powers. But to exercise those powers well, senators must have a better grasp of the basic issues than many have shown in recent Senate confirmation hearings for nominees for the courts. In particular, the obsession with "judicial activism" and "judicial restraint," terms that in themselves are largely vacuous, only distracts from the real issue: the nominee's philosophy of government and conception of the Constitution. To appreciate those points more fully, a bit of background is in order.

From Powers to Rights

The most important matter to grasp is the fundamental change that took place in our constitutional jurisprudence during the New Deal and the implications of that change for the modern debate. For decades after the New Deal constitutional revolution, but especially with the Warren and Burger Courts during the third quarter of the 20th century, debate focused far more on rights than on powers, and not surprisingly since the 1937 Court had effectively eviscerated the doctrine of enumerated powers. Thus, in Supreme Court confirmation hearings, senators sought mainly to learn a nominee's views about what rights are "in" the Constitution. That is an important question, to be sure, but it must be addressed within a larger constitutional framework, and that is what has been missing too often from recent hearings.

Clearly, the great American debate began with rights—with the protests that led eventually to the Declaration of Independence. In that seminal document, Jefferson made rights the centerpiece of the American vision: rights to life, liberty, and the pursuit of happiness, derived from a premise of moral equality, itself grounded in a higher or natural law discoverable by reason—all to be secured by a government of limited powers made legitimate through consent.

But when the Framers met 11 years later to draft a constitution, they focused mainly on *powers*, not rights, and for two main reasons. First, their initial task was to create and empower a stronger government than had been authorized by the Articles of Confederation, which the Constitution did once it was ratified. But their second task, of equal importance, was to limit that government. For that, they had two main options. They could have listed a set of *rights* that the new government would be forbidden to violate. Or they could have limited the government's *powers* by enumerating them; then, structurally, by pitting one power against another through a system of checks and balances—the idea being, again, that where there is no federal power there is, by implication, a right, belonging to the states or to the people. They chose the second option, for they could hardly have enumerated all our rights, but they *could* enumerate the new government's powers, which were meant from the outset to be, as Madison said, "few and defined." Thus, *the doctrine of enumerated powers* became our principal defense against overweening government.

Only later, during the ratification debates in the states, did it become necessary to add a Bill of Rights—as a *secondary* defense. But in so doing, the Framers were still faced with a pair of objections that had been posed from the start. First, it was impossible to enumerate all our rights, which in principle are infinite in number. Second, given that problem, the enumeration of only certain rights would be construed, by ordinary methods of legal construction, as denying the existence of others. To overcome those objections, therefore, the Framers wrote the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Clearly, we cannot "retain" what we do not first have to be retained—the natural rights we never gave up when we authorized and instituted the federal government through ratification.

Constitutional Visions

Thus, with the Ninth Amendment making it clear that we have both enumerated and unenumerated rights, the Tenth Amendment stating that the federal government has only enumerated powers, and the Fourteenth Amendment later making our rights good against the states as well, what emerges is an inspiring vision of freedom. Individuals, families, firms, and the infinite variety of institutions that constitute civil society are free to pursue happiness as they wish, in accord with whatever values they have, provided only that in the process they respect the equal rights of others to do the same; and governments are instituted to secure that liberty and do the few other things the people, through their constitutions, have authorized and empowered them to do.

That picture is a far cry from the modern liberal vision, rooted in the Progressive Era. But it is a far cry too from the modern conservative vision, especially in the emerging movement for "national conservatism." Both camps would empower government to manage all manner of economic affairs and a range of political and personal affairs as well. Neither vision reflects the true constitutional scheme. Both want to use the Constitution to promote their own substantive agendas. Repeatedly, liberals invoke democratic power for ends that are nowhere authorized by our Constitution of limited powers; at other times, they invoke redistributive "rights" that are no part of our unenumerated rights, requiring government programs that are nowhere authorized, while denigrating rights like property and freedom of contract that were plainly meant to be protected. But conservatives too rely on expansive readings of democratic power, thus running roughshod over rights that were meant to be protected, especially unenumerated rights.

From Liberty to Democracy

What we've seen over the course of the 20th century and the first decades of the 21st, then, is a steady progression from liberty to democracy, from judge-made common law to statutory law, from individual self-rule to collective rule. The idea that animated early 20th-century progressives—that the Constitution was outdated, that the basic purpose of government is to solve what in truth are personal problems—became the intellectual foundation for the New Deal constitutional revolution, which instituted that vision, not with an opinion here and there, as had already been happening, but systematically through several Supreme Court decisions that amounted to a radical reinterpretation of the Constitution, standing it on its head.

More specifically, as noted earlier, following President Roosevelt's 1937 Court-packing threat, the New Deal Court eviscerated our first line of defense against overweening government, the doctrine of enumerated powers. In a pair of decisions, the cowed Court converted the shields contained in the General Welfare and Commerce Clauses into swords of power. Then in 1938, in a famous footnote, the Court undermined the second line of defense, our enumerated and unenumerated rights, when it declared that henceforth it would defer to the political branches and the states when their actions implicated "nonfundamental" rights like those associated with "ordinary commercial transactions." Legislation implicating such rights would be given minimal scrutiny, the Court said in effect, which in practice amounted essentially to no scrutiny at all. By contrast, when legislation implicated "fundamental" rights like voting, speech, and, later, certain "personal" liberties, the Court would apply "strict scrutiny," rendering most such laws unconstitutional. Finally, in 1943, the Court jettisoned the nondelegation doctrine, grounded in the first clause of the Constitution after the Preamble: "*All* legislative powers herein granted shall be vested *in a Congress* . . . ." (emphasis added). That allowed Congress to delegate ever more of its legislative powers to the executive branch agencies it had been creating, which is where most of our law today is written in the form of regulations, rules, interpretations, and more. That undermined a core constitutional principle, the separation of powers. And it sanctioned the modern administrative state, the largely unaccountable executive state that regulates so much of life today.

Through those seminal decisions, the Constitution was transformed, without benefit of amendment, from a limited, libertarian, and supermajoritarian document to an effectively unlimited, simple-majoritarian document. The floodgates were thus opened to the potential for majoritarian tyranny, which very quickly became special-interest tyranny, including "crony capitalism," as public choice economic theory demonstrates should be expected. And that led in turn, increasingly, to claims from many quarters that rights were being violated by these expanding programs. Thus, the Court, focusing now not on powers but on rights, would have to try to determine whether the rights being claimed were or were not "in" the Constitution—a question the Constitution had spoken to only indirectly, for the most part, through the now-discredited doctrine of enumerated powers. And if it found the rights in question, the Court would then have to determine whether they were "fundamental" rights, to be protected under "strict scrutiny," or "nonfundamental" rights, which would be ignored if there were some "rational basis," some conceivable reason for the legislation that implicated them. Where in the Constitution is this judicial methodology to be found? Nowhere. The Court invented it from whole cloth to make the world safe for the New Deal's social engineering schemes.

Judicial "Activism" and "Restraint"

Thus, it is no accident that until very recently the modern debate focused on rights, not powers. With the doctrine of enumerated powers effectively dead and government's powers effectively unlimited, the main issue left for the Court to decide, apart from structural and related issues, was whether there might be any rights that would restrain that power and whether those rights were or were not "fundamental," since "nonfundamental" rights no longer counted for much. In the post–New Deal era both liberals and conservatives bought into this jurisprudence: liberals because they liked this government power, conservatives because they thought the battle a lost cause. Both camps saw the Constitution as giving a wide berth to democratic decisionmaking. Neither side asked the first question, the fundamental *constitutional* question: Does Congress have *authority* to pursue this end? Instead, that authority was simply taken for granted. Congress takes a policy vote on whatever proposal is before it and leaves it to the courts to determine whether there are any "fundamental" rights that might restrict their power.

As these fundamental changes played out, modern liberals, enamored of government programs, urged the Court to be "restrained" in finding rights that might limit their redistributive and regulatory schemes, especially "second-class" rights concerning property, contract, and economic liberty. At the same time, they urged the Court to look to "evolving social values" and to be "active" in finding "rights" invented from whole cloth, rights that served their political agenda.

But modern conservatives were often little better. Reacting to abuses by liberal judicial "activists," most conservatives called for judicial "restraint" across the board. Thus, if liberal programs ran roughshod over the rights of individuals to use their property or freely contract, the remedy, many conservatives said, was not for the Court to invoke the doctrine of enumerated powers or even to invoke the rights of property and contract that are plainly in the Constitution—that might encourage judicial activism—but to turn to the democratic process to overturn those programs. Oblivious to the fact that restraint in finding rights is tantamount to activism in finding powers, and ignoring the fact that it was the unrestrained democratic process that gave us those programs in the first place, too many conservatives offered us a counsel of despair amounting to a denial of constitutional protection.

In the era of the Warren and Burger Courts, conservatives too often overstated and misstated their complaints about the Court's "activism," especially in areas like civil rights and criminal procedure. At the same time, no one doubts that those Courts discovered "rights," especially redistributive rights, that are nowhere to be found in the Constitution, even among our unenumerated rights. But it is no answer to that problem to ask the Court to defer wholesale to the political branches, thereby encouraging it, by implication, to sanction unenumerated *powers* that are no part of the document either. Indeed, if the Tenth Amendment means anything, it means that there are no such powers. Again, if the Framers had wanted to establish a simple democracy, they could have. Instead, they established a limited, constitutional republic, a republic with islands of democratic power in a sea of liberty, not a sea of democratic power surrounding islands of liberty.

The role of the judge in our constitutional republic is thus profoundly important and often profoundly complex. "Activism" is no proper posture for a judge, but neither is "restraint" amounting to abdication. Judges must apply the Constitution to cases or controversies before them, neither making that law up nor ignoring it. They must be actively *engaged* with the document and, especially, with its underlying principles. In particular, they must appreciate keenly that the Constitution is a document of delegated, enumerated, and thus limited powers. That will get the judge started on the question of what rights are protected by the document; for again, where there is no power, there is a right, belonging either to the states or to the people. Indeed, we should hardly imagine that, during the three years before the addition of the Bill of Rights, the Constitution could be read properly as failing to protect *any* rights simply because most, save for those few in the original document, were not "in" that document.

But reviving the doctrine of enumerated powers is only part of the task before the Court. Especially when assessing the character and scope of *state* police power—the basic power of states to secure our rights—judges and justices in the wake of the Civil War Amendments must have a deep understanding of the classical theory of rights that stands behind the Constitution if it is to be restored correctly. In particular, when a plaintiff challenges a state statute by invoking an unenumerated right, rather than ask the plaintiff to find such a right "in" the Constitution, the better course would be for a judge to ask the state defendant what right its statute is protecting under its police power—again, the power, at bottom, to secure rights. To illustrate with a famous example from 1925, *Pierce v. Society of Sisters*, what right was the state of Oregon protecting with its statute effectively prohibiting parents from sending their children to nongovernmental schools? Since the state could not plausibly point to any such right, the unenumerated right of fit parents to direct the education of their children was implicitly "found" by the Supreme Court—and the burden of proof was placed correctly on the state. That approach can be used in an unlimited number of cases where unenumerated rights are at issue. Don't require the plaintiff to find an unenumerated right. Require the state to show what right its statute is protecting.

Those are the two sides—powers and rights—that senators need to examine in confirmation hearings for nominees for our courts. It's important to know a nominee's "judicial philosophy," to be sure. But it is even more important to know a nominee's understanding of the Constitution, for in the end it is the Constitution that defines us as a nation.

If nominees do not have a deep and thorough appreciation for the basic principles of the Constitution—for the doctrine of enumerated powers and for the classical theory of rights that underpins the Constitution—then their nomination should be rejected. In recent years, Senate confirmation hearings have provided opportunities for constitutional debate throughout the nation. Those debates need to move from the ethereal and often arid realm of "constitutional law" to the real realm of the Constitution. They are extraordinary opportunities not simply for constitutional debate but for constitutional renewal.

Unfortunately, in recent Congresses we have seen the debate move not from "constitutional law" to the Constitution but rather to raw politics. We have heard demands that judicial nominees pass "ideological litmus tests," for example, as if judges in their work were supposed to reflect popular views of one sort or another. That is tantamount to asking judges not to *apply* the law, which is what judging requires, but to *make* the law according to those values, whatever the actual law may require, and to commit to doing so during the judicial confirmation process no less. The duty of a judge under the Constitution is to decide cases according to the law, not according to whatever values or ideology may be in fashion. To perform that duty, the only ideology that matters is that of the Constitution.

Conclusion

America is a democracy only in the most fundamental sense of that idea: authority, or legitimate power, rests ultimately with the people as manifest in the Constitution. Having authorized that power, the people have no more right thereafter to tyrannize each other through majoritarian acts than government itself has to tyrannize the people. When they constituted us as a nation by ratifying the Constitution and the amendments that have followed, earlier generations gave up only certain of their powers as enumerated in the document, leaving us otherwise free to live our lives as we wish. We have allowed and even encouraged those powers to expand beyond all moral and legal bounds—at the price of our liberty and our well-being. The time has come to start returning those powers to their proper bounds, to reclaim our liberty, and to enjoy the fruits that follow.

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—Prepared by Roger Pilon

4. ELECTION LAW

State lawmakers should

- pursue best practices for both ballot security and voter convenience, recognizing that the two when reasonably sought are generally compatible;
- adopt tabulation methods that yield a substantially complete result on Election Night;
- consider methods such as ranked-choice voting that might enable a closer fit for voter preferences, curb the polarization found in low-turnout primaries, and give maverick and third-party candidates a fair chance; and
- respect the design laid out in the Constitution in which state lawmakers' discretion in devising methods for selecting presidential electors ends with the selection of those electors on Election Day.

Congress should

- except where the Constitution directs otherwise, generally leave election law and administration to the states;
- tread carefully on changes that might introduce legal or practical uncertainty as to results and thus invite a succession crisis; and
- tighten the Electoral Count Act so as to improve the certainty and clarity of the Electoral College count.

With their appreciation of the rule of law, constitutional checks on government power, and neutral and impartial governance, libertarians should be a voice in election law debates. Those debates are particularly important following the 2020 election, which raised the specter of a disputed transfer of power.

The events between Election Day 2020 and Inauguration Day 2021 posed a stress test for America's republican institutions. Some behaved well; others revealed weaknesses that represent possible breakpoints in some future crisis.

The lessons of this brush with constitutional extremity should inform proposals for election law overhaul. Reforms that shore up what were revealed as critical weaknesses deserve high priority; changes that would have made no difference may seem less urgent; and proposals that might destabilize the system or open up new risks of constitutional crisis are unlikely to be right for the moment.

Most constitutional actors resisted pressure to stray from their constitutionally prescribed duties during Donald Trump's attempt to overturn his electoral defeat. They included the vice president, state election officials and legislators, and most members of Congress. No more than a smattering of lawmakers in any state legislature buy into the wild (and legally ineffectual) scheme of replacing already-chosen electors. Less inspiring of confidence was the performance of the House of Representatives, 139 of whose 435 members voted against certifying at least one state.

Policy responses to these tremors should aim, where possible with bipartisan buy-in, to strengthen the institutions that secure the peaceful electoral transfer of power and narrow the range of factual and legal questions that might in the future enable an election loser to throw into doubt the winner's right to take office.

The most suitable area for congressional action is in clarifying and tightening up the confusing Electoral Count Act of 1887, which lays out rules for Congress's handling of certified electoral votes following a presidential election.

The Constitution gives state legislatures broad authority over the method of selecting presidential electors. All have chosen popular election, a fact that is unlikely to change. Whatever the method, they must choose it beforehand by process of law: Election Day completes the act of elector selection, foreclosing further choices as to method.

Although the Constitution accords states the power to certify results, it does accord to Congress the much more limited role of ruling on irregularities in the submitted certifications themselves, such as errors in date, absent signatures, or claims of forgery. If multiple certifications have been submitted claiming to speak for a given state, it must also resolve which authentically does so.

Because the 1887 law does not exhaustively define proper grounds for objections, partisans in Congress have sometimes sought, wrongly, to use the occasion to relitigate the underlying election. Congress should also clarify the scope of language that permits state legislatures to devise methods for later selection if Election Day balloting has "failed," an exception suited perhaps to a hurricane or similar disaster (ideally as defined by law in that state beforehand). Beyond that, revision of the Electoral Count Act should place a number of points beyond any possible cavil, such as that a vice president does not have discretion to reject duly certified slates.

Turn Down the Temperature

Republican institutions rest on a less secure footing if political factions regularly portray their opponents' election victories—or even their participation in politics—as illegitimate and reject the idea of "rotation in office," which posits that it is normal for voters to periodically replace one set of incumbents with another.

Evidence in recent years has failed to substantiate sensational claims of either voter fraud and "rigging" on the one hand or widespread "voter suppression" on the other. Extensive audits and integrity controls indicate that the volume of fraudulently cast votes is unlikely to be high enough to affect many races. As for "voter suppression," that epithet has been aimed at a variety of practices—many innocuous, widespread, or long-familiar—that have very little to do with preventing willing electors from casting ballots. For example, voter ID laws appear to have no detectable effects on turnout, minority or otherwise, and no detectable effects on fraud either.

In short, the alleged conflicts between ballot security and voter access are overstated. Conservatives should not act as if something is wrong with the goal of making voting more convenient and consumer-friendly; people like convenience, and not everyone has the same schedule, time demands, or car access. Liberals should concede that a practice like "ballot harvesting"—in which a single operative can be paid to collect hundreds of absentee ballots—does raise genuine concerns relating to voter privacy, risks of undue pressure, and security.

Steps to Reinforce Credibility and Encourage Concession

The fraud charges leveled by the 45th president following his loss are but one symptom of a rising unwillingness on both sides of the aisle to concede the legitimacy of election results. Following the 2016 election, for example, a significant share of Democratic voters polled credited an evidence-free theory that Russians had swayed the election by tampering directly with voting machine tallies, a theory recalling the enthusiasm some circles had shown in 2004 for the speculation that Diebold voting machines had delivered Ohio to George W. Bush.

Election administration at all times calls for methods that are secure against fraud and bad practice; an era of rising public distrust calls for methods that are also visibly so. Some moves in this direction have already gone forward with little controversy, as with anti-hacking safeguards and the principle of generating a paper and not simply electronic record for each ballot.

More is possible. Genuine professional-grade audits—as well as various recount methods and what are known as logic and accuracy tests to detect suspicious patterns—are already commonly used and can be adopted more widely. The same is true of transparency measures that—without allowing partisans or amateurs to interfere with counting or to violate security themselves—can serve to reassure doubters by making key stages of the count visible to party leaders and others. States should also mandate participating in what is known as the Electronic Registration Information Center, which allows them to compare their voter registration database with that of other member states to improve detection of moves, duplicates, and so forth.

One particularly important objective for states in current circumstances is to facilitate and, where appropriate, mandate local reporting of complete or near-complete counts on Election Night. A good example is Florida with its early and efficient reporting of results on Election Night 2020. When states do the opposite—in particular, when they refuse to provide for some advance processing of mailed ballots—results will tend to arrive in two widely spaced waves: first, same-day in-person votes, and second, votes by other methods. When the partisan composition of the waves differs, as in 2020, the resulting pattern may be for one side to open up a lead and then be overtaken by the other, leading to claims that someone or other must have engaged in overnight "vote dumps." There is a genuine national as well as within-state interest in ensuring that counts do not stretch into multiple days.

Timely and gracious acknowledgments of election losses are signs of a healthy democratic culture. Although candidates cannot be forced to concede, states often do structure financial incentives in ways that influence behavior, as with rules providing that when the reported margin of victory exceeds a stated margin, candidates that demand recounts must put up the associated cost themselves.

Work with America's Federalist Tradition

The Framers largely left the responsibility for elections to the states and localities. States are given the lead in regulating elections for the House and Senate, although the election clause empowers Congress to regulate the manner of election by law. (See "Redistricting.") The Electoral College device is structured to hold to a minimum the capital's influence on the selection of the president.

Amendments to the Constitution together with implementing legislation have added crucial national-level constraints of equal protection and noninfringement of the right to vote on such bases as that of race and sex. Still, election administration in America remains highly decentralized, relying on armies of local officials, community volunteers, and election judges. States are free to set their own course among a wide choice of methods. Even within a single state, communities may differ on which voting machines to use or how to handle voter correction ("curing") of incomplete ballot submissions.

There are important reasons to be cautious about allowing Washington to displace or regiment this decentralized responsibility.

One is the practical value of decentralization in resilience. Innovations adopted piecemeal can be sorted out by local trial and error with less risk of mass failure. The novel voting machine design doesn't cause havoc everywhere at once; communities considering a voting method like ranked-choice voting can learn from New York City's difficult tryout.

But those are secondary benefits compared with the big one: no Washington official or agency can start bossing around or removing local election officials generally and on short notice. By not entrusting the running of elections to a single central agency, we avoid what economist Steven Landsburg calls "centralizing the power to decide who will yield power."

Avoid Innovations That Invite Succession Crises

After the 2020 election, we can see that it is especially vital to curb the risk of a succession crisis: a situation in which more than one candidate with broad support is tempted to claim legitimate control of the government, often because of an election outcome that is indeterminate in law or practice. Yet some widely lauded reform ideas would head us in the opposite direction.

Consider, for example, the scheme known as the National Popular Vote Interstate Compact (NPVIC). The NPVIC's premise is to have states each pass identical legislation agreeing to award their electoral votes collectively to whichever candidate wins the national popular vote. As of this writing, the NPVIC has been adopted by 15 states and the District of Columbia with 195 electoral votes, more than halfway toward the 270 votes that by the terms of the compact would bring it into legal force.

But the drafters of the compact did not see fit to include workable definitions of how and when a national popular vote would be computed, nor any dispute resolution mechanism in case of disagreement or resistance. A national vote implies a national recount should results prove close, yet no law requires states to conduct a recount. The NPVIC simply takes it for granted that all states report their popular votes in a tidy and readily comparable fashion.

As Cato's Andy Craig has demonstrated, a variety of plausible fact patterns could generate dangerous indeterminacy about results. For example, states are currently free under the Constitution to adopt, and have adopted at times in the past, voting procedures that baffle the hope of obtaining a uniform count per candidate. Alabama in 1960 used a system in which the names of neither John F. Kennedy nor Richard Nixon appeared on the ballot. Voters instead were free to pick and choose among electors, many of whom were unpledged. Because of these anomalies, respectable sources at the time differed as to whether it was Kennedy or Nixon who had edged the other in popular votes—not that it mattered, since it was clear Kennedy had won the Electoral College.

That's not even counting the chances for deliberate sabotage by uncooperative states. Various bills in NPVIC-resistant state legislatures gesture in that direction; one that passed the North Dakota Senate proposes to withhold release of that state's popular vote until after the Electoral College has voted.

Ranked-Choice Voting

The reform known as ranked-choice voting (RCV) has been making inroads lately. Alaska and Maine have adopted versions of the reform, as have many large cities as well as smaller communities in states like Utah. The Virginia GOP has used the method to pick candidates for statewide office.

RCV allows you as the voter to mark not only your first choice among candidates, as now, but a second choice, third choice, and so on. Once ballots are cast, candidates are eliminated beginning with the least popular, whose supporters are redistributed per their ranked choices to the remaining candidates. This process continues until one candidate exceeds 50 percent of the active ballots. Versions of the method have long been used in countries like Australia and Ireland.

Economists have long tended to appreciate RCV because it offers a way to draw on much richer information about voter preferences. It reduces the chance that a candidate who has a committed base but who lacks appeal to most voters will slip through in a crowded field, or that a "spoiler" candidate will siphon support from the candidate who is genuinely most popular. RCV allows casting a conscience vote for the long-shot candidate who is actually best without throwing away the chance to influence the ultimate decision.

Local election administrators can also find practical advantages in using RCV for "instant runoff voting" to offer a speedier alternative to a later runoff election. And the variants known as "final-five" and "final-four" voting offer the hope of lessening the role of low-turnout primaries dominated by base voters.

Conclusion

The chief short-term goal in election reform should be to learn from and implement the lessons of late 2020 and early 2021. That suggests measures to shore up the legal and the factual certainty and transparency of election outcomes.

Election administration is an imperfect art at best with plenty of genuine tradeoffs. We should refrain from treating everyday disagreements as attempts to "rig" results or deprive others of the franchise.

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—Prepared by Walter Olson

5. REDISTRICTING

State lawmakers should

- specify objective criteria for redistricting, such as compactness of districts, contiguity, and congruence with political subdivisions;
- prescribe procedures for redistricting that limit political insiders' discretion in drawing district lines, or entrust the process to those without a vested interest; and
- enact transparency measures, including real-time open-source public access to geographic information, to allow the public to analyze districting maps under consideration and propose alternative maps.

Elected officials often exercise their power in ways that benefit themselves and their associates even at a cost to the public's well-being. A classic example is gerrymandering, the practice of drawing district lines to help ensure the desired result in future elections. The American system tends to leave the power of redistricting in the hands of the same officials whose careers are at stake, and they have routinely misused that power to draw lines with the aim of electing or defeating one or another candidate or party. In a classic gerrymander, the governing party draws many districts in which its own voters hold a comfortable, though not overwhelming, lead, while densely packing voters of the opposing party into as few districts as possible.

Both parties do it: in states such as North Carolina and Texas, Republican-drawn maps have placed Democrats at a disadvantage, while Democrats have done the same to Republicans in states such as Illinois and Maryland. When a state legislature is under mixed or split party control, the approach is often one of bipartisan connivance: you protect your incumbents and we'll protect ours. Third-party and independent voters, as is so common in our system, have no one looking out for their interests.

The practice dates far back in history: the name "gerrymander" comes from a dragon-shaped district that Massachusetts governor Elbridge Gerry helped devise in 1812. But gerrymandering has grown more acute in our own time with the rise of database technologies that can efficiently sort voters by political sympathy down to precincts, city blocks, and even individual buildings. Maryland's third congressional district, as devised in 2012—often cited as among the nation's worst offenders—snaked through four counties and Baltimore city, connected at various points only by water; its silhouette was compared with that of a praying mantis, a "broken-winged pterodactyl" (a federal judge's phrase), and the blood spatters at a crime scene.

Insulating Incumbents

Handicapping the opposition party is only the start. Creative gerrymandering can insulate incumbents and serve the interests of political insiders in a number of other ways as well:

- Those in charge can punish lawmakers of their own party, as well as opponents, by drawing them unfavorable districts at census time. Incumbents who ignore the leadership's wishes on key votes may find themselves assigned to a tough new district or thrust into a primary fight with a popular colleague. That's one method legislative chieftains use to keep a lid on insurgent forces in their own party.
- Carving up a coherent political community, such as a county or small city, among numerous districts can spare weak incumbents scrutiny of their performance. Residents who do not even know who their representative is, as is common with a scrambled map, are less likely to keep track of how well that representative is serving their interests. With multiple districts, races, and incumbents to follow, press outlets are less likely to do a thorough job of covering any of them.
- Where most seats are viewed as belonging to one party or the other, the only meaningful competition tends to come in the primary, and the chief political pressure on incumbents may be to cater to base voters for fear of attracting a primary challenge. Fewer lawmakers have reason to engage with sane voices on the other side.
- When a gerrymandered district sprawls across a state, it's harder for a newcomer to challenge an incumbent. For example, advertising across multiple media markets is expensive. Making the rounds of local events, such as fairs and parades, winds up wasting a lot of effort on people who vote in other districts. These disadvantages tend to reduce the role of "retail" politics—getting to know constituents face-to-face or through a strong record in local government—while magnifying the role of fundraising (to afford the high advertising budgets) and cultivating allies among the sorts of interest groups that can turn out disciplined voters statewide.

The Constitutional Background

In our system, states are in charge of apportioning their own legislatures and have the lead role in apportioning congressional districts as well. Article I, Section 4, of the Constitution reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

The federal government's role has remained limited. The Voting Rights Act of 1965, following the equal protection clause, bans drawing districts for a racially discriminatory purpose, and drafters of maps must ensure that they comply with the act's rules. The federal courts also enforce population equality among districts in a given state, which, under the Supreme Court's ruling in *Baker v. Carr* (1962), extends to state legislative districts as well as congressional districts. (The Court has allowed more leeway, a variance of roughly 10 percent, for state legislature districting.) And both state and federal districts must be reapportioned at least every 10 years to reflect new census results.

Although the Supreme Court has been urged to interpret various constitutional provisions as banning politically motivated gerrymandering, it has thus far declined to do so. Its rationale has been that it has found no principled standard to apply that would not draw it into a multitude of complicated local disputes.

Reforming Redistricting

Fortunately, ideas for reforming gerrymandering are almost as old as the practice itself. They fall into three main categories:

- rules on who is responsible for drawing district lines;
- rules directing the shape or extent of districts; and
- rules on the procedures that panels should follow.

Who Should Draw Lines?

Who draws the lines? Too often, the answer is a few party insiders huddled in a back room. Who *should* draw the lines? One of the ideas that recurs most frequently is to make the process bipartisan, entitling the second-largest party to a negotiating position. New Jersey, for example, entrusts redistricting to a panel selected by political figures with an even party balance and a tie-breaking neutral, with the state's supreme court authorized to intercede in case of deadlock.

Most reform proposals floated these days seek to go further in separating the process from incumbent control. In recent years, serious redistricting reform has caught on, especially in western states, including Alaska, Colorado, Idaho, and Washington. In Idaho and Washington, the process is entrusted to a commission whose members are mostly selected by elected officials, but who themselves must be citizens not holding office. Voters in Arizona, California, and Michigan, by way of ballot initiatives, have gone the furthest by creating what are closer to fully independent citizen commissions, in whose selection lawmakers have a more limited role.

Although each model has its own details, some features are typical. The selection process is usually meant to avoid empaneling a majority of loyalists from a single party. Elected officials and their families are frequently excluded, and sometimes so are persons who have been recent candidates or are political professionals. Where citizens themselves volunteer, some screening process is common; details vary as to which neutral body does the screening and how, but the intent is to find civic-minded individuals who are qualified for the work. Some plans use random or lottery selection for at least one phase of the screening. That system offers the advantage—as with the process for selecting juries in court cases—of impeding any scheme to "wire" the process to ensure that particular persons are chosen.

In a category of its own—and deserving special mention—is the system used in Iowa. It assigns redistricting to the same nonpartisan civil service staff that provides legislative services such as bill analysis at the capitol. Although Iowa's system is often praised for its fair results, it may owe some of that success to features of the local political scene not replicated elsewhere. For example, Iowa has traditionally had a fairly even party balance and a legislative staff whose nonpartisan bona fides are accepted by lawmakers of both parties.

What Should Districts Look Like?

The most essential task in redistricting reform is to provide clear, objective rules for governing how districts are drawn. The three most widely accepted standards are as follows:

Contiguous. All parts of a district should touch. Although this seems obvious, careful language helps prevent such tricks as corner-to-corner connections or circuitous connections over water.

Compact. Districts should look more like turtles than snakes, more like dustpans than rakes. It is not necessary to trust to intuition: at least two mathematical measures of compactness are widely employed. Colorado writes one of them, the total perimeter test, into its constitution: "Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible." The other test—radius or length/width—is used in a number of states, including Michigan.

Congruent. Where possible, districts should respect the boundaries of smaller political subdivisions, such as counties and towns. No one rule fits every state, because the basic unit of political organization varies from state to state (in much of America it is the county, but in New England it is more typically the town). Some states provide that smaller units cannot be split between districts unless no alternative exists. Another convenient measure of congruence is the number of county splits in a plan, with lower numbers ordinarily being better.

If too many criteria are prescribed, then a dangerous degree of discretion is reintroduced into the process, especially if the commission is given latitude to balance among them. For example, some proposals have suggested that a commission take into account vaguely defined "communities of interest" in assembling districts. But almost anything can be called a community of interest. For example, a coastal low-income suburban industrial enclave could be linked to other coastal areas, other low-income areas, other suburban areas, and so forth. Interested parties will find more ways to manipulate outcomes.

How Should the Process Work?

The rules by which a redistricting commission does its work are important as well. One powerful tool is "blinding," that is, directing the panel not to consider current party registration or past voting records in assembling population blocks. Even more powerful is to direct a panel not to consider the location of residence of any individual, such as incumbents or potential challengers. Although incumbent-blinding has potential inconveniences—it may wrench a lawmaker out of a district where one is well loved, or throw three incumbents into the same district—it has proved practical in states such as Iowa and serves as a badge of seriousness in refusing to cater to incumbent interests.

Once a panel agrees on a proposed map, it is typically sent to the legislature for approval. Since giving lawmakers unlimited power to amend the map before approving it is suspiciously akin to letting them draw the map from scratch, some states allow only an up-or-down vote, with any rejection kicked back for a second try. Provisions for judicial review should also be drafted with care: if court review is too weak, participants may feel free to ignore the law; but if it is too easy to sue, courts may wind up mostly drawing the maps themselves. Beleaguered citizen participants would then be left with the unpleasantness of being hauled into court without a sense of accomplishment to make up for it in the end.

Finally, reflecting on how rapidly technology has changed in this area, data transparency practices now have great potential to transform redistricting for the better. Public hearings and online comment registers have become a familiar part of the process. Now, provided a state cooperates by making the data available in correct formats, free or inexpensively available software allows almost any computer user to analyze the full data set behind a map, using geographic information system methods. In several states, this ability has already led to fruitful exchanges in which members of the public offer maps of their own, identify shortcomings in proposed maps, or both. Sometimes, these submissions improve the commission's final plan; at other times, they serve as a vehicle for judicial review, as when the Pennsylvania Supreme Court invalidated a map drawn by lawmakers as being clearly inferior to a map that had been submitted by Amanda Holt, an Allentown piano teacher.

Conclusion

Redistricting reform makes sense for its own sake and as a safeguard against the entrenchment and insulation of a permanent political class. Voters should choose legislators, not the other way around. It's time for every state to catch up.

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—Prepared by Walter Olson

6. GOVERNMENT TRANSPARENCY

Congress should

- pass meaningful, comprehensive national security whistleblower protection legislation that
    - forbids misuse of the classification system to conceal waste, fraud, abuse, mismanagement, or criminal conduct and mandates that any document found to be so misclassified be deemed unclassified and releasable by anyone with access to it;
    - allows prospective intelligence community whistleblowers to make disclosures to any House or Senate member, relevant committee, or the Government Accountability Office;
    - forbids any federal official (elected, appointed, or career civil service) to publicly expose an intelligence community whistleblower who has, in good faith, filed a complaint lawfully; and
    - provides cleared, private counsel to represent the whistleblower in any administrative or legal proceedings; and
- reform the Freedom of Information Act to eliminate broad, unreviewable anti-transparency exemption carve-outs by specifically
    - making a "foreseeable harm" standard review by a court-appointed special master mandatory for all (b)(3) statutes;
    - reevaluating the necessity and rationale for all existing (b)(3) statutes; and
    - mandating a "foreseeable harm" standard review by a court-appointed special master for all agency and department (b)(5) invocations not involving sensitive treaty negotiations.

Whistleblower Protections

American history over the past two centuries has demonstrated repeatedly that executive branch officials would often prefer that U.S. citizens *not* know what they are up to, particularly in the areas of national security and law enforcement. Our knowledge of major episodes of executive branch misconduct—the lies about our policy in Vietnam, the infamous FBI Counter-intelligence Program's domestic surveillance and political repression operation, warrantless mass surveillance by the NSA—all came from whistleblowers who risked prosecution to bring the truth to their fellow citizens.

The current patchwork of federal whistleblower protection laws is inadequate to shield government employees and contractors from retaliation for exposing waste, fraud, abuse, mismanagement, or even criminal conduct.

It was only in 1998 that Congress passed the first law to specifically deal with intelligence community (IC) whistleblower complaints: the Intelligence Community Whistleblower Protection Act (ICWPA). The ICWPA applied only to CIA employees. It required those seeking to report an "urgent concern" to go through the CIA inspector general (IG) *first*; if dissatisfied with the IG's response, they could go to Congress only after telling the director of the CIA that they intended to do so. Such a system guaranteed the exposure of the whistleblower, thus inviting potential reprisals by those accused.

More than a decade passed before Congress would enact any meaningful protections for IC whistleblowers generally.

The fiscal year 2010 Intelligence Authorization Act (Public Law 111-259) created the Office of the Inspector General of the Intelligence Community to investigate whistleblower complaints. But the statute bars only the IC inspector general from revealing a whistleblower's identity—it does not prohibit another official (such as the president) from doing so. That loophole creates the threat of a whistleblower's being involuntarily exposed and thus vulnerable to retaliation. Other issues that affect whistleblower safety from reprisal are generally constrained congressional reporting channels (i.e., limited to specific committees) and the lack of a private right of action to seek civil damages from those who engage in retaliation.

Congress has the power to fix these problems.

Providing prospective IC whistleblowers with multiple, protected pathways to make disclosures is a critical first step. IC whistleblowers should have the option of reporting complaints to any relevant committee, any House or Senate member, or the Government Accountability Office if they believe the committee of jurisdiction is too partisan or politicized to safely make their disclosures.

The current practices of forcing IC whistleblowers to initially go through the IG of the agency or department where they work or of requiring "agency notification" of IC whistleblower complaints to Congress in advance should be expressly forbidden. These mechanisms not only discourage whistleblowing but also affirmatively put prospective whistleblowers at risk of discovery and retaliation by their parent agency or department.

No federal official (elected, appointed, or career civil service) should be free to publicly expose an IC whistleblower who has, in good faith, filed a lawful complaint. Criminalizing IC whistleblower "outing" with assured mandatory minimum prison time and hefty fines is the best way to disincentivize whistleblower retaliation by executive branch officials at all levels.

One other problem routinely encountered by IC whistleblowers is the need to retain a lawyer with appropriate security clearances to represent them in any administrative or legal proceedings. By mandating expedited security clearance processing for the attorney (no more than 30 days from the date of the request), Congress could ensure that IC whistleblowers get proper representation promptly.

If enacted as a package, the reforms outlined here would protect future IC whistleblowers and make the IC as a whole more accountable to Congress and American taxpayers.

Freedom of Information Act Reform

Since its enactment over President Lyndon B. Johnson's objections in 1966, the federal Freedom of Information Act (FOIA) has become a major government transparency tool, employed by individual citizens and organizations across the political spectrum. Federal agency and department resistance to FOIA, however, has forced Congress to amend the law seven times, the last being in 2016.

In 2020, the Reporters Committee for Freedom of the Press, using Justice Department data, found that *nearly half* of FOIA requests are denied either partially or fully. Of the nine specific exemptions that agencies and departments are permitted to invoke, two are particularly problematic: the (b)(3) "other statutes" exemption (i.e., information that is prohibited from disclosure by another federal law) and the (b)(5) "deliberative process" exemption.

At present, there are 39 (b)(3) exemption carve-outs covering 13 U.S. Code titles and other specific laws, as well as the Federal Rules of Criminal Procedure. Some national security–related examples and their negative impacts on government transparency are worth citing.

First is 50 U.S.C. § 3605, or Public Law 86-36, the National Security Agency Act of 1959. Section 6 of that statute states, in relevant part, that "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency."

Such sweeping language allows the NSA to refuse to release information from the prosaic (whether the NSA has an employee cafeteria) to the profound (whether NSA officials have spied illegally on Americans). Similar language exists at 10 U.S.C. § 424, which allows the withholding of information on the "organization or any function of, and certain information pertaining to, employees of the Defense Intelligence Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency."

Most people would agree that the protection of *current* human sources and cryptographic methods is a necessity; however, wide-ranging (b)(3) FOIA carve-outs vitiate the very concept of government transparency.

The so-called deliberative process exemption—(b)(5)—is, in the view of many open government proponents, perhaps the most anti-transparency provision in FOIA.

Government advocates defend the (b)(5) exemption on the grounds that making predecisional government policy or legal deliberations subject to FOIA would have a "chilling effect" on government personnel with regard to providing candid advice and recommendations. Yet in the 50-plus years FOIA has been law, no evidence has surfaced to support that position. In fact, it is precisely when executive branch officials are *considering* potentially controversial—or perhaps even legally questionable—policies that the public and Congress most need to be aware of those potential plans and actions. Even so, Congress has only exempted records older than 25 years from (b)(5) invocation by agencies or departments.

The 2016 update to FOIA included the creation of what is known as the "foreseeable harm" standard for application to most, but not all, of the existing FOIA exemptions. The intent was to force agencies and departments that are seeking to invoke the (b)(5) exemption to articulate one or more specific, real-life harms that would result from disclosing the material at issue. A 2021 ruling by the U.S. Court of Appeals for the D.C. Circuit took exactly that position, denying FBI attempts to withhold allegedly predecisional materials—including draft IG reports—on FBI guidance to agents on impersonating journalists. Although that ruling was an important victory for opponents of the (b)(5) exemption, a permanent statutory fix would be a preferable long-term solution.

Congress has the power to improve FOIA and address these and other issues with the statute.

Revising FOIA to mandate a "foreseeable harm" standard review by a court-appointed special master for all (b)(3) statutory invocations in FOIA cases in litigation would be an important improvement over current law. But Congress should go further and direct the relevant committees of jurisdiction to reevaluate the necessity and rationale for all existing (b)(3) statutes and, where deemed appropriate, repeal (b)(3) statutes that have been abused to conceal federal government misconduct.

Another key change needed is reining in agency and department misuse of the "deliberative process" privilege via FOIA (b)(5) invocations. This is another area in which mandating a "foreseeable harm" standard review by a court-appointed special master for such invocations in FOIA litigation would likewise deter abuse of the (b)(5) exemption. A reasonable exception would be excluding documents involving sensitive treaty negotiations from such a review pending final Senate action on any such treaty.

These changes to FOIA would dramatically improve executive branch agency and department transparency without in any way harming the ability of federal officials to do their jobs. Indeed, additional public and congressional insights into proposed agency and department actions might well prevent bad policies or regulations from ever being enacted.

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—Prepared by Patrick G. Eddington

7. CAMPAIGN FINANCE

Congress should

- repeal the prohibition on soft-money fundraising in the Bipartisan Campaign Reform Act of 2002;
- repeal limits on spending coordinated between a political party and its candidates;
- repeal contribution limits in federal campaign finance law;
- carefully scrutinize the views of Supreme Court nominees on free speech and campaign finance;
- reject attempts to curtail free speech through onerous and unnecessary disclosure rules;
- reject efforts to force taxpayers to fund election campaigns; and
- refuse to extend campaign finance regulations to internet political activity.

The 107th Congress passed the most sweeping new restrictions on campaign finance in a generation, the Bipartisan Campaign Reform Act of 2002 (BCRA, also known as the McCain-Feingold Act). During the 108th Congress, the Supreme Court approved almost all of the BCRA. Since then, however, the Court has become much more protective of free speech. In *Citizens United v. Federal Election Commission* (2010), the Court held that Congress could not prohibit corporations and unions from spending independently on speech supporting or opposing candidates. A lower court later followed *Citizens United* and found that individuals who form groups limited to independent spending could not be bound by contribution limits. Such "super" political action committees (PACs) have been important in recent elections.

The effort to suppress speech by regulating the money spent on speaking has changed form but has not ended. In March 2021, the U.S. House of Representatives passed H.R. 1, a bill containing several campaign finance restrictions. Notably, all but one House Democrat voted for the bill while all House Republicans voted against it. S. 1, the Senate version of the bill, died in June of that year when Sen. Joe Manchin (D-WV) refused to support weakening the filibuster to permit S. 1 to be enacted by a party-line vote.

Some of the campaign finance proposals in these bills are likely to be introduced in the 118th Congress. Although the courts have trimmed back the BCRA, federal campaign finance law still limits free speech in important ways. Congress should supplement judicial efforts to protect political speech by eliminating restrictions on party funding and removing contribution limits.

Liberty and Corruption

The First Amendment to the Constitution prohibits governments from abridging the freedom of speech, and political speech receives the highest protection. In the seminal case of *Buckley v. Valeo* (1976), the Supreme Court recognized that restrictions on political spending abridge political speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Note that the Court did not say "money equals speech." But just as a restriction on money that can be spent on an abortion is a restriction on abortion, restrictions on the raising and spending of money used to disseminate political messages are ultimately restrictions on political speech.

Some believe there is too much money in elections, implying the nation would be better off with limits on giving. But people spend money to try to persuade voters to go to the polls, to cast a ballot for a particular candidate, or to support a particular issue. If we believe that the nation is better off if voters cast a more informed vote, we ought to encourage, not restrict, campaign spending. John J. Coleman of the University of Minnesota found that campaign spending increases public knowledge of the candidates across all groups in the population. Implicit or explicit spending limits reduce public knowledge during campaigns. When more money is spent on campaigns, voters and society benefit by improving public decisionmaking.

But Congress does limit spending on federal campaigns. In *Buckley v. Valeo*, the Supreme Court upheld limits on contributions to candidates, concluding that limits on contributions served two important interests: they prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." The Court defined "corruption" as the exchange of large contributions for “a political quid pro quo from current and potential office holders.” The Latin phrase quid pro quo means “something for something.” Such exchanges, the Court continued, undermine “the integrity of our system of representative democracy.” Representatives should respond to the wishes of a majority on most matters; quid pro quo arrangements imply that representatives respond to money.

It is difficult to determine when contributions are offered in exchange for favors. Scholars of campaign finance have found that individuals and groups generally give to candidates and causes that already support their views. That makes sense: Is it easier to support a candidate who already shares your views or to spend enough money to induce a candidate to change his or her mind? Perhaps quid pro quo corruption exists when money changes a politician’s mind. Public officials might alter their vote about an issue in exchange for a contribution. But scholarly studies over many years find little evidence that contributions significantly affect policymaking once other factors (partisanship, ideology, and constituency preferences) are taken into account. In the name of countering the insignificant effect of contributions on politicians’ behavior, Congress has taken a sledgehammer to political speech, making election-related speech more heavily regulated than pornography.

Critics of political spending often say that politicians trade access for contributions. Sometimes, they mean that officeholders meet with contributors to discuss their concerns and proposals. Let’s imagine, however, that a contribution goes toward advancing a candidate’s campaign rather than toward getting the candidate to support policies he or she would not otherwise support. If an organized interest gives a candidate $50,000 (which is currently illegal), and the candidate agrees to meet with its representatives to hear their concerns, is that problematic or is it just normal politics? Isn’t meeting with concerned citizens, even if they’re an organized interest, an essential part of democracy? “Access” in itself does not seem to be the problem. Rather, access becomes a problem if it is part of a quid pro quo relationship involving money rather than politics.

Independent spending on speech for or against candidates exceeds money spent by candidates themselves. Some argue that public officials know about and reward such support, creating a kind of quid pro quo. Evidence on this point is hard to come by. Those who spend large sums devote their efforts to one party or the other; such spending seems ideological or partisan, an expression of political commitment, rather than an attempt to buy policy favors.

The *Buckley* Court decision also said contribution limits were justified by “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” The appearance of wrongdoing, the Court suggested, would erode public confidence in representative government. By limiting contributions, Congress would bolster public confidence in government. Now, many people from both parties believe that Congress is "corrupt," but what they mean by "corruption" is usually difficult to discern. Sometimes "corruption" seems to be synonymous with "not enacting preferred policies"; thus, the lack of, say, single-payer health care is viewed as evidence of corruption. In years past, however, when modern campaign finance restrictions were not in place, people tended to have much more trust in government. Our growing distrust of government seems to be a product of something other than political spending, such as the significant partisan divide currently in Washington.

Here is a summary of the relationship of contribution limits and trust in government. The United States had no limits on individual contributions during the era of highest trust in government. Trust in government and effective limits on donations have varied since that high point. In the era of no limits, trust rose until 1963 and then fell until 1974, when contribution limits were enacted. From 1974 until 1980, trust continued to fall. In 1980, the limits on giving to political parties were loosened; trust began to rise until 1986 when it plateaued and began to fall, around 1989. Trust then started rising again after the middle of 1994 until the end of 2001. The McCain-Feingold law banned unlimited contributions to the parties in 2002; trust in government fell until about January 2010. *Citizens United* effectively removed limits on independent spending in early 2010; since then, trust has varied in a narrow range, but the trend is flat. No doubt many factors affected public trust over the years, but both limited and unlimited campaign contributions seem consistent with rising and falling confidence in government. In the states, scholars have found campaign finance regulations "are simply not important determinants of trust and confidence in government" during the period studied.

Contribution limits have another flaw. Individuals can donate only $2,900 to a candidate in an election; if they wish to give more, they must find a suitable super PAC. Looked at another way, contribution limits push some funding for political speech away from established channels and toward relatively new institutions (like super PACs) that exist because contribution limits curtail direct donations to candidates and because the First Amendment protects direct spending on speech. Many, but not all, donors would probably support speech through established institutions if they could, but the limits make that impossible.

Should federal law favor "outsiders" at a cost to "insiders"? Perhaps. Insiders might care too much about organized groups in the capital; outsiders can force the concerns of a broader public onto the public agenda. But compared with parties, outsiders lack experience organizing and representing mass opinion. Resources may be wasted and civic-minded folks frustrated. Outsiders might also be more extreme in their commitments, a virtue or a vice depending on one's point of view. Other arguments for and against insiders and outsiders come to mind. Which side should win the argument is unclear.

Let's look at the issue in a different way. The voters are supposed to choose the government. If government favors one group over another, it helps choose itself. Election laws should instead be neutral toward those engaged in politics. Contribution limits are not neutral; they favor outside spending over established channels. Citizens, not public officials, should choose between insiders and outsiders. Removing contribution limits would mean that political spenders would not have a legal reason to favor outsiders over insiders. A given spender may have a personal reason for preferring one mode of spending to another, but the law should be neutral between the two.

The question of neutrality goes beyond individual donors. The BCRA prohibited "soft-money" contributions to the political parties in 2002. The courts have struck down much of the BCRA, but this prohibition remains. In other words, individuals or organizations may give as much as they wish to super PACs but not to the political parties. This unusual preference for "outsiders" over "insiders" would end if Congress removed the soft-money ban.

Last, but far from least, is the problem of electoral competition. Campaign finance regulation brings every member of Congress face-to-face with the problem of self-dealing—not only the self-dealing that the regulations are supposed to prevent but, more immediately, the self-dealing that is inherent in writing regulations not simply for oneself but for those who would challenge one's power to write such regulations in the first place. Put simply: elected officials are writing the rules by which they get chosen for office, and it may not be a coincidence that many of those rules disproportionately harm challengers over incumbents. Unseating incumbents is very difficult, and campaign finance restrictions only make it harder. Even in the "revolution" of 1994, which changed control of the House of Representatives, 80 percent of members returned for the next Congress. Partisan flips do not indicate substantial turnover in the House. In 2010 and 2018, successful years for the Republicans and the Democrats, respectively, about 78 percent of House members returned for the next Congress.

Campaign finance restrictions may not fully explain the lack of competition for incumbents in American politics. But those restrictions encumber entry into the electoral market and thus discourage credible challenges to incumbents. A challenger needs large sums to campaign for public office, especially at the federal level. A challenger needs big money to overcome the manifest advantages of incumbency—name recognition, the power of office, the franking privilege, a knowledgeable staff, campaign experience, and, perhaps most important, easy access to the media. Current law limits the supply of campaign dollars: an individual can give no more than $2,900 to a candidate, and a political party or a political action committee can give no more than $5,000. In a free and open political system, challengers could find a few "deep pockets" to get them started, then build support from there, unrestrained by any restrictions save for the traditional prohibitions on vote selling and vote buying.

Disclosure

The courts have generally upheld mandated disclosure of contributions and contributors. Yet disclosure has its risks: officials may threaten those who fund their rivals for office. Congress should be wary of attempts to use onerous disclosure regimes as a backdoor to regulating speech. The Supreme Court has affirmed the right to anonymous speech (*McIntyre v. Ohio Elections Commission*), anonymous association (*NAACP v. Alabama*), and anonymous donations to nonprofit organizations (*Americans for Prosperity v. Bonta*), yet the precise contours of how far Congress or state legislatures can go in mandating disclosure are still unclear. Many lawmakers are trying to use that lack of clarity to hinder campaign spending.

In the 117th Congress, S. 1/H.R. 1 proposed several new disclosure requirements for spending on political activity. Corporations, unions, and nonprofits would be required to reveal who donated $10,000 or more for political activities, as well as campaign-related spending. Groups supporting political ads would have to reveal their donors and officials in such advertisements. Moreover, nonprofits would have been required to disclose their donors as a condition for their tax exemption. Finally, the bill sought to extend disclosure requirements for paid digital and internet communications that mention a candidate in any 30-day period before an election.

The proposals for nonprofits and for the internet are especially questionable. Nonprofits often speak out during elections in ways that threaten sitting members of Congress. Making a nonprofit's tax exemption dependent on disclosing its political activity to the very people it is criticizing contravenes democratic principles. Mandating disclosure on the internet means exposing political activity to Twitter mobs and similar attacks that are likely to chill speech. More generally, the internet has been largely free of campaign finance regulation. Disclosure is unlikely to be the end of restrictions on internet speech and political activity.

Disclosure advocates insist that voters need to know who is spending money in elections. This proposition is dubious in most circumstances. It's hard to imagine a situation in which one's ability to cast an informed vote depends on knowing who donated $400 or even $4,000 to a candidate. For voters committed to a party or an ideology, such knowledge is irrelevant; for marginal voters, studies have found that such information has little effect.

But disclosure can have a large effect on encumbering political speech, particularly in an increasingly partisan and volatile political climate. In 2014, for example, Mozilla founder and chief executive Brendan Eich resigned after it was revealed that he contributed $1,000 to an anti-gay-marriage group. In its 2021 decision in *Americans for Prosperity v. Bonta*—which arose from the California attorney general's attempt to get lists of top donors from nonprofits that raised money in the state—the Supreme Court noted that the challengers to the law had demonstrated "that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence." It is hard enough to support an unpopular cause, say gay rights in 1980 or opposition to gay rights in 2016, without adding the burden of having the names and addresses of supporters publicly disclosed and available on a website. Politics can make enemies of people who would otherwise be friends, and people should not be forced by the government to disclose to their neighbors what causes they support.

In the next two years, we will hear much about undisclosed legitimate spending on elections, so-called dark money. The phrase "dark money" evokes shadowy and nefarious entities, but the term lacks a meaningful definition. Some people across the political spectrum do not want their political spending to be known. Some of that spending goes to nonprofits that advocate for or against candidates. Some goes to issue-driven organizations like Planned Parenthood. It's unclear whether those who rail against dark money include organizations like Planned Parenthood, and whether they would support the mandatory disclosure of donors for advocacy that does not rise to the level of directly supporting or opposing a candidate, such as voter guides that give candidates grades. Many supporters of Planned Parenthood, perhaps living in deeply religious parts of the country, certainly want to remain "dark."

Given the prevalence of the term "dark money" in political rhetoric, one could be excused for thinking that most election-related spending is dark. Although the absolute amount of both disclosed and undisclosed independent spending has increased since 2000, dark money still represents a small part of election spending. According to the Center for Responsive Politics, in 2014 dark money accounted for $175 million of the total $3.7 billion spent, or 4.7 percent. In 2020 groups mostly favoring Democrats spent $1 billion on undisclosed political activity. That sounds like a large sum. However, the heavily contested 2020 election saw a total spending of $14.4 billion. Undisclosed spending thus constituted about 7 percent of the total, an increase over past elections but hardly the dominant mode of spending on the election. The general increase in independent spending over time is likely due to the increased partisanship around politics and, in particular, around which party controls Congress and the presidency.

Until the Supreme Court weighs in on the proper balance between voter information and donor privacy, lawmakers at all levels should resist new disclosure laws that provide little benefit to the electorate and do much harm to free speech. Lawmakers should also be wary that disclosure laws are often proposed for the implicit, and sometimes explicit, purpose of dissuading political engagement through public shaming and other actions. Valid disclosure laws should be narrowly tailored to achieve a compelling government interest, and they should not be justified by mere hand-waving reference to "voter information."

Two other proposals bear mention. Some in Congress favor forcing taxpayers to fund election campaigns (so-called public financing). Such mandates have been opposed by majorities in surveys for almost a century. With government debt at record levels, does forcing taxpayers of the future to pay for campaigns now make sense? Some have also proposed reducing the size of the Federal Election Commission from six members to five. This change would empower a partisan majority to enact rules that affect electoral speech. Having six members at least requires some bipartisan support to enact rules. In a polarized time, giving one of the major parties unrestrained power to use election law as a political weapon would hardly serve the public interest.

Finally, in recent years, some have called on the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS) to scrutinize election-related speech. The IRS is not qualified to regulate political speech, and Congress should resist any future attempts to increase the IRS's regulation of political groups. Similarly, many have proposed that the SEC should ensure that the political activities of publicly traded companies are disclosed to shareholders. Again, regulating political groups and political speech, if it is to be done at all, is the province of the Federal Election Commission, not the SEC. Congress should continue to block any attempt to involve the SEC in campaign finance.

Judicial Nominations

Campaign finance has emerged as one of the most contentious issues of our time, and there is little indication that this will change. Both sides have coalesced around fundamentally irreconcilable visions of the First Amendment. Judicial nominees at the federal level should be heavily scrutinized on which version of the First Amendment they endorse.

On one side, campaign finance reform advocates view the First Amendment as empowering agencies and courts to make the marketplace of ideas fairer.

On the other side are those who rightly resist any interpretation of the First Amendment that empowers, rather than limits, the government.

For almost all of U.S. history, the Supreme Court viewed the First Amendment as limiting rather than granting government power. In the past decade, the Court has reaffirmed, in the words of Justice Antonin Scalia, "the central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."

Today, many jurists and academics deny that central truth; they want the government to play an active role in regulating political debate for fairness. Yet there are no meaningful, objective standards by which an agency or a court could determine whether a political debate is fair, and any attempt to do so is sure to be imbued with bias. This is precisely why that interpretation of the First Amendment is not just wrong, it is dangerous. The "fairness" theory is not a modification of existing First Amendment doctrine, it is a fundamental shift away from over two centuries of liberalism, in the classical sense of the word. Congress should determine whether judicial nominees support that long liberal tradition of free and open politics and resist confirming those who do not.

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—Prepared by John Samples and Trevor Burrus

REINING IN A RUNAWAY EXECUTIVE

8. TOWARD A CONGRESSIONAL RESURGENCE

Congress should

- reclaim the power to make law by requiring an up-or-down vote on all "major rules" involving more than $100 million in economic costs;
- establish a standing committee to review past legislation and identify broad statutory language that abets executive overreach in rulemaking;
- revise the Administrative Procedures Act to make clear that federal courts reviewing agency action are to decide questions of federal law de novo, without deference to agencies' interpretations of their own authority;
- establish an Article I agency to inform lawmakers about executive branch regulations—comparable to White House regulatory review—to allow for meaningful congressional oversight of the administrative state;
- rein in the president's statutory powers by subjecting them to reasonableness review in Article III courts;
- reclaim the power of the purse by enacting a law requiring that all profits, fees, fines, civil and criminal forfeitures, and other revenues be deposited in the Treasury and spent through the normal congressional appropriations process; and
- require regulatory agencies to submit comprehensible budgets.

"In absolute governments, the king is the law," Thomas Paine proclaimed in *Common Sense*, but "in America, the law is king." We've come a long way since 1776: increasingly, in 21st-century America, the *president* is the law. Over the past few decades, the "most powerful office in the world" has grown more powerful still, thanks to a succession of presidents who repeatedly pushed the limits of executive authority and multiple Congresses unwilling to push back.

President Bill Clinton pioneered our modern era of "presidential administration," in which the White House has leveraged the executive order to become the primary policymaker in the federal government. An aide to Clinton famously described this approach to the press, saying "Stroke of the pen, law of the land. Kind of cool."

The George W. Bush administration became notorious for sweeping claims of executive authority in foreign affairs. Yet by the end of his second term, Bush had also radically expanded presidential power on the home front, into areas in which no plausible national security claim could be made, such as ordering a multibillion-dollar auto bailout just days after Congress failed to pass the bill.

On the campaign trail, Sen. Barack Obama (D-IL) railed against presidents "trying to bring more power into the executive branch and not go through Congress at all." But after assuming the office, Obama famously reached for his pen and phone to grant sweeping dispensations to immigration law, impose billions of dollars in climate regulations, and unilaterally amend the Affordable Care Act.

His successor, President Donald Trump, continued this aggressive unilateralism and then some, imposing "national security" tariffs on our NATO allies, barring entire classes of immigrants on the basis of nationality, and declaring a transparently bogus "national emergency" at the southern border to perform an end run around Congress's power of the purse.

Our system of separated powers was designed to force deliberation and consensus; for a bill to become law, it needs to meet with the approval of the representatives of three different constituencies: the House, the Senate, and the president. But when the executive branch makes law unilaterally, those procedural hurdles stand in the way of undoing what the president has ordered with the stroke of a pen.

As someone who spent most of his adult life in the Senate, President Biden surely appreciates the constitutional boundaries between the legislative and executive branches of government. He signaled as much before assuming office. "I am not going to violate the Constitution," the then president-elect told civil rights leaders in December 2020: the sort of "executive authority that my progressive friends talk about is way beyond the bounds."

Yet the allure of unilateral presidential lawmaking proved too tempting. In the first days of his administration, Biden unleashed such a flurry of unilateral edicts that even the *New York Times* editorial board felt compelled to cajole him: "Ease Up on the Executive Actions, Joe." Throughout his first year, Biden issued executive orders at an unprecedented clip for modern presidents—almost double the combined annual average of his three immediate predecessors. To date, the Biden administration has imposed several sweeping measures that are indistinguishable from major legislation, including a halt on oil and gas leasing on federal property, continuation of a nationwide moratorium on evictions initiated by his predecessor, and a vaccine mandate on businesses with more than 100 employees.

It's unlikely to stop there: Biden's progressive friends have an extensive wish list. Senate Majority Leader Chuck Schumer (D-NY) has urged Biden to "call a climate emergency," noting that "he could do many, many things" that wouldn't have to go through Congress. And Sen. Elizabeth Warren (D-MA) has been after him to declare an executive jubilee on student loans, forgiving up to $50,000 per debtor, at a cost of around a trillion dollars. They're sure to ramp up the pressure as his ability to pass legislation the old-fashioned way dwindles.

That's the political environment facing the 118th Congress, and, like the prospect of a hanging, it ought to concentrate the mind wonderfully. As we'll see, Congress bears much of the blame for the rise of one-person rule, having abdicated its core constitutional responsibility for making the law. But the crisis of executive governance creates an opportunity for a congressional resurgence. This chapter offers a number of reforms that, if implemented, would go some distance toward revitalizing Congress.

Congress and the Presidency in the Constitutional Order

The current regime of executive branch dominance is at odds with our Constitution's structure and history. Presidential hegemony wasn't part of the original plan: the Framers never conceived of the president as America's "national leader" and the prime mover in the federal system. Neither did they subscribe to the Jacksonian notion that the president, as the only nationally elected figure, was the "direct representative of the American people" or, as Theodore Roosevelt saw it, uniquely the "steward of the whole people," with special powers to act on their behalf.

If anything, Congress had the superior democratic pedigree. Compared with the chief executive or the federal judiciary, the members of the legislative branch, who "dwell among the people at large," James Madison wrote in *Federalist* no. 49, were "more immediately the confidential guardians of the rights and liberties of the people." And it is Congress that, on parchment at least, has the superior powers. Just as the Capitol dome looms over the president's house in the architecture of the federal city, Congress overshadows the president in the structure of the federal Constitution.

"All legislative Powers herein granted shall be vested in a Congress of the United States," the document proclaims in Article I, Section 1, the first sentence following the Preamble. Congress wields the power of the purse; it establishes the structure of the executive branch and the rules under which it operates.

It can create or abolish agencies, remove department heads and even, through the impeachment power, remove the president. The president has no reciprocal powers allowing executive control over Congress.

The first sentence of Article II vests "The executive Power" in the president. At its core, that power consists of the authority to carry into execution the laws that Congress makes. The point is underscored in Article II, Section 3, which imposes a number of duties on the president, among them that "he shall take Care that the Laws be faithfully executed."

The Constitution was not a blueprint for a government of coequal branches. To the contrary, as Madison explained, "in a republican government, the legislative authority necessarily predominates." In fact, given the relative balance of the branches' formal powers, the Framers worried about Congress overwhelming the president. Experience in the states, where "the legislative department is everywhere extending the sphere of its activity, and drawing all power into its *impetuous vortex*," served as a cautionary tale. To guard against that danger, the Constitution's architects divided the legislature into separate branches and fortified the president with the veto as a defensive weapon.

The Presidency Transformed

From a modern vantage point, the Framers' concerns about legislative dominance seem almost quaint. By the mid-20th century, the *executive's* "impetuous vortex" threatened to swallow up the powers of the first branch.

In the first century of the Republic, when Congress still served as the country's principal lawmaker, presidents issued fewer than 800 executive orders in total. Yet as the chief executive's responsibilities expanded, so too did his power to govern by decree. From Truman through Nixon, presidents issued over 2,200 executive orders, which became increasingly indistinguishable from legislative acts. For its part, Congress facilitated the growth of presidential rule by drafting increasingly broad and vague laws that accorded the executive discretion in interpretation and implementation. Legal scholar Gary Lawson has likened the legal regime that emerged from unrestrained delegation to one governed by "a statute creating the Goodness and Niceness Commission and giving it power 'to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.'" The myriad "goodness and niceness" commissions of the modern administrative state go by different names and have narrower purviews individually, but collectively, they're hard to distinguish from Lawson's reductio ad absurdum.

In the latter part of the 20th century—not coincidentally a period characterized by the "emerging Republican majority" in the Electoral College—conservatives perceived advantages to presidential dominance. Using the enhanced powers of the presidency, conservative chief executives could gain control over the administrative state and rein in the regulators, they reasoned. But as Elena Kagan—formerly a policy adviser in the Clinton administration and now a Supreme Court justice—pointed out in a 2001 *Harvard Law Review* article, there's little reason to think that "presidential supervision of administration inherently cuts in a deregulatory direction." A progressive president could use his control over the administrative state to pursue "a distinctly activist and pro-regulatory agenda"—as Clinton had done and as Obama and Biden would later do.

Reclaiming the Power to Make Law

Thankfully, the powers the Constitution gives to the first branch are more than adequate for the Congress to reestablish its rightful role. As law professor Charles Black noted four decades ago in the wake of Watergate: "My classes think I am trying to be funny when I say that . . . Congress could reduce the president's staff to one secretary . . . [and] put the White House up at auction. . . . [But] these things are literally true."

If Congress has the legal power to sell the White House, it certainly has the power to constrain and discipline the president in less dramatic fashion: to punish unauthorized spending, police violations of the take care clause, and reclaim responsibility for making the laws Americans are required to follow. What's needed now is for Congress to recognize the powers it has and begin flexing muscles that have grown slack with disuse.

To begin with, if members of Congress are concerned with presidential power grabs, they should stop *enabling* them. Too often, legislators have given the president a colorable claim to legal authority by passing broad and vaguely worded statutes that leave the details to be worked out by the executive branch. Congress should establish a standing committee to review past legislation and identify broad statutory language that abets executive overreach in rulemaking. The new committee would propose new, narrower language for existing statutes to restore congressional control over agencies. Such a retrospective review would provide a legislative complement to the Supreme Court's recent decision in *West Virginia v. EPA*, which requires Congress to be clear when it assigns significant regulatory authority to administrative agencies.

Congress should also consider framework legislation that promotes legislative accountability for new regulatory rules going forward. In the Congressional Review Act of 1996 (CRA), Congress defined a "major rule" as a regulation that involves more than $100 million in costs or otherwise significantly affects the economy. The CRA provided expedited procedures for members to challenge proposed regulations, via a disapproval resolution, which, if passed by both houses and signed by the president, prevents the rule from going into effect. In the first two decades after it passed, the act was employed to stop a final rule only once; in recent years, Congress has seen more success with the CRA, overturning 16 rules since 2017. Still, to truly reclaim responsibility for lawmaking, it needs a more reliable weapon than the CRA's post hoc veto.

The proposed Regulations from the Executive in Need of Scrutiny (REINS) Act is that weapon. It would require Congress to vote major rules into law before they take effect. Under its provisions, agency rules that meet the criteria are automatically introduced into each house and fast-tracked toward an up-or-down vote within 70 days. If enacted, the REINS Act—versions of which have passed the House four times since 2013—would increase Congress's workload, forcing members to consider 50–100 major rules per year. But as the Hudson Institute's Christopher DeMuth has put it, "Should not members of Congress stand and be counted on regulatory policies costing $100 million or more, even if that means spending less time naming post offices after one another and proclaiming National Orange Juice Week?" As with the retrospective review of existing legislation, discussed above, the REINS Act would complement the Supreme Court's decision in *West Virginia v. EPA*, which, again, calls for Congress to be clear when it grants major policymaking authority to regulatory agencies. Under REINS, Congress would signal its unambiguous intent with every significant administrative action to come out of the executive branch.

Further, Congress must equip itself with the analytical capacity to compete with the presidency for managerial control over the administrative state. As the saying goes, information is power; at present, Congress suffers from a gross informational asymmetry vis-à-vis the executive branch. Since the Reagan administration, the White House has superintended regulatory policymaking through a 40-person staff at the Office of Information and Regulatory Affairs (OIRA), whose role is to appraise the president of regulatory consequences. Yet Congress has developed no comparable function for assessing regulatory products. As a result, lawmakers are reliant on the executive branch for information about the costs, benefits, and other societal effects of administrative policymaking. To level the playing field, Congress should remedy this analytical gap by creating an Article I agency that performs an OIRA-like function. Only then will lawmakers have sufficient information to effectively oversee the administrative state. A historical parallel is the Congressional Budget Office that Congress created to redress the president's informational advantage when it comes to budgeting.

Further, Congress should consider revising the Administrative Procedure Act (APA) to empower judicial review of executive agency actions. Such review has become utterly anemic over the past several decades, under the judicially created *Chevron* doctrine, by which the courts accord executive branch agencies extraordinary deference to their interpretations of their own statutory authority. Bills introduced in the House and Senate in 2019 would overturn *Chevron* deference, amending the APA to empower courts to decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules."

Congress should also provide for a judicial check to prevent obvious abuses of discretion when a president exercises statutory powers. Most of the time, Congress delegates regulatory authority to an alphabet soup's worth of administrative agencies collectively known as the administrative state. Sometimes, however, Congress delegates regulatory authority directly to the president, especially in areas of international trade, immigration, or public land regulation. Although courts review agency regulations for reasonableness and abuse of discretion, the Supreme Court exempted the president from such review in the early 1990s. And because courts don't check for reasonableness, presidents are allowed to be unreasonable. This is why Trump was able to impose "national security" tariffs on NATO allies (see "International Trade and Investment Policy"), or why Obama could regulate fishing in an oceanic "monument" the size of Connecticut. To stop these obvious abuses of discretion, Congress should amend the Administrative Procedure Act to subject the president's regulatory decisions to reasonableness review. Such a requirement would in no way threaten to disrupt the president's ability to conduct foreign affairs or respond to crises: courts would retain the discretion to refrain from reviewing a president's actions in cases that implicate genuine constitutional powers. Instead, lawmakers would merely ensure that the president can no longer commit flagrant abuses of discretion when exercising delegations from Congress.

Congress should also address agencies' use of "coercive guidance" to expand their authority, meaning guidance issued outside the normal notice-and-comment procedures dictated by the APA. One way to do that is by amending the APA to establish qualified immunity for regulated parties, private or public, who violate abstract or contested rules issued as informal policy statements that outline proscribed behavior. In practice, such regulatory targets would not be held liable retrospectively. Law professor William Baude has described how qualified immunity would change coercive guidance:

> If presented with executive guidance that takes an aggressive or questionable interpretation of the underlying statute, the regulated entity would now be able to more confidently go on about its business, ignoring the agency's position. It is still equally possible for the agency to impose sanctions and take the regulated entity to court, but the entity has been insured to some degree against

the risk of losing a novel question of law. This makes it far more likely that debatable executive interpretations will end up subject to judicial review, and hence far more likely that they will ultimately be subject to congressional constraints.

Reclaiming the Power of the Purse

Congressional shortcomings go beyond promiscuous delegation of legislative power. Article I, Section 9, of the Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Nonetheless, a number of regulatory agencies rely on funding extracted outside the normal appropriations process and the congressional oversight it enables.

For example, the Consumer Financial Protection Bureau is funded outside the congressional appropriations process. Instead of going to Congress, the agency is authorized to draw funds from the Federal Reserve System. Every year, the bureau receives the amount that the director deems "to be reasonably necessary to carry out the authorities" of the agency.

The Federal Communications Commission sets and collects about $8 billion in taxes on landline and wireless telecommunications companies, cable companies that provide voice service, and paging service companies. The commission then has broad discretion in spending that money to achieve universal service. In this case, the power of the purse seems to be migrating to the executive branch. "All of this is easily fixed," notes legal scholar Michael McConnell. Congress can "pass a statute providing that all profits, fees, fines, civil and criminal forfeitures . . . and other revenues must be deposited in the Treasury and spent only in accordance with congressional appropriations."

Moreover, when it comes to presidential inaction and failure to faithfully execute the laws, the power of the purse is likely to be among the most effective weapons available to Congress. As Justice Antonin Scalia put it in a 2012 case, "Nothing says 'enforce the Act' quite like '. . . or you will have money for little else.'"

Finally, Congress should require agencies to submit comprehensible budget documents. Here, the Environmental Protection Agency's fiscal year 2022 budget justification is emblematic of most agencies' approach. Instead of organizing its budget justification by office or statute, the EPA employed an indecipherable matrix of conceptual goals and organizational labels. Over the course of almost 1,000 pages, the document described more than 150 of these matrix combinations, using airy prose that fails to impart even the most basic information (such as which office is spending the money). When agencies submit incomprehensible budgets, they make lawmaker oversight impossible. Congress should demand that agencies simplify these documents to make it easy to follow the money.

Crisis and Opportunity

Reining in the president's de facto lawmaking powers won't be easy. Members of Congress may be tempted to delegate their power to avoid responsibility for policy outcomes. But business as usual will only encourage the growing public perception that the game is rigged. The long decline in respect for Congress occurred during a period when it increasingly abdicated responsibility and power to the executive branch and stems in large part from the popular perception that, as an institution, it has become useless.

Unfortunately, Congress has done much to foster that perception. As Sen. Mike Lee (R-UT) has noted, "At the end of the day, the real change can't come to federal law until it comes to federal lawmakers. Congress has to re-assert its Article 1 powers—and get back in the habit of doing its job."

The current crisis in executive governance is an opportunity for congressional "institutionalists." And all the powers the Framers gave Congress are there for institutionalists' taking.

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—Prepared by Gene Healy and William Yeatman

9. EMERGENCY POWERS

Congress should

- amend the National Emergencies Act to
  - require affirmative congressional approval for new presidential emergency declarations,
  - provide that, unless authorized via joint resolution, such declarations—and the statutory powers they trigger—expire within 20 days (or a similarly brief period), and
  - limit renewal of authorized emergency declarations to one-year increments and require affirmative approval by Congress for each renewal;
- amend the International Emergency Economic Powers Act (IEEPA) to
  - provide that new IEEPA declarations expire within 90 days without affirmative authorization by Congress,
  - require yearly congressional reapproval of ongoing IEEPA programs,
  - prohibit the use of IEEPA authority to impose tariffs or import quotas,
  - require a warrant based on probable cause before Americans' assets can be frozen under the IEEPA, and
  - require meaningful due process for U.S. persons targeted by IEEPA sanctions; and
- appoint a standing committee in each house to conduct a comprehensive review of presidential emergency authorities and propose repeal or revision of those that are dangerously broad.

Emergency constitutionalism is the worldwide norm: 9 out of 10 countries have constitutions that formally empower their governments to declare national emergencies, specifying the conditions for declaring a "state of exception" to ordinary governance, the officials who can trigger a state of emergency, and the new powers thereby unlocked.

America's Constitution is exceptional in this regard: what crisis authorities the document grants are sparse, and they are vested in Congress. The legislative branch has the power to suspend habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it," and to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." The Constitution gives the president practically nothing in the way of emergency authorities. Aside from command of the militia "when called into the actual Service of the United States," he's vested only with the authority, via Article II, Section 3, to convene Congress on "extraordinary Occasions"—a provision that would only be necessary if he otherwise lacked powers sufficiently broad to deal with any conceivable crisis.

The Framers "knew what emergencies were, knew the pressures they engendered for authoritative action [and] knew too how they afford a ready pretext for usurpation," Justice Robert Jackson observed in his influential concurrence in the 1952 "steel seizure" case. Yet beyond the power to suspend habeas corpus, they declined to provide special powers for emergency rule, fearing that "emergency powers would tend to kindle emergencies."

The Normalization of Emergency Rule

The lack of constitutional warrant for emergency rule hasn't kept America free from the dynamic that Justice Jackson warned against, however. In 1973, a Senate special committee charged with reining in presidential emergency powers declared that "a majority of the people of the United States have lived all of their lives under emergency rule." "There are now in effect four presidentially proclaimed states of national emergency," Senators Frank Church (D-ID) and Charles Mathias (R-MD) marveled: a banking emergency declared by President Franklin Roosevelt in 1933; a 1950 emergency proclamation issued by President Harry Truman during the Korean War; and two more declared by President Richard Nixon to deal with a postal strike and a balance-of-payments crisis. The statutory provisions unlocked by those declarations, Church and Mathias warned, would allow the president to "seize property . . . regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens." The time had come, they insisted, "to restore normalcy to the operations of our Government."

The fruits of the special committee's inquiry included the 1976 National Emergencies Act (NEA), a framework statute aimed at restoring congressional oversight and "returning the United States to normal peacetime processes." Title I of the NEA brought those four emergencies to a close, sunsetting the authorities they relied on. Title II of the act imposed procedural strictures designed to cabin presidential emergency powers. To invoke such powers, the president was required to formally declare a national emergency and specify the statutory provisions he intended to rely on. Emergency declarations would expire after one year unless renewed by the president, but they could be terminated earlier by presidential or congressional action.

Far from achieving its aims, however, the NEA had the unintended effect of normalizing emergency rule. More national emergencies have been declared since its passage than in the decades before it went into effect. In the 1970s, Senator Church and his colleagues considered four concurrent national emergencies appalling and absurd; but by 2022, Americans were living under no fewer than 40 presidential emergencies, including the now four-decades-old declaration related to the Iranian hostage crisis of 1979.

The reforms of the 1970s failed thanks in large part to a 1983 Supreme Court decision that effectively neutered the NEA's mechanism for terminating emergency declarations. As originally structured, the act allowed Congress to terminate presidential emergencies by majority vote via concurrent resolution. In *INS v. Chadha*, the Court struck down such legislative vetoes, holding that attempts to overturn executive action must themselves run the gauntlet of the ordinary legislative process and be presented to the president for signature or veto. In 1985, Congress amended the NEA accordingly; the law now requires termination via joint resolution. The upshot is that presidents now enjoy broad power to wield emergency authority as they please unless and until Congress can assemble a veto-proof supermajority to stop them.

Recent experience with emergency decrees shows how the process works—or fails to work—under the revised NEA. In late 2018, President Donald Trump forced a partial government shutdown by refusing to sign any spending bill that didn't include $5.6 billion to "build the wall" on the U.S. southern border. On February 15, 2019, he invoked emergency powers to fund the project anyway, Congress be damned. "I didn't need to do this," the president admitted as he issued the proclamation, "but I'd rather do it much faster."

The statute Trump triggered, the Military Construction Codification Act of 1982, allows the president to divert funds to "military construction projects" supporting the use of the armed forces in a military emergency. It had been used only twice before—by George H. W. Bush in the run-up to the Gulf War and by George W. Bush after the September 11 attacks—both times in the sorts of circumstances for which it was clearly intended. It seems not to have occurred to any president before Trump that he could use the law to snatch funding for a pet project that Congress had repeatedly refused to support.

Yet that's precisely what President Trump did, and Congress proved powerless to stop him. Broad majorities in the House (248–181) and Senate (53–36) voted to terminate Trump's emergency declaration, only to fall short of the constitutional threshold of the two-thirds needed to overturn the president's veto.

"Many, Many Things He Could Do without Legislation"

The military construction law President Trump employed to do an end run around the legislature is hardly the broadest or most loosely drawn of the emergency authorities Congress has ceded to the president. Despite the post-Watergate reformers' best efforts, the U.S. Code today remains honeycombed with overbroad delegations of emergency power to the executive branch. A 2019 Brennan Center report identifies 123 standby statutory powers the president can invoke in a self-declared national emergency, most requiring little more than the president's signature on the emergency declaration. Some of the powers that can be triggered in that fashion are truly breathtaking, such as a provision of the 1934 Communications Act that could give the president power to seize control of U.S. communications infrastructure if he proclaims that a threat of war exists.

Surprisingly enough, presidential restraint has been a key factor in keeping our emergency powers regime from reaching its full potential for abuse. Of the extraordinary statutory authorities the Brennan report cataloged, nearly 70 percent have apparently never been invoked.

President Trump's "norm-busting" on emergency powers shows how quickly all that could change. Shortly after he declared the border-wall emergency, Sen. Elizabeth Warren (D-MA) weighed in on Twitter: "Gun violence is an emergency. Climate change is an emergency. . . . Donald Trump's ridiculous wall is not an emergency." The progressive senator had a point with regard to Trump's border-wall proclamation, but she sounded positively beguiled by the other possibilities.

Make no mistake, emergency rule is a *bipartisan* temptation. President Biden made that clear in August 2022, when he announced a scheme to cancel up to $600 billion in student loan debt using emergency powers.

The plan relies on a post-9/11 statute, the Higher Education Relief Opportunities for Students Act of 2003, principally aimed at providing relief to U.S. soldiers deployed in Iraq and Afghanistan. But the act is loosely worded enough to invite abuse. It allows the secretary of education to "waive or modify" student loan requirements for "affected individuals," including those who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency." The administration cites that language and the ongoing COVID-19 pandemic as justification for offering up to $20,000 in relief for debtors making as much as $125,000 a year.

In its potential cost to the taxpayer, Biden's student-loan jubilee dwarfs the cost of Trump's border wall. "As a progressive who was deeply disturbed by the Trump administration's abuse of [emergency] power," notes Fordham law professor Jed Shugerman, "it seems too convenient now for progressives to embrace emergency power references by a new president, when we were so troubled a few years ago."

Even so, there may be more progressive "emergencies" to come. Less than a week after President Biden's inauguration, Senate Majority Leader Charles Schumer (D-NY) called on the new president to "declare a climate emergency": there are "many, many things under the emergency powers . . . that he could do without legislation."

Progressives in the legal academy have fleshed out some of the "many things" President Biden could force through by declaring a climate emergency. He could unlock statutory powers allowing him to suspend federal oil leases; "support expansion of battery or electric vehicle production"; shift billions in Pentagon funds to update America's electrical grid; empower the secretary of transportation to impose new restrictions on automobile use; and deploy IEEPA to sanction "climate rogue states" or "companies trafficking in fossil fuels."

Weaponizing the International Emergency Economic Powers Act

Of the many statutory powers a president can invoke in a national emergency, IEEPA offers the most tantalizing possibilities to any individual bent on autocratic rule.

Like the NEA, the International Emergency Economic Powers Act grew out of post-Watergate efforts to limit unilateral presidential power. Congress first amended the previously abused Trading with the Enemy Act (TWEA) so its authorities could be invoked by the president only "during a time of war." Then it passed a new statute, IEEPA, with stronger procedural checks than TWEA included, to give the president power to impose economic sanctions during a peacetime national emergency.

Even so, IEEPA gives the president an imposing array of unilateral powers to deploy against "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States" if he "declares a national emergency with respect to such threat." Moreover, as with national emergencies in general, the 1983 *Chadha* decision frustrated the original scheme for terminating IEEPA emergencies with a simple majority vote. The result is that national emergencies declared under IEEPA persist until the president or a congressional supermajority decides to end them.

Since its passage in 1977, IEEPA has served as an all-purpose statutory tool for economic sanctions, at first directed primarily against foreign governments and then, starting in the 1990s, increasingly deployed against various bad actors abroad, such as terrorists, drug kingpins, and computer hackers.

In the months following the border-wall declaration, President Trump envisioned even more novel possibilities for the statute: he twice threatened to weaponize IEEPA against major U.S. trading partners. In May 2019, the president warned that if Mexico didn't crack down on cross-border migration, he'd use the law to hammer that country (and U.S. consumers) with a series of escalating tariffs on Mexican goods. Then, in August, the president sent the markets into a tailspin by tweeting, "Our great American companies are hereby ordered to immediately start looking for an alternative to China," following up with a statutory citation: "try looking at the Emergency Economic Powers Act of 1977. Case closed!"

Had Trump followed through on those threats, it's far from certain the courts would have stopped him. IEEPA gives the president sweeping powers to block transactions and freeze assets in which any foreign government or foreign national has an interest. Those powers have been used for comprehensive sanctions against countries (such as Iran and Libya) that effectively shut off Americans' ability to do business there. Applying similar restrictions to trade with China would be unprecedented only in the amount of disruption that would ensue. And although the statute wasn't intended for use as a trade-war bludgeon, the president might well get away with using it as one. A Congressional Research Service report published two months before Trump threatened Mexico with IEEPA-based tariff hikes opined that such a use was unlikely but probably permissible.

More troubling still, although IEEPA has so far been used mostly against foreign targets, nothing in the statute bars it from being turned directly against American citizens. Less than two weeks after the 9/11 attacks, President George W. Bush issued an executive order invoking IEEPA and authorizing the Treasury Department to freeze the assets of anyone, including U.S. persons, providing "services" to, or "otherwise associated with," a designated terrorist group.

Added to the target list in November 2001 was naturalized U.S. citizen Garad Jama, who ran a money-wiring business catering to Somali immigrants in Minneapolis. Federal agents raided his office, seized documents, and sealed the room with a sign reading, "All property contained in this building is blocked pursuant to an executive order of the president on Sept. 23 of this year under the authority of the International Emergency Economic Powers Act." They also froze access to Jama's business and personal bank accounts, leaving him unable to pay rent or buy groceries for himself and his family. After "nine months of hell" and a lawsuit challenging the designation, the government finally took Jama off the list for lack of evidence.

Even so, U.S. persons targeted under IEEPA have had only limited success with constitutional challenges to asset seizures. Federal courts are split on whether freezing assets via the act constitutes a "seizure" under the Fourth Amendment and whether a warrant is required. In two post-9/11 cases, federal courts found due process violations under the Fifth Amendment when Treasury's Office of Foreign Assets Control denied the plaintiffs any access to the administrative record allegedly justifying the seizures. But as Andrew Boyle of the Brennan Center notes, the governing regulations "to this day include no requirement that OFAC provide any notice to designated U.S. persons of the reasons for their designation." As one commentator put it, "The IEEPA designation of an American person . . . amounts to total incapacitation, while the designation of an American organization generally amounts to a death sentence."

That's a terrifying power, and one that recent history suggests is ripe for abuse. So it's worth thinking about some nightmare scenarios: how might another norm-busting president wield this weapon against Americans?

The Brennan Center's Elizabeth Goitein sketched one possible scenario, based on President Trump's 2018 description of migrant caravans on the southern border as a "national emergency." Faced with a similar border surge, she suggests, a future president in the Trump mold could decide "that any American inside the U.S. who offers material support to the asylum seekers—or, for that matter, to undocumented immigrants inside the United States—poses 'an unusual and extraordinary threat' to national security [under IEEPA], and authorize the Treasury Department to take action against them."

Nor is there any reason to assume that the potential for abuse cuts in only one direction politically. A norm-busting *progressive* president might look north for inspiration. In early 2022, Canadian Prime Minister Justin Trudeau faced a mass protest against COVID-19 restrictions, in which Canadian truckers obstructed key border crossings and effectively shut down the capital city with their rigs. Instead of simply clearing out the protesters via conventional means, Trudeau invoked emergency powers broad enough to permit the financial "unpersoning" of anyone participating in the protests, or even transacting with the protestors, locking targeted individuals out of the modern economy.

Canada's 1988 Emergencies Act gave the Trudeau government staggering powers to pursue what one analyst termed "the de-banking of individuals" without due process. Deputy Prime Minister and Finance Minister Chrystia Freeland put it starkly in a February 2022 warning to the truckers: "As of today, a bank or other financial service provider will be able to immediately freeze or suspend an account without a court order. . . . We are today serving notice: if your truck is being used in these protests, your corporate accounts will be frozen. The insurance on your vehicle will be suspended. Send your semi-trailers home."

As noted above, similarly sweeping powers are available to an American president under IEEPA when he declares a national emergency stemming "in whole or substantial part" from sources outside the United States. Would a thin or pretextual claim of foreign interference or funding of an American protest movement be enough to get past an immediate challenge in the courts? If history is any guide, federal judges will be reluctant to second-guess "the wisdom of the President's judgment concerning the nature and extent of [the] threat." Instead of depending on the courts to check the president, Congress should itself bar the door to potential abuse.

Ending Emergency Rule

Any serious attempt to check the president will have to address the structural deformities of the current emergency powers framework. As previously noted, under the current emergency powers regime, the president enjoys a free hand unless a veto-proof congressional supermajority can be assembled to stop him. To right the balance, what's needed is a revised NEA that reverses that default setting so that presidential emergencies rapidly expire without affirmative approval from Congress.

A number of reform proposals, starting with Senator Mike Lee's (R-UT) Assuring That Robust, Thorough, and Informed Congressional Leadership Is Exercised Over National Emergencies (ARTICLE ONE) Act, would do just that. Lee's bill, which passed out of the Senate Homeland Security and Governmental Affairs Committee with 18 Republican cosponsors in 2019, amends the NEA to provide that a declared emergency expires after 30 days "unless and until Congress passes a joint resolution *approving* of the declared emergency." The Protecting Our Democracy Act—a compendium of executive-power reforms that passed the House in December 2021—includes revisions to the NEA modeled on the ARTICLE ONE Act. It would set the time limit for presidential emergency declarations to 20 days before congressional approval is required.

Unfortunately, neither the Protecting Our Democracy Act nor the ARTICLE ONE Act adequately addresses IEEPA's enormous potential for abuse. While the latter bill forbids the president from using the 1977 law "to impose duties or tariff-rate quotas"—as President Trump threatened to do against Mexico and China—it exempts IEEPA emergencies from the approve-or-expire framework otherwise imposed on presidential emergency declarations. They would remain renewable at will by the president unless affirmatively repealed by Congress over the president's veto.

Any reform effort that exempts IEEPA leaves the vast bulk of emergency authority untouched. Eleven of President Trump's 13 national emergencies were IEEPA-based, and historically, over 90 percent of modern presidential emergency declarations have relied on the 1977 law.

The argument for exempting IEEPA from the approve-or-expire framework is, essentially, that it would demand a lot of fast-tracked congressional votes on fairly uncontroversial declarations like "Blocking Property with Respect to the Situation in Burma." It's true that most uses of IEEPA for traditional sanctions are in no sense "emergencies"; but for that reason, the Brennan Center's Andrew Boyle suggests, "The effect of including IEEPA as an emergency power under the NEA is to normalize the use of emergency powers in nonemergency situations." Instead, he suggests taking IEEPA out of the NEA framework, removing the requirement of a declared emergency to trigger the statute, and writing separate procedural strictures—including an approve-or-expire requirement—into IEEPA itself.

Under Boyle's proposal, new IEEPA declarations would run for 90 days before they'd need a majority vote by Congress to continue. Congressional reapproval would be required on a yearly basis, but to further minimize the legislative burden, all ongoing IEEPA sanctions programs would be packaged for a single vote. Under the revised procedures, "amendments would be considered germane only if they removed particular sanctions programs from the blanket approval"; thus, termination of individual programs would only require a majority vote.

Boyle also proposes several substantive amendments to the statute aimed at protecting the rights of U.S. persons. Before freezing the assets of any person or organization entitled to Fourth Amendment protection, the government should be required to obtain a warrant based on probable cause. Moreover, the law should require that American targets of IEEPA sanctions receive adequate notice of the charges against them and a meaningful opportunity to challenge their designation at an administrative hearing before seeking judicial review.

The reforms outlined here would provide some sorely needed protection against presidential abuse. But Congress can provide added security by pruning out open-ended, and therefore dangerous, delegations of such authority. In a 2019 bill, Senators Rand Paul (R-KY) and Ron Wyden (D-OR) proposed repealing the section of the 1934 Communications Act, discussed earlier, that could be used to seize control of internet and broadcast facilities. But Congress could undertake a more comprehensive review of emergency authorities delegated to the president by appointing standing committees to propose repeal or revision of those that are dangerously broad.

Congress should not rely on the courts—or, still less, on presidential restraint—to safeguard Americans from abuse of the vast authority it has delegated to the president. The "First Branch" has the power, and the responsibility, to reclaim that authority itself.

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—Prepared by Gene Healy

10. RESTORING DEMOCRATIC ACCOUNTABILITY IN THE EXECUTIVE BRANCH

Congress should

- amend the Vacancies Act to require that all acting cabinet members be confirmed by the Senate;
- establish Senate-confirmed civil service positions to serve as acting cabinet members during presidential transitions;
- eliminate the delegable duties loophole in the Vacancies Act, which allows the president to bypass the act's time limits and other limitations;
- amend the Administrative Procedure Act to require that all final rules be signed by a Senate-confirmed officer; and
- amend the Administrative Procedure Act to forbid ratification of actions that violate the Appointments Clause.

The Constitution's Appointments Clause requires, as a default rule, that officers of the United States be nominated by the president and confirmed by the Senate. In *Federalist* no. 76, Alexander Hamilton predicted that the Senate's confirmation power "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters." Hamilton warned against the danger of unilateral presidential appointments, arguing that "a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body."

In *Edmond v. United States*, the Supreme Court similarly recognized that the Appointments Clause "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." In *Ryder v. United States*, the Court explained that the Senate's duty to vet nominees "is a bulwark against one branch aggrandizing its power at the expense of another branch." Thus, as the Court put it in *Freytag v. Commis-*

sioner, "the principle of separation of powers is embedded in the Appointments Clause." If the Senate improperly abdicates its duty to check the executive, it is ultimately *the people* who suffer. As the Court added in *Freytag*, the "structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic."

Unfortunately, presidents of both parties have exploited several loopholes to frequently bypass Senate consent with impunity. Presidents have filled important offices for years at a time with officials who were never confirmed by the Senate. Final decisions affecting millions of citizens have been made by government employees who lack the democratic accountability that Senate confirmation provides: enforcement actions brought by a Department of Justice official whose policy priorities were never examined in a Senate hearing; sweeping environmental rules issued by an official who could not have won Senate confirmation; and cabinet departments led by officials whose basic competence to take on such weighty responsibilities was never endorsed by the Senate.

The people, through their elected senators, have lost an important voice in the functioning of the executive branch. To address these harms, Congress can and should take several measures to restore the proper role of the Senate in the federal appointments process.

Amendments to the Federal Vacancies Reform Act of 1998

Limiting Acting Cabinet Members to Senate-Confirmed Officers

Obtaining Senate consent takes time. That means that when an office becomes vacant—especially when that vacancy is unexpected—the office can remain vacant for a lengthy period. For that reason, Congress has created a procedure for the president to temporarily fill vacancies without Senate consent. This procedure for appointing "acting officers" has been implemented via a series of statutes known as Vacancies Acts, the most recent of which was enacted in 1998.

But if the Constitution requires that officers must be confirmed by the Senate, how can unconfirmed acting officers be constitutional? The answer is that *some* acting officers are constitutionally permissible, due to an exception to the Constitution's default rule. The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Thus, it is permissible for a statute (like the Vacancies Act) to exempt particular "inferior officers" from Senate consent.

Who are inferior officers? The Supreme Court held in *Edmond* that they are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." As the Court explained, this definition makes sense "in the context of a Clause designed to preserve political accountability." Limiting inferior officers to only those with direct supervision ensures that senators remain accountable for every officer's performance. It guarantees that even if the Senate did not vet and confirm a particular inferior officer, it at least vetted and confirmed that officer's supervisor.

Unfortunately, the Vacancies Act likely exceeds the permissible scope of this "inferior officers" exception. The Vacancies Act allows acting officers to serve without Senate consent not only in inferior offices but also in cabinet-level positions. These top-level positions have no superior but the president and are indisputably *not* inferior. And although acting officers have time limits on their service, they otherwise possess all the authority of any other occupant of their office.

Thus far, lower courts have declined to hold that the service of acting cabinet members is unconstitutional, relying on the 1898 Supreme Court precedent in *United States v. Eaton*. In that thinly reasoned decision, the Supreme Court seemingly endorsed the constitutionality of serving without Senate consent in noninferior offices, as long as the service is "for a limited time, and under special and temporary conditions." Yet in the century since *Eaton* was decided, courts have declined to put any upper limit on just how long this "special and temporary" service can last. And *Eaton* is in major tension with the Supreme Court's modern approach to the Appointments Clause, since the duration of an officer's service has nothing to do with whether that officer is "directed and supervised."

But Congress need not wait for the Supreme Court to reconcile *Eaton* with modern doctrine. Congress can and should end this practice itself by amending the Vacancies Act. Specifically, Congress should limit eligibility to serve as an acting cabinet-level officer to those who have *already* been confirmed by the Senate to another position within that same department. This action would ensure that the Senate has vetted and approved everyone serving at the top level of government. Of course, such acting officers would not have been confirmed *to the cabinet-level position* itself. But the Supreme Court explained in *Weiss v. United States* that the temporary promotion of Senate-confirmed officers to a higher position is constitutionally permissible. And ensuring that all acting cabinet members have been confirmed by the Senate to *some* position would go a long way toward preventing the elevation of "unfit characters" that the Appointments Clause was designed to guard against.

Such an amendment would mean that presidents could no longer use the Vacancies Act to appoint unconfirmed, unaccountable political loyalists to lead federal departments. To give a concrete example, it would mean that presidents could no longer do what President Donald Trump did in 2018, when he elevated Matthew Whitaker to be acting attorney general. That move was widely criticized precisely because Whitaker had not been serving in a Senate-confirmed position. Having not had the opportunity to review Whitaker's fitness to serve in the Department of Justice *at all*, the Senate was thus powerless to serve as the "check upon a spirit of favoritism in the President" that the Framers envisioned.

The most common argument against such an amendment is that it would create difficulties in finding acting cabinet secretaries during presidential transitions, especially when the White House is changing parties. It is customary for most Senate-confirmed officials to resign at the end of a presidential administration, thus potentially leaving a new president few Senate-confirmed options to serve as acting secretaries. For example, only 2 of the 15 acting cabinet secretaries at the start of the Biden administration were Senate-confirmed holdovers from the Trump administration; the rest were non-Senate-confirmed career civil servants.

But this problem is not insurmountable. There is no reason that the Senate cannot vet and confirm some already-serving career civil servants for the specific purpose of granting them eligibility to serve as acting cabinet members. Congress can and should create new Senate-confirmed titles that allow presidents to nominate career civil servants to be confirmed for this additional eligibility. This action would ensure that vetted and accountable caretaker acting secretaries are always available.

Eliminating the "Delegable Duties" Loophole in the Vacancies Act

The Vacancies Act places limits on both who can serve and how long they can serve as acting officers. If it did not place such limits, the president would have little incentive to ever nominate anyone for Senate confirmation. The president could simply use indefinite unconfirmed acting officers to fill every position instead.

In 1998, Congress recognized the importance of these limits and added an enforcement mechanism to the Vacancies Act, which mandated that actions taken by invalid acting officers "shall have no force or effect." The intention was that if a purported acting officer stayed in office past the deadline or lacked the required qualifications, that officer's actions could be challenged in court and invalidated.

Unfortunately, this enforcement mechanism has not encouraged compliance as effectively as its drafters expected. That is because under the current text of the Vacancies Act, only actions that qualify as the performance of a "function or duty" of an office can be invalidated, and the act adopts an exceedingly narrow definition of "function or duty," limited to those functions or duties required "to be performed by the applicable officer (and only that officer)." Crucially, courts have interpreted the parenthetical phrase "and only that officer" to mean that if a duty is delegable, it doesn't qualify as a "function or duty."

In 2004, the D.C. Circuit held that when a statute sets out an officer's authorities, "subdelegation to a subordinate federal officer . . . is presumptively permissible absent affirmative evidence of a contrary congressional intent." Relying on this presumption, the executive branch has consistently argued in court that nearly every power held by nearly every federal official is subdelegable and thus exempt from the Vacancies Act. And when a power of a vacant office is exempt from the act, that power can be performed by *anyone for any length of time* via a delegation of authority, without fear of invalidation.

As law professor Nina Mendelson has explained, the executive branch has exploited this loophole and "effectively created a new class of pseudo-acting officials subject to neither time nor qualifications limits." These pseudo-acting officials are delegated all the functions and duties of a vacant office, but they are not given the "acting officer" title. Thus, as Anne Joseph O'Connell of Stanford Law School notes: "In the first year of an Administration, one sees a lot of 'acting' titles on agency websites. After the Act's time limits run out, one sees 'performing the functions of [a particular vacant office]' language instead." And in many cases, these delegatees are the very same people whose time limit had just run out as acting officers.

Closing this loophole is more important than any other potential reform to the Vacancies Act's time limits or qualification requirements. That is because so long as delegation is available as an alternative to the Vacancies Act, the act's time limits and eligibility requirements can simply be ignored.

The solution is to amend the definition of a "function or duty" in the Vacancies Act to eliminate the parenthetical "(and only that officer)." A function or duty should instead be defined as simply any function or duty assigned to an office by statute or regulation.

During the 1998 Vacancies Act drafting process, some Senate offices feared that this approach would cause too drastic a disruption to government operations in the event that an acting officer's time limit ran out. But those fears were misplaced, because the enforcement mechanism would still only apply to agency "actions" (as defined by the Administrative Procedure Act) that can be challenged in court. That is still a relatively narrow category, one that leaves routine day-to-day duties outside the scope of invalidation.

Further, the Vacancies Act also allows agency actions to be performed by the agency head, ensuring that they can still be performed by *someone* even after its time limits expire. And the act can and should be amended to clarify that other officers who were assigned some of the same powers as a vacant office can also continue exercising them.

What should *not* be allowed is for *all* the powers of a vacant office to be performed indefinitely by a delegatee, including the power to take final agency actions. Such a loophole allows the executive branch to effectively exempt offices from the Senate confirmation requirement at its choosing.

Amendments to the Administrative Procedure Act

Forbidding Subdelegation of Final Rulemaking Power to Non-Senate-Confirmed Officials

The decision to issue a final rule is among the most consequential that an officer can make. Such decisions can directly affect millions of citizens. And when policy decisions are made by the executive branch rather than Congress, the people cannot directly praise or blame their own elected representatives. Preserving some democratic accountability in the form of Senate advice and consent, then, is particularly important for officers with rulemaking power.

Yet the executive branch has frequently thwarted such democratic accountability by subdelegating final rulemaking authority to officers who have not been confirmed by the Senate. In a study of all Department of Health and Human Services rules issued during a 17-year period, 2,094 of 2,952 total rules (71 percent) were issued by non-Senate-confirmed officials. Looking only at rules deemed "significant" by the Office of Management and Budget during that time, non-Senate-confirmed employees issued 254 of 755 significant rules (34 percent).

When rules are issued by non-Senate-confirmed agency employees, it is usually because rulemaking power has been subdelegated from a Senate-confirmed position, *not* because Congress chose to assign rulemaking power to an officer exempt from Senate consent. Such subdelegations thwart democratic accountability for the same reasons that officials indefinitely "performing the functions" of an office via delegation thwart democratic accountability. In both cases, consequential policy decisions are made by officials whose character and judgment has never been examined by the Senate. And if an unpopular decision is made, the citizens who are affected cannot hold their elected senators accountable for confirming the officer who made that decision.

One approach to solving this problem would be to amend the statutes defining the powers of particular offices to clarify that their final rulemaking authority cannot be subdelegated to an employee who has not been confirmed by the Senate. But with so many positions in the federal government, this approach would require hundreds of separate amendments.

A simpler, more straightforward, and more universal approach would be to amend the Administrative Procedure Act (APA), which defines the requirements for agency rulemaking. Congress could amend the APA to require that a final rule must be signed by a Senate-confirmed officer to be valid. With this one change, all subdelegations of rulemaking authority to non-Senate-confirmed officials would become inconsequential. Those officials would no longer be able to use that subdelegated authority to issue final rules on their own. Instead, a vetted and confirmed officer would be required to take accountability for every rule. And if Congress is unwilling to go that far, it could at least require the sign-off of a Senate-confirmed officer for some *subset* of particularly important rules, such as those that Office of Management and Budget has deemed "significant."

Forbidding Ratification of Actions Taken in Violation of the Appointments Clause

Non-Senate-confirmed acting cabinet members and non-Senate-confirmed issuers of final rules are both on shaky constitutional footing. Yet a pernicious legal doctrine currently insulates both types of officials from any consequence for potentially violating the Appointments Clause. Not only that, but the doctrine also prevents courts from even *deciding* the legal question of whether such officials have violated the Appointments Clause. This is the doctrine of "ratification."

The D.C. Circuit has explained that "ratification occurs when a principal sanctions the prior actions of its purported agent." And the D.C. Circuit has extended this doctrine to cover not just purported *agents* but also purported *predecessors*. The court has held that "a properly appointed official's ratification of an allegedly improper official's prior action . . . resolves the claim on the merits by remedying the defect (if any) from the initial appointment." When a rule issued by acting attorney general Matthew Whitaker was challenged in court, the D.C. Circuit in *Guedes v. BATF* upheld the rule solely on the grounds that it had since been ratified by Whitaker's Senate-confirmed successor William Barr. And challenges to a rule issued by a non-Senate-confirmed employee were similarly thwarted by the ratification of the rule by the employee's Senate-confirmed superior.

Because ratification was treated as resolving these cases on the merits, the courts *never decided* the constitutional questions at issue. Ratification thus stands in the way of the development of the law, giving the executive branch the security to continue to engage in questionable exercises of power and evade review by ratifying only those particular actions that are challenged in court.

Congress recognized precisely these problems in 1998, when the D.C. Circuit had recently accepted the ratification of an action taken in violation of the Vacancies Act. To remedy that problem, Congress made clear in the updated Vacancies Act that actions taken in violation of the act "may not be ratified." And in the 1998 Senate report for the act, the committee noted that the ban on ratification was included as a direct response to the D.C. Circuit's ratification decision. "If any subsequent acting official or anyone else can ratify the actions of a person who served beyond the length of time provided by the Vacancies Act, then no consequence will derive from an illegal acting designation. This result also undermines the constitutional requirement of advice and consent."

Exactly the same reasoning explains why ratification should not be allowed for actions taken in violation of the Appointments Clause. Congress took the correct approach in 1998, and it should follow that model to stop the ratification of actions taken in violation of the Appointments Clause. This modification can be achieved by the addition of a single sentence to the APA, modeled on the language in the Vacancies Act: "An action taken in violation of the Appointments Clause may not be ratified."

It is ironic that under current law, violations of a provision of the *Constitution* (the Appointments Clause) are more insulated from consequence and review than violations of a provision of a *statute* (the Vacancies Act). This proposed amendment to the APA would end that imbalance and finally allow the courts to fully interpret and enforce the limitations of the Appointments Clause.

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—Prepared by Thomas A. Berry

11. REINING IN THE ADMINISTRATIVE STATE

Congress should

- pass the Regulations from the Executive in Need of Scrutiny Act to restore democratic accountability to regulatory policymaking;
- apply "sunset" provisions requiring periodic reauthorization of regulatory programs to ensure the continuing effectiveness, or to identify ineffectiveness, of administrative policymaking;
- pass the Regulatory Accountability Act to bring the Administrative Procedure Act into the 21st century by modernizing procedural safeguards for legislative rulemakings; and
- neutralize the home-field advantage enjoyed by agencies that act as both prosecutor and judge by
    - moving certain agency adjudicative regimes, such as those seeking huge civil fines for fraud-like regulatory violations, to Article III courts; and
    - employing greater use of "separate function" adjudication designs, in which the prosecution and judging functions are delegated to different principal officers.

Although the Constitution vests "all legislative powers" in the legislative branch, Congress has "delegated" much of its lawmaking capacity to an alphabet soup's worth of regulatory agencies under presidential management, collectively known as the "administrative state." (Think EPA, SEC, FDA, etc.) Amazingly, there is no official count of how many executive branch agencies are making policy, though estimates reach as many as 430. Regardless of their exact number, "hundreds of federal agencies [are] poking into every nook and cranny of daily life," in the words of Chief Justice John Roberts, and "the danger posed by the growing power of the administrative state cannot be dismissed." According to the Competitive Enterprise Institute, the administrative state imposes almost \$1.9 trillion in annual regulatory costs.

Agencies regulate through a combination of the legislative, executive, and judicial functions by issuing rules with the force of law, policing those rules, and adjudicating their enforcement. In 2021, for example, the Biden administration issued 3,257 regulations with the force and effect of law, whereas Congress passed 81 laws during that time. The last available year for comprehensive data about administrative adjudications is 2013, when the five busiest agencies convened 1,351,342 executive branch tribunals; that same year, there were 57,777 total cases (civil and criminal) filed in the U.S. district and appellate courts.

Of course, the administrative state's concentration of legislative, executive, and judicial power operates in considerable tension with our constitutional structure, which was *designed* to diffuse government authority to better protect liberty. As James Madison warned in *Federalist* no. 47, the "the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."

Restore Popular Accountability to Domestic Policymaking

Under our constitutional design, legislating is supposed to be hard work. Congress's bicameral structure ensures that a bill must sustain a majority in the both the House and the Senate before becoming law. After that, the Constitution further requires the president's approval before a law can take effect. It takes significant time and resources before these three institutions—the House, the Senate, and the president—come to agreement on any given policy. The Founders made lawmaking difficult because they were animated by an awareness of the threat posed to liberty by government. In Federalist no. 62, James Madison warned that an "excess of lawmaking" is a "disease" to which "our governments are most liable."

By contrast, it's much simpler for the president to achieve a regulation that is the functional equivalent of a law passed by Congress. All he needs to do is pick up a "pen and phone" to initiate the executive branch's regulatory power. Yet the comparative ease of regulation incubates the "disease" of "excess" lawmaking—again, the Biden administration in 2021 issued 3,257 lawlike regulations, whereas Congress passed only 81 laws. And this tally of Biden-era rules does not include thousands of "subregulatory" documents, like guidance memos and policy statements, which are supposedly nonbinding but which nonetheless must be followed to avoid regulatory prosecution.

Scholars have coined the phrase "presidential administration" to describe how modern domestic policymaking is driven by the White House through the administrative state. In addition to facilitating overbearing government, presidential administration engenders unprecedented instability in federal policymaking. Every time the presidency changes hands from one party to another, the lawmaking machinery of the administrative state pivots 180 degrees, in alignment with the values of the incumbent president. As a result, thousands of rules affecting almost every aspect of American life bounce back and forth between partisan extremes every four to eight years, and the swings are becoming greater as presidents push the envelope of their authority to make administrative policy.

To reassert popular accountability to administrative lawmaking, Congress should pass the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require lawmakers to vote "major rules" into law before they take effect. Under its provisions, agency rules that meet the criteria are automatically introduced into each house and fast-tracked toward an up-or-down vote within 70 days. The practical effect would be that regulatory agencies could no longer promulgate major rules without congressional ratification. In its present form, the REINS Act applies to rules that cost more than $100 million ("major rules"); in 2021, there were 387 such rules (out of 3,257). If lawmakers are concerned about unduly adding to their workloads, one possible solution is to increase the threshold that triggers the REINS Act. Even subjecting the 50 most consequential rules to congressional scrutiny would go a long way toward reining in the administrative state.

Another way for Congress to reclaim control over domestic policymaking is to put a time limit on delegations of regulatory authority to administrative agencies. Under so-called sunset provisions, regulatory programs expire after a given period—typically 5 to 10 years—unless Congress revisits the program, assesses its effectiveness, and reauthorizes the delegation for another duration of time. At present, Congress employs sunset provisions sparingly, and almost never for discretionary regulatory programs in environmental or labor policy. Sunset mechanisms are used with much greater frequency at the state level, where they play an important role in ensuring popular supervision of regulatory policy.

Finally, Congress must modernize the Administrative Procedure Act (APA). Known as the "constitution of the administrative state," the APA is 76 years old and no longer meets the needs of the moment. When the APA was passed in 1946, agencies rarely issued legislative rules; instead, agencies created rules through case-by-case adjudication, akin to how the common law works. As a result, the APA gives scant attention to rulemakings, which are now the primary means by which agencies regulate. The absence of meaningful procedural safeguards has abetted the rise (and rise) of the administrative state. The bipartisan Regulatory Accountability Act is a promising vehicle for bringing the APA into the 21st century. In addition to codifying procedures for retrospective review of outdated rules, the act would establish a common-sense sliding scale of procedural requirements, depending on a rule's cost. As rules become more expensive, the act would require increasingly formalized cost–benefit analysis and greater opportunity for public input.

Right the Unbalanced Scales of Justice in Agency Courts

Besides promulgating lawlike regulations, agencies also enforce these rules in prosecutions before tribunals located within the same agency that brought the enforcement action. This combination of prosecutorial and adjudicative authority coexists uneasily with our constitutional structure. As Madison observed (quoting Montesquieu), "Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR."

In practice, the agencies' home-field advantage is sometimes conspicuous. For example, the Securities and Exchange Commission (SEC) acts both as the prosecutor and the judge when the agency pursues financial penalties through enforcement of its regulations for publicly traded companies and investment activities. According to an analysis conducted by the *Wall Street Journal*, the SEC had a 90 percent win rate in contested cases it brought before its administrative law judges from 2010 through 2015, while it prevailed in only 69 percent of federal court trials over the same period. During this period, regulated parties filed an official complaint regarding an alleged lack of impartiality by one SEC in-house judge, whose record ruling in favor of the agency had been 51–0.

Another example is the Federal Trade Commission's (FTC's) enforcement of its antitrust rules. According to former FTC commissioner Joshua Wright, "Whatever the congressionally intended promise of expert agency administrative adjudication [is] in theory, in practice, the application has been problematic and raises significant concerns that the deck is stacked against firms and in the agency's favor." Indeed, the FTC has not lost a single case on its home court for a quarter century. As the Ninth Circuit quipped, "Even the 1972 Miami Dolphins would envy that type of record." In a scholarly paper, ex-commissioner Wright and Angela Diveley collected data showing that appeals courts reverse FTC decisions at four times the rate of federal district court judges in antitrust cases.

To be sure, many adjudicative regimes in the executive branch do not raise these sorts of problems. For example, no one complains about a pro-agency bias in administrative adjudications that delineate federal rights under disability programs, such as Social Security or veterans benefits, because these proceedings are nonadversarial, meaning that there is no "prosecution" and that the judge operates under a presumption in favor of the beneficiary. In fact, these two relatively innocuous regimes account for almost 75 percent of agency adjudications. The rest involve adversarial proceedings, where the government prosecutes alleged violations and seeks sanctions. It is this latter class of cases, involving regulatory enforcement, that incur the threat of a tilted playing field.

Congress should take certain of these adversarial regimes out of the executive branch altogether. One example is the enforcement of "market manipulation" rules for the securities, commodities, and energy markets by the SEC, Commodity Futures Trading Commission, and Federal Energy Regulatory Commission, respectively. In practice, prosecution for "market manipulation" centers on alleged dishonesty by the regulated party, which is functionally no different than a common-law fraud claim. And the government typically seeks exorbitant civil penalties, including fines totaling scores of millions of dollars and permanent trading bans. In this context—that is, government prosecutions of multimillion-dollar fraud claims—controversies should be heard before Article III courts, not agency tribunals. In our constitutional system, fraud on this scale is for juries to decide. For these market manipulation cases, there is too much at stake to allow agencies to play prosecutor and judge. Congress should move this and any similar adjudicative regime out of the executive branch and into the judicial branch, where regulated parties enjoy impartial justice, as guaranteed by the Constitution. The Consumer Financial Protection Bureau, too, routinely seeks huge civil penalties in its in-house courts for fraudlike regulatory violations, including "lying" and "deceptive practices." These cases belong before the courts of law.

For the remaining adversarial adjudications, Congress should consider structural changes to ensure a level playing field. Specifically, lawmakers should make greater use of the "separate function" model of agency adjudication. Under this framework, judging responsibilities are vested in principal officers other than the ones who perform the prosecutorial function. For example, under the Occupational Safety and Health Act, Congress delegated prosecuting duties to the Labor Department and judging responsibilities to the Occupational Safety and Health Review Commission. The federal regulatory regime for mine safety is similarly divided between the Labor Department and the Federal Mine Safety and Health Review Commission. The judging function can be located within the agency or in a separate commission, if whoever makes the final decision is different from whoever makes the final decisions on prosecutions. Congress should consider switching to this "separate function" wherever government prosecutes adversarial proceedings.

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—Prepared by William Yeatman

LAW AND LIBERTY

12. RESTORING THE JURY TRIAL

Policymakers should

- create a trial lottery system for auditing plea bargains;
- provide that jurors be informed of the punishment defendants face if they are found guilty;
- require prosecutors to disclose exculpatory evidence before entering into plea agreements with defendants; and
- create plea integrity units to ensure defendants are pleading guilty because they are guilty, not because they were coerced by prosecutors.

The Constitution provides that the "trial of all crimes . . . shall be by jury," and the Bill of Rights devotes more words to the subject of jury trials than any other. Yet jury trials are now practically extinct on American soil, having been replaced by the ad hoc and often extraordinarily coercive process that we refer to somewhat euphemistically as plea bargaining. Indeed, as Justice Anthony Kennedy observed in a 2012 opinion, "Criminal justice today is for the most part a system of pleas, not a system of trials." But there are myriad problems with this extraconstitutional and mostly unregulated practice of plea bargaining that cry out for legislative reform.

According to the most recent data from the U.S. Sentencing Commission, 98.3 percent of criminal convictions in the federal system come from guilty pleas. As the Pew Research Center has shown, just 2 percent of federal prosecutions culminate in a constitutionally prescribed jury trial. The remainder are either dismissed (8 percent) or end with the defendants' waiving their right to trial and pleading guilty instead (90 percent). At first blush, this may seem like a win-win situation: taxpayers are spared the expense and inconvenience of unnecessary jury trials, and defendants receive a more lenient punishment in exchange for pleading guilty instead of contesting the charges against them. Upon closer inspection, however, it becomes evident that plea bargaining is, in fact, a deeply pathological process that severely undermines the Constitution's commitment to transparency, due process, and justice.

The first and most glaring problem with plea bargaining is that innocent people are regularly induced to plead guilty to crimes they did not commit. For a variety of reasons—including particularly the system's strong antipathy toward postconviction claims of innocence and numerous procedural barriers to pursuing such claims—it is not possible to state with any precision the total number of false guilty pleas. That said, it is possible to extrapolate from a number of credible sources, including the Innocence Project, which exonerates the falsely convicted using DNA testing and other similarly reliable scientific techniques. Of the more than 300 people exonerated by the Innocence Project, more than 10 percent pleaded guilty to heinous crimes that they did not commit. That figure is consistent with data from the National Registry of Exonerations, which has documented more than 3,000 exonerations since 1989—again, more than 10 percent of which flowed from false guilty pleas. Scholars estimate that somewhere between 2 and 8 percent of people who plead guilty are in fact innocent.

The reason so many people would plead guilty to crimes they did not commit quickly becomes apparent when one appreciates the extraordinary amount of coercive pressure that prosecutors can—and routinely do—bring to bear in the plea-bargaining process. Those levers include, but are not limited to, pretrial detention, charge stacking, mandatory minimums, and the infamous "trial penalty," which is the often-massive differential between the sentence a defendant will receive if he pleads guilty and the sentence he will receive if he goes to trial and loses. Unfortunately, judges make no serious effort to ensure that pleas are not coerced, and multiple courts have approved the use of such palpably coercive tactics as threatening to indict (or refrain from indicting) a defendant's family members simply to exert plea leverage.

Not surprisingly, there is a growing consensus among scholars and other experts that the plea-bargaining process stands in desperate need of reform. And among the most intriguing proposals is to create a so-called trial lottery that would randomly select a small percentage of cases that have been resolved through a plea bargain and send them to trial anyway to see what the result would have been. If the defendant is convicted at trial, he receives the benefit of the plea agreement; if the defendant is acquitted, he goes free and—ideally—the office or agency that brought the prosecution initiates a sentinel event review process (i.e., a comprehensive review of a major organizational error) to determine what went wrong and how to prevent it from happening again.

Another important step policymakers should take to rehabilitate criminal jury trials is to provide that jurors be told the sentence a defendant would face if convicted. At the time of America's Founding, jurors generally understood what the consequences would be for the defendant if they voted to convict because criminal law and its associated penalties were relatively simple. But as sentencing policy has become more complex, modern jurors are generally unaware of what punishment the defendant may confront if convicted.

The Founders meant for criminal juries to serve as an important check on government abuse of power, but jurors cannot effectively perform this role if they are unable to assess the severity of the punishment the defendant will receive if convicted in comparison with the culpability of the conduct at issue. This point is thrown into particularly sharp relief by the modus operandi of our current criminal justice system, where defendants regularly plead guilty because those who go to trial and lose face sentences that are, on average, over twice as long as those imposed on defendants who forgo their right to a jury.

The emerging consensus among criminal justice scholars is that the often disproportionately severe sentences defendants face for going to trial are neither intended nor expected to be the actual punishments imposed in most cases. Instead, policymakers design these statutory sentences to increase prosecutors' leverage in plea negotiations, maximize the number of defendants who can be induced to waive their constitutional right to a trial, and ultimately persuade defendants to accept whatever punishment a prosecutor really believes is fair.

This dynamic creates perverse incentives for prosecutors and legislators alike, prompting the former to overcharge defendants and the latter to overcriminalize behavior. Neither dynamic is good for the American people, and a system in which innocent people are regularly coerced into pleading guilty to crimes they did not commit will quickly lose its moral and political legitimacy.

Informing juries of the range of statutory sentences defendants face would substantially ameliorate the bane of coercive plea bargaining by making constitutionally prescribed jury trials relatively more attractive to defendants than they are now. Evidence suggests that informing juries about sentences makes them more likely to faithfully apply the appropriate standard of proof and ensure that the government's case satisfies the rigorous standards that the Constitution imposes. This result would make it riskier for prosecutors to level unrealistic or redundant charges at defendants, who could opt for a jury trial and turn laws with excessive penalties into a liability for the government.

Of course, it is precisely this heightened scrutiny by jurors that is often characterized as somehow improper or unfairly prejudicial, purportedly leading them to erroneously acquit people who are factually guilty. But as noted, our current system demonstrably has a worse effect: many defendants plead guilty despite being factually *innocent*, often due to a perfectly rational fear of suffering a far harsher sentence if they go to trial and lose. Informed juries will make it easier for innocent defendants to resist efforts to coerce them into false guilty pleas, since prosecutors will have better incentives to bring appropriate charges carrying a fair sentence—and not threaten defendants with blatant trial penalties.

The simplest implementation of this policy would require jury instructions to include the statutory ranges for all crimes charged. The instructions would explain whether charges would run concurrently or consecutively, with a cumulative range that takes this information into account. Because some laws stipulate higher penalties for defendants with a prior criminal history, the defense, as applicable, could request that this information be excluded from the instructions because of its potentially prejudicial effect. Should the defense not object, the jury would be told the range of years the defendant faces given his or her criminal history, with the judge emphasizing that this history is not relevant to the defendant's guilt in the current proceedings. This is just one possible approach, however, and policymakers may tailor it to fit their jurisdiction's particular sentencing system.

Finally, given that the vast majority of criminal cases are disposed of by guilty pleas, policymakers should require absolute transparency between prosecutors and defendants during the plea-bargaining process, most notably by requiring prosecutors to disclose all exculpatory evidence before a defendant pleads guilty. To ensure that this occurs, policymakers should establish plea integrity units to randomly audit plea agreements. These units would determine whether the plea was the result of corrupt or coercive tactics and ensure that prosecutors are disclosing necessary evidence and information so that criminal defendants can make informed decisions before waiving their constitutional right to a trial.

Our current system incentivizes prosecutors to overcharge defendants and then use the weaker charges as bargaining chips to obtain a guilty plea—even when they have evidence suggesting the defendant may not be guilty of every crime charged. The U.S. Supreme Court has long held that due process requires prosecutors to disclose all evidence material to a defendant's guilt or innocence before trial. Nevertheless, the Supreme Court has not expressed *when* such evidence must be shared, and courts seem to disagree on the correct timeline for disclosure—with some courts concluding that such evidence need not be disclosed at any point during the plea-bargaining process.

Purposeful withholding of exculpatory evidence in an effort to obtain a guilty plea undercuts the fundamental purpose of our criminal justice system: to punish the guilty and exonerate the innocent. The disclosure of exculpatory evidence before entering into a plea agreement would allow defendants to be fully apprised of the case against them and thus make informed decisions before waiving their constitutional right to a trial. As a result, innocent defendants who may otherwise have given in to prosecutorial pressure to plead guilty might instead opt to fight their charges.

Policymakers should provide for the creation of plea integrity units tasked with examining a sample of cases in which plea agreements have been reached.

These units could be part of the prosecutor's office, or better, part of an independent Office of Plea Integrity. The goal of these plea integrity units would be to evaluate plea deals to ensure that the defendant is, in fact, guilty; the government did not use unfairly coercive techniques to get the defendant to enter into the plea agreement; and the guilty plea does not represent a corrupt bargain to provide the defendant with more leniency than he deserves.

Federal courts hear approximately 80,000 criminal cases annually, so it would be unreasonable to assume that these units would have the resources to conduct a review of every single case. However, it would not be unduly burdensome to direct these units to develop a system for selecting a mix of random and specially designated cases for review. This randomized audit of cases would provide much-needed insight into the coercive nature of our current criminal justice system, and it would provide a meaningful deterrent to prosecutors who make convictions, rather than just outcomes, their metric of success.

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—Prepared by Clark Neily, Jay Schweikert, and James Craven

13. TECHNOLOGY AND LAW ENFORCEMENT

Congress should

- ensure that all federal law enforcement grants are conditioned on policies that protect privacy and promote transparency and accountability;
- impose a probable cause requirement on the collection of metadata through cellphone tracking devices used by federal law enforcement agencies, including joint federal and state task forces; and
- direct the Federal Bureau of Investigation and the Federal Communications Commission to rescind the nondisclosure agreements and secrecy policies that federal agencies negotiate with state and local law enforcement partners regarding cellphone tracking devices, or stingrays.

Since the beginning of modern policing in 1829, law enforcement agencies have taken advantage of new technologies. From two-way radios and eavesdropping devices to tasers and drones, police have been quick to put new technology into the field. However, recent developments in surveillance technology, combined with a lagging Fourth Amendment jurisprudence and inadequate legislative oversight, have jeopardized the constitutional rights of millions of American citizens. Modern technology gives police access to tools such as body cameras, drones, facial recognition technology (FRT), and cellphone tracking devices that could, without appropriate regulations in place, allow for the warrantless and persistent surveillance of entire American cities.

Police departments have a legitimate interest in the use of body cameras, drones, FRT, and cellphone trackers, but that interest must be weighed against the privacy interests and constitutional rights of American citizens. Our system of checks and balances obligates legislators and judges to ensure that law enforcement practices respect the rights of the American people.

Law enforcement is traditionally a state and local function in our federal system; however, over the past few decades, the federal government has increasingly injected itself into local policing through the proliferation of grant awards and equipment transfer programs. Ostensibly meant to help fight the drug war and the war on terror, these federal interventions in local law enforcement serve to distort policing priorities while granting the federal government a massive role in shaping law enforcement policy at the state and local levels.

Congress should consider the reforms outlined in this chapter, which would allow law enforcement agencies to take advantage of new technology while also increasing accountability and transparency and guarding against persistent and indiscriminate surveillance.

Cellphone Tracking

Cellphone trackers are colloquially referred to by the Harris Corporation trade name “StingRay” or the technical term “IMSI-catchers” (i.e., the International Mobile Subscriber Identity of nearby mobile phones). These devices operate by emitting radio signals and are regulated under the authority of the Federal Communications Commission (FCC). The FCC, in turn, requires state and local law enforcement agencies to coordinate their acquisition of stingrays with the FBI. Pursuant to that requirement, the FBI has proffered a nondisclosure agreement to state and local agencies applying to use stingrays. Among other things, the nondisclosure agreement forbids the agencies from disclosing any information about the use or capabilities of the technology to the public, courts, or defendants. The agreement even gives the FBI the authority to compel local prosecutors to withhold evidence or even drop entire prosecutions rather than disclose stingray evidence.

For example, in 2012, a judge in New York State ordered the Erie County Sheriff’s Office to disclose the terms of its nondisclosure agreement with the FBI. The agreement included the following provision:

> In addition, the Erie County Sheriff’s Office will, at the request of the FBI, seek dismissal of the case in lieu of using or providing, or allowing others to use or provide, any information concerning the Harris Corporation wireless collection equipment/technology, its associated software, operating manuals, and any related documentation (beyond the evidentiary results obtained through the use of the equipment/technology), if using or providing such information would potentially or actually compromise the equipment/technology.

The federal government’s demand for such extensive secrecy threatens privacy rights and undermines important federalism and separation-of-powers principles. Congress should direct the FBI and FCC to abolish such requirements for state and local stingray use.

The level of secrecy surrounding stingrays has made it difficult for courts to oversee the operation of the devices. With prosecutors, at the behest of the FBI, dropping cases rather than acknowledging stingray use, the jurisprudence is relatively sparse—despite the thousands of stingray deployments around the country.

A Maryland state appeals court found that a warrantless use of stingray equipment to track down an attempted murder suspect was a violation of the Fourth Amendment. The court concluded that the suspect had a reasonable expectation of privacy in the location of his cellphone within an apartment. The Second Circuit Court of Appeals reached the same conclusion about another warrantless stingray search of an apartment.

Rather than wait for the courts, several state legislatures have taken steps to prevent stingray abuses by state and local law enforcement. Illinois, for instance, passed the Citizen Privacy Protection Act, which conditions police deployment of stingrays on a showing of probable cause before a court. Congress should follow the lead of reforming states and impose a warrant requirement on the collection of telephony metadata or digital content by stingray technology.

Body Cameras

The body camera, another tool that raises federalist concerns, has become an increasingly prominent hallmark of criminal justice reform debates. Overwhelmingly popular among the public and used by an increasing number of police departments, body cameras can help improve evidence gathering as well as accountability and transparency in law enforcement. In December 2014, a month after it was announced that Ferguson, Missouri, police officer Darren Wilson would not face charges over the killing of Michael Brown, the Obama administration proposed 50 percent matching funds for the purchase of 50,000 police body cameras.

Since then, the federal government has spent millions of dollars on state and local police body camera grants. These grants should be conditioned on a set of body camera policies that emphasize accountability, transparency, and privacy, which are outlined in a later section.

Drones

Unmanned aerial vehicles (UAVs), commonly called "drones," vary considerably in size and capability and are used to collect video data. Police departments do not require federal permission to adopt body cameras, but drones are already regulated by the federal government. Police departments and other public entities can fly drones after either receiving a Certificate of Waiver or

Authorization from the Federal Aviation Administration (FAA) or by operating drones under the FAA's Small Unmanned Aircraft Systems (Part 107) rules, which require (among other things) that the drone not be flown over people or at night, although police departments can request that those requirements be waived.

Still, under certificates and Part 107 rules, police departments are not required to adhere to the types of privacy and transparency policies necessary to protect the rights of Americans from excessive government intrusion. Indeed, as the head of the FAA's Unmanned Aircraft Systems Integration Office said in 2013, "The FAA has no authority to make rules or enforce any rules relative to privacy." Congress, however, can condition law enforcement grants on the acceptance of policies that protect important constitutional values.

Facial Recognition

Law enforcement agencies at the local, state, and federal levels are increasingly using facial recognition technology. FRT confirms identity via the automated measurement of facial features in an image. These measurements are compared with measurements in a database. A match confirms the identity of the person in the image. Dozens of federal agencies and thousands of state and local police departments use FRT. Given its potential as a mass surveillance technology, FRT ought to be strictly controlled.

According to research from Georgetown Law's Center on Privacy and Technology, at least half of American adults are in databases that law enforcement can search with FRT. This situation is thanks in part to the fact that some states volunteer their department of motor vehicles data to law enforcement.

Some jurisdictions have taken steps to ban police use of FRT in light of the surveillance concerns associated with the technology. However, FRT has valuable private-sector applications and can be used to find missing persons. A ban is therefore not the best policy. Rather, policies that accept the benefits of facial recognition while also protecting privacy are worth pursuing.

Transparency, Accountability, and Privacy

Stingrays, body cameras, drones, and FRT can play a role in improving law enforcement by making it easier for police to search for suspects and missing persons and gather evidence. Body cameras in particular can help promote increased accountability and transparency in law enforcement. However, these benefits come with significant privacy concerns that Congress should address.

Each of these tools can collect a vast amount of sensitive data and subject law-abiding citizens to intrusive monitoring. Subjects of body cameras include not only the victims of crimes but also children, informants, and those involved in accidents. In addition, police body cameras can film inside homes. FRT can capture footage of people unconnected with any investigation peacefully going about their day.

As for UAVs, in the course of collecting video data, drones can gather information about "open fields" and other private property observable from the air. Thanks to Supreme Court rulings from the 1980s, warrantless naked-eye aerial surveillance of backyards is not proscribed. Thus, in the absence of privacy-protecting safeguards, Americans may have to adapt to a heightened level of surveillance: the explosion in the number of drones means that police will be able to snoop on people hosting barbecues, sunbathing, gardening, or playing with their children in backyards without having to secure a warrant first. That would be disturbing enough if drones were outfitted only with cameras, but they can also be used as platforms for a host of other surveillance tools, such as license plate readers and thermal imagers. Some states have imposed warrant requirements for drone surveillance, but Congress has yet to pass such a requirement for federal law enforcement agencies.

Stingrays can be helpful in locating suspects and kidnapping victims, but they also raise an array of privacy and constitutional issues. Although the full capabilities of the devices remain shrouded in secrecy, the ability to intercept content from the cellphones of everyone in a given geographic area without a warrant or even notification to the user is troubling. Telephony metadata—such as call times, durations, and incoming and outgoing numbers—allow the government to piece together the intimate details of an individual's life. While the government insists that its stingray devices "are not configured" to intercept the actual content of calls, the capability exists. Without proper oversight, that capability will remain an even greater threat to privacy than the bulk collection of metadata and warrantless location tracking.

In addition to privacy concerns associated with modern policing, there are also worries about transparency. Despite widespread international coverage of American police killings, the standard of nationwide data on fatal police encounters is poor. Journalists, not government bodies, provide the most comprehensive databases. Congress can improve the poor state of policing transparency by conditioning grants on police departments collecting data related to police-involved shootings.

New technologies do help police gather evidence, but under the right guidelines, those technologies can also play a role in informing the public about law enforcement activities. As more and more police departments seek new technologies, Congress should ensure that the federal government only funds or lends drones, body cameras, and stingrays for law enforcement agencies that demonstrate a commitment to transparency, accountability, and privacy.

Conditions for Use of Equipment

Since the advent of the drug war and the war on terror, the federal government has become a powerful and pervasive influence on state and local law enforcement policies. As long as the federal government maintains that role, Congress should endeavor to protect Americans' most cherished constitutional rights and prevent abuse.

At a minimum, any of America's roughly 18,000 law enforcement agencies applying for federal grants related to body cameras, drones, FRT, or stingrays or seeking to borrow such equipment or technology from federal agencies should outline policies that protect privacy and are consistent with increased accountability and transparency. Unfortunately, federal law enforcement grants have too often been awarded to police departments with poor policies. To promote increased transparency and accountability while protecting privacy, Congress should make federal law enforcement grants conditional on agencies' adherence to the following policies:

Transparency

- Regularly publish the number of drones, body cameras, and stingrays the agency has, how often these tools are used, and how much data they collect.
- Make the agency's drone, body camera, FRT, and stringray policies available to the public.
- Collect and regularly release data related to use-of-force incidents, including those unrelated to the use of body cameras, drones, FRT, and stringrays.
- Publish specifications allowing courts, defense attorneys, and the public at large to understand the full capabilities of the surveillance devices in use.

Accountability

- Make footage of incidents of public interest available.
- Prohibit officers from viewing UAV or body camera footage in which they appear before making statements related to a use-of-force incident.
- Establish guidelines that clearly state when body cameras should be on: during traffic stops, searches, arrests, detentions, use-of-force incidents, and all 911 responses.
- Ban drones from being outfitted with lethal and nonlethal weapons.

Privacy

- Require law enforcement agencies to secure a warrant before using a stingray or UAV, except in exigent circumstances.

- Ban the release of UAV and body camera footage showing the interior of private residential property. Such footage should be available to residents of the property or their next of kin.
- Ban the collecting or reading of text message and phone call content collected by stingrays without a warrant.
- Ban the use of biometric software, such as FRT, on body camera and UAV data.

Finally, Congress should take steps to apply these policies to federal law enforcement agencies. Those agencies not only are some of the country's largest law enforcement agencies but also are some of the best funded.

Congress should require appropriate transparency, accountability, and privacy-respecting policies before flooding state and local law enforcement agencies with grant money and cutting-edge surveillance technology.

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—Prepared by Matthew Feeney

14. THE WAR ON DRUGS

Congress should

- repeal the Controlled Substances Act of 1970;
- failing that, remove marijuana from the list of scheduled substances in the Controlled Substances Act;
- remove lysergic acid diethylamide (LSD), psilocybin, and 3,4-methylenedioxy-methamphetamine (MDMA) from the list of scheduled substances in the Controlled Substances Act;
- direct the administration not to interfere with the implementation of state initiatives that allow for the recreational or medical use of marijuana or states that have legalized or decriminalized psychedelics;
- repeal federal mandatory minimum sentences; and
- shut down the Drug Enforcement Administration.

Congress and states should

- expressly provide for the abatement of current prosecutions of marijuana offenses;
- pardon those serving sentences for now-repealed marijuana crimes, or work with the judiciary to schedule resentencing hearings for those currently incarcerated for marijuana offenses that either are no longer law or now carry substantially reduced penalties; and
- authorize automatic expungement of criminal records and arrest records for those charged or convicted of marijuana-related offenses.

The drug war is one of the worst things the American government has done and one of its most counterproductive policy failures. Fifty-one years after President Richard M. Nixon declared a "war on drugs," over 100,000 Americans died of drug overdoses between May 2020 and April 2021—more than gun deaths and automobile deaths combined. Aside from the $1 trillion fiscal price tag, the total cost of our drug war is incalculable: lives lost to overdoses, time lost to prison, children growing up without fathers and mothers, inner cities suffering from epidemics of gang violence, the militarization of our police, the destabilization of Central and South American countries, and the loss of trust between our government and our citizens. Drug legalization has long been perceived as the "radical" position, but it's now clear that it's the prohibitionists who must account for their radicalism in the face of clear facts.

Arguing for reform is not an endorsement of drug use. The issues here are the damaging effects of prohibition and the rights of adults to make choices about what they put in their bodies.

The government's attempts to prevent the harms of drug use have backfired in devastating ways. To name one, drug smugglers prefer transporting the highest potency version of a drug to evade detection, just as those who sneak alcohol into a football game prefer hard spirits to beer. That has created incentives for the black market to distribute fentanyl, the leading cause of death for Americans ages 18–45.

Federal drug prohibition has always been a bad fit for America, constitutionally and culturally. Before alcohol prohibition, states had different policies regarding alcohol. Some states were fully dry, some allowed only lower-potency beer and wine, and others had few restrictions. Drugs listed in the Controlled Substances Act are no different. Utah need not have the same alcohol policies as Massachusetts or Texas, and Alabama need not have the same marijuana policies as Colorado or Oregon.

Ours is a federal republic. The federal government has only the powers granted to it in the Constitution, and prohibiting drugs is not one of those powers. Federal alcohol prohibition was enacted (and rescinded) by a constitutional amendment because Congress at the time did not believe it was constitutionally authorized to prohibit the manufacture and distribution of alcohol within the states. Yet just over 50 years after the Eighteenth Amendment established alcohol prohibition—and without any intervening relevant constitutional amendment that increased the powers of Congress—the Controlled Substances Act was passed as a simple statute.

And the United States has a tradition of individual liberty, vigorous civil society, and limited government. Identification of a problem does not mean the government should undertake to solve it. Moreover, the fact that a problem occurs in more than one state does not mean it is a proper subject for federal policy.

In rethinking federal drug policy, it's important to keep those core ideas in focus. America is a large and diverse country that should not have a one-size-fits-all drug policy. That point is increasingly obvious to Americans when it comes to marijuana, and it is also true of "harder" drugs such as opioids, psychedelics, or MDMA. The Constitution does not give Congress the power to prohibit what Americans can put in their bodies because the Framers understood that such a power was unnecessary and unwise, and thus they intentionally withheld it from Congress.

It's time to restore some sanity and morality to our constitutional order.

Repeal the Controlled Substances Act

The Controlled Substances Act (CSA) creates five levels—"schedules"—of drug regulation. Drugs in Schedule I are prohibited in all cases except for research because they are deemed to have "no currently accepted medical use and a high potential for abuse." All other schedules are defined relative to each other. Schedule II drugs are defined as having a medical purpose but also as having a high potential for abuse. And medical opioids—such as morphine and Dilaudid (hydromorphone)—are placed in Schedule II, as are cocaine and methamphetamine. The other schedules are simply defined by being less dangerous than the previous schedule (e.g., Schedule V drugs are defined as having a lower potential for abuse than Schedule IV drugs).

The scheduling system is irrational and unscientific. Marijuana unquestionably has medical uses, yet it is in Schedule I. Heroin is used as a painkiller in dozens of countries, as well as in addiction treatment, yet it is Schedule I—while fentanyl, which is 50 times more potent, is Schedule II. Thousands of studies have shown that LSD, psilocybin (magic mushrooms), and MDMA (ecstasy) have immense potential to treat depression, anxiety, alcoholism, and other mental health issues, yet the CSA denies the states the freedom to even explore those drugs as medical treatment.

Congress should deal with drug prohibition the way it dealt with alcohol prohibition. The Twenty-First Amendment did not actually legalize the sale of alcohol; it simply repealed the federal prohibition and returned to the states the authority to set alcohol policy. States took the opportunity to design diverse liquor policies that were in tune with the preferences of their citizens. After 1933, three states and hundreds of counties continued to practice prohibition. Other states chose various forms of alcohol legalization.

Congress has abundant cause to end the federal government's disastrous war on drugs. First and foremost, the federal drug laws are constitutionally dubious. As noted, the federal government can exercise only the powers that have been delegated to it. The Tenth Amendment reserves all other powers to the states or to the people. However misguided the alcohol prohibitionists turned out to have been, they deserve credit for honoring our constitutional system by seeking a constitutional amendment to explicitly authorize a national policy on the sale of alcohol. Congress never asked the American people for additional constitutional powers to declare a war on drug consumers. That usurpation of power is something that few politicians or prohibitionists wish to discuss.

Second, drug prohibition creates higher levels of crime. Addicts commit crimes to pay for a habit that would be easily affordable if it were legal. Police sources have estimated that as much as half of the property crime in some major cities is committed by drug users. More dramatically, because drugs are illegal, participants in the drug trade cannot go to court to settle disputes, whether between buyer and seller or between rival sellers. When black-market contracts are breached, the result is often some form of violent sanction, which usually leads to retaliation and then open warfare in the streets.

Make no mistake, the annual carnage from gang violence has little to do with the mind-altering effects of marijuana gummies or LSD tabs. It is instead one of the grim and bitter consequences of an ideological crusade whose proponents will not yet admit defeat.

Third, it is a gross misallocation of law enforcement resources to have federal police agents looking for heroin and fields of marijuana when they could be helping solve crimes committed against other people and their possessions rather than crimes that are purportedly committed against oneself (e.g., putting drugs in your body). The Drug Enforcement Administration has 10,000 agents, intelligence analysts, and support staff members. Their skills would be much better used if they were redeployed to investigate crimes against persons or property.

Fourth, drug prohibition is a classic example of throwing money at a problem. In 1981, the federal drug war budget was about $1 billion. In 2021, the budget was $40.4 billion. Even accounting for inflation, that's over a 1,200 percent increase, with little to show for it. Moreover, as noted, the soaring overdose rate in America is a direct consequence of drug prohibition, so that money not only has been spent in vain, but also has killed people.

For years, drug war bureaucrats have been tailoring their budget requests to the latest news reports. When drug use goes up, taxpayers are told the government needs more money so that it can redouble its efforts against a rising drug scourge. When drug use goes down, taxpayers are told that it would be a big mistake to curtail spending just when progress is being made. Good news or bad, spending levels must be maintained or increased.

Fifth, drug prohibition channels billions of dollars per year into a criminal underworld that is occupied by an assortment of criminals, corrupt politicians, and international drug cartels. Alcohol prohibition drove reputable companies into other industries or out of business altogether, which paved the way for mobsters to make millions in the black market. If drugs were legal, organized crime would stand to lose billions, and drugs would be regulated and sold by legitimate businesses in an open marketplace.

Sixth, drug prohibition fundamentally transformed Americans' relationship with law enforcement. Public confidence in police has declined, and now only a bare majority of the public expresses confidence in police. Commanding that our police find and eliminate controlled substances has resulted in abuses of their search and seizure limitations established by the Fourth Amendment. The result is that police encounters are marked by distrust and fear—much of which could be avoided if we did not open the door to police searching and arresting people for carrying drugs. As citizens' distrust for police grows, police must reckon with declining morale. Public safety has become jeopardized as reputationally damaged police forces struggle to hire and retain able recruits.

The damage to the police-community relationship is particularly pronounced with people of color. Only 27 percent of black Americans expressed confidence in the police in 2021. Confidence plummeted from 36 percent to 30 percent in 2014, the year police killed Eric Garner while attempting to arrest him for selling hand-rolled cigarettes. That tragic encounter, which police would have no authority to initiate in a society with rational and restrained drug laws, ignited the Black Lives Matter movement and perpetuated the widespread perception that the broad discretion police departments have to carry out the drug war has unfairly targeted black communities.

The drug war fundamentally alters the dynamic between police and the community in ways that substantially impede rebuilding public trust. When police are confined to investigating crimes against people and possessions, victims of those crimes invite the police into their private spaces to investigate. If your house is robbed, you invite the police in to take evidence and pursue the culprit. Yet when the criminal and victim are the same person—which is what purportedly happens when you put drugs in your body—the police are tasked with tracking down the "criminal" when the "victim" doesn't want the "criminal" to be caught. Thus, police must resort to invasive and constitutionally dubious surveillance and enforcement tactics to catch the unwitting victims. Drug prohibition also gives police an ever-ready pretext for searching and seizing someone by claiming that they "smelled marijuana" or the suspect was "clearly impaired by drugs." Police officers with racial bias or animus can use the pretext of drug possession to go after racial minorities, with little or (more likely) no consequences for their actions.

In repealing the CSA, Congress has an opportunity to pass meaningful drug reform that respects the constraints of federalism. The CSA, after all, does more than just prohibit drugs; it also regulates how various legal drugs can be acquired and distributed. States are competent to decide what constraints should be placed on acquiring various drugs—such as age limits or prescriptions—and those laws can vary between states, as our system of federalism intended.

Students of American history will someday ponder the question of how today's elected officials could readily admit to the mistaken policy of alcohol prohibition in the 1920s but recklessly pursue a policy of drug prohibition. Indeed, the only historical lesson that recent presidents and Congresses seem to have drawn from Prohibition is that government should not try to outlaw the sale of booze. One of the broader lessons that they should have learned is this: prohibition laws should be judged according to their real-world effects, not their promised benefits. If Congress subjects the federal drug laws to that standard, it will recognize that the drug war is not the answer to problems associated with drug use.

Remove Marijuana from the Controlled Substances Act

If the CSA is retained, Congress should act promptly to remove marijuana from scheduling entirely. Although some proposals suggest rescheduling marijuana, the drug deserves no place in the CSA because of its variety, its overall safety, and its clear beneficial uses.

Marijuana's odd and unnecessary placement in Schedule I is due to a combination of ignorance, racial animus, and inertia. The original federal marijuana law, the Marihuana Tax Act of 1937, placed a prohibitionary tax on the plant. The drafters of the act deliberately chose the word "marihuana," rather than the commonly known "cannabis," to imbue the law with racial undertones. When marijuana was placed in Schedule I of the CSA in 1970, it was claimed to be provisional, and an official commission was formed to investigate the drug and its effects. The Shafer Commission, chaired by former Pennsylvania governor Raymond P. Shafer, recommended that marijuana be placed no higher than Schedule III. The recommendation was ignored by Congress and the Nixon administration.

Now, with 18 states and the District of Columbia having legalized recreational marijuana for adult use, marijuana's inclusion in the CSA is more than anachronistic, it's immoral and unconstitutional. Moreover, even in the 19 states where marijuana is legal only for medical use, the CSA sees no difference from those states that allow recreational use. Because of marijuana's Schedule I status—which recognizes no medical uses for the drug—all states with any form of legalized marijuana are violating the CSA.

Various bills have suggested rescheduling marijuana to either Schedule II (like cocaine, fentanyl, and methamphetamine) or Schedule III (like anabolic steroids and codeine) because of its recognized medical uses. Yet this is the wrong approach. Marijuana, as a plant with over 500 active compounds that may be smoked, vaporized, or ingested, will never sit easily with the Food and Drug Administration as "medicine." The FDA prefers drugs with a defined molecular structure that can be tested in randomized controlled trials. "Marijuana," as a category, is as broad as "alcohol," including various strains such as *C. indica* and *C. sativa*, not to mention different hybrids that growers have long produced and are now producing at a higher rate than ever. In short, the FDA is as likely to recognize marijuana as medicine as it would chicken soup.

Thus, like the broad category of "alcohol," marijuana, in all its forms, doesn't belong in any schedule of the CSA. Congress should immediately end the nearly 100-year misguided attempt at prohibiting a generally safe drug.

Provide Forgiveness Remedies for Past Marijuana Crimes

In the past three years, the number of states where all citizens can freely use marijuana has doubled. These states recognized something many Americans have known for some time: personal use of marijuana is generally safe, and legal efforts to stop Americans from consuming cannabis have subjected citizens to numerous harms.

Policymakers who are legalizing marijuana should also rein in the damage wrought by past criminalization of the possession, sale, manufacture, and transport of marijuana and marijuana paraphernalia. Over 40,000 Americans are currently incarcerated for marijuana crimes, depriving them of liberty and livelihood at taxpayer expense. Countless more Americans face hardships applying for jobs, education programs, and mortgages because of past marijuana crimes on their records. Policymakers should do three things to reduce these burdens.

First, policymakers should stop active prosecutions of marijuana crimes by including in the repeal measure their intent to abate marijuana charges pending adjudication. Doing so not only will prevent the conviction of people for actions that will no longer be illegal, but also will spare the state the cost of having attorneys, judges, and prison guards carry out the convictions.

Second, the president and state governors should commute the sentences of people currently incarcerated for marijuana offenses. If heads of state are hesitant to pardon these crimes despite their pending repeal, legislatures can instruct the judiciary to hold resentencing hearings where people convicted of marijuana offenses can have their sentences commuted.

Third, policymakers should set a deadline by which marijuana offenses must be automatically expunged from criminal records and arrest records. Such legislation should explicitly specify that the expunction may be legally treated as any arrest, charge, or conviction having never occurred at all. By making expungement automatic, policymakers will efficiently remove barriers that are impeding thousands of citizens' economic opportunities. An expeditious deadline for district attorneys, courts, and police departments to identify and erase these records will ensure that citizens get relief promptly.

Remove LSD, Psilocybin, and MDMA from the Controlled Substances Act

A growing body of research shows the benefits of various psychedelic compounds that are listed in Schedule I of the CSA. LSD, psilocybin, and MDMA exhibit none of the harmful characteristics of many other Schedule I drugs and have significant and demonstrated medical benefits. They should be removed from the CSA, or at a minimum, appropriately rescheduled to reflect their demonstrated medical applications and low potential for abuse.

Before being added to the CSA in 1970, LSD was extensively researched as a treatment for various mental health disorders, including depression and alcoholism. The effects on alcoholism were very promising, with some studies showing significant decreases in alcohol misuse months after taking LSD. For those suffering from depression and other disorders, LSD treatment was a valuable option. The actor Cary Grant credited his over 100 LSD therapy sessions with healing his depression and other mental health issues.

Similarly, before being added to the CSA in 1985, MDMA, also known as "ecstasy," had been used for decades by psychologists and psychotherapists to treat a variety of issues, from marriage counseling to depression and posttraumatic stress disorder (PTSD). Recently, in clinical trials to treat PTSD, MDMA showed such promise that the FDA had to put the drug on the "fast track" to approval, a statutory requirement for highly effective drugs. And the National Institutes of Health recently funded the first research into psilocybin in 50 years.

None of these drugs have an overdose risk—no known lethal dose exists for any of them—nor are they addictive. Their inclusion in Schedule I of the CSA is a product of myth and fear, and Americans are unnecessarily denied their numerous mental health benefits. Congress should remove them from the CSA.

Respect State Initiatives

The failures of drug prohibition are becoming obvious to more and more Americans. In 2012, voters in Colorado and Washington made those the first states to legalize marijuana for recreational purposes. Sixteen states and the District of Columbia have since followed their lead. More are inevitably to come. If Congress can't repeal the CSA or deschedule marijuana and psychedelics, it should at least refrain from interfering with states that are rolling back prohibition.

A particularly tragic consequence of the war on drugs has been the refusal to allow sick people to use marijuana as medicine. Prohibitionists insist that marijuana is not good medicine, or at least that legal alternatives to marijuana are equally good. Those who believe that individuals should make their own decisions—rather than have Washington bureaucracies make their decisions for them—simply say that that's a decision for patients and their doctors to make. But in fact, good medical evidence shows the therapeutic value of marijuana—despite the difficulty of conducting adequate research on an illegal drug. A National Institutes of Health panel concluded that consuming marijuana may help treat a number of conditions, including nausea and pain. It can be particularly effective in improving the appetite of AIDS and cancer patients. The drug could also help people who fail to respond to traditional remedies.

More than 70 percent of U.S. cancer specialists in one survey said they would prescribe marijuana if it were legal; nearly half said they had urged their patients to break the law to acquire the drug. In 2013, Dr. Sanjay Gupta, the chief medical correspondent for CNN, apologized to his viewers for previously voicing his opposition to medical marijuana without having done his own homework. He admitted that he had basically assumed that the Drug Enforcement Administration had sound scientific proof that marijuana could not benefit persons who are ill. After studying the subject more thoroughly, Gupta said, "We have been terribly and systematically misled for nearly 70 years in the United States, and I apologize for my own role in that."

The most relevant point for federal policymakers is that 37 states have authorized physicians licensed in those states to recommend the use of medical marijuana to patients residing in the states, without being subject to civil and criminal penalties.

In November 2020, Oregon became the first state to decriminalize psilocybin and legalize it for medical use. Various cities, such as Denver, Oakland, and Santa Cruz, have followed suit. Congress should respect state prerogatives in this area.

One of the benefits of a federal republic is that different policies may be tried in different states. One of the benefits of our Constitution is that it limits the power of the federal government to impose one policy on the several states. The federal government should capitalize on these benefits by respecting state initiatives.

Repeal Mandatory Minimums

The common law in England and America has always relied on judges and juries to decide cases and set punishments. Under our modern system, of course, many crimes are defined by the legislature, and appropriate penalties are defined by statute. However, mandatory minimum sentences and rigid sentencing guidelines shift too much power to legislators and regulators who are not involved in particular cases. They turn judges into clerks and prevent judges from weighing all the facts and circumstances in setting appropriate sentences.

Mandatory minimums for nonviolent drug offenders can result in sentences grotesquely disproportionate to the gravity of the offense. These draconian penalties are likely intended to deter drug addiction. They may, however, actually make it more difficult for those struggling with addiction to recover because incarceration handicaps their ability to pursue education or find work. Research has shown no relationship between aggressive incarceration policies and drug misuse, suggesting that mandatory minimums for drug crimes are unjustly punishing drug users without accomplishing their intended purpose. Congress should end this ineffective and harmful practice, repeal mandatory minimums, and let judges perform their traditional function of weighing the facts and setting appropriate sentences.

Conclusion

Drug abuse is a problem for those involved in it and for their families and friends. But it is better dealt with as a medical problem than as a criminal problem—"a problem for the surgeon general, not the attorney general," as former Baltimore mayor Kurt Schmoke put it.

Congress should repeal the Controlled Substances Act of 1970, shut down the Drug Enforcement Administration, and let the states set their own policies with regard to currently illegal drugs. State governments are fully capable of assessing and managing the harms associated with drug use and legalization. It is a near certainty that states will take up the mantle to prohibit drug sales to children, driving under the influence, and other unambiguously harmful applications.

By repealing the CSA, Congress would acknowledge that our current drug policies have failed. It would restore authority to the states, as the Founders envisioned. It would save taxpayers' money, and it would give states the power to experiment with drug policies and perhaps devise more successful rules.

Repeal of prohibition would take the astronomical profits out of the drug business and destroy the drug kingpins who terrorize parts of our cities and many Central and South American countries. Reform not only would reduce crime, but also would free federal agents and local police to concentrate on crimes that harm persons and property.

Prohibition has failed, again, and should be repealed, again.

Suggested Readings

Burrus, Trevor. "The Hidden Costs of Drug Prohibition." *American Consequences*, March 19, 2019.

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Hari, Johann. *Chasing the Scream: The First and Last Days of the War on Drugs*. New York: Bloomsbury, 2015.

Hart, Carl. *High Price: A Neuroscientist's Journey of Self-Discovery That Challenges Everything You Know about Drugs and Society*. New York: Harper, 2014.

—Prepared by Trevor Burrus

15. PROPERTY RIGHTS AND THE CONSTITUTION

Congress should

- pass either a joint resolution or a sense of the Congress resolution to guide federal agencies and influence courts, one that specifies the rights of property owners under the Constitution's Takings and Due Process Clauses;
- follow the traditional common law in defining "private property," "public use," and "just compensation";
- treat property taken through regulation the same as property taken through physical seizure; and
- provide a single forum in which property owners may seek injunctive relief and just compensation promptly.

America's Founders understood clearly that private property is the foundation not only of prosperity but of freedom itself. Thus, through the common law, state law, and the Constitution, they protected property rights—the rights of people to freely acquire, use, and dispose of property. With the growth of government, however, those rights have been seriously compromised. Unfortunately, the Supreme Court has yet to develop a principled, much less comprehensive, theory for remedying those violations. That failure has led to a property rights movement in state after state. It's time now for Congress to step in—to correct the federal government's own violations and to set out a standard that courts might notice as they adjudicate complaints about state violations.

In brief, state constitutions protect property rights in various ways. The U.S. Constitution does so through the Fifth and Fourteenth Amendments' Due Process Clauses, which prohibit governments from taking private property without due process of law, and, more directly, through the Fifth Amendment's Takings Clause: "nor shall private property be taken for public use without just compensation." Government can take property in two basic ways: (1) outright, by condemning the property through its power of eminent domain, taking title, and paying the owner just compensation; and (2) through regulations that restrict or compel uses, leaving the title with the owner—so-called regulatory takings. In the first case, the title is all too often taken not for a public but for a private use; and rarely does the owner receive just compensation. In the second case, the owner is often not compensated at all for his losses; and when he is, the compensation is again often inadequate.

Over the past four decades, the Supreme Court has chipped away at the problem of regulatory takings, requiring compensation in some cases; but its decisions have been largely ad hoc, leaving most owners to bear the losses. Thus, owners today can receive compensation when the title is actually taken, as just noted; when the property is physically invaded by government, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions to permits that are unreasonable, disproportionate, or unrelated to the purpose behind the permit requirement. But despite those modest advances, toward the end of its October 2004 term, the Supreme Court decided three property rights cases in which the owners had legitimate complaints, and in all three, the owners lost. One of those cases was *Kelo v. City of New London* in which the city condemned Ms. Kelo's property only to transfer it to another private party that the city believed could make better use of it. In so doing, the Court simply brushed aside the "public use" restraint on the power of government to take private property. The upshot, however, was a public outcry across the nation and the introduction of reforms in over 40 states. But those reforms varied substantially, and nearly all leave unaddressed the far more common problem of regulatory takings.

At bottom, then, the Court has yet to develop a principled and comprehensive theory of property rights, much less a comprehensive solution to the problem of government takings. For that, Congress (or the Supreme Court) needs to turn to first principles, much as the old common-law judges did. We need to begin, then, not with the public law of the Constitution as presently interpreted but with the private law of property.

Property: The Foundation of All Rights

It is no accident that a nation conceived in liberty and dedicated to justice for all should protect property rights. Property is the foundation of every right we have, including the right to be free. Every right claim, after all, is a claim to some *thing*—either a defensive claim to keep what one is holding or an offensive claim to something someone else is holding. John Locke, the philosophical father of the American Revolution and the inspiration for Thomas Jefferson when he drafted the Declaration of Independence, stated the issue simply: "Lives, Liberties, and Estates, which I call by the general Name, *Property*." And James Madison, the principal author of the Constitution, echoed those thoughts when he wrote, "[As] a man is said to have a right to his property, he may be equally said to have a property in his rights."

Much moral and legal confusion would be avoided if we understood that all of our rights—all of the things to which we are "entitled"—can be reduced to property. That would enable us to separate genuine rights—things to which we hold title—from specious "rights"—things to which other people hold title, which we may want for ourselves. It was the genius of the old common law, grounded in reason and custom, that it grasped that point. And the common-law judges understood a pair of corollaries as well: property, broadly conceived, separates one individual from another; and individuals are independent or free to the extent that they have sole or exclusive dominion over what they hold. Indeed, Americans go to work every day to acquire property just so they can be independent.

Legal Protection for Property Rights

It would be to no avail, however, if property, once acquired, could not be used and enjoyed—if rights of acquisition, enjoyment, and disposal were not legally protected. Thus, common-law judges, charged with settling disputes between neighbors, drew on principles of reason, custom, and efficiency to craft a law of property that, by and large, respected the equal rights of all.

In a nutshell, the basic rights they recognized, beyond acquisition and disposal, were the right of sole dominion—variously described as a right to exclude others, a right against trespass, or a right of quiet enjoyment, which all can exercise equally at the same time and in the same respect—and the right of active use, at least to the point where such use violates the rights of others to quiet enjoyment. Just where that point is will vary with the facts, of course, and that is the business of courts to determine, although legislatures can draw the broad outlines too. Given our modern permitting regime, however, the point to be noticed here is that the presumption of the common law was ordinarily on the side of free use. People were not required to obtain a permit before using their property, that is, just as people today are not required to obtain a permit before speaking. Rather, the burden was on those who objected to a given use to show how it violated a right of theirs. That amounts to having to show that their neighbor's use takes something they own free and clear. If they failed in that, the use could continue.

Thus, the common law limits the right of free use only when a use encroaches on the property rights of others, as in the classic law of nuisance and risk. The implications of that limit should not go unnoticed, however, especially in the context of modern environmental protection. Indeed, the belief, common today, that property rights are opposed to environmental protection is so far from the case as to be just the opposite: the right against environmental degradation is a *property* right. Under common law, properly applied, people cannot use their property in ways that injure their neighbors' property—defined, again, as taking things those neighbors hold free and clear. Thus, properly conceived and applied, property rights are self-limiting: they constitute a judicially crafted and enforced regulatory scheme in which rights of active use end when they encroach on the property rights of others.

The Police Power and the Power of Eminent Domain

But if the common law of property defines and protects *private* rights—the rights of owners with respect to each other—it also serves as a guide for the proper scope and limits of *public* law—defining in particular the powers of government and the rights of private owners with respect to government. For public law, at least at the federal level, flows from the Constitution; and the Constitution flows from the principles articulated in the Declaration of Independence, which largely reflect the common law. The justification of public law begins, then, with our private rights, as the Declaration makes clear. Government then follows, not to give us those rights through positive law but simply to recognize and secure the natural rights we already have. Thus, to be morally and legally legitimate, the powers of government must be derived from and consistent with those rights.

The two public powers most often at issue in the property rights context are the general police power—the basic power of government, mainly to secure rights and to protect health and safety—and the power of eminent domain—the power to take private property for public use after paying the owner just compensation, a power that is implicit in the Fifth Amendment's Takings Clause.

The general police power is derived from what Locke called the Executive Power, the power each of us had in the state of nature to secure our rights. Thus, *as such*, this legal power is legitimate since it is nothing more than the public law version of a power we already had, by right, which we gave to government to exercise on our behalf when we constituted ourselves in states or as a nation. But its exercise is legitimate only insofar as it secures rights and protects health and safety in a right respecting way; or used to provide certain "public goods" like national defense and clean air, goods that are narrowly defined, as economists do, as characterized by nonexcludability and nonrivalrous consumption, goods that would not likely be provided privately due to the free-rider problem. But its *exercise* is legitimate only insofar as it secures rights and protects health and safety in a right respecting way; or used to provide certain "public goods" like national defense and clean air, goods that are narrowly defined, as economists do, as characterized by nonexcludability and nonrivalrous consumption, goods that would not likely be provided privately due to the free-rider problem. Thus, although our private rights give rise to the police power, they also limit it: we cannot use the police power for non-police-power purposes. It is a power mainly to secure rights through restraints or sanctions, not some general power to provide the public with all manner of goods and services more broadly defined.

But the general police power rests with the states, not with the federal government. As the Tenth Amendment makes clear, the federal government's powers are delegated, enumerated, and thus limited. The Constitution leaves most power with the states—or with the people, never having been delegated to either level of government. Consistent with that basic doctrine of enumerated powers, therefore, the exercise of federal police power is limited to federal territory, is incidental to one of the federal government's enumerated powers, or is entailed mainly through one of its amendments. (See "Congress, the Courts, and the Constitution" for more detail on this point.)

The justification for the eminent domain power is more complicated, for unlike with the police power, none of us in the state of nature, prior to the creation of government, had a power to condemn a neighbor's property, however worthy our purpose or however much we compensated him. Thus, not for nothing was eminent domain known in the 17th and 18th centuries as "the despotic power." It arises from practical considerations alone—to enable public projects to go forward without being held hostage by holdouts unwilling to consent or by those seeking exorbitant compensation. Thus, the best that can be said for eminent domain is, first, insofar as consent can be said to justify government and its powers, concerning which there are well-known problems, we gave the federal government that power when we ratified the Fifth Amendment; and, second, as economists argue, the power's exercise is Pareto superior, meaning that at least one party is made better off—the public, as evidenced by its willingness to pay—and no party is made worse off—the owner, insofar as he receives just compensation and is thus indifferent as to whether he keeps the property or receives the compensation—the mark of truly *just* compensation.

But if the police power, federal or state, is thus limited, then any effort to provide the public with goods or services more broadly must be accomplished under some other power, such as those enumerated in Article I, Section 8, of the U.S. Constitution or those found in state constitutions. And insofar as any such effort would entail the taking of private property, it will be constrained by the Takings Clause and its public use and just compensation requirements.

Absent just compensation, the loss would fall entirely on the owner, not on the public that is benefiting from having taken the property. Not to put too fine a point on it, that would amount to theft in service of some public good or undertaking. It was to prohibit such a wrong that the Framers wrote the Takings Clause in the first place.

When Is Compensation Required?

We come then to the basic question: When do owners have to be compensated as a result of government actions? In general, there are four scenarios to consider.

First, when government actions incidentally reduce property values, but no rights are violated because nothing that belongs free and clear to the owner is taken, no compensation is due. If the government closes a military base or a neighborhood public school, for example, or builds a new highway distant from the old one with its commercial enterprises, property values may decline as a result—but nothing was taken. We own our property and all the legitimate uses that go with it, not the value in our property, which is a function of many ever-changing factors.

Second, when government acts under its police power to secure rights—when it stops someone from polluting, for example, or from excessively endangering others—the restricted owner is not entitled to compensation, whatever his financial losses, because the uses prohibited or "taken" were wrong to begin with. Since there is no right to pollute or to expose others to excessive risk, no right was taken. We do not have to pay polluters not to pollute. Here again, the question is not whether *value* was taken but whether a *right* was taken. Proper uses of the police power take no rights. They *protect* rights.

Third, when government acts not to secure rights but to provide the public with goods like wildlife habitat, scenic views, or historic preservation, and in so doing prohibits or takes some otherwise *rightful* use, then it is acting, in part, under its eminent domain power and *does* have to compensate the owner for any losses he may suffer. The principle here is quite simple: the public must bear the full costs of the goods it wants, just like any private person would have to. It's bad enough that the public can take the property it needs by condemnation; at least it should pay for what it takes rather than ask the owner to bear the costs of its appetite. It is here, of course, that modern regulatory takings abuses are most common as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, "off budget." As noted, there is an old-fashioned word for that practice—"theft"—and no amount of rationalization about "good reasons" will change that. Even thieves, after all, have "good reasons" for what they do.

Finally, when government, through full condemnation, takes for public use not simply some or all of the owner's uses but the entire estate, including the title, compensation is clearly due.

Some Implications of a Principled Approach

Starting from first principles, then, we see that there is no difference in principle between the full use of eminent domain as described in scenario four and a regulatory taking as described in scenario three—between taking full title and taking only uses. Thus, the oft-heard claim that the Takings Clause requires compensation only for "full" takings will not withstand scrutiny. Giving the clause a natural reading, it speaks simply of "private property." As Madison wrote, "property" denotes all the *uses* or rights that can rightly be made of a holding. It does not denote simply the underlying estate. In fact, in every area of property law except regulatory takings, we speak metaphorically of property as a "bundle of sticks" or uses, any one of which can be bought, sold, rented, bequeathed, what have you. Yet takings law has clung to the idea that only if the entire bundle is taken does government have to pay compensation, thereby enabling government to provide the public with goods "off budget" and thus "on the cheap."

That view allows government to extinguish nearly all uses through regulation —and hence to regulate nearly all value out of property—yet escape compensating the owner because he retains the all-but-empty title. And it would allow a government to take 90 percent of the value in year one, then come back a year later and take title for a dime on the dollar. Not only is that wrong, it is unconstitutional. It cannot be what the Takings Clause stands for. The principle, rather, is that property is indeed a bundle of sticks, a bundle of rights: take one of those sticks and you take something that belongs to the owner. The only question then is how much his loss is worth.

Thus, when the Supreme Court in *Lucas v. South Carolina Coastal Council* (1992) crafted what is effectively a 100 percent rule that allows owners compensation only if regulations restrict uses to a point where *all* value is lost, it went about the matter backward. It measured the loss to determine whether there was a taking. As a matter of first principle, the Court should have determined first whether there was a taking—whether otherwise legitimate uses were prohibited by the regulation—and only then should it have measured the loss. That addresses the principle of the matter. It then remains simply to measure the loss in value and hence the compensation that is due. In *Lucas*, since all uses were effectively taken, full compensation was due. The place to start, in short, is with the first stick, not the last dollar. That is especially so since most regulatory takings take only some uses, thus reducing the value of the property by less than its full value.

More generally, a principled approach to takings requires that courts have a basic understanding of the theory of the matter so that they can resolve conflicting claims about use in a way that respects the equal rights of all. That is hardly a daunting task, as the old common-law judges demonstrated, although the application of those principles in particular cases can be complicated, to be sure. But in general, as noted earlier, the presumption is on the side of active use until a plaintiff demonstrates that such a use takes the quiet enjoyment that is his by right (and the defendant's right as well). At that point the burden shifts to the defendant to justify his use: absent some defense like the prior consent of the plaintiff, the defendant may have to cease his use. Or if his activity is worth it, he might offer to buy an easement from or buy out the plaintiff. Thus, a principled approach respects equal rights of quiet enjoyment—and hence environmental protection. But it also enables active uses to go forward, though not at the expense of private or public rights. Users can be as active as they wish, provided they handle the "externalities" they create in a way that respects the rights of others.

What Congress Should Do

Again, the application of these principles is often fact dependent, so it is best done by courts. But until our courts, and the Supreme Court in particular, craft a more principled and systematic approach to takings, Congress can assist by drawing at least the broad outlines of such an approach as a guide both for the courts and, more directly, for federal agencies.

In this last connection, however, Congress should recognize that the regulatory takings problem begins with regulation. Doubtless the Founders did not anticipate the modern regulatory state, so they did not specify that regulatory takings are takings too and thus are subject to the Takings Clause. They did not envision our obsession with regulating every human activity and our insistence that such activities—residential, business, what have you—take place only after a grant of official permission. In some areas of business today we have almost reached the point at which everything that is not permitted is prohibited. That reverses our Founding principle: everything that is not prohibited is permitted—that is, "freely allowed," not allowed only after obtaining a government permit, often from governments at several levels.

Homeowners, developers, farmers and ranchers, mining and timber companies, firms large and small, profit seeking and not for profit—all have horror stories about regulatory hurdles they confront when they want to do something, particularly with real property. Many of those regulations are legitimate, of course, especially if they aim, preemptively, at securing genuine rights. But many more are aimed at providing some citizens with benefits at the expense of other citizens. They take rights from some and give rights to others. At the federal level, such transfers are unlikely to find authorization under any enumerated power, properly read. But even if constitutionally authorized, they need to be undertaken in conformity with the Takings Clause. Some endangered species may be worth saving, to take a prominent modern example, even if the authority for doing so belongs to states, and even if the impetus comes from a relatively small group. But we should not expect a few property owners to bear all the costs of that undertaking. If the public truly wants the habitat for such species left undisturbed, let it buy that habitat or, failing that, pay the relevant owners the costs of leaving their property unused.

In general, then, Congress should review the many federal regulations affecting private property to determine which are and are not authorized by the Constitution. If not authorized, they should be rescinded, which would quickly end a large body of regulatory takings now in place. But if authorized under some constitutionally enumerated power of Congress, the costs now imposed on particular owners, for benefits conferred on the public generally, should be placed "on budget." Critics of doing so often say that if those goods did go on budget, we couldn't afford them. What they are really saying, of course, is that taxpayers would be unwilling to pay for all the things the critics want. Indeed, the great fear of those who oppose taking a principled approach to regulatory takings is that once the public has to pay for the benefits it now receives "free," it will demand fewer of them. It should hardly be a surprise that when people have to pay for something they demand less of it.

It is sheer pretense, of course, to suppose that such benefits are now free, that they are not already being paid for. Isolated individual owners are paying for them, not the public. As a matter of simple justice, Congress needs to shift the burden to the public that is enjoying the benefits. Once we have an honest public accounting, we will be in a better position to determine whether the benefits thus produced are worth the costs. Today, we have no idea about that because all the costs are hidden. When regulatory benefits are thus "free," the public demand for them, as we see, is all but infinite.

But in addition to eliminating, reducing, or correcting its own regulatory takings—in addition to getting its own house in order—Congress should take such steps on the subject of takings as may help restore respect for property rights and reorient the nation toward its own first principles. To that end, Congress should take the following four actions:

Pass Either a Joint Resolution or a Sense of the Congress Resolution to Guide Federal Agencies and Influence Courts, One That Specifies the Rights of Property Owners under the Constitution's Takings and Due Process Clauses

As already noted, measures of the kind recommended here would be unnecessary if the courts were reading and applying the Takings Clause properly. Because they are not, it falls to Congress to step in. Still, there is a certain anomaly in asking Congress to do the job. Under our system, after all, the political branches and the states represent and pursue the interests of the people within the constraints established by the Constitution; and it falls to the courts, and the Supreme Court in particular, to ensure that those constraints are respected. To do that, the Supreme Court interprets and applies that law as it decides cases coming before it—often deciding *against* the political branches or a state when an owner seeks either to enjoin a government action on the ground that it violates his rights or to obtain compensation under the Takings Clause, or both. Thus, it is somewhat anomalous to ask or expect *Congress* to right wrongs that Congress itself may be perpetrating. Is not Congress, in carrying out the public's will, simply doing its job?

Yes, that is part of its job. But members of Congress swear to uphold the Constitution. That requires *independent* judgment about the meaning of the document's provisions. And in that connection, members need to recognize that we do not live in anything like a pure democracy. The Constitution sets powerful and far-reaching constraints on the powers of all three branches of the federal government and, especially since the ratification of the Civil War Amendments, on the states as well. Thus, the idea that Congress simply enacts whatever some transient majority of the population wants enacted, leaving it to the courts to determine the constitutionality of its acts, must be resisted. The oath of office is taken on behalf of the people, to be sure, but through and in conformity with the Constitution. Even if the courts fail to secure the liberties of the people, therefore, nothing in the Constitution prevents *Congress* from doing what the oath of office requires. Indeed, the oath *requires* Congress to step into the breach.

There is no guarantee, of course, that Congress will do a better job of interpreting the Constitution than the Supreme Court has done. In fact, given that Congress is one of the political branches and is thus an "interested" party, it could very well do a worse job. That is why the Framers placed "the judicial Power"—entailing, presumably, the power ultimately to say what the law is—with the Supreme Court, the nonpolitical branch. But that is no reason for Congress to ignore its responsibility to make its judgment known, especially when the Court is clearly wrong, as it often is here. Although nonpolitical in principle, the Supreme Court does not operate in a political vacuum—as it demonstrated in 1937, unfortunately, after Franklin Roosevelt's infamous Court-packing threat. If the Court can be persuaded to undo the centerpiece of the Constitution, the doctrine of enumerated powers, as it did after that extraordinary and unconscionable political interference, one imagines it can be persuaded by *Congress* to restore property rights to their proper constitutional status.

Thus, as a start, Congress should revisit and rescind or correct legislation that results in uncompensated regulatory takings—and enact no such new legislation. In addition, however, Congress should pass either a joint resolution or a sense of the Congress resolution that specifies the constitutional rights of property owners under the Due Process and Takings Clauses, drawing on common-law principles to do so.

Follow the Traditional Common Law in Defining "Private Property," "Public Use," and "Just Compensation"

As discussed, property rights are not protected by the Fifth Amendment's Takings Clause alone—that is, by positive constitutional law. Indeed, during the more than two years between the time the Constitution was ratified and took effect and the time the Bill of Rights was ratified, it was the common law that protected property rights against both private and public invasion. Thus, the Takings Clause simply made explicit, against the new federal government, the guarantees that were already recognized under the common law. (Constitutional protection was *implicit* during that time, of course, through the doctrine of enumerated powers, for no uncompensated takings were *authorized* under the new Constitution; nor would they have been *proper* under the Necessary and Proper Clause.) And after the ratification of the Civil War Amendments—in particular, the Fourteenth Amendment's Privileges or Immunities Clause—the common law guarantees against the states were constitutionalized as well. Thus, because the Takings Clause takes its inspiration and meaning from the common law of property, it is to that law that we must look to understand its terms.

"Private property." The first of those terms is "private property": "nor shall private property be taken for public use without just compensation." As every first-year law student learns, "private property" means far more than a parcel of real estate. Were that not the case, property law would indeed be an impoverished subject. Instead, the common law reveals the many significations of the concept "property" and the rich variety of arrangements that human imagination and enterprise have made of the basic idea of private ownership. As outlined previously, however, those arrangements all come down to three basic ideas—acquisition, exclusive use, and disposal, the three basic rights we have in property, from which more specifically described rights may be derived.

With regard to regulatory takings, however, the crucial thing to notice is that absent contractual arrangements to the contrary the right to acquire and hold property entails the right to *use* it as well. As Madison wrote, people have "a property" in their rights, including in their rights of use. If the right to property did not entail rights of use, it would be an empty promise. People acquire property, after all, only because doing so enables them to use it, which is what gives it its value. Indeed, the fundamental complaint about uncompensated regulatory takings is that, by thus eliminating some or all of the uses owners may make of their property, government makes the title they retain that much less valuable—even worthless in extreme cases. Who would buy property that cannot be used?

The very concept of "property," therefore, entails and denotes all the legitimate uses that can be made of the underlying estate, giving it value. And the uses that are legitimate are those that can be exercised consistent with the rights of others, private and public alike, as defined by the traditional common law. As outlined above, however, the rights of others that limit an owner's uses often depend on the facts. Thus, a resolution can state only the principle of the matter, not its application in specific contexts. Still, the broad outlines should be made clear in any congressional enactment. In particular, the term "private property" should be defined to include all the uses that can be made of property consistent with the common-law rights of others. The only grounds that justify restricting uses without compensation are (1) to protect the rights of others and (2) to provide narrowly defined "public goods," where owners receive public benefits equivalent to the losses incurred by regulation. By contrast, when a particular owner's uses are restricted to provide the general public with goods more broadly defined, the resulting loss in value should be compensated.

"Public use." Turning now from regulatory takings to the full use of eminent domain, here the government condemns the entire property and takes title in order to give the property a "public use"—a military base, for example, or a public school or highway. Unfortunately, governments today too often use eminent domain for much broader purposes, and courts have sanctioned such condemnations by reading "public *use*" as "public *benefit*." That has led to private-public collusion against private rights as governments condemn private property for the benefit of other private users, either directly or by delegating their condemnation power to a quasi-public or even a private entity. Those are rank abuses of the eminent domain power, amounting often to implicit grants of private eminent domain and to invitations to public graft and corruption. Typically, when a large private entity wants to expand, it goes to the relevant public agency and asks that a target property be condemned and its title transferred to it, arguing that its new use will benefit the public through increased jobs, business, taxes, what have you. No longer needing to bargain with the owner of the target property in an effort to buy it, the private entity simply asks or even pays the public agency to condemn the property "for the public good."

Because eminent domain is a "despotic power," it should be used rarely and only for genuinely *public* uses. That means uses that are broadly enjoyed by the public, rather than by some narrower part of the public; and in the case of the federal government, it means a constitutionally authorized use. In defining "public use," however, here too facts matter, and sometimes there is no bright line. Nevertheless, certain general considerations can be noted. To begin, if the compensation is just, then no problem arises when title is transferred to the public for a genuine public use, such as those previously mentioned. Nor is there a problem when title is transferred to a *private* party—for example, to avoid the holdout situation that might arise with network industries like cable and telephone companies—provided the subsequent use is open to all on a nondiscriminatory basis, often to be regulated in the public interest. In such cases, were eminent domain available only when the public kept the title, the public would be deprived of the relative efficiencies of private ownership.

Beyond such cases, however, the public use restriction on employing eminent domain looms larger. Thus, condemnation for "blight reduction," often a ruse for transferring title to a private developer, sweeps too broadly. If the "blighted" property constitutes an actual nuisance, it can be condemned under the police power, after all, without transferring title to another owner. A close cousin to the blight reduction rationale is the "economic development" rationale used in the infamous *Kelo* case and often used for the erection of privately owned sports stadiums; this rationale should never be allowed, whatever the claimed public benefit. Private economic development nearly always generates spillover benefits for the public, but that is no justification for using eminent domain, for private markets provide ample opportunities for obtaining the property the right way, by voluntary agreement. To avoid abuse and the potential for corruption, therefore, Congress needs to define "public use" rigorously, with reference to titles, use, and control.

"Just compensation." Finally, Congress should define "just compensation" with an eye to its function: it is a remedy for the wrong of taking someone's property, which no private party could rightly do. That the Constitution implicitly authorizes that wrong does not change the character of the act, of course. As discussed, the rationale for this despotic power, even when properly used, is problematic. Given that, the least the public should do is make the victim of its use whole. That too will be a fact-dependent determination, but Congress should at least make it clear that for compensation to be "just" and thus make the owner whole, he must receive more than the "market value" of his property, the normal standard today. After all, the simple fact that the owner does not have his property on the market indicates that its value to him is greater than the market price. Moreover, his compensation should reflect the fact that his loss arises not by mere accident, as with a tort, but from a deliberate decision by the public to force him to give up his property.

In the case of regulatory takings, however, it should be noted that not every such taking will require compensation for an owner. Minimal losses, for example, may be difficult to prove and not worth the effort. Moreover, some regulatory restrictions may actually enhance the value of property—say, if an entire neighborhood is declared "historic." Finally, that portion of "just compensation" that concerns market value should reflect value before, and with no anticipation of, regulatory restrictions. Thus, in determining compensation, government should not benefit from reductions in value that its regulations bring about. Given the modern penchant for regulation, that may not always be easy. But in general, given the nature of condemnation as a forced taking, any doubt should be resolved to the benefit of the owner forced to give up his property.

If Congress enacts a resolution that outlines the constitutional rights of owners by following the common law in defining the terms of the Takings Clause, it will abolish, in effect, any real distinction between partial and full takings. Nevertheless, Congress should be explicit about what it is doing on that score.

Treat Property Taken through Regulation the Same as Property Taken through Physical Seizure

The importance of passing a unified and uniform takings resolution cannot be overstated. Today, we have one law for "full takings," "physical seizures," "condemnations"—call them what you will—and another for "partial takings," "regulatory seizures," or "condemnations of uses." Yet there is overlap too. Thus, as noted earlier, the Supreme Court has said that if regulations take *all* uses, compensation is due—perhaps because eliminating all uses comes to the same thing, in effect, as a "physical seizure," whereas eliminating most but not all uses seems not to come to that.

That appearance is deceptive, of course. In fact, the truth is much simpler—but only if we go about discovering it from first principles. If "property" signifies not only the underlying estate but all legitimate uses that by right can be made of it, then any government action that takes any one of those uses or rights is, by definition, a taking—requiring compensation for any financial losses the owner may suffer as a result. The issue is really no more complicated than that. There is no need to distinguish "full" and "partial" takings: *every* condemnation, whether full or partial, is a taking. Indeed, the use taken is taken "in full." Imagine that the property were converted to dollars—100 dollars, say. Would we say that if the government took all 100 dollars that there was a taking, but if it took only 50 of the 100 dollars that there was not a taking? Of course not. Yet that is what we say under the Court's modern regulatory takings doctrine: as Justice Antonin Scalia put it in his opinion for the Court in the *Lucas* decision, "Takings law is full of these 'all-or-nothing' situations."

That confusion must end. Through a resolution specifying the rights of property owners, Congress needs to make it clear that compensation is required whenever government eliminates common-law property rights and an owner suffers a financial loss as a consequence—whether the elimination results from regulation or from outright condemnation.

Provide a Single Forum in Which Property Owners May Seek Injunctive Relief and Just Compensation Promptly

The promise of the common law and the Constitution will be realized, however, only through procedures that enable aggrieved parties to press their complaints. Some of the greatest abuses today are taking place because owners are frustrated at every turn in their efforts to reach the merits of their claims. Accordingly, Congress should provide a single forum for owners to press their claims.

In its 1998 term, the Supreme Court decided a takings case that began 17 years earlier, in 1981, when owners applied to a local planning commission for permission to develop their land. After submitting numerous proposals over this period—all of which were rejected even though each satisfied the commission's previous recommendations—the owners finally sued, at which point they faced the hurdles the courts put before them. Most owners, of course, cannot afford to go through such a long and expensive process, at the end of which the odds are still against them. But that process confronts property owners across the country today as they seek to enjoy and then to vindicate their rights. If it were speech or voting or any number of other rights, the path to vindication would be smooth by comparison. But property rights have been relegated to a kind of second-class status.

The first problem is the modern permitting regime. We would not stand for speech or religion or most other rights to be enjoyed only by permit. Yet that is what we do with property rights, which places enormous, often arbitrary, power in the hands of federal, state, and local "planners." Driven by political goals and considerations, planning commissions open the application forum not only to those whose *rights* might be at stake but also to those with *interests* in the matter. Thus is the common-law distinction between rights and interests blurred and eventually lost. Thus is the matter transformed from one of protecting rights to one of deciding whose "interests" should prevail. Thus are property rights effectively politicized. And that is the end of the matter for most owners because that is as far as they can afford to take it.

When an owner does take it further, however, he finds the courts are often no more inclined to hear his complaint than was the planning commission. Federal courts routinely refrain from hearing federal claims brought against state and local governments, requiring owners to litigate their claims in state courts before they can even set foot in a federal court on their federal claims. Moreover, the Supreme Court has held that an owner's claim is not ripe for adjudication unless (1) he obtains a final, definitive agency decision regarding the application of the regulation in question and (2) he exhausts all available state compensation remedies.

Needless to say, many planners, disinclined to approve applications to begin with, treat those standards as invitations to stall until the "problem" goes away. Then if an owner does spend years and extraordinary expense jumping through those hoops and he gets into federal court at last, he faces the *res judicata* restriction of the federal Full Faith and Credit Act: the court will say that the case has already been adjudicated by the state courts. Finally, if the claim is against the federal government, the owner faces the so-called Tucker Act Shuffle: he cannot get injunctive relief and compensation from the same court but must go to a district court for an injunction and to the Court of Federal Claims for compensation, each waiting upon the other to act.

In 2019, in *Knick v. Township of Scott, Pennsylvania*, the Supreme Court addressed some of those issues when it partially overturned its 1985 decision upholding those abuses. But more needs to be done and done by Congress. The 105th and 106th Congresses tried to address those procedural hurdles through several measures, none of which passed both houses. Those or similar measures must be revived and enacted if the unconscionable way we treat owners—who are simply trying to vindicate their constitutional rights—is to be brought to an end. This is not an "intrusion" on state and local governments. Under the Fourteenth Amendment, properly understood and applied, those governments have no more right to violate the constitutional rights of citizens than the federal government has to intrude on the legitimate powers of state and local governments. Federalism is not a shield for local tyranny. Properly read, it is a *brake* on tyranny, whatever its source.

Conclusion

The Founders would be appalled to see what we have done to property rights over the course of the 20th century. One would never know today that their status in the Bill of Rights was meant to be equal to that of any other right. The time has come to restore respect for these most basic of rights, the foundation of all of our rights. Indeed, despotic governments have long understood that if you control property, you control the media, the churches, the political process itself. We are not at that point yet, of course. But if regulations that provide the public with benefits continue to grow, unchecked by the need to compensate those who bear the costs, we will gradually slide to that point—and in the process we will pay an increasingly heavy price for the uncertainty and inefficiency we create. The most important price, however, will be to our system of law and justice. Owners are asking simply that their government obey the law—both the common law and the law of the Constitution. Reduced to its essence, they are simply saying this: stop stealing our property; if you must take it, do it the right way—pay for it. That hardly seems too much to ask.

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—Prepared by Roger Pilon

16. CIVIL FORFEITURE REFORM

Congress should

- amend the Civil Asset Forfeiture Reform Act to require, in most cases, a criminal conviction to be obtained before assets may be forfeited to the government;
- prohibit federal agencies from "adopting" state or local asset forfeiture cases and engaging in the "equitable sharing" of any forfeited property in such cases;
- require forfeited property to be assigned to the federal treasury rather than to the agencies executing the forfeiture;
- short of those reforms, adopt stronger nexus and proportionality requirements for asset forfeitures and require proof by at least a clear and convincing standard, if not beyond a reasonable doubt; and
- require the government to have the burden of proof in establishing whether someone is an "innocent owner."

States should

- eliminate civil forfeiture by requiring a criminal conviction before assets can be forfeited;
- short of that, adopt stronger nexus and proportionality requirements for asset forfeitures and require proof by at least a clear and convincing standard, if not beyond a reasonable doubt;
- prohibit state and local law enforcement agencies from participating in federal "equitable sharing" programs;
- require any forfeited assets to be deposited in the state's general fund rather than given to the law enforcement agencies that initiated the seizures; and
- require law enforcement agencies to file timely annual reports concerning all aspects of their seizure and forfeiture activities.

American asset forfeiture law has two branches: criminal forfeiture and civil forfeiture. *Criminal* forfeiture is usually fairly straightforward, whether it concerns contraband, which as such may be seized and forfeited to the government, or ill-gotten gains from crimes and instrumentalities of crime. Pursuant to a criminal conviction, any proceeds or instrumentalities of the crime are subject to seizure and forfeiture. Courts may have to weigh the scope of "proceeds" or "instrumentalities." Or they may have to limit statutes that provide for excessive forfeitures. But forfeiture follows conviction, with the usual procedural safeguards of the criminal law.

Not so with *civil* forfeiture, where most of the abuses today occur. Here, law enforcement officials often simply seize property on mere suspicion of a crime, leaving it to the owner to try to prove the *property's* "innocence," where that is allowed. Unlike *in personam* criminal actions, *civil* forfeiture actions, if they are even brought, are *in rem*—brought against "the thing" on the theory that it "facilitated" a crime and thus is "guilty." That is why forfeiture cases have names like the *United States v. $19,356.76*.

Forfeiture outrages span the country. In Volusia County, Florida, it's standard practice for police to stop motorists going south on I-95 and seize any cash they're carrying in excess of $100 on suspicion that it's money to buy drugs. After seizure, it's left to the victim to prove that the money is not for buying drugs. New York City police routinely seize cars from those accused of a DUI (driving under the influence). In 2010, Philadelphia police tried to seize a grandmother's house and car because, without her knowledge, her son sold less than $200 worth of marijuana from the house. In 2017, the Pennsylvania Supreme Court overturned the seizure. Philadelphia has abused civil forfeiture so brazenly—seizing over 1,000 homes, more than 3,000 vehicles, and $44 million in cash over an 11-year period—that the Institute for Justice filed a class-action suit that was settled in 2018 with the city agreeing to reform its practices.

In each such case, the property is seized for forfeiture to the government, not because the owner has been found guilty of a crime but because the property is said to "facilitate" a crime, whether or not a crime was ever proved or a prosecution even begun. And if the owner wants to try to get his property back, the cost of litigation, to say nothing of the threat of an *in personam* criminal prosecution, is frequently an insurmountable bar to reclaiming the property.

Behind all these seizures are perverse incentives: the police themselves or other law enforcement agencies often keep the forfeited property—an arrangement rationalized as a cost-efficient way to fight crime. The incentives thus skew toward ever more forfeitures. Vast state and local seizures aside, according to federal government records, Justice Department seizures alone went from

$27 million in 1985 to $556 million in 1993 to nearly $4.2 billion in 2012. Since 2000, states and the federal government have seized for forfeiture at least $68.8 billion, and, with many states not providing full data, the number is surely much higher.

Grounded in the "deodand" theories of the Middle Ages when the "goring ox" was subject to forfeiture because "guilty," this practice first arose in America in admiralty law. Thus, if a ship owner abroad—and hence beyond the reach of an *in personam* action—failed to pay duties on goods he shipped to America, officials could seize the goods through *in rem* actions. Except for such uses, forfeiture was fairly rare until Prohibition. With the war on drugs, it came to life again. And today, officials use forfeiture well beyond the drug war. As revenue from forfeitures has increased, federal, state, and local officials across the country have become addicted to the practice, despite periodic exposés in the media.

In some cases, of course, the use of civil forfeiture might be justified simply on the facts, as in the admiralty case just noted. Or perhaps a drug dealer, knowing his guilt but also knowing that the state's evidence is inconclusive, will agree to forfeit cash that police have seized, thereby avoiding prosecution and possible conviction. That outcome is simply a bow to the uncertainties of prosecution, as with any ordinary plea bargain. But the rationale for the forfeiture in such a case is not "facilitation." Rather, it is the alleged ill-gotten gain.

By contrast, when police or prosecutors, for acquisitive reasons, use the same tactics with *innocent* owners who insist on their innocence—"Abandon your property or we'll prosecute you," at which point the costs and risks surrounding prosecution surface—they are employing the facilitation doctrine to justify putting the innocent owner to such a choice. In those cases, the doctrine is pernicious: it's simply a ruse—a fiction—serving to coerce acquiescence.

Because it lends itself to such abuse, therefore, the facilitation doctrine should be unavailable to any law enforcement agency once an owner challenges a seizure of his property. Once he does, the government should bear the burden of showing not that the *property* is guilty but that the *owner* is; therefore, his property may be subject to forfeiture if it constitutes ill-gotten gain or was an instrumentality of the crime, narrowly construed (e.g., burglary tools, but not cars in DUI arrests or houses from which drug calls were made). In other words, once an owner challenges a seizure, *criminal* forfeiture procedures should be required. Indeed, "civil" forfeiture, arising from an allegation that there was a *crime*, is essentially an oxymoron. The government should prove the allegation, under the standard criminal law procedures, before any property is forfeited.

Many of these abuses take place at the state level, of course. Yet Congress can take steps not only to reform federal law—which often serves as a model for state laws—but to affect state laws as well. States can also take the lead in reforming their forfeiture laws and policies, and 36 states and the District of Columbia have enacted some type of civil forfeiture reform since 2014. Four states—Maine, Nebraska, New Mexico, and North Carolina—eliminated the practice entirely by requiring a criminal conviction. And despite the warnings of police unions and other law enforcement groups, eliminating civil forfeiture did not result in a rise in those states' crime rates.

On the federal level, the Civil Asset Forfeiture Reform Act of 2000, brought to fruition by the efforts of the late Rep. Henry J. Hyde (D-IL), implemented several procedural reforms. But it left the underlying substantive problem, the facilitation doctrine, untouched. The abuses have thus continued, so much so that in 2014 two former directors of the Justice Department's civil forfeiture program wrote in the *Washington Post* that "the program began with good intentions but now, having failed in both purpose and execution, it should be abolished."

If abolition of civil forfeiture is not possible, Congress should make fundamental changes in the program. In particular, if a crime is alleged, federal law enforcement officials should have the power to seize property for subsequent forfeiture under only three conditions: (1) when *in personam* jurisdiction is unavailable, as in the admiralty example; (2) when, in the judgment of the officials, the evidence indicates that a successful prosecution is uncertain, but there is a high probability that the property at issue is an ill-gotten gain from the alleged crime *and the target does not object to the forfeiture*, as in the drug-dealer example; and (3) when the property would be subject to forfeiture following a successful prosecution, and there is a substantial risk that it will be moved beyond the government's reach or otherwise dissipated prior to conviction; but such seizures or freezes should not preclude the availability of funds sufficient to enable the defendant to mount a proper legal defense against the charges, even though some or all of the assets may be dissipated for that purpose.

Those reforms would effectively eliminate the facilitation doctrine, except for a narrow reading of "instrumentalities," and would largely replace civil forfeiture proceedings with criminal proceedings. Still, the doctrine may continue to be employed by state and local officials. Because of that, and out of respect for federalism more broadly, Congress should prohibit the practice of "adoption" or "equitable sharing" whereby federal agencies adopt cases brought to them by state and local enforcement agencies, then share the forfeited assets with those agencies. In such cases, the usual motive is to circumvent state restrictions aimed at stopping abuses by requiring, for example, that forfeited assets be directed to state education departments rather than kept by the state or local law enforcement agencies. Thus, here again, forfeiture's perverse incentives drive this practice while undermining state autonomy in the process.

Consistent with that reform, Congress should put an end to the underlying incentive structure by requiring that forfeited assets be assigned to the federal treasury rather than to the enforcement agencies—which should not be allowed, in effect, "to police for profit." In 2021, the federal Asset Forfeiture Fund exceeded $2.4 billion, having more than doubled since 2008 and increased 20-fold since it was created in 1986. Not coincidentally, the growth in civil forfeiture closely parallels the ability of law enforcement agencies to profit from their activities. In fact, a veritable cottage industry has arisen that instructs officers how to stretch their legal authority to the absolute limit and beyond. It's a system that resembles piracy more than law enforcement.

At the least, if the reforms suggested here are not made, Congress should require the government to show, if challenged, that the property subject to forfeiture had a significant and direct connection to the alleged underlying crime, not simply that it was somehow "involved" in the crime, as now. And the standard of proof should be raised from a mere preponderance of the evidence to at least clear and convincing evidence. Beyond a reasonable doubt—the same burden of proof required for criminal convictions—would be even better. Florida recently raised the burden for civil forfeiture to the beyond-a-reasonable-doubt standard.

Moreover, a proportionality requirement should be imposed to ensure that the government does not seize property out of proportion to the offense. Congress should require officials to consider the seriousness of the offense, the hardship to the owner, the value of the property, and the extent of a nexus to criminal activity. If a son living in his parents' home is convicted of selling $40 worth of heroin and officials try to take the home, as happened in Philadelphia, a proportionality requirement ensures that prosecutors cannot take a home for a $40 crime.

Finally, if Congress cannot eliminate the facilitation doctrine, it should strengthen the innocent owner defense. Under current law, the burden is on the owner to prove his innocence by a preponderance of the evidence. Just as people enjoy the presumption of innocence in a criminal trial, property owners never convicted or even charged with a crime should not be presumed guilty in civil forfeiture proceedings. The burden of proof should be on the government to show, by at least clear and convincing evidence, that the owner knew or reasonably should have known that the property facilitated a crime and he did nothing to mitigate the situation or that the property reflected the proceeds of a crime. (A higher standard, such as beyond a reasonable doubt, would be preferable.)

The Civil Asset Forfeiture Reform Act of 2000 has proved inadequate for curbing abuses as countless Americans across the nation, having done nothing wrong, continue to lose their homes, businesses, and, sometimes, their very lives to the aggressive, acquisitive policing that civil forfeiture encourages. There is broad agreement today that Congress should act quickly and decisively to fix a system that is badly in need of reform.

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17. RESTORING THE RIGHT TO KEEP AND BEAR ARMS

Congress should

- repeal the most extreme elements of the District of Columbia's gun control ordinances;
- repeal the federal ban on interstate purchases of handguns; remove suppressors (silencers) and short-barreled rifles and shotguns from the National Firearms Act;
- amend federal law to allow users of controlled substances to purchase firearms, particularly in states with legalized medical or adult-use marijuana;
- resist onerous and ineffective proposals for universal gun registration on firearm sales and loans;
- modernize and improve the operations at the Bureau of Alcohol, Tobacco, Firearms and Explosives, and revoke the executive branch's authority to use the Arms Export Control Act to impose gun control;
- restore funding to process relief from disability applications to own firearms; and
- ensure that secret government lists—such as the no-fly list—are not used to unconstitutionally deprive citizens of their Second Amendment rights.

It has been 14 years since the Supreme Court decided *District of Columbia v. Heller*, which affirmed that the Second Amendment secures a preexisting individual right to keep and bear arms. Two years later, in *McDonald v. Chicago*, the Court incorporated the Second Amendment against the states, meaning that the amendment now protects citizens from onerous firearm regulations passed by federal, state, or municipal governments. In 2016, in *Caetano v. Massachusetts*, the Court reversed a Massachusetts decision that had upheld the prohibition of electric stun guns. And in 2022, the Supreme Court decided

New York State Rifle and Pistol Association (NYSRPA) v. Bruen, holding that the Second Amendment right to bear arms means that states must grant carry permits to qualified adults.

Within the *Heller/McDonald/Caetano/NYSRPA* framework, Congress now has a historic opportunity to begin restoring Americans' right to keep and bear arms. To be sure, Cato Institute scholars have often opposed congressional legislation in the gun control arena on the ground that most federal regulations of firearms are not authorized under the Interstate Commerce Clause. That clause was intended to ensure the free flow of trade across state lines, not to sanction a federal police power. Regrettably, the battle to limit the interstate commerce power to actual interstate commerce appears to have been lost in the courts, which have expanded the scope of the Commerce Clause to cover regulation of nearly anything and everything. Yet Congress can still act to repeal or amend laws that offend the Second Amendment.

Indeed, even if a federal gun law were constitutionally authorized, that does not mean it would be constitutionally mandated. Accordingly, included in what we propose here are recommendations to repeal or amend statutes that are misguided on public policy grounds and that may also be infringements of the Second Amendment.

Repeal the Most Extreme Elements of the District of Columbia's Gun Control Ordinances

No jurisdiction in the United States worked as doggedly to disarm citizens as did the District of Columbia, our nation's capital and, in the 1990s, the "murder capital" of America. Until the *Heller* decision, no handgun could be registered in DC. Even those handguns grandfathered in before the District's 1976 ban could not be carried from room to room in the home without a license, which was never granted. Happily, the Supreme Court ruled that those provisions violate the personal right to keep and bear arms that is secured by the Second Amendment.

Today, DC still has some of the most regressive gun laws in the country. All firearms must be registered, and the registration process is onerous. The District also has a constitutionally dubious ban on magazines holding more than 10 rounds, which constitute about half the magazines in the United States. The District has one of the most sweeping bans on long guns in the United States, based on the false claim that many common and traditional rifles are "assault weapons." The common-use test articulated in *Heller* and *McDonald* casts doubt on the constitutionality of laws prohibiting these arms.

Under Article I, Section 8, of the Constitution, Congress can and should exercise its plenary power over all legislative matters in the nation's capital and compel the city to abide by the principles established by the Supreme Court. Home rule, arising out of authority delegated by Congress to the DC government, is not a license to violate the Constitution.

To begin with, Congress should enact legislation to alter how DC processes gun registrations. A streamlined registration process would be based on the congressionally created National Instant Criminal Background Check System, which is mandatory for all retail firearm sales in the United States. The system uses computerized databases to complete a background check within a few hours in most cases.

Congress should also repeal DC's magazine restriction and relax the constraints on starting and maintaining gun stores. Gun stores can operate only in C-2 zoned areas, and they cannot be within 300 feet of "(1) a residence or Special Purpose District; or (2) a church or other place of worship, public or private school, public library or playground," which leaves very few available spaces. Because federal law prohibits interstate handgun sales, and because the DC government has made it nearly impossible for any gun store to operate in the District, a DC resident who wishes to keep a handgun at home must purchase the handgun in another state, such as Virginia, and then pay for the store to ship the handgun to one of the two Federal Firearms Licensees (FFL) in the District. Neither of the District's two FFLs operates a retail gun store, and one is open only by appointment. They primarily act as go-betweens for those who want to transfer guns to the District, and they charge about $120 for the service. After passing a background check and receiving the handgun from the District FFL, a DC resident must then register the firearm with the District's Metropolitan Police Department and pay more fees for another background check.

Finally, although courts struck down the District's good-reason requirement for receiving a permit to carry a handgun—which required applicants to show a good reason, such as a personal threat, why they should carry a gun—Congress should streamline DC's carry permitting process, which can cost over $500. Congress should make the process simpler, less expensive, and more like the carry license rules in the states. Like the states, the District has a legitimate interest in requiring applicants to understand the laws about deadly force and about places where licensed carry is not allowed, but state experience shows that the District's process is far more cumbersome than needed.

Repeal the Federal Ban on Interstate Purchases of Handguns

Under federal law, a person who is not a licensed dealer—that is, a Federal Firearms Licensee—may acquire a handgun only within that person's own state. The acquirer may, however, purchase the handgun from an out-of-state

FFL, providing an arrangement is made for the handgun to be shipped to an FFL in the purchaser's state of residence. There, the purchaser can obtain the handgun after complying with all necessary background checks. That rule does not apply to rifles and shotguns. A buyer may acquire a rifle or shotgun, in person, at a licensee's premises in any state, provided the sale complies with laws applicable in both the state of sale and the state where the purchaser resides. So a person who resides in New Mexico can buy a shotgun from a licensed firearms dealer in South Dakota (who must, by federal law, get prior approval for the sale from the National Instant Criminal Background Check System). The New Mexican can then take the gun home to New Mexico, in compliance with New Mexico law.

No persuasive reason exists for why the framework applicable to rifles and shotguns should not be equally applicable to handguns. No relevant state laws would be violated, and all background checks would be completed. In short, Congress should repeal the federal restrictions on interstate handgun sales.

The unique situation in Washington, DC, compels timely action. Because of the District's 1976 ban and its present restrictive zoning, there are currently no stores within the city where a handgun can be obtained, and there are only two FFLs willing to take delivery from out-of-city parties, on a limited basis. Thus, it is difficult for someone who lives in DC to acquire a handgun either inside or outside the city. Residents of the city who do not own a handgun are seriously impaired from exercising the right, guaranteed by the Constitution and affirmed by the Supreme Court, to acquire handguns for lawful purposes, including self-defense.

Remove Suppressors and Short-Barreled Rifles and Shotguns from the National Firearms Act

Suppressors, which are sometimes inaccurately called silencers, are currently covered by the National Firearms Act of 1934 (NFA), which is the same law that regulates possession of fully automatic machine guns. Under the NFA, to legally purchase a suppressor, an applicant must undergo a lengthy registration process and background check with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and pay a $200 tax. Next, purchasers must also undergo the same background check as those purchasing an ordinary gun. In short, the legal requirements for acquiring a suppressor are the same as those for acquiring an ordinary gun *and* for acquiring a machine gun.

America's heightened restrictions on suppressors are bizarre and anomalous, even when compared internationally. Although American gun laws are less onerous than those of many other nations, suppressors are far less restricted in nations such as Finland, France, Germany, Italy, and the United Kingdom (the last of which is known for having some of the strictest gun laws in the world. Although getting a gun in those countries is more difficult than in America, those who can legally have a firearm can always have a suppressor—often one that comes preattached to the gun.

Except for the lowest-powered firearms, such as .22 caliber, suppressors do not really make firearms quiet. A typical silencer reduces the volume of a gunshot by about 30 decibels. A shot from a typical 9-millimeter handgun is about 160 decibels, which is approximately the same as a jet taking off. With a silencer, at 130 decibels, the gun would be as loud as a jackhammer. Reducing gunshot noise by 30 decibels mitigates the damage loud gunshots can cause—especially repeated shots in a day of target practice at a range. Physical ear protection, such as earplugs or earmuffs, is helpful, but it is even better when augmented by a suppressor.

Suppressors have numerous benefits in addition to hearing protection. They reduce the loud noises heard by people who live near a range. They help prevent beginning shooters from developing a habit of flinching when they press the trigger. They also substantially reduce perceived recoil so that the user can fire the gun more accurately and safely.

As for criminals, lowering a gunshot to the sound level of a jackhammer will not produce a wave of silent shootings—as the experience of the aforementioned nations confirms.

The inclusion of suppressors in the NFA was a result of ignorance, misinformation, and, yes, even racism. In a 1913 book called *Our Vanishing Wildlife: Its Extermination and Preservation*, William T. Hornaday, director of the Bronx Zoo, warned that overhunting would soon wipe out many types of American wildlife. Modern hunters, he alleged, were using advanced guns that were more accurate and had a longer range. They were also using suppressors, supposedly so their shots wouldn't scare away the game.

But the real problem for Hornaday was that the lower classes, particularly immigrants from southern Europe, were lawfully hunting. "The slaughter of song, insectivorous and all other birds by Italians and other aliens from southern Europe has become a scourge to the bird life of this country," he wrote. One solution was to ban suppressors, and some states did so. In 1934, silencers were included in the NFA with little discussion. It's time for Congress to end this irrational regulation. Removing suppressors from the National Firearms Act would still leave them covered by the Gun Control Act of 1968, so all suppressor buyers would still go through the same background check required for the purchase of handguns or long guns.

Short-barreled rifles (SBRs) and short-barreled shotguns—with barrels of less than 16 inches and 18 inches, respectively—are also covered by the NFA, with the same restrictions as suppressors and machine guns. Their inclusion is also to some extent a historical accident. Because the original draft of the NFA would have covered handguns, including short-barreled rifles and short-barreled shotguns in the bill was thought necessary to prevent circumvention of the handgun regulations with small rifles. Handguns were removed from the final version of the bill to get the National Rifle Association's support, leaving in place the strange regulation of short-barreled rifles and short-barreled shotguns. Oddly, it is fully legal to own a pistol with a 16-inch barrel.

The presence of SBRs in the NFA creates much confusion with defining a "rifle," and the ATF has changed the rules over the years. Braces that attach to the back of a pistol allow easier firing with one hand, and they are especially useful to handicapped shooters. In 2015, the ATF issued a rule that said firing a pistol equipped with a brace from the shoulder—somewhat like firing a rifle—would instantaneously convert the weapon to an SBR and turn the shooter into a felon. In 2017, the bureau tried to clarify this rule by saying that a shoulder-fired braced pistol would not be considered an SBR if the shoulder firing was only "incidental, sporadic, or situational." Now the Biden administration is in the process of finalizing a rule that will retroactively turn millions of brace owners into felons, because a brace supposedly turns a handgun into a short-barreled rifle.

Because violating the NFA can carry a 10-year prison sentence and up to a $250,000 fine, the ATF should not be able to create felonies so easily. The best fix to this concerning situation is to simply remove short-barreled rifles and short-barreled shotguns from the NFA.

Amend Federal Law to Allow Firearm Purchases by Users of Controlled Substances, Particularly in States That Have Legalized Medical or Recreational Marijuana

Federal law, under 18 U.S.C. § 922(g), currently lists a wide variety of people who are prohibited from possessing a firearm even for a moment. Some of the prohibitions are sensible (violent felons, fugitives from justice), but some are not. Of particular concern are prohibitions affecting people who are not violent. As the Supreme Court held in *Heller*, the right to keep and bear arms is fundamental, and Congress should be wary of taking away that right from entire classes of nonviolent people.

As of March 2022, adults can now legally purchase and consume marijuana in 18 states and the District of Columbia. Nevertheless, federal law still classifies marijuana as a Schedule I drug, thus making marijuana simultaneously legal under those states' laws and federally illegal. That puts marijuana users in those states in a difficult spot when it comes to purchasing a gun. The federal form they must fill out asks whether they are a user of marijuana. If they say yes, they will be unable to purchase a gun; if they lie and say no, they will be committing a felony punishable by up to five years in prison.

Medical marijuana users are also prohibited from purchasing a gun, as federal law still doesn't recognize the legitimate medical uses for the drug. Nineteen states that do not allow recreational marijuana do allow medicinal marijuana. Becoming an authorized medicinal user often includes registering with a state database or permitting system. That makes the act of lying on the federal form when purchasing a gun even more hazardous.

At the very least, Congress should remove from the list of prohibited persons marijuana users in those states that have legalized either medicinal or recreational use. More broadly, controlled substance users should not automatically have their Second Amendment rights taken from them. Drug users with no history of dangerous behavior still have a right to self-defense. State laws can appropriately address the issue, as they do with alcohol; for example, a person's demonstration of dangerous lack of self-control when under the influence (e.g., impaired driving convictions) can lead to revocation of a handgun carry permit.

Resist Onerous and Ineffective Proposals for Universal Registration of Firearm Sales and Loans

In recent years, calls for universal background checks on all firearm purchases have received a lot of attention. Congress should be aware that expanding background checks will be unlikely to affect the gun crime rate, and many bills that claim to be about universal background checks for gun sales are laden with poorly drafted rules that can turn nearly every gun owner into a felon.

Federal law currently requires all persons engaged in the business of selling firearms to have a Federal Firearms License. Among the many regulations on license holders is the requirement that they contact the FBI or a state equivalent agency for a background check on every person to whom they transfer a firearm. No background check is required when a sale or loan occurs between two private individuals. In other words, you can sell your hunting rifle to your neighbor or let him borrow it for a weekend without doing a background check on him.

There is some dispute about how many guns are transferred via this so-called private sale loophole. Many gun control advocates have inaccurately claimed that the number is 40 percent. That claim, which relies on data that are two decades old and predates the inauguration of our current background check system in 1998, received "three Pinocchios" from the fact checkers at the *Washington Post*. More accurate studies have found non-background-check gun acquisitions to be around 20 percent of gun sales—and many of those are gifts between family members.

Surveys of criminals have long indicated that their guns are rarely obtained through legal avenues. Instead, the black market is the overwhelming source for guns used in crimes. That makes sense: criminals are unlikely to submit to a background check, which they are likely to fail. Therefore, most criminals acquire guns in unlawful ways.

Nevertheless, it is also overreaching to say that background checks could never help keep guns away from any criminal. There will always be marginal criminals who are weakly motivated to acquire a gun. But the vast majority can either access the black market or find a surrogate to buy the gun for them. This method is called a "straw purchase" and has been a federal felony since 1986. The ATF and the trade association for the firearms industry, the National Shooting Sports Foundation, have a joint program to educate firearm retailers about detecting straw purchasers.

Before any talk of expanding the federal background check system, Congress should first fix the system so it stops denying lawful purchasers. For example, would-be buyers are sometimes denied a purchase because of records that show an arrest but not the disposition of a case, or because the buyer is confused with a criminal who has the same name. Presently, in such cases, the purchaser's only recourse is to ask the state agency to correct the record, and such requests are often ignored.

The federal background check law should be changed so that when the background check agency (the FBI or a state equivalent agency) denies a purchase on the basis of inaccurate or incomplete records in another jurisdiction, the background check agency should contact the other jurisdiction directly. A jurisdiction with defective records is more likely to respond to a request from the FBI than from an ordinary citizen.

The unstated but obvious purpose of so-called universal background checks is universal gun registration. Indeed, as Greg Ridgeway, former acting director of the National Institute of Justice during the Obama administration, acknowledged in a 2013 memorandum, requiring background checks for gun sales by non-FFLs would be unenforceable without universal gun registration. Such a registry would be contrary to the Firearm Owners' Protection Act and other provisions of federal law.

Further, universal background check bills at the federal and state level are Trojan horses that often criminalize gun owners' ordinary activities that have nothing to do with firearm sales. At minimum, any proposed federal bill should be heavily scrutinized to ensure that it doesn't produce the absurd consequences of state universal background check laws.

In Washington State—which has enacted one version—the normal, everyday practices of gun owners, safety instructors, hunters, and even museums have been turned into felonies. The state's background check law exempts some types of temporary transfers, but many harmless firearm transfers—such as lending a rifle to a friend to go to a shooting range—are prohibited without first processing the transfer through an FFL. That is because the state of Washington defines a transfer as "the intended delivery of a firearm to another person without consideration of payment or promise of payment including, but not limited to, gifts and loans." The state law applies to permanent, temporary, and even momentary transfers.

Running a background check is no simple matter. The recipient of a firearm in an FFL transfer must fill out federal paperwork consisting of dozens of questions, including offensive and irrelevant ones, such as the transferee's racial or ethnic background. A knowingly false answer is a federal crime punishable by up to five years in prison. Filling out the form in a manner not approved by the ATF (such as writing one's state of residence as "Wash." rather than "WA") will get the store in trouble. So store clerks understandably spend a lot of time making sure that customers fill out the paperwork correctly. Of course, the store charges a fee for the service, since time spent processing the loan is time not spent selling the store's own firearms. On top of the store's fee, the state government may collect its own fee for conducting the background check.

Imposing this process on firearm loans is pointless and bureaucratic. It also makes firearm loans impossible except during hours that a nearby gun store is open and is willing to process the transaction. Many stores refuse to do so, since they want their employees to spend time selling their own inventory, rather than risking liability for paperwork errors involving other people's guns.

The absurdly overbroad controls on loans criminalize most gun owners for innocent activity. They are particularly problematic for gun safety instructors, who pass guns back and forth between themselves and students while teaching safety courses. They are also problematic for people in rural areas who may live hours away from any gun store, and even for museums that may wish to display guns but cannot obtain, move, or clean them without submitting to a background check.

In 2013, Colorado amended its universal background check bill to exempt all temporary transfers of less than 72 hours. That made the law more sensible but did not solve all the problems. Someone who wishes to store his gun at his cousin's house while he goes on vacation for a month would need a background check on his cousin and then another on himself when the gun is returned. Every single firearm would require its own multipage paperwork, twice.

Some think that people would never be prosecuted for these minor infractions, even if they are technically illegal. But relying on the restraint of federal prosecutors is never a good idea. Gun owners are constantly prosecuted for similar, or even smaller, transgressions. For example, in 2002, John Mooney seized a firearm from his ex-wife when she, while intoxicated, pointed it at his head. He then walked seven blocks to the bar where he worked to hand the weapon over to the police. Because Mooney was a convicted felon, however, he was charged with the unlawful possession of a firearm.

Even if a universal background check law were a good idea, *it should apply only to sales and permanent dispositions*; loans and returns should be exempted. And every effort should be made to reduce the burden on gun buyers—including fees, paperwork, and trips to gun stores.

Furthermore, law enforcement officers and those who already hold concealed carry permits issued by their state should not have to undergo additional background checks when they purchase a gun from a private seller. Concealed carry permit holders typically have submitted to biometric identity verification, background checks, and safety training. Making them go to a gun store for a lower-quality background check when they borrow a gun, or buy one from a friend, is duplicative and unnecessary.

Background checks can be accomplished in many ways without requiring a seller and a buyer to find a gun store to carry one out. Private citizens should be able to accomplish any required background check by contacting the appropriate state agency by phone or the internet. Any universal background check bill that really aims for background checks on gun sales—rather than the mass criminalization of innocent gun owners—will contain all the exceptions above. And finally, it should be noted that proposals for universal background checks distract Congress from the more meaningful debate about policy changes that could significantly lower gun violence, such as ending the war on drugs and improving rehabilitation and mental health treatment for prisoners.

Modernize and Improve ATF Operations and Revoke the Executive Branch's Authority to Use the Arms Export Control Act to Impose Gun Control

Abusive practices by the ATF led Congress to enact the Firearms Owners' Protection Act (FOPA) in 1986, which, among other things, prohibited the creation of a federal gun registry. Yet there are backdoor ways of creating a gun registry through the records the ATF requires FFLs to maintain. Over the years, appropriations riders have prevented the ATF from using gun dealer records to compile a computerized national registration database of gun owners. The ATF has claimed that a computerized database of every sale ever conducted by every retired FFL is not a national gun registry in violation of FOPA. (FFLs who retire must send all their records to the ATF.) Other appropriations riders protect citizen privacy by preventing the ATF from disclosing gun-tracing data (e.g., the name and address of a person whose gun is stolen) to the general public. The data can still be disclosed in connection with a bona fide law enforcement investigation. Those disclosure rules should be permanently codified as well.

Federal law has long required licenses for persons who commercially manufacture firearms and for persons who engage in the business of gunsmithing. The licenses are issued by the ATF. In July 2016, the Obama administration issued guidance requiring many gunsmiths to obtain a separate license, costing $2,500, from the Department of State's Directorate of Defense Trade Controls. Supposedly, these licenses are necessary for compliance with the Arms Export Control Act, but the administration required them from people who never export anything. The Trump administration rescinded that requirement in 2020, but the Biden administration could change it back. The ATF should not be allowed to rewrite our gun laws so easily, especially when violations can result in severe criminal penalties. Congress has the ability to clear this up, and at the minimum it should clarify that gunsmiths who don't export anything don't need an export license.

Restore Funding to Process Relief from Disability Applications to Own Firearms

The federal prohibitions on firearm possession are extremely broad and *ex post facto*. The Gun Control Act of 1968 banned gun possession by anyone convicted of a felony or dishonorably discharged from the military. Thus, a person who pleaded guilty to a nonviolent tax offense in 1959 is barred for life from possessing a gun. The 1994 ban on gun possession by someone guilty of a domestic violence misdemeanor is also *ex post facto*—applying to people who might have pleaded guilty decades earlier, even if they had done nothing wrong but could not afford a lawyer and found it simpler to resolve the case for a $50 fine.

To provide a safety valve for the expansive bans, the Gun Control Act allows relief from disability. People who can prove they have a long record of law-abiding behavior and good conduct can petition the ATF for restoration of their Second Amendment rights. Granting a petition is entirely at the discretion of the ATF. Yet since 1992, annual appropriations riders have forbidden the ATF from processing petitions for restoration of rights. Those riders should end, and the ATF should be directed to set up a process in which such petitions are funded by a fee charged to the petitioner.

Federal law also bans gun possession by people subject to temporary restraining orders. The law should be clarified so that it applies only to cases where a judge has made a particularized finding that a person has threatened, or constitutes a threat to, another person. Routine orders directing one or both parties in a divorce to stay away from and not harm each other should not be the basis for deprivation of a constitutional right. The change can be effectuated by changing the word "or" to "and" in 18 U.S. Code § 922(d)(8)(B)(i) and in (g)(8)(C)(i).

Ensure That Secret Government Lists—Such as the No-Fly List—Are Not Used to Unconstitutionally Deprive Citizens of Their Second Amendment Rights

Many have called for the federal government to prohibit those on the so-called no-fly list from purchasing firearms. This practice not only should be resisted, but should be seen as setting a dangerous precedent for the government's stripping citizens of constitutionally enumerated rights by secretly placing them on government-maintained lists.

The no-fly list has been called a Kafkaesque bureaucracy by the American Civil Liberties Union. The list is secretive, unaccountable, and discriminatory. Someone can be listed based on suspicion or hunch; according to the government's guidelines for adding people to the list, "irrefutable evidence or concrete facts are not necessary." In 2014, a federal district court ruled that it violates due process to doom individuals to indefinite placement on the list without telling them why they're on it or giving them an opportunity to challenge their inclusion.

According to the Associated Press, more than 1.5 million names—most of them not U.S. citizens or residents—have been added to the list, and subsequent reporting found that half of those were marked as having "no recognized terrorist group association."

Although the proposals in Congress are labeled as "no-fly, no-buy," they go much further than simply stopping future gun purchases. Anyone secretly put on the no-fly list would become a prohibited person, meaning that the person's possession or temporary use of a firearm (e.g., borrowing a gun at a target range) would be a federal felony. Yet because the no-fly list is secret, such persons would never know that their firearms possession is illegal—until they are arrested.

On top of these concerns, a no-fly, no-buy law would have no effect on mass shootings or terrorist attacks. Even if would-be terrorists appeared on the list, terrorists and other mass shooters are highly motivated criminals who are not deterred by being told no at a gun store because their name appears on a list. Such laws are political theater at its finest—scoring solid points on rhetoric and doing nothing to solve the problem—while setting a dangerous precedent for eliminating civil liberties through government-maintained secret lists.

Conclusion

The Second Amendment secures "the right of the people" by guaranteeing the right of each person. Over the years, our elected representatives have adopted a dangerously court-centric view of the Constitution: a view that decisions about constitutionality are exclusively left to the judiciary. But members of Congress also swear an oath to uphold the Constitution. Congress can make good on that oath by legislating to restore our right to keep and bear arms.

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—Prepared by Trevor Burrus and David B. Kopel

18. STOPPING POLICE MILITARIZATION

Congress should

- stop transfers to local law enforcement agencies of any military equipment listed on either the Department of State Munitions Control List or the Department of Commerce Control List—military weaponry designated as "controlled property"—and repossess all currently distributed controlled property;
- failing that, ensure that any currently and subsequently distributed controlled property is subject to extensive reporting requirements and randomized audits;
- mandate that the use of controlled property against misdemeanors or "Part II index crimes" (as described in the Uniform Crime Reports)—that is, nonviolent, less serious crimes, including drug use, possession, and cultivation—requires a secondary report listing the articulable reasons for believing the specific situation posed a particular threat; and
- require that law enforcement agencies with a track record of using extreme force against Part II index crimes, including drug possession and use, be subject to further investigation, oversight, and controlled property repossession.

Starting in the early 1990s, the Department of Defense began to transfer to local law enforcement agencies (LEAs) property that was "excess to the needs of the Department," including armored vehicles and small arms, to be used by LEAs in counterdrug activities. In 1997, the "1033" program was created as part of the National Defense Authorization Act, which expanded the permitted uses to broadly include "law enforcement activities." The program has grown considerably. In 1990, the department transferred $1 million worth of gear. Between 2015 and 2017, $775 million worth of military tech, weaponry, and vehicles were transferred to LEAs.

The bulk of the gear is not dangerous—including office furniture, computers, and personal protective equipment. But the program also transfers high-powered military gear—so-called controlled property—that has few justified uses in domestic law enforcement. Congress should end the profligate transfer of such excessive military gear and repossess the gear that has already been transferred. However, if the program can't be ended, Congress should ensure that LEAs use controlled property rarely, responsibly, and with maximum transparency.

Controlled property includes such things as armored vehicles and troop carriers, high-caliber firearms, and grenade launchers. Such items can feasibly improve officer safety because officers who approach a crime scene in an armored carrier might be slightly safer than those using other modes of transportation. Yet easy access to militarized gear can also encourage officers to perform their jobs in more dangerous ways, to both themselves and the suspect. Breaking down a door with a battering ram in the early morning hours can cause occupants—who often don't know the assailants are police—to reach for a gun or other form of protection. This happened in 2020, in the notorious killing of Breonna Taylor by plainclothes police in Louisville, Kentucky, who broke down the door allegedly without sufficiently announcing themselves as police. Taylor's boyfriend armed himself and fired a shot, possibly hitting an officer in the leg. Officers returned fire and killed Breonna Taylor, an emergency room technician, in the crossfire. Had they served the warrant in daylight hours by knocking on the door, Taylor would be alive today. Such violent law enforcement practices are facilitated by the 1033 program.

During a period of significant decline in violent crime, the number of violent SWAT (special weapons and tactics) raids has skyrocketed. In 1980, when the violent crime rate was approximately 50 percent higher than it is now, there were on average 3 SWAT raids per day nationwide; now there are about 120. Shockingly, the vast majority of those SWAT raids are undertaken merely to execute search warrants, 60 percent of the time for drugs. According to a 2014 study by the American Civil Liberties Union, only 7 percent of SWAT deployments were for hostage situations or barricaded shooters, the original purpose for creating SWAT teams. In short, each day, local police are violently raiding homes approximately 120 times, mostly for nonviolent offenses. In the process, they destroy property, often kill pets, sometimes injure or kill innocent people, and generally create an unhealthy atmosphere of fear and distrust.

These raids occur in large part because federal transfers have given LEAs the necessary equipment and because they have little to no accountability for misusing that equipment. Ending police abuse of controlled property will require seemingly drastic steps to ensure that LEAs do not persist in believing that "if we have it, we might as well use it." A federal fix to this problem must focus on both stopping the transfer of controlled property and repossessing the property already distributed.

According to a *USA Today* analysis, currently over 1,100 mine-resistant ambush-protected (MRAP) vehicles are in the hands of LEAs, almost double the number distributed in 2014—the year of the unrest in Ferguson, Missouri—as well as hundreds of grenade launchers and tens of thousands of high-powered assault rifles. Overall, approximately 500,000 pieces of controlled property are in the hands of local law enforcement. No serious attempt at reforming police militarization can commence until that gear is removed from LEAs' possession and its distribution is reassessed. Surely Watertown, Connecticut (population 22,514), does not need an MRAP vehicle, for example, nor does Bloomington, Georgia (population 2,713), need four grenade launchers. Since 2014, 31 MRAP and other armored military vehicles have been distributed to law enforcement agencies serving counties with fewer than 10,000 people.

If Congress decides to continue distributing controlled property and to leave distributed property in the possession of LEAs, however, it has a duty to ensure that the equipment is used responsibly and justifiably. After all, a rarely used armored troop carrier gathering dust in a police department parking lot should be viewed as a good thing—it speaks to a safe and well-policed community. Rather than "if we have it, we might as well use it," LEAs should be encouraged to adopt a "we have it and hope we never use it" philosophy.

By requiring extensive reporting on the use of distributed controlled property, Congress can help ensure that SWAT teams are used rarely and only in exceptional circumstances. Reporting requirements should include when the equipment was used, which suspected crimes or crowd-control situations it was used against, whether shots were fired, whether suspects allegedly brandished a weapon, whether any person or animal was killed or injured in the process, whether forced entry was used, whether a warrant was served under either no-knock or knock-and-announce circumstances, whether any children or elderly individuals were on the premises, whether the possible presence of children or the elderly was investigated, and a copy of the warrant (if used) explaining the probable cause for the action. Moreover, audits of LEA compliance should be periodically and randomly carried out. Consistently noncompliant LEAs should be immediately stripped of their property.

Finally, using SWAT teams to address nonviolent crimes, such as drug use, possession, and distribution, should be strongly discouraged. Nonviolent crimes—generally described as "Part II index crimes" in the Federal Bureau of Investigation's Uniform Crime Reports—almost never deserve a violent response. Exceptional circumstances—such as a suspected drug producer with an arsenal and a history of violent crime—might justify a militarized response, but such a justification should never be presumed. LEAs should be required to report specific and particularized facts that necessitate the use of controlled property to address a nonviolent crime. Consistent violation of these requirements should result in investigation, discipline, and property repossession.

In May 2015, the Obama administration's Law Enforcement Equipment Working Group issued recommendations on the 1033 program that later became an executive order. Many of those new policies were generally similar to those in this chapter: establishing a list of prohibited property that cannot be acquired by LEAs (e.g., tracked, armored, and manned vehicles; bayonets; grenade launchers; and large-caliber weapons and ammunition); establishing a list of controlled property that LEAs can acquire if they provide additional information, certifications, and assurances (e.g., wheeled armored or tactical vehicles, specialized firearms and ammunition, explosives and pyrotechnics, and riot equipment); and increasing federal oversight and compliance. President Trump rescinded that order in August 2017.

Yet even during its short life, President Obama's executive order was ineffective in curbing LEAs' acquisition of military gear. The military gear that was restricted composed less than a half of a percent of all controlled equipment. The restrictions were also highly specific. The restriction on tracked, armored, and manned vehicles, for example, applied only to vehicles that were all three; thus, an armored, manned, but untracked vehicle wasn't restricted. Of the approximately 1,300 military vehicles distributed to LEAs at the time of the executive order, only 126 were recalled. During that same period, another 400 vehicles were newly distributed to local police.

President Obama's executive order came at a time when—shortly after the unrest in Ferguson in response to a police officer shooting Michael Brown—citizens became aware of our overmilitarized police. Nevertheless, a tiny adjustment was apparently the best that he could do. With enough fortitude, the Biden administration or another future president could unequivocally stop the transfer of all controlled property tomorrow, but the next administration could rescind the policy as easily as it was passed. That's why Congress should take up the task of ending or significantly reforming the 1033 program. America's police forces have become too militarized, and it will take strong and unapologetic action from Congress to fully fix the problem.

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—Prepared by Trevor Burrus

19. ACCOUNTABILITY FOR GOVERNMENT AGENTS

Congress should

- ensure that our federal civil rights laws fulfill their core purpose of providing a remedy to individuals whose constitutional rights have been violated by government officials;
- amend 42 U.S.C. § 1983 to eliminate the defense of qualified immunity for all state and local officials;
- amend 42 U.S.C. § 1983 to eliminate absolute prosecutorial immunity;
- create joint-and-several liability for public employers whose employees violate people's constitutional rights; and
- create an explicit statutory cause of action against federal officials who violate people's constitutional rights.

In the landmark Supreme Court case of *Marbury v. Madison*, Chief Justice John Marshall stated: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Stated differently, constitutional rights mean little if state actors can violate those rights with impunity. Such rights would become, in James Madison's words, "parchment barriers"—symbolic commitments to individual liberty that do nothing in practice to deter or prevent unlawful misconduct by government agents. Accountability for public officials is therefore an absolute necessity for the rule of law in general and for our constitutional order in particular.

Congress created a robust means for ensuring the accountability of state and local officials back in 1871, when it passed what would become our primary civil rights statute. That statute is presently codified at 42 U.S.C. § 1983 and thus is usually called "Section 1983" after its place in the *United States Code*. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux

Klan Act, which itself was part of a series of "Enforcement Acts" designed to help secure the promise of liberty and equality enshrined in the then recently enacted Fourteenth Amendment.

As currently codified, the statute states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In other words, the statute states simply and clearly that any state actor who violates someone's constitutional rights "shall be liable to the party injured." The purpose behind creating such a cause of action is quite simple: individuals whose rights are violated deserve a remedy, and at a structural level, the potential for such a remedy ensures accountability among public officials.

Despite its sweeping language, however, Section 1983 today regularly fails to achieve the deterrent and remedial purposes for which it was designed. This failure is largely the result of egregious Supreme Court doctrines that have effectively rewritten the statute by protecting state officials from liability even when they violate constitutional rights—namely, qualified immunity and absolute prosecutorial immunity. Congress should therefore amend Section 1983 to clarify that the statute means what it says—that a person acting under color of state law who causes the violation of someone's constitutional rights "shall be liable to the party injured."

But Congress can also ensure official accountability by expanding the scope of Section 1983 in two key respects. First, Congress should create joint-and-several liability for public employers whose employees commit constitutional violations. This action will ensure that victims of official misconduct are always fully compensated for their injuries, and it will also give public employers the proper financial incentives to devise hiring, training, and retention policies that minimize the risk of such injuries occurring. Second, Congress should create a statutory cause of action against *federal* officials who violate people's constitutional rights so that victims of such misconduct do not have to rely on the Court-created *Bivens* remedy.

Eliminate Qualified Immunity

As noted above, Section 1983 provides in clear, unambiguous language that any person acting under color of state law who violates someone's federally protected rights "shall be liable to the party injured." It does not provide for any defenses, qualified or otherwise. This approach comports with Founding-era and 19th-century common law, which generally permitted private torts against government officials whenever they acted unlawfully.

But the Supreme Court effectively rewrote this statute by inventing the doctrine of "qualified immunity." This judicial doctrine shields state and local officials from liability, even when they act unlawfully, so long as their actions did not violate "clearly established law." In practice, this is a huge hurdle for civil rights plaintiffs, because the Court has repeatedly insisted that "clearly established law must be 'particularized' to the facts of the case." In other words, to overcome qualified immunity, civil rights plaintiffs generally must show not just a clear legal *rule*, but a prior case in the relevant jurisdiction with functionally identical *facts*.

Although the Supreme Court has always purported to say that an exact case on point is not strictly necessary, it has also stated that "existing precedent must have placed the statutory or constitutional question beyond debate." And in practice, lower courts routinely hold that even seemingly minor factual distinctions between a case and prior precedent will suffice to hold that the law is not "clearly established." To give just a couple of concrete examples:

- In *Baxter v. Bracey*, the Sixth Circuit granted qualified immunity to two police officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. A prior case had already held that it was unlawful to use a police dog without warning against an unarmed suspect lying on the ground with his hands at his sides. But despite the apparent factual similarity, the *Baxter* court found this prior case insufficient to overcome qualified immunity because "Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put [the defendant] on notice that a canine apprehension was unlawful in these circumstances." In other words, prior case law holding unlawful the use of police dogs against nonthreatening suspects who surrendered by *lying on the ground* did not "clearly establish" that it was unlawful to deploy police dogs against nonthreatening suspects who surrendered by *sitting on the ground with their hands up*.
- In *Latits v. Phillips*, the Sixth Circuit granted immunity to a police officer who rammed his vehicle into the car of a fleeing suspect, drove the suspect off the road, then jumped out of his vehicle, ran up to the suspect's window, and shot him three times in the chest, killing him. The court acknowledged that several prior cases had clearly established that "shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment,

absent some indication suggesting that the driver poses more than a fleeting threat." Even though that statement would seem to govern this case exactly, the majority held that these prior cases were "distinguishable" because they "involved officers confronting a car in a parking lot and shooting the nonviolent driver as he attempted to *initiate* flight," whereas here "Phillips shot Latits *after* Latits led three police officers on a car chase for several minutes." The lone dissenting judge in this case noted that "the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet."

Thus, given how the "clearly established law" test works in practice, whether victims of official misconduct will get redress for their injuries turns not on whether state actors broke the law, nor even on how serious their misconduct was, but simply on the happenstance of the fact patterns of prior judicial decisions.

Perhaps most disturbingly, the doctrine can have the perverse effect of making it *harder* to overcome qualified immunity when misconduct is *more* egregious—precisely because extreme, egregious misconduct is less likely to have arisen in prior cases. In the words of one federal judge, "To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."

There is no shortage of cases illustrating this point, but the following two are representative:

- In *Corbitt v. Vickers*, police officers pursued a criminal suspect into an unrelated family's backyard, at which time one adult and six minor children were outside. The officers demanded that they all get on the ground, everyone immediately complied, and the police took the suspect into custody. But then the family's pet dog walked into the scene, and without any provocation or threat, one of the deputy sheriffs started firing at the dog. He repeatedly missed, but he did strike a 10-year-old who was still lying on the ground nearby. The child suffered severe pain and mental trauma and had to have orthopedic surgery to repair his leg. The Eleventh Circuit granted qualified immunity on the grounds that no prior case law involved the "unique facts of this case." One judge did dissent, reasonably explaining that "no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children."
- In *Kelsay v. Ernst*, Melanie Kelsay was playing at a public pool with her friend, when some onlookers thought her friend might be assaulting her and called the police. The police arrested her friend, even though she

> repeatedly told them he had not assaulted her. While talking with a deputy, Matt Ernst, Kelsay saw that her daughter had gotten into an argument with a bystander and tried to go check on her. Ernst grabbed her arm and told her to "get back here," but Kelsay again said she needed to go check on her daughter, and began walking toward her. Ernst then ran up behind her, grabbed her, and slammed her to the ground in a "blind body slam" maneuver, knocking her unconscious and breaking her collarbone. The Eighth Circuit granted Ernst qualified immunity on the grounds that no prior cases specifically held that "a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer."

Qualified immunity has therefore substantially undermined both the remedial and deterrent purposes of Section 1983. Victims of official misconduct, even egregious misconduct, are routinely left with no remedy, simply because the fact patterns of their cases differed from the facts of prior cases. And public officials are not given the proper incentives to conform their conduct to constitutional limitations.

Fortunately, for all the harm that qualified immunity has caused, the fix is quite simple. Congress simply needs to amend Section 1983 to clarify that the statute means what it says and that the judicially invented defense of qualified immunity is inapplicable to claims brought under the statute. The following language would accomplish this goal:

> It shall not be a defense or immunity to any action brought under this section that (1) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant; or (2) the defendant believed his or her conduct to be lawful at the time when the conduct was committed, or that the defendant did not intend to cause a deprivation of the rights, privileges, or immunities secured by the Constitution and laws.

Subsection (1) is simply the elimination of qualified immunity in its current form—that is, the "clearly established law" standard that was first articulated in the 1982 decision in *Harlow v. Fitzgerald*. Subsection (2) clarifies that courts should not return to the pre-*Harlow* conception of qualified immunity, which also depended on the defendant's "subjective good faith"—that is, the defendant's actual beliefs and intentions with respect to the underlying constitutional violation.

Finally, Congress could include clarifying language in an amendment to Section 1983 that would head off one of the most persistent misunderstandings about qualified immunity—namely, the misconception that qualified immunity is somehow necessary to protect the discretion of police officers to make split-second decisions in the field.

The doctrine of qualified immunity only matters when a public official has, in fact, violated someone's federally protected rights. This means that if police officers have not committed any constitutional violation, then by definition they do not need qualified immunity to protect themselves from liability, because they have not broken the law in the first place. And the Supreme Court has made crystal clear that when police officers make good-faith mistakes of judgment—like arresting someone who turns out to be innocent, or using force that turns out to have been unnecessary—then they have not violated the Fourth Amendment at all, as long as they acted reasonably. In other words, deference to reasonable, on-the-spot decisions by police officers is already baked into our substantive Fourth Amendment jurisprudence, and qualified immunity is unnecessary to protect it.

Nevertheless, the fear that eliminating qualified immunity would deny officers the discretion to make difficult, on-the-spot decisions in the field—however misplaced—is, and is likely to remain, one of the primary obstacles to the dissolution of qualified immunity. Thus, to defuse any misunderstandings on what the effect of eliminating qualified immunity would be, the following language could be included in an amendment to Section 1983:

> Nothing in this section shall be construed to hold a law enforcement officer personally liable in an action brought under this section alleging excessive force in violation of the Fourth Amendment to the United States Constitution, unless the officer's use of force was objectively unreasonable. For the purposes of this subsection, "objectively unreasonable" means "unreasonable from the perspective of a reasonable officer on the scene at the time at which the use of force occurred.

To be clear, this language is essentially just restating black-letter Fourth Amendment doctrine, so its inclusion in an amendment to Section 1983 would not actually change the state of the law. But it would clarify, both to the lawmakers and to the public, that the elimination of qualified immunity would not generally expose police officers to liability for reasonable, good-faith mistakes.

Eliminate Absolute Prosecutorial Immunity

Qualified immunity applies across the board to any state or local official who might be sued under Section 1983 for violating someone's constitutional rights. But the Supreme Court has invented a separate doctrine—equally unsupported by the text or history of Section 1983—that also severely undermines official accountability: *absolute* immunity for prosecutors.

To briefly restate the relevant statutory framework here, Section 1983 creates liability for any person acting "under color of" state law—which would obviously include prosecutors—and it provides for no immunities on its face. Nevertheless, in the 1976 decision in *Imbler v. Pachtman*, the Supreme Court held for the first time that prosecutors are absolutely immune from Section 1983 suits pertaining to the "judicial phase of the criminal process." The main rationale underlying the Court's decision to permit such a defense was the principle that Section 1983 should be interpreted in light of background common-law principles, and that absolute prosecutorial immunity was "based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties."

As many scholars and jurists have since explained in detail, however, the *Imbler* Court almost certainly got its historical analysis wrong. As Justice Antonin Scalia explained in 1997, historically, absolute judicial immunity "extended only to individuals who were charged with resolving disputes between other parties or authoritatively adjudicating private rights." When Section 1983 was first passed, there was no clear concept of "prosecutorial immunity," in part because the modern office of a public prosecutor was basically nonexistent in 1871. But most prosecutorial *functions* would have been considered, in 19th-century parlance, "quasi-judicial"—"that is, official acts involving policy discretion but not consisting of adjudication." But if prosecutorial functions were quasi-judicial under 19th-century common law, then individuals performing such functions were *not* entitled to absolute immunity.

As a practical matter, though absolute prosecutorial immunity is more limited in scope than the defense of qualified immunity, its application is even more egregious. No matter how willfully or maliciously a prosecutor violates a criminal defendant's constitutional rights, and no matter how devastating the consequences for the victim, a prosecutor can simply *never* be held accountable in a civil rights suit for misconduct pertaining to the initiation or litigation of criminal charges.

One of the most common and damaging constitutional violations that prosecutors commit in this context is withholding exculpatory material from the defense. Under *Brady v. Maryland*, prosecutors are obligated to turn over material evidence that might exonerate the defendant—for example, statements or other evidence that someone besides the defendant committed the crime. It is difficult to assess exactly how often prosecutors fail to meet their *Brady* obligations, but there is ample reason to believe such violations are widespread.

Consider the example of Michael Morton, who was wrongfully convicted for the murder of his wife and spent nearly 25 years behind bars. Morton was exonerated in 2011 on the basis of DNA testing, but a subsequent investigation revealed that Ken Anderson, the prosecutor in his case, intentionally withheld evidence that could have exonerated him before he was ever convicted. Anderson ultimately pleaded guilty to criminal contempt of court and became the first prosecutor to *ever* spend time in jail for misconduct that led to a wrongful conviction—he was sentenced to 10 days, of which he served 5. Yet not even this conviction has any bearing on his absolute immunity, leaving Morton with no remedy against the official who cost him a quarter century of his life.

The simplest and most straightforward solution to this glaring lack of accountability would be for Congress to clarify that a defendant's acting in a prosecutorial capacity is not a defense or immunity under Section 1983. However, as an intermediate measure, Congress could also amend the statute to say that no such immunity applies when there has been a *judicial finding* of prosecutorial misconduct, as would be common in cases involving defendants who were later exonerated.

Create Joint-and-Several Liability for Public Employers

Qualified immunity and absolute prosecutorial immunity are doctrines that apply to public officials sued in their individual capacity. But another crucial question for government accountability is how our civil rights laws should apply to public *employers* when one or more of their employees violate someone's rights.

At common law, the traditional rule for employer liability was *respondeat superior* ("let the master answer"), meaning that employers are liable for their employees' acts committed in the course of their employment. But that is not the rule that applies today in Section 1983 cases. In *Monell v. Department of Social Services*, the Supreme Court held that municipalities *do* count as "persons" under Section 1983, but that they can only be sued directly when a "policy or custom" of the municipality directly caused the underlying constitutional violation. Thus, the mere fact that a public employee violated someone's rights in the course of their employment is not enough to hold their employer liable.

In *Monell*, the Court held that this doctrine does not apply to municipal employers under Section 1983—in other words, just because a municipal employee commits a constitutional violation does not mean that the municipality itself is liable. Instead, a plaintiff must also show that the violation was committed pursuant to an official "policy or custom" of the municipal body.

It is debatable whether the *Monell* Court was correct in interpreting Section 1983 in such a manner in the first place. After all, unlike qualified immunity and absolute prosecutorial immunity, *respondeat superior* is a rule that *was* well established in 19th-century common law, and it is reasonable to think that the Reconstruction Congress intended this rule to apply to Section 1983.

But regardless of whether *Monell* was correctly decided, Congress today can and should amend Section 1983 to create employer liability directly whenever a public employee violates someone's constitutional rights.

There are two primary reasons why employer liability is an important supplement to qualified immunity and absolute immunity reform. First, employer liability guarantees a complete remedy to victims of official misconduct, in light of the fact that public employers are the entities that actually have the funds to cover most judgments. Even today, individual Section 1983 defendants are nearly always fully *indemnified* by their employers. In the law enforcement context, for example, law professor Joanna Schwartz found that out of all dollars paid out in civil rights suits against individual police officers, 99.98 percent of those dollars were actually paid by the officers' employers. Second, employer liability gives public employers the proper financial incentives to structure their hiring, training, and retention policies in a manner that discourages employees from committing violations in the first place.

However, it is equally important that employer liability function as a *supplement* to individual liability, not an *alternative* to it. Making employers solely liable for the misconduct of their employees might serve the remedial purpose of making victims whole, but it would fail to provide the individualized deterrence that is also a crucial component of civil rights laws. Even if individual defendants are typically indemnified, there's a major difference between *some* skin in the game, and *no* skin in the game.

The best solution is therefore a *shared liability* regime (or joint-and-several liability, in technical terms) between public employers and employees. The following language, if adopted as an amendment to Section 1983, would accomplish this goal:

> If any person acting under color of law subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, the public employer of that person shall be jointly and severally liable to the party injured for the conduct of its employee in an action at law, suit in equity, or other proper proceeding for redress, regardless of whether a policy or custom of the public employer caused the violation.

The benefits of such a shared-liability regime are numerous. It guarantees that victims of misconduct will always get a complete remedy. It provides accountability for individual officers while still recognizing that employers will generally be the ones paying for the bulk of any judgments. And, perhaps most important, it both permits and incentivizes states and localities to experiment with different systems on how to apportion liability between employers and employees.

For example, in June 2020, Colorado enacted qualified immunity reform that allows individuals to sue police officers who violate their constitutional rights, without qualified immunity; presumptively guarantees full indemnification by the officer's employer; but if the department determines the officer "did not act upon a good faith and reasonable belief" that the conduct in question was lawful, makes the officer personally responsible for a small portion of the judgment (5 percent or $25,000, whichever is less). In other words, it gives officers skin in the game, but to a degree they could reasonably be expected to cover.

If Congress created shared liability between employers and employees, it would effectively leave the choice about how best to apportion responsibility to states and localities. Some would presumably adopt Colorado-style caps on the individual contribution, whether by statute or by contract. Some might employ a system in which police departments fund individual officer liability insurance. And if a particular jurisdiction truly wanted to avoid individual liability entirely, it could do that too, simply by guaranteeing that public employers are always responsible for the entire judgment. Shared liability at the federal level is therefore the approach to civil rights reform that will best allow us to see the virtues of federalism in action.

Create a Statutory Cause of Action against Federal Officials

Shared liability gives states flexibility in apportioning liability to state employees. But just as important is the method by which *federal* employees may be held accountable for constitutional violations. Although the Framers clearly intended federal officials to be liable for unconstitutional misconduct, the current avenue for this has proved ineffective.

For most of this nation's history, federal officials could be held personally liable for unconstitutional misconduct at common law. Plaintiffs bypassed sovereign immunity through the enumeration principle, which treated public officials who exceeded their constitutional authority as having no authority at all—and no immunity either.

This manner of holding government actors accountable was a natural continuation of English jurisprudence. Among the most famous cases on the Framers' minds when they penned the Constitution was *Carrington v. Entick*. In *Carrington*, Lord Halifax, the English secretary of state, issued a false warrant ordering four of the king's messengers to break into the home of British author John Entick to seize "seditious papers" supporting Halifax's political rivals. Because Halifax and his subordinates acted outside their legal authority, they were found liable for trespass at common law. The U.S. Supreme Court would go on to laud *Carrington* as the "true and ultimate expression of constitutional law."

But the common law proved unable to adapt to novel constitutional violations. For instance, though courts agreed that wiretapping without a warrant was a Fourth Amendment violation, it could not rightly be called trespass. The divergence of the common law and constitutional jurisprudence left many rights effectively unenforceable.

The Supreme Court remedied this situation in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which created an independent cause of action for constitutional violations by federal officials. With the passage of the Federal Employees Liability Reform and Tort Compensation Act of 1988 barring most common-law tort suits, *Bivens* actions replaced the common law as the primary vehicle for citizens to enforce their constitutional rights against federal employees.

Yet the accountability promised by *Bivens* has proved elusive. Government data analyzing roughly 12,000 *Bivens* claims from 1971 to 1985 revealed only 5 where plaintiffs ultimately recovered damages. The largest bar to recovery was the defense of qualified immunity.

Congress can restore the accountability envisioned by the Framers by supplanting *Bivens* with a statutory cause of action, parallel to Section 1983, that would allow citizens to enforce their constitutional rights against federal officials. This statute should include the same amended language recommended for Section 1983: establishing shared liability between federal employees and their employers, and barring the defense of qualified immunity.

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—Prepared by Clark Neily, Jay Schweikert, and James Craven

20. REFORMING SURVEILLANCE AUTHORITIES

Congress should

- reform Section 702 of the FISA Amendment Act to close its "backdoor search" and "about search" loopholes;
- update the Electronic Communications Privacy Act to provide meaningful protection for stored communications and location data;
- protect the integrity of strong encryption technologies against proposals to create government backdoors; and
- develop a statutory framework regulating government hacking—in particular, the use and disclosure of software vulnerabilities.

The United States, perhaps uniquely among nations, owes its existence in no small part to its people's outrage against government invasions of privacy. The Founders' abhorrence of the general warrants and writs of assistance wielded by the British Crown left its mark on our Constitution in the form of the Fourth Amendment's guarantee that our persons, homes, and papers shall remain secure against unreasonable government searches. In our more recent history, the systematic abuse of surveillance authorities uncovered by the Church Committee of the 1970s provided a sobering reminder of how readily the powers we grant government to protect our democracy can be perverted to threaten it.

As we face a daunting array of novel 21st-century threats, from violent global terror groups to sophisticated cybercriminals, Americans routinely hear that we can purchase our safety only by giving up essential liberty, that our Founders' resistance to government intrusions is a luxury we can no longer afford in a dangerous world, and that our commitment to liberty and limited government is a weakness and a source of vulnerability. In the coming years, legislators will confront that Faustian bargain in myriad forms—but a Congress guided by reason rather than fear will consistently reject it.

Close Section 702's "Backdoor Search" and "About Search" Loopholes

In 2008, Congress amended the Foreign Intelligence Surveillance Act of 1978 (FISA), empowering the director of national intelligence and the attorney general to jointly authorize programmatic interception, at domestic communications facilities, of communications pertaining to foreign intelligence targets. Under Section 702 of that statute, the Foreign Intelligence Surveillance Court (or FISA court) approves only broad targeting and minimization procedures governing such collection, whereas the selection of specific targets and accounts to be collected is left to the discretion of National Security Agency (NSA) analysts.

Although only non-U.S. persons located abroad may be formally targeted under these general warrants, the massive scale of collection nevertheless ensures that enormous numbers of American communications are swept up by the NSA. In 2015, more than 94,000 foreign "persons"—potentially including corporate entities—were "targets" of Section 702 collection. A 2014 review by the Privacy and Civil Liberties Oversight Board (PCLOB) noted that, by 2011, the NSA was collecting more than 250 million internet communications annually under this authority alone; the review also noted that the current number was "significantly higher." Though collection must be conducted for some legitimate foreign intelligence purpose, there is no statutory requirement that the particular accounts identified for interception belong to a terrorist or other foreign agent.

The PCLOB's review of Section 702 indicates that, unlike the bulk telephony metadata program ended by the USA Freedom Act of 2015, such surveillance has yielded intelligence of significant value. Less clear is whether an essential component of Section 702's utility is the collection of communications of identifiably U.S. persons—not targeted in themselves but incidental to the collection of targeted communications. The Framers of the Constitution did not prohibit general warrants on the premise that they would never yield valuable information about criminal conduct; clearly they would. The relevant question is whether the marginal benefit of general searches, relative to what could be obtained with more traditional particularized warrants, is so enormous as to justify the ancillary invasion of the privacy rights of many thousands of Americans.

Over the longer term, then, Congress should authorize a thorough inquiry into whether the value of Section 702 collection would be materially diminished by requiring additional judicial approval for the collection of communications to or from accounts known or reasonably believed to pertain to U.S. persons, even when such collection is incidental to the warrantless targeting of foreigners. The Fourth Amendment, after all, guarantees citizens a right to be secure against unreasonable *searches*, not unreasonable "targeting": the fact that general warrants do not explicitly target the persons they render subject to search has not traditionally been understood as a mitigating factor but rather as a key component of what makes them so onerous.

Ideally, then, collections under Section 702 would be limited—to the greatest extent feasible—to foreign–foreign communications. Thus, providers would have to segregate messages between foreign targets and users identifiably based in the United States before sending the foreign–foreign communications to the NSA. Such messages could be retained by providers in case subsequent scrutiny establishes probable cause for a warrant to obtain them. Providers themselves frequently retain quite accurate information about the geographical location of their users for their own business purposes. Thus, they should often be able to conduct such segregation without the need for additional government scrutiny of communications for the purpose of locating the participants in the conversation.

In the interim, Congress should, at minimum, close the two loopholes that raise the most significant constitutional and practical concerns about the overcollection and potential misuse of U.S. citizen communications: the "backdoor search" and "about search" loopholes. Though Section 702 authorizes only the targeting of foreign persons for intelligence purposes, the subsequent querying and use of the data collected (including, of course, the communications of American citizens) are less stringently restricted. Databases containing the fruits of the PRISM data-collection program—that is, Section 702 collection directly from and with the participation of major U.S. internet communications platforms—are made available to cleared analysts, at both the NSA and other intelligence agencies, and can be queried using U.S. person "identifiers." In 2015, intelligence agencies *other than the Federal Bureau of Investigation* retrieved raw communications content using such queries 4,672 times. The FBI is statutorily exempt from tracking or reporting the frequency with which it performs such queries but has acknowledged that it does so routinely. Thus, the true total number of "backdoor" queries is likely at least an order of magnitude higher.

Under current law, then, FBI agents—even those conducting preliminary investigations not predicated on any hard evidence of wrongdoing—may deliberately search for and obtain the private communications of U.S. persons in these vast data stores, even though a warrant based on probable cause would be required to obtain such communications directly. Perversely, the FBI is exempt from reporting to Congress or the public on the frequency of these backdoor searches precisely because they apparently occur so routinely that officials have indicated it would be infeasible even to attempt to quantify them. This point is particularly disturbing in light of press reports that law enforcement agencies engage in a practice known as "parallel construction" to conceal from both courts and defendants the intelligence origins of electronic communications evidence introduced in criminal trials.

Congress should therefore act to ensure that broad powers justified by the exigencies of foreign intelligence cannot be surreptitiously used to circumvent the safeguards that properly govern criminal investigations. The FBI, like other agencies with access to Section 702 databases, should be required to design its computer systems to facilitate the automatic logging and classification of queries to those databases. That way, Congress and other oversight bodies can be adequately informed about how the information collected is being used. Analysts should be informed when intelligence databases contain results responsive to a query on a U.S. person identifier. However, if a judicial warrant founded on probable cause would be required to *directly* target a person or account, then law enforcement should be held to the same standard to access communications in Section 702 databases.

The second major loophole Congress should address is the use of "about searches," an element of the "upstream collection" the NSA conducts by filtering traffic flowing over the internet backbone. Until relatively recently, the general public believed—and the government even falsely represented to the Supreme Court—that Section 702 authorized the acquisition only of communications either sent to or originating from an account reasonably believed to belong to a foreign target. In fact, as we now know, the NSA engages in mass filtering of the *contents* of international internet communications, which it also uses as a basis for acquisition. Thus, for example, the NSA may acquire an email from an American citizen to any person abroad if the email merely *mentions* the email address or other electronic identifier of an intelligence target, even though neither the sender nor the recipient is designated as a target, and neither the sending nor receiving account has been tagged for collection. Though the FISA Amendments Act forbids the intentional acquisition of wholly domestic communications, the FISA court estimated in 2011 that, under the "upstream" procedures then in place, the NSA would likely acquire some 56,000 wholly domestic emails annually—a result of the technical difficulty of segregating the domestic from the international emails that might be received or transmitted by the same user during a single online session. Although the procedures at issue in that case were subsequently modified by order of the FISA court, the broader practice of "about" searching persists.

These searches raise especially acute constitutional concerns. The legality of warrantless Section 702 collection is predicated on the idea—never explicitly affirmed by the Supreme Court—that such collection falls within a "foreign intelligence exception" to the Fourth Amendment's presumptive requirement that searches of the contents of Americans' communications be authorized by a particularized warrant founded on probable cause. Declassified FISA court opinions have articulated a two-pronged test defining the limits of this exception. Surveillance must be conducted "to obtain foreign intelligence for national security purposes" *and* must be "directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."

According to the intelligence community's traditional understanding of these terms, the "target" of surveillance is the person or entity *from or about whom* information is sought (typically but not necessarily a party to the intercepted communication), whereas surveillance is "directed against" the communications facility that either originates or receives an intercepted message. Because Section 702 does not require that its foreign targets be agents of foreign powers, it is not clear that the exception covers the interception of communications between a U.S. person and foreign persons whose accounts are targeted for either upstream or PRISM collection. It does seem clear, however, that the exception cannot plausibly be stretched to accommodate searches directed at *neither* the sending nor receiving account and, indeed, conducted without regard to whether the sender or receiver is even an intelligence target, let alone a suspected foreign agent.

In addition to the constitutional concerns, Section 702 has created an international backlash, with potentially serious consequences for global digital commerce. In 2015, the Court of Justice of the European Union (EU) cited Section 702 in a ruling invalidating the "Safe Harbor" arrangement governing commercial transfer of personal data about EU citizens to U.S. firms. Despite subsequent efforts to negotiate a new agreement addressing European concerns, the risk of an adverse ruling in future cases remains high as long as Section 702 is perceived as effectively granting the government discretionary access to the private data of foreign persons held by American firms. More transparent and restrictive targeting rules limiting the applicability of Section 702 to suspected foreign agents would substantially mitigate this risk.

Congress should therefore amend Section 702 to ensure that collection pursuant to this authority, at a minimum, falls within the bounds of the warrant exception articulated by the FISA court and to clarify that the acquisition of content entering or leaving the United States is limited to communications whose sender or intended recipient is a valid intelligence target. In cases where the sender or recipient of a message, whether acquired via upstream or PRISM collection, *is* a Section 702 target but has not been affirmatively determined to be an agent of a foreign power, the NSA should be required to develop procedures designed to minimize, to the greatest practicable extent, the collection, retention, or dissemination of communications to or from identifiable U.S. person accounts.

Update the Electronic Communications Privacy Act to Provide Meaningful Protection for Stored Communications and Location Data

Although intelligence surveillance has received the lion's share of public attention in recent years, our increasing reliance on digital communications technologies means that ordinary law enforcement agencies, too, depend increasingly on electronic data gathering in the course of criminal investigations. Yet in contrast to intelligence authorities, which have been amended many times since 2001, they do so largely under the aegis of the increasingly outdated Electronic Communications Privacy Act (ECPA) of 1986.

The structure of ECPA may have made sense at the time of passage, but the law is now dramatically out of step with the realities of 21st-century communications practices. It makes unclear distinctions between "remote computing" and "electronic communications" services that are difficult for both government lawyers and technology companies to apply coherently to the vast array of online services Americans use. Inconsistent levels of protections may be applied to different types of electronic data—and even to the same communication at different times. Perhaps most egregiously, ECPA authorizes law enforcement agencies to obtain the contents of private emails without satisfying the requirements for a probable cause search warrant, depending on factors such as the amount of time a message has been in storage or even (according to one Justice Department interpretation) whether it has been read by the recipient. As a growing number of courts have already held, these provisions violate the Fourth Amendment.

Congress should amend ECPA to establish a uniform requirement, consistent with the Fourth Amendment, of a probable cause search warrant to obtain the contents of both private electronic communications and remotely stored personal data not available to the general public. Though major communications providers, backed by several appellate courts, have already insisted that they will produce user content only pursuant to a warrant, that requirement should be codified in statute to ensure clarity and consistency for both police and providers. (This would not, of course, affect the ability of government agencies to continue serving subpoenas directly to the owners of stored data, just as they would for data stored locally on a user's hard drive.)

The warrant requirement should also apply to at least some forms of communications metadata, which both privacy advocates and many law enforcement officials acknowledge is increasingly as sensitive and revealing as communications' content. Detailed internet transactional logs, for example, often effectively reveal a user's detailed reading habits, or vitiate the First Amendment right to speak anonymously online, as surely as any wiretap designed to capture the contents of those data transactions. Yet ECPA adopts the mechanical assumption that all transactional data stored by a third party—even data never normally reviewed by any human observer—fall outside the protection of the Fourth Amendment and is subject to compulsory production under standards far less stringent than probable cause. Although some types of communications records, such as "basic subscriber information," should reasonably be available to law enforcement via subpoena or court order, judges should be afforded greater discretion to impose the higher Fourth Amendment standard of probable cause when investigators seek internet transactional data that are either functionally equivalent to communications content or otherwise implicate core privacy interests. The mere fact of third-party custodianship should not be the sole factor in determining whether government acquisition of such transactional data implicates citizens' reasonable expectations of privacy.

Geolocation data—whether obtained via prospective Global Positioning System (GPS) tracking of a subject or from such sources as cellular connection records—similarly enables increasingly precise monitoring of Americans' physical movements and patterns of activity, in both public and private spaces. In 2012, a unanimous Supreme Court held in *U.S. v. Jones* that the installation of a GPS tracking device on a vehicle—especially when used for protracted monitoring—constitutes a search subject to the requirements of the Fourth Amendment. Congress should recognize that the privacy interest invaded by location tracking does not depend on the details of the technical mechanism by which the tracking is accomplished and should establish a uniform warrant standard for electronic location surveillance.

Protect the Integrity of Strong Encryption Technology against Demands for Government Backdoors

As high-profile cyberattacks regularly demonstrate the vulnerability of Americans' most sensitive data to malicious actors—from domestic criminals to foreign governments—we increasingly (and often unwittingly) rely on the critical protection of strong data encryption. Indeed, the flourishing digital economy we all now take for granted is in significant measure a product of the government's decision in the late 1990s to ease export restrictions on strong encryption software.

Recently, however, some law enforcement officials have issued renewed calls—wisely rejected when they were first heard more than two decades ago—for legislation requiring communications services and technology manufacturers to design deliberately insecure products, with built-in backdoors enabling law enforcement to unlock encrypted data. Unbreakable encryption has long been available for traditional personal computers—refuting dire prophecies that such software would quickly render criminal investigations all but impossible. Now, the increasing deployment of default encryption on mobile computing devices, and in digital communications platforms such as instant messaging services, has resurrected the idea that companies must be prohibited from selling Americans "too much" privacy or security.

Such demands are not only offensive in principle but would be futile and destructive in practice. The principled problem should be all too clear: a backdoor mandate effectively treats millions of law-abiding Americans as presumptive criminals who may be forced to store their own private data, not in a format of their own choosing but in one dictated by the government. Such a proposal applied to more traditional forms of communication—a mandate that Americans tape their verbal conversations for the convenience of police or ensure that their personal diaries are legible to government investigators—would be obviously abhorrent. It is no less offensive when our thoughts and conversations are mediated by digital bits rather than air or paper.

The practical pitfalls of backdoor mandates are nearly as obvious to technologists and security professionals. First, experts broadly agree that it is extremely difficult, if not impossible, to build a "backdoor" that opens for law enforcement officers without simultaneously rendering the technology less secure and more vulnerable to other attackers, including repressive foreign governments. Though secure mechanisms for "exceptional access" by law enforcement have been described in theory, the general consensus of security experts is that they are extremely unlikely to be securely implementable at scale across many thousands of providers in a rapidly changing software ecosystem requiring frequent updates and patches to adapt to newly discovered bugs, vulnerabilities, and threats.

Second, unbreakable encryption tools are already widely available. Sophisticated cybercriminals—those for whom such digital evidence is most likely to be critical to an investigation—will not rely on products with backdoors to protect their private data; instead, they can choose from an array of widely available, secure products regardless of any mandates the United States chooses to impose. Indeed, several recent surveys of the current technological landscape have found that a substantial majority of widely used encrypted messaging tools are produced either by foreign firms or via a globally distributed "open source" model of development untethered to any physical location.

Third, and in consequence of the previous point, such mandates would hobble American companies in the global technology marketplace, even as individual and corporate consumers alike are increasingly demanding robust assurances of data security. This concern is particularly acute in the cloud computing sector. Firms conducting sensitive corporate communications or storing valuable intellectual property will naturally want assurances that their data will not be improperly accessed by the employees of any company entrusted with the data. The simplest way to provide that assurance is to leave the encryption keys for cloud-stored data in the hands of the end users, rendering the data unintelligible to either hackers or unscrupulous employees. A backdoor mandate would ensure that only non-U.S. companies could provide such assurances.

Fourth and finally, any effective mandate would impose design constraints on programmers and manufacturers far more drastic than most nontechnologists recognize, creating pressure to adopt more centralized (and so more easily monitored) communications protocols and to make device operating systems more opaque and resistant to modification by their own users and owners. Requiring developers to comply with government demands for unencrypted data would create an implicit bias in favor of centralized over peer-to-peer communications protocols (for which a secure backdoor is intrinsically more difficult to design) and in favor of closed and proprietary over open-source software development, regardless of which approach would be superior on the technical merits.

In short, Congress should recognize that any legislative attempt to deny Americans access to strong privacy technologies would be economically injurious, practically feckless, technologically uninformed, and morally offensive.

Develop a Statutory Framework Regulating Government Hacking

For both intelligence agencies and ordinary law enforcement, the ability to conduct effective investigations increasingly turns on the ability to access digital communications and other stored data—data that are often encrypted, beyond the easy physical research of investigators, or stored on computers whose geographic location is (at least initially) unknown to the government. As a result, these agencies have found it necessary to develop and deploy capabilities for surreptitious remote access to computer systems—or, more prosaically, government hacking capabilities. Yet to date, this process has not unfolded pursuant to any coherent legislative framework but via a patchwork of internal guidelines, interagency memorandums, rules committee hearings, and warrant applications to low-level judges with limited technical expertise. These forums are inappropriate for balancing the complex constitutional and policy questions raised by government hacking.

Perhaps the simplest step legislators can take toward providing the necessary framework for government hacking is to formalize and codify the Vulnerabilities Equities Process. This process is currently used by the intelligence community to determine when software vulnerabilities identified by intelligence agencies should be disclosed to developers and when they should be retained for intelligence-gathering purposes. As White House cybersecurity coordinator Michael Daniel explained in a 2014 blog post, this process is appropriately biased toward disclosing software vulnerabilities to developers so that they can be patched. "Building up a huge stockpile of undisclosed vulnerabilities while leaving the Internet vulnerable and the American people unprotected," Daniel explained, "would not be in our national security interest."

There are, however, causes for concern with the status quo. Established in 2010, the interagency vulnerability review process appears to have fallen into disuse until being "reinvigorated" by the Obama administration in 2014. Moreover, no statute or executive order requires participation in the process, meaning it could easily be weakened or even abandoned entirely under future administrations. The process is also unnecessarily opaque, with few mechanisms for holding the Equities Review Board—the body within the NSA tasked with making disclosure determinations—accountable, either to overseers or to the general public. This lack of accountability unnecessarily undermines confidence in the soundness of the process—and may make firms and security researchers wary of collaborating closely with the government.

Congress should formally establish an independent Equities Review Board comprising both members of the intelligence community and cleared representatives of the technology sector and require that vulnerabilities discovered by government agencies be promptly submitted to the vulnerabilities review process. Whereas particular disclosure determinations will properly remain classified, the general principles and guidelines used to arrive at those determinations should be public. In general, the presumption should be that any vulnerability in software used by the private sector or general public must be disclosed eventually—and in most cases immediately. In the rare cases when the balance of considerations favors delaying disclosure of a vulnerability so that it can be retained for intelligence or law enforcement use, that determination should be reviewed at regular intervals, with disclosure as the default in the absence of a continuing compelling interest in retaining it. Statistical information about the average delay between discovery and disclosure of a vulnerability should be made publicly available, and a sampling of specific determinations should be subject to review by the appropriate inspectors general.

Of more direct relevance to hacking by law enforcement, Congress should act to supplant a recent amendment to Federal Rule of Criminal Procedure 41 permitting broad extrajurisdictional warrants for digital searches. Under the revised Rule 41, law enforcement agencies may apply for warrants to remotely search computers outside the jurisdiction in which the warrant is issued when the location of the target computers "has been concealed through technological means" or when more than five target computers "have been damaged without authorization and are located in five or more districts." The latter provision is generally understood as authorizing the issuance of broad warrants to compromise and identify computer systems that have been infected by criminal "botnets."

These amendments raise serious concerns about both extraterritoriality and Fourth Amendment particularity. When search warrants are issued for computers that cannot be reliably located in the physical world, it is all but certain that some will prove to be outside the United States. In practice, then, the amendment authorizes the extraterritorial enforcement of U.S. search warrants, in likely violation of the law of the country in which the target computer is located. International agreements, not the determinations of magistrate judges, provide the appropriate process for regulating such potential cross-border searches.

In addition, the FBI has already obtained court approval in at least some cases for "watering hole" searches, in which large numbers of computers accessing government-operated sites and purporting to offer illicit content are remotely compromised, raising novel questions about the appropriate standard of particularity for authorizing such searches. In the case of government hacking to identify botnet victims, this lack of particularity is all but guaranteed—with the added difficulty that the targets are the purported victims, rather than perpetrators, of a crime. And in both cases, the enormous variety of computer systems and software configurations that would be targeted by any large-scale government exploitation make it difficult to ensure that a government-installed exploit would not damage the targeted systems or otherwise interfere with their normal operations.

At a minimum, Congress should restrict the use of hacking tools against either targets of unknown location or botnet victims to the purpose of identifying the computer systems in question, in cases where no less intrusive means of identification are available. This restriction would allow investigators to seek an appropriately particularized warrant in the former case and to notify the victims in the latter case. It would also minimize the danger of unanticipated side effects on the targeted machines and reduce the risk of hacking warrants being used to facilitate fishing expeditions for evidence of criminal conduct unrelated to the initial purpose of the warrant.

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—Prepared by Julian Sanchez

21. ONLINE SPEECH AND SOCIAL MEDIA

Policymakers should

- maintain the free speech protections of Section 230;
- place responsibility for internet misuse with individuals, not the tools they use;
- prevent anti-competitive uses of the Computer Fraud and Abuse Act; and
- make internet freedom a goal of diplomacy.

The Internet as a Speech Ecosystem

The internet is a varied, thriving, and ever-changing speech ecosystem, teeming with products that carry almost every conceivable form of speech. New websites and social media platforms are frequently launched to compete with current offerings, providing new features and distinct ways of arranging and presenting user speech. Each platform crafts its policies to attract the speech it deems valuable. Different platforms aim to please different audiences and advertisers. Twitch prioritizes live video, eBay highlights well-reviewed sellers, Twitter prohibits hate speech, and Patriots.win only welcomes supporters of Donald Trump. Diversity of opinion marks the system as a whole but not every platform within it.

All internet regulation should be considered and evaluated in light of its effect on the digital speech ecosystem as a whole, rather than its effect on particular companies. When legislation is introduced to correct the failings of specific platforms or business models, it often affects other services in unforeseen and unintended ways.

Unlike new products that individual consumers can adopt or ignore at their leisure, new legislation affects everyone. The costs of complying with new regulations often fall hardest on small or new platforms, which are also less likely have a voice in the legislative process. Policymakers should take care to avoid unintentionally advantaging incumbent firms by creating new barriers to market entry. The risk of inadvertently doing harm is particularly acute when modifying broad protections that many different sorts of websites rely on, such as Section 230.

Section 230

Section 230, part of the 1996 Telecommunications Act, restates the rights to freedom of speech and freedom of association for the internet. It holds that interactive computer services cannot be treated as the publishers of any information provided by their users. Section 230 also protects intermediaries from lawsuits about their decisions to moderate or refrain from hosting user speech. Shielding websites from liability for users' speech allows them to carry all lawful speech and publish submissions immediately, without automated filtering or time-consuming review. By empowering websites to remove off-topic, unwanted, or "otherwise objectionable" material without facing costly litigation, Section 230 ensures that online communities and service providers can choose whatever rules or standards they think most fitting for their particular corner of the internet.

The massive scale of social media raises the potential costs of litigating suits concerning content moderation. Following Section 230, courts dismiss lawsuits seeking to hold social media platforms liable as publishers. Absent the statute's protections, even small platforms would have to continually vindicate their First Amendment rights. Section 230's procedural shield is invaluable to small or new platforms, which cannot afford costly, repeated litigation.

Section 230 does not give platforms a blank check. It only protects them from liability for user-submitted content—so if platforms help create, or substantially modify, users' speech, they can be held responsible for it. Platforms also remain responsible for their own speech, such as content labels or warnings.

Section 230 includes exceptions for federal criminal law and copyrighted material. As a result, platforms of all stripes strictly prohibit illegal media, such as child pornography, because they face criminal liability for knowingly distributing it. The Digital Millennium Copyright Act creates a notice-and-takedown system to police the unauthorized republication of copyrighted material. At scale, platforms rarely question the notices they receive, and automated filters often mistakenly remove users' original content. This alternative system offers a view of how platforms might treat controversial speech in the absence of Section 230.

For the past 26 years, Section 230 has insulated the internet speech ecosystem from most forms of government interference. Rather than protecting particular platforms or offering separate rules for different sorts of services, it protects all internet intermediaries equally, regardless of their size, purpose, or policies. Agnostic as to medium, Section 230 shields ancient bulletin boards and the latest virtual reality apps. Importantly, it has allowed internet communication to progress freely—each iteration of services receives the same protections as the last. Under this uniform, predictable arrangement, specific platforms may set their own rules. They may choose to cater to mass audiences or provide safe spaces for niche subcultures and can govern their services accordingly. As a whole, today's internet is the "forum for a true diversity of political discourse" that Section 230's drafters envisaged. The statute's liberal, decentralized approach remains the best means of ensuring freedom of speech online. Proposals to eliminate or amend Section 230 would leave Americans with fewer opportunities to speak, now and in the future.

Individual Responsibility Online

That the internet has been a tremendous boon for free speech does not mean that it cannot be misused. Speech may of course be used to plan, coordinate, and commit crimes. While the internet may merely make some crimes more visible rather than more common, it also creates genuinely novel opportunities for abuse.

Law enforcement often struggles to address revenge pornography, swatting (maliciously prompting an emergency response by law enforcement), and criminal stalking or harassment online. Whether the result of a lack of resources, a lack of specialized training, or a lack of appreciation for the severity of digitally delivered harm, the enforcement gap between different varieties of cybercrimes is striking. Harassment that includes interstate terroristic threats or child pornography is taken seriously, elevated to federal law enforcement, and prosecuted. Without these elements, existing laws against stalking and harassment often go unenforced.

Instead of punishing intermediaries, such as social media platforms, for failing to prevent cybercrime, the law should seek to hold individual speakers responsible for their words. Policymakers should reject theories of liability that deem publishing tools "defective" merely because they can be misused. Rather than modify platforms to eliminate opportunities for abuse, which would harm lawful users, policymakers should encourage police to take cybercrime more seriously and to give law enforcement the training necessary to identify and prosecute cybercriminals.

Children and Parents

One group of users who are less responsible for their actions is children. Children are always a special case in policy, and internet policy is no different. However, as in other areas of life, policymakers who want to help children online can best do so by empowering parents, not replacing them.

Legislation that would require platforms to identify underage users or automatically pair children's accounts with those of their parents, such as the Kids Online Safety Act, expects too much of these services. Age gating is difficult to implement effectively without compromising users' privacy. Requiring a credit card to access adult content was ruled unconstitutional in *Reno v. ACLU*. Algorithms can't be trusted to reliably deduce age from user behavior and rely on intrusive monitoring to gather data. Children often borrow, buy, or steal adult credentials. Instead of counting on platforms to get these settings right, activating a children's mode or linking a parental account should happen on device. Relying on parents' or family members' physical access to children's devices minimizes opportunities for abuse.

More broadly, platforms should never be required to adopt responsibilities that they will be unable to fulfill. Parents or other family members will always be the best supervisors of children's activity online, and misplaced expectations of platform-provided safety are dangerous in their own right.

Drawing hard lines between children, teens, and adults will always be difficult. Young people mature at different rates and often use the internet to avoid being treated as children. Existing norms around children's internet use are idiosyncratic—conventional wisdom discourages children's social media use, but parents routinely allow their children to play social video games intended for adults. Here, the existing Children's Online Privacy Protection Act—which requires parental consent to collect data from users under age 13—largely goes unenforced. Proposals to protect teens by raising the COPPA age threshold from 13 to 15 would only further decrease compliance.

Platform-specific solutions risk staying one step behind the changing tastes of youth. As their parents joined Facebook, teens left the platform for Instagram and are lately moving to TikTok as policymakers investigate Instagram for potential violations of consumer protection law. Improving digital literacy among parents, children, and teens is a better path forward than trying to keep up with this moving target via the blunt instrument of regulation. Internet education efforts should emphasize that users are content creators and curators rather than mere passive consumers.

CFAA Abuse

Along with protecting children, another increasingly popular rationale for internet regulation is to encourage competition. However, before imposing new obligations on platforms to foster or enhance competition, policymakers should eliminate existing regulations that inhibit competition. The 1986 Computer Fraud and Abuse Act (CFAA) criminalizes accessing a computer without authorization or exceeding authorized access to a computer. The statute was intended to punish computer hacking, but its civil provisions are sometimes abused by dominant firms to squelch competition.

Both computer code and platform policies control access to computer systems. When new services try to utilize the features or data of existing platforms —for example, by letting users access their Facebook feed via another app— these new services violate Facebook's policies. However, instead of simply leaving it to Facebook to prevent these unwanted uses of its service, the CFAA empowers Facebook to sue its competitors for unauthorized or excessive access to Facebook's systems, as it did with Power Ventures, a social media aggregation startup.

The Supreme Court's 2020 *Van Buren v. United States* decision narrowed criminal applications of the CFAA but has not prevented its use as a cudgel by incumbent firms. The threat of an expensive CFAA lawsuit is often enough to cow hobbyists and scare off investors, chilling competition and limiting consumer choice. In March 2021, Activision shuttered a popular video game stats tracking website with the threat of CFAA lawsuits.

It is time for Congress to fix the problem by removing the civil causes of action for unauthorized and excessive access from the CFAA. The CFAA was intended to prevent hacking, not interoperable internet services. If unauthorized access damages a computer system, other CFAA provisions and many preexisting torts can still provide redress.

Foreign Regulation

Like the internet itself, efforts to regulate digital platforms reach across borders. When platforms serve many markets around the world, speech restrictions in one country can shape the rules of products and services created and enjoyed by Americans. Although Congress is sometimes accused of dithering while the European Union "leads" on technology regulation, the European approach illustrates the pitfalls of unthinking tinkering. The European Digital Markets Act, which comes into effect in 2023, mandates interoperability between messaging services at the expense of privacy and security. This is not a lead that America should follow. Indeed, in the coming years, one of the most important jobs for internet policymakers will be shielding American websites from foreign regulation.

Foreign governments increasingly demand that American platforms filter content and surveil users as a condition of market access. America cannot set the domestic policies of foreign nations, but it can make internet freedom a focus of its foreign policy. Policymakers should support efforts to treat censorship obligations—such as Turkey's laws against "anti-Turkish speech" and its requirement that platforms appoint a representative for handling government takedown requests—as nontariff barriers to trade and make liberal internet speech governance more central to American diplomacy. The inclusion of Section 230–like intermediary liability protections in the 2020 United States–Mexico–Canada Agreement was a victory for this approach. Policymakers should attempt to replicate this success in other trade deals. There are few formal levers that can be used to prevent erstwhile American allies such as Turkey from punishing American platforms that fail to toe its line. However, policymakers need not tolerate these actions and could give greater consideration in foreign-aid disbursement decisions.

Above all else, policymakers should avoid strangling America's golden goose with regulation. Foreign censorship demands often go unenforced, and even regulated American platforms carry culture and are shaped by American values. For the rest of the world, regulating American platforms is a second-best alternative to homegrown replacements. Foreign governments resent the dominance of American digital infrastructure, but most have been unable to cultivate domestic alternatives.

Conclusion

In debates about updating American internet regulation, proposals to amend or repeal Section 230 have sucked up most of the oxygen in the room. However, altering Section 230 would upset a delicate speech ecosystem, leaving Americans with fewer opportunities to speak. Instead, preserving Section 230 while reforming the CFAA, better equipping law enforcement to fight cybercrime, and opposing foreign censorship will improve what needs fixing without upsetting what works. These important reforms have not received the attention paid to Section 230, but they are the best steps policymakers can take to make the internet safer, more competitive, and more free.

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—Prepared by Will Duffield

DEFENSE AND FOREIGN POLICY

22. RESTORING REALISM AND RESTRAINT IN U.S. FOREIGN POLICY

Policymakers should

- embrace, not squander, the United States' unique geopolitical blessings;
- play hard to get with allies who have more at stake and should be carrying their share;
- realize that the biggest military challenges come from wealthy states with lots of military power; and
- weigh the tradeoffs between the corrosive, anti-republican effects of expansive national security policies against any measurable gains in security.

The United States is the most secure great power in modern history. In a saying attributed to Jean Jules Jusserand, France's ambassador to the United States during World War I, the United States is uniquely blessed with weak neighbors to the north and south and fish to the east and west. Geography insulates the United States from most of the dangers that militaries were designed to defend against.

The "tyranny of distance" about which U.S. Army and Marine commanders regularly complain is actually a blessing, since it works in both directions. These leaders worry that it takes a tremendous amount of effort to get the United States into trouble; but the tyranny of distance also means that trouble must travel a tremendous distance to get to the United States. U.S. policymakers, with their emphasis on so-called forward defense, have worked assiduously to squander this benefit.

Allies and Partners

As early as 1959, President Dwight D. Eisenhower was worrying aloud that U.S. allies in Europe were close to "making a sucker out of Uncle Sam" by not carrying their share of the burden for defending Europe. Things have gotten much worse with U.S. allies, the world over, since Ike's complaint. America's alliances have grown weaker as they have expanded. In every alliance, the United States is far more important to its allies than its allies are to the United States. And in almost every case, the United States is more important to its allies' defense than their own efforts are.

Unfair defense burdens are baked into U.S. alliances. No amount of whining or cajoling can change it, but that has not stopped U.S. policymakers from whining and cajoling. To take one example, Robert Gates, defense secretary to Presidents George W. Bush and Barack Obama, lamented in 2011 that non-U.S. NATO defense budgets "have been chronically starved for adequate funding for a long time, with the shortfalls compounding on themselves each year," warning of "the very real possibility of collective military irrelevance." Pushing the point further, Gates warned of the prospect of a "dwindling appetite and patience" among Americans to spend resources on behalf of European states "apparently willing and eager for American taxpayers to assume the growing security burden left by reductions in European defense budgets."

These sorts of complaints, while no doubt cathartic to the policymakers who release them, do nothing to distribute burdens more equitably. This is because at the same time they complain about allied exertions for their own defense, U.S. policymakers go to great lengths to reassure U.S. allies about the strength of the U.S. commitment. There is a zero-sum tradeoff between reassurance and burden sharing. To the extent the allies are sure of the U.S. commitment, they are likely to decline to carry a fairer share of the burden. If allies worry about the strength of the U.S. commitment, they are more likely to do more. Policymakers should square up to this tradeoff. And in cases where allies have the ability to do much more for their own defense, policymakers should stop reassuring so much and even cultivate uncertainty.

Large, Powerful States Are the U.S. Military's Proper Focus

Meanwhile, policymakers have focused their attention for the better part of two decades on one of the world's most backward and strategically unimportant regions: the greater Middle East. U.S. policymakers' fixation on small countries and their troubles has been a grave miscue, for several reasons.

First, the greatest dangers to the United States come from large countries with powerful militaries. If the U.S.-China relationship deteriorates to the extent that some predict, every American would feel the consequences. If China were to dominate East Asia, it would have important consequences for American citizens. By contrast, the problems of small, weak states pose at worst a limited threat to Americans' way of life. If you want to cause a lot of trouble in international politics, take the helm of a wealthy, powerful state.

Second, the military tools at the United States' disposal are almost completely ineffective for countering terrorists or fixing the myriad problems of weak states. Trying to remake the politics of the Middle East by force, for example, was enormously costly but did not solve the problem of Islamic extremism. The danger posed by Islamist terrorists was vastly overstated in the immediate aftermath of the 9/11 attacks, but that small danger actually grew in response to the U.S. policies designed to counter the problem. In the words of Kenneth Waltz, "To say that militarily strong states are feeble because they cannot easily bring order to minor states is like saying that a pneumatic hammer is weak because it is not suitable for drilling decayed teeth."

The central problem national security planners should be thinking about is the growth in Chinese military power. That said, China is no juggernaut. Although it possesses an economy much larger relative to the U.S. economy than the Soviet Union's was during the darkest years of the Cold War, it has sizable problems of its own. China has structural economic problems, including a population that is growing much older and lacks meaningful pension systems. At every border, nautical or land, it faces problems, adversaries, or both. China possesses no allies of any import. It has no marketable ideology. Its "wolf warrior" diplomats are often their own worst enemy. Its vaunted foreign development projects frequently involve graft, corruption, misallocation of resources, and alienation of local populations. China blunders at least as badly as the United States blunders.

At the same time, panegyrics about the pacifying effects of economic interdependence are misplaced. It is true that interdependence creates constituencies on both sides that oppose war, but trade is not a firebreak against conflict. Both democracies and autocracies have suffered awful economic costs in pursuit of political objectives they viewed as vital. Moreover, it is unlikely the United States could lead a coalition to punish Chinese misbehavior over Taiwan, for example, in the way it has done to punish Russian misbehavior. China's economic size prevents it from doing so.

As the United States rallies around the Chinese challenge, U.S. allies and partners in Asia are busily sitting on their hands. Japan, Taiwan, and other allies and partners have barely increased their defense exertions as a percentage of economic output. This suggests one or both of two possibilities: either these nations do not see Chinese power as being as dangerous as policymakers in Washington do, or else they are certain that the United States will defend them. Either possibility is bad, and their combination would be worse. No U.S. ally in Asia spends as much of its wealth on defense as the United States does. This reflects the enduring pathology of the U.S. alliance system in Asia.

Asian states threatened by China should be spending more on defense than the United States does. That they are not suggests a conviction that U.S. citizens will handle their defense for them. This is a bad deal for the United States, and it squanders the country's national advantages.

War and Militarism Are Bad for Liberty

Beyond these transactional considerations, policymakers should return to some basic facts about U.S. foreign policy. The expansive strategy both Republicans and Democrats have pursued since the Cold War's end has been corrosive both to small-R republican and small-D democratic values. The country's foreign policy exists to protect the well-being of the citizens who pay for it, not the other way around. That said, the United States is so secure that foreign policy rarely figures prominently in public concerns, even in presidential elections. Foreign policy in the United States is an elite sport.

U.S. foreign policy has barely been democratic in recent years. Too often, U.S. policymakers have viewed citizens with contempt and behaved as though they wished they could dissolve the people and elect another: one more willing to support their grand foreign policy visions. The Biden administration made hay during the 2020 presidential campaign about conducting a "foreign policy for the middle class," then forgot that promise (and the middle class) by embarking on a costly (to the middle class) proxy war against Russia in Ukraine. In foreign policy, tradeoffs are everywhere, and policymakers who try to elide them do a disservice to democratic values. They also seem likely, if they push hard enough, to eventually elicit a response from voters.

Small-R republican values have been similarly gored by the fever dreams of makers of U.S. foreign policy. The republican institutions most closely associated with James Madison are on life support. The one-two punch of the Cold War and then the post–Cold War manias have consolidated power in the executive branch, disgraced the idea of competent congressional oversight, debased core civil liberties, and expanded government spending, bureaucracies, and surveillance. Republican politics at home are impossible for a country that aspires to empire abroad.

Policymakers should jealously guard the geographic advantages the United States possesses; demand more of U.S. allies and make allies worry about the extent of U.S. commitments, not reassure them; focus on the main security challenges that the U.S. military can defend against; and acknowledge the injury that expansive foreign policies do to the democratic and republican values that made America great in the first place.

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—Prepared by Justin Logan

23. THE MILITARY BUDGET AND FORCE POSTURE

Policymakers should

- adopt a grand strategy of restraint to guide military spending reductions;
- move away from a grand strategy that demands military dominance in multiple theaters simultaneously and toward strategies of denial;
- make the U.S. Army leaner and shift resources to the U.S. Air Force and Navy;
- phase out legacy weapons systems that are expensive to maintain and unsuited to the modern battlefield, such as the Ticonderoga-class cruiser, the littoral combat ship, and the A-10 aircraft, among other capabilities;
- transition from a nuclear triad to a dyad by phasing out ground-based intercontinental ballistic missiles; and
- adopt a nuclear strategy that uses nuclear weapons to deter a shorter list of adversary actions.

On August 30, 2021, the United States ended its nearly 20-year war in Afghanistan. The end of America's longest war offered an opportunity to reflect on how the United States wields its military power, how much it spends on war, and why its preferred grand strategy calls for frequent military intervention. Unfortunately, this moment came and went without introspection or strategic change.

Instead, the Biden administration has held on to the outdated goal of sustaining U.S. military dominance in Europe, the Middle East, and the Indo-Pacific simultaneously, which demands astronomical levels of defense spending. The fiscal year 2022 enacted defense budget was $781.8 billion. In spring 2022, the Biden administration asked Congress for a FY 23 national defense budget of $813.4 billion, a 4 percent increase from the previous fiscal year. Both the House and Senate have voted to authorize more spending than the administration's FY 23 request, indicating an appetite for taking defense spending even higher.

If the United States continues down its current path, it will not take long for defense spending to cross the $1 trillion threshold, and advocates of an unrestrained, global U.S. military posture will undoubtedly regard even that sum as too little.

Strategic inertia is tempting because it allows policymakers to avoid harder policy questions. So long as the United States remains wedded to a grand strategy of primacy, defense budgets will continue to rise.

This chapter argues for a different approach, one of grand strategic restraint. Under this alternative grand strategy, the U.S. military would focus on countering a narrower set of threats via a more conservative approach to military strategy that abandons the idea of sustaining U.S. military dominance in all three regions. Restraint would force allies to take on a greater share of the burden for their own defense, would reduce the overall size of the U.S. military, would reduce the role and number of forward-deployed forces, and would adopt a rightsized nuclear strategy.

The Problems with Primacy

Primacy is the current U.S. grand strategy. It is based on the idea that the forward deployment and frequent use of military power have prevented great-power conflict. During the Cold War, the United States established military alliances in Europe and Asia to contain the Soviet Union. Large deployments of U.S. troops on allied territory became the norm. This globe-spanning military presence continued after the collapse of the Soviet Union with the expansion of U.S. alliances and a new rationale of maintaining the United States atop the international order.

U.S. military strategy under primacy emphasizes going on the offensive quickly and decisively. Because primacy takes an expansive view of threats to U.S. security, the military must be able to fight terrorist groups, great powers like Russia and China, and "rogue states" like Iran and North Korea in their own backyards. This in turn requires large numbers of forward-deployed U.S. forces in Europe, the Middle East, and the Indo-Pacific. In other words, under a grand strategy of primacy, the U.S. military must be able to go on the attack against a long list of adversaries across three large regions with the potential to fight multiple conflicts at the same time.

This approach has performed well against the regular military forces of small, weak U.S. adversaries. The United States was able to easily sweep away opposing militaries in Afghanistan, Iraq, and Libya, but the disastrous consequences of those interventions point toward the significant problems of primacy and its associated military strategy.

Primacy's overarching goal of maintaining the United States atop the international order via unrivaled military strength goes hand in hand with threat inflation. It is good to be the king of the international system, but this position looks precarious to the country at the top. Any challenge to U.S. military dominance—be it a rising China, Iran seeking a nuclear weapon, or terrorist groups wreaking havoc in the Middle East—is a threat to the United States, not because war is at America's doorstep but because the challenge risks shaking the international order. Perceived threats are everywhere, so the U.S. military must also be everywhere.

In the 2000s and 2010s, threat inflation and global military presence combined in the Global War on Terror, which saw frequent U.S. military interventions against terrorist groups and states that harbored them. These wars were costly. The Costs of War Project at Brown University estimates that the United States spent $8 trillion on the Global War on Terror, including Department of Defense Overseas Contingency Operations funding, Department of State war expenditures, care for veterans, Department of Homeland Security spending, and interest payments.

Another major problem with primacy is that it makes prioritization impossible. If there are many potential threats to U.S. dominance, then focusing on one specific threat and adjusting U.S. force posture accordingly creates unacceptable risks because the military will be less prepared to respond to other contingencies.

That inability to prioritize also makes it difficult for the military to shed outdated legacy systems that are costly to maintain. For example, the U.S. Navy wants to retire 22 *Ticonderoga*-class cruisers by FY 27, which are 35 years old on average. Although each ship can carry upward of 120 missiles, their aging components and systems have a higher likelihood of breaking down, which means more time and money spent on repairs. Furthermore, the radar systems on the cruisers are being outstripped by new systems, and it would be too costly and time-consuming to upgrade the ships. However, several members of Congress—including the ranking member of the House Armed Services Committee's Subcommittee on Seapower and Projection Forces—oppose retiring the ships because it would reduce the overall size of the fleet while China's navy is growing.

Restraint: An Alternative Approach

Policymakers should abandon primacy and instead adopt a grand strategy of restraint with an associated military strategy of denial that uses force less often and has a smaller forward-deployed footprint.

The military component of restraint has three pillars. First, the United States should abandon the goal of sustaining global military dominance against all potential threats and instead emphasize preventing other great powers from achieving dominance over Europe and Asia. Second, the United States should shift the burden for regional stability onto its allies and reduce its forward-deployed military presence significantly in all regions while removing forces entirely from the Middle East. Third, the United States should change its military force posture to reduce the size of the army and turn the air force and navy into surge forces that could deploy quickly should allied forces face decisive defeat by a regional great power and vital U.S. interests come under threat.

U.S. military strategy under restraint would emphasize denial—preventing quick and easy victory by an attacker. It is generally easier to prevent an opponent from establishing a dominant military position than it is to maintain overwhelming U.S. military advantages in perpetuity. Under a strategy of denial, the United States could focus more on playing defense and making it harder for opponents to project military power outward rather than going on the offensive itself.

A denial strategy requires much smaller forward deployments of U.S. troops because these units would no longer be expected to defeat the attacker outright. Instead, smaller forward-deployed units or "stand-in" forces would be light, mobile, and dispersed to avoid destruction while still being a thorn in the attacker's side. Some ground units could remain in the stand-in force, but these deployments would be minimal and geared toward frustrating an offensive push by an adversary rather than going on the attack. Stand-in air and naval forces would likewise focus on defensive operations, but most of the U.S. Air Force and Navy would serve as a surge force that could deploy should the stand-in forces and U.S. allies prove insufficient.

American policymakers should expect allies to pull their own weight, especially since allies face much greater immediate risks from regional great powers. U.S. allies in Europe and Asia have the economic capacity to increase defense spending—in 2021, the combined gross domestic product of the four largest European NATO members (France, Germany, Italy, and the United Kingdom) was seven times that of Russia; and given their geographic proximity to Russia and China, they have a strong strategic incentive to bolster their defenses. Allies will understandably lack the political will to make serious, sustained investments in their own defense if the United States is willing to increase its own military presence at the first sign of danger.

Of all the military services, the U.S. Army should be cut most. The active-duty army should be substantially smaller and postured mostly for defense of the U.S. homeland. Active-duty army end strength should be cut by 20 percent, from approximately 486,000 soldiers to approximately 389,000. This smaller army should also emphasize different capabilities, reducing its armored units while improving its ability to fight at longer range with more unmanned reconnaissance systems, longer-range artillery, and better air and missile defense. These types of capabilities will help the army operate at longer range and protect itself against attack in the rare event that it needs to deploy.

The U.S. Marine Corps is more relevant to a grand strategy of restraint than is the U.S. Army. Under the Force Design 2030 (FD 2030) plan, the marine corps is getting rid of all tanks, reducing manned aircraft, and reducing its active-duty end strength to increase investments in long-range missiles, unmanned vehicles, and mobility. According to a May 2022 review, divestments from equipment and manpower guided by FD 2030 allowed the marine corps to free up $16 billion over two and a half years that it reinvested in new capabilities.

FD 2030 is primarily aimed at China. The proposed changes would help smaller marine units survive in a fight against China and give them the ability to prevent Chinese ships from getting close to whichever island the marines are holding.

FD 2030 is drawing criticism from retired marine corps generals who argue that it will make the service less flexible, but serious long-term prioritization and difficult tradeoffs are exactly what each military branch ought to be doing. Policymakers should encourage full implementation of FD 2030 and emphasize it as a model for the rest of the armed services.

Unlike the ground warfare services, the U.S. Air Force and Navy would not face large budget cuts so much as shifts in posture and priorities. Both services would see reductions in forward deployments, but they would also retain the capacity to surge into a theater if vital U.S. interests were threatened and regional allies were incapable of addressing the threat.

The big change for the U.S. Air Force under restraint would be a reduced need to penetrate heavily defended airspace, since a military strategy of denial places a lower premium on offensive operations. This change in air force missions would mean the service could reduce emphasis on stealthy aircraft such as the F-35A. The air force currently operates approximately 300 F-35As. According to the Department of Defense's comptroller, the FY 23 budget request aims to procure 33 F-35As for $3.9 billion, or roughly $118 million per aircraft.

Under a grand strategy of restraint, the air force could reduce its procurement of F-35As and instead buy more F-15EXs, a modernized version of the F-15 fighter aircraft that is less expensive to both procure and maintain than the F-35A. The F-15EX is not a stealth aircraft, which means it would struggle to penetrate modern air defenses. However, the F-15EX is well suited for defensive counterair missions (shooting down opposing, attacking aircraft) thanks to its larger weapons payload. The FY 23 budget request could procure 24 F-15EXs for roughly $2.7 billion, or $112 million per aircraft. The Trump administration's air force acquisition chief suggested capping the F-35A fleet at 800 aircraft or roughly 11 wings, and the air force currently plans on fielding two wings of F-15EXs. Shifting this mix to five wings of F-35As and eight wings of F-15EX would save the air force around $3 billion in procurement costs alone.

U.S. Air Force changes under restraint would go beyond these two airframes of course, but the F-35A versus F-15EX tradeoff is one look into the adjustments and cost savings possible with a new grand strategy.

The U.S. Navy would be the most important service for implementing a grand strategy of restraint, but it would need to be redesigned. The navy should reduce its number of exquisite, expensive ships, such as nuclear-powered aircraft carriers, to build larger numbers of smaller ships. Larger warships are powerful, but they are also very expensive, take a long time to build, and are increasingly vulnerable to relatively inexpensive, long-range anti-ship weapons. Smaller warships are less powerful but can be built faster and—thanks to advances in the accuracy and range of missile systems—can punch above their weight.

A June 2022 report from the Quincy Institute for Responsible Statecraft on shifting the United States to a denial strategy in East Asia offers a blueprint for how the navy could adjust its fleet. The report recommends shedding 4 nuclear-powered aircraft carriers (100,000-ton ships) between now and 2035 and fielding 10 light aircraft carriers (45,000-ton ships) through a combination of new ship construction and repurposing of some existing ships. The fleet would also reduce its stock of large amphibious assault ships by retiring and not replacing seven Wasp-class landing helicopter docks. Larger surface ships—destroyers and cruisers—would drop from 92 to 73, primarily via retirement of the *Ticonderoga*-class ships (22 hulls to 3 by 2035). Smaller surface ships would get a significant boost, with 35 new *Constellation*-class frigates joining the fleet between now and 2035.

Overall, the 2035 fleet envisioned in the Quincy Institute report would have more ships than the current fleet, but it would be less expensive. The report estimates that its proposed fleet would save $13 billion annually by 2035.

Finally, restraint calls for a different nuclear force posture and approach to deterrence. The United States is currently modernizing all three legs of the U.S. nuclear triad (land-based missiles, submarines, and nuclear-capable aircraft). Over the next 30 years, this modernization effort will cost over $1 trillion. A 2021 Congressional Budget Office report assessed that more than half of this amount, $634 billion, will come due between 2021 and 2030. This upcoming period when nuclear modernization costs rise as programs move out of research and development and into procurement is commonly known as the "bow wave." Navy and air force leadership have raised concerns that nuclear modernization costs will crowd out funding for conventional capabilities unless defense spending increases.

Nuclear strategy would also change under restraint. If allies shoulder a greater burden for preventing and responding to regional threats with larger conventional forces, then the United States could depend less on nuclear weapons to deter those threats. Washington should move toward a "sole purpose" doctrine that contemplates using nuclear weapons to prevent nuclear but not conventional attack. This alternative approach to deterrence requires fewer nuclear weapons. Policymakers should cancel the new land-based intercontinental ballistic missile (ICBM) program and begin a phased retirement of existing ICBMs to move from a triad to a dyad of nuclear-armed submarines and bombers. Eliminating the ICBM leg of the triad would save $150 billion over 30 years.

Conclusion

Policymakers should begin the process of moving from a grand strategy of primacy undergirded by global U.S. military dominance toward a grand strategy of restraint. Sustaining dominance is a recipe for ever-growing defense spending. Restraint would push U.S. allies to do more for their own defense by drastically reducing forward-deployed U.S. troops. The U.S. Army would see steep cuts, and the marine corps could focus on being a lighter, more mobile force that could work alongside allied units to blunt potential attacks. The U.S. Air Force and Navy could be restructured to become a surge force that could intervene if lighter U.S. stand-in forces and allies are not strong enough and vital U.S. interests came under threat.

Restraint is a more effective, less expensive grand strategy that better reflects the minuscule threat to the U.S. homeland and the capacity for allies to do more to uphold stability in their own backyards. Implementing restraint would require a smaller, less forward-deployed U.S. military and reduce the defense budget. Policymakers should begin moving toward this alternative defense strategy immediately.

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—Prepared by Eric Gomez

24. EAST ASIAN SECURITY

Policymakers should

- recognize that America's allies in East Asia should do more to provide for their own defense;
- encourage allies and partners to take on greater defense responsibilities by adjusting U.S. defense strategy and gradually reducing America's military presence in the region;
- sell military equipment to friends and allies that enables low-cost, asymmetric responses to Chinese threats;
- abandon the unrealistic goal of North Korea's complete denuclearization and instead focus on arms control; and
- resist pressure to adopt a more explicit defense commitment toward Taiwan.

East Asian security issues are growing increasingly salient and more challenging for the United States and its allies. The U.S.-China relationship is steadily deteriorating, and North Korea remains a nuclear-armed state with an expanding and improving arsenal despite the Trump administration's diplomatic overtures to Kim Jong-un. China's economy was already slowing down before the COVID-19 pandemic due to a mix of factors, including an aging population, a real estate construction bubble, and the general difficulty of maintaining high growth rates as the economy got larger. China's response to the pandemic, especially the zero-COVID policies that completely locked down large cities like Shanghai, is further dimming China's long-term economic prospects. Despite these headwinds, however, China's military spending is steadily increasing.

American policymakers in both the Trump and Biden administrations have repeatedly stated that responding to China's growing military power is the U.S. armed forces' top priority. Although this is a prudent policy given the disastrous consequences of a war in East Asia, U.S. security strategy in East Asia is bedeviled by unrealistic goals and assumptions. Washington wants to hold on to military dominance in Asia as long as it can, but doing so will be expensive, difficult, and dangerous.

A better way forward would be for the United States to shift a larger share of the burden for regional peace and stability onto its allies and partners while setting more-limited objectives and expectations for U.S. military power. Countries such as Japan, South Korea, and Taiwan, with large, advanced economies, should do more to address the security challenges posed by China and North Korea.

Although America's allies and partners are unable to match the size of China's military, they can field high-quality, defense-oriented forces capable of stymieing Beijing's potential offensive designs. Forward-deployed U.S. forces can contribute to this approach, but victory could be achieved with a much smaller U.S. military presence. This shift in U.S. strategy would move the United States from a position of primacy toward one of balancer-of-last-resort.

Context and Background

Recent developments in both China and North Korea paint a worrying picture for East Asian security. China has shown greater willingness to flex its military muscles against its neighbors. A long-standing border dispute between India and China flared up in 2020, leading to deaths on both sides.

China's air force also increased incursions into Taiwan's air defense identification zone (ADIZ) beginning in late 2020. This activity peaked in October 2021, when approximately 150 aircraft entered the ADIZ over the course of four days. Admittedly, Chinese military aircraft tend to spend a short amount of time in Taiwan's ADIZ and do not approach Taiwan's territorial airspace; several of the larger incidents also coincided with nearby U.S. naval activity. Nevertheless, the ADIZ incursions stress Taiwan's air defenses and prompt calls for U.S. countermeasures.

This assertive behavior is backed by a Chinese military that is making rapid improvements to its ability to project power farther from China's territory. Beijing initiated a set of military reforms in the mid-2010s that reduced the size of the People's Liberation Army but put more resources into the navy, air force, and a new service branch specializing in space, cyber, and electronic warfare. China's nuclear arsenal is also growing. In the summer of 2021, commercial satellite imagery revealed three large silo fields under construction that could hold approximately 350 intercontinental ballistic missiles once completed. Other recent improvements to the nuclear arsenal have improved the ability to defeat U.S. missile defense capabilities.

China's domestic behavior has also taken worrying turns. In 2019, mass protests in Hong Kong blocked a proposed extradition law and pressed for democratic reforms. Local authorities responded with a violent crackdown, leading to a political impasse and restrictions on civil and political liberties in the former British colony. In June 2020, Beijing imposed a national security law on Hong Kong to cement its control. The law established draconian prison sentences, including life in prison, for vaguely defined crimes that covered participating in protests, organizing politically, reporting critically on government, criticizing Chinese rule, and contacting foreigners. Beijing also established a new security agency under its direct control and special judges to handle national security law cases.

Human rights abuses increased in mainland China as well. For instance, virtually every expression of dissent has been suppressed. The mass detention and forced labor of Muslim Uyghurs in China's western Xinjiang province have received significant international attention. President Xi Jinping's political changes have enhanced his role as leader and eroded collective leadership within the Communist Party, reducing potential internal checks to his policies. Xi's zero-COVID policies that combat disease outbreaks through near-total, violently enforced lockdowns of major urban areas underscore his control of both the country and the Communist Party.

Compared with China, North Korea presents a much more bounded challenge to East Asian stability. Pyongyang's conventional military is large, but it does not pose a significant threat to South Korea's much better equipped and sizable forces; an attempt at reunification via large-scale invasion à la 1950 therefore is highly unlikely.

North Korea's steadily advancing nuclear weapons and ballistic missile programs, however, are a more serious concern. Japan and South Korea—despite being covered by the U.S. nuclear umbrella—worry about coercive threats backed by nuclear weapons. Repeated failures to denuclearize North Korea at the negotiating table and a surge in recent missile testing have prompted calls for the United States to demonstrate the seriousness of its commitment to allies by deploying more high-end weapons systems. Also likely to increase tensions on the peninsula is the shift in South Korea from the more conciliatory Moon administration to a new conservative government under Yoon Suk-yeol, which is likely to advance a more confrontational policy toward Pyongyang.

An Alternative Approach to East Asian Security

East Asia's security challenges are real and significant, but how should the United States deal with them? China's and North Korea's military capacity and actions represent a serious potential threat to countries in East Asia, but a lesser, and certainly less direct, danger to the United States. The United States has an interest in a stable and peaceful East Asia, but it has traditionally borne a disproportionate share of the burden for maintaining the current system.

This situation is partly due to resource constraints, but also to strategic intentions. The United States desires to be the dominant power in East Asia as elsewhere, so its first impulse is to embrace "forward defense," committing more military resources in response to any challenge to its position. This approach makes for a regional defense strategy that is costly, prone to triggering a spiral of threatening behavior, and militarily difficult to sustain given the challenge of projecting power so far from U.S. territory.

The United States should adjust its approach to East Asian security in ways that force its allies and partners to take on a greater burden for their own defense. China and North Korea have already inadvertently encouraged many U.S. allies to bolster their military capabilities. The best way for Washington to ensure that friendly military balancing continues is to avoid the temptation to increase its own military footprint in the region. The United States is always quick to reassure allies, but this encourages them to rely more on the United States rather than devoting resources to their own defense.

American allies in East Asia have taken steps to improve their self-defense capabilities. According to data from the Stockholm International Peace Research Institute (SIPRI), Japan had the ninth-largest defense budget in the world in 2021, spending $54.1 billion in current U.S. dollars. Japan's defense spending has increased every year since 2015, when it spent $42.1 billion. In late April 2022, a panel from the ruling Liberal Democratic Party advised Tokyo to raise defense spending to 2 percent of gross domestic product (GDP) over the next five years. Historically, however, Japan has not raised defense spending above 1 percent of GDP, so an increase to 2 percent faces strong domestic political resistance. Japan has the economic capacity to field a much larger and stronger military. The United States should push Japan to reach its potential by reducing its own presence.

South Korea has likewise pumped up its defense budget. According to SIPRI data, although South Korea spends slightly less than Japan ($50.2 billion versus $54.1 billion in 2021), Seoul's military spending has increased at a much faster rate. Between 2012 and 2021, South Korea's defense spending increased by 43 percent compared with an 18 percent increase by Japan over the same period. Seoul also spent more on defense as a percentage of GDP than any other U.S. ally in Asia in 2021, with a total of 2.8 percent. Prominent examples of domestically produced major weapons systems include long-range cruise and ballistic missiles, diesel-electric submarines, and missile defense interceptors.

In comparison, Taiwan is sorely underinvesting in its military despite the very real threat of China's using military force against it. As a percentage of GDP, Taiwan's defense spending has hovered around the 2 percent mark for the past 10 years, despite China's steadily growing military strength. Taiwan is also fond of pursuing exquisite yet vulnerable weapons systems, such as the U.S.-made Abrams tank, indigenously produced submarines, and fighter aircraft. Its defense would be much better served by investments in asymmetric weapons, especially missiles, that can counter the large numbers of ships and aircraft that China would send its way in an attack. The United States has made efforts to push Taiwan toward acquiring such capabilities, which should continue.

The United States can encourage these positive developments in allied military spending to continue by adjusting its own defense strategy in East Asia toward a concept called denial. Denial prevents an attacker from achieving its military aims quickly and easily. Importantly, a strategy of denial does not require a defender to seize and maintain military superiority to be effective. Instead, the defender needs to prevent the attacker from gaining superiority, which is easier to achieve. Denial's lower bar for success means that it requires a smaller force that is more mobile and focused on fewer operational tasks than the current U.S. force posture in Asia.

The U.S. Marine Corps Force Design 2030 project offers a template for what U.S. forces geared toward denial might look like. That plan calls for the marines to discard tanks and instead focus on a lighter force that can move around the battlefield. Small drones coupled with small vehicles carrying anti-ship missiles would allow these units to deny easy access to islands and nearby ocean.

Other military branches should follow the example of the marines and divest from outdated legacy platforms that are expensive to maintain and tailored for large ground wars. Looking beyond individual branches, U.S. military strategy in East Asia should slowly but consistently reduce both security guarantees and forward deployments. A gradual process would give allies time to improve their capabilities and take on a greater share of the burden for regional peace and stability.

Beyond Defense: Nonmilitary Ways to Improve Regional Security

In addition to encouraging its allies to do more militarily, the United States should adjust nonmilitary aspects of its approach to the region to improve East Asia's security.

First, the United States should develop a positive vision of, and plan for, economic engagement that increases market access and promotes free trade. Washington has paid far too much attention to defense matters and far too little attention to economic issues. East Asia has massively benefited from economic globalization, but this process is threatened by trends toward greater nationalism and support for economic decoupling in both the United States and China. Developing a strategy for regional economic engagement should reduce Washington's emphasis on its military presence.

Second, the United States should abandon the impossible goal of the denuclearization of North Korea and move toward a combination of arms control and risk reduction. The United States is unlikely to achieve denuclearization without going to war, and war would be an unacceptable gamble. America's military presence in South Korea and its sanctions are not enough to force Pyongyang to abandon its nuclear weapons. However, the United States might be able to trade them for other, more limited North Korean concessions, such as freezing weapons testing and development, dismantling some nuclear facilities, or establishing more consistent diplomatic engagement.

Third, Washington should encourage increased security cooperation among East Asian countries without adding new U.S. defense commitments. The Quad is a good example of such a cooperative mechanism, allowing greater coordination among Australia, India, Japan, and the United States while falling short of a full military alliance. Washington should encourage other countries to adopt similar arrangements that improve regional security cooperation but do not create a formal alliance that would entangle the United States in potential conflict.

Conclusion

Threats to peace and stability in East Asia are growing, but the United States should resist the temptation to double down on its military commitment in the region. East Asian allies have the capacity to shoulder a greater burden for their own defense, and China's rapidly growing military power is a serious threat. American allies are taking some positive steps toward improving their ability to uphold regional stability, but they must accelerate their actions given the immediacy of the problem. The United States should push allies to do more by doing less itself, slowly decreasing its overall military presence and focusing the forces that remain on a shorter, less ambitious list of objectives. American allies have a much stronger interest in regional stability because they live there and have the capacity to do much more militarily on their own behalf.

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—Prepared by Doug Bandow and Eric Gomez

25. RELATIONS WITH CHINA

Policymakers should

- cease trying to maintain U.S. primacy throughout the Indo-Pacific region;
- recognize that China is a peer competitor of the United States, not an implacable enemy;
- place strict limits on the nature and extent of the U.S. commitment to Taiwan to spur the island to spend more than the current, meager 2.5 percent of gross domestic product (GDP) on defense; and
- reduce the U.S. military footprint in East Asia and the Western Pacific, creating pressure on Japan and other regional powers to do more for their own defense instead of relying on the United States to act as the balancer of first resort.

Relations between the United States and the People's Republic of China (PRC) have become increasingly frosty in recent years. Indeed, some analysts contend that a cold war now exists between the two countries, with ominous implications for the global economy as well as prospects for continued great-power peace. Such concerns are well-founded, as both China's disposition toward the political-military status quo in Asia and U.S. policy toward Beijing have become increasingly confrontational.

Adopting a more assertive policy toward Beijing has strong bipartisan support. That aspect has become especially pronounced since the PRC's crackdown on Hong Kong and Beijing's lack of transparency regarding the origins of the COVID-19 pandemic. During his 2020 campaign for president, Joe Biden went out of his way to emphasize that he was even tougher than President Donald Trump with respect to China policy. Biden's actual policies as president have been more restrained, but he has retained many of the tariffs and other protectionist measures the previous administration adopted. U.S. deployments of naval forces in the South China Sea and in waters near Taiwan have increased since Biden took office. The administration's policies regarding Taiwan surpass Trump's own support for Taipei's security. One of the Biden foreign policy team's first actions was to stress that U.S. backing for Taiwan was "rock solid." Since then, President Biden himself has suggested that he believes the United States has a firm commitment to come to Taiwan's defense were it to be attacked.

Washington's policies toward Beijing reflect a determination to maintain U.S. military dominance of East Asia and the Western Pacific. Indeed, U.S. officials increasingly speak of the need to maintain stability throughout an "Indo-Pacific region," implying a heightened focus on the Indian Ocean as well as Pacific waters.

U.S. dominance in East Asia arose from the highly unusual conditions that existed after World War II. The war had temporarily eliminated Japan as a significant economic and military player. China was both weak and convulsed in civil war. The remaining actors consisted of small, generally poor countries or the decaying remnants of the European colonial empires. They were, therefore, minor factors, both militarily and economically. The United States enjoyed an artificially dominant position in East Asia even greater than its hegemony elsewhere in the world.

However, matters have changed dramatically in all respects. Japan fully revived as an economic power several decades ago and currently has the world's third-largest economy. Tokyo is finally emerging as a serious military actor as well. Other significant economic players, including India, Indonesia, South Korea, and Thailand, also have gradually emerged over the decades since the end of World War II. But China's economic rise has been the most dramatic development of all. The PRC has gone from being a poverty-stricken, developing country constrained by the folly of Maoist economics to being the world's second-largest economy—or largest, using purchasing power parity. U.S. economic dominance in East Asia, so overwhelming in the years immediately following World War II, has evaporated.

The military environment has changed less dramatically, but it is still substantially different from the era in which the United States enjoyed unchallenged strategic primacy. True, Washington has maintained its leadership position with Japan, South Korea, and other countries by enmeshing them in its hub-and-spokes system of bilateral alliances. However, notable policy differences continue to surface between the United States and even its closest allies. There is notable reluctance, especially in South Korea, to enlist in a U.S.-led containment policy directed against China.

The PRC's own military rise further reduces Washington's ability to sustain its position in Asia. Long gone is Mao Zedong's "people's army," with its reliance on mass manpower and the ability to wear down an opponent through attrition. Over the past two decades, Beijing has focused on transforming the PRC's military into a high-tech force focused on air and naval power. Multiple simulations conducted by both the Pentagon and the RAND Corporation in the past few years suggest that the United States can no longer assume that it would win a military showdown with China in the Western Pacific. Attempting to preserve primacy under such conditions and unfavorable economic and military trends is a losing proposition.

Washington increasingly regards the PRC as a dangerous adversary rather than merely a rising diplomatic, economic, and military competitor. That attitude has deepened in the past few years, and Pentagon leaders, along with elites in both political parties, openly state that China poses the biggest threat to U.S. security—one even greater than the one they believe Russia poses. Washington's response has been to adopt an unsubtle containment policy toward the PRC, even as it tries to maintain significant bilateral economic ties. Some experts have described the resulting awkward policy formulation as one of "congagement."

International economic engagement is the primary engine for the growth of China's economy and, with it, China's military. In particular, international trade is the fuel for China's growing military power. Engaging with China suggests acquiescence in its growth. Containing it implies making efforts to slow that growth. A policy that fuels China's growth while seeking to contain its influence is fundamentally incoherent. The two parts of the policy work at cross-purposes, with engagement making containment harder.

A thoroughgoing containment policy is likely to make Washington's relations with Beijing even testier than they are now, to say nothing of the economic consequences. The growing U.S. naval presence in the South China Sea and the escalated U.S. support for countries whose territorial claims in that body of water challenge Beijing's are contributing to rising bilateral tensions. Washington's knee-jerk support for Japan's claim to the disputed Senkaku Islands in the East China Sea is having a similar effect.

The United States should scale back its military presence in the South China Sea and adopt a more neutral position on the competing territorial claims instead of continuing its current "anyone but China" stance. The same neutral approach should be used with respect to the rival claims of Japan and China over the Senkakus (just as it should between South Korea and Japan over the Dokdo/Takeshima Islands). Those moves would constitute modest concessions to Beijing, but they have the potential to substantially ease tensions with the PRC.

Trade and Economics

Another important issue also requires a more delicate policy. Rising anger toward the PRC and enthusiasm for containment are fueling calls in the United States for "decoupling" the world's two leading economies. However, decoupling is a strategy that not only would impose severe economic costs on both countries, but it would also be unlikely to work.

One manifestation of the desire to decouple economically is an effort to reduce U.S. dependence on China as the source of certain important goods, such as electronic components and pharmaceuticals. The drive to diversify supply chains received a boost when mutual recriminations erupted between Beijing and Washington over the handling of the COVID-19 pandemic. The danger of supply chain disruptions, not to mention Beijing's possible use of its dominance in pharmaceutical sources to gain political or strategic leverage on the United States with respect to other issues, boosted calls for greater American independence.

Such worries have strengthened the campaign for an overall decoupling of the U.S. and PRC economies. But there are serious downsides to adopting that approach, rendering it fanciful. Developing entirely new supply chains in multiple industries would be both expensive and disruptive. Those problems would exist even if the United States remained willing to tolerate dependence on non-PRC sources in East Asia and other regions. More importantly, there is no indication that any U.S. partners or allies—even those with the most to lose from China's growing power—would go along with an effort to decouple from China. If the United States decoupled without cooperation from the rest of the world, the economic consequences for the United States could be worse than they would be for China, negating the point of the policy. Moreover, even if it could be achieved, U.S. economic decoupling from China would weaken an important factor that acts as a buffer against military confrontation between the two countries. (See "International Trade and Investment Policy.")

Taiwan

The Taiwan issue is an especially dangerous flashpoint in U.S.-PRC relations, and the situation is likely to grow worse. U.S. policy regarding Taiwan has been somewhat murky and contradictory since the United States signed the Shanghai Communiqué in 1972 and then switched official diplomatic relations from Taipei to Beijing in 1979. Both moves embodied a delicate exercise in diplomatic skill. In the Shanghai Communiqué, the United States acknowledged that "all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China." The joint communiqué in 1979 confirmed that Washington acknowledged "the Chinese position that there is but one China and Taiwan is part of China." However, the switch in diplomatic relations was accompanied by passage of the Taiwan Relations Act, which stated, "Any effort to determine the future of Taiwan by other than peaceful means . . . [poses] a threat to the peace and security of the Western Pacific area and [is] of grave concern to the United States." The act also committed the United States to continue selling Taiwan "defensive" weapons. Left unclear has been whether the United States would intervene militarily if China uses force to compel Taiwan to accept political unification with the mainland. Washington's long-standing policy of "strategic ambiguity" captures the essence of that hazy approach. One daunting problem with sustaining that strategy is that Washington's key original assumption is no longer valid. Multiple opinion polls in recent years indicate that most Taiwanese no longer regard Taiwan as part of China. Taipei's policies reflect that change in public attitudes, and the current government is emphatic about preserving the island's de facto independence.

Pressure in Congress and some portions of the foreign policy community is mounting for the United States to adopt a new policy of "strategic clarity"—making it clear that Washington will use its own forces to defend Taiwan if the PRC attacks the island. To the contrary, U.S. leaders should signal to Taipei that there is an emphatic limit to Washington's support for Taiwan's de facto independence. Taiwan's defense budget of roughly 2.5 percent of GDP shows the extent to which it is still relying on the United States for its defense. Emphasizing that, going forward, Washington's commitment to Taiwan's security will be limited to generous arms sales, and the sharing of military intelligence should help shake Taiwan's leaders from their inadequate attention to the island's defense while also limiting America's risk exposure in the event of an armed conflict between the PRC and Taiwan.

Washington should encourage Taipei to embrace a "porcupine strategy" toward the PRC—raising the predictable cost of a Chinese attempt at military conquest to such a painful level that rational leaders in Beijing would not make the attempt. Fully achieving that goal will require a substantial boost in Taipei's annual military budget, as well as the development of a more extensive and capable indigenous defense industry. It would also require fundamental changes not just in how much Taiwan spends on defense, but in how Taiwan spends its defense dollars. Instead of buying big-ticket items that have dubious military utility but are aimed at securing U.S. support, Taiwan should focus on platforms that enhance its ability to deter China by denying China its aims in Taiwan. There is no reason Taiwan should have spent billions of dollars buying Abrams tanks, for example.

Regional Balance

A number of existing trends point toward a greater effort on the part of East Asia's leading powers to balance the PRC and forestall any chance that China could attain regional hegemony. In particular, the Japanese ruling party's proposal that the government increase defense spending to 2 percent of GDP indicates that Japan may finally be preparing to play a security role commensurate with its economic capabilities and status. Both Japan and Australia have made it clear that they would consider a move by the PRC against Taiwan as menacing their own security. Those regional players also have taken steps to deepen their strategic cooperation with India, Indonesia, and Vietnam.

U.S. leaders should strongly encourage such independent moves instead of trying to orchestrate and dominate efforts to balance China's power. One important way to do that is for the United States to reduce its own military footprint in the region. A change of that nature would not only benefit American taxpayers, but it would also create pressure for nations in the region to intensify their defense buildups and find ways for even greater cooperation and coordination on security issues. Reducing their reliance on U.S. power and protection would be better for Americans.

The United States needs to develop a workable alternative to the current policy of trying to preserve primacy in East Asia and the Western Pacific, combined with a crude and incoherent containment policy directed against China. It is an uncomfortable reality that the PRC is an increasingly important economic and military player throughout the Indo-Pacific region. Indeed, Beijing has become the principal alternative model to liberal capitalist democracy in several parts of the world. It assuredly would be less worrisome for the United States if China were not an unpleasant autocracy. U.S. leaders and the American people would have less reason to worry about a rising competitor with democratic capitalist characteristics. Unfortunately, that is not the current situation, nor are conditions likely to improve in the foreseeable future. Washington, therefore, must adopt the most feasible, lower-risk strategy available.

The principal feature of the alternative approach is to quietly facilitate the emergence of a regional balance of power organized and directed by China's neighbors, who have the most at stake in preventing PRC hegemony. An important collateral benefit is that a more restrained and subtle U.S. policy would likely improve Washington's important bilateral relationship with China, since the United States would no longer be on the frontlines of every dispute and confrontation throughout the region. That policy shift would help fulfill the U.S. government's fiduciary responsibility to protect the best interests of the American people.

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—Prepared by Ted Galen Carpenter

26. U.S. POLICY TOWARD AFGHANISTAN

Policymakers should

- release Afghanistan's $7 billion from the Federal Reserve Bank of New York;
- restart humanitarian aid—especially related to staple foods and medical supplies to help limit the suffering of Afghans in the current crisis;
- accelerate the Special Immigrant Visa process; and
- hold multiple public hearings on the misstatements and misrepresentations the U.S. government told the American people during the war in Afghanistan and at its end.

Since President Biden withdrew U.S. forces from Afghanistan in August 2021, the country's political, economic, and social conditions have deteriorated exponentially. Although U.S. personnel managed to airlift 125,000 people safely out of the country—the largest airlift in U.S. history and extraordinary by all measures—it did nothing for the Afghans and others left behind.

The Taliban takeover was followed by crippling sanctions that have done little to change the group's behavior and instead have made life miserable for the 37 million Afghans who remain there.

The George W. Bush administration invaded Afghanistan with the aim of dismantling al Qaeda and preventing the country from becoming a staging ground for anti-American terrorist groups. That aim was largely achieved by 2002, but the war limped on for another 19 years, morphing into an ambitious nation-building project. A U.S. intelligence assessment published after the killing of al Qaeda leader Ayman al-Zawahri in Kabul concluded that al Qaeda had still not been reconstituted in Afghanistan and was unable to use the country to launch attacks against the United States. The main post-withdrawal problem is a humanitarian crisis resulting from the collapse of the Afghan economy, which was partly caused by U.S. sanctions.

When it comes to Afghanistan, the Biden administration and Congress should do four things: (1) disburse Afghanistan's central bank assets that the United States has confiscated, (2) restart and facilitate humanitarian aid to get food and medical supplies to Afghans, (3) accelerate the Special Immigrant Visa process and ensure that the Afghans who endangered their lives to help U.S. and allied forces are able to immigrate to the United States, and (4) create a plan for accountability that includes investigating U.S. policymakers and the military for the waste, lies, and corruption in the conduct of the war in Afghanistan.

Unfreezing Assets

After the Taliban forcefully took over Kabul in August 2021, the U.S. government seized the assets of Da Afghanistan Bank—Afghanistan's central bank. The assets, approximately $7 billion, are currently being held in the U.S. Federal Reserve Bank of New York. The assets consist of $3.1 billion in U.S. bills and bonds, $2.4 billion in World Bank Reserve Advisory and Management Partnership assets, $1.2 billion in gold, $1.3 billion in international accounts, and about $300,000 in cash. The Biden administration did not need any new authority to freeze these reserves because the Taliban was (and remains) sanctioned under Executive Order 13224 as a Specially Designated Global Terrorist.

On February 11, 2022, the Biden administration announced that it would split Afghanistan's assets between humanitarian assistance to the country and a 9/11 families lawsuit. That decision has politicized the 9/11 families further. In this instance, under the Justice Against Sponsors of Terrorism Act (JASTA), 130 of the 9/11 families sued the Taliban in the U.S. court system when the group forcibly took over Kabul in August 2021.

JASTA resulted from a desire to give 9/11 families a route to justice and accountability. Congress passed JASTA in 2016 over President Barack Obama's veto. In the past, these kinds of cases have resulted in large damages for the plaintiffs, but the funds have never been paid. President Biden's decision to allocate approximately $3.5 billion of Afghanistan's reserves to the latest lawsuit will be the first instance. Another group of 9/11 families deemed the lawsuit "morally wrong" and has written the White House to request that the funds be released to the Taliban.

U.S. policymakers should return the entirety of Afghanistan's assets to Da Afghanistan Bank for two reasons. First, Afghanistan desperately needs the money to function. Its economy is in turmoil, and the country is in the midst of a humanitarian crisis, which worsened after an earthquake killed 1,000 people and injured over 1,500 others in eastern Afghanistan. During the war, about 80 percent of Afghanistan's budget was funded by the United States and international donors—and all of that ended when the Biden administration withdrew U.S. troops and froze the assets.

Second, for better or worse, the money is Afghanistan's, not the United States', and it should be returned to the country regardless of who is in power. The human suffering caused by withholding this money is preventable, and the United States should help prevent it. There is little reason to believe that the Taliban will use these funds in a way that jeopardizes U.S. national security.

Reshaping Assistance

The practical problem for Congress and the Biden administration is how to provide assistance to Afghanistan now that the central government has collapsed and the Taliban seems likely to remain in power for the foreseeable future. Some questions remain: If the United States provides aid, what conditions can it impose on the Taliban? Who should administer the flow of aid? How can the aid flow be transparent to limit corruption and waste? These questions, however, miss three key factors.

The first factor is U.S. leverage: The underlying assumption of these questions is that the Biden administration has leverage over the Taliban. Currently, it does not—and will not if present policy continues. The Taliban is no longer a nonstate actor with limited goals. The Taliban today is a state vying for international legitimacy and recognition, with an active foreign policy; it has cultivated relations with China, Russia, and Central Asian states. Any kind of U.S. leverage today, therefore, is dependent on other players as well, and on whether other states would put any (or similar) conditions on Afghanistan. It is in U.S. interests to acknowledge this reality and work multilaterally to deliver short-term humanitarian aid to Afghanistan.

Second, the assistance debates also ignore the fact that Afghanistan does not have the banking infrastructure and capacity to absorb large amounts of aid, which means that aid workers need to be on the ground for the distribution of monies to be effective. However, since the Taliban takeover, almost all large humanitarian organizations have left Afghanistan, which has made administering aid even more challenging since these organizations were at the forefront of aid and responsible for the daily activities associated with it. Their absence has led the country to become extremely food insecure. According to the United Nations Assistance Mission in Afghanistan, as of March 2022, 95 percent of Afghans are food insecure and 100 percent of female-led households in Afghanistan don't have enough food. Because the majority of humanitarian aid organizations are reluctant to return for fear of being sanctioned themselves, it is essential for the United States to lift sanctions on Afghanistan.

The third and most important factor is the end to which aid is directed. The reports from the Special Inspector General for Afghanistan Reconstruction all pointed to an emphasis on “nation building” and on building Afghanistan’s army. Moving forward, Congress should reprioritize its aid goals in Afghanistan to focus more on short-term humanitarian needs, such as food and medical supplies. Although the United States cannot build a nation in Afghanistan with aid any better than it could with its military, U.S. policy has contributed to the current crisis, and a limited and time-bound effort to avoid humanitarian suffering is appropriate.

Providing Asylum

Approximately 80,000 Afghans qualify for the Special Immigrant Visa, a program that Afghan translators, allies, and their family members who assisted U.S. forces can use to immigrate to the United States. While analysts have made the case for expediting applications, the State Department’s Bureau of Consular Affairs has been excruciatingly slow. This situation is related partly to the COVID-19 pandemic, but it is more attributable to bureaucratic incompetence or willful neglect.

History supports this interpretation. President Donald Trump signed a withdrawal deal with the Taliban in early 2020, declaring that all U.S. troops would leave Afghanistan within the year. Why, then, were Special Immigrant Visa applications not processed in a timely manner? Congress should prioritize the processing of these applications and ensure that those who do receive a U.S. visa are provided safe passage to the United States.

Creating Accountability

There seems to be an appetite for accountability in Congress. In the fall of 2021, the House Foreign Affairs Committee held two hearings on the U.S. withdrawal from Afghanistan to evaluate its disastrous execution. In February 2022, the Senate Foreign Relations Committee held a hearing on the humanitarian crisis that was unfolding. No hearings have been held since then. Perhaps stinging from the politics of the botched withdrawal, President Biden didn’t even mention Afghanistan in his State of the Union address.

The nonpartisan commission proposed by Senator Tammy Duckworth (D-IL) to study the war in Afghanistan as part of the fiscal year 2022 National Defense Authorization Act, which is set to begin its investigation this fall, is a welcome move. However, the U.S. government needs to hold more public hearings on U.S. involvement in Afghanistan centered on how U.S. policymakers and military leaders misled the American public on the war's progress, along with misperceptions about Afghanistan's reconstruction, waste, and corruption.

Conclusion

Even though the United States has withdrawn from Afghanistan, it should remain engaged to ensure that the Taliban government does not consort with anti-American terrorist groups. The Biden administration should create a plan of engagement with Afghanistan that focuses on diplomacy and basic needs. The plan should unfreeze Afghanistan's assets that remain in the New York Federal Reserve Bank, lift or loosen its sanctions to allow humanitarian assistance to get through, end the gridlock with the Special Immigrant Visa process, and investigate the failures and deceit of the U.S. war in that country to ensure accountability.

The U.S. government spent more than $2 trillion on the war in Afghanistan, in addition to the lives of thousands of U.S. service members and, conservatively, tens of thousands of civilians. If the Biden administration is serious about creating a human-focused foreign policy, it needs to conduct an investigation into the U.S. war in Afghanistan that spans domestic and international issues.

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—Prepared by Sahar Khan

27. MIDDLE EAST SECURITY

Policymakers should

- recognize the limited relevance of the Middle East to U.S. national security;
- create distance between the United States and its client states in the region;
- support a diplomatic agreement that limits the potential of nuclear proliferation in Iran; and
- withdraw all U.S. ground forces from the region over the next five years and enter into agreements to maintain naval access in Bahrain and elsewhere, should those governments agree to terms favorable to the United States.

The Middle East is a poor, militarily weak region beset by an array of problems that mostly do not affect Americans—and that U.S. forces cannot fix. Put more bluntly, the region is a strategic backwater. Its gross domestic product constitutes between 3 and 4 percent of world GDP, compared with roughly 33 percent in the Western Hemisphere and 25 percent each in Europe and East Asia. The Middle East's population is between 3.5 and 5.0 percent of the world total, depending on how one defines "Middle East." No Middle Eastern state can project military power outside the region, and none has the ability to project much power in its immediate neighborhood. These facts make U.S. focus on the Middle East a puzzle.

Three main fears have propped up U.S. interest in the Middle East over the years. These fears center on oil, Israel, and terrorism. But none of these problems constitute a grave threat to U.S. interests, much less one that requires a costly and risky forward-deployed military presence in the region.

Oil

On oil, policymakers worry either that instability will jeopardize the flow of Middle Eastern oil onto world markets, or that if a regional hegemon were to emerge, it would control enough of the world supply to give it outsized influence over production decisions. But energy markets do not work the way that makers of U.S. foreign policy seem to believe they do. As a leading oil economist explained in 2004, "U.S. oil policies are based on fantasies not facts."

Oil is a fungible commodity sold on world markets. What that means for discussions of "energy security" is that the question is not who imports oil from the Middle East or any other region. Rather it is which countries are net importers versus net exporters and how price volatility would affect their economies.

When the price of oil in one country rises, it rises in all countries—even those that claim to have achieved the Shangri-La of "energy independence." There is no way to make a country independent from the world price of oil. When supply decreases, price goes up, and producers have an incentive to produce more oil to reap the higher profits.

In his examination of price shocks through history, Eugene Gholz demonstrates that in five of the six major oil supply shocks since 1978, prices fell quickly because price incentives led nonaffected suppliers to ramp up production.

Moreover, most major oil price fluctuations in history have been the result of changing demand, not military or political tensions. Given that this was true both before and during the modern era (with tens of thousands of U.S. troops in the Middle East), it suggests that the presence of U.S. troops in the region is not preventing major oil price volatility today.

As to the other fear about oil, that a regional hegemon would gain a dangerous level of influence over world prices, that is conceptually defensible but empirically fantastic. No Middle Eastern country has a shot at regional hegemony. The regional balance of power, in particular the defensive capabilities of the major states, prevents it. Power in the region is divided among Egypt, Iran, Israel, Saudi Arabia (and its Gulf allies), and Turkey. Successful conquest of even a smaller, weaker state like Lebanon or Yemen would likely inflame local identity politics, which would inhibit further expansion.

Similarly, for China or Russia to dominate the Middle East, it would need to displace the governments of (at least) Iran and Saudi Arabia, then put down rebellions, establish a new, reasonably stable political order, and then usurp the vanquished states' oil supply for its own gain, impoverishing the locals. Any such effort would likely be destructive to those aggressor countries, not beneficial. Both Russia and China have been opportunistic in the region, but trying to run a remote Middle East empire from Moscow or Beijing seems unlikely to appeal to two countries that appear to have their hands full today.

American policymakers should withdraw all forward-deployed ground troops from the Middle East in the next five years, because they are costly and do not serve U.S. interests. Maintaining naval access in Bahrain and possibly elsewhere would be a useful and low-cost (possibly no-cost) hedge against the extremely unlikely threat of a regional hegemon. Oil producers have stronger incentives to get their product to market than the United States has in getting it to market for them. Policymakers should tell Saudi Arabia and other players in the region that their economies are their problem, not ours.

Israel

One also hears concerns regarding the safety and power position of American partners in the region, especially Israel. For example, President Donald Trump claimed in 2020, "We don't have to be in the Middle East, other than we want to protect Israel."

While Trump's statement was characteristically blunt, amorphous concerns over Israel's well-being have been an enduring anchor of U.S. policy in the region. But since the Israel Defense Forces shellacked the Egyptians, Jordanians, and Syrians in the Six-Day War in 1967, Israel has aggressively pursued its interests throughout the region without losing a conventional conflict. Israel suffers from terrorism, but a forward U.S. military presence in the region does nothing to help the Jewish state with its terrorism problem.

Israel today enjoys an enormous qualitative military edge over any combination of potential regional rivals in conventional military terms. It also has at least 90 nuclear weapons deployed on an array of platforms, including submarines, that give it a secure second-strike capability against any state that might threaten its survival. No other state in the region has nuclear weapons.

The one problem that could pose significant military challenges for Israel is the advent of an Iranian nuclear weapon. Perversely, the administration of then Israeli prime minister Benjamin Netanyahu did everything in his power to prevent, and later to unravel, the Joint Comprehensive Plan of Action, the 2015 nuclear deal that eliminated the risk of an Iranian nuclear weapon for a generation.

Other recent Israeli governments have opposed a U.S. return to a nuclear deal with Iran, preferring, with Netanyahu, a confrontational policy toward Iran that views the Iranian regime, rather than its nuclear program, as the problem to be solved. This approach is extremely counterproductive from the U.S. point of view, and even from Israel's point of view raises the prospect of a dire scenario: Iranian nuclear weapons. American policymakers should rejoin the nuclear deal and work with their negotiating partners and Iran to expand on its restrictions on proliferation. Making the perfect the enemy of the good puts Israel in greater, not less, danger.

Terrorism

Especially since 9/11, policymakers have invoked fears about terrorism to justify U.S. policies in the region. But given that the basic contours of American policy in the region predate 9/11 by decades, it is strange to think that a concern that emerged after a policy began explains the policy.

There is no evidence that terrorism is a threat that warrants an effort to manage the Middle East militarily. The chance of an American being killed by terrorism outside a war zone from 1970 to 2012 was roughly 1 in 4 million. By any conventional risk analysis, that is an extraordinarily low risk. As early as 2002, smart risk analysts were asking questions about counterterrorism policy, such as "How much should we be willing to pay for a small reduction in probabilities that are already extremely low?"

Terrorist groups with serious political ambitions—like ISIS—discover that hit-and-run insurgencies are less satisfying than seizing power and governing. Then they discover that behaving like a state makes you supremely vulnerable to American and regional firepower.

The amount Americans pay now to fight Islamist terrorism is absurdly divorced from the risk it chases. If someone ran a hedge fund assessing risk the way the government has responded to terrorism, it would not be long for this world. Moreover, it is difficult to identify how U.S. policy across the region—with the possible exception of some drone strikes and special operations raids—has reduced the extremely low probability of another major terrorist attack in the United States. If anything, our policies may have increased it.

Conclusion

The United States spends more than $70 billion each year on its military exertions in the Middle East. This policy is at best wasteful and, at worst, counterproductive to its stated goals. The United States has disrupted oil markets, not stabilized them; inflamed the region in a way that endangers Israel; and fanned the flames of grievance that fuel terrorism. Expensive policies hedging against tail risks that produce disastrous results should be discarded.

American policies in the region have received too little scrutiny, and their assumptions have been interrogated too rarely. The policy limps along based on inertia. The murky counterfactuals of swirling chaos and economic disaster are based on bad folk social science. Hearing U.S. foreign policy thinkers discuss the Middle East brings to mind a passage from George Orwell's *The Road to Wigan Pier*, in which Orwell laments:

> The high standard of life we enjoy in England depends upon our keeping a tight hold on the Empire, particularly the tropical portions of it such as India

> and Africa . . . an evil state of affairs, but you acquiesce in it every time you step into a taxi or eat a plate of strawberries and cream. The alternative is to throw the Empire overboard and reduce England to a cold and unimportant little island where we should all have to work very hard and live mainly on herrings and potatoes.

Later, of course, England saw the Empire pried from its grip, but became a country that still had affordable taxis and strawberries and cream. Likewise, not only could the United States retain its way of life and prosperity having departed the Middle East, but it would also benefit by shedding the unnecessary costs of attempting to manage the unruly region.

The past 20 years of U.S. foreign policy in the Middle East have been particularly ruinous, but the broader foundations of U.S. policy in the region have been rotten for far longer than that. At a cost north of $70 billion per year, at a time when the United States faces significant challenges at home and in East Asia, policymakers should cashier our costly and destructive policies in the Middle East.

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—Prepared by Justin Logan

28. EUROPEAN SECURITY

Policymakers should

- realize that Europe can defend itself but will not unless the United States stops defending Europe itself;
- abandon efforts to expand NATO;
- vocally support autonomous security cooperation in the European Union as a replacement for NATO/U.S. efforts;
- announce their intention that the next Supreme Allied Commander Europe be a European;
- resume the withdrawal of U.S. troops from Germany as announced by President Donald Trump and rescinded by President Biden, and withdraw the additional 20,000 U.S. troops sent to Eastern Europe in the wake of the Russian invasion of Ukraine;
- revive the annual Defense Department report, Allied Contributions to the Common Defense; and
- hold congressional hearings on defense burden sharing in the context of the NATO alliance.

In 1959, President Dwight D. Eisenhower lamented to a military adviser that U.S. allies in Europe were "close to 'making a sucker out of Uncle Sam.'" In Ike's mind, "so long as they could prove a need for emergency help, that was one thing. But that time has passed."

More than 60 years later, Europe's indifference to European security has grown worse. In the context of European security, it is indisputable that Uncle Sam has become Uncle Sucker. In 2022, only 8 of the 29 non-U.S. NATO members were spending the agreed-to 2 percent of GDP on defense, and of those 8, only Poland and the United Kingdom bring meaningful military power to the alliance. The others who meet the 2 percent standard are tiny, militarily weak states.

The United States is the primary security provider in Europe, despite the fact that the most important parts of Europe for U.S. security are profoundly safe, and even the European periphery is mostly secure.

Moreover, the consequences of European shirking have grown higher. At least during the Cold War, U.S. efforts were focused primarily on countering the Soviet Union in Europe anyway. The question was the distribution of the burden, not tradeoffs among priorities. Now, three U.S. presidents in a row have insisted that the focus of U.S. military efforts should be on Asia. The war in Ukraine has served as a distraction from that stated priority, just as the civil war in Syria and the rise of ISIS did for presidents Barack Obama and Donald Trump. European indifference has led to the deployment of an additional 20,000 U.S. troops to Eastern Europe and a rededication of the United States to play the central role in European security affairs.

Every U.S. president since Eisenhower has complained about burden sharing in Europe. None has made much progress. That is in part due to the U.S. emphasis on reassuring its partners and allies at the first sign of trouble. The singular priority for U.S. policymakers throughout the postwar era has been establishing and maintaining the credibility of U.S. commitments. This constant supply of reassurance has encouraged European countries to rely on the U.S. commitment for their defense.

Getting Europe off the security dole is a vital task for U.S. defense policymakers. Several ideas recommend themselves.

First, U.S. policymakers should publicly announce that they have no intention of supporting any further expansion of the NATO alliance. This would send shock waves through Europe, making it clear that U.S. attention to Europe is likely to wane. It would also make clear that the United States has no intention of making security guarantees to Georgia or Ukraine similar to NATO's Article 5—the collective defense provision of the North Atlantic Treaty. This would also likely make the weaker, more vulnerable NATO member states pursue other avenues to secure their own countries.

To drive this point home, U.S. policymakers have more options. One would be to make clear that the next Supreme Allied Commander Europe (SACEUR) will not be an American, and that the Europeans must settle on a European commander. Since the alliance's inception, the SACEUR has been an American, with his deputy being a European. This arrangement is backward. Europe should be in the driver's seat for European security. Once European states decide on a candidate, the Americans should offer to make his or her deputy an American.

Another way to press the issue is by resuming the withdrawal of U.S. troops from Germany initiated under Trump and rescinded by Biden before the war in Ukraine. Trump had moved to withdraw roughly 12,000 service members from Germany, redeploying some elsewhere in Europe and bringing some home. Biden paused, then rescinded, that move on taking office. Resuming that withdrawal would deliver a shock to Europe in general but to Germany in particular, which has already begun to walk back the pro-defense measures it instituted after the Russian invasion of Ukraine. It is worth examining that phenomenon briefly as an example of how burden sharing in Europe doesn't work.

After the start of the Ukraine war, Europeans were shaken from their slumber. German Chancellor Olaf Scholz announced a *Zeitenwende*, translated as a "watershed" or the change of an era. Scholz announced a €100 billion fund to spend on German defense over the next four years, and that Germany would thereafter meet the 2 percent of GDP target for military spending. The measures had support from large majorities of the German public in all the polling done around the announcement.

However, in the intervening months, things changed. The United States sent 20,000 more troops to Eastern Europe and announced new initiatives it would be taking on behalf of European security. It supported the expansion of NATO, the U.S.-led alliance in Europe. In other words, it recentered European security on the United States.

Shortly thereafter, Germany announced that it would be cutting defense spending. The €100 billion fund would serve to obscure the fact that Germany was, in fact, cutting defense spending. By 2026, at the end of the four-year period covered by the €100 billion, Germany would be spending less on defense than it did in 2022. This phenomenon—where a crisis flares up, European states get good press for stepping up, then the crisis and the stepping up both fade away—characterizes how efforts to distribute defense burdens have worked historically. It is time for the United States to wise up.

A final measure can contribute to forcing the issue on the Europeans. From the 1980s until the early 2000s, the Defense Department was required every four years to submit to Congress a report entitled "Allied Contributions to the Common Defense." Although this normally involved DOD acting as lawyer for U.S. allies and explaining that if you change methodologies, you can see that our allies are actually doing quite a lot, it provided fodder for discussion in Congress about burden sharing both in NATO and in U.S. alliances in Asia. There has been an effort to reinstate the report in the 2022 National Defense Authorization Act; as of this writing, it is unclear whether that will remain in the bill.

There is also precedent for Congress to examine burden sharing in NATO and other U.S. alliances. In 1988, the House Armed Services Committee convened the Defense Burden Sharing Panel. The panel issued a report stating "in the strongest possible terms that Europeans had better be prepared to defend their own territory without a large-scale U.S. ground commitment, because that commitment cannot be guaranteed forever." It suggested further that "the major reason the United States is shouldering a disproportionate share of the defense burden is that . . . [a]s long as Americans pay most of the cost and assume most of the risks and responsibilities for the defense of the free world, the allies will be prepared to let the United States do so."

The end of the Cold War overtook these admonitions; however, the pathologies that afflict U.S. policy in Europe remain the same. Europe's exertions on behalf of its own defense are inadequate, U.S. exertions are excessive, and the vaunted transatlantic community has no answer to the problem, or, more often, does not see a problem.

If the executive branch cannot or will not shake U.S. allies in Europe from their willful slumber, Congress should. There is simply no good reason for the United States to be the central pillar of European security in the 21st century. Making clear that NATO expansion is over, insisting that the next Supreme Allied Commander Europe be a European, resuming the withdrawal of troops from Germany and Eastern Europe, and reinstituting periodic examinations of allied burden sharing both at the Defense Department and in Congress would go a long way toward getting Europe off the dole and making European defense European.

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—Prepared by Justin Logan

29. RELATIONS WITH RUSSIA

Policymakers should

- make staying out of the war between Russia and Ukraine the top Russia policy priority for the United States;
- make clear to Ukraine the U.S. vision of an appropriate end to the war, encouraging rather than impeding negotiations to terminate the war; and
- highlight and attempt to convince Russia that the punishment imposed as a response to the Russian invasion of Ukraine can and will stop should Russia withdraw or settle on terms agreed to by Kyiv.

Relations between Washington and Moscow are worse than they have been since the worst days of the Cold War. Both Moscow's brutal aggression against Ukraine and the Biden administration's decision to use the war as an opportunity to "weaken" Russia, in U.S. defense secretary Lloyd Austin's phrase, run serious risks. Vladimir Putin's government has already warned that weapons shipments coming into Ukraine from NATO countries are legitimate military targets. The Biden administration wisely has rejected the most reckless proposals from the U.S. policy elite, such as imposing a no-fly zone over Ukraine or attempting to use the U.S. Navy to limit Russian operations in the Black Sea or the Sea of Azov. Any of these moves would significantly increase the risk of a direct military confrontation with Russia—a confrontation that would run the highest risk of a nuclear exchange since the darkest days of the Cold War.

This chapter is dominated by the war in Ukraine just as U.S.-Russia relations are dominated by it now. As understandably outraged as many analysts and legislators are, it is important to start with some basic facts. The war in Ukraine does not directly affect U.S. national security unless the United States enters the war. If Russia had seamlessly annexed all of Ukraine without a shot having been fired—which obviously was not going to happen—it would have increased Russian GDP by roughly 10 percent. This scenario would have complicated

NATO defense planning, but NATO defense planning has operated outside military realities since at least the admission of the Baltic states in 2004. (The militarily vulnerable Baltic states were admitted to NATO in 2004, but the alliance had no plan for their defense until 2010.)

Ukraine's limited importance to the United States (and to the major NATO members) both kept it out of NATO and permitted Russia to invade. Russia's invasion of the country has not changed that reality. Accordingly, the number-one priority for U.S. leaders should be to keep the United States from becoming a party to the war. To raise the risk of a nuclear exchange in pursuit of something other than U.S. national security is particularly reckless statecraft.

Moreover, in Syria, U.S. intervention prolonged a brutal civil war without changing its outcome—the worst of all possible worlds. U.S. policymakers should consider whether they are doing the same in Ukraine: providing enough aid to prolong the war, but not enough to overcome Russia's sizable advantages.

The administration's repeated insistence that the terms on which the war (and with it, U.S. aid to Ukraine) can end are entirely up to Ukraine's president, Volodymyr Zelenskyy, has not helped matters. It has emboldened Zelenskyy and granted him outsized influence on a policy that runs serious risks for U.S. citizens. Escalation—even to include bringing the United States into the war—likely serves Zelenskyy's interest. It is emphatically not in the U.S. interest. What would be banal in other contexts now needs to be said flatly: U.S. interests are not the same as Ukraine's.

Further, the sanctions placed on Russia as punishment for the invasion need to be made revocable. As Thomas Schelling, the Nobel Prize–winning economist and national security strategist, famously observed, the warning "stop, or I'll shoot!" logically implies both that the target of the threat can be made to believe it and that if he does stop, the issuer of the threat will not shoot. If participants in these sanctions cannot spell out a clear, realistic vision for Russian behavior that would lead to the sanctions' removal, then the sanctions are astrategic: they serve not as a bridge between the status quo and a desired end, but rather as unthinking punishment.

For these reasons, the United States should have a generally favorable view of an end to the war. Russia has decades of rebuilding to do before its military will even be in the shape it was in in 2021, when, as we now know, it was hardly a juggernaut. To the extent that a reconstituted Russian military presents a military problem in Europe, that should be a problem *for* Europe. To pose a nonnuclear military danger to the United States, Russia would need a military that could threaten the industrial heartland of Europe. We now know that even at the war's outset, the Russian military posed no such threat. To the extent that smaller NATO allies like the Baltic states implicate U.S. national security, they do so exclusively because the United States willfully chose to underrate their vulnerability and overrate their value to the alliance.

Meanwhile, a host of issues in U.S.-Russia relations do implicate U.S. security interests. Arms control, China's growing military, and efforts to create a stable, sustainable security architecture in Europe should not be tossed aside in favor of policies that heighten Russian fears and the risk of U.S.-Russia conflict. Moscow is unlikely simply to recede from European security affairs as it did in 1991. U.S. policymakers need to prioritize their interests and establish a more realistic, attainable set of objectives concerning Russia. But it is difficult to think any progress can be made on any other issues until the war in Ukraine ends.

Demanding that Russia surrender to Ukraine and retreat to the February 24, 2022, borders seems almost certainly implausible. So, too, are calls for the United States to somehow push for Vladimir Putin to be removed from power and prosecuted for war crimes, though his forces have unquestionably committed them. Unfortunately, the United States is likely to be dealing with the Putin government (or a similar successor) for an extended period.

Rightly or wrongly, Russia perceives itself as having been threatened by NATO and European Union expansion for decades. That belief shapes its behavior. No amount of cajoling or insistence has changed that belief or is likely to change it. As the current CIA director William Burns wrote to his then boss Condoleezza Rice in 2008: "Ukrainian entry into NATO is the brightest of all redlines for the Russian elite (not just Putin). In more than two and a half years of conversations with key Russian players, from knuckle-draggers in the dark recesses of the Kremlin to Putin's sharpest liberal critics, I have yet to find anyone who views Ukraine in NATO as anything other than a direct challenge to Russian interests."

Given the low security stakes for the United States in Eastern Europe and the high stakes for Russia there, combined with the much higher U.S. priorities at home and elsewhere in the world, Washington should make clear to Kyiv that it has little desire to fund the Ukrainian resistance over the long term or with little prospect of an end to the war. Washington should quietly encourage Kyiv to start thinking about the terms on which it would begin negotiations, and the terms on which it would conclude them.

Russia and the United States cannot simply wish each other away. With a permanent seat on the UN Security Council, the largest nuclear arsenal on Earth, and the ability to project power into formal treaty allies of the United States, Russia will continue to complicate U.S. policy. The knowledge that Russia cannot militarily threaten U.S. national security in the policy-relevant future should provide some flexibility for finding a way out of the war in Ukraine and toward a sustainable European security architecture.

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—Prepared by Justin Logan

30. U.S. POLICY TOWARD LATIN AMERICA

Policymakers should

- facilitate dollarization for any country that wishes to adopt the dollar as its national currency;
- merge all hemispheric trade agreements into a single Free Trade Area of the Americas;
- end the federal ban on marijuana to allow imports from Latin America as a first step to end the hemispheric war on drugs; and
- get rid of tariffs for Latin American agricultural products.

Latin America has witnessed dramatic political swings in the past several years. Between 2015 and 2018, the first wave of "21st-century socialism" seemed to have been defeated. In Venezuela, the opposition took control of the National Assembly; Argentine voters got rid of the Peronist government; in Chile and Colombia, center-right candidates won presidential elections against communist-backed opponents; and in 2019, massive protests and the loss of support from the military forced Evo Morales, the left-wing Bolivian strongman who had been in power since 2006, to flee the country after carrying out a fraudulent election. Since then, however, the so-called pink tide—as some referred to the succession of far-left, anti-American governments that came to power in the 2000s—has returned with a vengeance.

The Maduro regime remains in power in Venezuela, a formerly rich country that is now poorer than Haiti, and the opposition has little or no chance of gaining power democratically. In Argentina, former president Mauricio Macri failed to curb public spending or inflation, thus paving the way for a return to Peronism in 2019. In Chile, the most successful economy in the region since the 1980s, former president Sebastián Piñera yielded to violent protests in 2019, when he decided to hold a referendum on whether to uphold the current constitution. In a landslide, voters opted for a constitutional convention. In 2021, Gabriel Boric, a progressive parliamentarian, comfortably won the presidential election in a runoff and formed a coalition with, among others, the

Communist Party. In Bolivia, Morales's Movement for Socialism returned to power in 2020, when his former finance minister was elected president. In Colombia—where the United States has spent $12 billion in failed anti-drug efforts since 2000—Gustavo Petro, a former guerrilla fighter and adviser to Hugo Chávez, was elected president in June 2022.

Even in Peru, where free-market reforms had led to some of the most significant economic and social progress in the region during the past three decades, the 2021 presidential campaign ended with the victory of Pedro Castillo, a union leader who represents a Marxist-Leninist party. In Brazil, former Workers' Party president Lula Da Silva (2003–2010), who was jailed because of the Odebrecht corruption scandal, was returned to power in the October 2022 election over the embattled firebrand Jair Bolsonaro, who promised a free-market revolution but failed to privatize state monopolies as he implemented a wide array of subsidies and handout schemes. Mexico, the largest Spanish-speaking Latin American country, has itself turned toward a populist, highly centralized rule with a greater involvement of the military in the economy under Andrés Manuel López Obrador, the current left-wing president. Among other heavy-handed measures, López has reversed his predecessor's much-needed liberalization of Mexico's energy sector.

The Return of Protectionism

The new leftist governments in Chile, Colombia, Mexico, and Peru all embrace trade protectionism, raising questions about the future of the Pacific Alliance, a promising bloc formed in 2011 to abolish all barriers to the free movement of goods, services, capital, and people among its four original member states. Ecuador is set to join the bloc in 2023, and several other Latin American countries have expressed interest in full membership. In early 2022, Singapore became the first associate member, as the bloc seeks to increase its trade with Asia. In 2016, the protocol that eliminates tariffs on 92 percent of the products traded within the bloc went into effect, and it stipulates that the remaining 8 percent will be phased out by 2030.

The Pacific Alliance requires firm commitments to freer movement of goods and people, and it only admits as members those nations that agree to fully comply with its ambitious goals. It is uncertain, however, whether protectionist governments will press ahead with the bloc's liberalizing mission. Peru's Castillo, for instance, invoked economic nationalism in his promise to renegotiate all of his country's free trade agreements (FTAs), including that signed with Mexico, a cornerstone treaty of the Pacific Alliance. In Colombia, Petro promises to renegotiate all of the country's FTAs, including that signed with the United States.

Similarly, Chile's president, Gabriel Boric, promised to alter his country's FTA with the United States so as to saddle American investors with a list of local content requirements. Such thinking marks a clear contrast with former Chilean governments, even those of the center left. After all, it was the administration of Ricardo Lagos, a social democrat, that signed Chile's landmark FTA with the United States in 2004, less than a decade after Mexico had officially entered the North American Free Trade Agreement in 1995. Thereafter, Washington negotiated trade deals with the Central American nations and the Dominican Republic (2006–2009), Peru (2009), Panama (2012), and Colombia (2012).

In the short term, these agreements consolidated any previous market access and set common standards on rules of origin and nontariff regulations. Meaningful market openness was meant to take place in the ensuing decades, as the lengthy periods of tariff phaseouts were completed. A similar process arose between numerous Latin American countries and Canada, China, and the European Union, among others. During the next few years, there will likely be a relapse into protectionism after two decades of liberalized trade in the hemisphere and beyond.

Commodities and Fundamental Reforms

Not for the first time in recent history, Latin America's shift to authoritarian, interventionist regimes is coinciding with a massive upswing in commodity prices, a rise exacerbated by Russia's invasion of Ukraine. The current commodities boom might be the initial stage of a secular bull market in a series of Latin American exports, such as oil, gas, copper, beef, and soy. This means that, after years of relatively low prices, there are now strong tailwinds behind many of the region's economies. According to CERES, a Uruguayan think tank, the countries that stand to benefit most under the current macroeconomic circumstances are the net exporters of both energy and foodstuffs, namely Argentina and Brazil. Net exporters of one of the two—for example, Colombia in the case of oil, Paraguay of food—will benefit to a lesser extent. Meanwhile, the net importers of both energy and food are poised to struggle.

As in previous cycles, the commodities boom is benefiting those Latin American governments that can impose windfall taxes on extractive industries or exploit natural resources directly through state-owned companies, such as Brazil's Petrobras or Argentina's YPF oil concern. Although accelerated growth will offset the sharp COVID-19–induced GDP decline of 2020, the bonanza will also tempt governments to spend beyond their means, increase debt levels, expand state payrolls, and multiply subsidy schemes in order to increase their political support, all at the expense of fiscal discipline and much-needed structural reforms. In the past, high commodity prices have concealed even the most destructive forms of collectivism, as was the case during much of Hugo Chávez's presidency in Venezuela (1999–2013), where $1 trillion in oil revenues did not suffice to avoid a debt-fueled, self-induced economic catastrophe.

Even if Venezuela's precipitous economic collapse is unlikely to be replicated, most Latin American economies still have underperformed because of weak property rights, rigid labor laws, and a predominance of anti-business regulations. They tend to tax companies heavily and maintain substandard public education systems, which are under the monopolies of ideologized teachers unions. Reforming these key sectors is essential to increase formal employment rates, attract foreign investment, and train a workforce that can compete in the 21st-century economy. Doing so, however, has usually not been a priority for the region's governments, much less for those that have recently come to power.

Liberal Democracy

After decades of progress, liberal democracy is under threat in the region; illiberal regimes are more commonplace, and dictatorships have taken root. Cuba's tyranny and its satellites in Venezuela and Nicaragua continue to oppress their own people with utmost brutality. This fact came briefly to the world's attention in 2021, when the Cuban regime crushed a rare outburst of mass protests in favor of democracy and economic liberties. For his part, Nicaragua's Daniel Ortega incarcerated all his main political opponents before a presidential election. This action came a mere three years after the so-called Mother's Day massacre of 2018, when the Ortega regime killed 15 anti-government protestors and left nearly 200 wounded.

These regimes are bent on expanding their influence across the region, as was evident with Venezuela's open support for organized street violence and attacks against urban infrastructure in Santiago, Bogotá, Quito, and other cities between 2019 and 2021. The Maduro regime had already destabilized its neighboring countries by causing the humanitarian collapse that, amid widespread shortages of food and medicines, led 6.5 million people to leave Venezuela as refugees—an exodus that placed severe pressure on the poorly financed health and education systems of the nearest South American countries.

Even within Cuba's sphere of influence, however, it is evident that not all regimes of 21st-century socialism, a preferred term of Hugo Chávez, are created equal. Venezuela followed much of Cuba's communist recipe, with rigid exchange, price, and capital controls; the nationalization of farms and entire industries; monetary debasement and uncontrolled public spending; and the military in charge of central economic planning. In Argentina, the left-wing administrations of the late Néstor Kirchner and his successor—and wife—

Cristina Fernández became increasingly authoritarian as they implemented some policies similar to those of Venezuela, such as nationalizations, currency and exchange controls, and unsustainable levels of public spending financed by inflation. Nevertheless, republican institutions largely withstood the onslaught, to the extent that voters were able to defeat Peronism in 2015.

Other left-wing governments eroded property rights and civil liberties while stopping short of the economic precipice. In Bolivia, Evo Morales nationalized energy companies, public utilities, and airports as he got rid of most institutional checks on his presidential power. Nevertheless, he shied away from price controls early in his presidency, thus avoiding widespread shortages. Morales built the world's largest foreign exchange reserves as a proportion of GDP. He even pegged the local currency to the U.S. dollar, thus helping achieve low inflation levels. In Ecuador, former president Rafael Correa likewise set up an authoritarian presidency, got rid of term limits, and severely curbed press freedom. But he was unable to undo the country's successful policy of dollarization, which 89 percent of citizens supported in a 2020 poll. Nicaragua's Daniel Ortega has maintained a significant degree of fiscal discipline and economic freedom—including the country's FTA with the United States—even as he sent hundreds of dissidents to jail and his regime killed many more. In 2016, the International Monetary Fund closed its office in Managua because of "Nicaragua's success in maintaining macroeconomic stability and growth." Not all the region's declared socialist leaders practice orthodox socialism.

Foreign Policy

With regard to foreign policy, Cuba, Nicaragua, and Venezuela do see eye to eye, and they have formed alliances with the world's most powerful authoritarian states. This action has led to a type of meddling in other countries' affairs that transcends regional geopolitics. Russia, for instance, has armed the Venezuelan regime heavily and used its territory to destabilize Colombia, a longtime U.S. ally whose guerrilla insurgencies receive clandestine support from Moscow. For its part, China has also helped prop up the Maduro regime, but its influence in Latin America extends much further. In fact, China recently became Latin America's top trading partner, with strategic investments in infrastructure, minerals, and agricultural commodities across the region. Although the United States' autocratic adversaries have been gaining ground in the Western Hemisphere, the postpandemic era offers numerous opportunities to strengthen America's ties with Latin America and serve as an attractive example of liberal democracy.

According to the International Monetary Fund, Latin America is uniquely positioned to ease the global food, metal, and energy shortages that Russia unleashed with its war against Ukraine. For its part, *The Economist* argues that "the capriciousness of Chinese regulators, the tangled state of global trade and the trend towards reshoring and nearshoring" make Latin America an ideal location to supply the United States and vice versa. Regional economic integration should be a priority, and thus the United States should promote "lower trade barriers, harmonize provisions across . . . trade agreements and clear up onerous customs procedures."

On the other hand, Washington should avoid greater political interference, military aid, and bilateral aid packages. In fact, sending large amounts of U.S. taxpayer money to countries with serious institutional flaws not only fails to solve the recipient nations' problems, but also can exacerbate them. A good example was seen in the "Northern Triangle" countries of El Salvador and Honduras, whose grades in the Rule of Law dimension of the World Bank's Worldwide Governance Indicators deteriorated in the 2010s. Meanwhile, both countries were receiving hundreds of millions of dollars in U.S. aid from the Millennium Challenge Corporation, supposedly for fighting corruption and improving governance. Instead of spending money on costly and counterproductive aid packages, policymakers should consider how Washington's war on drugs contributes to instability and corruption in Central America, especially as regimes with authoritarian tendencies, such as that of Nayib Bukele in El Salvador, take root.

Trade, Not Aid

U.S. lawmakers should also focus on allowing American businesses and consumers to strengthen their trade links with their Latin American counterparts. One obvious area in which unilateral liberalization would offer considerable opportunities for Latin American producers, while benefiting American consumers, is agriculture. Take the case of the U.S. sugar program, which, as the Cato Institute's Colin Grabow notes, manipulates the internal market so that "domestic sugar prices . . . are typically twice those of the world sugar market." The program's arbitrary loan rates, overall allotment quantities, and tariff-rate quotas increase prices for American sugar consumers and businesses that use sugar in their production process, some of which have moved their operations to Mexico because of that country's privileged access to the U.S. market through the United States-Mexico-Canada Agreement. Scrapping the program altogether would open the American consumer market, one of the world's largest, to companies in other sugar-producing countries in the region, among them Brazil, Colombia, Guatemala, and Peru.

Access to the nascent legal marijuana market in the United States also would benefit Latin American nations. As Congress debates a series of bills to end the federal prohibition of the substance, policymakers should consider eliminating all restrictions to imports of marijuana and marijuana-based products. Doing so would offer myriad opportunities for investment, job growth, and wealth creation in Latin American countries with a competitive advantage in cannabis production.

Free trade with Latin America, however, should go beyond specific industries or even the existing free trade agreements between the United States and several countries, which include the Pacific Alliance nations as well as those of Central America and the Dominican Republic. In 2005, Argentina, Brazil, and Venezuela—which are members of the Southern Common Market (Mercosur), a protectionist tariff union—killed the idea of a hemisphere-wide free trade area stretching from Alaska to Patagonia. However, there is now an opportunity for a substantial hemispheric trade agenda, especially since Uruguay, also a Mercosur member, is seeking a bilateral FTA with the United States, even if this takes place outside the Mercosur tariff union structure. Lawmakers should take advantage of the occasion; a trade agreement with Uruguay could lead quickly to others with Paraguay and even Brazil, the region's largest economy. In early 2021, in fact, Brazil's President Bolsonaro requested a free trade agreement from President Biden. Eventually, the liberalization of Mercosur—or, alternatively, its fracturing—could even result in free trade between the United States and Argentina.

Since the countries that have free trade agreements with Washington also have similar deals among themselves, there is already a fragmented version of a Free Trade Area of the Americas (FTAA) despite some gaps. One obvious problem with the current pattern of FTAs is the so-called spaghetti bowl effect, a term coined by economist Jagdish Bhagwati to describe a multitude of trade agreements with different rules of origin, tariff schedules, and nontariff regulations. The United States should lead an effort to merge all the regional free trade agreements into a single FTAA, at least for the nations willing to be part of it. The negotiations could also help complete those missing links in the hemispheric trade jigsaw puzzle. The FTAA would leave the door open for other Latin American countries that might want to join in the future.

During the 2022 Summit of the Americas in Los Angeles, Biden inaugurated the Americas Partnership for Economic Prosperity, an agenda whose talking points include "reinvigorating regional economic institutions," "creating clean energy jobs and advancing decarbonization and biodiversity," and "ensuring sustainable and inclusive trade." However, the initiative does not mention free trade, and critics are correct to point out that it amounts to an attempt to update the social contract between governments. What the region truly needs, however, is a concerted effort to allow a much greater degree of commercial interaction between the people of the Americas. Such an effort requires reducing tariffs, increasing market access, and promoting genuinely free trade across the hemisphere.

U.S. Policy toward Cuba

During the past decade, the United States has enacted considerable changes in its policy toward Cuba, but their economic impact has been largely symbolic. American tourists were allowed to travel to the island regularly on commercial airlines, cruise ships, and ferries. Remittances also increased considerably as limits were lifted. These were steps in the right direction, since curbs on commercial and personal liberties likely harm ordinary Cubans as much as the communist regime itself. Besides, for well over half a century, the embargo has served as one of the Cuban regime's main tools of propaganda, allowing it to pose as a victim of American aggression. However, as William Leogrande of American University writes, the reforms have left "the core of the economic embargo . . . intact," since only pharmaceutical and telecom companies can enter joint ventures with the Cuban state, while U.S. exports are "still limited to agricultural, medical, and some consumer goods."

Politically, recognizing and legitimizing Cuba's dictatorship turned out to be mistaken and harmful, especially as the communist regime carried out a de facto takeover of Venezuela. It was also a mistake to end the so-called wet foot, dry foot policy, which allowed Cuban refugees who reached U.S. soil to remain in the country and obtain green cards. This measure eliminated a valuable escape route from repression. So, too, did the end of the Cuban Medical Professional Parole Program, which allowed the Cuban health care professionals who are sent abroad on forced labor assignments to defect to U.S. embassies and consulates. These programs should be reinstated.

The United States should build on what the two previous administrations got right while avoiding the mistakes of each. Policymakers should undo all commercial and travel restrictions and allow as much free trade as possible with Cuban citizens. Washington should also avoid any public embrace of the Cuban dictatorship, which should not mean engaging in hostilities. The approach should be simple: oppose, pressure, and denounce the Cuban dictatorship—but allow American commerce, tourism, and money transfers to benefit ordinary Cubans.

Currencies

One sure way to bring economic benefits to the Latin American population is an increased use of the U.S. dollar. In Ecuador, a perceived threat to the country's dollarization was likely an important factor in the presidential elections of 2021, when voters rejected a Rafael Correa–backed candidate and chose the pro-market Guillermo Lasso instead. Dollarized Panama, which has had the highest GDP per capita growth in Latin America during the past several decades, has not swung to political extremes since the return of democracy in 1989.

As Ecuadoreans, Panamanians, and others can attest, full dollarization is a clear safeguard against the type of inflationary chaos that has become prevalent in Venezuela and Argentina. Dollarized countries, in fact, are the region's best performers in staving off inflation, both in the long term and during the current, post-COVID-19 inflationary bout. Contrary to what dollarization's opponents claimed, in fact, higher inflation levels in the United States have not translated into equal price increases in the dollarized nations of Latin America, a factor that is rarely mentioned in the financial press.

Even less discussed is the fact that, in countries that have managed to keep inflation under relative control, dollarization—or dollar parity—also protects citizens' savings from strong, chronic bouts of currency devaluation. In fact, a sharp devaluation of the local currency against the dollar is a common but underappreciated factor of social unrest in nations that have recently turned to the hard left or may be about to do so. At the time of writing, the Peruvian sol and the Mexican peso had, respectively, lost 69 percent and 66 percent of their value against the dollar in the decade since May 2012. Meanwhile, currency devaluation in Brazil, Colombia, and Chile ranged between 38 and 57 percent during the same period.

Certainly, more governments should consider the option to dollarize as inflation returns to the region. After two decades under relative control, inflation contributes yet again to high levels of poverty, inequality, and economic instability, bringing to mind the region's seven episodes of hyperinflation from the 1970s through the 1990s. In Latin American countries with weak currencies, dollarization would curtail inflation, end currency risk, reduce interest rates, and help stimulate investment and growth. The United States should neither discourage nor encourage dollarization, but rather facilitate the process where it occurs. That strategy may mean sharing the dollar's seigniorage—the profit that derives from printing currency—with countries that decide to dollarize. In that way, the United States would neither gain nor lose money as a result of another country's decision to dollarize, but the dollarizing country might more easily dollarize if it could still earn seigniorage from the currency it uses.

Tech and Capital Markets: Positive Developments

Amid Latin America's difficulties, positive signs can be found in Uruguay and in the Latin American technology sector. During the COVID-19 pandemic, Luis Lacalle Pou, Uruguay's president, rejected the call for wealth taxes, kept businesses open, and defended individuals and entrepreneurs, not the central government, as the drivers of economic growth and progress. In recent years, there has been an impressive rise of technology startups in Latin America valued at more than $1 billion in market capitalization—including Uruguay's own dLocal, a Nasdaq-listed "unicorn."

By the end of 2021, Latin American entrepreneurs had produced 34 unicorns. Several of them operate in the financial technology sector, where they are disrupting many of the region's banking oligopolies by offering customers better services at lower prices. Much of the investment in these companies, most of which are based in Brazil, comes from American venture capitalists and VC firms, such as Y Combinator. Also, U.S. technology companies have intensified their hiring of staff in Latin America as the postpandemic, remote work revolution increases its pace. In February 2022, Bloomberg reported a 156 percent increase in "the number of foreign companies hiring from Latin America, the most of any world region, with software engineers leading the recruiting rally." These initiatives are proving that capital markets and private businesses are far more successful at creating positive change in Latin America than U.S. foreign aid and other government programs. As such, legislators should favor actions that facilitate U.S. trade and investment in Latin America over state-led endeavors.

End the Hemispheric War on Drugs

Washington should take concrete steps to end its destructive war on drugs in the region, which works at cross-purposes with important U.S. policy priorities. In drug-source and transit countries, such as Colombia, Mexico, and the Central American and Caribbean nations, the drug war is fueling corruption and violence, undermining the rule of law, and otherwise debilitating the institutions of civil society. According to 2020 figures published by the United Nations Office on Drugs and Crime, 8 of the 10 countries with the highest intentional homicide rates in the world were located precisely along the cocaine route from the Andes to the United States. These include Central American transit countries (El Salvador, Honduras, and Belize) and the island nations that serve as jumping points along the transit routes to the U.S. mainland. In Mexico, drug violence claimed 125,000 to 150,000 lives between 2006 and 2018.

The effect of the U.S.-led war on drugs south of the border has been imperceptible in the United States, but its consequences in Latin America are completely at odds with Washington's stated goal of encouraging free markets and civil society. As stated earlier, proceeding with federal marijuana legalization and permitting imports of the drug from Latin America would be a good beginning. (See "The International War on Drugs.")

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—Prepared by Daniel Raisbeck

31. U.S. POLICY TOWARD SUB-SAHARAN AFRICA

Congress should

- expand the Africa Growth and Opportunity Act by granting tariff- and quota-free access to all imports from sub-Saharan Africa;
- end U.S. farm subsidies that undermine African producers and keep food prices in the United States unnecessarily high;
- discontinue bilateral aid to African governments and oppose International Monetary Fund and World Bank lending to the governments in the region;
- discontinue the U.S. Africa Command, which might draw the United States into more conflicts and be viewed by Africans as a neocolonialist venture; and
- be realistic about the efficacy of "smart sanctions" to force positive change, but continue to use them against leaders who are under suspicion of corruption and human rights abuses.

Sub-Saharan Africa (hereafter “Africa”) consists of 46 countries and 9.4 million square miles. With a population of 1.13 billion, more than one in seven people on earth live in Africa. The continent’s share of the world’s population is bound to increase because Africa’s fertility rate remains higher than elsewhere. If current trends continue, there will be more people in Nigeria than in the United States by 2050.

Africa is the world’s poorest continent, but it is no longer a “hopeless continent,” as *The Economist* described it in 2000. Since the start of the new millennium, average per capita income adjusted for inflation and purchasing power parity rose by more than 30 percent. Between 1999 and 2019, Africa’s GDP growth rate has averaged 4.2 percent per year, not only because of high commodity prices but also because of better economic policies.

Increasing wealth has led to improvements in key indicators of human well-being. In 1999, 59 percent of Africans lived on less than $1.90 per person per day. By 2018, 40.4 percent lived on that income—while the population rose from 613 million to 1.13 billion. If the current trends continue, Africa's absolute poverty rate will fall to 29 percent by 2030.

Life expectancy rose from 50 years in 2000 to 62 years in 2019. Infant mortality declined from 91 deaths per 1,000 live births to 50 deaths over the same period. When it comes to HIV/AIDS, malaria, and tuberculosis, the occurrence, detection, treatment, and survival rates have all improved. Food supply is around 2,500 calories per person per day (the U.S. Department of Agriculture recommends consumption of 1,900 calories for moderately active women and 2,500 calories for moderately active men), and famines have disappeared outside of war zones.

In 2019, before the socioeconomic impact of COVID-19 and the associated lockdown policies, primary, secondary, and tertiary school enrollments were at all-time highs. After a modest decline in 2020 and 2021, enrollment rates are rebounding.

Africa's improvement across a range of metrics of human well-being was so substantial in the first decade of this century that, in contrast to its analysis in 2000, *The Economist* described the region as "the hopeful continent" in 2011.

Compared with previous decades—when much of the continent eschewed globalization, competition, free trade, foreign direct investment, and multinational corporations—an increasing number of African governments appreciate the benefits of participating in a global economy. Economic freedom has grown since the start of the new millennium, and the business environment has improved. These trends may well continue in this decade.

Conversely, there has been no substantial improvement in the quality of Africa's political institutions. The quality of the rule of law and the amount of corruption in the public sector are strikingly similar to 2000 levels. Similarly, political and civil freedoms have not noticeably improved.

Africa's demographic and economic expansion will present the United States with unique opportunities and challenges. Africa's natural resources, including minerals and metals, will remain important. Similarly, given that the continent is home to 60 percent of the world's arable land, its agricultural output could become more substantial thanks to increased population and improved farming techniques. Finally, the rising affluence of the African consumer will make the continent more lucrative to American businesses.

Whatever challenges pertaining to Africa's economic and institutional development remain, Americans need to recognize that the ability of the United States to influence Africa's politics and economics is limited. Most of Africa's developmental challenges are caused by domestic factors that require domestic solutions.

Domestic Reforms

Much of Africa's postcolonial history was marred by governments' mismanagement of the economy. In the second half of the 20th century, many leaders of newly independent states embraced a form of "African socialism," and central control of economic activity became the norm. That development strategy proved not to be conducive to economic growth.

Debilitating inflationary monetary policies; price, wage, and exchange rate controls; and marketing boards kept the prices of agricultural products artificially low and impoverished African farmers. State-owned enterprises and monopolies were commonplace. In many states, the embrace of statist policies created oversized bureaucracies and helped perpetuate one-party governance.

After the fall of the Berlin Wall, that began to change. Socialism lost much of its appeal, and the Soviet Union, which bankrolled and protected many African dictatorships, fell apart. As a result, dozens of African states were integrated into the global economy. Between 1990 and 2019, economic freedom, as measured by the Fraser Institute in Canada, rose from 4.74 out of 10 to 6.40. Freedom to trade rose even more, from 4.36 to 6.26. Africa has also made much progress in monetary policy, or access to sound money, which rose from 5.25 to a remarkable 7.55 over the same period.

Africa has made similar strides in microeconomic policy. As the World Bank's *Doing Business* report indicates, Africa's regulatory environment is much improved. Starting a business, for example, is much easier than in the past, having risen from a score of 41.1 out of 100 in 2004 to 80.1 in 2020. Construction permitting, resolution of insolvencies, access to electricity, ease of paying taxes, time to register property, and getting credit have all improved considerably.

Some countries have adopted more democratic constitutions that include term limits and other legislative and institutional checks on the executive branch of government. In the Varieties of Democracy Project's Liberal Democracy Index, Africa's score rose from 0.15 in 1990 to 0.29 in 2021, of a perfect 1.0.

Unfortunately, many African rulers have found ways to circumvent constitutional checks and balances and to remain in power and abuse that power. According to the World Bank, corruption continues to thrive among government officials and, importantly, among members of the judiciary. Consequently, rule of law indicators for African countries have remained largely unchanged and in some instances have marginally declined. Africa's economic potential will always remain unfulfilled without efficient and impartial courts.

That said, as experience in other regions shows, institutional development tends to lag behind economic reforms. In the long run, the growth of the African middle class, which is growing in large part thanks to increased economic liberalization, could yet result in a political awakening, a greater assertiveness of the African populace, and eventual widespread democratization.

Free Trade

The United States can help Africa by further opening its markets to African exports. Congress took a step in the right direction by adopting the Africa Growth and Opportunity Act (AGOA) in 2000, which provides unilateral duty-free exports for 6,500 products from Africa. In 2015, AGOA was extended until 2025. Today, 36 African countries remain eligible to export to the United States under the terms of AGOA. The president annually reviews the AGOA membership list, with eligibility criteria based on a range of issues, including governance, domestic policies, workers' rights, and human rights. In December 2021, for example, President Biden removed three African states from AGOA.

The benefits of free trade are political as well as economic. First, free trade and concomitant job growth can help create political stability in poor countries, thus making those countries less susceptible to extremism and more capable of eliminating terrorist cells aimed at harming the United States. Second, trade increases specialization, which leads to increased productivity. Reductions in the cost of production lead to cheaper goods and services, which, in turn, increase the standard of living for Americans and Africans alike.

Unfortunately, Washington limits the economic benefits of AGOA in two specific ways. First, some quotas predate AGOA and were not amended by the legislation. Second, AGOA excludes some agricultural products from duty-free access, including sugar, tobacco, peanuts, dairy, beef, and processed agricultural goods, such as dried garlic, canned peaches, and apricots.

Since the United States does not, by and large, produce the same kinds of goods and services as AGOA countries do, further trade integration is politically feasible and unlikely to run into heavy protectionist sentiment.

Agricultural Subsidies

In addition to making AGOA more comprehensive, the U.S. government should stop subsidizing the American agricultural sector. The 2018 Agriculture Improvement Act (2018 Farm Bill), which amended the 2014 Farm Bill, is expected to cost the taxpayer $428 billion between 2019 and 2023. In 2020 alone, farmers derived almost 40 percent of their income directly from U.S. government subsidy schemes.

By artificially lowering the price of U.S. farm goods, farm subsidies increase the price of foreign goods relative to U.S. goods and reduce imports. Ending farm subsidies would make some agricultural products exported by African countries more competitive, would increase African farm incomes, and would reduce poverty in Africa. Doing so is especially important considering the foundational role agriculture has historically played in economic development.

Aid and Debt

The Nobel Prize–winning economist Angus Deaton has noted, "If poverty is not a result of lack of resources or opportunities, but of poor institutions, poor government, and toxic politics, giving money to poor countries—particularly giving money to the governments of poor countries—is likely to perpetuate and prolong poverty, not eliminate it." That is an especially accurate description of aid to Africa.

Instead of stimulating private-sector growth, as a 2005 working paper published by the International Monetary Fund (IMF) put it, there is ample long-term evidence that "aid inflows have systematic adverse effects on a country's competitiveness." Aid increases the size of government and enables government officials to embezzle large amounts of money, misspend much of it on loss-making projects, or increase military expenditures. Indeed, in 2012, the then World Bank president Ban Ki-moon claimed that 30 percent of development aid "failed to reach its final destination," and Paul Collier, an economist at the University of Oxford, has estimated that 40 percent of Africa's military spending is inadvertently financed by aid.

Crucially, by making recipient governments more accountable to aid agencies rather than their citizenry, aid has served as a disincentive to economic and political reforms. Even researchers from the World Bank, in a study conducted between 1975 and 2000, have acknowledged that they could find no evidence that aid promoted democracy. Today, most researchers agree that economic growth depends on market-oriented domestic policies, not aid.

Since most African nations gained independence in the 1960s, the region has been one of the largest aid recipients per capita. Yet the region's growth rate averaged 1.7 percent per year during the final 20 years of the past millennium and has averaged 4.3 percent since the start of the new millennium. The difference in the growth rates then and now is not due to the increased amount of aid but rather to high commodity prices and domestic reforms.

Considering the negative consequences of aid and the precarious state of American finances, it is surely time to stop transferring financial resources to governments abroad. The sums are not trivial. In 2019, the most recent year for which comprehensive data are available, the U.S. Agency for International Development (USAID) spent $48.1 billion globally, with disbursements to Africa amounting to $12.0 billion—far more than 20 years earlier. In 1999, only one African country appeared among USAID's top 15 aid recipients. In 2019, there were six.

If Congress insists on spending resources on African projects, developing human capital might deliver greater dividends than giving money to African governments. More African judges and lawyers, for example, might benefit from observing the workings of an efficient and impartial judiciary in the West. Similarly, African businessmen and women might benefit from easier travel to and work in the United States, thereby learning best business and accounting practices. Congress could help build Africa's human capital by relaxing visa and work requirements for Africans. Doing so would make it easier for private organizations to offer scholarships and apprenticeships to qualified applicants.

Aside from bilateral aid, Washington also participates in multilateral aid schemes overseen by various international institutions, including the World Bank, the African Development Bank, and the IMF. Those multilateral institutions have often backed unsavory African regimes engaged in human rights abuses and gross macroeconomic mismanagement. And although the World Bank's structural adjustment programs and IMF lending were designed to provide credit in exchange for reforms in the region, African compliance with lending conditions has been poor or nonexistent.

The World Bank and the IMF do not have the ability to enforce compliance with their loan conditions. Yet both agencies keep lending, and Africa's debt continues to accumulate. Under the Heavily Indebted Poor Countries Initiative, 30 of the 37 eligible countries worldwide are in sub-Saharan Africa and receive some form of debt relief amounting to tens of billions of dollars. Consequently, Africa's general government gross debt-to-GDP ratio fell from 61 percent in 2000 to a low of 23 percent in 2008. Since then, the ratio has climbed back up to 56 percent in 2021.

Unlike in the past, when African governments borrowed almost exclusively from official creditors, such as the World Bank and the IMF, today Africa owes about 45 percent of its $700 billion debt to private creditors. This is a step in the right direction because private lenders tend to be more circumspect when lending money to African countries and more insistent that African governments fulfill their commitments to reform and repayment. The discipline that markets impose on historically irresponsible governments would be much enhanced if official aid to Africa ceased.

China

In 2008, *The Economist* published an article titled "The New Colonialists," which bemoaned the supposedly massive Chinese expansion in Africa. According to the article, many Western politicians worried about "losing Africa to China." In 2015, *The Economist* published a follow-up story titled "Not as Easy as It Looks." The article noted, "Western worries about China's burgeoning influence in Africa may be overblown." Yet in 2022, the magazine was back to "How Chinese Firms Have Dominated African Infrastructure," noting that "when it comes to building big things in Africa, China is unrivalled." What explains this apparent paradox?

Chinese investment overseas is unusual because some, perhaps most, of China's foreign direct investment (FDI) is driven by the Chinese government's foreign and domestic policy goals, not by the commercial objectives of the Chinese private sector. Consequently, unlike Western lenders, Chinese lenders are often willing to back projects created by African governments that will likely never turn a profit. This approach partly explains why Chinese investment, especially in infrastructure, has ballooned in recent years.

Between 2003 and 2020, annual flows of Chinese FDI to the continent have increased from just $74 million to $4.2 billion. By comparison, U.S. FDI to Africa amounted to just $2.1 billion in 2020. Chinese FDI flows to Africa have been higher than U.S. FDI flows since 2013. Similarly, China has been Africa's largest trading partner since 2009.

Yet Chinese investment in Africa ought to be kept in perspective. The stock of Chinese investment in Africa stood at $44 billion in 2019, making China the fourth-largest investor on the continent. Also note that Africa's trade with the European Union is almost 2.5 times larger than the continent's trade with China.

Moreover, although an estimated one to two million Chinese people live in Africa, that's just 0.09 to 0.17 percent of the people who live on the continent. The combination of the Chinese presence in Africa and Chinese business practices has been accompanied by the rise of African xenophobia, resentment, and many anti-Chinese protests on the continent.

Most importantly, the Chinese have found that doing business in Africa is more difficult than elsewhere. The lack of basic infrastructure (including ports and roads), the byzantine bureaucracy, and the lack of reliable electric supply have hindered some of China's larger ambitions. In 2014, for example, Chinese lenders were quick to provide a $3.2 billion loan for a new Kenyan railway despite the World Bank warning it would never turn a profit. In 2015, the expansion of the new line meant that the loan topped $4.7 billion. Yet so far, the project has lost more than $200 million and has left the Kenyan government loaded with more debt.

Chinese loans to Africa, it seems, are largely driven by the Chinese desire to build a client voting bloc in the United Nations that befits a great power, to invest accumulated capital emanating from Chinese trade surpluses, and to find employment for Chinese labor, rather than sound business considerations. The United States—which already has large international support among democracies and runs huge annual deficits—does not need to "buy" friends and should not try to emulate the Chinese example.

AFRICOM

The U.S. Africa Command (AFRICOM) began operations on October 1, 2007. Today, AFRICOM has approximately 2,000 assigned personnel. About 1,400 people work at the command's headquarters in Stuttgart, Germany. Others are assigned to AFRICOM units at MacDill Air Force Base, Florida, and Royal Air Force Molesworth, United Kingdom. In 2021, AFRICOM had a budget of $277 million.

Unlike America's other regional commands, AFRICOM is not intended merely to manage military planning in its area of responsibility. Instead, AFRICOM's mission is to coordinate with other U.S. agencies, such as USAID, to help African governments establish peace and stability and bring about economic development. AFRICOM's mission assumes not only that American military officers know the causes of Africa's problems, but that they are able to help Africans fix those problems. This assumption is often incorrect. One prominent example of AFRICOM's inability to achieve its stated mission is its failure in Mali. Despite spending millions of dollars on government support and training in Mali before 2011, Mali's government quickly crumbled when faced with an insurgency by al Qaeda–affiliated groups.

Originally, AFRICOM was meant to be headquartered in Africa. But things have not gone as planned. Many African nations proved unsuitable to host AFRICOM because of political instability, ongoing civil wars, or large and unfriendly populations. Other countries saw AFRICOM as a neocolonial adventure necessitated by America's supposed hunger for Africa's natural resources. Nigeria and South Africa, for example, have been vocal in their opposition to the expansion of the American military presence in Africa. Indeed, a 2018 report from the Carnegie Endowment for International Peace found that the American military presence in Africa not only has created backlash against local governments, but has increased resentment of the United States.

Another problem with AFRICOM is the lack of full cooperation from the State Department, which has been reluctant to subordinate U.S. diplomats to the U.S. military. With good reason, the State Department believes that America's African embassies are better places than military bases in Germany from which to engage with African governments.

AFRICOM's advocates say that terrorist organizations, such as al Qaeda, would eventually run much of Africa were it not for the military training that

AFRICOM provides to the African militaries and the water wells it helps dig in African villages. In reality, there has been growing evidence of African and European troops working to ensure stability in the region, without the need of U.S. intervention.

AFRICOM has not had a real impact on America's security. As AFRICOM's commander Marine Gen. Thomas Waldhauser noted before the House Armed Services Committee in 2019, "The threats we are working against aren't necessarily a threat to the homeland and may not be a threat to the region overall . . . even though [some groups] may call themselves Al Qaeda or ISIS, sometimes it's difficult to say they're a threat to the homeland."

Moreover, most Americans oppose the United States' acting as the world's policeman. Given that African conflicts pose no compelling threat to the vital national interests of the United States, AFRICOM should be disbanded, and American troops should return home.

Smart Sanctions

In the past, the United States has often imposed some form of sanctions to punish the perpetrators of gross human rights violations. However, it is important to recognize that few international sanctions have led to policy changes in targeted countries. To the extent that they helped end apartheid, the success of sanctions against South Africa appears to be an exception, not the rule.

There are several reasons for the limited effectiveness of sanctions. Global agreement on imposition of sanctions is difficult to reach and even more difficult to maintain. Moreover, as sanctions against Saddam Hussein's Iraq showed, all too often it is the poor who suffer, not the ruling elite. Should the United States feel compelled to target those leaders in Africa who are strongly suspected of corruption and human rights abuses, it might consider resorting to international arrest warrants, freezing of personal assets abroad, prohibitions on travel, and arms embargos. That said, caution is in order: there is little evidence that such smart sanctions will bring about change in government policies or make the lives of the ruling elite more difficult.

For example, despite smart sanctions being imposed on him and his cronies by the United States in 2003, Robert Mugabe continued to run Zimbabwe for another 14 years. He enjoyed shopping and traveling overseas and had access to the best health care until his death in an expensive private Singapore hospital in 2019. At home, he used "American sanctions" to stoke anti-Western sentiments and blamed the United States and other Western powers for Zimbabwe's economic problems. In many cases, international sanctions also create a "rally 'round the flag" effect, whereby support for domestic leaders increases in time of hardship or other crises.

Today, Mugabe's successor Emmerson Mnangagwa has smart sanctions imposed on him. Yet Mnangagwa continues to travel internationally using expensive private jets, receives treatment in private hospitals abroad, and despite little evidence to the contrary, like Mugabe, he continues to blame Zimbabwe's weak economic performance on U.S. and EU sanctions.

Ultimately, the chief responsibility for the quality of government on the African continent rests with the African people, not with the well-meaning Americans.

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—Prepared by Marian L. Tupy and Alexander C. R. Hammond

32. COUNTERING TERRORISM IN THE UNITED STATES

Policymakers should

- begin all security policy discussions with an elemental question: "How safe are we?";
- consider that, even with 9/11 included in the count, an American's chance of being killed by a terrorist is about 1 in 4 million per year;
- be wary of counterterrorism policies that are not backed up by the sound analytic procedures routinely applied to other hazards;
- increase government efforts to perform and publish such analysis, especially in the Department of Homeland Security;
- avoid or cancel the many homeland security programs with costs that outweigh benefits; and
- be aware that the terrorist "adversary" is anything but a mastermind.

When seeking to expend funds and to create policies to deal with any hazard that threatens human life, the single most important question to ask at the outset is also one that is almost never put forward when formulating policy about terrorism. The question is not "Are we safer?" but "How safe are we?"

Assessing the Expenditures

The question can be answered fairly directly. From 1970 to the present, a period that includes, of course, the 9/11 attacks, the odds an American in the United States will be killed by a terrorist (of any sort) are 1 in 4 million per year. For the period since 9/11, the odds are about 1 in 80 million per year. By comparison, the odds an American will be killed in a traffic accident are about 1 in 8,000 per year.

The issue then becomes the one posed shortly after September 11 by risk analyst Howard Kunreuther: "How much should we be willing to pay for a small reduction in probabilities that are already extremely low?" That question can be used as a basis to briefly consider the efficacy of U.S. counterterrorism expenditures.

Questions like Kunreuther's are too rarely asked within the U.S. government. In 2010, a careful assessment by a committee of the National Academy of Sciences concluded that domestic counterterrorism funds were being expended without serious analysis of the sort routinely required in other areas of government, or even the sort carried out by the Department of Homeland Security (DHS) itself for natural hazards. The committee said it could not find "*any* HS risk analysis capabilities and methods" adequate for supporting its counterterrorism decisions. The report seems to have generated no media coverage at all.

The situation about which the committee warned continues. Extensive and transparent efforts to evaluate the counterterrorism expenditures in the United States are overdue. Instead, alarmist perspectives have essentially been maintained by the department, and the vast and hasty increases in spending on homeland security have been perpetuated.

Applying Various Approaches

It is possible to apply standard cost–benefit and risk-analytic procedures of the sort the National Academy committee called for. These procedures have been developed, codified, and increasingly used as an aid in responsible decisionmaking for the past few decades—or in some respects, for centuries. They have been applied to a wide variety of hazards, including ones that are highly controversial and emotive, such as pollution, chemical power plant accidents, and exposure to nuclear radiation and environmental carcinogens. And they have been *required* by executive order at least since the 1980s.

One of these approaches involves the concept of "acceptable risk," a phrase that has been almost entirely neglected in discussions about counterterrorism expenditures. In practice, risks tend to be deemed acceptable if they cause death for fewer than 1 in 1 million or, in some studies, 1 in 2 million people per year. Hazards that fall into the unacceptable range (traffic accidents, for example) should generally command the most attention and resources, whereas little should be spent to combat hazards in the acceptable range—drowning in bathtubs, for example. The latter should be viewed as a risk we can live with, where further precautions would scarcely be worth pursuing unless they are quite inexpensive.

Terrorism presents a threat to human life in the United States that is much less of a risk than ones we have essentially agreed to accept. And efforts, particularly expensive ones, to further reduce its likelihood or consequences are unjustified. Diverting even a few billion dollars from the homeland security budget toward more smoke alarms, additional tornado shelters, greater car safety, and other effective lifesaving measures would save far more lives.

Another approach is to calculate how many lives domestic counterterrorism expenditures would need to save to be justified. Following widely applied procedures, a study for DHS concluded that the best estimate of the value of a saved human life for homeland security measures would be about $15 million in the case of terrorism. Under that stipulation, domestic counterterrorism spending would be worthwhile if it deterred, disrupted, prevented, or protected against some 4,800 terrorism deaths in the country each year. This figure seems to be very high: Islamist extremist terrorists in the United States have killed about five people a year since 9/11, and far-right and racist terrorists have killed about seven or eight per year.

Still another approach would apply a full cost–benefit analysis to determine how many terrorist attacks the increase in expenditures since 9/11 would have had to deter, disrupt, or protect against to be justified. The number turns out to be quite high: 150 attacks like the Boston Marathon bombing each year—or about one every other day. Or 15 attacks per year like the one in 2005 on the London transportation system—more than one a month. Or about one 9/11 attack every three years. Similarly, the protection of a standard office-type building would be cost-effective only if the likelihood of a sizable terrorist attack on the building is a thousand times greater than it is at present. Assessed on their own, some specific security measures, such as hardening airline cockpit doors, do seem to be cost-effective, whereas others, like the Federal Air Marshal Service, don't.

Is the Low Terrorism Rate a Consequence of the Security Measures?

A defender of current spending might argue that the number of deaths from terrorism is low primarily because of the counterterrorism efforts. However, while the measures should be given some credit, it is not at all clear that they have made a great deal of difference.

To begin with, the people prosecuted on terrorism charges in the United States do not appear to be all that capable. An assessment by RAND Corporation's Brian Jenkins is apt: "Their numbers remain small, their determination limp, and their competence poor." Left on their own, it seems likely that few, if any, of them would have actually been able to cause much damage.

In addition to those prosecuted on terrorism charges, authorities have encountered a considerable number of people who seem to be aspirational terrorists. Lacking enough evidence to convict these individuals on terrorism charges, prosecutors have levied lesser ones to put, or send, these would-be perpetrators away. However, these people are even less likely than those charged with terrorism to carry out attacks.

Finally, it is often argued that many terrorists have been deterred by security measures. It is true that an array of extensive and very costly security measures may have taken one set of targets—commercial airliners—off the target list for just about all terrorists. The same might be said for military bases in the United States, which would otherwise be favored targets since a primary motivation for much terrorism has been outrage at U.S. foreign and military policy.

Nevertheless, a dedicated terrorist should have little difficulty finding other potential targets if the goal is to attack crowds, destroy property, or get attention: potential targets are everywhere. Actually, insofar as many people are actually deterred from committing terrorism, it is likely that that comes from the realization that terrorism simply doesn't work: expressing grievances and outrage in random or semirandom civilian destruction is highly unlikely to productively serve their cause.

Another fear has been that militants who had gone to fight with ISIS or other groups abroad would be trained and then sent back to do damage in their own countries. However, there has been virtually none of that in the United States. In part, the reason is because foreign fighters tend to be killed early (they are common picks for suicide missions); often become disillusioned, especially by infighting in the ranks; and do not receive much in the way of useful training for terrorist operations back home. And recent research by analyst Nelly Lahoud concludes that the once much-feared al Qaeda has been notable mainly for its "operational impotence," while Osama bin Laden, its fabled, if notorious, leader, was "powerless and confined to his compound, over-seeing an 'afflicted' al-Qaeda."

These considerations are based on history, and there is no guarantee that the frequencies of the past will persist into the future. It is possible the United States will soon suffer the frequent mass terrorist attacks that many terrorism analysts predicted after 9/11. However, that tragedy very much stands out as an aberration: no terrorist attack before or since, even in war zones, has inflicted even one-tenth as much destruction. Those who wish to discount such arguments and projections need to demonstrate why they think terrorists will suddenly improve their performance and become capable of massively increasing their violence, visiting savage discontinuities on the historical data.

In the past few years, concerns about domestic terrorism have shifted from Islamists to right-wing groups and individuals. Any terrorist-inflicted death is of course tragic and abhorrent. However, these groups and individuals have not inflicted violence to a degree that is notably higher than that inflicted since 9/11 by Islamist terrorists.

The terrorist threat as it currently exists justifies little of the domestic spending designed to confront it. If, as is likely, policymakers will not undertake large cuts, they should at least require DHS and other agencies to conduct more rigorous cost–benefit analyses of their programs.

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—Prepared by John Mueller

33. NUCLEAR PROLIFERATION

Policymakers should

- consider that nuclear proliferation is unlikely to accelerate or prove to be a major danger;
- seek to dampen excessive alarmism over the issues of nuclear proliferation and atomic terrorism;
- be wary of the potentially destructive consequences of some counterproliferation policies, such as war and economic sanctions;
- understand that one way to reduce the likelihood that errant regimes will seek nuclear arsenals is to stop threatening them; and
- recognize that the likelihood of terrorists' being able to acquire a nuclear weapon is vanishingly low.

The foreign policy establishment has long taken it as a central article of faith that the proliferation of nuclear weapons is an overwhelming danger and that great efforts, including perhaps even war, must be undertaken to keep it from happening. Alarm escalated after the experience of September 11, 2001, which raised concerns that terrorists might obtain nuclear weapons even though the terrorists on that tragic day used weapons no more sophisticated than box cutters.

However, nuclear proliferation is unlikely to accelerate or prove to be a major danger, and terrorists are likely to continue to find that obtaining and then using nuclear weapons is exceedingly difficult. Moreover, aggressive counterproliferation policies can sometimes generate costs far higher than those likely to be inflicted by the proliferation problem they seek to address. Those policies need careful reconsideration.

The Proliferation of Nuclear Weapons

Except for their effects on rhetoric, posturing, and military spending, the consequences of nuclear proliferation have been largely benign: countries that have acquired the weapons have "used" them simply to stoke their egos or to seek to deter real or imagined threats. For the most part, nuclear powers have found the weapons to be a notable waste of time, money, effort, and scientific talent. They have generally kept the weapons quietly in storage and haven't even found much benefit in rattling them from time to time.

Since World War II, there seems never to have been a militarily compelling reason to use nuclear weapons, particularly because it is so difficult to identify suitable targets—or targets that couldn't be attacked just about as effectively by conventional munitions.

Conceivably, however, conditions exist under which nuclear weapons could serve a deterrent function. There have been suggestions, for example, that nuclear weapons may have kept crises between India and Pakistan from escalating further. And it is also argued that North Korea's nuclear weapons may have lowered the likelihood that the United States would attack—although that likelihood has never been terribly high even during the long period before North Korea got its nuclear deterrent. Overall, however, there is little reason to suspect that nuclear weapons have been necessary to deter war thus far. This holds even for the Cold War period: neither the United States nor the Soviet Union believed that a repetition of World War II, whether or not embellished by nuclear weapons, was remotely in its interests.

Moreover, nuclear weapons have not proved to be crucial status symbols. How much more status would Japan have if it possessed nuclear weapons? Would anybody pay a great deal more attention to Britain or France if their arsenals held 5,000 nuclear weapons, or much less if they had none? Did China need nuclear weapons to impress the world with its economic growth or its Olympics?

Those considerations help explain why alarmists have been wrong for decades about the pace of nuclear proliferation. Most famously, in the 1960s, President John Kennedy anticipated that in another decade "fifteen or twenty or twenty-five nations may have these weapons." Yet of the dozens of technologically capable countries that have considered obtaining nuclear arsenals, very few have done so. Insofar as most leaders of most countries (even rogue ones) have considered acquiring the weapons, they have come to appreciate several drawbacks of doing so: nuclear weapons are dangerous, costly, and likely to rile the neighbors. Moreover, as the University of Southern California's Jacques Hymans has demonstrated, the weapons have also been exceedingly difficult for administratively dysfunctional countries to obtain—it took decades for

North Korea and Pakistan to accomplish the task. In consequence, alarmist predictions about proliferation chains, cascades, dominoes, waves, avalanches, epidemics, and points of no return have proved faulty.

Although proliferation has so far had little consequence, that is not because the only countries to get nuclear weapons have had rational leaders. Large, important countries that acquired the bomb were run at the time by unchallenged —and perhaps certifiably deranged—monsters. Consider Joseph Stalin, who in 1949 was planning to change the climate of the Soviet Union by planting a lot of trees, and Mao Zedong, who in 1964 had just carried out a bizarre social experiment that resulted in an artificial famine in which tens of millions of Chinese perished.

Some also fear that a country might use its nuclear weapons to "dominate" its area. That argument was used with dramatic urgency before 2003 when Saddam Hussein supposedly posed great danger, and it has been frequently applied to Iran. Exactly how that domination is to be carried out is never made clear. The notion, apparently, is this: should an atomic rogue state rattle the occasional rocket, other countries in the area, suitably intimidated, would bow to its demands. Actually, states so threatened are far more likely to make common cause with each other and with other concerned countries (including nuclear ones) against the threatening neighbor. That is how countries coalesced into an alliance of convenience to oppose Iraq's region-threatening invasion of Kuwait in 1990.

Yet another concern has been that the weapons will go off by accident or miscalculation, devastating the planet in the process. But those prognostications have now failed to deliver for over 75 years, and that suggests something more than luck is operating. In fact, as Stephen Younger, former head of nuclear weapons research and development at Los Alamos National Laboratory, notes, "Regardless of what is reported in the news, all nuclear nations take the security of their weapons very seriously." Moreover, the notion that if one nuclear weapon goes off in one place, the world will necessarily be plunged into thermonuclear cataclysm should remain in the domain of Hollywood scriptwriters.

The Often-Deadly Consequences of Anti-Proliferation Policy

Anti-proliferation efforts can be counterproductive in their own terms. Thus, "one of the unintended 'demonstration' effects of the American anti-proliferation war against Iraq," notes Mitchell Reiss, an expert on nuclear proliferation, "was that chemical and biological weapons proved insufficient to deter America: only nuclear weapons, it appeared, could do this job." North Korea has apparently learned this lesson. Insofar as nuclear proliferation is a response to perceived threat, one way to reduce their spread is simple: stop threatening countries that might consider acquiring them.

The impulse to prevent nuclear proliferation by any means available should also be weighed against the potentially very high costs of anti-proliferation economic sanctions and of counterproliferation wars. The war in Iraq and the ISIS insurgency it spawned has resulted in the deaths of hundreds of thousands—greater than the death toll that atomic bombs inflicted at Hiroshima and Nagasaki combined. That war began as a militarized counterproliferation effort, one supposedly required to keep Saddam Hussein's pathetic regime from developing weapons of mass destruction, including nuclear ones, and to prevent him from transferring some of these weapons to eager and congenial terrorists. Karl Rove, one of President George W. Bush's top political advisers, reflected in 2008 that, absent this belief, "I suspect that the administration's course of action would have been to work to find more creative ways to constrain him like in the '90s." And anti-proliferation sanctions on Iran and North Korea are currently killing people there. Moreover, North Korea considers the weapons vital to its security—especially to deter any U.S. attempt to overthrow its regime. Thus, it is highly unlikely to budge on the issue at least for the time being, and the nuclear weapons issue stands in the way of making any progress toward normalization of relations in the area.

The Prospects for Atomic Terrorism

Alarm about the possibility of nuclear weapons proliferating to terrorists has been raised repeatedly over the decades. In the wake of 9/11, many commentators were predicting that terrorists might well set one off by 2014.

Alarm has tapered some in recent years because it has become increasingly evident that terrorist groups have exhibited only limited desire and even less progress in going atomic. Perhaps, after a brief exploration of the possible routes, they have discovered that the tremendous effort required is scarcely likely to succeed.

One route a would-be atomic terrorist might take would be to receive or buy a bomb from a generous, like-minded nuclear state for delivery abroad. That route, however, is highly improbable. The risk would be too great—even for a country led by extremists—that the source of the weapon would ultimately be discovered. Moreover, the weapon could explode in a manner or on a target the donor would not approve—including, potentially, on the donor itself.

Some observers have worried about "loose nukes," weapons that can be stolen or bought illicitly. However, Younger's observation remains relevant: nuclear nations are very serious about the security of their weapons. Moreover, finished bombs are usually outfitted with safety devices that are difficult to defeat.

Most analysts believe that a terrorist group's most promising route would be to attempt to make a bomb using purloined fissile material—plutonium or highly enriched uranium. However, as the Gilmore Commission—an advisory panel on terrorism and weapons of mass destruction—stressed in 1999, building and deploying a nuclear device presents "Herculean challenges." As it noted, the process requires a lengthy sequence of steps; if each is not fully met, the result is not simply a less powerful weapon but one that can't produce any significant nuclear yield at all or can't be delivered.

Physicists who have studied the issue conclude that fabricating a nuclear weapon "could hardly be accomplished by a subnational group" because of "the difficulty of acquiring the necessary expertise, the technical requirements (which in several fields verge on the unfeasible), the lack of available materials and the lack of experience in working with these." Others stress the "daunting problems associated with material purity, machining, and a host of other issues" and conclude that the notion that a terrorist group could fabricate an atomic bomb or device "is farfetched at best."

The notion that terrorists could come up with a nuclear weapon seems remote. As with nuclear proliferation to countries, there may be reason for concern, or at least for interest and watchfulness. But alarm and hysteria are hardly called for.

Suggested Readings

Allison, Graham T. *Nuclear Terrorism: The Ultimate Preventable Catastrophe*. New York: Times Books, 2004.

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—Prepared by John Mueller

34. ARMS SALES

Policymakers should

- incorporate the risks of arms sales more stringently into their review process and suspend sales to countries that are the riskiest, including those that are in conflict, serial violators of human rights, and fragile or corrupt states;
- support "flip the script" legislation that would require Congress to approve arms sales instead of the current model where Congress can only block sales;
- transfer monitoring and regulator responsibilities for the sales of small arms and light weapons from the Commerce Department back to the State Department;
- support efforts to increase human rights monitoring; and
- create an oversight board that can determine and—in cases where recipients are violating human rights against the terms of the sale—publicize those transgressions.

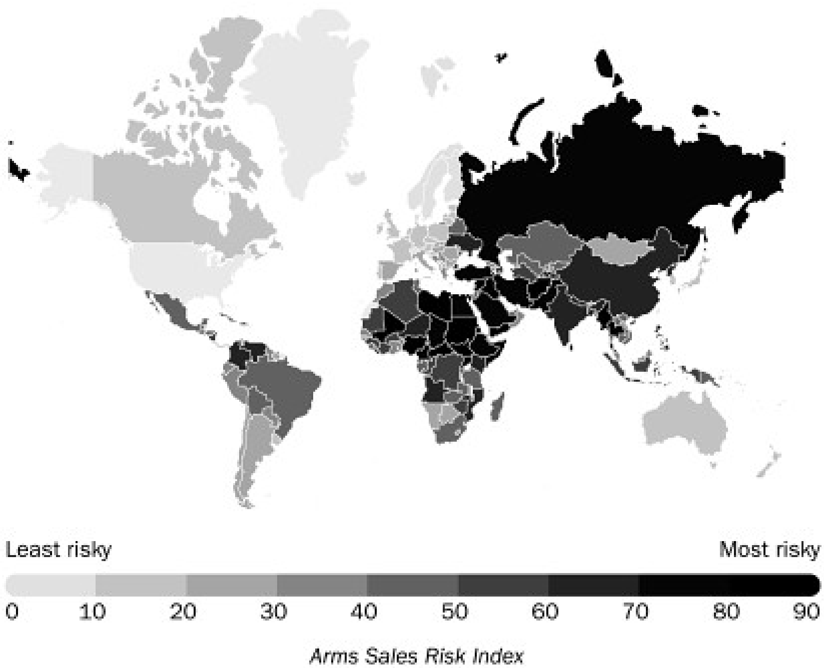
Since 2017, the United States has been the world's dominant exporter of weapons, with a global arms market share of 39 percent. Since 2009, the U.S. government has approved over $1.3 trillion in weapons sales to 167 countries. These include powerful weapons—like fighter jets, anti-aircraft missiles, and tanks—as well as small arms and light weapons (SALW)—like handguns, man-portable air defense systems, and ammunition.

These sales have a net negative impact on U.S. security and global human rights. U.S. weapons sales can lead to arms dispersion to cartels and terrorists, empower dictators, and help aid in serial violations of human rights.

There are three major problems with the current U.S. weapons sales process. First, it does not incorporate the risks of arms sales into the review process (see Figure 1). Risks include discounting of human rights, state fragility, authoritarianism, and participation in a conflict. Second, Congress lacks authority to

Figure 1

World arms sales risk



Sources: "UCDP/PRIO Armed Conflict Dataset," Uppsala Conflict Data Program, Peace Research Institute Oslo; Sarah Repucci and Amy Slipowitz, "Freedom in the World 2021: Democracy under Siege," Freedom House, 2021; "Fragile States Index," Fund for Peace; Mark Gibney et al., "The Political Terror Scale 1976–2020," 2021; *Global Terrorism Index 2019: Measuring the Impact of Terrorism* (Sydney, Australia: Institute for Economics and Peace, November 2019); "Corruption Perceptions Index, 2020," Transparency International; "SIPRI Arms Industry Database," Stockholm International Peace Research Institute; and Pieter Wezeman et al., "Trends in International Arms Transfers, 2020," Stockholm International Peace Research Institute, March 2021.

regulate sales effectively, giving the executive branch unrivaled power over the process. Third, after an arms transfer, Washington lacks the mechanisms and capability to track them, especially for SALW sales.

Given the scope and complexity of the U.S. arms sales process, it is impossible to examine every case in which American weapons are used improperly. Instead, this chapter will examine these problems and offer policy recommendations. Solving the issues at hand will mitigate the risks involved in arms sales and better protect U.S. interests.

Assessing Risk in the Arms Sales Process

Four factors inform the risks of arms sales: corruption, instability, domestic human rights abuses, and conflict. Yet the United States frequently ignores these factors. Since 2009, Washington's top 10 customers have included risky countries like Egypt, Iraq, and Saudi Arabia (see Table 1). These sales have aided human rights abuses and war crimes in Yemen, led to weapons falling into the hands of ISIS, and facilitated military attacks against citizens.

Table 1

Arms Sales Risk Index scores

Country	Arms sales in millions of U.S. dollars (2009–2020)	Risk score 2020	Risk score 2019	Risk score 2018	Risk score 2017	Risk index change year on year
Afghanistan	1,234	93	92	84	84	1
Albania	39	31	29	29	40	2
Algeria	359	51	51	52	51	0
Angola	13	69	70	69	71	−1
Antigua and Barbuda	4	11	12	11	10	−1
Argentina	367	26	26	23	36	0
Armenia	26	35	39	34	28	−4
Australia	10,956	10	9	8	22	2
Austria	101	10	9	6	13	1
Azerbaijan	27	56	55	58	60	1
Bahamas	3	19	17	16	18	2
Bahrain	798	47	48	45	41	−1
Bangladesh	45	66	65	62	66	1
Barbados	7	13	15	14	23	−3
Belarus	0	41	39	34	47	2
Belgium	634	13	12	20	23	1
Belize	11	16	18	16	32	−2
Benin	3	31	29	27	41	3
Bhutan	0	22	22	17	17	1
Bolivia	5	43	37	31	37	6
Bosnia and Herzegovina	40	36	35	32	28	1
Botswana	14	20	23	18	29	−3

(continued)

Brazil	895	43	42	35	37	1
Brunei	219	29	25	25	23	4
Bulgaria	80	25	24	26	27	1
Burkina Faso	3	55	46	40	50	9
Burundi	1	82	80	76	79	2
Cambodia	8	48	47	42	41	1
Cameroon	12	74	73	72	60	1
Canada	4,935	11	9	6	22	2
Cape Verde	1	18	18	17	29	0
Central African Republic	2	81	81	81	76	0
Chad	9	78	77	83	83	0
Chile	654	24	21	14	18	3
China	0	63	63	60	56	0
Colombia	1,905	63	62	66	71	1
Comoros	0	41	37	32	38	4
Costa Rica	18	15	13	12	14	2
Côte d'Ivoire	3	53	54	57	64	–1
Croatia	43	19	17	16	29	2
Cuba	0	41	40	35	24	1
Cyprus	2	21	20	18	34	0
Czech Republic	140	15	14	15	25	1
Democratic Republic of Congo	5	91	90	89	87	1
Denmark	1,027	6	4	5	8	3
Djibouti	25	55	54	60	51	1
Dominica	3	9	10	9	28	–1
Dominican Republic	20	41	36	42	49	5
Ecuador	49	36	36	42	43	0
Egypt	8,517	78	78	74	74	0
El Salvador	52	36	35	38	42	1
Equatorial Guinea	0	52	37	23	40	15
Eritrea	0	79	78	79	75	1
Estonia	89	10	10	11	13	0

(continued)

Ethiopia	23	76	76	75	76	0
Fiji	0	17	20	20	21	–3
Finland	1,025	6	5	5	9	1
France	2,083	19	21	17	27	–3
Gabon	10	43	44	38	41	–1
Gambia	0	33	38	52	50	–5
Georgia	175	38	38	37	41	0
Germany	2,779	13	12	11	27	2
Ghana	9	34	33	35	39	1
Greece	2,459	30	25	29	38	5
Grenada	3	20	17	17	17	3
Guatemala	30	43	43	46	47	0
Guinea	1	55	55	61	56	0
Guinea-Bissau	0	38	40	51	42	–2
Guyana	3	30	29	28	28	2
Haiti	10	61	54	59	61	7
Honduras	20	47	43	46	52	4
Hungary	101	27	25	24	35	2
Iceland	4	7	5	4	20	2
India	2,677	60	58	53	55	2
Indonesia	896	53	52	50	51	1
Iran	0	72	66	62	59	6
Iraq	10,445	89	85	91	88	4
Ireland	26	12	10	10	17	2
Israel	8,949	54	52	53	60	1
Italy	2,350	21	20	18	27	1
Jamaica	16	31	30	34	46	1
Japan	12,840	12	12	11	23	0
Jordan	2,286	45	42	47	51	3
Kazakhstan	30	43	44	47	49	–1
Kenya	150	65	65	63	69	0
Kosovo	24	23	32	27	17	–9
Kuwait	3,773	36	36	48	39	0
Kyrgyzstan	6	45	44	49	45	1
Laos	0	44	44	43	37	0

(continued)

Latvia	109	16	14	18	25	2
Lebanon	558	59	58	65	67	1
Lesotho	0	37	32	41	43	5
Liberia	20	59	53	61	68	6
Libya	10	89	88	89	89	1
Lithuania	62	14	13	12	14	1
Luxembourg	132	5	3	2	18	2
Macedonia	32	28	33	34	34	–5
Madagascar	1	47	44	48	57	3
Malawi	1	40	38	34	33	1
Malaysia	568	37	37	38	43	0
Maldives	1	34	36	41	45	–2
Mali	5	84	75	70	75	9
Malta	3	15	12	11	24	3
Mauritania	27	54	54	50	51	0
Mauritius	88	20	19	18	33	1
Mexico	1,994	49	48	43	39	2
Moldova	12	37	37	32	39	0
Mongolia	27	27	25	24	31	2
Montenegro	6	29	28	21	27	1
Morocco	1,978	37	37	36	36	0
Mozambique	2	65	60	60	56	4
Myanmar	0	82	80	79	83	2
Namibia	3	22	21	21	28	1
Nepal	10	66	65	68	70	1
Netherlands	2,164	10	8	5	7	2
New Zealand	268	11	2	1	4	9
Nicaragua	11	53	53	48	47	0
Niger	27	66	64	66	58	2
Nigeria	137	81	79	76	70	2
North Korea	0	62	61	53	48	1
Norway	1,766	6	2	4	16	4
Oman	1,505	32	33	28	31	–1
Pakistan	3,660	79	78	74	81	1
Panama	40	22	20	19	19	2

(continued)

Papua New Guinea	2	46	41	35	40	5
Paraguay	10	37	37	34	44	0
Peru	115	34	34	34	42	0
Philippines	613	72	71	66	64	2
Poland	1,609	17	19	13	13	–2
Portugal	439	11	8	8	11	2
Qatar	2,290	25	24	28	16	1
Republic of Congo	0	54	54	49	37	1
Romania	388	24	22	21	34	2
Russia	66	74	73	70	68	0
Rwanda	0	69	62	66	64	7
São Tomé and Príncipe	0	23	22	21	33	1
Saudi Arabia	26,889	71	71	71	60	0
Senegal	11	39	39	41	53	0
Serbia	10	31	29	28	31	2
Seychelles	1	18	18	22	18	0
Sierra Leone	3	43	48	43	39	–5
Singapore	2,977	13	12	11	17	1
Slovakia	42	21	15	18	32	6
Slovenia	23	11	10	9	23	2
Solomon Islands	0	26	26	26	29	0
Somalia	19	91	91	87	74	0
South Africa	163	40	39	37	46	1
South Korea	7,917	19	8	12	20	11
South Sudan	5	93	93	94	93	0
Spain	1,482	22	22	14	25	0
Sri Lanka	12	66	61	65	68	5
St. Kitts and Nevis	3	2	4	3	20	–1
St. Lucia	3	13	16	10	14	–3
St. Vincent and the Grenadines	2	8	10	10	12	–2
Sudan	11	89	90	91	82	–1
Suriname	1	29	26	22	27	2

(continued)

Swaziland	1	31	37	49	49	−6
Sweden	718	9	8	8	22	1
Switzerland	761	5	3	2	8	2
Syria	0	96	95	96	80	1
Taiwan	9,489	8	11	8	9	−3
Tajikistan	18	64	63	66	68	1
Tanzania	2	47	45	49	49	1
Thailand	1,062	72	72	73	76	1
Timor-Leste	7	32	32	32	39	0
Togo	1	52	46	41	32	5
Tonga	2	4	6	6	14	−2
Trinidad and Tobago	18	26	24	25	26	2
Tunisia	381	40	35	37	38	5
Turkey	5,493	78	77	69	63	1
Turkmenistan	3	50	49	53	44	1
Uganda	13	73	69	73	72	4
Ukraine	171	66	67	65	65	−1
United Arab Emirates	10,504	40	39	43	45	1
United Kingdom	8,121	18	16	14	22	3
Uruguay	9	10	8	7	16	1
Uzbekistan	31	48	48	53	50	0
Vanuatu	0	13	16	15	18	−3
Venezuela	1	67	60	51	46	6
Vietnam	31	43	48	46	49	−4
Yemen	59	94	92	93	84	2
Zambia	4	41	40	43	50	1
Zimbabwe	0	53	52	49	47	1

Sources: "UCDP/PRIO Armed Conflict Dataset," Uppsala Conflict Data Program, Peace Research Institute Oslo; Sarah Repucci and Amy Slipowitz, "Freedom in the World 2021: Democracy under Siege," Freedom House, 2021; "Fragile States Index," Fund for Peace; Mark Gibney et al., "The Political Terror Scale 1976–2019," 2021; *Global Terrorism Index 2019: Measuring the Impact of Terrorism* (Sydney, Australia: Institute for Economics and Peace, November 2019); Security Assistance Monitor, Center for International Policy; A. Trevor Thrall and Caroline Dorminey, "Risky Business: The Role of Arms Sales in U.S. Foreign Policy," Cato Institute Policy Analysis no. 836, March 13, 2018; A. Trevor Thrall, Caroline Dorminey, and Jordan Cohen, "The 2019 Arms Sales Risk Index," Cato Institute, September 10, 2019; A. Trevor Thrall, Caroline Dorminey, and Jordan Cohen, "The 2020 Arms Sales Risk Index," Cato Institute, October 27, 2020; and "Corruption Perceptions Index, 2020," Transparency International.

Not all U.S. arms sales present these sorts of risks. The United States also sells its most expensive weapons platforms (like the F-35) to less risky countries, such as Japan, South Korea, and the United Kingdom. Nor is the United States the only country selling to risky recipients (see Figure 2). Authoritarian countries like China and Russia sell to riskier countries than does America. U.S. allies do too, with France, Italy, and South Korea selling to riskier clients than the United States.

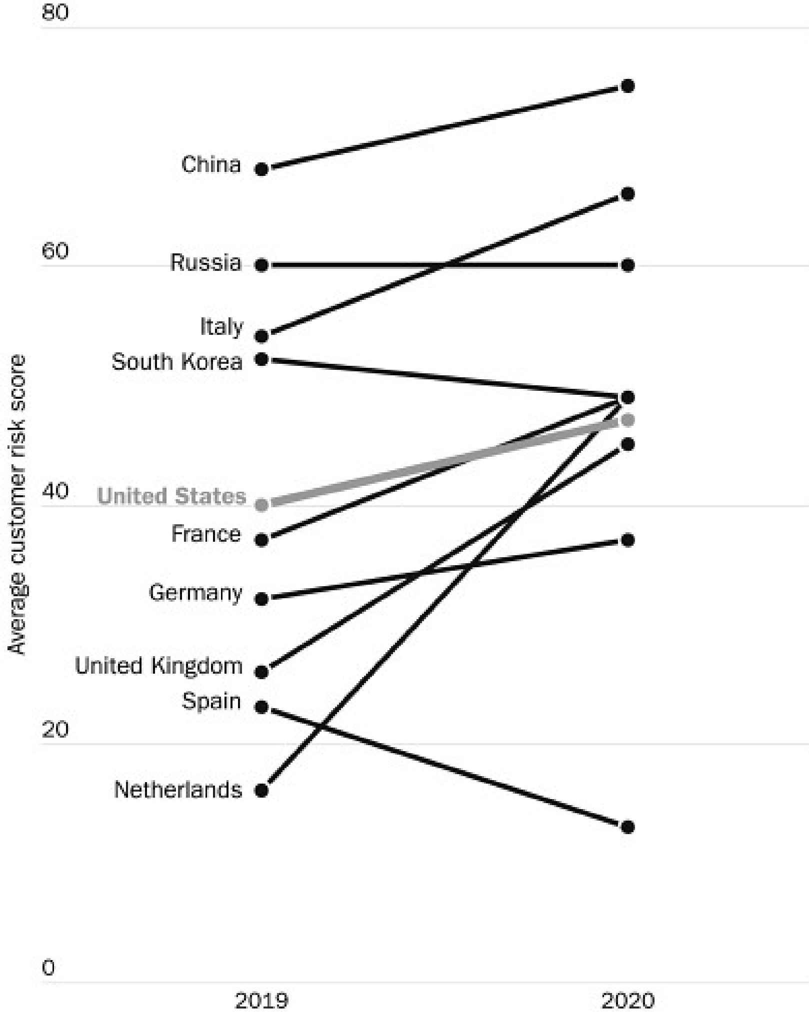
Still, the United States has a responsibility to lead by example and match its actions to its rhetoric. As President Biden notes, Washington's diplomacy should be "rooted in America's most cherished democratic values: defending freedom, championing opportunity, upholding universal rights, respecting the rule of law, and treating every person with dignity." Current U.S. weapons transfer policies do the opposite and, as a result, open the door to entanglement (involving the United States in a conflict) and dispersion (weapons falling into the wrong hands).

Recent examples include the Saudi intervention in Yemen and weapons dispersion in Central America's Northern Triangle. In Yemen, Riyadh uses U.S. ammunition and warheads with laser guidance to target innocent civilians. Selling weapons to a country that abuses human rights at home or abroad directly opposes the Biden administration's strategy to build a foreign policy based on democratic values.

The story is no better in Central America's Northern Triangle, which contains some of the highest crime areas in the world. According to a study conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives, a total of 27,240 firearms were recovered in Central America's Northern Triangle, of which nearly 57.6 percent were made outside the United States. Weapons made in the United States made up 40.1 percent of the total; of these firearms, 39.1 percent were traced to a nonoriginal purchaser and only 43.6 percent were traced to the party who purchased the weapons through American federal firearms sales (see Figure 3). The same study found that Washington spent over $38 million trying to disrupt this dispersion. In other words, U.S. weapons are used by gangs to commit murder. Lack of oversight prior to sales likely led to criminal misuse and a costly post hoc cleanup effort paid for by the U.S. taxpayer.

Figure 2

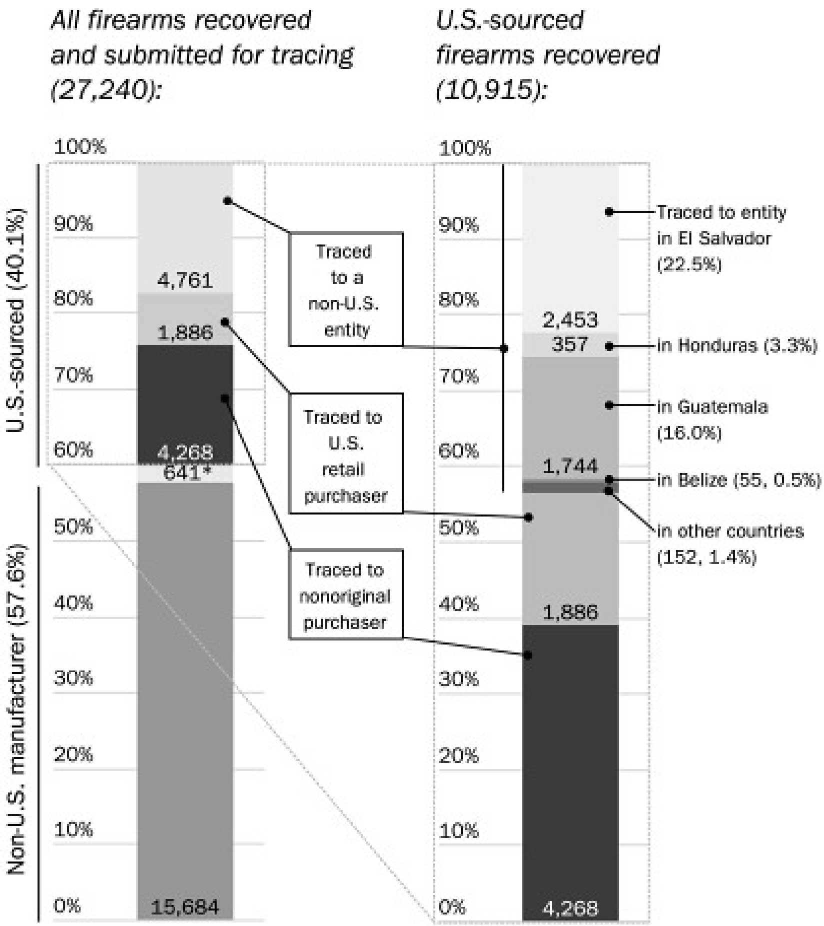
Average customer risk scores for leading arms exporting nations, 2019–2020



Sources: "Stockholm International Peace Research Institute Arms Transfer Database," Stockholm International Peace Research Institute; "UCDP/PRIO Armed Conflict Dataset," Uppsala Conflict Data Program, Peace Research Institute Oslo; Sarah Repucci and Amy Slipowitz, "Freedom in the World 2021: Democracy under Siege," Freedom House, 2021; "Fragile States Index," Fund for Peace; Mark Gibney et al., "The Political Terror Scale 1976–2020," 2021; *Global Terrorism Index 2019: Measuring the Impact of Terrorism* (Sydney, Australia: Institute for Economics and Peace, November 2019); "Corruption Perceptions Index, 2020," Transparency International; "SIPRI Arms Industry Database," Stockholm International Peace Research Institute; and Pieter Wezeman et al. "Trends in International Arms Transfers, 2020," Stockholm International Peace Research Institute, March 2021.

Figure 3

Origins of firearms recovered in Belize, El Salvador, Guatemala, and Honduras, and traced by ATF to U.S. and non-U.S. entities, 2015–2019



Source: U.S. Government Accountability Office, "Firearms Trafficking: More Information Is Needed to Inform U.S. Efforts in Central America," January 2022.
Note: *Undetermined origin; ATF = Bureau of Alcohol, Tobacco, Firearms, and Explosives.

Although problematic, these incidents underscore the need for the United States to move away from selling arms to risky countries and toward a more responsible weapons sales policy. The first step is to incorporate metrics to measure the risk of weapons sales on which to base these policy changes, such as requiring the State Department to issue public risk assessments or by creating an oversight board that evaluates every sale, in addition to the State Department's analysis. The world's riskiest countries should receive no weapons, even if they are current clients. Further, countries that receive weapons and are at risk of dispersion or violations of human rights should demonstrate improved handling of these issues before receiving more U.S. weapons. Finally, this review process should be publicized so constituents can understand the risks of selling weapons to dangerous countries. Incorporating risk into arms sales decisions is a simple solution, but it will have an outsized impact on avoiding risk from current U.S. arms sales policy. The goal is not to prevent all sales but to identify and stop those that could pose threats to U.S. security in the future.

This change, however, will not be effective without further empowering policymakers and policy implementers. A current lack of congressional influence and limited end-use monitoring capabilities prevent such action.

The Importance of Flipping the Script on Arms Sales

The current arms export system—as defined in the 1961 Foreign Assistance Act and 1976 Arms Export Control Act—gives Congress the ability to stop a sale 30 calendar days before a transfer of equipment valued at $14 million or more. Additionally, Congress can stop a sale of firearms controlled under category 1 of the U.S. Munitions List (a type of SALW) 30 calendar days before a transfer of equipment, as long as it is valued at $1 million or more. To do so, Congress must pass a joint resolution of disapproval. Yet because of the difficulty of overriding a presidential veto of a disapproval resolution, Congress has rarely voted to block an arms sale. When it has, those attempts have always been overturned by the president's veto.

This process is slow and difficult. Many sales of SALW are less than $1 million, skirting congressional oversight. The executive branch and weapons manufacturers can put together packages of sales for $999,999 and avoid notifying Congress. As a result, many lethal weapons are sold in small packages valued below $1 million. Congress often does not know about such sales, let alone have any mechanism through which to stop the process. Beyond that, 30 days is not much time. This is especially true in the House of Representatives because there is no method for a House member to force the House Foreign

Affairs Committee to debate stopping a sale, which allows this legislation to die in committee.

Recently, the president has superseded Congress through emergency declarations. Former president Donald Trump was able to prevent Congress from stopping sales to Saudi Arabia multiple times. He first did so in May 2019 by declaring the sales to be an emergency-use authorization, or when a sale is in the immediate national security interests of the United States. The president can make such a declaration under the claim that a certain sale or group of sales is classified as an emergency and thus circumvents the 30-day rule. In another instance, President Trump simply vetoed a congressional resolution of disapproval in July 2019. Because Congress needs to pass a resolution disapproving of the president's sale, the president can veto Congress's joint resolution of disapproval. The legislature, therefore, needs two-thirds majorities in both the House and Senate to stop a sale.

Congress could make two major changes to current arms sales policy that could help reduce risks in sales. First, Congress should pass legislation reducing the threshold at which the president must notify the legislature. Many SALW packages are sold for under $1 million. By lowering this number, Congress will be able to stop dangerous sales in the Northern Triangle and other fragile regions.

Still, the most important change that policymakers can make is flipping the script on the sales process. The president holds all the power over arms sales, relegating Congress to a rubber-stamping role. Instead, if all arms sales are null unless Congress *approves* the sale, the presidential veto threat will no longer exist. Those supporting the sale, therefore, will need to defend it publicly, which will pose a greater challenge for the riskiest of sales.

An additional benefit to this policy is that, if Congress decides a sale is in U.S. interests, it would pass a resolution of approval. For example, on April 25, 2022, President Biden notified Congress about a $165 million sale of nonstandard ammunition—such as grenades and grenade launchers—to Ukraine. Given Congress's near-unanimous support for arming Ukraine, if legislation had already flipped the script on arms sales, it likely would have passed a resolution of approval. Flip-the-script legislation empowers Congress to make decisions on weapons sales, and this makes that process more democratic.

Improving End-Use Monitoring of U.S. Weapons

The United States does not adequately monitor weapons and prevent dispersion, partially because the Trump administration placed the monitoring and regulating of most SALW under the Commerce Department's jurisdiction, moving it away from the State Department. In Central America, the consequences are severe. A 2022 Government Accountability Office study found that the Commerce Department conducted only two end-use checks in the Northern Triangle in 2021. In the six previous years, when the State Department conducted end-use monitoring checks, it found 130 firearms, 3,500 firearm components, and 217,000 rounds of ammunition destined for illicit transfers to Central America.

Beyond SALW, monitoring major weapons systems is a challenge in other parts of the world. For example, on May 26, 2015, Saudi Arabia used U.S. bombs to bomb a school. These systems have been sold to Saudi Arabia since 2008, per the U.S. Department of Defense. As a result, poor monitoring by the United States has resulted in deaths of innocent civilians in Yemen. The United States clearly lacks the proper infrastructure to monitor the weapons it sends to high-risk areas. This deficiency allows U.S. weapons to end up in the hands of cartels, terrorists, and other anti-American groups, unbeknownst to the American government.

In the worst cases, loose weapons are used to violate human rights or harm Americans. For example, before the U.S. withdrawal from Afghanistan, a U.S. military investigation into the Taliban's killing of two Americans found that there was a "distinct possibility" that the Taliban had used U.S.-made SALW in the attack. Policymakers should move SALW monitoring back to the State Department. Although the previous system was imperfect, improving monitoring of small arms that go to fragile states helps Washington avoid future headaches. Problems with bureaucratic oversight of U.S. weapons after delivery often result in millions of dollars spent and hours wasted in recovering dispersed weapons.

Not only should the United States trace its weapons after delivery, but so should recipient countries. Agreements like the Arms Trade Treaty provide an avenue for doing so, as similar requirements can be written into arms sales agreements themselves. Rather than spend tens of millions of dollars recovering weapons, Washington should mandate that the recipient ensures their safety or faces repercussions. By working with other countries to institute such processes, policymakers can certify that American bureaucratic organizations know how to track weapons in places where governments are more likely to stop weapons dispersion and selling arms to recipients with poor human rights records.

Restraining Risky Arms Sales

Washington discounts risk in weapons sales, and doing so comes with consequences. Over the past 15 years, U.S. weapons sales have aided human rights abusers, countries at war, and fragile and corrupt states.

There is a better option. Preventing presidents from unilaterally selling weapons to whomever they choose and monitoring where U.S. arms end up will help avoid these problems. Policymakers need to reform the weapons sales process. Doing so will positively affect U.S. security.

Suggested Readings

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—Prepared by Jordan Cohen and A. Trevor Thrall

35. THE INTERNATIONAL WAR ON DRUGS

Policymakers should

- recognize that the war on drugs has stimulated an increase in violence in drug source and transit countries while producing few intended results;
- recognize that prohibition creates a huge black-market premium and potential profit from drug trafficking that terrorist groups will exploit;
- end federal marijuana prohibition;
- cease military and financial aid to foreign countries based on supply-side campaigns against narcotics and institution building; and
- accept the legalization, decriminalization, and harm-reduction strategies adopted by the Netherlands, Portugal, Uruguay, and other countries as a better model for dealing with the problem of drug abuse.

Drug trafficking is one of the most resilient and lucrative industries in the world, with estimated annual revenues of between $426 billion and $652 billion according to a recent study. Despite the tens of billions of dollars that Washington and other governments spend every year trying to disrupt them, drug-trafficking organizations have shown tremendous ingenuity and adaptability to satisfy over a quarter billion customers worldwide.

The debacle of the war on drugs is obvious to any independent observer. In 1998, the United Nations set itself the goal of achieving a "drug-free world" by 2008. This utopian vision failed to materialize; moreover, it is evident that, in many cases, drug use has remained constant or even increased during the past decades. According to the National Survey on Drug Use and Health, 1.7 percent of U.S. adults ages 26 and older had used cocaine in the past 12 months in 2019, compared to 1.8 percent in 2002. In the case of marijuana, use among adults more than doubled from 7.0 percent in 2002 to 15.2 percent in 2019.

Even the U.S. government admits its own failures in stopping the flow of drugs: the 2021 National Drug Threat Assessment by the Drug Enforcement Administration (DEA) states that "a steady supply of cocaine was available throughout domestic markets" in 2019 and even in 2020, apparently despite the COVID-19 pandemic.

Heroin availability also remains high, the report adds, as Mexican transnational criminal organizations "are responsible for the production and trafficking across the Southwest Border of the overwhelming majority of heroin available" in the United States. The DEA also found an overlap in "the domestic markets for heroin, fentanyl, and other illicit synthetic opioids." In the case of methamphetamine, it not only is widely available, but "has become more prevalent in more areas that historically were not major markets for the drug, particularly the Northeast." None of these findings are surprising to those who, during the past 50 years, have viewed the drug war through the lens of economics.

As early as the 1970s, leading economists such as Milton Friedman and George Shultz were among the first to point out the futility of drug prohibition, citing the laws of supply and demand. These lessons have only become more relevant as drug violence reached gruesome levels in Mexico and Central America in the past two decades. Former Mexican president Felipe Calderón kicked off his presidency in December 2006 by launching an all-out military assault against cartels that claimed 125,000 to 150,000 lives between then and 2018, but even he had to acknowledge the futility of his efforts. Describing the economic dynamics of illicit drug trafficking, Calderón said: "If the price goes up [thanks largely to interdiction efforts] and the demand is the same, you will increase profits, so you are creating more incentives for participants in the market. And it's clearly a textbook case of an unstable economic system in which the more successful you are, the more criminals you are creating."

The dynamics of drug trafficking are best illustrated by what happens to a kilogram of cocaine from its production in the Andes to its distribution and sale in the United States. In 2017, the nearly 350 kilograms of dried coca leaves required to produce 1 kilogram of cocaine in Colombia cost approximately $266, while the paste or base to produce cocaine cost $563 per kilogram. Once produced, a kilogram of Colombian cocaine cost $1,682 in that country. Once it reached the United States, however, the product would have increased in value to a wholesale price of $28,000, but it could be sold at a retail price, adjusted for purity and inflation, of $160,000—a 60,000 percent markup from the raw product.

The logic behind prohibition is that the more the price of a drug goes up, the less consumption there will be. However, research shows that the demand for drugs is inelastic—that is, even if the price goes up, consumption remains more or less the same. Therein lies the problem with Washington's supply-side campaign against narcotics: it significantly inflates the price of drugs, but it does not reduce demand meaningfully. The result is that the value of the market increases—hence its appeal to violent criminals.

It is not a coincidence that, according to 2020 figures published by the United Nations Office on Drugs and Crime, 8 of the 10 countries with the highest intentional homicide rates in the world were located precisely along the cocaine route from the Andes to the United States. These include Central American transit countries (El Salvador, Honduras, and Belize) and the island nations that serve as jumping points along the transit routes to the U.S. mainland: Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines, and the U.S. Virgin Islands.

The international war on drugs has also weakened allied nations in Latin America while serving to support terrorist groups and rogue anti-American narco-regimes that benefit financially from the cocaine trade's enormous profits. Counternarcotics strategy thus conflicts with sound foreign policy goals—namely, bolstering allies, encouraging peace, and strengthening the institutions of democracy and civil society.

The war on drugs even causes considerable environmental destruction as collateral damage. According to Colombia's Institute of Hydrology, Meteorology and Environmental Studies, coca growers have deforested nearly 8,000 hectares (19,768.4 acres) of land in the country's natural reserves, including in the Amazon region, where eradication efforts cannot take place. Encroaching into these supposedly protected areas is a means for growers and traffickers to evade the state's enforcement.

Around the world, there is a growing realization that the current prohibition on most drugs needs to be replaced with more effective policies. Despite this mounting consensus, the nature of the "drug problem" is still hotly debated, and thus the alternative policies have yet to be agreed on.

Assessing Alternatives

The predominant view in Washington is that the present strategy fails not because drug laws are flawed, but because of weak institutions in producing and transit countries. The solution, according to this analysis, is greater security and intelligence cooperation among nations; more expenditure in the security and judiciary apparatuses; and tougher laws dealing with corruption, gun trafficking, and money laundering. Inevitably, this approach involves needless meddling with, and involvement in, other countries' internal affairs, all at a huge cost to the American taxpayer.

According to the Biden administration, for example, its "new, holistic U.S.-Colombia counternarcotics strategy" includes "robust investment in rural development, citizen security, and access to justice" in Colombia. But sending robust amounts of money to that country is nothing new. As a 2021 Congressional Research Service report states, "Since 2000, the U.S. government, with largely bipartisan congressional support, has provided about $12 billion in bilateral aid to implement Plan Colombia and its successor strategies." In the early 2000s, part of that aid did help the Colombian government from falling to the Revolutionary Armed Forces of Colombia (FARC), a communist guerrilla group that became the world's largest drug cartel. But since then it has done nothing to halt the spread of coca crops, illicit drug production, and the constant flow of cocaine to the United States. In fact, in 2020, coca cultivation in Colombia reached a new record of 212,000 hectares (523,863.4 acres) according to the White House, while there were fewer than 200,000 planted hectares (494,210.8 acres) in the year 2000, when then president Bill Clinton inaugurated Plan Colombia.

Drug war proponents in both the United States and Colombia argue that the sharp rise in coca crops since 2013—when 48,000 hectares (118,610.6 acres) were cultivated—is due to the suspension of aerial fumigation with glyphosate in 2015. In fact, producers have adapted to aerial spraying efforts by increasing their capacity to obtain cocaine for every hectare planted with coca. On the other hand, the costs of aerial spraying are prohibitive. According to one study, the marginal cost of removing one kilogram of cocaine from the retail market with glyphosate amounts to $240,000. Since the retail price stands at around $160,000 per kilogram, it would be a great relief to the American taxpayer's pocket if the federal government simply bought each kilo from the narcotraffickers outright.

Although developing countries do suffer from weak institutions, the burden of strengthening them should not fall on U.S. taxpayers. The problem, however, is that drug prohibition in the United States actually exacerbates this institutional problem by inflating the profit margins of organized crime to stratospheric levels, thus increasing its corrupting and violent power. For example, a study by the United Nations Development Programme pointed out that, in 2010, the seven Central American governments spent a combined $3.97 billion on security and their justice systems. That sum represented a 60 percent budget increase since 2006. Yet the figure falls short of the drug cartels' estimated revenues. According to one estimate, Colombia's cocaine production and trafficking business produced more than $5 billion in 2018, a sum that amounted to around 1.5 percent of that country's gross domestic product and dwarfed the annual expenditure of anti-narcotics efforts. In 2010, another report from the U.S. Justice Department concluded that Colombian and Mexican drug trafficking organizations sent up to $39 billion annually in bulk currency from the interior of the United States to the southwestern border, with “billions of U.S. dollars [being] sent back to Mexico.”

Another challenge is the disparity among countries in their institution-building efforts, which leads to the balloon effect of criminal activities. This is perhaps the main feature of the drug business: its ability to adapt to changing circumstances. For example, in the early 1990s, as pressure grew on coca growers in Peru, those crops were moved to Colombia. After a decade of eradication programs in that nation, coca growers moved back to Peru. Now Colombia has retaken its spot as the world’s leading coca producer. Despite the back and forth, the Andean region continues to produce the same amount of cocaine as it did 20 years ago.

Over the years, the most common approach to the war on drugs has been the attempt by governments in producing and transit countries to export the problem to their neighbors. Greater cooperation, harmonization of efforts, and same-pace institution building seems unrealistic.

In some countries, the challenge is even greater, given the active presence of terrorist organizations. In Colombia, the FARC went from being a small, largely irrelevant insurgency of around 800 troops in the late 1970s to a potent, cash-rich force of 20,000 armed men at the end of the 1990s. The FARC’s precipitous growth was not due to the sudden popularity of its Marxist-Leninist ideology, but rather to its strategic decision—made in 1982—to participate fully in the cocaine trade. In 2016, *The Economist* reported that the FARC’s fortune, amassed mainly from the cocaine industry, amounted to a staggering $10 billion.

Although the Colombian government negotiated with a much-weakened FARC from 2012 until 2016, granting its leaders impunity for their crimes and 10 unelected seats in Congress, the group still retains its armed power, as its many “dissident” remnants, which did not take part in the negotiations with the state, number as many as 5,000 insurgents (the government originally hoped to demobilize around 6,500 combatants). The fallout from the negotiations, moreover, created a dangerous power vacuum. Other armed groups—among them trafficking organizations with strong links to Mexican drug cartels and the National Liberation Army (ELN), another Marxist, Cuba-backed guerrilla force—joined the struggle to control coca-growing areas and cocaine export routes. Despite the billions of American taxpayer dollars spent there during the past decades, the country is certainly not at peace, and it is now common to read headlines such as “War Returns to Colombia’s Countryside.”

Colombia, however, is not an exception. In Afghanistan, the Taliban was reaping about $100 million per year from the poppy and heroin trade in 2011, according to one estimate. These funds were used to maintain the fighting capability that eventually led to the fall of the U.S.-backed Afghan government. Clearly, the huge black-market premiums that result from drug prohibition undermine the federal government's efforts to support democracy around the globe.

An alternative is for one country or a group of countries to turn a blind eye to drug distribution, without legalizing or decriminalizing the drug trade, while focusing their police resources on violent crimes. However, as long as the drug trade remains illegal, such a policy wouldn't likely avoid the effects of prohibition.

In Mexico in the 1970s and 1980s, the authorities tacitly accepted drug trafficking: the federal government looked the other way while drugs were shipped to the north. But drug trafficking at that time was conducted mostly by a single organization; today, several powerful and violent Mexican cartels fight each other for control of trafficking routes. Even if the Mexican government were to adopt a hands-off approach to drug smuggling, that would not prevent the cartels from engaging in bloody turf wars. Drug violence might decline, since government intervention adds volatility to a changing cartel landscape, but Mexico would likely remain a violent country.

Moreover, there is the case of a large transit nation that decided not only to abandon the fight against drug trafficking altogether, but to fully take part in it. Venezuela became not only a safe haven for kingpins, but also a full-blown narco-state that is actively hostile to the United States and Latin America's liberal democracies. The Maduro regime sponsors the so-called Cartel of the Suns. A 2021 report by Insight Crime refers to this "shadowy group inside Venezuela's military," whose different elements "essentially function as drug trafficking organizations." Closely linked to Colombia's FARC and ELN guerrillas, the Cartel of the Suns arose in the mid-2000s, when cells in Venezuela's security forces "began to purchase, store, move, and sell cocaine themselves," whereas they had previously extorted cocaine shippers. According to a U.S. official quoted by CNN, 240 metric tons of cocaine transited through Venezuela in 2018, which amounted to nearly 28 percent of Colombia's production potential for that year. The enormous windfall that cocaine profits bring to the Maduro regime allows it to survive the U.S. economic sanctions imposed because of human rights abuses and other crimes. Thus, Washington's obstinacy with prohibition has strengthened a rogue regime that actively undermines American interests across the region.

Finally, there is the increasingly accepted assessment that the problem with the international war on drugs is not the illicit substances but prohibition. In recent years, a growing number of high-ranking officials around the world, including sitting and former presidents, have called for the adoption of a legal market for certain drugs, starting with cannabis. There are already well-known precedents: in 2013, Uruguay became the first country to fully legalize marijuana. In 2018, Canada followed in its path, becoming the first nation in the G20 to allow the recreational use of cannabis. Mexico also legalized recreational cannabis consumption in 2021.

In the United States, 36 states have legalized the medical use of marijuana and 18 states have legalized its recreational use as well, with more states surely poised to do so in the near future, especially since it is in their financial interest to do so. According to one study, states collected a total of $10.4 billion in taxes from legal recreational marijuana sales between 2014 and 2021. Additionally, a group of scholars found that, as a result of cannabis legalization in the United States, the Mexican cartels that had previously dominated the marijuana trade suddenly "had difficulties competing and in making profits in the marijuana market because the demand for illegal marijuana started to decrease." They also found evidence for a drop in drug-related violent crime as a result of decreased profitability. Clearly, this is a better approach to fighting crime and weakening the cartels than the traditional prohibitionist stance.

Some European countries—such as the Netherlands and Portugal—have opted for implementing harm-reduction policies, either de facto or de jure. In 2001, Portugal decriminalized all drugs, including cocaine and heroin. Not only have the predicted spike in drug use and a public health crisis failed to materialize, but Portugal's drug-usage rates also compare favorably with many other European states that have maintained a more severe approach, and in some cases, its usage rates have dropped.

As the terms of the debate have shifted significantly in favor of legalization as an alternative to the war on drugs, the discussion has focused on marijuana. Indeed, a Pew Research poll in April 2021 showed that 60 percent of Americans favor legalizing the drug for both medical and recreational purposes. Lawmakers should prioritize ending the federal ban on marijuana and allow a full range of both recreational and medical cannabis imports from abroad.

Although the positive effects of marijuana legalization are already evident, the fact remains that the countries besieged by drug violence do not suffer under marijuana trafficking, but rather under the prohibition of other drugs, especially cocaine and heroin. Given the failure of the international drug war to stop the flow of narcotics into the United States, and given the benefits of the harm-reduction approach that treats drug addiction as a social problem rather than a criminal problem, the end of prohibition clearly must include the whole range of narcotics.

Toward a Constructive Approach

Washington's international drug war has been disastrous. Production of drugs in foreign countries has increased, and the flow of drugs to the United States has continued. As Tom Wainwright from *The Economist* wrote in 2016, "The 'all-out war' approach has failed to cut the number of consumers, while it has driven up the price of a few cheap agricultural commodities to create a hideously violent, $300-billion global industry." The impact of the U.S. war on drugs has severely aggravated political, economic, and social problems in developing countries, all at a tremendous cost to the American taxpayer. Attempts to spend even more and escalate the drug war, even in a dramatic way, will do little to change those realities.

As the world's largest consumer of illicit drugs, it is the responsibility of the United States to encourage the worldwide shift away from prohibition toward the creation of markets and civil society by ending its international crusade against drugs. Doing so will hardly affect U.S. drug consumption, because of the inelasticity of demand, but it would at least acknowledge that narcotics abuse is a domestic social problem that foreign policy cannot solve.

Suggested Readings

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—Prepared by Daniel Raisbeck and Ian Vásquez

36. INTERNATIONAL TRADE AND INVESTMENT POLICY

Congress should

- recognize and publicly acknowledge that trade is conducted not by governments but by millions of individuals freely seeking their own benefit and, to this end, that trade barriers are regressive taxes that reduce real incomes and raise living costs;
- recognize and publicly acknowledge that the benefits of trade go beyond cheaper consumer goods and greater exports to include gains for import-using American companies and new foreign direct investment, which together deliver real benefits to workers and households and lead to a more dynamic and prosperous U.S. economy;
- recognize and publicly acknowledge that trade and economic interdependence do not weaken the United States but instead make our companies and workers—including those in high-tech and defense manufacturing—more competitive, make our economy better able to withstand economic shocks, reduce the likelihood of armed conflict here and abroad, and make U.S. neighbors and allies stabler and more prosperous;
- reject calls for new U.S. industrial policies—which have a long history of high costs and failed objectives—and establish a high bar for government intervention to boost "critical" industries or to fix alleged market failures;
- address the China challenge using allies, available trade tools, economic openness, and smarter domestic policies rather than tariffs and investment restrictions;
- conclude the Environmental Goods Agreement to liberalize trade in environmental goods and commit to multilateral agreements that ensure common disciplines on both carbon regulation and related trade measures;

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- reform—if not repeal—the ambiguous and outdated trade laws that empower the executive branch to restrict trade without congressional and public oversight, to the detriment of consumers, import-using domestic industries, and the U.S. economy more broadly;
- eliminate tariffs on imports of intermediate goods—if not on all imported products—to increase the purchasing power of the poorest people and reduce domestic production costs;
- audit the U.S. regulatory, tax, and policy environments to identify redundancies, inefficiencies, and systemic problems that artificially raise the cost of doing business and deter investment in U.S. value-added activity;
- repeal "Buy America" laws and related localization mandates that waste taxpayer dollars and make U.S. firms less prepared to meet the rigors of the global marketplace;
- repeal or reform the Jones Act and other protectionist maritime laws that raise transportation costs and discourage interstate commerce while utterly failing to foster a vibrant maritime industry;
- reengage in free trade agreements, including the Trans-Pacific Partnership (now called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership), to achieve both economic and geopolitical benefits; and
- restore the Appellate Body of the World Trade Organization, and reassert American leadership in pursuing multilateral agreements that achieve additional liberalization and address issues of the 21st-century economy.

Why We Trade

Often described as periodic transactions between nations, international trade is actually millions of daily, cross-border economic exchanges that individuals undertake voluntarily for their own benefit. These international exchanges—which differ little from ones made between Americans in different U.S. cities or states—enable us to consume more (in both quantity and variety) and work less, while improving broader economic growth and innovation in the process. "Free trade" simply gets the government (in the form of tariffs, quotas, etc.) out of our way.

Almost 96 percent of the world's population lives outside U.S. borders. Enlarging markets to integrate more buyers, sellers, innovators, investors, and workers enables more refined specialization and economies of scale that, in turn, lead to greater wealth and living standards. Just as Americans in domestic markets specialize in certain jobs and use the money we earn to purchase items that require different skills, so should we be able to harness the nation's competitive advantages to achieve similar gains in the international marketplace. And just as making everything at home is costly and wasteful, so is making everything in America. The larger the market, the greater is the potential for specialization, exchange, invention, and economic growth.

Trade's most direct and obvious benefits accrue to consumers, mainly from imports that both provide cheaper, better, or more varied goods and services and promote competition and innovation here at home. The consumer gains from trade are a big reason that Americans today work far fewer hours to own more and better essentials than at any prior time in U.S. history.

Yet trade also benefits companies and workers, even in manufacturing. Companies benefit from imports, either by moving or selling foreign-made items in the United States or by using them to produce other, more sophisticated products. For example, wholesale trade, retail trade, and transportation and warehousing activities contributed $3.1 trillion to the U.S. gross domestic product (GDP) in 2019, much of which would not exist but for global trade. Companies also benefit from foreign direct investment (FDI)—dollars that overseas investors acquired from selling things to Americans—to grow and innovate. Total FDI assets ("stocks") in the U.S. manufacturing sector alone hit $1.8 trillion in 2019, and majority-owned affiliates of all foreign multinational companies contributed $1.1 trillion to U.S. GDP that same year.

The "corporate" gains from trade inevitably translate to gains in American employment—trade directly or indirectly supports more than 40 million jobs in goods- and services-producing industries, and FDI supports about 8 million jobs. New research finds that the small share of American companies directly or indirectly involved in trading goods internationally has accounted for a majority of U.S. jobs created since the Great Recession—jobs that can pay better than those in manufacturing, even for workers without a college degree.

Then there are the "unseen" contributions of trade to the U.S. economy. Trade is a cornerstone of "creative destruction"—the birth, life, and death of firms that breed domestic innovation and increase living standards. Much of this activity may be imperceptible, but it is doubtlessly driven by consumers and capital seeking more productive ends in the global marketplace. Through these invisible mechanisms, international competition has long pushed American companies (e.g., "Big 3" automakers) to improve their products or go out of business, and the money Americans save by buying cheaper, more-basic foreign goods is often spent on, or invested in, domestic companies and their higher-skilled workers. The result of these unseen transactions is not just "cheaper stuff" but better and once-unimaginable goods, better jobs, better companies, and better lives.

These benefits also reveal some of the costs of restricting trade through tariffs, quotas, import and export restrictions, or other protectionist policies—costs repeatedly found to be borne by American consumers while failing to revive the protected industry at issue. Many tariffs and other trade barriers have declined since the 1940s, but egregious U.S. protectionism persists: "national security" tariffs and export controls; "Buy America" procurement mandates; services restrictions in air transportation and shipping; farm subsidies, as well as quotas and high tariffs on imported sugar and other agricultural goods; tariff "peaks" on consumer goods like clothing, footwear, and pickup trucks; antidumping duties and other "trade remedies" that typically target manufacturing inputs; regulatory protectionism masquerading as health or safety precautions; and restrictions on foreign investment. The list goes on.

Americans would be better off if we simply removed these barriers without regard for what other governments do—something Congress has the constitutional authority to do. That another nation seeks to impoverish its citizens via protectionism is a silly reason for the United States to do the same. Free trade is about the freedom of people to transact as they wish, when they wish, and with whom they wish, without politicians, bureaucrats, and their cronies serving as gatekeepers. That so many trade barriers remain implies that policymakers do not believe Americans are worthy of the freedom to make their own economic choices. We are.

The Economic Benefits of Interdependence

In our globalized economy, expanding the size of the market means not only more customers for U.S. exports but also more competition for U.S. consumers' dollars, more providers of intermediate goods, more opportunities for supply chain collaboration, greater variety, innovation, and so on. When trade barriers are lowered, production can span borders and oceans and be organized in new and more efficient formats. The result is more value creation, greater wealth, and higher living standards.

Globalization means that companies have growing options with respect to where and how they produce. So governments must compete for investment and talent, which both tend to flow to jurisdictions where the rule of law is clear; where there is greater certainty to the business and political climate; where the specter of asset expropriation is negligible; where physical and administrative infrastructure is in good shape; where the local workforce is productive; and where there are limited physical, political, and administrative frictions.

For many tradable goods, global production sharing has become the norm. In 2019—the last year before the onset of the COVID-19 pandemic—about half of the value of U.S. imports was in industrial supplies, other intermediate goods, and capital equipment, purchases that U.S. businesses, not individual consumers, then use to make other, globally competitive downstream products. According to estimates from the United Nations Conference on Trade and Development, intermediate goods represent about half of world trade in goods.

Increasing global interdependence is reflected in a variety of other statistics, as well. For example, only about 50 percent of the value of U.S. imports from China reflects Chinese labor, materials, and overhead. The other half consists of value-added in other countries. When it comes to high-technology products, Chinese value-added is much lower. For instance, only a small percentage of the retail value of an "assembled in China" iPhone accrues to Chinese manufacturers, whereas the vast majority is earned by U.S. companies—including Apple—and their shareholders.

Meanwhile, more than 30 percent of the content value of a "made in South Carolina" Boeing Dreamliner is imported or produced by foreign-owned companies in the United States. American icon General Motors produces and sells more automobiles in China than in the United States; Ford Motor Company has more production and assembly operations outside the United States than within; Chrysler is an Italian company; and more than half of U.S. auto production occurs in foreign nameplate (Honda, Kia, BMW, etc.) factories across the United States.

In fact, nearly $2 trillion of foreign direct investment is in U.S. manufacturing operations—the most foreign investment in any country's manufacturing sector—and more than eight million Americans work for foreign-headquartered companies in the United States.

Finally, open trade and investment policies bolster economic resilience. Diversifying our supply base might make the U.S. economy more vulnerable to external shocks—such as a global pandemic or a foreign conflict—but it also decreases the nation's vulnerability to, and increases its ability to recover from, *domestic* shocks, like the ice storms that shut down the state of Texas in early February 2021; Hurricane Laura, which reduced U.S. fuel and petrochemical production for weeks; the wildfires in California, which forced the closure of production facilities and major transit routes; or the Abbott Laboratories factory closure in Michigan, which left U.S. infant formula shelves bare for much of 2022. In each case, imported alternatives to goods produced in these areas cushioned the economic blow (though the last required emergency federal actions to lower U.S. trade barriers).

Exposing and Refuting the Myths Surrounding Trade

Electoral campaigns are often rife with misinformation about trade, free trade, free trade agreements, and U.S. trade policy. Members of Congress should feel a responsibility to distill fact from fiction and to set the record straight for the American public. A rejection of trade and international cooperation in favor of protectionism and retrenchment would be a costly mistake—as history reminds us. Members of Congress should be aware of the most common trade fallacies and be able to refute them.

Trade Is Not a Zero-Sum Game

Trade does not create "winners" and "losers"—at least not directly. An exchange of goods and services will not take place in a free market unless both parties believe they will benefit ("win") from the transaction, and Americans gain every day by their freedom to exchange goods, services, capital, and other assets in global markets. The vast majority of trade occurs between individuals and companies on these mutually beneficial and inherently fair terms. Indeed, for every import allegedly "dumped" into the United States is a willing and satisfied American consumer on the other end.

To the extent trade does produce "losers," this result is indirect: domestic companies and workers lose sales when their fellow Americans freely choose to purchase from a foreign alternative. However, these "losers" have no legal or moral *right* to the consumers' earnings, and the indirect "losses" they incur are no different economically from the millions that result daily from *any* market competition between two sellers. (The only difference may be that a national border is involved.) These same "losers" also enjoy the consumer and broader economic benefits of an open trade regime.

The Trade Deficit Does Not Reflect Trade Policy Failure

Trade is not a contest between nations to see who can export the most and import the least, and the trade balance is not a trade policy scorecard. Trade statistics are simply the aggregated activity of millions of people engaged in billions of transactions each year—transactions that enable them to acquire goods and services at lower cost while raising their productive capacity to produce things for others. A trade deficit does not represent American "wealth" leaving the country because this conclusion ignores the wealth—goods and services—that American consumers and import-using producers receive in return for their dollars. It also undervalues the benefits of a net inflow of foreign investment—capital that foreigners acquired by selling us things and that is returned to the United States to build factories, finance the borrowing of the federal government, keep interest rates lower than they otherwise would be, and would not exist but for American import consumption. (It is an iron law of economics that any trade deficit [net outflow of dollars] is matched by an investment surplus [net inflow of dollars].)

The United States has run continual trade deficits since the 1970s, in years of recession as well as robust expansion. Those trade deficits are not a sign of weakness but of robust demand by American consumers and businesses for imports. The United States remains an export powerhouse in manufactured goods, farm commodities, and services—and increasingly oil and natural gas. But the world is even more attracted to U.S. assets, such as Treasury bonds, stocks, and direct investment, which provides a steady inflow of capital that fuels economic growth and job creation.

Far from being a "drag on growth," the data strongly suggest that the trade deficit actually accommodates economic growth by allowing greater levels of domestic investment. That explains why trade deficits tend to grow during economic expansions, propelled by rising domestic demand and even greater foreign preference for U.S. assets.

American Manufacturing Isn't Dying

International trade has not destroyed the U.S. industrial base. The United States ranks second in the world in manufacturing value-added, which on a per-worker basis far exceeds that of China, Germany, or Japan. By any relevant measure—output, revenues, exports, imports, investment, and research and development (R&D) expenditures—the U.S. manufacturing sector is stable or growing, and its inflation-adjusted value-added hit a record high in 2021.

Manufacturing's share of the U.S. economy (GDP) peaked in 1953 at 28.1 percent but has hovered around 11 percent for a decade. However, the sector's real (inflation-adjusted) value-added has increased by more than 20-fold—from $110 billion to $2.3 trillion—over that same period, and its falling share of GDP is a standard story of economic development: as countries get richer, they produce and consume more services relative to manufacturing and agriculture. (U.S. consumers, for example, dedicated half of their spending to goods—50.3 percent—in 1960 but only 33 percent by 2010.) Thus, the "decline" of U.S. manufacturing is really a story of a growing sector simply outpaced by the growth of services—a story shared by other developed nations, including ones like Germany and Japan with persistent trade surpluses and active industrial and labor policies.

Manufacturing employment trends are similarly irrelevant. Manufacturing jobs peaked in 1979, but their subsequent, decades-long decline is again shared by other advanced economies and many emerging markets, such as China. In fact, China shed almost 18 million industrial jobs between 2012 and 2019 (the last year for which data are available). Thus, the decline in U.S. manufacturing employment mostly reflects broader trends (e.g., productivity gains and changing consumption patterns), not the state of American manufacturing.

Top-line manufacturing data also can mislead about the nation's ability to produce essential goods during a national emergency. For example, manufacturing productivity (our ability to make stuff) increased more between 2000 and 2008, a time of significant U.S. manufacturing job *loss*, than between 2010 and 2018, when job gains "outperformed" those in China, Germany, and Japan. Nondurable goods manufacturing output was lukewarm between 1997 and 2018, but this circumstance was driven by declines in textiles, apparel, paper products, and tobacco, while energy, chemicals, and pharmaceuticals were expanding. U.S. durable goods production also expanded, with particular strength in "essential" (i.e., for supposed national or economic security) goods like aerospace, motor vehicles, and semiconductors. These and other data reveal a flexible and dynamic sector that is generally responsive to market forces—a flexibility that proved critical during the COVID-19 pandemic.

Finally, it is imperative to reiterate that the U.S. manufacturing sector's health depends on economic openness and international engagement. American manufacturers gain from access to cheaper inputs that they can later use to produce more advanced, globally competitive products. They benefit by selling into newly liberalized export markets: the United States is the second-largest merchandise exporter in the world. The sector thrives on foreign direct investment in facilities, such as those owned by foreign nameplate automakers across the country. And all of this activity, in turn, benefits U.S. manufacturing workers: firms engaged in the trade of goods account for 80 percent of U.S. manufacturing employment.

This is not to say, of course, that the disruptions experienced by American manufacturing communities over the past 40 years are insignificant. Yet the U.S. government has unsuccessfully tried to protect or subsidize certain manufacturing industries for years, and many government programs targeting displaced workers—especially "trade adjustment assistance"—have done more harm than good, as participants have been found to have ended up worse off, based on future wages and benefits, than similarly situated nonparticipants. Nevertheless, history shows that adjustment is not only possible but common: most American counties that in the 1970s had a disproportionate share of manufacturing jobs have successfully transitioned away from manufacturing and are today thriving. The contrast between these communities and those still reeling reveals a failure not of U.S. trade policy but of local, state, and federal policies that inhibit necessary adjustment.

Outsourcing Doesn't Hurt the U.S. Economy

Critics of outsourcing see it as a substitute for domestic value-added activity, either by hiring foreign service providers or moving factory production abroad. But in fact, the freedom to invest abroad and to import services enhances the ability of U.S.-based companies to produce products and expand sales, boosting the U.S. economy and job creation.

U.S. companies hire foreign service providers to reduce costs, which enables them to sell their final products at home and abroad at more competitive prices. The savings from foreign-based call centers or information technology services enable U.S. companies to expand their core operations in the United States, creating sustainable jobs at home. The United States is also a major provider of "insourcing" services to foreign clients. In 2021, the United States ran large trade surpluses in such categories as financial, telecommunications, information, and other business services.

U.S. companies invest abroad primarily to sell U.S.-branded goods and services to foreign customers. More than 90 percent of the value of output from foreign affiliates of U.S.-based companies is sold in foreign markets. Establishing affiliates abroad helps U.S. firms market to foreign customers, better design products to meet foreign preferences, provide after-sale customer service, and diversify market-specific risks. And the goods that U.S. multinationals *do* export back to the United States (e.g., iPhones or Amazon streaming devices) often support other jobs here in related services (e.g., software or media).

Trade Doesn't Especially Hurt the "Little Guy"

It is also a myth that trade disproportionately benefits big multinational corporations and high-income individuals.

First, nearly 300,000 small and medium-sized enterprises (SMEs) accounted for almost one-third of total U.S. goods exports in 2020. Yet this figure does not completely capture the role of SMEs in U.S. supply chains and the value of their "indirect exports"—inputs (including services) that contribute to the production of exports by larger firms. Accounting for these "indirect exports" reveals that SMEs provide as much as 40 percent of total exports in value-added. Thanks to increasing digitalization, especially of services, the role of SMEs in trade will likely expand further in the years ahead.

Second, trade barriers increase the costs of goods and services—costs that are harder for small businesses and poorer consumers to absorb or mitigate. Indeed, U.S. tariffs disproportionately harm lower-income families, who tend to concentrate their spending on such tradable sectors as food, clothing, and footwear, where tariffs tend to be higher. By contrast, large corporations often have market power to strong-arm foreign suppliers or pass on higher trade costs to their customers, or they have teams of lawyers, accountants, and logistics professionals to exploit loopholes, lobby for exclusions, or find and qualify new suppliers. Their smaller competitors don't stand a chance.

China Does Not Undermine the Case for Free Trade

Economists have long recognized that the case for free trade is a unilateral one. Lifting trade restrictions benefits Americans even if foreign trade partners do not reciprocate. When the British unilaterally repealed the Corn Laws in the 19th century, British citizens and the domestic economy benefited. More than a century later, developing economies in Asia unilaterally liberalized trade after seeing its benefits for the developed West. Today, the case for unilateral free trade is as strong as it was in those previous periods, even in the face of an ascendant China.

First, liberalized trade with China has generated significant economic benefits. For American consumers, Chinese import competition has been found to produce $410,000 for every U.S. job supposedly lost—or the equivalent of giving every American $260 in extra spending per year for the rest of their lives. These benefits disproportionately help the poor and middle class, whose consumption tilts toward tradable goods sold by large retailers. American businesses and workers also benefited: low-cost inputs help manufacturers and service providers (e.g., in construction) increase output, hire more workers, and offer better wages; and increased trade volumes benefit supporting industries in retail, transportation, and warehousing. Finally, heightened competition invisibly boosts our economy's dynamism and fuels "creative destruction" and innovation.

At the same time, China does pose legitimate challenges to the United States and the rest of the rules-based trading system. Government-directed investment and cyber espionage, currency and banking interventionism, heavily subsidized state-owned enterprises, and other aspects of China's "state capitalist" model can distort global markets and harm American companies and workers. Human rights abuses, diplomatic hostilities, and extraterritorial ambitions raise additional serious concerns.

Despite these very real challenges, however, recent U.S. responses have been misguided. Today, tariffs cover about two-thirds of U.S. imports from China, and the average tariff is close to 20 percent, up from about 3 percent before the trade wars began. Countless academic studies have shown that the tariffs imposed a significant toll on American consumers—both families and firms—while failing to alter Beijing's troubling practices. The Federal Reserve Bank of New York, for example, estimates that the tariffs cost about $830 per year for the typical American household and caused American firms to lose approximately $1.7 trillion in market capitalization. Moody's found that the trade war destroyed about 300,000 American jobs. Chinese retaliation hurt American exporters, especially farmers, and pushed the U.S. government to dole out tens of billions of dollars in taxpayer-funded "emergency" relief. And overbroad U.S. restrictions on exports of semiconductor equipment to China exacerbated the global chip shortage that crippled American automakers and other U.S. manufacturing supply chains in 2021–22.

Meanwhile, China has not complied with its commitments under the "Phase One" agreement ceasefire and has doubled down on self-sufficiency, distortive industrial policy, and nationalism more generally. Even worse, recent reports show that Chinese citizens and companies have become more amenable to Beijing's nationalism in response to U.S. tariffs and sanctions. Beyond trade, the government's hard-line stances on human rights, Hong Kong, the South China Sea, and other issues have deteriorated further.

The failure of unilateralism does not mean that the U.S. government should do nothing about China. Given Beijing's decent record of World Trade Organization (WTO) dispute settlement compliance and its receptivity to multilateral pressure, the United States should partner with like-minded countries to discipline Chinese trade practices through the WTO system (negotiations and disputes). By rejoining the Trans-Pacific Partnership (TPP), now called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States can counterbalance China's economic gravity in the Asia-Pacific region and promulgate new trade rules to address aspects of Chinese state capitalism that might escape WTO scrutiny. And finally, the United States must get its own house in order, embracing market-oriented reforms to tax, trade, immigration, regulation, and labor policies that boost U.S. companies' global competitiveness. Taking these actions can exert pressure on China to raise its commercial standards while minimizing damage to American families and firms and avoiding unintended consequences.

Protectionism Can't Save Struggling U.S. Industries

After decades of bipartisan support for trade liberalization, American politicians are once again advocating trade restrictions to increase jobs, revitalize industry, and promote economy-wide prosperity. They ignore, however, the arsenal of academic work and contemporaneous articles showing that protectionism not only imposes immense economic costs on American consumers but also routinely fails to achieve its intended economic objectives. In fact, even during the so-called golden era of U.S. tariffs and industrial prosperity—

the period between the Civil War and the Great Depression—protectionism *inhibited* industrial and broader economic growth (except in the American lobbying industry, which got its start advocating tariffs).

As trade liberalization expanded during the 20th century, incumbent businesses sought protection from import competition through opaque "nontariff" barriers. For example, new "trade remedies" laws (antidumping, especially) made it easier for the government to hide high import taxes beneath layers of bureaucratic arcana. These measures' harms, however, remain significant: studies of the steel, softwood lumber, paper, tires, and other sectors uniformly reveal significant costs (annually costing U.S. consumers hundreds of thousands of dollars per job allegedly protected) *and* a domestic industry that, even after years of import protection, remains dependent on government assistance. Recent tariff impositions have been no different.

Protectionism's inefficacy is easily explained. Manufacturing employment and output trends are primarily driven by broad, macroeconomic factors, not by trade policy. Insulated from market competition, moreover, U.S. firms lack incentives to invest in productivity- and competitiveness-enhancing technologies or new, cutting-edge products. These firms also raise prices, eventually dampening domestic demand for their products (and thus crimping their future output). They also devote windfall profits to executive pay and lobbying for more protection, which is far cheaper than competing. It's therefore no surprise that steel makers, shipbuilders, and other U.S. companies enjoying *decades* of government assistance continue to experience declining output, uncompetitive pricing, negative employment trends, *and* strong political engagement to maintain import protection.

Trade, Resiliency, and National Security

There is little to indicate that openness to international trade and investment has harmed national security or made the United States less resilient. As noted before, greater trade and investment may increase the U.S. economy's exposure to external supply and demand shocks, but it can also reduce its vulnerability to—and improve its recovery from—domestic shocks. The COVID-19 pandemic prompted some to question global supply chains on "resiliency" grounds, but analyses have shown that supply chain "renationalization" would not have boosted economic performance, that manufacturers using imported inputs fared better when their home markets were hit by COVID-19, and that inventory management and supply chain diversification—not repatriation—were usually the best approach.

Furthermore, free-market policies would boost resiliency by strengthening the U.S. economy, expanding domestic industrial capacity, and helping manufacturers adapt in the face of economic shocks. Such policies include eliminating tariffs on industrial inputs and curtailing presidential tariff powers (to provide greater investment certainty); expanding the national technology and industrial base, which encourages defense-related trade, investment, and R&D collaboration, to include allies (and innovative manufacturing nations) such as Finland, Germany, Japan, the Netherlands, Singapore, South Korea, Sweden, or Switzerland; eliminating Buy America procurement requirements that raise costs and limit supplies in national stockpiles; and reforming tax, immigration, and regulatory policies that reduce American manufacturers' productive capacity and global competitiveness. Protectionist policies, by contrast, undermine resiliency by weakening a country's economy *and* manufacturing sector and by inhibiting adjustment when shocks occur. Thanks to U.S. trade barriers, almost 98 percent of all infant formula consumed domestically in 2021 was made in America—and a single Michigan factory closure caused more than *six months* of empty store shelves in 2022.

Finally, global trade bolsters national security by discouraging armed conflict. U.S. and foreign policymakers who founded the institutions underpinning the multilateral trading system—the WTO and its predecessor, the General Agreement on Tariffs and Trade—were energized not by the prospect of increased trade but by the desire to avoid another world war. The system—by providing for greater economic interdependence and an avenue for the peaceful resolution of commercial disputes—has largely succeeded in achieving this goal. Academic research finds that countries that trade more are less likely to engage in armed conflict, and the broad and immediate public and private response to Russia's invasion of Ukraine shows the power of economic interconnectedness to deter and punish rogue actors.

Trade and the Environment

Free trade also can play a major role in improving the environment. First, trade boosts economic growth, and wealthier countries tend to be greener. A globalized economy means more competition, more providers of intermediate goods, more opportunities for supply chain collaboration, greater variety, and more innovation. This creates value and wealth that, over time, improves the efficiency and cleanliness of production processes—often in response to investor or citizen demands. Thus, for example, the "environmental Kuznets curve" shows an inverted-U relationship between pollution and economic development: countries initially pollute more as they industrialize but become greener after reaching a certain level of growth because of clean technology diffusion and a shift toward services. The United States, moreover, is today experiencing "dematerialization," whereby the economy continues to grow but consumes fewer raw materials.

Second, free trade can encourage the production, dissemination, and use of clean technologies by lowering prices and expanding supplies of both finished goods and their inputs. Today, many countries—including the United States—impose restrictions on imports of clean energy (e.g., hydroelectric power), "environmental goods" (e.g., solar panels and wind turbines), or their materials (e.g., steel, critical minerals, and polysilicon). The United States should eliminate these barriers and encourage others to do so through the now-stalled Environmental Goods Agreement at the WTO. It should also ensure that future U.S. trade agreements fully liberalize, without exception, trade in environmental goods and services and exempt such items from future U.S. "trade remedies" (antidumping, countervailing duty, and safeguards measures). Doing so would not only improve the environment but also reestablish the United States as a leader in trade and environmental policy.

Policymakers are considering whether to implement trade measures to mitigate "carbon leakage" (when a business relocates production to a country with lax climate regulations). One such proposal is a carbon border adjustment mechanism (CBAM), under which a nation applies its domestic carbon price (via a tax or fee) to imports from other countries. A CBAM could be viable in both economic principles and WTO rules *if* it is nondiscriminatory and ensures that taxes or fees applied to an imported good are equivalent to those applied to domestic like products. It does, however, raise serious practical concerns about design (how to measure a product's carbon intensity), scope (how to determine covered products and countries), politicization (how to prevent a CBAM from becoming another antidumping law, which is widely abused), and unintended consequences. If a CBAM is not paired with a domestic carbon price or if a domestic industry wins an exemption from any such price, the CBAM would simply be WTO-inconsistent protectionism and sure to elicit foreign retaliation, likely worsening the environment. The best course of action, therefore, is for the United States to pursue a multilateral agreement ensuring common disciplines on both carbon regulation and related trade measures.

Industrial Policy Remains Misguided

In the wake of the COVID-19 pandemic, rising U.S.-Chinese tensions, and the Russian invasion of Ukraine, American policymakers have once again embraced "industrial policy" to fix perceived market failures. By their account, almost every major modern marvel is an "industrial policy success."

However, few such innovations are the result of real U.S. industrial policy, which both advocates and critics historically understand to mean targeted and directed government interventions intended to achieve specific, market-beating industrial and commercial outcomes within national borders. Instead, successes almost always lack government targeting, direction, or commercialization intent (e.g., basic research or defense procurement) or were already being developed when state funding arrived. That a university researcher on a small federal grant stumbled on an innovation in an unrelated field does not "industrial policy" make.

By contrast, real "industrial policy" has a long and ignominious history in the United States, owing to four typical obstacles. First, industrial policy efforts struggle to surmount what F. A. Hayek described as the "knowledge problem." Government attempts to identify "critical technologies" in the 1990s, for example, failed in part because the state could not predict which technologies would be most valuable in the future or foresee how the marketplace would develop. Semiconductor and supercomputer protectionism picked the right industries but the wrong products and companies. Numerous other initiatives suffered the same fate.

Second, even if U.S. planners pick the right industries or products, politics thwarts policy implementation—just as "public choice theory" predicts. Supercomputer policy in the 1990s, for example, supported politically powerful Cray and ignored other American market entrants that offered different and arguably better products. Energy technology demonstration projects funded by the 2009 American Recovery and Reinvestment Act were dominated by unpromising (and now failed) clean coal and carbon capture projects, accounting for about five of every six dollars allocated, due in large part to the political influence of coal and ethanol producers and President Barack Obama's affection for his home state of Illinois. Contemporaneous green energy loans have been tied to lobbying expenditures and campaign contributions, not scientific merit. During the pandemic, Defense Production Act subsidies went to politically favored industries that had no connection to COVID-19, while vaccine supplies were imperiled by failures at Maryland vaccine manufacturer Emergent BioSolutions—a longtime government contractor that lobbied heavily yet consistently underperformed.

Politics also routinely causes American industrial policies to suffer from a lack of discipline. Unlike private transactions whose success or failure is determined by the market, government industrial policies often live or die based on political considerations. As a result, the Jones Act, ethanol mandates, U.S. antidumping law, government technology projects, and other programs end up wasting billions of dollars and crowding out more meritorious investment yet endure long after failure has been established. Legislators and bureaucrats sometimes even respond to these mistakes not with reform but with more funding or favoritism.

Third, industrial policies are often undermined by other government policies that have distorted the market at issue. Substantial American Recovery and Reinvestment Act funding for carbon capture, for example, was diverted to ethanol—a subsidized energy product with few if any environmental benefits but substantial political backing. Federal loan guarantee applicants' compliance with the Davis-Bacon Act (mandating high wages and favoring politically connected labor unions), Buy America rules (mandating domestic content), and the National Environmental Policy Act (requiring government review and approval of projects "significantly affecting" the environment) increased project costs, duration, and paperwork—and scuttled some projects altogether. Recent policies to boost U.S. spending on infrastructure and technology were once again larded with Davis-Bacon and Buy America rules, and bipartisan efforts to expand the domestic supply of COVID-19 rapid tests were foiled by byzantine, protectionist U.S. Food and Drug Administration regulations.

Fourth, industrial policies have "unseen" costs far beyond their "seen" budgetary overruns. They include indirect costs paid by others (e.g., consumers of tariffed goods), deadweight loss for the economy as a whole, opportunity costs (i.e., soaking up resources that could be better spent elsewhere), unintended consequences, moral hazard and adverse selection, and uncertainty inherent in a system dependent on politics, not the market. Government bailouts of General Motors and Chrysler, for example, were deemed an industrial policy "success" because they only "cost" taxpayers about $10 billion, yet this ignores the immense unseen costs that the bailout imposed on the economy.

Industrial policy advocates' responses to these criticisms are routinely deficient. Beyond the overbroad list of alleged successes, for example, rosy projections of direct economic benefits for recipient companies are rarely combined with empirical assessments of whether the U.S. economy would be better off because of the oft-claimed but usually unproven positive externalities, market-beating R&D spillovers, or faster economic growth. Furthermore, little consideration is given to whether an industrial policy success would have occurred in a market without the supporting program at issue. In this regard, the success of the Pfizer-BioNTech vaccine (which famously refused upfront government involvement) contrasts favorably to the failures of the most interventionist vaccine production alternative, federal contractor Emergent BioSolutions.

Finally, there is little reason to believe that the industrial policy experiences of other countries, particularly China, justify U.S. industrial policy. Leaving aside that differences in national cultures, economies, and politics limit the extent to which other countries' experiences can inform our own, the "successes" of countries like China, Japan, Singapore, South Korea, and Taiwan are routinely exaggerated. In reality, those nations' impressive economic growth was, at best, mostly disconnected from industrial policy and, at worst, actually slowed by it. Meanwhile, any legitimate successes abroad are more than offset by countless failures in Europe, India, Latin America, the UK, and—of course—the United States.

In sum, industrial policy—properly defined—has an extensive and underwhelming history in the United States, featuring high costs, failed objectives, and political manipulation. Not every U.S. industrial policy effort has ended in disaster, but facts here and abroad demand that we rigorously question any new government efforts to boost "critical" industries and workers and thereby fix alleged market failures. Unfortunately, such skepticism is rarely applied.

Recommendations for Congressional Action

Reform U.S. Trade Laws

Although the U.S. Constitution grants Congress plenary authority to regulate international commerce, much of that power has since been delegated to the executive branch, with troubling results. President Donald Trump, for example, used vague, Cold War–era statutes (Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974) to impose tariffs on almost 17 percent of U.S. imports on dubious grounds and with no congressional oversight. Congress must remove some of this authority, ideally by repealing the laws at issue or by requiring an express vote of approval before any tariffs are imposed.

If these reforms are not possible, Congress should amend Section 232 to narrow "national security" to defense-related goods, to move investigations away from the Commerce Department to the Defense Department or the U.S. International Trade Commission, and to ensure transparency and due process. In amending Section 301, meanwhile, Congress should expressly require that the Office of the United States Trade Representative (USTR) first pursue WTO (or applicable trade agreement) dispute settlement, specify when the USTR may implement a unilateral action, and limit the USTR's discretion in defining an "unfair" foreign trade action. Both laws should also require that all unilateral actions taken thereunder are subject to judicial review and a hard sunset.

Antidumping and countervailing duty (AD and CVD) proceedings are governed by more detailed laws and regulations but are also increasingly subject to abuse by the Commerce Department and the International Trade Commission. As of mid-2022, over 650 AD and CVD orders were in place—almost double the total in 2016. The increasing success rate of petitions is the result of congressional amendments that grant broad methodological and procedural discretion to the Commerce Department, thus allowing it to disregard record evidence and inflate final duty rates.

These laws today amount to little more than an avenue for the government to protect U.S. incumbents at the expense of American consumers, mainly other domestic manufacturers that use imported inputs. Yet the statutes forbid the agencies from considering the impact of duties on the broader "public interest," even in times of emergency, or to apply "lesser duties" when doing so would mitigate injury suffered by the petitioning domestic industry. Congress should revise the law to limit agency discretion and abuse, especially regarding the calculation of "dumping," the use of record evidence, and the application of "lesser duties"; to require an analysis of prospective duties' economic impact; to reject the imposition of duties where estimated costs exceed a certain threshold; and to suspend or terminate measures against the public interest (e.g., during emergencies).

Enact Fundamental Tariff Reform

Some of the highest U.S. tariffs—averaging about 11 percent—are applied to food, clothing, footwear, and construction materials, making necessities more expensive and disproportionately harming the poorest Americans. Astonishingly, tariffs are usually lower on luxury products (leather shoes, cashmere sweaters, etc.) than on cheaper mass-market alternatives and are particularly burdensome for parents who must regularly buy new clothes for their children. The unilateral removal of tariffs on basic consumer necessities would help lift people out of poverty, benefiting society at large.

Congress sometimes exercises its trade powers by suspending tariffs on certain industrial inputs through "miscellaneous tariff bills," or MTBs. Covered products tend to be intermediate goods that are uncontroversial and not made in the United States, such as chemicals, electronic components, and mechanical parts. However, these bills are temporary, cannot reduce tariff revenues by more than $500,000 per product, and impose a considerable and complex bureaucratic process on petitioning companies. Recognizing that downstream import-consuming industries account for a greater share of U.S. GDP, employ more workers, pay more taxes, and are more innovative than protected upstream firms, Congress should eliminate import duties on intermediate goods or, if that's politically impossible, expand and simplify the MTB process.

Congress should also enact tariff reform to achieve climate goals. Since negotiations stalled on the WTO Environmental Goods Agreement, which would have removed or reduced tariffs on clean technologies like wind turbines, Congress should exempt such goods from tariffs *and* current and future trade remedies, such as the "Section 201" safeguard tariffs on solar products.

Congress also sometimes passes preference programs like the Generalized System of Preferences (GSP), which allows duty-free imports for certain products from poor countries. The program provides opportunities for producers in developing countries to sell more to the U.S. market than they otherwise could and offers more options to American consumers. However, the GSP exempts many products that these developing countries tend to have a comparative advantage in, such as textiles—yet another result of successful lobbying. Congress should consider radically changing the GSP to allow free trade flows between the beneficiaries and the United States on a nondiscriminatory basis. Congress should go a step further and consider how to make such programs permanent.

Require an Audit of U.S. Regulatory, Tax, and Policy Environments

In the global competition to attract investment from the world's best companies, the United States has enormous advantages and has thus long been the premier global destination for foreign direct investment. In recent years, however, the United States has slipped in several important areas, causing its share of global FDI to decline from 39 percent in 1999 to 26 percent in 2019.

Congress should formally recognize that the United States is competing with the rest of the world to attract investment in domestic value-added economic activities and that success in this regard requires smarter domestic policies. As a starting point in this process, Congress should require a comprehensive audit of the U.S. regulatory, tax, and policy environments to identify redundancies, inefficiencies, and systemic problems that artificially raise the cost of doing business and deter global investment in U.S. value-added activity.

Foreign direct investment is a verdict about the efficacy of a country's institutions, policies, and potential. Given the importance of FDI to economic growth, understanding its determinants and crafting policy accordingly are matters of good governance and common sense. As former Sen. Bob Corker (R-TN) put it, "If we want the U.S. to be the very best place in the world to do business, we need to take a close look at what we're doing right, what we're doing wrong, and how we can eliminate barriers that diminish investment in the U.S."

Repeal Buy America Laws and Related Localization Mandates

For decades, the federal government has been hamstrung by laws requiring the purchase of U.S. products and services in federal contracts. Although the Buy American Act of 1933 is a leading example of such measures, other similar legislation includes the Berry and Kissell Amendments for the purchase of goods by the Department of Defense and the Department of Homeland Security, as well as preference laws requiring government-impelled cargo to be transported on U.S.-flagged ships—far costlier than foreign alternatives. Such laws increase project costs, invite reciprocal retaliatory measures from U.S. trading partners, and increase the federal government's difficulty of carrying out its assigned duties.

That local content mandates continue to be attractive to many in Congress is likely due to fallacious notions that they bolster the health of U.S. firms or that dollars going to foreign businesses represent an economic loss. However, favoring U.S. products coddles American suppliers and makes them less prepared to face the rigors of the global marketplace. It's no surprise, then, that preferred industries, such as steel, textiles, footwear, and others continue to struggle after decades of procurement protection. Furthermore, foreign businesses that receive government contracts use the dollars earned to buy American products or invest in the United States. Such exchange between countries to mutual advantage is the very essence of trade.

Federal procurement mandates should therefore be repealed, excepting only those goods and services with a direct and obvious national security imperative (e.g., weapons systems). Otherwise, the federal government should have all options at its disposal when making purchases to ensure that maximum value is attained and that unintended consequences are avoided. Failure to do so means higher taxes, reduced expenditures elsewhere, increased borrowing and debt, lower economic growth, or some troubling combination thereof.

Repeal the Jones Act and Other U.S. Maritime Protectionism

The 1920 Jones Act restricts domestic waterborne transportation to vessels that are U.S.-flagged, U.S.-built, and at least 75 percent U.S.-crewed and -owned. Under Jones Act protectionism, the competitiveness of U.S. commercial shipbuilding has degraded to the point where U.S.-built ships cost four to five times as much as those built abroad. The predictable result of such high prices has been little demand for new commercial ships, with an average of just three delivered per year since 2000. In 2021, U.S. shipyards delivered zero commercial ships.

High capital costs along with operating expenses approximately three times higher than foreign-flagged vessels make for expensive shipping that disincentivizes intra-U.S. commerce. Although these pains are particularly acute and obvious for noncontiguous U.S. states and territories, such as Alaska, Hawaii, and Puerto Rico, they are also felt nationwide. The expense of using Jones Act tankers, for example, has been cited as a factor behind American companies buying crude oil, petroleum products, and liquefied natural gas (LNG) from Russia and other foreign countries, instead of from U.S. suppliers. Indeed, there are a total of *zero* Jones Act–compliant LNG tankers available to transport abundant American natural gas.

Expensive domestic shipping reverberates throughout the U.S. economy. It means higher demand for trucking and rail, leading to higher costs for these transportation modes, as well as increased congestion, more wear and tear on highways, and added emissions. The Jones Act has thus been a contributor to pandemic-era supply chain problems. The law also harms U.S. exporters, because U.S. trading partners reduce market access as retaliation for the U.S. refusal to allow the use of foreign shipping services or foreign-built vessels in domestic trade.

Other protectionist U.S. maritime laws are similarly problematic:

- The Foreign Dredge Act of 1906, which restricts dredging services to U.S.-built and U.S.-registered vessels, closes off the U.S. dredging market to far more efficient foreign firms and increases the cost of maintaining waterways and deepening ports. It thus prevents U.S. ports from accommodating the increasingly large container ships engaged in international trade, and it decreases U.S. supply chain efficiency.
- The Passenger Vessel Services Act (PVSA) of 1886 restricts the transport of passengers between U.S. ports to U.S.-built and U.S.-flagged vessels and all but destroyed our interstate cruise industry. Today, only one large cruise ship (with capacity exceeding 800 passengers) is operating under the U.S. flag. That lone ship, the Hawaii-based *Pride of America*, was delivered by a German shipyard and required a special congressional waiver to operate under the PVSA. In fact, no U.S. shipyard has delivered a large cruise ship since 1958.

Congress should repeal the Jones Act, the Foreign Dredge Act, and the Passenger Vessel Services Act immediately.

Reengage in Trade Agreements

Since the end of World War II, the United States has worked to lower trade barriers through reciprocal trade agreement negotiations with other countries. Though slower and messier than unilateral liberalization, these efforts are more politically palatable and have paid significant economic and geopolitical dividends.

In recent years, however, U.S. policymakers have abandoned market-liberalizing trade deals and the "trade promotion authority" needed to negotiate and implement them. The Trump administration unwisely withdrew from the TPP in January 2017. It then dedicated substantial resources to renegotiating the North American Free Trade Agreement—in a more protectionist direction—

with Canada and Mexico, both members of TPP's successor, the CPTPP. In fact, the last comprehensive trade liberalization agreements involving the United States—with Colombia, Korea, and Panama—were implemented a decade ago.

Others have not been so timid. As noted, the CPTPP entered into force shortly after the United States departed. The European Union has implemented five new trade agreements over the same period, and the newly "Brexited" United Kingdom has also inked several. The Beijing-led Regional Comprehensive Economic Partnership and the 54-nation African Continental Free Trade Area each went into effect at the beginning of 2022, and notoriously difficult India concluded a free trade agreement with Australia shortly thereafter. The list goes on (and on).

An atrophying liberalization agenda will hurt the United States. Over the long run, we can expect a less competitive and dynamic U.S. economy. American firms shielded from foreign competition will be less efficient and innovative; they and other U.S. companies will lose market share to their peers in countries with more robust trade agreements; American consumers will suffer higher prices and fewer choices. Likewise, by sitting on the trade agreement sidelines, the United States will lose a pillar of its "soft power" foreign policy and be unable to set standards for commerce in the 21st century. China and others will fill the vacuum.

Given these realities, the United States should quickly work to reauthorize Trade Promotion Authority and rejoin the TPP/CPTPP. Doing so not only would benefit the U.S. economy but also would help counterbalance China's economic gravity in the Asia-Pacific region and troubling commercial and diplomatic practices. Deepening economic ties with Europe—through both the stalled Transatlantic Trade and Investment Partnership and the U.S.-UK free trade agreement—should also be reconsidered, perhaps especially given recent Russian belligerence. Bilateral or regional deals with developing economies in Africa and Latin America could also promote U.S. economic and geopolitical interests, particularly given China's embrace of these regions for critical raw materials.

In the alternative, the United States can continue to sit on the sidelines and watch the rest of the world pass it by.

Revitalize the World Trade Organization

The strength and survival of the rules-based multilateral trading system under the auspices of the WTO is a U.S. economic and foreign policy imperative. Membership in the WTO system has boosted annual U.S. GDP growth by about $87 billion in the 25 years since the WTO's establishment—*more than* *any other country*. The WTO, and its predecessor, the General Agreement on Tariffs and Trade, have also long been a pillar of U.S. security policy and the liberal international order.

Although most world trade continues to abide by WTO rules, the system itself has slipped from the center of global trade governance. Members have repeatedly failed to negotiate further trade liberalization, to fully engage on 21st-century trade issues like digital trade and environmental technologies, or to conclude an agreement on trade in medical goods during the COVID-19 pandemic. Furthermore, the centerpiece of the WTO—its hitherto highly successful international dispute settlement system—lacks an operational Appellate Body (and is thus hobbled) because of U.S. refusal to seat new judges.

The 12th Ministerial Conference of the WTO in Geneva in June 2022 provided modest momentum to the organization. WTO members agreed to continue a moratorium on tariffs on electronic commerce, thus preventing the proliferation of taxes on purchases of everything from streaming films to e-books to financial transactions. They concluded a waiver of certain intellectual property rights for COVID-19 vaccines, thus setting the stage for a needed and broader focus on global vaccine distribution and production. They agreed to prevent domestic food export restrictions from applying to humanitarian efforts by the World Food Programme to address the world food crisis. And they concluded only the second multilateral agreement by the WTO since its establishment in 1995, and the first since 2013, with the signing of an accord to discipline some of the fisheries subsidies that contribute to rapidly declining fish stocks worldwide.

Each of these agreements falls short of what is truly needed. Yet they do provide modest momentum to the WTO as it strives to return to the center stage of world trade. Further negotiations continue in each of these areas. In addition, negotiations are continuing on a number of issues that have long been under consideration but did not make it to the final agenda in Geneva: eliminating tariffs on environmental goods, creating WTO rules on digital trade, identifying ways to limit plastics pollution from trade, and reducing the subsidies and other measures that distort agricultural trade. Additional issues, old and new alike, are also awaiting WTO action now that WTO members have proved anew—to the world and, importantly, to themselves—that they can conclude multilateral agreements.

The United States played a leading role in creating and building the WTO-based multilateral trading system, for Americans' sake *and* for the sake of all those who live in the 163 other WTO member countries. Renewed and active American leadership is desperately needed to fix the WTO's problems and help restore it to the center of world trade, to the immense benefit of American businesses, workers, and consumers. The United States should therefore immediately reengage at the WTO, and—as an act of good faith and an effort to jump-start new negotiations—lift its hold on new Appellate Body members *and* indicate that its own sacred cows (especially agricultural subsidies and trade remedies) are on the table if other members' are too. Such efforts would not right the WTO's ship overnight but would go a long way to setting it back in the right direction.

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—Prepared by Scott Lincicome, James Bacchus, Gabriella Beaumont-Smith, Colin Grabow, Daniel Griswold, and Clark Packard

37. FOREIGN AID AND ECONOMIC DEVELOPMENT

Congress should

- abolish the U.S. Agency for International Development and end government-to-government aid programs;
- withdraw from the World Bank and regional multilateral development banks;
- not use foreign aid to encourage or reward market reforms in the developing world;
- eliminate programs that provide loans to the private sector in developing countries and oppose schemes that guarantee private-sector investments abroad;
- privatize or abolish the Export-Import Bank, the Overseas Private Investment Corporation, the U.S. Trade and Development Agency, and other sources of international corporate welfare; and
- not counter the increase in China's foreign aid with more U.S. foreign aid.

Foreign aid has risen notably since the turn of this century. The United States spends $40 billion in overseas development assistance, and total aid from rich countries is now around $168 billion per year (see Figure 1).

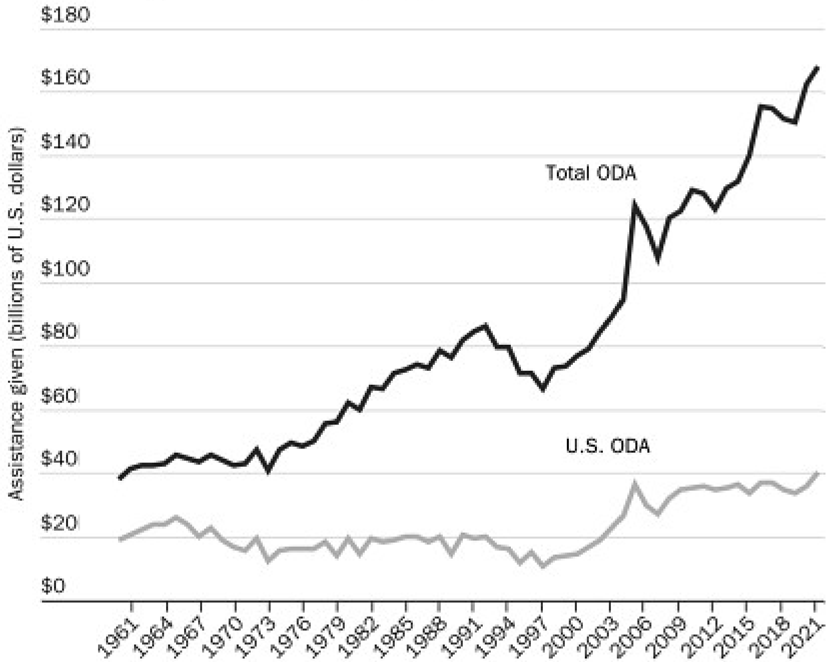
Despite that increase in foreign aid, what we know about aid and development provides little reason for enthusiasm:

- There is no correlation between aid and growth.
- Aid that goes into a poor policy environment does not work and contributes to debt.
- Aid conditioned on market reforms has failed.
- Countries that have adopted market-oriented policies have done so because of factors unrelated to aid.
- There is a strong relationship between economic freedom and growth.

A widespread consensus has formed about those points, even among development experts who have long supported government-to-government aid. The

Figure 1

Official development assistance (ODA), 1960–2021



Source: "Net ODA," Organisation for Economic Co-operation and Development.

increase in aid reflects a gap between the scholarly consensus on the limits of development assistance and the political push that has made more spending happen.

The Dismal Record of Foreign Aid

By the 1990s, the failure of conventional government-to-government aid schemes had been widely recognized and brought the entire foreign assistance process under scrutiny. For example, a Clinton administration task force conceded that "despite decades of foreign assistance, most of Africa and parts of Latin America, Asia, and the Middle East are economically worse off today than they were 20 years ago." As early as 1989, a bipartisan task force of the House Foreign Affairs Committee concluded that U.S. aid programs "no longer either advance U.S. interests abroad or promote economic development."

Multilateral aid has also played a prominent role in the post–World War II period. The World Bank, to which the United States is the major contributor, was created in 1944 to provide aid mostly for infrastructure projects in countries that could not attract private capital on their own. The World Bank has since expanded its lending functions, as have the regional development banks that have subsequently been created on the World Bank's model and to which the United States contributes: the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development. The International Monetary Fund (IMF), also established in 1944, long ago abandoned its original role of maintaining exchange-rate stability around the world and has since engaged in long-term lending on concessional terms to most of the same clients as the World Bank.

Despite record levels of lending, the multilateral development banks have not achieved any more success at promoting economic growth than has the U.S. Agency for International Development (USAID). Numerous self-evaluations of World Bank performance over the years, for example, have uncovered high failure rates of bank-financed projects. In 2000, the bipartisan congressional Meltzer Commission found a 55 to 60 percent failure rate of World Bank projects based on the bank's own evaluations. A 1998 World Bank report concluded that aid agencies "saw themselves as being primarily in the business of dishing out money, so it is not surprising that much [aid] went into poorly managed economies—with little result." The report also said that foreign aid had often been "an unmitigated failure." "No one who has seen the evidence on aid effectiveness," commented Oxford University economist Paul Collier in 1997, "can honestly say that aid is currently achieving its objective." There is scarce evidence that the record of aid has improved in more recent years.

Massive transfers from the developed to the developing world have not led to a corresponding transfer of prosperity for several reasons. Aid has traditionally been lent to governments, has supported central planning, and has been based on a fundamentally flawed vision of development.

By lending to governments, USAID and the multilateral development agencies supported by Washington have helped expand the state sector at the expense of the private sector in poor countries. U.S. aid to India from 1961 to 1989, for example, amounted to well over $2 billion, almost all of which went to the Indian state. Moreover, much aid goes to autocratic governments.

Foreign aid has thus financed governments, both authoritarian and democratic, whose policies have been the principal cause of their countries' impoverishment. Trade protectionism, byzantine licensing schemes, inflationary monetary policy, price and wage controls, nationalization of industries, exchange-rate controls, state-run agricultural marketing boards, and restrictions on foreign and domestic investment, for example, have all been supported explicitly or implicitly by U.S. foreign aid programs.

Not only has lack of economic freedom kept literally billions of people in poverty, but development planning has thoroughly politicized the economies of developing countries. Centralization of economic decisionmaking in the hands of political authorities has meant that a substantial amount of poor countries' otherwise useful resources has been diverted to unproductive activities, such as rent seeking by private interests or politically motivated spending by the state.

Precisely because aid operates within the (usually deficient) political and institutional environments of recipient countries—even when it goes to countries that don't rely on development planning—it can have detrimental effects. That is all the more true with higher levels of foreign assistance, as has been the case with sub-Saharan African countries, most of which have received 10 percent or more of their national income in foreign aid for at least three decades. As Nobel laureate in economics Angus Deaton notes: "Large inflows of foreign aid change local politics for the worse and undercut the institutions needed to foster long-run growth. Aid also undermines democracy and civic participation, a direct loss over and above the losses that come from undermining economic development."

It has become abundantly clear that—as long as the conditions for economic growth do not exist in developing countries—no amount of foreign aid will be able to produce economic growth. Indeed, a comprehensive study by the IMF found no relationship between aid and growth. Moreover, economic growth in poor countries does not depend on official transfers from outside sources. Were that not so, no country on earth could ever have escaped from initial poverty. The long-held premise of foreign assistance—that poor countries were poor because they lacked capital—not only ignored thousands of years of economic development history but also was contradicted by contemporary events in the developing world, which saw the accumulation of massive debt, not development.

Promotion of Market Reforms

Even aid intended to advance market liberalization can produce undesirable results. Such aid takes the pressure off recipient governments and allows them to postpone, rather than promote, necessary but politically difficult reforms. For instance, Ernest Preeg, former chief economist at USAID, saw that problem in the Philippines after the collapse of the Marcos dictatorship: "As large amounts of aid flowed to the Aquino government from the United States and other donors, the urgency for reform dissipated. Economic aid became a cushion for postponing difficult internal decisions on reform. A central policy focus of the Aquino government became that of obtaining more and more aid rather than prompt implementation of the reform program."

Far more effective at promoting market reforms is the suspension or elimination of aid. Although USAID lists South Korea and Taiwan as success stories of U.S. economic assistance, those countries began to take off economically only after massive U.S. aid was cut off. As even the World Bank has conceded, "Reform is more likely to be preceded by a decline in aid than an increase in aid."

Still, much aid is delivered on the condition that recipient countries implement market-oriented economic policies. Such conditionality is the basis for the World Bank's structural adjustment lending, which it began in the early 1980s after it realized that pouring money into unsound economies would not lead to self-sustaining growth. But aid conditioned on reform has been ineffective at inducing reform. One 1997 World Bank study noted that there "is no systematic effect of aid on policy." A 2002 World Bank study admitted that "too often, governments receiving aid were not truly committed to reforms" and that "the Bank has often been overly optimistic about the prospects for reform, thereby contributing to misallocation of aid." Oxford's Paul Collier explains: "Some governments have chosen to reform, others to regress, but these choices appear to have been largely independent of the aid relationship. The microevidence of this result has been accumulating for some years. It has been suppressed by an unholy alliance of the donors and their critics. Obviously, the donors did not wish to admit that their conditionality was a charade."

Lending agencies have an institutional bias toward continued lending even if market reforms are not adequately introduced. Yale University economist Gustav Ranis explains that within some lending agencies, "ultimately the need to lend will overcome the need to ensure that those [loan] conditions are indeed met." In the worst cases, of course, lending agencies do suspend loans in an effort to encourage reforms. When those reforms begin or are promised, however, the agencies predictably respond by resuming the loans—a process Ranis has referred to as a "time-consuming and expensive ritual dance."

In sum, aiding reforming nations, however superficially appealing, does not produce rapid and widespread liberalization. Just as Congress should reject funding for regimes that are uninterested in reform, it should reject schemes that call for funding countries based on their records of reform. That includes the Millennium Challenge Corporation, a U.S. aid agency created in 2004 to direct funds to poor countries with sound policy environments. The most obvious problem with that program is that it is based on a conceptual flaw: countries that are implementing the right policies for growth, and therefore do not need foreign aid, will receive aid. In practice, the effectiveness of such selective aid was questioned by an IMF review that found "no evidence that aid works better in better policy or geographical environments, or that certain forms of aid work better than others."

The practical problems are indeed formidable. The Millennium Challenge Corporation and other programs of its kind require government officials and aid agencies—all of which have a poor record in determining when and where to disburse foreign aid—to make complex judgment calls on which countries deserve the aid and when. Moreover, it is difficult to believe that bureaucratic self-interest, micromanagement by Congress, and other political or geostrategic considerations will not continue to play a role in the disbursement of this kind of foreign aid. It is important to remember that the creation of the Millennium Challenge Corporation was not an attempt to reform U.S. foreign aid. Rather, the aid funds it administers are in addition to the much larger traditional aid programs that continue to be run by USAID—in many cases in the very same countries.

Help for the Private Sector

Similar efforts to promote market economies include the underwriting of private entrepreneurs by the World Bank (through its program to guarantee private-sector investment) and U.S. agencies such as the Export-Import Bank, Overseas Private Investment Corporation, and the Trade and Development Agency, which provide comparable services. U.S. officials justify the programs on the grounds that they help promote development and benefit the U.S. economy. Yet providing loan guarantees and subsidized insurance to the private sector relieves the governments of underdeveloped countries of the need to create an investment environment that would attract foreign capital on its own. To attract much-needed investment, countries should establish secure property rights and sound economic policies, rather than rely on Washington-backed schemes that allow avoidance of those reforms.

Moreover, while some corporations clearly benefit from the array of foreign assistance schemes, the U.S. economy and American taxpayers do not. Subsidized loans and insurance programs amount to corporate welfare. Macroeconomic policies and conditions, not corporate welfare programs, affect factors such as the unemployment rate and the size of the trade deficit. Programs that benefit specific interest groups manage only to rearrange resources within the U.S. economy and do so in a very wasteful manner. Indeed, the United States did not achieve and does not maintain its status as one of the world's largest exporters because of agencies like the Export-Import Bank, which finances less than 0.5 percent of U.S. exports.

Even USAID has claimed that the main beneficiary of its lending is the United States because close to 80 percent of its contracts and grants go to American firms. That argument is fallacious. "To argue that aid helps the domestic economy," renowned economist Peter Bauer explained, "is like saying that a shop-keeper benefits from having his cash register burgled so long as the burglar spends part of the proceeds in his shop."

Debt Relief

By the mid-1990s, dozens of countries suffered from inordinately high foreign debt levels. Thus, the World Bank and the IMF devised a $75 billion debt-relief initiative benefiting 39 heavily indebted poor countries. The initiative, of course, was an implicit recognition of the failure of past lending to produce self-sustaining growth, especially since an overwhelming percentage of eligible countries' public foreign debt was owed to bilateral and multilateral lending agencies. Indeed, in 2006, at about the time the debt relief initiative began taking effect, 96 percent of those countries' long-term debt was public or publicly guaranteed.

Forgiving poor nations' debt is a sound idea, on the condition that no other aid is forthcoming. Unfortunately, the multilateral debt initiative is keeping poor countries on a borrowing treadmill, since they are eligible for ongoing multilateral loans based on conditionality. There is no reason, however, to believe that conditionality will work any better now than it has in the past. Again, as a World Bank study emphasized, "A conditioned loan is no guarantee that reforms will be carried out—or last once they are."

Nor is there reason to believe that debt relief will work better now than in the past. As former World Bank economist William Easterly has documented, donor nations have been forgiving poor countries' debts since the late 1970s, and the result has simply been more debt. From 1989 to 1997, 41 highly indebted countries saw some $33 billion of debt forgiveness, yet they still found themselves in an untenable position by the time the current round of debt forgiveness began. Indeed, they began borrowing ever-larger amounts from aid agencies. Easterly notes, moreover, that private credit to the heavily indebted poor countries was virtually replaced by foreign aid and that foreign aid itself was lent on increasingly easier terms.

The debt relief initiative did in fact reduce debt, but it did not prevent countries from getting themselves back into trouble. For example, debt owed to official and private creditors has again risen significantly in African countries that made up the bulk of the heavily indebted poor countries initiative. The public debt of sub-Saharan African countries grew to 35 percent of gross domestic product by 2014, then to 55 percent by 2019, before the COVID-19 pandemic. The debt in the region reached 60 percent by 2021, with the IMF now listing dozens of developing countries in debt distress or being at risk of debt distress.

The Folly of Countering Foreign Aid from China

In the past 15 years, China has become a major aid donor. It has spent hundreds of billions of dollars on education, agriculture, and infrastructure projects, among other areas, and has done so by imposing little conditionality and less concessionary terms than those required by Western aid donors. The rise in China's aid is viewed by admirers as an effective way to promote development based on recipient countries' interests with few strings attached and to simultaneously advance Chinese diplomacy and national interests.

Many in the United States similarly view Chinese aid as particularly effective and thus a challenge to U.S. influence that must be countered in kind. According to Jim Richardson, former director of the Office of Foreign Assistance at the U.S. State Department, for example, "Washington needs to do the same—and beat Beijing at its own game." At a G-7 meeting in July 2022, President Biden announced a multiyear, $200 billion initiative to support infrastructure in the developing world that would be complemented by hundreds of billions of dollars in additional spending from other G-7 countries.

There is, however, no reason to believe that Chinese foreign aid is immune to the problems that have long plagued other countries' aid programs. For example, although China's ambitious Belt and Road Initiative (BRI)—a massive, overseas infrastructure lending program—has often been touted as a savvy way for China to promote development and its own hegemony, evidence of the initiative's serious shortcomings keeps growing. A recent review by AidData at the College of William and Mary of more than 13,000 projects financed by China and worth $843 billion in 165 countries found that "35% of the BRI infrastructure project portfolio has encountered major implementation problems—such as corruption scandals, labor violations, environmental hazards, and public protests." The resulting rise in negative sentiments toward China has even led some countries to cancel BRI projects. Thomas Fingar and Jean Oi at Stanford University conclude that "China's relationship with more or less all countries is more fraught today than it was before [President] Xi launched the BRI [in 2013] and China began to flex its economic and military muscles in ways neighbors found worrisome." In short, while much of China's overseas aid is difficult to assess because of its opaque nature, it is increasingly evident that its approach is misguided, and it is a mistake for the United States to counter China with yet greater aid expenditures.

Other Initiatives

The inadequacy of government-to-government aid programs has prompted an increased reliance on nongovernmental organizations (NGOs). NGOs, or private voluntary organizations (PVOs), are said to be more effective at delivering aid and accomplishing development objectives because they are less bureaucratic and more in touch with the on-the-ground realities of their clients.

Although channeling official aid monies through PVOs has been referred to as a "privatized" form of foreign assistance, it is often difficult to make a sharp distinction between government agencies and PVOs beyond the fact that the latter are subject to less oversight and are less accountable. Michael Maren, a former employee at Catholic Relief Services and USAID, notes that most PVOs receive most of their funds from government sources.

Given that relationship—PVO dependence on government hardly makes them private or voluntary—Maren and others have described how the charitable goals on which PVOs are founded have been undermined. The nonprofit organization Development Group for Alternative Policies, for example, observed that USAID's "overfunding of a number of groups has taxed their management capabilities, changed their institutional style, and made them more bureaucratic and unresponsive to the expressed needs of the poor overseas." Maren adds, "When aid bureaucracies evaluate the work of NGOs, they have no incentive to criticize them." For their part, NGOs naturally have an incentive to keep official funds flowing. The lack of proper impact assessments plagues the entire foreign aid establishment, prompting former USAID head Andrew Natsios to acknowledge, "We don't get an objective analysis of what is really going on, whether the programs are working or not." In the final analysis, government provision of foreign assistance through PVOs instead of traditional channels does not produce dramatically different results.

Microenterprise lending—another program often favored by advocates of aid—is designed to provide small amounts of credit to the world's poorest people. The poor use the loans to establish livestock, manufacturing, and trade enterprises, for example. Many microloan programs, such as the one run by the Grameen Bank in Bangladesh, appear to be highly successful. Grameen has disbursed tens of billions of dollars since the 1970s and achieved a repayment rate of about 97 percent, according to its founder. Microenterprise lending institutions, moreover, are intended to be economically viable, to achieve financial self-sufficiency within three to seven years.

Given those qualities, it is unclear why microlending organizations would require subsidies. Indeed, microenterprise banks typically refer to themselves as profitable enterprises. For those and other reasons, Jonathan Morduch of New York University concluded in a 1999 study that "the greatest promise of microfinance is so far unmet, and the boldest claims do not withstand close scrutiny." He added that, according to some estimates, "if subsidies are pulled and costs cannot be reduced, as many as 95 percent of current programs will eventually have to close shop." David Roodman of the Center for Global

Development found little evidence for the grand claims of the microcredit movement, including that it can noticeably reduce poverty. He advocated reducing funding for microlending and increasing its effectiveness.

Furthermore, microenterprise programs alleviate the conditions of the poor, but they do not address the causes of the lack of credit faced by the poor. In developing countries, for example, about 90 percent of poor people's property is not recognized by the state. Without secure private property rights, most of the world's poor cannot use collateral to obtain a loan. The Institute for Liberty and Democracy, a Peruvian think tank, found that, when poor people's property in Peru was registered, new businesses were created, production increased, asset values rose by 200 percent, and credit became available. Of course, the scarcity of credit is also caused by a host of other policy measures, such as financial regulation that makes it prohibitively expensive to provide banking services for the poor.

In sum, microenterprise programs can be beneficial, but successful programs need not receive aid subsidies. The success of microenterprise programs, moreover, will depend on specific conditions, which vary greatly from country to country. For that reason, microenterprise projects should be financed privately by people who have their own money at stake rather than by international aid bureaucracies that appear intent on replicating such projects throughout the developing world.

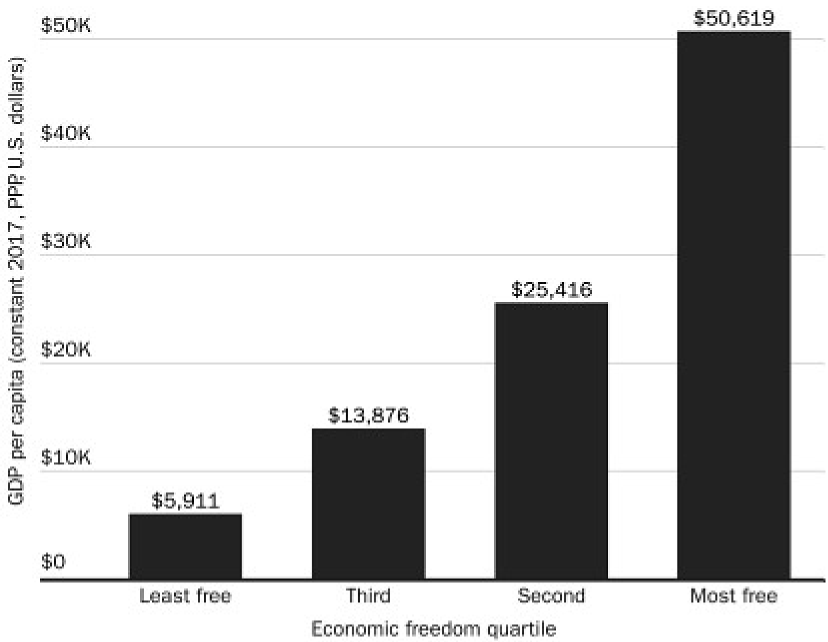
Conclusion

Numerous studies have found that economic growth is strongly related to the level of economic freedom. Put simply, the greater a country's economic freedom, the greater its level of prosperity over time (Figure 2). Likewise, the greater a country's economic freedom, the faster it will grow. Economic freedom—which includes not only policies, such as free trade and stable money, but also institutions, such as the rule of law and the security of private property rights—increases more than just income. It is also strongly related to improvements in other development indicators, such as longevity, access to safe drinking water, less corruption, and dramatically higher incomes for the poorest members of society (Figure 3).

The developing countries that have liberalized their economies the most and achieved high levels of growth have done far more to reduce poverty and improve their citizens' standards of living than have foreign aid programs. As Deaton observes:

> Even in good environments, aid compromises institutions, it contaminates local politics, and it undermines democracy. If poverty and underdevelopment are

Figure 2
Countries with greater economic freedom have substantially higher per capita incomes, 2019



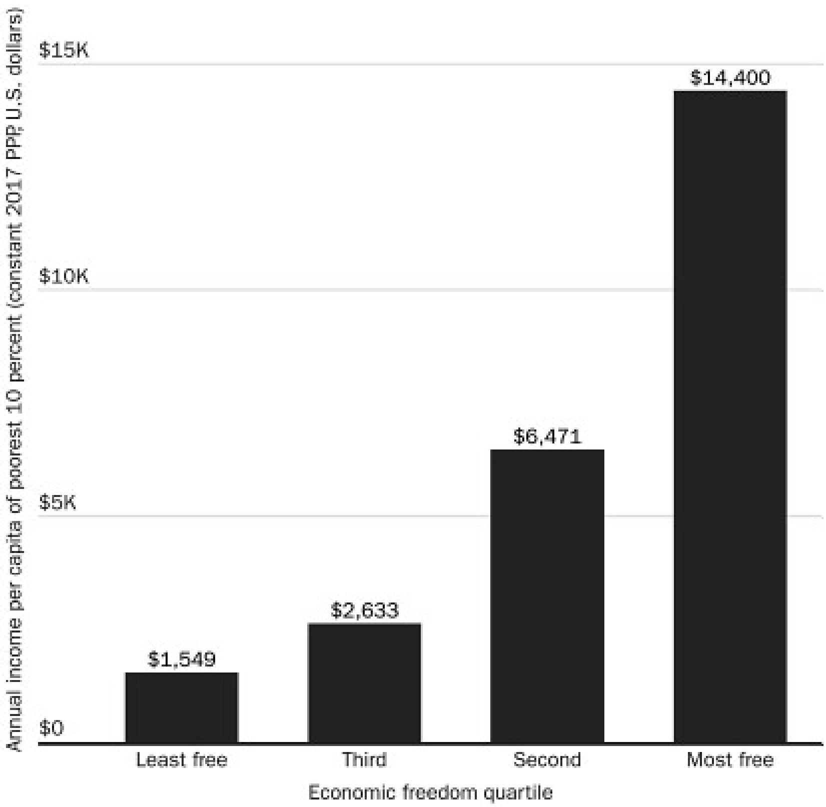
Source: James Gwartney et al., *Economic Freedom of the World: 2021 Annual Report* (Vancouver: Fraser Institute, 2021), p. 18.
Notes: GDP = gross domestic product; PPP = purchasing power parity.

primarily consequences of poor institutions, then by weakening those institutions or stunting their development, large aid flows do exactly the opposite of what they are intended to do. It is hardly surprising then that, in spite of the direct effects of aid that are often positive, the record of aid shows no evidence of any overall beneficial effect.

In the end, a country's progress depends almost entirely on its domestic policies and institutions, not on outside factors such as foreign aid. As Easterly suggests, aid distracts from what really matters, "such as the role of political and economic freedom in achieving development." Congress should recognize that foreign aid has not caused the worldwide shift toward the market and that appeals for more foreign aid, even when intended to promote the market, will continue to do more harm than good.

Figure 3

Economic freedom and the income earned by the poorest 10 percent, 2019



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—Prepared by Ian Vásquez

DOWNSIZING GOVERNMENT

38. CUTTING FEDERAL SPENDING

Congress should

- cut federal spending from 24 percent to 18 percent of gross domestic product and balance the budget by 2032;
- cut aid-to-state programs for education, housing, transportation, welfare, and other activities;
- end corporate welfare, including subsidies for agriculture and energy businesses;
- privatize postal services, passenger rail, electric utilities, air traffic control, and other activities that should be funded in the marketplace;
- convert Medicaid to a block grant and limit spending growth;
- reduce the growth in Medicare and transition to a system based on savings, competition, and choice; and
- reduce the growth in Social Security and transition to a system based on private accounts.

Federal spending is soaring, deficits are chronic, and government debt is reaching all-time highs relative to the size of the economy. Rising spending and debt are undermining growth and may push the nation into an economic crisis. The solution is to downsize most federal agencies by cutting and terminating harmful and unneeded programs. This chapter proposes specific cuts that would balance the budget and reduce dangerously high debt levels.

In recent decades, the federal government has expanded into many areas that should be left to state and local governments, businesses, charities, and individuals. That expansion is reducing freedom and creating a top-down bureaucratic society that is alien to American traditions. The COVID-19 pandemic prompted Congress to borrow and spend more than $5 trillion on relief programs, but lawmakers should now be retrenching as the crisis subsides.

The flood of deficit-financed pandemic spending is contributing to today's high inflation. The Hoover Institution's John Cochrane argues that pandemic spending was "an immense fiscal helicopter drop. People are spending the money, driving prices up. . . . The economy didn't need demand-side stimulus." To control inflation, we should slash deficit spending and tighten monetary policy. Without spending cuts, Cochrane says we could enter a vicious cycle: "The central bank raises rates to fight inflation, which raises the deficit via interest costs, which only makes inflation worse."

Federal debt held by the public has almost tripled as a share of gross domestic product (GDP)—from 35 percent in 2007 to 98 percent in 2022. At $24 trillion, the debt totals more than $180,000 for every household in the nation. With accumulated debt so high, the risk of an economic crisis has increased. Each percentage point rise in the average borrowing rate on $24 trillion of debt creates $240 billion in increased annual interest costs.

Experts do not know what level of government debt will precipitate a crisis, but many empirical studies find that economic growth slows when debt tops about 90 percent of GDP. Combined U.S. federal and state government debt is about 140 percent of GDP, which is substantially higher than the average of 100 percent in the Organisation for Economic Co-operation and Development member nations.

Federal policymakers should change course. They should cut spending and debt to reduce interest costs and support economic growth. The Congressional Budget Office (CBO) projects that under current law, federal spending will rise from 21.9 percent of GDP in 2024 to 24.3 percent by 2032 and federal debt will rise from 96 percent of GDP to 110 percent over that period. The plan presented here would balance the budget by cutting spending to 18.1 percent of GDP by 2032 while reducing debt to 80 percent of GDP.

Many policymakers believe that cutting government spending would hurt the economy, but they are mistaken. Retaining more resources in the private sector would be a net gain for the economy because markets have mechanisms to allocate resources to productive uses, whereas government allocations are guesswork. Markets are innovative and constantly fixing mistakes, whereas governments are rigid and often don't fix failed policies for years.

Federal spending cuts would revive growth by shifting resources from lower-valued government activities to higher-valued private activities. And cuts would enhance personal liberties by dispersing power from Washington and allowing individuals and communities to make more of their own choices.

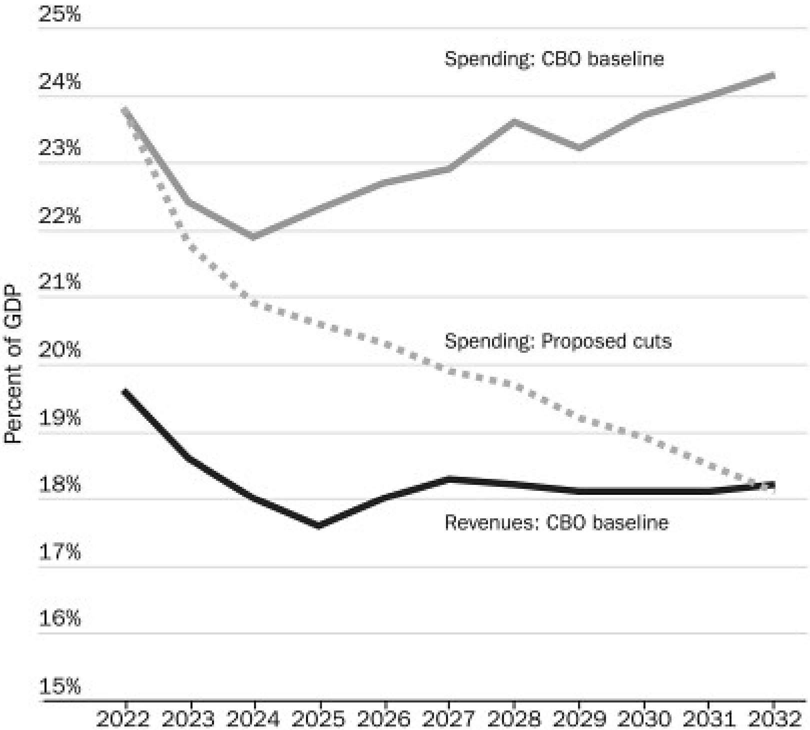
The plan proposed here includes a menu of possible spending reforms. These and other reforms are discussed further at DownsizingGovernment.org.

Spending Cut Plan

The starting point for the spending reform plan is the CBO's baseline projections. Figure 1 shows CBO projections from May 2022 for revenues and

Figure 1

Projected federal revenues and spending, percent of GDP, 2022–2032



Sources: Author's calculations and "The Budget and Economic Outlook: 2022 to 2032," Congressional Budget Office, May 25, 2022.
Note: CBO = Congressional Budget Office; GDP = gross domestic product.

spending as a percentage of GDP. The gap between the two lines is the federal deficit, which is expected to grow if no reforms are made.

The figure shows projected spending under the reform plan proposed here. Under the plan, spending would decline from 23.8 percent of GDP in 2022 to 18.1 percent by 2032, which would balance the budget that year. Spending reductions would be phased in over 10 years and by 2032 would total $2.3 trillion annually, including reduced interest costs.

The CBO revenue baseline assumes that the individual tax cuts under the 2017 Tax Cuts and Jobs Act expire as scheduled after 2025. If Congress pursues spending reforms, it would create budget room to extend the 2017 tax cuts while still reducing deficits. Extending the tax cuts would also be an opportunity to simplify the tax code by eliminating special breaks and flattening the tax-rate structure.

Table 1 shows proposed reforms to Social Security and health care programs, which would generate rising savings over time. The table shows the annual

Table 1

Proposed federal budget cuts, health care and Social Security

	Spending reform	Annual savings in 2032 (in billions of dollars)
Health care		
	Limit Medicare growth to GDP growth	$499.0
	Block-grant Medicaid and grow at 2%	$161.0
	Repeal ACA exchange subsidies	$105.0
	Cut non-Medicaid state health grants by 25%	$43.0
	Total cuts	$808.0
Social Security Administration		
	Limit Social Security retirement growth to GDP growth	$306.0
	Cut Social Security Disability Insurance by 25%	$55.0
	Cut Supplemental Security Income by 25%	$19.0
	Total cuts	$380.0
Total annual savings		**$1,188.0**

Source: Author.

Note: ACA = Affordable Care Act; GDP = gross domestic product.

savings compared with the CBO baseline in 2032. Table 2 shows cuts to programs other than Social Security and health care. These cuts would total $611 billion annually, but the plan assumes that one-tenth of the cuts would be phased in each year over the coming decade. Most values in Table 2 are estimated spending in 2022, but (where applicable) extra pandemic-related spending was excluded so that the values better reflect typical spending levels.

These reforms are deeper than the savings from "duplication" and "waste" that policymakers often mention. We should cut hundreds of billions of dollars of "meat" from federal departments, not just the obvious "fat." If the activities that are cut are useful to society, then state governments or private organizations should fund them. The following sections discuss subsidies, aid to the states, entitlement programs, privatization, and defense spending.

Table 2

Proposed federal budget cuts, discretionary programs and other entitlements

Department	Spending reform	Annual savings in 2032 (in billions of dollars)
Department of Agriculture		
	End farm subsidies	$33.5
	End food subsidies	$145.6
	End rural subsidies	$5.8
	Total cuts	$184.9
Department of Commerce		
	End telecom subsidies	$3.6
	End economic development subsidies	$1.5
	Total cuts	$5.1
Department of Education		
	End K–12 aid to states	$30.0
	Cut college student aid by 50%	$45.9
	Total cuts	$75.9
Department of Energy		
	End subsidies for renewables	$2.7
	End subsidies for fossil fuels, nuclear power, and electricity	$4.1
	Privatize power marketing administrations	N/A
	Total cuts	$6.8
Department of Homeland Security		
	Devolve TSA airport screening to airports	$5.3
	Devolve FEMA activities to the states	$24.8
	Total cuts	$30.1
Department of Housing and Urban Development		
	End rental assistance	$40.2
	End community development subsidies	$19.0

(continued)

	End public housing subsidies	$8.1
	Total cuts	$67.3
Department of the Interior		
	Reduce net outlays by 50% through spending cuts, privatization, and user charges	$10.0
Department of Justice		
	End state/local discretionary grants	$2.6
Department of Labor		
	End employment and training services	$4.9
	End Job Corps	$1.7
	End trade adjustment assistance	$0.5
	End Community Service for Seniors	$0.4
	Total cuts	$7.5
Department of Transportation		
	End urban transit subsidies	$21.7
	Cut highway aid that exceeds fuel tax revenues	$19.0
	Privatize air traffic control (federal fund savings)	$2.1
	Privatize Amtrak and end rail subsidies	$7.0
	Total cuts	$49.8
Department of the Treasury		
	End refundable earned income tax credit	$57.1
	End refundable child tax credit	$29.0
	End refundable AOTC	$3.3
	Total cuts	$89.4
Other savings		
	Repeal Davis-Bacon labor rules	$12.0
	Cut foreign aid by 50%	$12.3
	Cut NASA budget by 50%	$11.7
	Cut federal civilian compensation costs by 10%	$33.2

(continued)

	End the Small Business Administration	$1.1
	End EPA state/local grants	$3.7
	End aid for the Corporation for Public Broadcasting	$0.5
	Privatize the Corps of Engineers (Civil Works)	$7.0
	Privatize the Tennessee Valley Authority	N/A
	Privatize the U.S. Postal Service	N/A
	Total cuts	$81.5
Total annual savings		**$610.9**

Source: Author.
Notes: AOTC = American Opportunity Tax Credit; EPA = Environmental Protection Agency; FEMA = Federal Emergency Management Agency; TSA = Transportation Security Administration; NASA = National Aeronautics and Space Administration; N/A = not available.

Subsidies to Individuals and Businesses

The federal government funds more than 2,300 subsidy programs, more than twice as many programs as in the 1980s. The *scope* of federal activities has expanded in recent decades along with the *size* of the federal budget. The federal government subsidizes farming, health care, school lunches, broadband, rural utilities, energy, rental housing, aviation, passenger rail, public broadcasting, job training, foreign aid, urban transit, space exploration, and many other activities.

Each subsidy damages the economy by requiring higher taxes or debt. Each subsidy generates a bureaucracy, spawns lobby groups, and encourages even more groups to demand handouts. Individuals, businesses, and nonprofit groups that become hooked on federal subsidies become tools of the state. They lose their independence, have less incentive to work and innovate, and shy away from criticizing the government.

Table 2 includes cuts to subsidies in agriculture, commerce, energy, foreign aid, housing, and other activities. These cuts would not eliminate all unjustified subsidies in the budget, but they would be a good start. Government subsidies are like an addictive drug, undermining America's traditions of individual reliance, voluntary charity, and entrepreneurialism.

Aid to the States

Under the Constitution, the federal government was assigned specific limited powers, and most government functions were left to the states. Unfortunately, policymakers and the courts have mainly discarded constitutional federalism in recent decades. With "grants-in-aid" programs, Congress has pursued many activities that were traditionally reserved to state and local governments. Grant programs are subsidies that are combined with federal regulatory controls to micromanage state and local activities. Federal aid to the states was $721 billion in 2019 and was distributed through more than 1,300 separate programs. Congress boosted aid by hundreds of billions of dollars during the COVID-19 pandemic in 2020 and 2021.

The theory behind grants-in-aid is that the federal government can operate programs in the national interest to solve local problems efficiently. But the aid system does not work that way in practice. Policymakers usually focus on maximizing subsidies for their states, and they tend to ignore efficiency, program failures, and the need for spending tradeoffs in the overall budget.

Furthermore, federal aid stimulates overspending by state governments, and the regulations tied to aid programs raise state and local costs. Aid undermines government accountability because each level of government blames the other levels for program failures. And aid undermines democratic control because it transfers policy decisions from elected state and local officials to unelected officials in faraway Washington.

The grants-in-aid system serves no important economic purpose, and it should be phased out. The states should fund their own activities. Tables 1 and 2 include cuts to grants for education, health care, highways, housing, justice, transit, and other activities.

Medicare, Medicaid, and Social Security

The growth in major entitlement programs is the main cause of the government's looming fiscal crisis. The actuaries of Social Security and Medicare estimate that promised but unfunded future benefits are $60 trillion and $103 trillion, respectively, in present value terms. Those costs dwarf the federal debt of $24 trillion. The only good news is that entitlement programs can be, and should be, cut to reduce future costs. Table 1 lists some proposed reforms.

Congress should limit annual spending growth in Medicare to nominal GDP growth. The table assumes that such a limit begins in 2024, which generates growing savings over time compared with the baseline. Reforms that would limit spending growth include raising the retirement age, increasing program deductibles and copays, increasing premiums for Part B, and cutting the program's improper payment rate.

Congress should also consider major restructuring of Medicare. Cato scholars have proposed moving to a system based on individual vouchers, personal savings, and consumer choice for elderly health care, as discussed elsewhere in this *Handbook*. Such reforms would encourage patients to become more discriminating health care consumers and induce providers to improve quality and reduce costs.

Congress should convert Medicaid from an open-ended matching grant to a block grant while giving the states more flexibility to control costs and tailor the program to local needs. That was the successful approach used for welfare reform in 1996. The plan here would cap the federal contribution to Medicaid at 2 percent annual growth. It would also phase in cuts of 25 percent to non-Medicaid health grants to the states compared with baseline projections.

Congress should limit annual growth in Social Security retirement spending to nominal GDP growth. The table assumes such a limit begins in 2024, which generates growing savings over time. Some reforms that would limit spending growth include raising the normal retirement age and indexing initial benefits to prices rather than wages. The plan would also phase in cuts of 25 percent to the fraud-plagued Social Security Disability Insurance and Supplemental Security Income programs.

Over the longer term, Congress should transition Social Security retirement to a system based on private accounts, as discussed elsewhere in this *Handbook*. Private accounts would increase personal financial security and improve work incentives by converting payroll taxes to account contributions that are personally owned.

Privatization

A privatization revolution has swept the world since the 1980s. Following the United Kingdom's lead, governments in more than 100 countries have transferred thousands of state-owned businesses to the private sector. More than $3 trillion of railroads, energy companies, postal services, airports, and other businesses have been privatized.

Privatization helps spur economic growth. It allows entrepreneurs and markets to reduce costs, improve quality, and increase innovation. It also benefits the environment by reducing the wasteful use of resources we often see in government-run activities.

Despite the global success of privatization, many activities that have been privatized abroad remain in government hands in this country. Federal policymakers should learn from foreign experiences and enact proven reforms here. Table 2 includes the privatization of the air traffic control system, Amtrak, the Army Corps of Engineers, federal electric utilities, and the U.S. Postal Service. Such reforms would produce only modest savings to the federal budget, but they could substantially improve the management and efficiency of these services.

Defense Spending

Under the CBO baseline, national defense spending is projected to fall from 3.1 percent of GDP in 2022 to 2.7 percent by 2032. That would be the lowest level of defense spending relative to GDP since before World War II. Elsewhere in this *Handbook*, Cato's defense and foreign policy experts describe a general policy of restraint and discuss numerous strategies to reduce defense costs.

Conclusion

Without budget reforms, federal debt will rise continuously as a share of GDP in coming years, which will precipitate an economic crisis at some point. Rising debt and deficits are already contributing to inflation and are likely undermining economic growth. The sooner policymakers tackle spending reforms, the better. Numerous foreign leaders have pursued vigorous cost cutting when their government debt started getting out of control, and there is no reason why our leaders cannot do the same.

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—Prepared by Chris Edwards

39. SCHOOL CHOICE

State legislators should

- move from funding districts to funding students;
- focus on programs that provide the most freedom for the most people: tax credit–eligible education savings accounts; and
- avoid imposing rules and regulations on private schools, both in choice programs and outside them, especially that schools administer state standardized tests.

American elementary and secondary education is based on a backward model, in which it is expected that children will be shoehorned into what a school system offers rather than the system meeting the myriad and unique needs of diverse children, families, and communities. Local control has somewhat mitigated this problem, but over the decades public schooling has become highly centralized and homogeneous.

State policymakers should flip the model. Instead of funding school districts and enacting state-level controls to which families and children must conform, states should attach education funding to children and let families choose among options offered by educators who are free to decide what they want to teach and how they will teach it. Education should work with freedom and diversity, not against them.

A Brief History of American K–12 Education: From Freedom to Government Control

From the beginning of the colonial period to the late 1830s, education was generally considered to be the purview not of government but of free people, especially families and churches. Government did sometimes play a role, with some colonies requiring that children be provided with basic education in religion, reading, and mathematics, and with Massachusetts in 1647 going as far as requiring towns to ensure that there was a teacher or a grammar school to whom families could send their children if they so desired. Government also sometimes supplemented the funding of schools because the greatest reliable generator of funds for schools in the Old World was one of the few superabundant things in the new: land. Even with that, Massachusetts families were expected to pay even for public schools as long as they had the means, and such government provision did not extend far beyond New England.

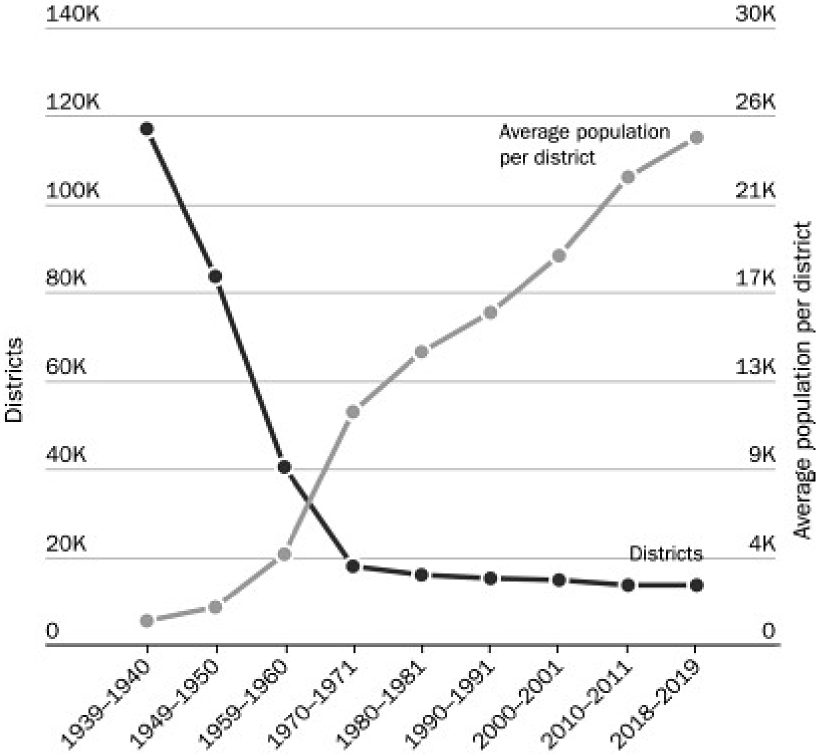
The absence of public schooling did not render Americans uneducated. Children throughout history have always learned a lot—through instruction from their parents and other elders as well as hands-on experience—whether the subject was how to obtain food and shelter or how the society into which they were born worked. In the colonial and early republican eras, much knowledge and skill were acquired by working with one's parents on a farm—agriculture was by far the most common occupation for most of American history—or through an apprenticeship with a master of a trade, such as a printer or blacksmith. But there was also a great deal of less vocational learning, including in reading, writing, mathematics, and more, sometimes in schools, sometimes out of them. Indeed, an estimated 90 percent of adult white Americans were literate by the dawn of the "common schooling" movement in 1837. (African Americans were often forbidden by law from receiving an education.) As historian David Tyack has noted, "Before Americans generally accepted the idea that schooling should be publicly controlled and financed they clearly believed in education of the public."

The year 1837 marks the start of the public-schooling era because it is the year that tirelessly crusading Horace Mann—"father of the common school"—became the first secretary of the Massachusetts Board of Education. He was the leading advocate in the country for uniform, government-provided schooling, aimed at creating virtuous, unified state and national citizens. It took a long time for public schooling to become coupled with compulsory education laws. The first was not passed until 1852, in Massachusetts, and the last among then-existent states was passed in Mississippi in 1918, and use of the schools was long sporadic.

Public schooling did not, as literacy levels attest, typically fill an education vacuum. It crowded out private schools and other options, including the many forms of education in the colonial era—homeschooling, apprenticeships, private schools of many types—and later pushed aside or took over widespread private academies that were the forerunners of public high schools.

Despite the uniformity goal espoused by some of its elite backers, for much of public schooling's history, it was typically very local. As can be seen even in the relatively recent district data in Figure 1—the oldest national data readily available—districts have become fewer and larger since 1940. Overall, the number of districts dropped from 117,108 in 1939–1940 to 13,452 in 2019,

Figure 1
Number of school districts and average population per district



Sources: U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2020*, Table 214.10, https://nces.ed.gov/programs/digest/d20/tables/dt20_214.10.asp; and "Historical Population Change Data (1910–2020)," U.S. Census Bureau, April 26, 2021, https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html.

while the population rose from 132,164,569 to 331,449,281. That moved the average population per district from 1,129 to 24,639—more than 20 times larger. Consolidations were driven by efforts to eliminate districts run by immigrant communities, to achieve economies of scale, to enable more racial integration, and other aims.

Because people naturally tend to live with others like themselves—religiously, culturally, ethnically—small districts enabled public schools to reflect the cultures and values of the members of their oft-homogeneous communities. That fostered peaceful coexistence; people did not have to fight to get the teaching they thought was right for their children—in contrast to what we have seen in stark relief over COVID-19 policies, critical race theory, and more in recent years.

In larger districts, religious and cultural conflicts, sometimes even violent, occurred. Of course, anyone in a small district not of the predominant group no doubt often felt marginalized. Also, African Americans, and sometimes children of Asian and Hispanic heritage, were either barred from public schooling completely or forced into segregated institutions.

In addition to forcing diverse people to wrestle for control to get the teaching they want, larger districts tend to be less responsive to the communities they serve and to perform more poorly as a result. The odds of knowing school board members or bumping into them at the grocery store and sharing your thoughts is pretty low when your district serves tens of thousands of families. Making matters even worse, since the federal government became heavily involved in education in the 1960s, it has increasingly imposed requirements on all public schools and tasked states with implementing them, greatly decreasing local control while increasing state and federal power.

Outcomes

It is impossible to rigorously compare our present situation with the counterfactual—what if we had left education to the free market? That said, the evidence suggests that if we had left education in the free market, we would likely be in no worse condition in terms of educational outcomes and would have more peace in education.

Studies that have examined outcomes for students randomly selected to receive or not receive private school scholarships they requested—scholarships help put private schooling on a more equal financial footing with public schooling—have gotten mixed results on standardized test scores. (Random assignment helps pinpoint the effects of the schools versus characteristics of students who attend them.) But as seen in Table 1, studies have more often found positive test-score effects than negative. And many people do not believe that test scores are useful indicators of educational success, asserting that they reduce education to what can easily be measured as opposed to outcomes such as character development, critical thinking, and more.

More conclusive than test score outcomes is attainment. Several studies have shown that school choice leads to greatly increased high school graduation rates and college attendance, while none have found negative effects. Research has also found that chosen schools, controlling for outside factors, produce more tolerant, knowledgeable, and active citizens. Meanwhile, history—including that of countries such as the Netherlands, Belgium, and Canada—has shown that school choice helps reduce social conflict among diverse people by enabling them to freely pursue education best suited to their beliefs and desires.

As a bonus, research has consistently found that more options lead to improved *public* school test scores. Competition, it appears, spurs public schools

Table 1
Overall effects for studies of private school choice programs

Outcome	Total number of studies	Number of studies with positive effect	Number of studies with no visible effect	Number of studies with negative effect
Program participant test scores	17	11	4	3
Educational attainment	7	5	2	0
Parent satisfaction	32	30	1	2
Public school students' test scores	28	25	1	2
Civic values and practices	11	6	5	0
Integration	7	6	1	0
Fiscal effects	73	68	4	5

Source: EdChoice, "Overall Effects Counts for Studies of Private School Choice Programs," *The 123s of School Choice*, April 19, 2022. The number of effects detected may differ from the total number of studies because of dual classification of studies that detect both positive and negative effects.

to improve. Choice is also a potential money saver for taxpayers, with the average per-pupil expenditure in public schools sitting at roughly $16,000 and average private school tuition just about $12,000.

Recommendations

States should adopt school choice. At its most basic level, that means the norm should be having funding follow students to the educational options—traditional public school, charter, private, homeschool—that their families select. To be most meaningful, choice must include the ability to attend truly private schools. Charter schools, though privately managed, are public schools, and they are not sufficient to provide robust choice. As public schools, they are held accountable through the use of state tests and, hence, state curricular standards, and they cannot be religious.

Vouchers—simply letting government dollars follow children to private schools—are the most direct way to deliver choice that includes private schools. They are not, however, ideal.

To minimize the threat of stultifying regulation, it is important to give both funders and families freedom. On the funder side this is done through tax credits that (a) individual filers can get for their own private schooling expenses or (b) corporations or individuals can get on their income, property, or other taxes if they donate to groups that provide families funding to choose private options. Ideally, donors do not just choose to donate; they are also able to choose among different providers so that their funding does not go to schools that do things to which they might object, such as teaching math poorly or espousing religious beliefs they do not share.

Credits for donors are typically called scholarship tax credits. As of early January 2022, such credits existed in 21 states, while credits and deductions for a family's own private education expenses existed in 9 states. Scholarship tax credits have been shown to grow more quickly and to carry lighter regulatory loads than vouchers, likely because no taxpayer is forced to fund anyone's school selection.

Even more powerful for families than scholarship tax credits are tax credit–eligible education savings accounts (ESAs). ESAs—essentially, savings accounts holding funds specifically for educational uses—can help pay for private school tuition but also other education expenses, including tutoring for children who need extra help, therapies for students with disabilities, the purchase of science equipment for homeschoolers, and more. They move from *school* choice to broader *education* choice.

The ESA concept is relatively new, first implemented with government funding in Arizona in 2011. As of early January 2022, eight states had government-funded ESAs, and one state—Kentucky—had enacted a tax credit–eligible ESA program.

No matter what private-choice programs a state or district adopts, it is important to minimize regulation. First and foremost, that means not requiring that participating schools administer state standardized tests. Requiring state testing de facto cripples choice by forcing schools to focus on state curricula, homogenizing a key part of what makes many private schools different. Schools should also be free to set their own admissions, pricing, and teacher quality criteria, allowing them to build cohesive communities and try different ways to fund and deliver education. Allowing profit is also crucial, as profit-making signals other educators that a model is in demand and should be replicated.

Along with minimizing rules should be maximizing scholarship size and reach. Within the realm of scholarship tax credits and tax credit–eligible ESAs, that means setting high caps on the total amount of credits available, on the size of the credit for which donors are eligible, and on making credits 100 percent—for example, if you donate $1,000, you get a $1,000 credit. There also should be high or no caps on how many students are eligible. Such caps often take the form of strict, numeric enrollment limits or highly restrictive means testing.

If scholarship tax credits or tax credit–eligible ESAs are not politically viable, vouchers are a move in the right direction, but lawmakers must be extra vigilant about threats to regulate participating schools. Charters are also an option, and they are preferable to all schooling being assigned according to students' home addresses, but their great limitations must be understood. Also, they often take students from private schools because families see them as essentially the same thing, only free. If they hurt private schooling, that might well render them a long-term loss for educational freedom.

Conclusion

For much of American history, education was largely based in liberty, at least for people that government did not bar from receiving it. Over time, though, public schooling became more commonplace and eventually highly centralized, crowding out private options and the ability for people to attend true community public schools. Today, public schooling is highly centralized. That is neither good for unique children, families, and communities nor good for society. States need to remedy that centralization with educational freedom, and the ideal way to provide that is through tax credit–eligible ESAs.

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—Prepared by Neal McCluskey

40. DEPARTMENT OF EDUCATION

Congress should

- continue down the path of returning power to states, districts, schools, and parents that slowly began with the Every Student Succeeds Act;
- ultimately eliminate federal involvement in K–12 education except for supplying school choice in Washington, DC; funding education for students in military families and on Indian reservations; and prohibiting discrimination in state and local provision of education; and
- via tax reductions, let taxpayers keep the roughly $90 billion per year that the federal government spends on K–12 education.

The Constitution gives the federal government no authority to exercise control over elementary and secondary education, including by spending money and attaching conditions to the funds, the primary mode by which Washington has influenced education. And no, the Founders did not exclude dominion over education from the specific, enumerated powers given to Washington because they thought such authority was subsumed under the General Welfare Clause. They did not include it because education was believed best left in the hands of parents and civil society—the families and communities closest to the children—and certainly not in a distant national government. Nearly 60 years of experience with major and, until very recently, constantly expanding federal meddling in K–12 education have proved them right.

A Brief History of Federal Involvement

The federal government is a relative newcomer to elementary and secondary schooling. As many advocates of a federal role in education are quick to point out, the Land Ordinance of 1785 and Northwest Ordinance of 1787 contained provisions calling for territories to dedicate revenue from the sale of portions of land to educational purposes. But those laws preceded the Constitution, were often ignored, and asserted no federal control over what might be taught, how, or by whom. Education was also barely discussed in the Constitutional Convention. And when it was, the specific subject was almost entirely a national university, which, it was understood, could be created under a specific, enumerated power: jurisdiction over the "Seat of Government," not any education power. Reinforcing this view, in 1792 James Madison argued against a bill to provide aid to fisheries by noting that, were Congress to decide that the Constitution furnished the authority to spend money thusly, it could also, absurdly, "take into [its] own hands the education of children." In 1806, President Thomas Jefferson recommended using some federal monies for education, but said "an amendment to the constitution" was "necessary, because the objects now recommended are not among those enumerated in the constitution." In 1943, the U.S. Constitution Sesquicentennial Commission, chaired by President Franklin Delano Roosevelt, published a document that included the following: "Q. Where, in the Constitution, is there mention of education? A. There is none; education is a matter reserved for the states."

It was not until the Soviet Union sent the satellite Sputnik into orbit in 1957, and the American public briefly panicked, that the federal government began to exercise significant influence over education. That foray, the National Defense Education Act, primarily aimed to improve capacity in science and engineering at the college level. And the act had a clear connection to a constitutionally explicit federal responsibility: national defense.

Only in the mid-1960s, under President Lyndon Johnson's Great Society, did Washington completely break with the Constitution by enacting a K–12 law untethered to explicit defense needs. The Elementary and Secondary Education Act (ESEA), enacted in 1965, sought, primarily, to provide compensatory funding to districts serving low-income populations, not to exercise authority over states and districts. What was discovered over the course of about two decades, however, was that funding alone made little difference in outcomes.

By the early 1980s, many people considered the American education system to be failing. As a result, the federal role began to morph from one focused on funding to one focused on control made possible by attaching coercive rules to federal dollars. The Reagan administration—which at first strove to eliminate the cabinet-level U.S. Department of Education that had just been created in 1979—published the report *A Nation at Risk* in 1983 with a Sputnik-like effect. It intoned, "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war." The administration's second education secretary, William Bennett, became a major personality to whom the media and public looked for guidance on education issues, and the 1988 reauthorization of the ESEA for the first time called on states and districts to demonstrate academic achievement. The era of "standards and accountability" had begun, and it arguably reached its apex with the 2002 ESEA reauthorization, the No Child Left Behind Act (NCLB).

NCLB asserted enormous control over the shape and functioning of K–12 education, requiring that all schools adhere to uniform state standards, be held accountable by aligned standardized tests, and bring all students (including numerous subsets based on race and other group identities) to full "proficiency" by the end of the 2013–2014 school year. Schools were punished if any group failed to make "adequate yearly progress" toward that full-proficiency goal.

Over time, parents and others came to greatly dislike the law's strictures and its emphasis on standardized testing, and irritation evolved into disgust with the "Race to the Top" program. Among other things, that program essentially required states to use the Common Core national curriculum standards and one of just two federally funded, Core-aligned tests, to compete for a share of a $4 billion pool of funding. The program also called for greater data collection on students and teacher evaluations based on students' test scores. In addition, the Obama administration started to offer NCLB waivers in exchange for states' adopting administration-selected policies. Those centralizing efforts united opposition on the left and right against Washington, the new "national school board."

The end result is the latest iteration of the ESEA, the Every Student Succeeds Act (ESSA), which President Barack Obama signed in December 2015. The ESSA removed some onerous provisions of NCLB, Race to the Top, and NCLB waivers, especially "adequate yearly progress," coercion to adopt the Common Core, and mandatory use of standardized test scores in teacher evaluations. Still, it is too controlling, continuing the requirements that states have uniform standards and tests, that almost all students in grades 3 through 8 take those tests, that all high school students take at least one standardized assessment, and that test results be a part of school accountability evaluations. It also still required that states submit detailed school improvement plans to Washington for approval.

Outcomes

What have we gotten from federal spending and control? First, it is very difficult—perhaps impossible—to fully separate the effects of federal policy from numerous other variables that affect academic achievement. Those variables include state policies, local policies, students' family lives, attitudes toward education, and more. Thus, we cannot say definitively that federal policy caused something to happen or not happen. Nevertheless, the evidence suggests that federal K–12 interventions have been largely ineffectual and almost certainly not worth the money expended on them. Note that this failure does not include interventions by federal courts, which have often been necessary to enforce the Fourteenth Amendment's equal protection requirements against state and district discrimination.

Historically, the evidence is powerful that neither government provision of schools nor compulsory attendance was needed for most people to educate their children. Numerous historians have noted that white Americans (blacks were often prohibited by law from receiving an education) had very high rates of literacy before there was significant provision of "common schools," and very large percentages of Americans were sending their children to school before attendance was compulsory. People valued education and did not appear to need government provision, which largely *followed* widespread education.

To assess learning in the modern era, the most consistent national measure we have is the National Assessment of Educational Progress (NAEP) long-term trend assessment. The assessment is given to a nationally representative sample of students—but without stakes attached and, thus, insulated against "gaming"—which has remained largely consistent since the 1970s. There was a long lag in administration of the tests, but a new one occurred for 9- and 13-year-olds in 2020, before the onset of the COVID-19 pandemic. Unfortunately, the most important group for assessing the "final products" of the education system—17-year-olds—was unable to take the exam before COVID-19 made administering it untenable.

It is difficult to pinpoint precisely the effect of federal education spending—the main thing Washington does—on NAEP results, and standardized tests scores are just one limited measure of educational success. But it is also the case that the federal government itself calls the NAEP the "Nation's Report Card," so it is valuable to see whether it indicates success.

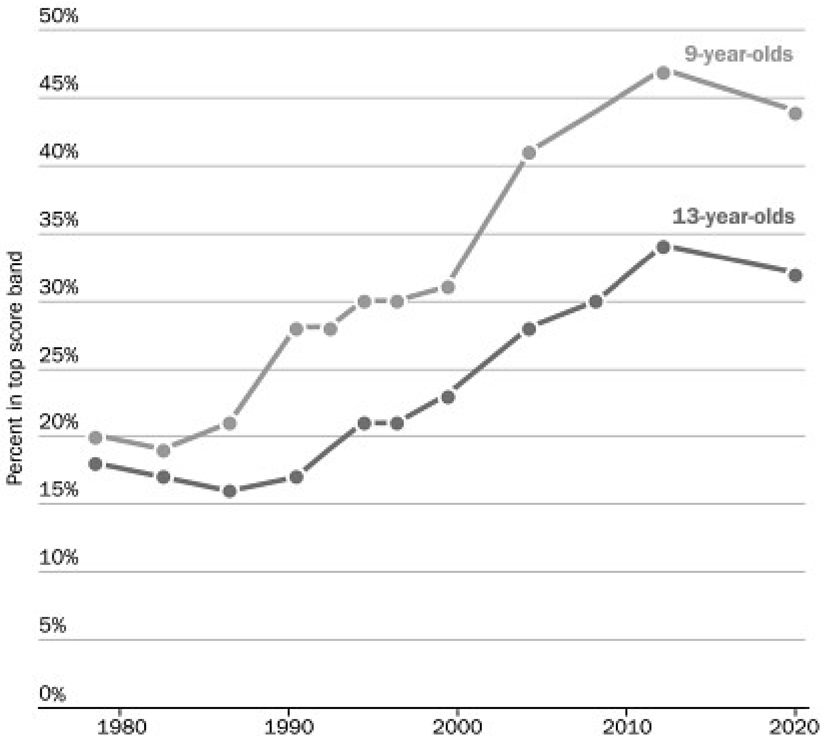
Looking at 9- and 13-year-olds, there has been improvement over the course of the past several decades. First looking at math (Figure 1), both age groups have seen increases in the share of students hitting the top score bands (250 or higher for 9-year-olds and 300 for 13-year-olds). Indeed, the share more than doubled for 9-year-olds from beginning to end and came close to doubling for 13-year-olds.

Reading for the same age group has seen much less impressive growth. As Figure 2 shows, 9-year-olds saw a rise from 16 to just 22 percent scoring at the highest level, and a similarly low trajectory for 13-year-olds.

Looking at 17-year-olds over the decades, achievement is almost completely flat, even dropping. Because the long-term-trend NAEP has not been administered to 17-year-olds since 2012, it is valuable also to look at scores for 12th

Figure 1

Change in NAEP math results for 9- and 13-year-olds



Source: U.S. Department of Education, National Center for Educational Statistics, National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard.

Note: NAEP = National Assessment of Educational Progress.

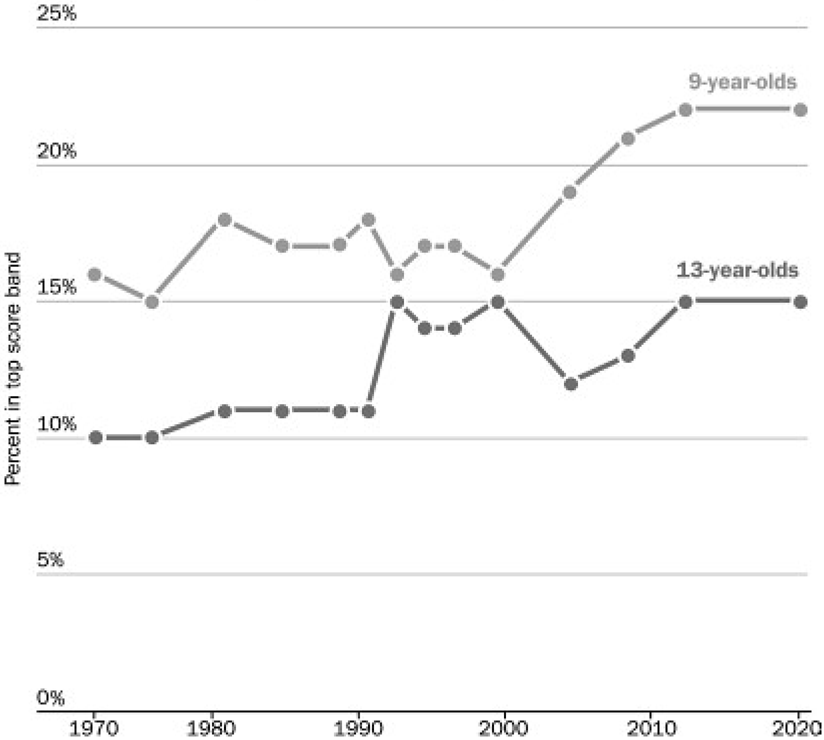
graders on the main NAEP, which covers fewer decades and is not intended to be consistent for a long period, but nonetheless suggests trends for more recent years.

Starting with the long-term trend math and reading scores (Figure 3), the share of students scoring in the top band has been in the single digits since the 1970s; in the case of reading, it actually dropped by a percentage point between the beginning and end of the period.

Finally, Figure 4 shows shares of students reaching "proficient" on the main NAEP. (The long-term-trend NAEP does not have a "proficient" rating.) Again, the results are flat or slightly declining, although we only have five points of math data.

Aside from math for 9-year-olds and 13-year-olds, results have been pretty stagnant, and, most concerning, even dropping in reading for the "final products" of the education system. Perhaps this is a result of declines in spending. After all, it is common to hear complaints that public schools are underfunded.

Figure 2
Change in NAEP reading results for 9- and 13-year-olds



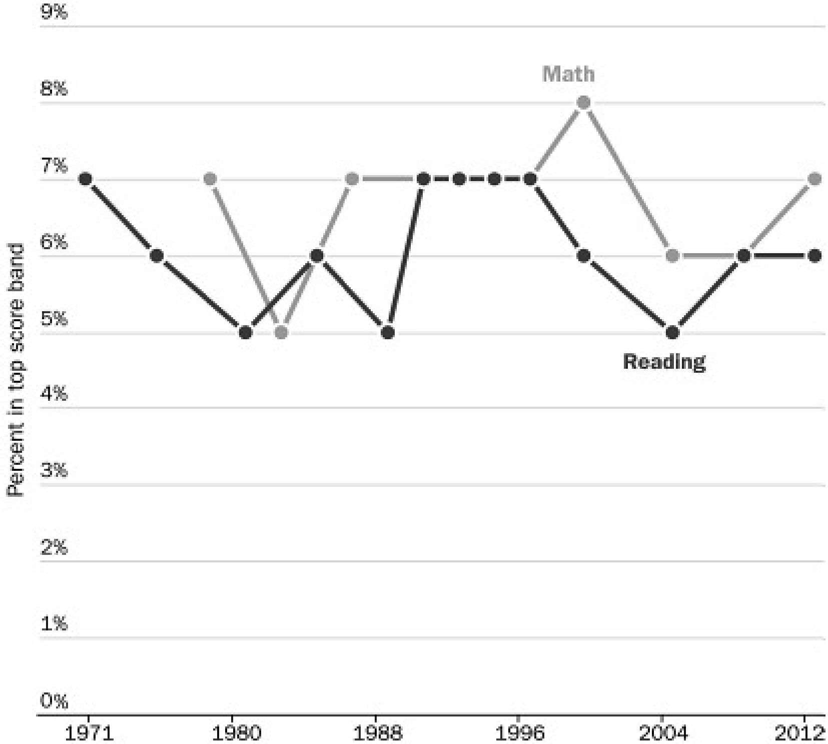
Source: U.S. Department of Education, National Center for Educational Statistics, National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard.
Note: NAEP = National Assessment of Educational Progress.

Spending does not appear to be the problem, at least in terms of growth. First, as Figure 5 shows, inflation-adjusted federal spending on a per pupil basis has grown appreciably over the period of NAEP examinations, more than doubling, although it has fluctuated. Overall, growth is much steeper than increases in top-performer shares, save for 9-year-old math.

General stagnation does not seem to be a product of overall spending, either. As seen in Figure 6, that has more than doubled for public schools since the early 1970s. Indeed, it has grown faster than the federal component, seeing 143 percent growth versus 123 percent. It certainly appears that outcomes have not been nearly commensurate with spending. And achievement gets worse the older kids get, suggesting that the longer children are in the education system, the worse their performance.

Perhaps the problem is that life for children has become more difficult, and more funding is needed to compensate for problems such as poverty. Conditions associated with poverty are certainly problems for many children, but overall,

Figure 3
Change in NAEP results, long-term trend math and reading scores, 17-year-olds

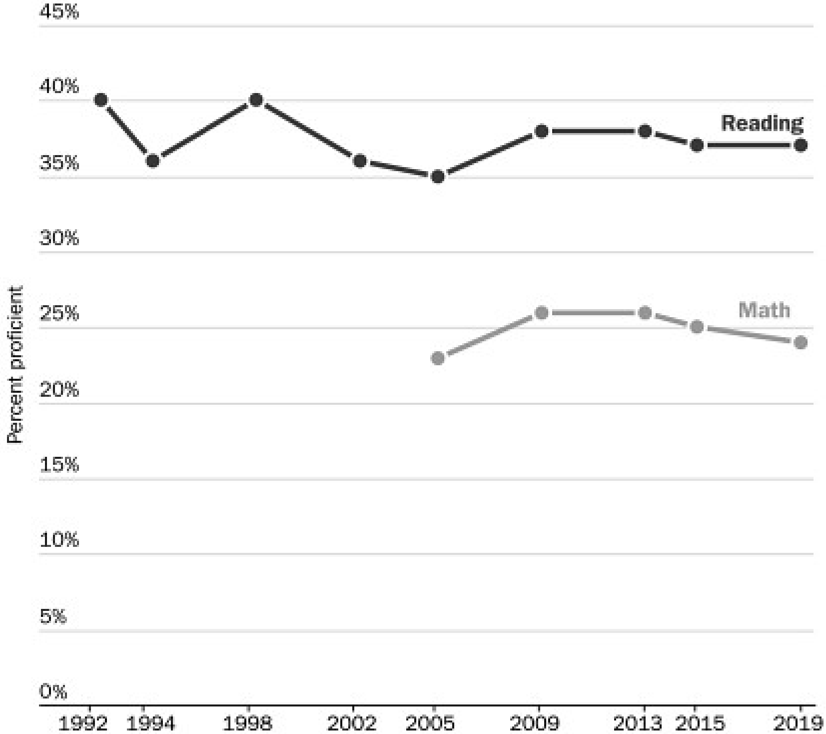


Source: U.S. Department of Education, National Center for Educational Statistics, National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard.
Note: NAEP = National Assessment of Educational Progress.

the period from 1970 to today has been one of markedly rising prosperity. As shown in Figure 7, real GDP per capita has well more than doubled, increasing 138 percent. That suggests that the average student is at least materially much better off today than in 1970, strongly militating against the possibility that we see little overall improvement despite major spending increases because kids are coming to schools in worse shape.

It is also true that the student demographic mix has changed appreciably since 1970, especially with a much larger share identifying as Hispanic, and a much smaller share as white. This change might explain some of the score stagnation, as traditionally higher-performing groups have become smaller, and lower-performing groups larger, shares of the overall population. But we have seen 12th-grade reading performance on the main NAEP for white students stagnate—46 percent at or above proficient in 1992, just 47 percent there in 2019. Math is better, but not great: white proficiency and above was 29

Figure 4
Change in NAEP proficient results, 17-year-olds



Source: U.S. Department of Education, National Center for Educational Statistics, National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard.
Note: NAEP = National Assessment of Educational Progress.

percent in 2005 and 32 percent in 2019. And all groups should benefit from rising standards of living.

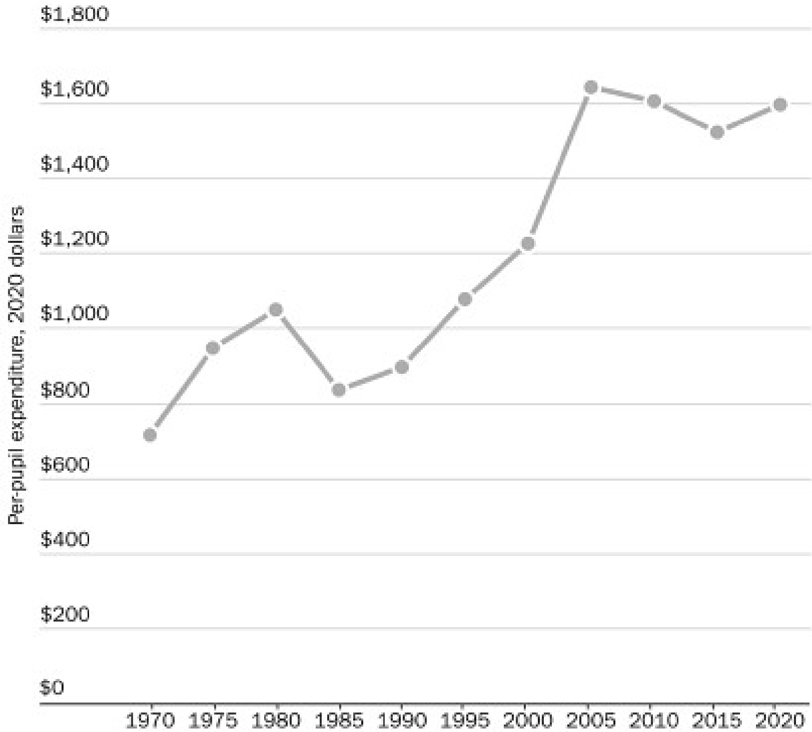
Americans appear to have seen little return for their tax money, federal or otherwise, at least when it comes to federal standardized test results. What they have gotten much more often has been micromanagement and standardization, peaking with NCLB and the Common Core.

Recommendations

Moving away from the hyper-prescriptiveness of NCLB and the Common Core regime was something we do not see very often: the federal government giving some power back to states, districts, and people. It was a step in the right direction, but there are still many, many miles to travel to get the federal role where it should be. Eventually, outside of a few specific constitutionally authorized items, Washington should withdraw from K–12 schooling.

Figure 5

Change in federal spending per pupil, 2020 dollars



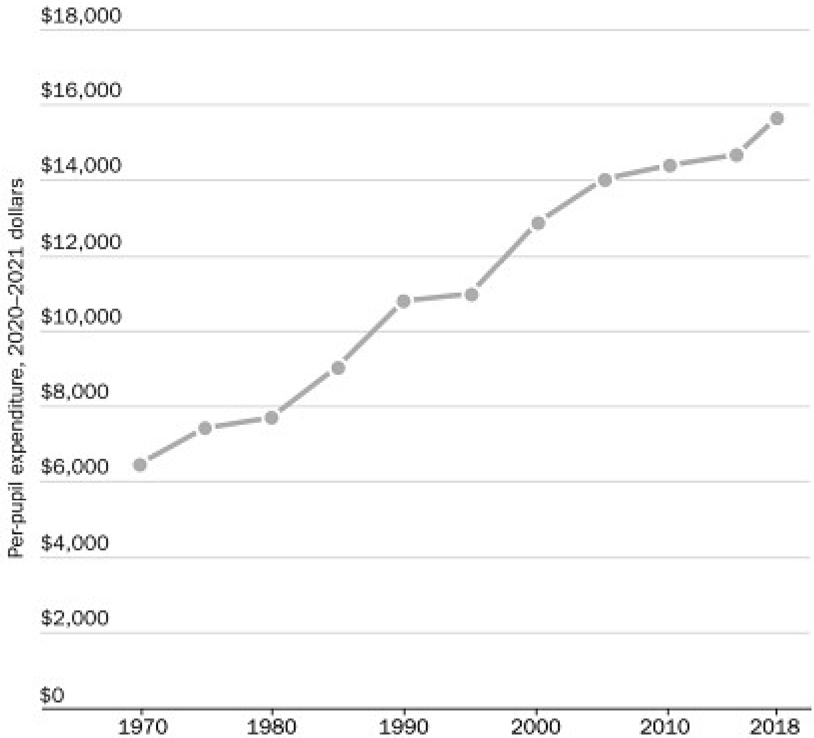
Sources: "Table 401.10. Federal Support and Estimated Federal Tax Expenditures for Education, by Category: Selected Fiscal Years, 1965 through 2020," National Center for Education Statistics, Digest of Education Statistics, https://nces.ed.gov/programs/digest/d20/tables/dt20_401.10.asp; "Table 105.30. Enrollment in Elementary, Secondary, and Degree-granting Postsecondary Institutions, by Level and Control of Institution: Selected Years, 1869–70 through Fall 2029," National Center for Education Statistics, Digest of Education Statistics, https://nces.ed.gov/programs/digest/d20/tables/dt20_105.30.asp; and Thomas D. Snyder, ed., *120 Years of American Education: A Statistical Portrait* (Washington: Center for Education Statistics, 1993), table 9, https://nces.ed. gov/pubs93/93442 pdf.

In the short term, Congress could make such changes to the ESSA as removing the uniform state math and reading/language arts curricular standards and test mandate, with flexibility for states to allow all districts to choose among multiple standards and tests. It could also reduce the grades required to take the tests from the current grades 3 through 8 and once in high school. Finally, it could decrease the share of students—currently 95 percent—required to take those tests.

Those are only minimal changes that are politically realistic in the short term. Ultimately, federal involvement in education—which has always been unconstitutional and has, over the past several decades, failed to demonstrate effectiveness—should be eliminated. That is, with the following exceptions:

Figure 6

Change in total spending per public school pupil, 2020–2021 dollars



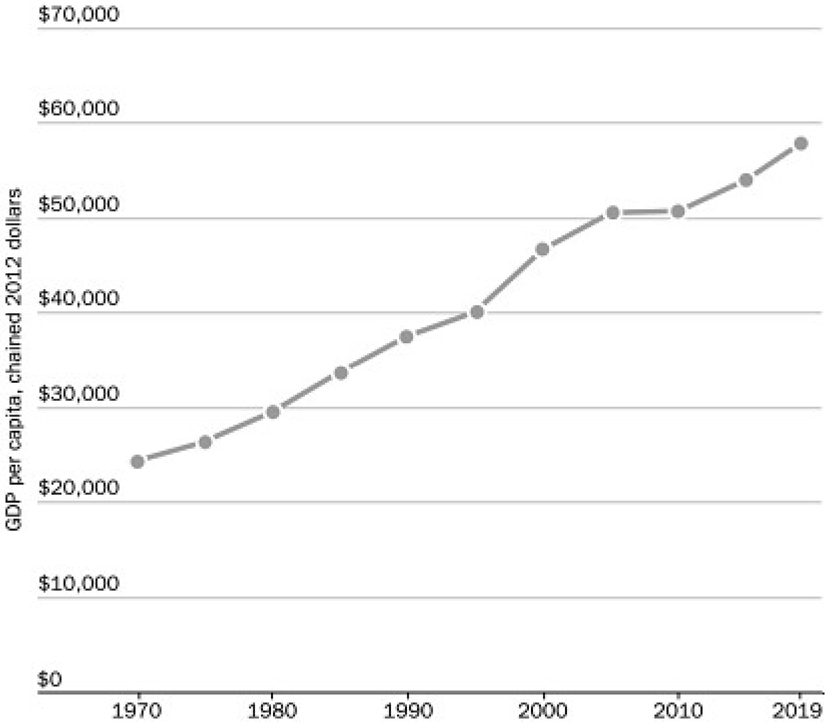
Source: "Table 236.55. Total and Current Expenditures per Pupil in Public Elementary and Secondary Schools: Selected Years, 1919–20 through 2018–19," National Center for Education Statistics, Digest of Education Statistics, https://nces.ed.gov/programs/digest/d21/tables/dt21_236.55.asp.

enforcing the Fourteenth Amendment in states or districts that clearly discriminate in their provision of education, exercising the federal government's fully constitutional authority over the District of Columbia and education on military bases, and assisting with education on Indian reservations. Even those three exceptions call for a light touch. For instance, the Department of Education's Office of Civil Rights has in the past been too aggressive in de facto making law, not just by regulation, but in *interpretation* of regulations in the form of "Dear Colleague" letters. It is also generally best for the people of Washington, DC, to exercise control over their own public schooling system, and of Indian tribes, as independent nations, to be self-governing.

Where the federal government can do something positive in DC, on reservations, and for the military, is providing school choice. Basically, attach federal funding to children instead of putting it directly into districts or public schools. Washington, DC, already has the Opportunity Scholarship Program, but it is too small at only $17.5 million, and is constantly under threat of eradication.

Figure 7

Change in GDP per person, chained 2012 dollars



Source: "Real Gross Domestic Product per Capita," Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/A939RX0Q048SBEA.
Note: GDP = gross domestic product.

It should be made permanent and given appreciably more funding. Similarly, funding for the Bureau of Indian Education and Department of Defense education funding could be "voucherized."

One final concern: empowering parents to choose educational options is powerful, enabling the people who know their children best to select their learning environments and people with different norms and desires to avoid zero-sum battles. But that does not mean it is desirable for Washington to voucherize overall federal education spending or to create federal scholarship tax credits. Doing so would be unconstitutional, and would create a very real danger of national regulation of such things as standards and testing in private schools nationwide.

Conclusion

The Constitution does not grant the federal government any authority to govern education, and for most of our history Washington stayed out of the schoolhouse. Over the past several decades, unfortunately, that changed—first with funding, then with control. Pinpointing the effect—or lack thereof—of federal intervention on education is difficult. But the evidence strongly suggests that, while Washington has driven no lasting improvements, it has marginalized and angered parents and other citizens. The federal government should drop the reins and let people at the state level decide where and how to exercise education authority.

Suggested Readings

Alger, Vicki E. *Failure: The Federal Misedukation of America's Children*. Oakland, CA: Independent Institute, 2016.

Amselem, Mary Clare, et al. "Rightsizing Fed Ed: Principles for Reform and Practical Steps to Move in the Right Direction." Cato Institute Policy Analysis no. 891, May 4, 2020.

Arons, Stephen. *Short Route to Chaos: Conscience, Community, and the Re-Constitution of American Schooling*. Amherst: University of Massachusetts Press, 1997.

DeAngelis, Corey A., and Neal P. McCluskey, eds. *School Choice Myths: Setting the Record Straight on Education Freedom*. Washington: Cato Institute, 2020.

Glenn, Charles L. *The Myth of the Common School*. Amherst: University of Massachusetts Press, 1987.

McCluskey, Neal P. *Feds in the Classroom: How Big Government Corrupts, Cripples, and Compromises American Education*. Lanham, MD: Rowman & Littlefield, 2007.

—Prepared by Neal McCluskey

41. PRE-K EDUCATION AND CHILDCARE

Congress should

- recognize that the promises of large returns on investment for universal preschool programs are grossly overstated;
- recognize that the high-quality research on large-scale preschool programs fails to find lasting positive effects on participating students;
- understand that a universal preschool program is likely to cost tens of billions of dollars without measurably improving student outcomes;
- end direct federal subsidies of childcare and preschool programs; and
- refrain from expanding childcare funding or enacting a universal preschool program.

Childcare assistance and universal preschool are among the more popular proposals from Washington each year. Yet the research on early childhood education does not support universal programs at the federal level. Some very limited programs have had positive results, but those results often fade within a few years. Other studies have found negative results in a variety of measurements. No studies have examined initiatives comparable to a universal program heavily regulated by the federal government.

The federal government has no constitutional authority when it comes to education or childcare. This limitation makes sense when you consider how diverse America is. Politicians and bureaucrats in Washington cannot know the needs of the millions of three- and four-year-olds throughout the country.

The mandates and bureaucracy that would accompany a federal program would likely worsen the early childhood landscape for many families by driving preferred alternatives out of business. This outcome would harm, rather than help, young children.

Probing the Promises about Preschool Programs

President Biden has gone beyond his Democratic predecessors with his support for universal preschool. President Obama proposed "a new federal-state partnership to provide all low- and moderate-income four-year old children with high-quality preschool" through a "Preschool for All" program. Similarly, in her presidential campaign, Hillary Clinton proposed universal preschool for every four-year-old.

Biden has upped the ante when it comes to early childhood education by including all three- and four-year-olds—an estimated 8 million children—in his universal preschool proposal. That increase would be an unprecedented expansion of the federal government's involvement in education. The president has attempted to justify this expansion by claiming his program will generate a host of benefits.

"There's universal pre-K for every three- and four-year-old child in America. It's going to increase academic achievement in all children and give them an even start no matter what—what home they come from, no matter how little—little they've been taught to read or they've been read to. It's going to change everything" (remarks by President Biden at a virtual grassroots event for the Democratic National Committee, November 9, 2021). According to the Annenberg Public Policy Center's FactCheck.org, Biden is stretching the evidence when it comes to the benefits of universal preschool: "There is plenty of research on specific targeted programs, but there isn't much on universal programs. And the research that does exist, in many cases, is more nuanced and less optimistic than Biden suggests."

Children who attend some preschool programs may reap short- and long-term benefits; however, that does not mean every child would benefit from the programs that would successfully navigate the bureaucracy of a federal program. In fact, the widely diverging outcomes from various preschool studies are good evidence against a universal program. When programs are designed at a local level, they'll be better able to meet the needs of families in that area.

Results from Rigorous Research on Large-Scale Programs

The best test of universal preschool is research that uses the most rigorous method, that uses random assignment, and that studies the impact of large-scale programs over time. Although some studies meeting those criteria have found short-term gains, the gains fade after just a few years. Other studies have found actual harm from these programs. No rigorous research has uncovered lasting gains from large-scale programs.

Tennessee Voluntary Pre-K Initiative

In January 2022, universal preschool supporters received surprising news. Researchers from Vanderbilt University released a randomized study of Tennessee's Voluntary Pre-K initiative that found that children who participated in the program experienced "significantly negative effects" compared with the children who did not. The results were so shocking that the researchers had to "go back and do robustness checks every which way from Sunday," according to Dale Farran, one of the lead researchers. "At least for poor children," she concluded, "it turns out that something is not better than nothing."

Importantly, this program has been deemed "high quality," being 1 of only 13 programs to meet at least 9 of the National Institute for Early Education Research's 10 quality standards benchmarks. Like similar programs in Boston and Tulsa, teachers must be licensed, are paid at parity with elementary teachers, and receive retirement and health benefits. Classes have a staff member–child ratio of 1 to 10 or better. And instruction is offered for a minimum of 5.5 hours per day, five days a week (usually 6 to 8 hours).

Head Start

Perhaps the most relevant research pertains to the federal Head Start program: that research is national in scope and tracked students through third grade. Enacted in 1965, Head Start provides educational and social services to low-income families nationwide. It is the largest preschool program in the United States, serving more than a million underprivileged children each year.

A 2012 U.S. Department of Health and Human Services report on Head Start is the most comprehensive study of a large-scale preschool program. But the study found the program had little or no effect on student outcomes that persisted through third grade, despite costing more than $7 billion per year at the time ($7,900 per child). The program now costs more than $10 billion, or more than $10,000 per child.

Some Head Start proponents have theorized that perhaps the program has "sleeper effects" that only turn up much later. Former Brookings Institution scholar Grover J. "Russ" Whitehurst has criticized that theory, noting that "research on the impacts of early intervention consistently shows that programs with longer-term impacts also evidence shorter-term impacts in elementary school." It is highly unlikely that Head Start is producing significant and lasting positive effects that are undetectable in the interim.

Some studies seem to support the "sleeper effects" theory, including a 2016 study by the Hamilton Project at the Brookings Institution and a 2021 study of Boston's preschool program. But the Hamilton study attempted to generate treatment and control groups by comparing the outcomes of people who had attended Head Start against the outcomes of their siblings who did not. For this method to truly isolate the impact of Head Start, the sibling pairs must have the same average characteristics, except for Head Start attendance. The authors concede that this assumption does not necessarily hold. Parents' decisions to enroll one child in Head Start and not another may suggest significant yet unobserved differences.

Georgia and Oklahoma

As far back as the Obama administration, the state-funded preschool programs in Georgia and Oklahoma have been cited as successful. Although research has suggested some benefits for disadvantaged students, there is little evidence that these programs have significantly improved educational outcomes for participating students overall. Moreover, the research used methods with significant limitations.

Georgia initially enacted a means-tested preschool program in 1992 and expanded it to include all children in 1995. Research finds some evidence that the program benefits some disadvantaged students, at least at first. A 2008 study by a researcher at the Stanford Institute for Economic Policy Research found that "disadvantaged children residing in small towns and rural areas" who attended preschool in Georgia were more likely to have higher reading and math scores in fourth grade. However, the study found no consistent and statistically significant benefits to middle-income students. The researcher concluded that universal preschool failed a cost–benefit analysis.

Oklahoma enacted a universal preschool program in 1998. A study of participating children in Tulsa found much larger positive impacts than in Georgia, the equivalent of about eight months of learning for verbal skills. Although the results appear quite impressive, they may have been an artifact of the research design. A later study that examined preschool programs in five states, including Oklahoma, failed to detect similarly large results.

The Perry Preschool and Carolina Abecedarian Projects

Proponents of universal preschool often point to two random-assignment studies that found positive outcomes for disadvantaged students. However, the programs that they studied differed significantly from the types of efforts under discussion today.

Beginning in 1962, the Perry Preschool Project studied 123 children from low-income households in Ypsilanti, Michigan. The study randomly assigned 58 children to a "treatment group" and enrolled those students in the Perry Preschool; the remaining children formed a "control group" of students who were not enrolled. The study tracked the outcomes of both groups through age 40, finding that participants in the treatment group were less likely to be arrested and more likely to graduate from high school, obtain employment, and earn higher incomes than the control group. Accordingly, the researchers estimated a societal return on investment of $7.16 for every $1.00 expended, factoring in increased tax revenues, decreased welfare payments, lower crime rates, and so on.

Like Perry, the Abecedarian Project studied a small-scale, high-intensity program for mostly black students from low-income households. Beginning in 1972, the project studied 111 students in Chapel Hill, North Carolina, with a treatment group of 57 students. Decades later, researchers found that the program produced positive outcomes, including lower rates of teenage pregnancy and higher rates of college matriculation and skilled employment.

However, these findings should be interpreted with great caution. First, the sample sizes—fewer than 60 students in the treatment group in each study—are tiny. Second, both studies had flaws in their randomization process that may have biased the results. Moreover, even if there had been no methodological issues, it would be unwise to assume that large-scale programs would produce similar results because the two earlier programs differed significantly from the sorts of universal preschool programs proposed today.

Program Management. Both programs were run by people who were trying to prove that their model worked, rather than by the types of people who would staff preschool centers in a large-scale program.

Services. Both Perry and Abecedarian were high-intensity projects. Perry offered a student-to-teacher ratio of about five or six to one, held regular group meetings with parents and teachers, and even had weekly home visits. Abecedarian students received full-time, year-round care for five years beginning in their first year of life; individualized education activities that changed as the child grew; transportation; a three-to-one student-to-teacher ratio for younger students that grew to six-to-one for older students; nutritional supplements; social services; and more. Those services are not comparable to standard preschool programs, which have significantly more students per classroom and offer few of the services mentioned.

Cost. In 2016 dollars, Perry cost more than $21,000 per student and Abecedarian cost more than $22,000, compared with less than $7,000 per student on average in most state programs. No one is proposing spending anything remotely close to that amount per student today.

Students. Whereas the Perry Preschool and Abecedarian projects targeted at-risk students from low-income households, universal preschool programs would also include students from middle- and upper-income families who are not nearly as likely to reap such large benefits.

The Perry Preschool and Abecedarian projects simply bear no resemblance to the sorts of programs being proposed today. Whitehurst of the Brookings Institution colorfully cautioned against extrapolating from Perry and Abecedarian, which he said "demonstrate the likely return on investment of widely deployed state pre-K programs . . . to about the same degree that the svelte TV spokesperson providing a testimonial for Weight Watchers demonstrates the expected impact of joining a diet plan."

Proponents of universal preschool also point to a few other studies, including the Abbott program in New Jersey and Chicago Child–Parent Centers. But none of those studies were gold-standard studies of large-scale programs that tracked students over time.

Childcare

Childcare assistance proposals are often grouped with universal preschool. These programs differ from universal preschool; however, they have similar problems that stem from federal interventions.

Federal assistance typically comes with significant regulations. These can result in a crowding-out effect, whereby small, independent, and faith-based programs are unable to participate because of the difficulty of complying with the accompanying regulations.

A December 2020 poll by the Bipartisan Policy Center found that parents have a wide variety of preferences when it comes to childcare. Nearly half of parents said that they would prefer having some combination of themselves, a spouse or partner, a relative, or a friend care for their children. Around 27 percent said they preferred center-based care, with 14 percent preferring religious and 13 percent wanting secular. About 10 percent preferred home-based (nonrelative) childcare. Nine percent preferred a part-time pre-K program. Federally funded and regulated programs would likely have mandates that would make participation very hard for religious, home-based, and part-time options.

In addition to potentially driving out preferred options, universal childcare programs can cause harm. A 2019 paper on the effects of the universal childcare program in Quebec shows that policymakers should be reluctant to enact federal universal childcare:

> We find the Quebec policy had a lasting negative impact on noncognitive skills. At older ages, program exposure is associated with worsened health and life satisfaction, and increased rates of criminal activity. Increases in aggression and hyperactivity are concentrated in boys, as is the rise in the crime rates. In contrast, we find no consistent impact on their cognitive skills.

Conclusion and Recommendations

Proponents of federal childcare and universal preschool programs rest their case on a thin empirical reed. The programs that produced large and lasting positive effects were small, highly intense, prohibitively expensive, and not comparable to the sorts of programs being proposed today. In contrast, the most rigorous research on large-scale programs has consistently found that positive effects tend to fade within a few years. Some even show lasting negative effects.

Even if the Constitution granted the federal government the authority to do so, the research literature does not support enacting federal childcare or preschool programs. Instead, Congress should phase out subsidies for existing programs, such as Head Start and the Preschool Development Grants. In the interim, as long as the federal government funds early childhood education and childcare programs, it should allow states to make those dollars portable, following eligible children to a private provider of choice.

Moving forward, Congress should reduce taxes to allow families to keep more of their money so they can finance the childcare options of their choice. Policymakers should also enact pro-growth regulatory policies that enable employers to afford paid family leave for workers.

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—Prepared by Jason Bedrick and Colleen Hroncich

42. HIGHER EDUCATION

Congress should

- reverse wide-scale loan forgiveness;
- end the singular focus on for-profit colleges for censure;
- reject proposals to incentivize more state spending on colleges; and
- ultimately phase out student aid programs, including grants, loans, and tax incentives.

There is a tendency to think that education is good, so more must be better. But decades of huge federal spending on higher education, driven by this simplistic conviction, have produced numerous outcomes that are anything but good. This chapter explores these harmful effects, which deliver an unmistakable lesson when coupled with the Tenth Amendment dictum that "the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people": Washington should withdraw from higher education.

Student Debt and Financial Aid

The Great Recession of 2008 and 2009 brought with it a new focus on student debt and the price of college, issues made especially visible by three things: (1) in 2010, total student loan debt surpassed total credit card debt for the first time; (2) the 2011 Occupy Wall Street protests focused to a significant extent on college costs; and (3) in 2012, total student debt broke the psychologically huge $1 trillion mark. The COVID-19 pandemic brought additional attention, with a freeze on debt repayment instituted soon after the pandemic struck that was maintained for nearly three years and a push by progressive lawmakers to forgive tens-of-thousands of dollars for a wide swath of borrowers, which President Joseph Biden instituted by executive action in August 2022.

This attention came after significant expansions and reforms of student aid. For several decades, the federal government has been the primary provider of aid to students, through grants, loans, work study, and tax incentives for higher education expenditures. Since 2007, that role has grown significantly. The Bush and Obama administrations and Congress raised the maximum Pell Grant and expanded the percentage of students eligible for it; increased the maximum amounts available through loans; offered loan forgiveness for people who work for government or eligible nonprofit entities; introduced income-based repayment that caps payments at 10 or 15 percent of adjusted gross income and forgives remaining debt after 20 or 25 years; and cut interest rates on student loans.

Washington also changed loan financing, eliminating the "guaranteed" program in which borrowers obtained loans from ostensibly private lenders, but the federal government essentially guaranteed lenders a profit with the backing of federal dollars. That was replaced with lending directly from the federal treasury.

Federal Aid: Seems Good, Is Bad

The first major negative effect of federal intervention, in particular student aid, has been rampant price inflation. It was not hard to anticipate: In 1987, Secretary of Education William Bennett famously surmised that federal aid was encouraging tuition inflation. In a *New York Times* op-ed titled "Our Greedy Colleges," he wrote that "federal student aid policies do not cause college price inflation, but there is little doubt that they help make it possible." Essentially, when we give people money to pay for something, we incentivize providers to raise their prices.

Colleges are revenue maximizers, and they are always thinking of things they could do with more money: start new programs, pay employees more, avoid cost-saving changes such as eliminating underused programs, or build new fitness facilities or even water parks. Even economists Robert Archibald and David Feldman, who largely disagree with the "Bennett Hypothesis," tacitly concede this in their book *Why Does College Cost So Much?* They argue that anything that might constrain colleges would at least appear to compromise "quality," which they seem to define as supplying everything someone might say is good, including small classes, "research or public service," and limited adjunct professors.

Top Five College Water Parks

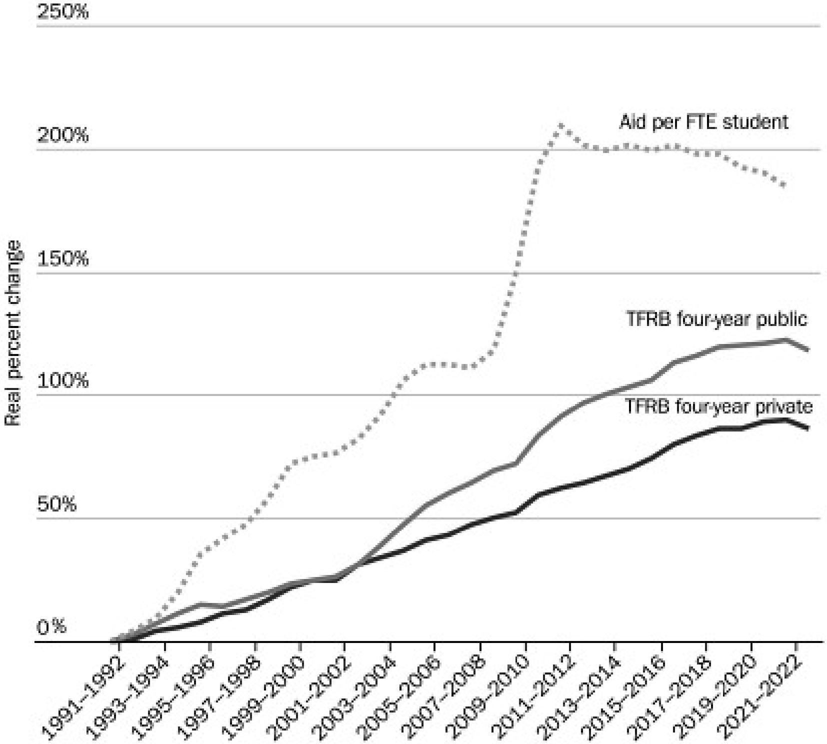
- University of Missouri "Tiger Grotto": According to the Mizzou website, "The Grotto will transform your dullest day into a vacation, with our resort quality facilities and atmosphere that will unwind you, even with the most stressful of schedules. The Grotto features a zero-depth pool entry with a high-powered vortex, lazy river and waterfall. Our hot tub, sauna and steam room will help you loosen up after a hard workout."
- Texas Tech "Student Leisure Pool": According to Texas Tech's website, this is "the largest leisure pool on a college campus in the United States." It features, among other things, a 645-foot-long lazy river and a 25-person hot tub.
- University of Alabama: According to the school's "University Recreation" webpage, the outdoor pool facility features a "current channel," "spray features," a "tanning shelf," a "water slide," and a "bubble bench."
- Missouri State: The school's pool features LED lights that change color at night, a 16-seat spa and sauna near the pool, and a 20-yard zipline.
- Louisiana State University: The aquatics facility features a 536-foot lighted lazy river in the shape of "LSU," two "bubbler lounges," and a 21,000-square-foot sun deck made of "broom finished concrete with sand blasted etching of tiger stripes."

Figure 1 illustrates that for the past three decades, inflation-adjusted aid per full-time-equivalent student has tended to increase at a remarkable rate, more than tripling by 2010–2011. That increase almost certainly provided the fuel for the more than doubling of inflation-adjusted tuition, fees, and room and board charges at public four-year institutions and the roughly 90 percent increase in prices at four-year private schools. Of course, aid is not the only factor in college pricing. Skeptics of the Bennett Hypothesis often blame cuts in state and local subsidies to colleges as the primary culprit behind rising prices. But those cuts do not meaningfully affect private institutions, which receive little such subsidization. Plus, public institutions have seen an increase in total state and local funding since 1990. Where there has been an appreciable reduction is on a per-pupil basis, but that is primarily a consequence not of tight-fisted states but of enrollment increases—from 7.8 million to 10.6 million full-time-equivalent students between 1990 and 2021.

As problematic as subsidizing students is, a welcome consequence of higher education being structured more like a free market than K–12 education—

Figure 1

Percent change in aid per full-time-equivalent undergraduate student and tuition, fees, and room and board charges since the 1990–1991 academic year, inflation adjusted



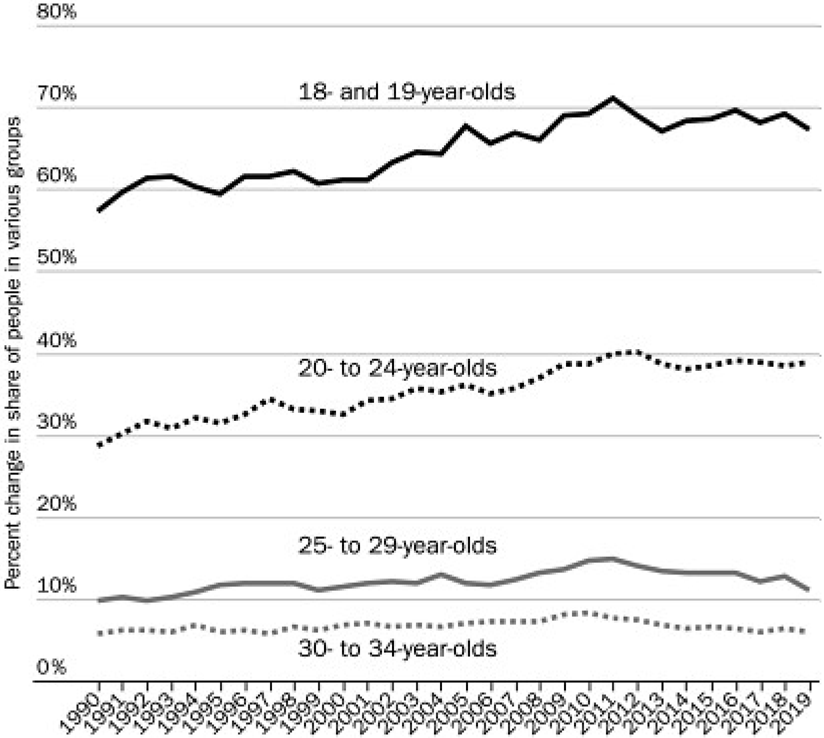
Source: College Board, Trends in College Pricing 2021, Table CP-2, in 2021 dollars, and Trends in Student Aid 2021, Table 3, in 2020 dollars, https://research.collegeboard.org/trends/student-aid.
Notes: FTE = full-time equivalent; TFRB = tuition, fees, room and board.

attendance is not compulsory and subsidies are much more attached to students—is that the system can somewhat self-correct. With sticker prices hitting sometimes astronomical levels and debt rising, fewer people have been attending college and are using less aid. As Figure 1 shows, aid per full-time-equivalent undergraduates starts decreasing after peaking during the 2009–2010 academic year. Similarly, total enrollment in postsecondary education dropped from 20.3 million in 2009 to 19 million in 2020, and the share of people ages 18 to 34 overall and for several subgroups (Figure 2) dropped between roughly 2011 and 2019.

While in the past it was necessary to make a detailed case that student aid fuels rampant price inflation, it no longer is. It seems to be well accepted.

Figure 2

Percent change in share of people in various groups, ages 18 to 34, enrolled in school



Source: National Center for Education Statistics, *Digest of Education Statistics*, U.S. Department of Education, 2020, Table 103.20.

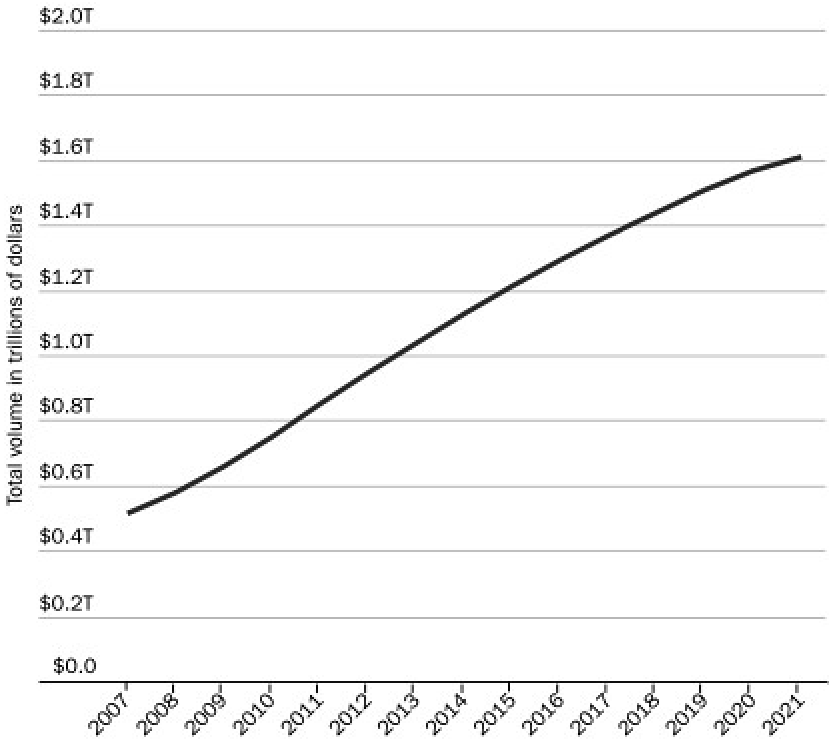
Unfortunately, instead of focusing on fixing the problem by reducing aid, some prominent policymakers and activists have keyed in on treating a symptom: debt—specifically, forgiveness of debt in the range of $10,000 to $50,000 per debtor, often without regard to a borrower's income.

The debt situation does look scary, especially in the aggregate. As Figure 3 shows, total federal student debt rose from about $516 billion in 2007 to $1.6 trillion in 2021. But again, people seem to be wising up. As seen in Figure 4, the total amount of debt taken on each year rose until 2011 but then plunged, again as people reevaluated going to college and how much to spend.

It appears that the debt situation may indeed be correcting itself; although debt levels rose substantially, most federal borrowers owe less than $20,000. Finally, while prices are artificially high, the payoff for a bachelor's degree is around $1 million more in earnings over one's lifetime than just having a high school diploma. A graduate degree confers from $1.6 million to $3.1 million

Figure 3

Total federal student debt, 2007–2021



Source: "Federal Student Loan Portfolio," Federal Student Aid, U.S. Department of Education.

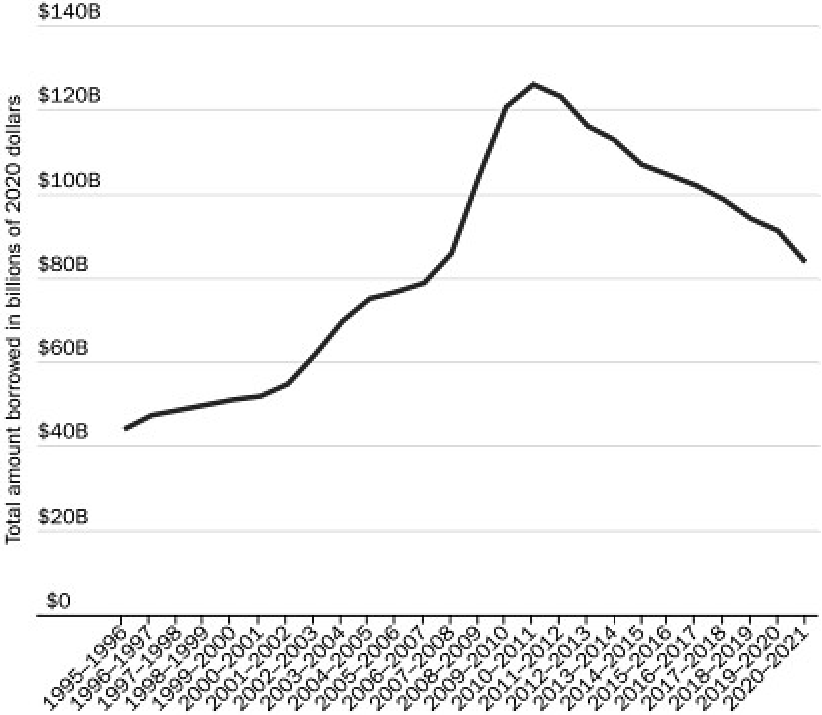
more, depending on the type of degree. For degree completers, debt is not only manageable but is a wise investment.

Given the big college payoff, there is no justification for mass student debt cancellation. Taxpayers should be repaid. Unfortunately, after several years of prodding by progressive activists and politicians such as Senators Elizabeth Warren (D-MA) and Chuck Schumer (D-NY), President Biden declared that the U.S. Department of Education would cancel $10,000 of student debt for any federal borrower with an income less than $125,000 individually, or in a household with an income below $250,000. He also promised to cancel up to $20,000 for any Pell Grant recipient with federal student debt, subject to the same income caps. The caps include all but essentially the top five percent of earners, and estimates put the cost of the cancellation in the $400 billion range. Also, the executive action clearly violates the constitutional separation of powers, which gives Congress the power of the purse.

Again, the solution is to reduce federal student aid, not cancel repayment.

Figure 4

Total federal student borrowing per year, 1995–1996 to 2020–2021 academic years, billions of 2020 dollars



Source: College Board, Trends in Student Aid 2021, Table 1, https://research.collegeboard.org/trends/student-aid.

But is not reducing consumption of higher education—which would presumably come with large aid cuts—a bad thing? Should we not want greater human capital even if there are some negative effects of producing it?

This is an understandable position, but funding something called "education" does not mean that we are getting more learning—or learning in areas of need.

First, about a third of all students who enter college, frequently enabled by aid, never finish, often because they are unprepared for college-level work. Thus, they have debt but no degree with which to greatly increase their earnings and repay what they owe. Indeed, small debtors compose the biggest chunk of loan defaulters, whereas students with heftier debt levels have often gotten undergraduate and graduate degrees. In 2015, researchers found that 34 percent of those who borrowed between $1,000 and $5,000 had defaulted on repayment, versus only 18 percent who borrowed more than $100,000.

That said, many who finish college have difficulty finding work requiring their degree. According to the Federal Reserve Bank of New York, approximately one out of every three bachelor's degree holders is in a job not requiring the credential. Meanwhile, the surfeit of degree holders is leading to "credential inflation." According to the human resources firm Burning Glass Technologies and Harvard Business School, many job advertisements call for a degree even though the people currently occupying those positions typically do not have one, and the desired skills are not college level. For instance, researchers found 67 percent of postings for supervisors of production workers calling for a bachelor's degree but only 16 percent of current occupants possessing one. Finally, while the wage premium for a degree is large, earnings for people with at least an undergraduate credential dropped between 2000 and 2019.

What about learning?

We do not have great measures of learning, but the National Assessment of Adult Literacy revealed that in 1992, about 40 percent of adults whose highest degree was a bachelor's were proficient in reading prose, but by 2003—the only other year the assessment was administered—only 31 percent were proficient. Among people with advanced degrees, prose proficiency dropped from 51 percent to 41 percent. More recently, the Program for the International Assessment of Adult Competencies found in 2012 and 2014 that U.S. households with members ages 16 to 65 had 68 percent of people with more than a high school education score in the third literacy level or above. In 2017, only 64 percent did. In numeracy, the drop was 57 to 53 percent.

This outcome is consistent with something that has been observed for many decades: college students are spending less time on academics. Authors Richard Arum and Josipa Roksa have noted that college students reported spending 40 hours per week on academic pursuits in the early 1960s but only 27 hours in 2011. Time spent studying declined from 25 hours per week in 1961 to 20 hours in 1980 and 13 hours in 2003.

The U.S. System: Don't Make It Worse

As problematic as American higher education is, it works much better than either our elementary and secondary systems or most other countries' postsecondary systems. American universities dominate world rankings; the United States is the top destination for students pursuing studies outside their home countries; and we have by far the greatest number of top scholars, including Nobel Prize winners. Why? Because as wasteful and distorting as student aid is, it is much better to attach money to students and give institutions autonomy than to have the government operate schools and fund them directly. We want a system that can supply diverse education and that allows students and schools to respond quickly to changing needs.

Of course, American higher education is far from perfect in that regard. Public colleges and universities receive heavy direct subsidies from state and local governments that render them significantly insulated from the pressures of student demands. And private, nonprofit schools often have big endowments or other sources of funds accumulated through tax-favored donations. For-profit colleges and, to a lesser extent, community colleges have often been more responsive to changing workforce demands.

That tells us, first, that Congress should not enact legislation that would offer federal funding to states in exchange for greatly increased subsidies to public colleges and lower or zero tuition, as has been proposed. Such legislation would reduce sticker prices and debt but would also render higher education even less efficient than the current system while ballooning the taxpayer burden.

Second, Congress should reverse widespread loan forgiveness if it survives court challenges. Mass cancellation would encourage much more borrowing in the future and enable even worse price inflation, with potential borrowers assuming that their loans would eventually be forgiven. It should also do this because President Biden's executive action is an egregious breach of the separation of powers.

Third, Congress should not singularly focus punishments for poor outcomes on for-profit institutions. Students who attend for-profit schools tend to have relatively high loan default levels and tend not to earn as much as graduates of four-year public schools and private, nonprofit schools. But for-profits work with students with the greatest challenges—older, poorer, more likely to have families and full-time jobs—even compared with community colleges. Meanwhile, for-profits tend to be relatively quick to expand or create new programs when demand for specific skills arises and to scale down or end programs when demand subsides. Of course, they tend to try to maximize their revenue, but that makes them no different from putatively not-for-profit colleges. Any punishments for poor performance should apply equally to schools regardless of tax status.

Removing the Federal Government from Higher Education

James Madison wrote in *Federalist* no. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. . . . [They] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce." Since the Constitution grants the federal government no role in higher education, Washington may only be involved in ways that support legitimate federal concerns. Ultimately, that means maintaining the Senior Reserve Officers' Training Corps, the service academies, and national defense–related research, and perhaps assisting institutions in federal jurisdictions, such as the District of Columbia.

Washington cannot, however, withdraw immediately. Abruptly ending federal student aid would leave millions of students scrambling for funds and would overwhelm private lenders, schools, and charitable organizations that have made plans based on expected levels of federal involvement. What follows is an overview of a six-year plan to withdraw the federal government from higher education:

- **Two years:** End direct federal aid to institutions, with the possible exceptions of Howard University and Gallaudet University, both of which are in the District of Columbia and receive significant federal dollars. If schools are to be directly subsidized, state or local governments should do it. Also, federal tax incentives, which are heavily skewed to the well-to-do—529 plans, Coverdell education savings accounts, and Lifetime Learning Credits—should end, though existing savings should receive the tax treatment promised when the money was deposited.
- **Four years:** Phase out "unsubsidized" federal loans, including parent and grad PLUS, which are available without regard to financial need. There is little justification for supplying loans to people who could otherwise afford to pay for college. The maximum available loan should be reduced in equal increments over four years, to a complete phaseout.
- **Six years:** Eliminate all remaining aid programs. Each year after the enactment of the federal phaseout, the maximum Pell Grant should be reduced in equal increments. Similarly, maximum "subsidized" loan sizes should be reduced in equal increments.

Conclusion

The federal presence in higher education is ultimately self-defeating, fueling huge price inflation and overconsumption. The solution is to avoid the superficial thinking that all "education" is good and to let people freely decide what education they need and how they will pay for it.

Suggested Readings

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—Prepared by Neal McCluskey

43. SPECIAL INTERESTS AND CORPORATE WELFARE

Congress should

- end subsidies for businesses, including grants, loans, and industry research; and
- end regulations and trade barriers that reduce competition and reward favored businesses at the expense of consumers and other businesses.

Policymakers should have the broad public interest in mind when considering spending and regulations. Unfortunately, the policy process often works in convoluted ways that produce results contrary to the general public interest. Special-interest groups often gain narrow benefits from the government at the expense of the public. This chapter discusses why this occurs and focuses on corporate welfare, meaning cronyism or business subsidies.

Special Interests versus the General Interest

In an idealistic view of democracy, policymakers put average citizens first. They study alternatives in detail and pass laws and regulations that have broad support. They also ensure that their actions are allowable under the U.S. Constitution.

This "public interest theory of government" falls short in explaining the real world of policymaking. Congress often enacts ill-conceived laws that benefit narrow groups at the expense of most citizens. Many federal programs and regulations harm the overall economy and are only sustained because powerful lobby groups support them.

Members of Congress are receptive to these groups, particularly those from their home states. Members receive campaign support from the groups, and they may look forward to post-congressional careers working with them. Also,

Table 1
Majority voting does not ensure that benefits outweigh costs

Legislator	Vote	Benefits received by constituents	Taxes paid by constituents
Smith	Yea	$12	$10
Jones	Yea	$12	$10
Davis	Yea	$12	$10
Garcia	Nay	$2	$10
Miller	Nay	$2	$10
Total	Pass	$40	$50

Source: Author.

members and their staffs get bombarded with seemingly convincing messages from interest groups about why government programs are needed.

Members often believe they are doing the right thing when they support industry subsidies and protections. They may not appreciate that such policies usually make the nation as a whole worse off through higher taxes and economic distortions. The benefits created by subsidies and protections are often visible and tangible, but the higher costs are diffused across millions of taxpayers or consumers.

Table 1 shows how a special-interest bill gains majority support even if it is bad for the nation overall. A five-person legislature votes on the bill, which provides nationwide benefits of $40 but costs taxpayers $50. Assuming that legislators vote in the narrow interests of their states, the bill garners a majority vote. The key to passage is that the benefits are more geographically concentrated than the costs. The legislation is a political success, but it is a failure for the nation because it costs more than the benefits created.

Logrolling, or vote trading, makes special-interest provisions even easier to pass. Party leaders or committees bundle many narrow provisions that benefit particular states and interest groups. Such bills often pass even though the specific provisions do not have majority support on their own.

Table 2 shows how two subsidy programs, A and B, can pass the five-person legislature, even though both have higher costs than benefits. Neither A nor B has majority support, and each would fail if voted on separately. So Smith, Jones, and Davis agree to bundle the two programs into a single bill. They logroll. The two programs get approved, even though each of them imposes a net cost on society.

Logrolling has been around since the 19th century. One early example was omnibus river and harbor bills, which sprinkled dozens of Army Corps of Engineers projects across many states to ensure passage. Even at that early time, experts observed that such bills included low-value projects that did not

Table 2
Logrolling allows passage of narrow subsidies

	Program A		Program B		
Legislator	Benefits received by constituents	Taxes paid by constituents	Benefits received by constituents	Taxes paid by constituents	Vote on bill that includes A and B
Smith	$15	$10	$8	$10	Yea
Jones	$15	$10	$8	$10	Yea
Davis	$4	$10	$20	$10	Yea
Garcia	$3	$10	$2	$10	Nay
Miller	$3	$10	$2	$10	Nay
Total	$40	$50	$40	$50	Pass

Source: Author.

have broad support. The magnitude of federal spending is much greater today, and so the logrolling problem is worse. Nearly all federal spending today is through huge bills that bundle many diverse provisions. Members have neither the time nor the incentive to rigorously critique each individual program in these large bills.

Congress recently magnified the logrolling problem with the reintroduction of large-scale earmarking in the omnibus budget bill passed in March 2022. The bill included 367 pages listing about 5,000 specific local projects, such as roads and museums. This is a bad development because earmarking fuels political corruption and distracts members of Congress from truly national issues. And as former Oklahoma senator Tom Coburn noted, earmarking is a “gateway drug to overspending” because it biases members toward passage of massive bills containing budget-busting items that do not by themselves have true majority support.

Eight Types of Corporate Welfare

Governments often pass subsidy programs and regulations that aid favored businesses at the expense of taxpayers, consumers, and other businesses. The federal government spends more than $100 billion a year on business subsidies, including farm subsidies, energy subsidies, broadband subsidies, aviation subsidies, and small-business subsidies. With regard to regulations, federal, state, and local governments impose many rules that favor incumbent firms over new entrants, large firms over small firms, and firms with political connections over outsiders.

Corporate welfare is a complex phenomenon, especially today because government has become so large. Subsidies and regulations that do the following are some of the benefits that businesses seek through government.

1. **Expand sales.** Regulations and subsidies help favored industries expand their sales, often at the expense of taxpayers, consumers, and other businesses. One example is the billions of dollars the federal government spends each year helping favored companies export their products. Another example is the federal Renewable Fuel Standard, which requires that transportation fuels contain biofuel, primarily corn-based ethanol. This benefit for farmers and the biofuels industry costs motorists money, raises food prices, and likely does not benefit the environment.
2. **Expand profits.** Governments provide ongoing subsidies to favored industries, which boosts their profits. Federal farm programs, for example, provide about $30 billion a year in an array of subsidies to agricultural businesses. The largest 15 percent of farm businesses receive about 85 percent of total farm subsidies.
3. **Receive bailouts.** Over the years, the federal government has bailed out failing financial companies, car companies, airlines, and other businesses experiencing down markets. Such policies encourage other firms to expect bailouts down the road, and they undermine growth by slowing the movement of capital from poorly managed and declining firms to well-managed and expanding firms.
4. **Reduce competition.** Regulations and international trade restraints create barriers to competition, which tend to slow innovation and raise consumer prices. State occupational licensing restricts entry into more than one-fifth of American jobs. The rationale for licensing is that it promotes safety, but licensing boards are often dominated by existing businesses aiming to reduce competition. Similarly, many states impose "certificate of need" rules on the health care industry, which create barriers to new health companies wanting to challenge incumbents.
5. **Tilt the playing field.** Governments use subsidies and regulations to benefit some businesses over others within industries. In banking, the "too big to fail" doctrine favors larger banks over smaller ones, and in the beer industry, state regulations on wholesaling often favor big brewers over smaller ones.
6. **Hijack benefits.** Government benefits for disadvantaged individuals are sometimes captured by businesses. The federal low-income housing tax credit is supposed to reduce housing costs for the poor, but

much of the program's benefits are captured by housing developers and banks. Another example is the earned income tax credit. This $70 billion program may make low-income workers better off overall, but it works by increasing the labor supply, which in turn reduces market wages for low-income workers and cuts business costs.

7. **Offload costs.** In some industries, governments pay industry expenses that businesses should pay for themselves. The federal government spends billions of dollars a year subsidizing fossil fuel, nuclear, and renewable energy research, but energy companies should pay those costs. Similarly, the federal government spends billions of dollars a year subsidizing airports and air traffic control. But those activities should be run by businesses, and the costs covered by passenger charges and other market revenues.
8. **Abuse contracting.** Federal contractors are infamous for cronyism, cost overruns, and inflated profits, which is why they are called "Beltway bandits." One company that caught the attention of federal auditors was TransDigm, which produces military parts. *Defense News* reported in 2019, "The Pentagon paid contractor TransDigm $1,443 for a three-inch ring called a 'non-vehicular clutch disk' which is used in the C-135 transport aircraft, though it cost the company just $32 to produce." Auditors found that the company earned "excess profit" on 112 of 113 contracts they reviewed. Another contractor scandal involved Leonard Glenn Francis, who cozied up to U.S. Navy leaders in the Pacific to win hundreds of millions of dollars in deals to resupply ships. He overpriced his contracts and submitted fraudulent invoices. He won contracts by wining and dining naval officers and providing them with cash, gifts, and prostitutes. The scandal exposed "a staggering degree of corruption within the Navy," the *Washington Post* concluded in 2016.

Seven Harms of Corporate Welfare

The following are some of the negative effects of corporate welfare.

1. **Harms taxpayers.** A 2012 Cato report found that the federal government spends about $100 billion annually on corporate welfare, or about $800 for every U.S. household. Recent increases in corporate welfare for farm subsidies, broadband, the electric grid, electric vehicles, and renewable energy have pushed subsidies even higher.
2. **Harms consumers and businesses.** Corporate welfare aids some businesses, but it harms other businesses and consumers. Federal sugar

regulations and trade barriers protect producers, but they increase sugar prices by more than $2 billion a year, thus harming consumers and also food companies that use sugar in their products.

3. **Creates an uneven playing field.** Subsidies give businesses an unfair advantage over their unsubsidized competitors, and they can also hurt businesses in other industries. The U.S. Export-Import Bank has subsidized jet purchases by foreign airlines, but that has given the foreign airlines an unfair advantage over U.S. airlines that paid full prices for their jets.
4. **Duplicates private activities.** Corporate welfare programs often duplicate activities that are available in private markets, such as insurance, loans, marketing, and research. The U.S. Department of Agriculture's Risk Management Agency spends billions of dollars a year providing farm businesses with what it calls "market-based risk management tools," such as insurance. But if these services are "market-based," then Congress can end the program and farmers can buy insurance and other tools in the marketplace.
5. **Fosters corruption.** Corporate welfare fosters corruption as businesses wanting handouts lobby government officials. The Department of Energy (DOE) gave solar panel maker Solyndra a $535 million loan guarantee in 2009. Solyndra was a spendthrift company with uncompetitive products. It went bankrupt and closed its doors in 2011 with taxpayers footing the bill for the failed loan. A *Washington Post* investigation was titled "Solyndra: Politics Infused Obama Energy Programs." It found that the people behind companies receiving federal green subsidies at the time were often Obama campaign donors and that a major Democratic fundraiser and frequent visitor to the Obama White House held a one-third stake in Solyndra. The White House pressured the DOE to approve the subsidy. The scandal was classic cronyism.
6. **Weakens the private sector.** Corporate welfare draws talented people away from productive pursuits and into wasteful subsidy activities. Companies that take government subsidies often become weaker, less efficient, and distracted from serving their customers. They take on riskier projects, they make decisions divorced from market realities, and they substitute lobbying for innovation. This was true of Solyndra. It was also true of the failed energy company Enron Corporation. Federal export subsidies induced Enron to pursue excessively risky overseas projects that helped bankrupt the company. Another example is Southern Company. Prompted by the receipt of federal subsidies, the company spent more than $6 billion on the disastrous Kemper

"clean coal" power plant in Mississippi, which ended up doubling in cost.

7. **Damages trust in government and business.** Public opinion polls have shown falling support for politicians and big businesses over the decades. Gallup finds that just one-fifth of Americans have "a great deal" or "quite a lot" of confidence in big business and that about three-quarters of people think there is "widespread corruption" in government. The rise of populist politicians in recent years stems partly from the feeling that the "system is rigged" in favor of big businesses. Businesses and political leaders would both garner more respect if they cut their ties with each other by ending corporate welfare.

Conclusion

Corporate welfare and other special-interest subsidies and regulations should be abolished. But federal reforms will only happen if the president and congressional leaders make it a priority. Without restraint-minded leadership, subsidies grow in an environment where politicians think "every man for himself" in handing out benefits to their favored interest groups.

Congress has the ability to end corporate welfare and other sorts of subsidies. But the job would be easier if Congress made structural reforms to force itself to make tradeoffs, such as imposing a cap on overall spending. Also, members need to hear much more from constituents who want to cut programs to counterbalance all the special-interest messages they are bombarded with.

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—Prepared by Chris Edwards

44. INFRASTRUCTURE INVESTMENT

Congress should

- privatize federally owned infrastructure, including passenger rail, electric utilities, and air traffic control;
- cut federal aid for highways, urban transit, airports, and other infrastructure owned by state and local governments;
- free the states from federal regulations that raise the costs of infrastructure projects; and
- reform federal laws that impede state and local privatization.

The importance of infrastructure investment to the U.S. economy is widely recognized. But policy discussions usually focus on the level of subsidies and ignore the efficiency of infrastructure investment and operation, which would increase if the federal role were reduced. State and local governments and the private sector are more likely to make sound infrastructure decisions without federal intervention.

Government Infrastructure in Perspective

The word "infrastructure" refers to long-lived fixed assets that provide a backbone for other activities in the economy. In the United States, most infrastructure is provided by the private sector, not by governments. In 2021, gross fixed private nonresidential investment was $3.1 trillion, according to the U.S. Bureau of Economic Analysis. That includes investment in factories, freight rail, pipelines, refineries, power plants, cell towers, satellites, and many other items.

By contrast, total federal, state, and local government infrastructure investment in 2021 was $802 billion. Excluding national defense, government investment was $606 billion. Thus, private investment in infrastructure is five times larger than government investment in nondefense infrastructure.

One implication of the data is that if policymakers want to strengthen the nation's infrastructure, they should enact reforms that spur private investment.

In particular, they should reduce regulations and business income tax rates, which would increase returns and boost investment for a broad range of infrastructure assets.

Although smaller than private investment, government investment in infrastructure is also important. Congestion on our highways, at airports and seaports, and with other infrastructure imposes substantial costs on the economy, as does inefficiency in the investment and operation of those facilities. The solution to these problems lies in state and local government reforms and in privatization, not in greater federal intervention.

Problems with Federal Intervention

Frequent calls to support infrastructure spending led to the passage of the Infrastructure Investment and Jobs Act of 2021. The law increased federal spending on infrastructure over five years by $550 billion. Unfortunately, the legislation did not tackle the distortions created by existing federal subsidies for infrastructure. Indeed, the law will increase distortions by expanding the scope of subsidies to include the broadband, electricity, and automobile industries. In turn, these new subsidies will likely encourage more private industries to lobby Washington for subsidies down the road.

Here are some of the distortions created by federal subsidies and interventions:

- **Investment is misallocated.** Federal investments are often based on pork barrel and bureaucratic factors rather than on marketplace demands. Amtrak investment, for example, is spread around to low-population regions where rail carries few passengers and is slower than intercity buses. Because lawmakers all want an Amtrak route through their state, investment gets steered away from where it is really needed, such as the Northeast Corridor.
- **Infrastructure is utilized inefficiently.** Government infrastructure is often used inefficiently because supply and demand are not balanced by market prices. The water infrastructure operated by the Bureau of Reclamation, for example, underprices irrigation water in the western United States. That wastes resources, harms the environment, and contributes to a looming water crisis in many areas in the West.
- **Projects are mismanaged.** Governments do not have strong incentives to construct infrastructure efficiently. Federally funded highway, transit, airport, and air traffic control projects often have large cost overruns. The budget for the Big Dig highway project in Boston—which was two-thirds funded by the federal government—exploded to five times the original

cost estimate. Similarly, the Army Corps of Engineers and the Bureau of Reclamation have built numerous projects that were financial boondoggles.

- **Mistakes are replicated.** When Washington makes infrastructure mistakes, it replicates them across the nation. High-rise public housing projects, for example, were a terrible idea that federal funding spread to cities nationwide in the mid-20th century. More recently, federal subsidies for light-rail projects have biased dozens of cities in favor of these expensive systems, even though they are usually less efficient and flexible than bus systems.
- **Regulations are costly.** Federal infrastructure spending comes tied to costly regulations. Federal Davis-Bacon rules, for example, inflate wage costs on highway projects by about one-fifth. President Biden added more bureaucracy to infrastructure projects with Executive Order 14063 in 2022, which imposes pro-union "project labor agreements" on federal construction contracts of more than $35 million. Also, federal environmental rules can impose costly delays on infrastructure projects. The number of environmental laws affecting transportation projects has risen from roughly 26 in 1970 to about 70 today.
- **Subsidies are not green.** The environmentally sound way of funding infrastructure is to charge the users of facilities. User charges for highways, bridges, airports, water systems, energy facilities, electric vehicle chargers, and other infrastructure limit consumer demand and minimize resource use. A problem with federal subsidies is that they replace user charges with funding from income taxes and debt. The Infrastructure Investment and Jobs Act of 2021 Act exemplified the problem with $550 billion in new spending financed by federal borrowing, not by efficient user charges that would limit demand.

The solution to all these problems is to privatize federally owned infrastructure, cut federal aid to the states, and reduce federal regulations so that the states can tackle their own infrastructure challenges in the most efficient manner.

Privatizing Federal Infrastructure

A privatization revolution has swept the world since the 1980s. Governments in more than 100 countries have transferred thousands of state-owned businesses worth more than $3 trillion to the private sector. Railroads, airports, seaports, energy utilities, and other infrastructure businesses have been privatized or partly privatized. Privatized infrastructure usually relies on funding from user charges, not subsidies, and thus tends to be more economically and environmentally sound than government infrastructure.

Unfortunately, some types of infrastructure that have been successfully privatized abroad remain in government hands in this country. Congress should study foreign reforms and proceed with privatizing the following infrastructure assets:

- **Air traffic control**. The Federal Aviation Administration has struggled to modernize our air traffic control (ATC) system. ATC is a high-technology industry, but we still run it as an old-fashioned bureaucracy. Meanwhile, Canada privatized its ATC system in 1996 as a self-funded nonprofit corporation. Today, the Canadian system is highly efficient and one of the safest in the world. The Canadians are on the leading edge of ATC technologies, and they sell their innovations worldwide.
- **Tennessee Valley Authority**. One of the largest utilities in the nation is owned by the federal government. The Tennessee Valley Authority (TVA) has a bloated cost structure and a poor environmental record, and it has wasted billions of dollars on its nuclear program. Electric utilities have been privatized around the world, so privatizing the TVA should be an obvious choice.
- **Amtrak.** The government's passenger rail company has a costly union workforce and a poor on-time record, and it loses about $2 billion a year. The bulk of the loss comes from running trains on low-ridership routes where intercity buses and air travel make more sense. Congress should privatize Amtrak and give entrepreneurs a crack at creating a downsized and more efficient system.
- **Power Marketing Administrations.** The federal government owns four Power Marketing Administrations (PMAs), which transmit wholesale electricity in 33 states. The power is mainly generated by hydroelectric plants owned by the Army Corps of Engineers and the Bureau of Reclamation. The PMAs receive numerous subsidies and sell most of their power at below-market rates. Congress should privatize the PMAs and the hydro plants.
- **Army Corps of Engineers.** The civilian part of the corps constructs and maintains water infrastructure, such as locks, waterways, and flood control structures. But the corps is filling roles that private engineering and construction companies could fill. When the states need to construct and maintain levees, harbors, beaches, inland waterways, and recreational areas, they should hire private companies to do the work. The Army Corps of Engineers should be privatized and compete for such work.
- **Bureau of Reclamation.** This agency builds and operates dams, canals, and hydro plants in the 17 western states. It is the largest wholesaler of water in the nation. The bureau subsidizes irrigation water, a practice which distorts the economy and causes environmental harm. The agency's facilities should be transferred to state government ownership or privatized.

States Should Lead on Infrastructure

When considering investments in highways and other assets, people often assume that Washington needs to lead the effort. But the great bulk of government infrastructure is owned by state and local governments, not the federal government, including the nation's highways, bridges, airports, seaports, and transit systems. The states can raise their own taxes or user charges to fund their transportation facilities anytime they want.

State and local governments should explore privatization and public-private partnerships (PPPs), which partially privatize infrastructure. PPPs shift some project financing, management, operations, and risks to the private sector. When businesses take the risks and put their profits on the line, investment is more likely to be allocated to high-return projects. Empirical studies have found that PPP projects are more likely to be completed on time and on budget than traditional government infrastructure projects.

The usual process of government contracting decouples construction from the future management of facilities, which results in contractors having little incentive to build projects that minimize long-term costs. PPPs solve this problem because the same company both builds and operates new facilities. Another advantage of PPPs is that businesses can tap capital markets to build capacity and meet market demands—thus avoiding the instability of government budgeting.

The United States lags Australia, Canada, and some other nations in using PPPs, but some states have pursued the approach. In Virginia, a private company built and now operates toll lanes along 14 miles of the Capital Beltway, I-495. The company used debt and equity to finance most of the project's $2 billion cost. The lanes were completed on time and on budget in 2012. Other PPPs in Virginia have been opened on 31 miles of I-95 and 8 miles of I-395.

Some state and local infrastructure can be fully privatized. In Virginia, the Dulles Greenway is a privately owned toll highway that was completed in the mid-1990s with $350 million of private debt and equity. Another private project in Virginia is the $142 million South Norfolk Jordan Bridge over the Elizabeth River, which was privately financed and constructed and has been operating since 2012. The construction costs of such private projects are paid back to investors over time from toll revenues.

In the United States, all major airports are owned by state and local governments, but many airports around the world have been privatized. A study by Airports Council International found that almost half the airports in the European Union are either "mostly" or "fully" private, and these airports carry about 75 percent of all passenger trips in the EU. Privatized airports fund their operations through passenger charges, airline charges, advertising, and revenues from airport retail and parking concessions.

Removing Barriers to Privatization

Why hasn't the United States kept pace with global trends in privatization? There are structural barriers to reform that deter policymakers from pursuing privatization:

- **Tax exemption on bond interest.** When state and local governments borrow funds to build infrastructure, the interest on the debt is tax free under the federal income tax. That allows governments to finance infrastructure at a lower cost than private businesses can, which stacks the deck against the private provision of facilities such as airports.
- **Federal subsidies.** Federal subsidies tilt the states in favor of government-owned infrastructure. Most urban bus and rail services in America used to be privately owned and operated. But that ended with the passage of the Urban Mass Transportation Act of 1964, which provided subsidies to government-owned systems and prompted governments to take over private systems to access the subsidies. Similarly, in the early years of commercial aviation, many major U.S. airports were privately owned. But then the federal government began handing out regular subsidies to government-owned airports in the 1940s, and over time private airports were taken over by states and cities to access the federal aid.
- **Federal regulations.** Federal regulations can restrict state and local privatization. One restriction is that states that have received federal aid for facilities may be required to repay a portion of the past aid if facilities are privatized. Another restriction is that tolling is generally prohibited on interstate highways, although there are exceptions, such as projects that add new capacity.
- **Crowding out.** The existence of government infrastructure displaces or crowds out private investments, especially when government services are provided free to the public or at artificially low prices. Private facilities may also be at a disadvantage if their customers have to pay twice. Drivers using a private highway—such as the Dulles Greenway in Virginia—must pay the private tolls as well as the fuel taxes that fund the government's highways.
- **Income and property taxation.** Private facilities usually must pay taxes, which creates unfair competition with government facilities that do not. A for-profit airport, for example, would have to pay federal and state income taxes on its earnings. And government-owned facilities are nearly always exempt from property taxes, whereas for-profit businesses often bear a heavy burden of property taxes on their land, structures, and equipment.

To conclude, America should strive to have the world's best infrastructure, which would allow workers and businesses to better compete in the global economy. To pursue that goal, we should reduce federal intervention and devolve control over infrastructure to the states and private sector. Congress should repeal barriers to privatization, including the municipal bond tax exemption and federal aid to the states. The states should pursue PPPs and privatization for highways, airports, seaports, and other infrastructure that can be supported by user charges.

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—Prepared by Chris Edwards

45. AGRICULTURAL POLICY

Congress should

- phase out farm subsidy programs because they are harmful to taxpayers, the economy, and the environment; and
- eliminate trade protections on agricultural goods while pursuing liberalization in global markets.

The U.S. Department of Agriculture (USDA) spends roughly $30 billion a year on support for farm businesses. The particular amount each year depends on the market prices of crops, the level of disaster payments, and other factors. Most agricultural subsidies go to farmers of a handful of major crops, including wheat, corn, soybeans, and cotton. About 1.2 million farmers and landowners receive federal subsidies but the payments are heavily tilted toward the largest producers.

Some farm subsidy programs counter adverse fluctuations in prices, revenues, and production. Other programs subsidize farmers' conservation activities, insurance coverage, product marketing, export sales, research and development, and other activities. Agriculture is no riskier than many other industries, yet the government has created a uniquely large welfare system for farmers.

In 1996 Congress enacted some pro-market reforms under the Freedom to Farm law. The law allowed farmers greater flexibility in planting and moved toward reliance on market supply and demand. But Congress reversed course in the late 1990s and passed a series of large supplemental farm subsidy bills.

In 2002 Congress enacted a farm bill that further reversed the 1996 reforms. The law increased the level of subsidy payments, added new crops to the subsidy rolls, and created a new price guarantee scheme called the countercyclical program.

In 2008 Congress overrode a presidential veto to enact farm legislation that added more subsidies. The law created a permanent disaster program and added a revenue protection program for farmers to lock in profits from high commodity prices. It added a sugar-to-ethanol program to help keep sugar prices artificially high, and it added new subsidies for specialty crops, such as fruits and vegetables.

In 2014 Congress passed another huge farm bill. This changed the structure of subsidies but did not cut the level of benefits. The law ended the direct payment program, the countercyclical program, and the Average Crop Revenue Election program. However, it expanded the largest farm subsidy program—crop insurance—and added two new subsidy programs, the Agricultural Risk Coverage (ARC) program and the Price Loss Coverage (PLC) program. When the 2014 farm bill was passed, supporters claimed that it would save taxpayer money, but overall subsidies actually increased.

Congress most recently reauthorized farm programs in the Agriculture Improvement Act of 2018, which continued all the major subsidy programs and expanded some of them. The law did make one important reform, which was legalizing industrial hemp. Hemp comes from the cannabis plant but contains minimal amounts of tetrahydrocannabinol (THC). Hemp can be used for making clothing, fabrics, shoes, rope, paper, fuel, animal feed, and building materials.

Large farm subsidies ensure that farmer incomes are higher than the incomes of most other Americans. Farm programs are welfare for the well-to-do. They also induce overproduction, inflate land prices, and harm the environment. They should be ended, and American farmers should stand on their own two feet in the marketplace.

Seven Types of Farm Subsidy

1. Insurance. Crop insurance run by the USDA's Risk Management Agency is the largest farm program, with annual outlays of about $9 billion. Subsidized insurance protects against adverse weather, low yields, and low revenues. It covers about 120 crops, but corn, cotton, soybeans, and wheat are the main ones. It subsidizes both insurance premiums and the administrative costs of the private insurance companies that offer policies to farmers. The companies receive the subsidies, and they earn excess profits from the high premiums they charge, but farmers also benefit because the USDA pays about 60 percent of their premium costs. Congress now channels the largest portion of farm subsidies through the insurance program because the program has no income limits and the structure of the program obscures the identities of the wealthy recipients.

2. Agricultural Risk Coverage. This program pays subsidies to farmers if their revenue per acre, or alternately, their county's revenue per acre, falls below a benchmark or guaranteed amount. Generally, the lower prices and revenues are, the larger the subsidies that are paid. More than 20 crops are covered, from wheat and corn to chickpeas and mustard. ARC subsidies have fluctuated between about $1 billion and $6 billion annually in recent years.

3. Price Loss Coverage. This program pays subsidies to farmers based on the average national price of each particular crop compared with the crop's reference price. The larger the fall in a crop's price below its reference price, the larger the payout to farmers. PLC subsidies cover more than 20 crops and have fluctuated between about $1 billion and $5 billion annually in recent years.

4. Conservation programs. The Conservation Reserve Program pays farmers about $2 billion a year to keep millions of acres of land out of production. The Environmental Quality Incentives Program provides farmers with subsidies for making environmental improvements to their land and it also costs about $2 billion a year.

5. Disaster aid. The government operates numerous ongoing disaster aid programs for many types of farmers, including wheat growers, livestock producers, and tree fruit producers. In addition to these programs, Congress distributes additional aid after adverse events. Disaster aid typically costs about $1 to $2 billion a year, but the government recently handed out huge temporary payments. It distributed $23 billion in Market Facilitation Program payments to farmers in 2018 and 2019 to offset the negative effects of international trade disruptions. And the government distributed more than $50 billion to farmers in 2020 and 2021 in response to the pandemic. Economist Eric Belasco found that—like regular farm subsidies—the Market Facilitation Program (MFP) payments were heavily tilted toward larger farms.

6. Marketing and export promotion. The Agriculture Marketing Service spends more than $2 billion a year on farm and food promotion activities. The Foreign Agricultural Service spends more than $2 billion a year on a range of activities, including marketing U.S. farm and food products abroad through dozens of foreign offices.

7. Research support. Most American industries fund their own research and development, but the government employs thousands of scientists and other experts to aid the agriculture industry. The USDA spends more than $3 billion a year on agriculture and food research at more than 100 locations. The USDA also produces an array of statistical and economic data and studies of benefit to the agriculture industry.

Six Reasons to Repeal Farm Subsidies

1. Subsidies redistribute wealth upward. Farm subsidies transfer the earnings of taxpayers to well-off farm businesses and landowners. USDA data show that farm incomes have risen far above average U.S. incomes. In 2020 the average income of farm households was $122,291, which was 26 percent higher than the $97,026 average of all U.S. households. The same year, the median income of farm households was $80,060, which was 19 percent higher than the U.S. median of $67,521.

While members of Congress often say they want to help small farmers, most farm subsidies go to the largest farms. Economist Vincent Smith found that the largest 15 percent of farm businesses receive more than 85 percent of farm subsidies. Many well-known billionaires have received farm subsidies because they own farmland. In the past, the Environmental Working Group found that 50 people on the Forbes 400 list of the wealthiest Americans received farm subsidies. Recent farm bills have channeled the largest share of subsidies through insurance companies, making it hard to determine recipient identities. But a 2015 analysis by the Government Accountability Office (GAO) found that at least four recipients of crop insurance subsidies had a net worth of more than $1.5 billion.

2. Subsidies damage the economy. The extent of federal coddling and micromanagement of the agriculture industry is unique. In most industries, market prices balance supply and demand, profits steer investment, businesses take risks, and entrepreneurs innovate to improve quality and reduce costs. Those market mechanisms are undermined in U.S. agriculture, causing a range of economic harms, including overproduction, distorted land use, distorted choice of crops, inflated land prices, and inadequate cost control.

One important effect of farm subsidies is that they inflate land prices and land rental costs because—to an extent—the expected future stream of subsidies is capitalized. As a result, subsidies probably benefit landowners more than farmers, and those are often different people because about half of U.S. cropland is rented, according to the U.S. Department of Agriculture. As subsidies have pushed up sales prices and rental costs for land it has become harder for young farmers to break into the business.

3. Subsidies are prone to scandal. Like all government subsidy programs, farm programs are subject to both bureaucratic waste and recipient fraud. One problem is that some farm subsidies are paid improperly because farmers create business structures to get around legal subsidy limits. Another problem is that Congress and the USDA distribute disaster payments in a careless manner, with payments going to farmers who do not need them. Yet another problem is the "prevented planting" program, which covers farmers for losses if conditions during a season prevent them from planting some areas. The Environmental Working Group found that the program is a boondoggle as it has paid billions of dollars to farmers who would not normally have planted the areas they claimed losses for.

4. Subsidies undermine trade relations. Global stability and U.S. security are enhanced when less-developed countries achieve economic growth. America can help by encouraging poor nations to adopt free markets and expand their international trade. However, U.S. and European farm subsidies and agricultural import barriers undermine progress on achieving open trading relationships. Federal sugar protections block freer trade within the Americas, for example, while enriching sugar growers and harming U.S. consumers and U.S. food companies that use sugar.

5. Subsidies harm the environment. Federal farm policies damage the natural environment in numerous ways. Subsidies cause overproduction, which draws lower quality lands into active production. As a result, areas that might otherwise have been used for parks, forests, grasslands, and wetlands get locked into less-efficient agricultural use.

Subsidies are also thought to induce excessive use of fertilizers and pesticides. Producers on marginal lands that have poorer soils and climates tend to use more fertilizers and pesticides, which can cause water contamination problems. Sugarcane production has expanded in Florida because of the federal sugar program, for example, and the phosphorous in fertilizers used by the growers causes damage to the Everglades.

6. Agriculture would thrive without subsidies. If U.S. farm subsidies were ended and agricultural markets deregulated, farming would change. Different crops would be planted, land usage would change, and some farm businesses would contract while others would expand. But a stronger and more innovative industry would emerge that had greater resilience to market fluctuations. Private insurance, other financial tools, and diversification would help cover risks, as they do in other industries.

An interesting example of farmers prospering without subsidies is New Zealand. In 1984 New Zealand ended its farm subsidies, which was a bold stroke because the country is far more dependent on farming than is the United States. The changes were initially met with resistance, but New Zealand farm productivity, profitability, and output soared after the reforms. New Zealand farmers cut costs, diversified land use, sought nonfarm income, and developed new markets. The Federated Farmers of New Zealand argues that that nation's experience "thoroughly debunked the myth that the farming sector cannot prosper without government subsidies." That myth needs to be debunked in the United States as well.

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—Prepared by Chris Edwards

46. AMTRAK

Congress should

- privatize Amtrak and allow the passenger rail company to shed uneconomic routes and restructure its operations; and
- phase out subsidies to passenger rail and other modes of transportation.

Private passenger rail thrived in the United States between the mid-19th century and the early 20th century. By the late 1950s, however, passenger rail was struggling because of the rise of automobiles, buses, and airlines. Railroads also faced large tax, regulatory, and union burdens not faced by other modes of transportation. The Interstate Commerce Commission micromanaged the railroads and hindered their efforts to cut costs. Railroads paid heavy property taxes, and the federal government imposed a special excise tax on rail tickets from the 1940s until 1962.

After a number of railroads, including Penn Central, went bankrupt, Congress stepped in to take over passenger rail by creating Amtrak in 1970. Amtrak is structured like a corporation, but the federal government owns the company's stock. It was supposed to become self-supporting after a transition period, but it has never earned a profit and it consumed more than $50 billion in federal subsidies over five decades to 2020.

In fiscal year 2021, Amtrak had revenues of $2.1 billion, expenses of $4.1 billion, and a loss of $2.0 billion. It had been receiving about $2 billion a year in federal aid but then received $3.7 billion in pandemic-related aid in 2020 and 2021. Most recently, the federal Infrastructure Investment and Jobs Act of 2021 provided a huge $66 billion infusion of subsidies for rail, including direct funding of Amtrak and grants to the states for rail projects.

Amtrak's Failures

Amtrak has many woes. One problem is unreliable service, as only about three-quarters of its trains run on time. Another problem is unions' undermining Amtrak's efficiency. More than 83 percent of the company's 17,000 employees are covered by collective bargaining. Unions tend to protect poorly performing workers, resist innovation, and create rule-laden workplaces. Former Amtrak head David Gunn complained, for example, that at the company's maintenance facilities, workers from different unions were not allowed to perform work outside their narrow specialties.

Most of Amtrak's problems are created by Congress, which inhibits the company from cutting costs and making other rational business decisions. Congress insists on supporting an excessively large nationwide system of passenger rail. Many routes have low ridership and lose money, which does not make economic or environmental sense.

In his book *End of the Line*, rail expert and former Amtrak spokesperson Joseph Vranich argued: "Congressional requirements that Amtrak spend money on capital improvements to lightly used routes are outrageous. . . . Throughout Amtrak's history, it has devoted too much of its budget to where it is not needed, and not enough to where it is."

Amtrak operates more than 30 routes on 21,000 miles of track in 46 states. Amtrak owns the trains, but freight rail companies own about 95 percent of the track. An analysis by Randal O'Toole found that only four Amtrak routes earn an operational profit. Some Amtrak routes lose hundreds of dollars per passenger and fill fewer than 40 percent of their seats.

The few routes that earn a return are in the Northeast, while the biggest money losers are the long-distance routes. An analysis by Amtrak in 2018 titled "How Do Long Distance Trains Perform Financially?" found that 15 of its long-distance trains account for 20 percent of passenger revenues but 86 percent of Amtrak's operating losses. Revenues from the 15 long-distance trains cover just half their operating costs, let alone any capital costs. As one example of a money loser, the average per-passenger federal subsidy is $362 for the New Orleans–to–Los Angeles Sunset Limited.

Rail is slower than intercity buses on many routes outside the Northeast Corridor, based on comparing times posted on Amtrak's website and the websites of bus companies, such as Greyhound and Megabus. Charlotte to Atlanta is 5 hours, 48 minutes by rail, but 3 hours, 15 minutes by bus. Dallas to Austin is 6 hours, 32 minutes by rail, but 3 hours, 10 minutes by bus. It is not surprising that Amtrak accounts for only a small fraction of America's overall travel.

In sum, Amtrak spends a lot maintaining service on slow and money-losing routes instead of focusing on routes with heavier traffic that make more economic and environment sense. Unfortunately, part of the huge cash infusion to Amtrak in the 2021 infrastructure bill will likely be spent on expanding services to highly unprofitable and low-value routes. Amtrak proposes adding dozens of new routes across the country. Aside from being a waste of resources, new passenger routes threaten to interfere with existing freight services on those routes.

Advantages of Privatization

Congress should consider privatizing Amtrak as a way to improve performance, reduce costs, and spur innovation. A private company would have more incentive and flexibility to prune excess workers, to base worker pay on performance, and to end inflexible union rules.

A private Amtrak could also close the routes that lose the most money. Passenger rail makes sense in the Northeast Corridor between Boston and Washington, but that corridor accounts for fewer than 500 miles within the current 21,000-mile system. Other corridors may make sense within a lower-cost privatized system, but that would be for a private entrepreneurial Amtrak to find out. By closing the least successful routes, Amtrak could shift investment and maintenance spending to high-demand routes and improve service.

A number of countries have privatized, or partly privatized, their passenger rail systems. Vranich found that privatized systems generally provide improved service, increased ridership, and more efficient operations. Regarding the United Kingdom, for example, he argued that "private operators have demonstrated more initiative, imagination, and visionary planning than state-run British Rail did in its prime or Amtrak does today."

As a state-owned business, British Rail was heavily subsidized, and it faced a steady decline in ridership from the 1950s to the 1980s. In 1994, the UK government split up the company and privatized the track infrastructure separately from passenger service operating companies. This ending of vertical integration created problems, and track infrastructure was later renationalized. The operating companies had franchise agreements with the government, typically for seven-year periods.

UK passenger rail continues to be heavily subsidized, but the partly privatized system has succeeded on many dimensions. UK rail ridership soared from 735 million passenger trips in 1995 to 1.8 billion by 2019, according to the UK Office of Rail and Road. Before the pandemic, UK rail ridership was hitting levels not seen since the early 1920s, and ridership growth in recent years has far surpassed growth elsewhere in Europe.

The UK system is one of the safest in Europe, and surveys have found high levels of customer satisfaction over the past decade. The on-time performance of UK passenger rail improved after privatization and today appears to be much higher than Amtrak's. Whereas Amtrak says that 75 percent of its trains are on time, 85 percent or more of UK trains are on time within three minutes of schedule, according to the UK Office of Rail and Road. In a 2013 study, the European Commission found that the UK's railways were the "most improved" in Europe since the 1990s.

Nonetheless, the pandemic and a number of recent rail problems led the UK government to reassess the industry's structure. Based on a major review (the Williams Report), the government decided in 2021 to end the franchise model and create a new government entity, Great British Railways, which will contract with private companies to operate trains on timetables and fares set by the government. The review said, "Private sector innovation has helped deliver the spectacular growth the railways have seen in the last quarter-century," but the government is nonetheless taking steps to increase central control.

Japan restructured and privatized its rail system in the 1980s and 1990s. Japanese National Railways (JNR) had been stagnating as a result of bloated labor costs, labor strife, and political manipulation. The government broke up JNR into six regional and vertically integrated passenger rail companies in 1987 and then started privatizing them in the 1990s.

The JNR companies reformed their rigid union rules and slashed their workforces by roughly one-third following the reforms. A National Bureau of Economic Research study found that labor productivity in the Japanese passenger rail companies increased, on average, by about 50 percent with the restructuring and privatization of the 1990s. Accident rates were cut in half.

The three largest privatized companies (JR East, JR Central, and JR West) have been profitable, but the smaller companies continue to rely on government subsidies. One of the strategies of the three large and profitable firms has been to diversify into complementary real estate development. All in all, Vranich called the improvements from JNR's privatization "stunning."

The United States has its own positive experience with rail privatization—freight rail privatization. When Penn Central collapsed in 1970, it was the largest business failure in American history to date. Other railroads followed it into bankruptcy. Congress created Conrail in the mid-1970s to replace the failed railroads. That government-owned company consumed $8 billion in subsidies and floundered until Congress deregulated freight rail under the Staggers Rail Act of 1980. Deregulation allowed Conrail to become profitable, and it was privatized in 1987. Since then, U.S. freight railroads have been a dramatic success.

Amtrak supporters argue that since other modes of transportation receive subsidies, so should passenger rail. But Amtrak receives substantially more subsidies per passenger-mile than other modes of transportation, including automobiles, buses, and aircraft. Automobiles used to receive relatively little in net subsidies because government highway spending was mainly covered by fuel taxes. Unfortunately, federal highway spending in recent years is being increasingly covered by general tax revenues. Policymakers should work toward phasing out subsidies to all modes of transportation.

The problem for passenger rail is not that it needs more subsidies but that competitors to rail have become more efficient. For consumers, real (inflation-adjusted) rail prices have risen in recent decades, while real airline prices have fallen because of the deregulated and competitive airline environment. Real intercity bus prices have also fallen with the rise of low-cost firms such as Megabus. Recent spikes in fuel prices may change the competitive landscape somewhat.

It seems unlikely that passenger rail will play a large role in America's transportation future. Rail carries few people compared with automobiles and planes, and in many U.S. corridors, rail makes no economic or environmental sense. In the near term, Congress and Amtrak should end the routes that are the biggest money losers, particularly the long-distance routes, and it should focus on investment in the Northeast Corridor. In the longer term, Congress should take steps to free passenger rail from the government. Let's allow entrepreneurs to bring efficiencies and innovation to rail and to make the industry more competitive with other modes of transportation.

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—Prepared by Chris Edwards

47. U.S. POSTAL SERVICE

Congress should

- repeal the U.S. Postal Service monopolies on first-class mail and access to mailboxes;
- repeal the special tax and regulatory benefits given to the USPS; and
- privatize the USPS.

The U.S. Postal Service (USPS) is a major business enterprise operated by the federal government with 650,000 workers and $77 billion in revenues in 2021. USPS revenues are supposed to cover the system's expenses, but mail volume has been falling and the USPS has been losing billions of dollars a year.

The bright spot for the USPS is that its package or parcel delivery business is growing. However, that growth comes at the expense of private delivery companies that have tax and regulatory disadvantages compared with the USPS. The goal of federal policy should be to create a level playing field in postal and parcel markets that are open to competition.

Europe has faced the same challenge of declining mail volumes, and it has responded by opening postal markets and privatizing postal providers. The United States should follow suit. Congress should privatize the USPS, repeal its tax and regulatory advantages, and allow businesses to compete in all postal markets.

USPS Advantages

Congress confers on the USPS monopolies on the delivery of first-class mail and access to mailboxes, the latter of which is a unique protection among the world's postal systems. Congress provides the USPS numerous other benefits:

- it can borrow from the U.S. Treasury at low interest rates;
- it is exempt from state and local sales, income, and property taxes, as well as from parking tickets and vehicle fees;

- it pays federal corporate income taxes on its earnings from competitive products, but those taxes are circulated back to the USPS;
- it is not bound by local zoning laws, is immune from a range of civil actions, and has the power of eminent domain; and
- it has government regulatory power, which it can use to impede competitors.

Despite these advantages, the USPS has lost more than $90 billion since 2007. The losses stem mainly from the 51 percent drop in first-class mail volume: from 104 billion pieces in 2001 to 51 billion pieces in 2021. The rise of email, the growth in internet bill paying, and other factors have driven the falling volume of mail. A mandate to prefund its future retiree health benefits had compounded the USPS's financial challenges, but the Postal Service Reform Act of 2022 relieved the USPS of that requirement.

Incremental Reforms

The decline in USPS mail volume will likely continue as the demand for letters, magazines, and other printed materials falls. When private businesses face falling demand for their products, they cut costs, improve efficiencies, and innovate to regain profitability. The USPS has taken some steps to cut costs, including reducing employment, consolidating mail facilities, and reducing hours at some post office locations. But more needs to be done, including the following steps:

Close post offices. The USPS has more than 34,000 retail locations, including contract locations. The agency's inspector general reported in April 2021 that 42 percent of locations do not generate enough revenue to cover their operational costs and that these locations "are often located within a few miles of another post office." The bottom one-quarter of locations bring in just 2 percent of the USPS's retail revenues. An earlier USPS analysis found that the bottom 4,500 locations averaged just 4.4 customer visits a day. The USPS should close thousands of low-volume post offices to save money and reduce energy and land use.

Cut labor costs. Labor accounts for more than three-quarters of USPS costs. Average USPS compensation is higher than for comparable private-sector companies. The 2022 postal law relieved the USPS of the need to prefund future retiree health benefits, but those benefits will still need to be paid when they come due. To control both health and pension costs going forward, Congress should replace the USPS's defined-benefit plans with defined-contribution plans. Relatively few private companies even provide health coverage to retirees.

End collective bargaining. Collective-bargaining agreements cover four-fifths of the USPS workforce. The agreements reduce business flexibility, make it harder to cut costs, and have impeded the automation of postal functions. Congress should repeal collective bargaining at the USPS and move toward private-sector labor standards. Just 6 percent of U.S. private-sector workers are members of labor unions today.

Narrow the universal service obligation. The federal government has adopted expansive delivery standards for the USPS called the universal service obligation (USO). The USO includes delivery to every home six days a week, uniform letter pricing, and other requirements. The USPS has a more expansive USO than postal companies in many other countries.

An expansive USO is no longer needed because individuals have electronic options for messages, paying bills, and other interactions. Congress should allow the USPS to reduce the number of mail delivery days, reduce delivery speed, use cluster boxes for residential delivery, and make other reforms reflecting today's smaller mail volume.

Cutting delivery frequency, perhaps to every second day, would allow the USPS to slash its armada of 230,000 trucks, which would reduce costs and benefit the environment. Similarly, reducing the speed of delivery could reduce costs and aid the environment by allowing some mail currently transported by air to go by ground.

End unfair competition. The USPS appears to use earnings from its monopoly products (mainly letters) to subsidize its competitive products (mainly parcels). The cross-subsidies stem from the way the enterprise allocates its institutional costs. Markets are further distorted by the USPS's regulatory and tax advantages over private parcel companies. The USPS does not pay federal, state, or local taxes, whereas, for example, FedEx pays about $1.8 billion a year in taxes. Economists Robert Shapiro and Isaac Yoder examined the economics of the USPS in a 2021 study, and found:

> USPS has been able to compete in the parcel market by leveraging its privileges and subsidies from universal mail service—tax exemptions, Treasury loans, its mailbox monopoly—and by using its nationwide network of facilities, equipment, personnel, and vehicles for mail delivery, financed by postal rates, to support its parcel business.

As mail volume continues to decline, the USPS will increasingly rely on its parcel business to survive, but that will mean that the distortions caused by the USPS's advantages over private firms will grow. The way forward is to allow the USPS to grow its parcel business and diversify into other competitive products, but also to privatize the enterprise and create a level playing field in mail, parcels, and all related markets.

Privatization and Competition

Congress should privatize the USPS, require it to pay taxes, and repeal its legal monopolies. Entrepreneurs should be allowed to compete in the mail industry. They may pursue innovations that the USPS has not even thought of. At the same time, Congress should give the USPS the flexibility it needs to reduce costs and face new competition.

Postal companies in the European Union have faced similar challenges as the USPS from falling mail volumes, but the EU solution has been to open markets and, in some nations, to privatize their systems. The Netherlands privatized its postal company in the 1990s and opened postal markets to competition in 2009. Britain opened postal markets to competition in 2006 and privatized the Royal Mail with stock offerings in 2013 and 2015. Germany began privatizing Deutsche Post with a stock offering in 2000 and opened postal markets to competition in 2008. A 2019 report by the technology company Escher Group on the future of postal services said, "Deutsche Post DHL is the most admired postal operator in the world."

A 2018 European Commission report about the continent's postal markets found that companies have made the following changes:

- reengineered postal networks and cut costs;
- expanded the use of on-call work, temporary work, and performance pay;
- reduced USO mandates to allow slower and less frequent delivery; and
- cut the number of post office locations in 23 of 32 countries.

A March 2020 study by the USPS inspector general found that six countries it examined had all outsourced large portions of their retail networks to private businesses. Germany, for example, has closed all its standalone post offices and moved retail transactions to counters in grocery stores and other businesses. Such outsourcing reduces costs; it can also benefit postal customers because private businesses usually have longer operating hours.

Lithuania illustrates another cost-saving innovation, as discussed in a 2019 Copenhagen Economics study. It is replacing rural post offices that have few customers with postal vehicles that visit many locations during the day on a schedule. The Lithuanian postal company found that the vehicles serve about 150 customers a day compared with about 7 customers a day in its rural post offices.

Numerous countries have reduced delivery frequency. A May 2020 study by the USPS inspector general found that seven of eight foreign postal systems it examined had cut, or were planning to cut, delivery frequency. Sweden recently cut letter delivery to every other day, while Italy has gone to every other day for many rural areas.

Unlike our Congress, the Europeans have recognized that postal and delivery markets are changing, and that postal carriers need flexibility to cut costs and innovate. Whereas the Europeans are reducing mail delivery frequency, for example, Congress just reaffirmed America's wasteful six-day delivery in the 2022 postal law. Whereas the Europeans are innovating, the Government Accountability Office reported in September 2021 that the USPS's productivity has been declining in recent years.

Competition and privatization are the best paths forward. The Government Accountability Office noted in June 2017 that most postal experts think that relaxing USPS monopolies "could induce USPS to become more efficient and increase innovation across the postal market" and that "the prospect of competitive pressure would stimulate USPS to be more efficient through both cost-cutting and general restructuring."

Similarly, a June 2018 Trump administration report on reforming the government recognized the new realities of postal markets. It found that "a privatized Postal Service would have a substantially lower cost structure, be able to adapt to changing customer needs and make business decisions free from political interference, and have access to private capital markets to fund operational improvements without burdening taxpayers."

Conclusion

Monopoly government postal systems are obsolete. But nostalgia for a bygone paper era continues to impede reform in the United States. In February 2022, House Speaker Nancy Pelosi called the USPS "a beautiful thread that continues to weave together communities across America." But what is the beautiful thread? Advertising or junk mail now accounts for 62 percent of household mail volume, according to the USPS, while bills and other business statements are the second-largest mail item. Person-to-person letters have fallen to just 2 percent of mail volume.

Today's "beautiful thread" is the internet, not the junk mail that dominates our mailboxes. Government operation of a paper delivery system is unneeded in a world where 300 billion emails fly around the planet every day. Congress should follow the European lead and privatize the postal service while opening competition in all postal markets.

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—Prepared by Chris Edwards

48. AIR TRAFFIC CONTROL

Congress should

- move air traffic control operations from the Federal Aviation Administration to a self-funded nonprofit corporation outside the government.

The nation's air traffic control (ATC) system is currently operated by the Federal Aviation Administration (FAA). ATC is a high-technology business, but we are still running it as an old-fashioned bureaucracy from Washington, DC. The FAA is inflexible and slow moving, and it has a history of cost overruns and delays on major projects.

In recent decades, many nations have partly or fully separated their ATC systems from their governments. In 1996, Canada moved its ATC to a private nonprofit corporation, Nav Canada. That reform was the model for an FAA restructuring bill that passed the House transportation committee in 2016 and in a revised form in 2017. Unfortunately, that reform effort stalled despite support from the administration, most airlines, the air traffic controllers union, and many experts.

Nonetheless, ATC reform will return to the congressional agenda at some point because trying to run a dynamic technology business out of the federal bureaucracy makes no sense. Moving ATC operations out of the government would improve efficiency and spur innovation. The benefits of improved ATC would include shorter flight times, fewer delays, greater safety, and lower fuel costs.

Management and Technology Failures

Air traffic control is transitioning from old technologies, such as radar and voice radio, to newer technologies, such as satellite-based navigation. But the FAA has struggled to make the needed reforms under the NextGen array of investment projects. Many reports by federal auditors have found cost overruns and slow progress on NextGen projects. In congressional testimony in 2019, the airline trade association, Airlines for America, agreed with federal auditors that the FAA's "modernization efforts have been plagued by significant cost overruns, delays and lack of benefits to users of the system." In a congressional roundtable with aviation stakeholders in 2021, "Most of the discussion involved the broad frustration at the lengthy timetable to implement the unfinished elements of NextGen Air Traffic Control," reported the Eno Center for Transportation.

In a study on the FAA's performance for the Hudson Institute, ATC expert Robert Poole found that the agency is risk averse, is slow to make decisions, and mismanages procurement. It loses skilled people to private industry because of a lack of pay flexibility and frustration with the government work environment. Poole found that the FAA is "particularly resistant to high-potential innovations that would disrupt its own institutional status quo."

In critiquing the structure of our ATC system, Jeff Davis of the Eno Center noted, "It is widely acknowledged that federal procurement rules make it difficult for agencies to carry out large high-tech procurement." Dorothy Robyn of the Brookings Institution points to other problems of running ATC inside a government agency: Congress has "long blocked large-scale consolidation of the FAA's aging and inefficient facilities," and it "micromanages FAA spending on investment and maintenance."

These problems can be tackled by separating ATC from direct federal control. Such a reform would remove the conflict of interest arising from the FAA's both operating ATC and overseeing aviation safety. The reform would increase transparency because hidden decisions now made internally within the FAA would be made public. The International Civil Aviation Organization recommends arm's-length separation between safety regulation and ATC provision.

The FAA's slowness on innovation is illustrated by recent moves abroad toward remote or virtual towers for ATC. Airport towers with big windows for controllers to see runways may be on the way out. They are starting to be replaced by visual and infrared cameras on masts and runways able to pan and zoom, with the electronic feed going to control centers either nearby or miles away. The feeds are displayed on wall-sized monitors overlaid with flight and sensor information. Remote towers promise superior ATC performance at night and during bad weather, and they can reduce costs, which particularly benefits smaller airports. European and Canadian companies are pioneering the technologies.

The FAA has been modestly supportive of two nonfederal demonstration projects of remote towers in Colorado and Virginia, but it has been too risk averse to embrace the technology, reports Robert Poole. Meanwhile, Belgium, Denmark, Germany, the Netherlands, Norway, Spain, Sweden, and the United

Kingdom are moving ahead with remote towers. Norway is a pioneer, and by the end of 2022 will service 15 of its airports remotely from a central ATC facility. The UK's privatized ATC company, NATS, is also an innovator. According to *Airport Technology* magazine, London City Airport in 2021 became the "first major international airport globally to be entirely controlled by a virtual system. . . . Nearly 16 high-definition cameras and sensors have been deployed on the mast for capturing a 360-degree view of the airfield. The view is then transmitted to the control room in NATS' air traffic control centre via fibre connections."

As a high-tech industry, ATC will keep moving forward globally, but the United States will continue to lag if it retains a bureaucratic government system. This situation matters because rising demands for air travel will make our airspace more crowded and will strain the ATC system. Transitioning to new ATC technologies promises to expand airspace capacity, increase safety, and save fuel by allowing aircraft to fly more direct routes.

Canada's Reforms

Dozens of nations have restructured their air traffic control systems to separate them from government budgets and political micromanagement. Canada privatized its system in 1996 in the form of a self-funded nonprofit corporation, Nav Canada. The Canadian reform has been very successful. Nav Canada has won three International Air Transport Association (IATA) Eagle Awards as the world's best ATC provider. The IATA has said that Nav Canada is a "global leader in delivering top-class performance" and that its "strong track record of working closely with its customers to improve performance through regular and meaningful consultations, combined with technical and operational investments supported by extensive cost-benefit analysis, place it at the forefront of the industry's air navigation service providers."

In Canada, funding was changed from a government ticket tax to direct charges on aircraft operators for services provided. Nav Canada charges for terminal services, flying through Canadian airspace, and oceanic services. Those cost-based charges are a more efficient way to price ATC services than the U.S. system, which is mainly based on ticket taxes.

Nav Canada is a private monopoly, so there might be concerns that its user charges would rise excessively. But that has not happened. Indeed, Nav Canada's real customer charges have fallen as efficiency has increased. The system is handling more traffic than before privatization, but with fewer employees. One reason for the good performance is that airlines and other aviation stakeholders appoint members of Nav Canada's corporate board, and those stakeholders have a strong interest in increasing both efficiency and safety.

Another advantage of privatization is innovation. Nav Canada is praised for its development of new technologies. Robert Poole noted, “The technical expertise at Nav Canada has led to a thriving business marketing innovative ATC hardware and software and advising other air navigation service providers.” In a 2013 address, Nav Canada’s chair Nicholas Geer said that the company has “sold and installed our home-grown technology around the world from Australia to Hong Kong to Dubai, and all over the UK and Europe.”

In testimony to the Senate in May 2015, the head of the U.S. National Air Traffic Controllers Association, Paul Rinaldi, noted that Canada’s system has “the air traffic controller, the engineer, and the manufacturer working together from conceptual stage all the way through to training, implementation, and deployment within their facilities. And what that does is it saves time and money. And they actually are developing probably the best equipment out there, and they are selling it around the world.”

In 2016 and 2017, the National Air Traffic Controllers Association backed U.S. House bills that would have moved our ATC system into a nonprofit corporate structure. It may seem odd that a labor union would be supportive of such reforms, but the controllers have been concerned that our system is not receiving the steady funding and advanced technology it needs. A self-funded ATC company would create more financial stability than the current system, which has been buffeted by federal budget battles.

Reforms Are Long Overdue

Since the 1970s, various studies and commissions have recommended restructuring the U.S. air traffic control system to move it partly or fully out of the federal government. Numerous studies, such as a 2005 Government Accountability Office report, have found that commercialized ATC systems in countries such as Australia, Canada, Germany, New Zealand, and the United Kingdom had cut costs, invested in new technologies, and maintained or increased safety levels.

The Canadian reform has been particularly impressive, and it captured the attention of former House Transportation and Infrastructure Committee chair Bill Shuster. His bill embracing a Canadian-style restructuring passed through committee in 2016 and again in 2017. The Trump administration supported the thrust of the Shuster bill in 2017. Alas, that support was not enough to move legislation over the finish line in Congress.

Privatization would provide the flexibility, incentives, and funding needed for ATC managers to increase efficiency and pursue innovation. Innovation is the key to reducing flight times, increasing airspace capacity, and cutting fuel costs. In an October 18, 2015, interview in the *Wall Street Journal*, the head of Nav Canada, John Crichton, was blunt: "This business of ours has evolved long past the time when government should be in it. . . . Governments are not suited to run . . . dynamic, high-tech, 24-hour businesses."

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—Prepared by Chris Edwards

49. CULTURAL AGENCIES

Congress should

- eliminate the National Endowment for the Arts;
- eliminate the National Endowment for the Humanities; and
- defund the Corporation for Public Broadcasting.

In a society that constitutionally limits the powers of government and maximizes individual liberty, there is no justification for the forcible transfer of money from taxpayers to artists, scholars, and broadcasters. If the proper role of government is to safeguard the security of the nation, by what rationale are its residents made to support exhibits of paintings, symphony orchestras, documentaries, scholarly research, and radio and television programs they might never freely choose to support? The kinds of things financed by federal cultural agencies were produced long before those agencies were created, and they will continue to be produced long after those agencies are privatized or defunded. Moreover, the power to subsidize art, scholarship, and broadcasting cannot be found within the powers enumerated and delegated to the federal government under the Constitution.

The National Endowment for the Arts (NEA), an "independent" agency established in 1965, makes grants to museums, symphony orchestras, individual artists "of exceptional talent," and organizations (including state arts agencies) to "encourage individual and institutional development of the arts, preservation of the American artistic heritage, wider availability of the arts, leadership in the arts, and the stimulation of non-Federal sources of support for the Nation's artistic activities." The NEA's fiscal year 2022 budget was $180 million.

The National Endowment for the Humanities (NEH)—with a FY 22 budget of $180 million—"funds activities that are intended to improve the quality of education and teaching in the humanities, to strengthen the scholarly foundation for humanities study and research, and to advance understanding of the humanities among general audiences." Among the things it has funded are controversial national standards for the teaching of history in schools, the traveling King Tut exhibit, and the documentary film *Rosie the Riveter*.

The 54-year-old Corporation for Public Broadcasting (CPB)—with a FY 22 budget of $485 million—provides money to "qualified public television and radio stations to be used at their discretion for purposes related primarily to program production and acquisition." It also supports the production and acquisition of radio and television programs for national distribution and assists in "the financing of several system-wide activities, including national satellite interconnection services and the payment of music royalty fees, and provides limited technical assistance, research, and planning services to improve system-wide capacity and performance." Some of the money provided to local public radio and television stations is used to help support National Public Radio (NPR) and the Public Broadcasting Service (PBS).

Note that the amount of arts funding in the federal budget is quite small. That might be taken as a defense of the funding were it not for the important reasons to avoid any government funding of something as intimate yet powerful as artistic expression. Also note how small federal funding is as a percentage of the total arts budget in this country. The NEA's budget is about 1 percent of the $19.5 billion contributed to the arts by private corporations, foundations, and individuals in 2020. According to Americans for the Arts, the nonprofit arts are a $166 billion industry. And the NEA says that arts and culture contribute $877 billion to the economy. Surely, the arts will survive without whatever portion of the NEA's budget gets out of the Washington bureaucracy and into the hands of actual artists or arts institutions. Indeed, when the NEA budget was cut in 1995, private giving to the arts rose dramatically.

In 1995, Congress voted to phase out the NEA over three years. The 118th Congress should revive that commitment and also end federal involvement with the National Endowment for the Humanities and the Corporation for Public Broadcasting.

Subsidies by the Poor to the Rich

Since art museums, symphony orchestras, humanities scholarship, and public television and radio are enjoyed predominantly by people of greater-than-average income and education, the federal cultural agencies oversee a fundamentally unfair transfer of wealth from the lower classes up. It's no accident that you hear ads for Rémy Martin and private banking services on NPR, and not for Budweiser and free checking accounts. Columnist Robert J. Samuelson called federal cultural agencies "highbrow pork barrel." Harvard political scientist Edward C. Banfield wrote, "The art public is now, as it has always been, overwhelmingly middle and upper-middle class and above average in income—

relatively prosperous people who would probably enjoy art about as much in the absence of subsidies." Supporters of the NEA often say that their purpose is to bring the finer arts to those who don't already patronize them. But Dick Netzer, an economist who favors arts subsidies, conceded that they have "failed to increase the representation of low-income people in audiences." In other words, lower-income people are not interested in the kind of entertainment they're forced to support; they prefer to put their money into forms of art that is often sneered at by the cultural elite. Why must they continue to finance the pleasures of the affluent?

Corruption of Artists and Scholars

Government subsidies to the arts and humanities have an insidious, corrupting effect on artists and scholars. It is assumed, for example, that the arts need government encouragement. But if artists need such encouragement, what kinds of artists are they? Novelist E. L. Doctorow once told the House Appropriations Committee, "An enlightened endowment puts its money on largely unknown obsessive individuals who have sacrificed all the ordinary comforts and consolations of life in order to do their work." Few have noticed the contradiction in that statement. As author Bill Kauffman has commented: "[Doctorow] wants to abolish the risk and privation that dog almost all artists, particularly during their apprenticeships. 'Starving artists' are to be plumped up by taxpayers. . . . The likelihood that pampered artists will turn complacent, listless, and lazy seems not to bother Doctorow." Moreover, as Jonathan Yardley, the *Washington Post*'s longtime book critic, asked, "Why should the struggling young artist be entitled to government subsidy when the struggling young mechanic or accountant is not?"

Politicizing of Culture

James D. Wolfensohn, former chair of the Kennedy Center for the Performing Arts, decried talk about abolishing the NEA. "We should not allow [the arts] to become political," he said. But it is the subsidies that have politicized the arts and scholarship, not the talk about ending them. Some artists and scholars are to be awarded taxpayers' money. Which artists and scholars? They can't all be subsidized. The decisions are ultimately made by bureaucrats (even if they are advised by artists and scholars). Whatever criteria the bureaucrats use, they politicize art and scholarship. As novelist George Garrett has said: "Once (and whenever) the government is involved in the arts, then it is bound to be a political and social business, a battle between competing factions. The NEA, by definition, supports the arts establishment." Adds painter Laura Main, "Relying on the government to sponsor art work . . . is to me no more than subjecting yourself to the fate of a bureaucratic lackey."

Mary Beth Norton, a scholar of women's history and a former member of the National Council on the Humanities, argues that "one of the great traditions of the Endowment [for the Humanities] is that this is where people doing research in new and exciting areas—oral history, black history, women's history to name areas I am familiar with—can turn to for funding." When the NEH spent less money in the mid-1980s than previously, Norton complained, "Now, people on the cutting edge are not being funded anymore." But if bureaucrats are ultimately selecting the research to be funded, how cutting edge can it really be? How can they be trusted to distinguish innovation from fad? And who wants scholars choosing the objects of their research on the basis of what will win favor with government grant referees?

Similar criticism can be leveled against the radio and television programs financed by the CPB. They tend (with a few exceptions) to be aimed at the wealthier and better educated, and the selection process is inherently political. Moreover, some of the money granted to local stations is passed on to NPR and PBS for the production of news programs, including *All Things Considered* and the *NewsHour*. Why are taxpayers in a free society compelled to support news coverage, particularly when it is inclined in a statist direction? Robert Coonrod, former president of the CPB, defends the organization, saying that "about 90 percent of the federal appropriation goes back to the communities, to public radio and TV stations, which are essentially community institutions." Only 90 percent? Why not leave 100 percent in the communities and let the residents decide how to spend it? Since only 15 percent of public broadcasting revenues now come from the federal government, other sources presumably could take up the slack if the federal government ended the appropriation.

Most arguments for defunding center on the NEA and some of its grants that have been perceived as intellectually, morally, politically, or sexually offensive to conservatives or even most Americans. In the late 1980s and early 1990s, the NEA made controversial grants to artist Andres Serrano, whose exhibit featured a photograph of a plastic crucifix in a jar of his own urine, and the Institute of Contemporary Art in Philadelphia, which sponsored a traveling exhibition of the late Robert Mapplethorpe's homoerotic photographs. PBS drew fire for broadcasting *Tales of the City*, which has gay characters. (*More Tales of the City*, which appeared on Showtime after PBS ducked the political pressure, generated little political controversy.) Such criticisms will likely endure as long as these agencies are funded with taxpayers' money. Civil rights activists made the Library of Congress take down an exhibit on antebellum slave life, and veterans groups pressured the Smithsonian to remove a display on the bombing of Hiroshima. An NEA official asked grant recipients to support President Barack Obama's policy agenda. President Donald Trump named a Florida political consultant with no arts background to head the NEA. Sen. Ted Cruz (R-TX) complained that *Sesame Street* was propagandizing for COVID-19 vaccines. NPR has been criticized both for an excessive and politically correct focus on race and gender and for driving away hosts from marginalized communities. And occasionally, such as during the bicentennial of the U.S. Constitution, the agencies have been used to subsidize projects favored by conservatives.

But no particular controversy is the fundamental objection to the federal cultural agencies. The brief against those agencies would be the same had the money been used exclusively to subsidize works inoffensive or even inspiring to the majority of the American people.

Nor can the case against the cultural agencies be based on how much they spend. In FY 22, a total of about $845 million was appropriated for the two endowments and the CPB, a mere morsel in a federal budget of nearly $6 trillion. The NEA's budget is about 0.1 percent of the total amount spent on the nonprofit arts in the United States.

No, the issue is neither the content of the work subsidized nor the expense. Taxpayer subsidy of the arts, scholarship, and broadcasting is inappropriate because it is outside the range of the proper functions of government. As such, it needlessly politicizes, and therefore corrupts, an area of life that should be left untainted by politics.

Government funding of anything involves government control. That insight, of course, is part of our folk wisdom: "He who pays the piper calls the tune." "Who takes the king's shilling sings the king's song."

Defenders of arts funding seem blithely unaware of this danger when they praise the role of the national endowments as an imprimatur or seal of approval on artists and arts groups. Former NEA chair Jane Alexander said: "The Federal role is small but very vital. We are a stimulus for leveraging state, local and private money. We are a linchpin for the puzzle of arts funding, a remarkably efficient way of stimulating private money." Drama critic Robert Brustein asked in 1995, "How could the NEA be 'privatized' and still retain its purpose as a funding agency functioning as a stamp of approval for deserving art?"

Philip Boroff wrote in the *Broadway Journal* that "the NEA confers a stamp of approval for a project, which is appealing to other donors." Why should people who prize their independence—and are often proud to defy the government in their plays and public comments—be so eager for a "stamp of approval" from that very government?

The politicization of whatever the federal cultural agencies touch was driven home by Richard Goldstein, a supporter of the NEH, in a 1982 article about the struggle for control of the NEH in the Reagan administration. Goldstein pointed out:

> The NEH has a ripple effect on university hiring and tenure, and on the kinds of research undertaken by scholars seeking support. Its chairman shapes the bounds of that support. In a broad sense, he sets standards that affect the tenor of textbooks and the content of curricula. . . . Though no chairman of the NEH can single-handedly direct the course of American education, he can nurture the nascent trends and take advantage of informal opportunities to signal department heads and deans. He can "persuade" with the cudgel of federal funding out of sight but hardly out of mind.

The cudgel (an apt metaphor) of federal funding has the potential to be wielded to influence those who run the universities with regard to hiring, tenure, research programs, textbooks, and curricula. That is an enormous amount of power to have vested in a government official. Surely, it is the kind of concentration of power that the Founding Fathers intended to thwart.

Separation of Conscience and State

We might reflect on why the separation of church and state seems such a wise idea to Americans. First, it is wrong for the coercive authority of the state to interfere in matters of individual conscience. If we have rights, if we are individual moral agents, we must be free to exercise our judgment and define our own relationship with God. That doesn't mean that a free, pluralistic society won't have lots of persuasion and proselytizing—no doubt it will—but it does mean that such proselytizing must remain entirely persuasive, entirely voluntary.

Second, removing religion from the sphere of politics enhances social harmony. Europe suffered through wars of religion as churches made alliances with rulers and sought to impose their theology on everyone in a region. Religious inquisitions, Roger Williams wrote in 1644, put towns "in an uproar." If people take their faith seriously, and if government is going to make one faith universal and compulsory, then people must contend bitterly—even to the death—to make sure that the true faith is established. If, instead, we enshrine religion in the realm of persuasion, there may be vigorous debate in society, but there won't be political conflict. People can deal with one another in secular life without endorsing the private opinions of their colleagues.

Third, competition produces better results than subsidy, protection, and conformity. "Free trade in religion" is the best tool humans have to find the nearest approximation to the truth. Businesses coddled behind subsidies and tariffs will be weak and uncompetitive, and so will churches, synagogues, mosques, and temples. Religions that are protected from political interference but are otherwise on their own are likely to be stronger and more vigorous than a church that draws its support from government.

If those statements are true, they have implications beyond religion. Religion is not the only thing that affects us personally and spiritually, and it is not the only thing that leads to cultural wars. Art also expresses, transmits, and challenges our deepest values. As the managing director of Baltimore's Center Stage put it: "Art has power. It has the power to sustain, to heal, to humanize . . . to change something in you. It's a frightening power, and also a beautiful power. . . . And it's essential to a civilized society." Because art is so powerful, because it deals with such basic human truths, we should not entangle it with coercive government power.

That means no censorship or regulation of art. It also means no tax-funded subsidies for arts and artists, for when government gets into the arts funding business, political conflicts ensue. To avoid political battles over how to spend the taxpayers' money, to keep art and its power in the realm of persuasion, we would be well advised to establish the separation of art and state.

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—Prepared by Sheldon L. Richman and David Boaz

REGULATION

50. PRIORITIZING ECONOMIC GROWTH

Congress should

- recognize that the U.S. economy has experienced a significant fall in its long-run sustainable growth rate, with a recent pace of growth one-half that seen through the postwar 20th century;
- prioritize raising the country's growth potential, given that faster growth would beget higher living standards, stronger public finances, and less zero-sum politics;
- understand that policy changes can affect both the level of gross domestic product (and so short-run growth) and the long-term growth rate;
- realize that a lot of "pro-growth" policies entail federal, state, and local governments doing less, liberalizing rules, or regulating less intrusively; and
- seek out pro-growth reforms that attract support across broad swaths of the political spectrum.

The United States has seen a major decline in its growth trajectory in the 21st century. From 1947 to 2000, real (i.e., inflation-adjusted) gross domestic product (GDP) per capita rose at an average annual rate of 2.3 percent. The long-term growth path remained remarkably steady over time, with recessions followed by strong catch-up growth. Yet between 2000 and 2021, real growth in equivalent terms averaged just 1.1 percent—less than half the rate seen in the 20th-century postwar period.

Since the turn of the millennium, the United States has endured two massive recessions. The Great Recession of 2007–2009 shrank overall GDP per capita by 5.1 percent and was followed by a historically anemic recovery. After reasonable growth in 2018 and 2019, the country was then ravaged by the COVID-19 pandemic, with its combination of government lockdowns and voluntary retreats from in-person activity. These setbacks, coupled with the fall in underlying trend growth, mean that GDP per capita at the end of 2021 was as much

Figure 1
Actual GDP vs. GDP growing at 1947–2000 trend

Source: Bureau of Economic Analysis, "Real Gross Domestic Product per Capita," Federal Reserve Bank of St. Louis, updated August 25, 2022.
Note: GDP = gross domestic product.

as 27.6 percent below where it would stand if the postwar growth rate through 2000 had persisted over the past two decades (see Figure 1).

This growth downturn is expected to endure. The Congressional Budget Office assumes, for example, that the annual sustainable real per capita GDP growth rate will be 1.1 percent per year from the late 2020s through most of the next three decades. Accounting for population growth, that translates to overall real GDP growth of 1.5 to 1.6 percent per year (compared with the 3.6 percent average rate seen from 1947 to 2000).

A "New Normal" of Slow Growth?

There are structural forces that imply that a big growth slowdown was always to be expected.

As my former colleague Brink Lindsey outlined in the 2017 *Cato Handbook for Policymakers*, real per capita growth can occur from (1) growth in labor participation, or annual hours worked per capita; (2) growth in labor quality,

Figure 2

Civilian labor force participation rate

Source: Bureau of Labor Statistics, "Labor Force Participation Rate (CIVPART)," Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, updated October 7, 2022.
Note: GDP = gross domestic product.

or the skill level of the workforce; (3) growth in capital deepening, or the amount of physical capital invested per worker; or (4) growth in so-called total factor productivity, or output per unit of quality-adjusted labor and capital. Sadly, there are significant headwinds against all these components of growth.

First, you can get more output per head if a higher proportion of the population works or if the average number of hours of those already working increases. Between the mid-1960s and 2000, average annual hours worked per capita increased from less than 800 to more than 950, powered by rising labor force participation among women and the influx of baby boomers into the workforce. But now we have an aging population that has pulled down the proportion of the population in the labor market (see Figure 2). Meanwhile, among employees, the secular trend as we have gotten richer and more productive is for workers to work fewer hours, not more (see Figure 3). Although in recent years this trend has plateaued—meaning it's less of a drag on growth than before—there is no reason to expect a sharp rebound soon.

Figure 3
Average weekly hours of production and nonsupervisory employees, seasonally adjusted

Source: Bureau of Labor Statistics, "Average Weekly Hours of Production and Nonsupervisory Employees, Total Private (AWHNONAG)," Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, updated October 7, 2022.

Second, in the postwar period, the United States benefited from growth occurring because of the low-hanging fruit of an increasingly better-educated workforce. Harvard economists Claudia Goldin and Lawrence Katz have estimated that rising educational attainment may have accounted for about 15 percent of total growth over the period 1915–2005, as years of education increased while access was broadened. But the education level of the workforce has since largely plateaued and, in any case, adding yet more additional years of formal education would have sharply diminishing returns.

Third, capital investment can be a source of growth: workers with more and better tools can produce more. Yet net national investment (investment net of depreciation charges) as a percentage of net national product has been in a volatile, yet downward, trend for decades (see Figure 4). There are significant measurement issues with regard to this trend, not least due to the rise in importance of "intangibles"—investments in nonphysical capital, such as orga-

Figure 4

Net domestic investment rate (as a share of net national product)

Sources: Bureau of Economic Analysis (BEA), "Real Gross Domestic Product per Capita," Federal Reserve Bank of St. Louis (FRED), updated August 25, 2022; BEA, "Net Domestic Investment," FRED, updated August 25, 2022; BEA, "Net National Product," FRED, updated August 25, 2022; and author's calculations.

nizational capabilities, branding, or processes. That notwithstanding, without meaningful policy reform, it's unclear why we would expect an investment boom to counteract the unfavorable trends regarding hours worked and worker skills.

That makes the fourth and final source of growth even more important: innovation. That is, the introduction of productive new technologies or better ways of combining inputs to produce more or new output by improving efficiency, managing resources better, or inventing popular new products.

The prospects for this source of growth are unclear and unpredictable. Economist Robert Gordon's very pessimistic book, *The Rise and Fall of American Growth: The U.S. Standard of Living since the Civil War*, suggests that the United States has exhausted the low-hanging fruit of certain major general-purpose technologies, such as electricity, and that we are unlikely to see similarly transformative innovations like this again. Some economic historians, such as

Figure 5

Total factor productivity growth, 1949–2020

Source: "Productivity," Bureau of Labor Statistics.

Deirdre McCloskey, have suggested that certain ideas permeating through culture about the virtues of market-tested betterment are key to explaining the growth takeoff in the past two and a half centuries. Given the unpredictability of innovation, and of political and ideological support for it, forecasting future innovative growth trends is incredibly difficult. This source of growth is difficult to identify and measure, even retrospectively. Economists typically talk as if we can estimate it as synonymous with total factor productivity growth—a residual measure of the improvement in output after controlling for the amount and quality of labor and capital inputs. As Figure 5 shows, nothing in the data suggests a sufficient innovation takeoff to offset the trends previously mentioned. It's possible that the integration of artificial intelligence, the metaverse, and more can lift trend growth in the future. Innovation tends to be unpredictable and volatile, with new ideas often appearing unexpectedly, but the data do not yet reflect an innovation "get out of jail free" card.

The Importance of Growth

The fact that major structural trends, such as population aging, are depressing growth, and that other advanced economies have also seen growth slowdowns, suggests that reversing these trends will be extremely difficult.

Nevertheless, we should not be resigned to growing at such a slow rate. Labor participation, labor quality, investment, and innovation are all affected by federal, state, and local policies, which shape the incentives of individuals and businesses to engage in productive activities and affect the broader allocation of resources. In other words, policy can affect our growth prospects. Better policy can make us better off.

Given the economic and political benefits of growth, in fact, the observed headwinds against it make it imperative that policies currently impairing either the level of GDP or its growth are reformed or excised. The stakes are high. If the per capita annual GDP growth rate could be increased from its current projected 1.1 percent to, say, 1.5 percent, then the power of compounding means that after 50 years, we'd be 22 percent better off than in the slower growth scenario. Put another way, with a 1.1 percent growth rate, GDP per capita would double every 64 years. With growth at 1.5 percent or even 2 percent, that figure would fall to 47 years or 36 years, respectively.

GDP is certainly not everything, as the COVID-19 pandemic showed. Curbs on our personal liberties do not all show up in GDP, but we clearly value those liberties immensely. In a free society, individuals may accept a slower growth of GDP in exchange for more leisure time to enjoy the fruits of their income, and that is perfectly reasonable. A lot of the benefits of modern technological advances, including free social media services, do not show up in GDP. GDP may also decline in the process of eliminating curbs on activities that harm the environment in unsustainable ways but that nevertheless improve human welfare. It is obvious, then, that governments should not chase GDP growth at all costs.

But subject to these constraints, a society of more sustainable abundance over time produces better results for virtually everyone. As economist Tyler Cowen has argued when advocating for the maximization of "wealth plus"—sustainable economic growth—as an ultimate societal goal, few would quibble that "it is much better to live in the United States than Albania, or better to live in Denmark than Burkina Faso." That may sound trite, but the implications of growth apply over time for a country on the frontier of progress, just as much as between them today.

If we acknowledge that obtaining a more prosperous United States is desirable, then we should take raising the sustainable growth rate much more seriously as a policy objective. In doing so, we would worry far less about redistributive programs and far more about investment incentives. We would ponder less about how to revive struggling areas and think more about removing government constraints that prevent thriving areas from expanding. We would generally be much more open to economic freedom over providing economic security, given that the former is strongly correlated with broad-based measured prosperity.

A higher sustainable growth rate would not only leave more dollars in people's pockets; higher living standards over time are associated with better health, more creativity, a widening of access to cultural wonders, more sustainable federal finances, and so much more. As a bonus, faster growth also makes politics less zero-sum. When living standards are rising for most, one person's large gains are less likely to be seen as a threat to others. It should not surprise us that over the past two decades of slower growth, politics has become uglier, with scapegoats—whether billionaires, international elites, or immigrants—being blamed for our social and economic problems.

Although the growth headwinds are real, we have largely taken rising living standards for granted during recent decades. Macroeconomic debates have focused on the role of fiscal and monetary policy in reducing GDP volatility by alleviating recessions, rather than on long-run growth.

The implied consensus of the focus of much commentary was that, provided governments kept "aggregate demand" on a stable path, then sustainable growth driven by innovations and business investment would just happen on its own accord. Or, at least, that this demand-stabilizing role was more important or feasible than attempts to raise the long-run growth rate. Two decades of historically slow growth, coupled with the recent inflationary pressures, have since reemphasized the importance of the supply side of the economy: its capacity to produce more and higher-value goods and services and the way the government shapes this.

Although neither the left nor right of American politics seems ready to throw out their shibboleths in favor of a full-throated pro-growth agenda just yet, the COVID-19 pandemic does appear to have convinced many of a broader domestic economic sclerosis that is largely driven by misguided policies and institutional failures.

In the United States, it is difficult and costly to build infrastructure in the right places, to find the workers you need, or to get approval for innovative new projects. The pandemic saw a period in which the United States lagged other countries in approving cheap, at-home rapid diagnostic tests. Supply chain disruptions have been exacerbated by protectionist policies and local regulations on ports. As the case studies pile up, people are coming (often indirectly) to the view that structural reforms are required to enhance the market sector's ability to produce goods and services or to adapt to changing circumstances. Many of these ideas could raise the level or growth rate of economic activity.

A Pro-Growth Agenda

Politicians should aspire to a more meaningful growth focus than just an ad hoc fix for certain egregious problems. In theory, better policies could create new economic capacity directly or else could lower the costs of engaging in investments or activities that later increase it.

Most economic reforms would have level effects for output (promoting a one-time, but permanent, rise in GDP, with growth increasing during the transition to this higher level of activity). Some, though, may even raise the rate of innovation, permanently raising the growth rate of the economy.

Much of the rest of this *Handbook* discusses policy ideas that, by liberating markets from government, would also have the happy side effect of raising the economy's productive potential. It's therefore unnecessary to delineate a comprehensive guide to what a pro-growth agenda would look like here. But scholars have discussed many of its headline components since 2014, when Cato asked 51 top economists for ideas on how to boost the sustainable growth rate.

Regulatory reforms that remove anti-competitive product market regulation, reduce administrative burdens on firms, limit government interventions to alleviating genuine market failures, and sunset regulations to avoid their accumulation are a set of broad but important pro-growth regulatory principles that could deliver higher market output at lower cost.

The current thicket of environmental, land-use, and zoning regulations that inflate the cost of and delay new private-sector infrastructure and housing being supplied in productive areas is especially ripe for an overhaul. They not only make the economy less adaptable to changing wages and prices, undermining efficiency, but also snuff out the benefits of dense, productive agglomeration of industries in certain cities.

Tariffs and other trade restrictions today heighten input costs and reduce competitive pressures on our producers to become more efficient. The Jones Act—a 1920 law that requires all intrastate shipping to use expensive U.S. merchant marine vessels—not only raises transportation costs, causing all sorts of downstream inefficiencies, but also causes enormous collateral damage. Then there are "Buy American" provisions, which waste resources by causing the U.S. federal government to overpay relative to world prices in procurement, while requiring an extensive bureaucracy to administer and police.

Plenty of government-erected barriers stand between workers' taking up employment or moving to new roles. Welfare and other entitlement programs create large disincentives to work or to earn more labor income. Labor laws and regulations drive up hiring costs. Occupational licensing requirements, compulsory unionization, regulatory compliance burdens, and more create entry barriers to new jobs.

Immigration restrictions choke off a crucial source of new entrepreneurship and labor supply, especially in areas where regulatory-induced restrictions raise costs, such as health care and childcare. One consequence is the safety valve of a large illegal migration sector, with a lot of activity occurring in the shadow economy. We should make legally migrating to the United States easier, especially for the most talented researchers, scientists, and entrepreneurs.

The tax code (especially in its interaction with welfare programs) is littered with perverse incentives against work, production, investment, and innovation. Tax reform that eliminated distortions and lowered rates would increase efficiency and be pro-growth.

Then there are the relatively poor state of schooling and the high cost of health care across much of the country. More choice, fewer restrictions on entry into those respective markets, and money following students or patients could all help marry individuals' needs in ways that deliver better human capital accumulation and cheaper health care.

Any individual regulatory or policy change in these domains might appear to have only a small impact on GDP or the economic growth rate. But the cumulative effects of a pro-growth focus could meaningfully improve the economy's productive potential and its adaptiveness to ever-changing circumstances. Raising the sustainable growth rate as an overarching ambition should, in theory, get politicians thinking about change across all the areas of economic activity outlined.

Sadly, despite all the benefits of economic growth and the country's shared interest in achieving it, most of these policy debates are highly polarized and politically charged. Liberalization of markets typically entails undermining incumbent special interests, whether they be unions, homeowners, administrative bureaucracies, or other constituencies. This creates additional barriers to reform. Indeed, to successfully instill a pro-growth policy environment may well require altering the policymaking process itself.

Given the difficulties of entrenched positions and vested interests, the most promising areas for reform will be those not already subject to high-profile, politically polarized debate or where one side realizes its ambitions cannot be achieved without embracing policies that have historically been the focus of its political opponents. Infrastructure regulatory policy may be a good example, given that the progressive ambition for a renewables revolution will inevitably run into the same barriers and environmental audits that free-market proponents have long bemoaned as smothering private-sector projects.

Other promising possibilities for new pro-growth coalitions will arise in areas where reform could bring the double dividend of improved efficiency and distributional wins for a key constituency. For example, reforming restrictive zoning laws could increase economic output by improving the efficiency of the allocation of housing, with people who are poor benefiting disproportionately from lower housing costs.

America's growth slowdown remains a relatively recent problem and—given the ongoing headwinds against a high sustainable growth rate—will require a huge shift in policy to meaningfully offset. But the long-term benefits of achieving faster growth would be worth it. Economic growth should be a frontline priority that looms over all policy decisions.

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—Prepared by Ryan Bourne

51. REGULATORY REFORM

Congress should

- require that all new major regulations be approved by Congress; and
- include "sunset" provisions and carefully limit rulemaking authority when Congress delegates that power to federal agencies.

The president should

- use his current authority over rulemaking to improve the efficiency of federal regulation.

Lawmakers often vow to “rein in the regulatory state.” Their proposals range from expanding the use of cost–benefit analysis for proposed rules and instituting regular review and critical analysis of existing regulation to giving Congress more power to strike down rules. Other ideas include statutory adoption of regulation-constraining policies previously implemented by executive order, such as former president Donald Trump’s “one-in, two-out” edict for new rules.

Requiring Congress—as the representatives of the American people—to take greater responsibility for federal regulation is a good idea, as is critical analysis of both new and existing rules. However, these ideas imply that costly and inefficient federal regulation is the result of unaccountable rulemaking bureaucrats and that elected officials have little control over the regulatory state. That implication is false; there is ample evidence that federal agencies operate according to Congress and the president’s direction. If lawmakers want the administrative state to operate differently, they need to give regulators different instructions and incentives.

Congressional Delegation and Its Effects

Article I, Section 8 of the Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . [all] Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." But laws often require lengthy explanations of how they are to be executed and how compliance is attained—that is, they require regulations. Lawmakers routinely delegate to federal agencies the authority to craft such rules.

Within limits, this makes sense. Good rulemaking requires more expertise and attention to minutiae than Congress exhibits. As long as agencies are "fleshing out the details" of legislation and not policymaking in place of elected legislators, such rulemaking is consistent with the principles of limited government as enshrined in the U.S. Constitution. As the Supreme Court ruled in *Wayman v. Southard* (1825), federal agencies can "fill up the details" of statutes and "vary minor regulations" provided they stay "within the broad outlines marked out by the legislation."

But as is the natural progress of things, *Wayman*'s limits have eroded over time, and Congress has handed increasingly broad policymaking authority to the bureaucracy. In *Hampton v. United States* (1928), the Supreme Court gave its imprimatur to this authority, ruling that a statute need only provide "an intelligible principle" of what Congress wants to accomplish, while the agencies can handle the balance of the policymaking.

This situation is a great deal for Congress. Members need only legislate some noble goal like "clean air" or "worker safety" or "securing the homeland," whereas federal agencies must make difficult decisions about how much employment or consumer expense or innovation to trade for Congress's desired benefit. Lawmakers get the acclaim for the noble goals while bureaucrats get the blame for policy costs and failures.

Nearly a century ago, agency policymaking had reached such a degree that Justice Benjamin Cardozo—hardly a limited-government jurist—lamented "delegation running riot" in his concurrence in *Panama Refining Co. v. Ryan* (1935), one of the few decisions to check such delegation. Nonetheless, the courts have continued to approve the expansion of bureaucratic policymaking. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* (1984), the Supreme Court went so far as to limit judicial review over the basic question of whether specific agency rulemakings even reflect congressional intent.

This history should not be understood as saying that regulatory policymaking is in the hands of ideologically driven career bureaucrats who mischievously inflict burdensome regulations on Americans. Public choice economics points out that public employees are like their private-sector counterparts: they want to keep and advance in their jobs and have a tolerable work environment. To do that, they must satisfy their superiors, who ultimately are the 4,000-odd presidential appointees seeded throughout the federal agencies, more than two-thirds of whom do not require Senate approval. Thus, Congress's delegation of rulemaking authority has not produced some "deep state" bureaucracy ruling America through regulation; rather, it has empowered presidential administrations to do so. And most administrations have happily used that power to carry out their agenda, sometimes going so far as to draw on legislation from decades ago that was intended to address matters that differ from what presidents want to tackle today.

Recent Presidents

This delegation of rulemaking authority might, at one time, have been acceptable to lawmakers. The president can be viewed as the elected representative of the entire nation and thus more likely to craft regulations that benefit Americans as a group, as opposed to senators and representatives beholden to parochial interests.

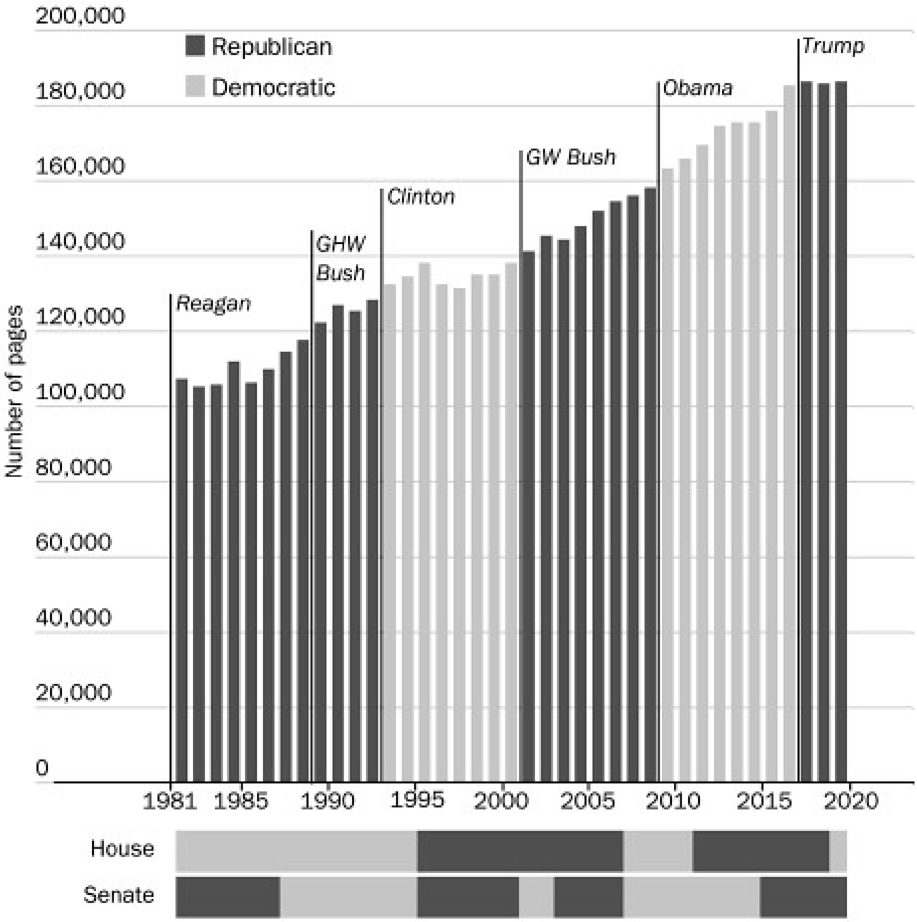
Besides, regular swings in control of the Oval Office give each party the chance to "course-correct" the other's regulatory policymaking. But this has not been happening in recent decades. Although Republicans often advocate *de*regulation, the two most recent GOP presidencies did not pursue deregulatory course corrections. As shown in Figure 1, regulation surged during the George W. Bush administration, in part because of legislation adopted in the war on terror. And rulemaking activity basically froze during the Trump administration, which can be interpreted as the regulatory burden's not growing any heavier, but it can also be interpreted as Trump's maintaining the burden from Barack Obama's administration. In fairness, rulemaking—whether regulatory or deregulatory—requires considerable administration diligence and procedural expertise. That history suggests that members of Congress, from both parties, may no longer want to curb the rulemaking power of the presidency.

Reform Ideas and Their Limitations

Proposals to reform the regulatory process can be divided into two groups: those that would constrain rulemaking at the agency level and those that would increase congressional oversight of regulation. Among the former are such ideas as increasing the use and rigor of cost–benefit and other critical analysis of existing and proposed rules, caps on the overall number of regulations and their aggregate compliance cost, and ad hoc, temporary suspensions of specific rules to boost economic activity or experiment with alternative regulatory schemes.

Figure 1

Total pages in the *Code of Federal Regulations*, 1981–2019



Source: Federal Register Statistics, *Code of Federal Regulations*, Total Pages and Volumes, 1938–2019.
Note: GHW Bush = George H. W. Bush; GW Bush = George W. Bush.

As meritorious as those ideas might appear, their benefits would likely be limited and perhaps nonexistent. Concerning constraints on agency rule-making, if an administration favors some regulation, negative analysis results usually pose little impediment to its implementation. Likewise, positive analysis gives little boost to a regulation the administration opposes. Evidence of this effect is found in the many federal regulations whose costs dwarf their benefits. Administration priorities would also likely overcome caps on the number or cost of regulations.

There is more promise in proposals to give Congress greater ability to review, block, and repeal regulations. Among those proposals are the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require congressional approval via an expedited process of any new major regulation, and the inclusion of "sunset" clauses in legislation, which would force Congress to regularly revisit statutory delegations of rulemaking power. However, as demonstrated by the infrequent use of the Congressional Review Act—a regulatory oversight proposal that became law in 1996—an unlikely alignment of political factors is necessary for these powers to be exercised. Still, expansion of Congress's ability to check the executive branch's policymaking power via regulation is worthwhile.

The best policy would be for Congress to limit its delegation of policymaking authority to federal agencies and, by extension, to the president. Good public policy is the product of compromise and the balancing of different factions' interests, within the confines of limited governance. That is especially the case in a large, diverse nation whose domestic tranquility is best secured by obeisance to the Constitution and the nation's Founding ideals. As such, lawmakers should set federal policy and government agencies should carry it out and, at most, only "fill up the details" of what Congress legislates.

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—Prepared by Thomas A. Firey

52. COVID-19: #NEVERNEEDED REGULATIONS

Policymakers should

- remove regulations that impede the rapid and efficient supplying of tests, vaccines, and therapeutics to patients;
- remove regulations that impede the flow of health care practitioners to areas where they are most needed;
- remove regulations that block patients from the benefits of telehealth technology;
- remove regulations that block experienced health care professionals from other countries from providing health care to patients in America; and
- remove regulations that prevent health care professionals from serving patients to the full extent of their training.

During the early days of the COVID-19 pandemic, policymakers implemented emergency measures that removed regulatory barriers to a rapid and efficient response to the crisis. Unfortunately, most of the emergency measures have expired and the old barriers have returned. Yet by issuing the emergency actions, policymakers tacitly recognized that the regulations unjustifiably block people's access to health care.

Getting Patients Access to Tests, Vaccines, and Therapeutics

The Food and Drug Administration's test approval process resulted in an avoidable and costly delay in getting test kits for COVID-19 infection out to the public, which impeded an effective response to the pandemic by more than a month.

Eventually, the FDA permitted states to independently approve tests for use within their borders even if the tests had not yet received FDA approval. This temporary emergency action allowed several states that were hard-hit by the pandemic to rapidly ramp up testing. In some instances, states imported tests of proven quality that had been used in other countries. The devolution of authority to the states—50 "laboratories of democracy"—should remain in effect. The pre-pandemic federal monopoly on approving tests was never needed.

Congress should consider granting states the authority to approve drugs and other devices that may be marketed within their borders, independent of FDA approval, even when no public health emergency exists.

The Pfizer/BioNTech, Moderna, and Johnson & Johnson COVID-19 vaccines were developed and granted emergency approval in record time. The first messenger RNA vaccines became available less than a year after the pandemic reached North America. According to a report from the World Economic Forum, a vaccine takes an average of 10 years and $500 million to be developed and approved.

The FDA fast-tracked approval of COVID-19 vaccines as well as therapeutics under the Coronavirus Treatment Acceleration Program (CTAP). Under CTAP, the FDA grants emergency use authorization, if the benefits outweigh the risks, to vaccines that have already completed Phase 1 trials that demonstrate safety and Phase 2 trials that demonstrate safety and efficacy, but have not yet completed Phase 3 (long-term protection) trials. Therapeutics such as remdesivir, Paxlovid, and molnupiravir have similarly been fast-tracked.

Policymakers should learn from this. Fast-tracking drug and vaccine approvals should become the rule, not the exception. Better yet, patients should be able to choose between drugs and vaccines that are FDA-approved and those approved by other "trusted" countries' regulatory agencies. Patients should even be allowed access to therapeutics approved by independent third-party certifiers if the label clearly states how and from whom the drug received certification. And as coronavirus cases mounted, the FDA should have sought to ameliorate the shortage of test kits by authorizing the use of tests already being used in similar countries.

Congress should pass legislation granting patients access to drugs and medical devices (including tests) already approved in similar countries. This already exists among the European Union states plus Iceland, Liechtenstein, and Norway. In July 2019, Sen. Ted Cruz (R-TX) introduced S. 2161, the Reciprocity Ensures Streamlined Use of Lifesaving Treatment (RESULT) Act, which would allow the marketing of drugs approved in certain countries but not yet approved by the FDA, if "there is an unmet need." It granted the FDA authority to block such drugs if the agency determined they were not safe and efficacious. Unfortunately, that provision, along with the "unmet need" requirement, undermined the goals of the proposed legislation. The bill failed to advance out of the Senate Committee on Health, Education, Labor and Pensions.

Health Care Practice across State Lines

The pandemic acutely demonstrated how state licensing laws impede the free flow of health care practitioners to where patients need them. In several of the states hardest hit by the pandemic, governors suspended state licensing laws to allow practitioners licensed in any state to come to the aid of other states' residents. These emergency actions tacitly recognize a pressing problem: state clinician licensing laws block access to care.

Some states have already enacted laws recognizing the out-of-state occupational and professional licenses of health care providers who establish permanent locations within their jurisdictions. In early 2019, Arizona became the first state to do so, and several other states have since followed suit. The remaining states and the District of Columbia should do the same.

Such reform would make it much easier for health care practitioners to provide services to patients in various parts of the country. However, requiring practitioners to establish permanent locations within respective states renders the reform less effective. For greater impact, state lawmakers in all 50 states and the District of Columbia should remove this requirement. States would still retain the power, under our federal system, to grant licenses and regulate occupations and professions within their borders.

The social distancing measures required to address the COVID-19 pandemic led to a newfound appreciation for telemedicine, a technological advance that has been available for several decades. State licensing laws for health care practitioners have impeded the widespread use of telehealth. Most states allow health care practitioners to provide telemedicine to patients only in the state in which those providers are licensed, a barrier to the free flow of health care services across state lines.

Incongruously, patients can travel to another state to receive medical treatment and even surgery from a doctor licensed in that state, but those doctors cannot travel to the patients' states to provide the same services unless they are licensed in those states.

Though many states, early in the pandemic, temporarily removed barriers to the movement of health care practitioners or the delivery of telehealth across state lines, some of those measures have since lapsed and the barriers returned. But policymakers in Arizona learned from the experience that these regulatory barriers were never needed. In May 2021, Arizona became first state to allow its patients to receive telehealth services from health care practitioners licensed in any of the other states and the District of Columbia. Out-of-state telehealth providers are subject to the laws governing the health care professions of the state of Arizona, as well as review and disciplinary action by the relevant professional licensing boards of the state of Arizona. They are required to show proof of malpractice insurance coverage. Liability cases will be heard in Arizona courts subject to Arizona liability law.

Policymakers in the other states and territories should follow Arizona's example. But federal policymakers can also act. To the extent consistent with its authority to tear down barriers to interstate commerce under Article 1, Section 8, of the Constitution, Congress should define the "locus of care" as the state in which the practitioner is located as opposed to the state in which the consumer of the service resides. Although states have constitutional authority to regulate the practice of medicine for residents within their borders, crossing state lines to provide telehealth or short-term in-person care can reasonably be classified as interstate commerce.

Removing the obstacles to health care delivery across state lines will increase access to care and allow patients to use expertise that may exist in areas of the country otherwise beyond their reach. It would also remove the protection from out-of-state competitors that health care providers otherwise enjoy. The increased competition would redound to the benefit of patients by lowering prices and improving quality of care.

Congress should also apply this definition of the locus of care to practitioners licensed in one state who provide short-term in-person care in a state where they do not have a permanent location. Examples of providers to whom such an act would apply include those who usually work through agencies to provide care during short temporary stints in medically underserved areas; those located very close to the border of a neighboring state; and out-of-state experts in rare and specialized medical conditions brought in to consult and help manage a fragile patient unstable for transfer. These examples are analogous to telemedicine practice.

Defining the locus of practice as the state in which a health care practitioner is licensed would make it easier for locum tenens ("fill in") providers and out-of-state specialists to provide itinerant temporary health services to remote and underserved communities, while avoiding the licensing applications and fees in the several states where these communities reside. If a practitioner establishes an office within a state, the practitioner will then become subject to applicable state-based practitioner licensing laws.

Meeting Health Care Workforce Needs

The Canadian provinces, Australia, and most European Union countries have a provisional licensing system whereby experienced foreign doctors are allowed to practice under the supervision of a licensed domestic physician for a designated period. When the supervisory period is complete, and contingent on passing the same exams required of domestic physicians, they are granted an unconditional license. In many cases, they are required to practice for a certain period in an underserved area. America's patients would benefit if policymakers would create provisional licensing programs for licensed and experienced physicians who were trained and practice in other countries. Gov. Phil Murphy of New Jersey patterned a public health emergency measure on the provisional license model. However, despite any reforms that state lawmakers might enact, federal immigration laws remain an obstacle to their smooth implementation.

Although Congress has no constitutional authority to intervene in state licensing matters, Congress can facilitate state lawmakers who seek to reform state licensing requirements for foreign physicians as well as international medical graduates (IMGs) who do their postgraduate training in the United States by removing immigration law barriers that impede the effectiveness of state licensing reform.

IMGs must obtain exchange visitor (J-1) visas to enroll in U.S. postgraduate training programs. One way to remove immigration law barriers that prevent states from increasing the health care workforce would be to remove the requirement that J-1 visa holders must return to their country of origin for at least two years after they complete their postgraduate training. They should be allowed to apply directly for a green card that would take effect once the J-1 visa expires. At a minimum, Congress should adopt this reform for any physician who works for three years in a medically underserved area without involving state governments.

Congress can—and should—also eliminate the cap on H-1B visas or create an extra allotment of H-1B visas designated for foreign health care professionals who must now compete for H-1B visas with other applicants in highly skilled fields. Likewise, the cap on green cards should be eliminated or an extra allotment created for foreign health care professionals. Congress should also guarantee green cards to the family members of any health care worker if the worker dies while still in a temporary status—a tragedy that is not an infrequent occurrence in the United States.

Scope-of-Practice Laws

To address the demand for health care professionals, a growing number of states have opted out of the federal guideline that requires that certified registered nurse anesthetists (CRNAs) practice under the supervision of physicians. CRNAs are now permitted to practice independently, providing more patients—particularly those in rural areas—access to anesthesia services.

In our federal system, states have power over occupational licensing and determining the scope of work in which a licensee may engage. For licensed health care professions, this is referred to as “scope of practice.” For decades, state legislators have witnessed turf battles among the various health care professions. Nurse practitioners (NPs) and physician assistants (PAs), for example, seek to practice independently of physicians and to expand their scope of practice to meet their level of training. This goal is usually met with resistance from medical doctors, who argue that NPs and PAs lack the necessary training to safely provide care beyond a narrowly defined scope. States vary in how they define the scopes of practice of NPs and PAs. Broadening their scope helped address the COVID-19 public health crisis. With the crisis behind us, maintaining the broadened scope will give people more health care options and access, particularly in underserved rural areas.

Pharmacists are another health care profession seeing its scope gradually expand. All 50 states currently allow pharmacists to vaccinate patients, with states differing on age limitations and types of vaccinations allowed. Oregon and Rhode Island allow pharmacy technicians to vaccinate. Several states now allow pharmacists to prescribe hormonal contraceptives, and California and Colorado allow pharmacists to prescribe PrEP (pre-exposure prophylaxis) and PEP (post-exposure prophylaxis) for HIV. Pharmacists’ scope of practice can be expanded to include a host of services, including administering and interpreting tuberculosis skin tests; testing and administering prescription meds for patients with influenza and other viral illnesses or common bacterial infections like strep throat; providing nonsedating or low-sedating antihistamines, corticosteroids, and decongestants; and extending routine noncontrolled chronic medication prescriptions for an additional 30–60 days.

Optometrists who have the training should not be blocked from offering simple eye surgical procedures to patients. Policymakers should permit appropriately trained doctorate-level psychologists to prescribe psychotherapeutics. Policymakers should allow dental therapists (analogous to physician assistants) and dental hygienists to practice independently, and to the full extent of their training.

Conclusion

Policymakers suspended regulations they recognized were blocking efforts to save lives during a historic public health emergency. They should learn from this action. They should not reinstate the regulations. Instead, policymakers should permanently remove regulations they tacitly acknowledged are bad for public health.

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—Prepared by Jeffrey A. Singer

53. LABOR AND EMPLOYMENT LAW

Congress should

- repeal the National Labor Relations Act;
- repeal the federal minimum wage, overtime, and other provisions of the Fair Labor Standards Act;
- repeal the Family and Medical Leave Act;
- repeal the Davis-Bacon Act (the 1931 law that requires federal public works contractors to pay local prevailing wages, as calculated by the U.S. Department of Labor, which often reflect local union wage rates);
- require the Department of Labor to follow notice-and-comment rulemaking and to conduct economic analysis before issuing regulations that increase burdens on private parties;
- repeal federal age discrimination law, including its ban on the practice of automatic retirement ages at private workplaces;
- repeal in whole or large part the Americans with Disabilities Act, in particular its coverage of disabilities beyond traditional categories, such as deafness, blindness, and paraplegia; and
- reverse executive orders on employment practices of federal contractors when those orders do not either safeguard constitutional principles or assist the government in procuring the best-quality and lowest-cost products and services from a wide universe of contractors.

"Employment at will" is the phrase that developed to describe the law governing labor markets in a free society: either party could bring an employment relationship to an end, typically on short notice, and terms of pay and benefits were left for the two sides to negotiate. The federal labor law ushered in by the Progressive Era and New Deal infringed on that liberty in several ways. For example, it became unlawful for an employer not to bargain with a union that claimed the support of a majority among a group of workers;

minimum wage and overtime rules applied regardless of the two sides' preference for other terms; and so forth.

Although labor unions were an institution central to the New Deal scheme, they entered a long decline after World War II. Union membership fell from a peak of 35.0 percent of wage and salary workers in 1945 to 10.3 percent in 2021, and only 6.1 percent in the private sector in that year. That decline is in stark contrast to the health of public-employee unions, which now boast 33.9 percent density. The strike threat also declined, from a peak of 60 million workdays lost annually in the late 1950s to approximately 1 million now. The political power of unions, however, has remained important, with the decline of some once-mighty industrial and trade unions offset by impressive gains for their counterparts in government employment.

All the while, private employers' legal worries remained. Even as union bargaining shrank in importance, new kinds of legislation and litigation grew. Where unions had once angled for "fringe benefits," for example, Congress and other levels of government in recent decades enacted laws mandating benefits that had previously been voluntary, such as family leave, medical coverage, and pregnancy benefits. Already favored by the tax system, and now also the subject of legislative prescription, employee benefits became a large part of compensation packages; their cost to employers sometimes rivaled that of wages or salaries themselves.

Government was also interfering more with decisions to hire and, especially, fire. The most important single contributor was the steady expansion of antidiscrimination law from the 1960s onward. First came the seemingly limited goal of overcoming the legacy of racial discrimination. Then, before long, the list of protected categories included sex, age, disability, veteran status, and many others. Most employees fell into at least one protected category; that meant, if fired, they might cast back over their experience to identify some evidence of bias and sue, arguing that bias played a role or that they had suffered related injuries, such as retaliation or harassment. Age and disability were especially important expansions because age had traditionally been a legitimate reason for termination—but in 1978, standard policies requiring retirement at age 65 became unlawful. In some cases, workers fired for their inability to carry out job responsibilities could sue by alleging that the employer had discriminated against them on the basis of a protected category, such as illness, disability, use of leave, or mental/emotional issues covered by the Americans with Disabilities Act.

Four Great Moments in European Labor Law

Economists often credit America's successful culture of entrepreneurial startups, especially in creative and technology fields, to our relatively free labor market. In places like Europe, governments have gone much further to regulate hiring and firing of workers, conditions on the job, and even pay scales. Four examples from the headlines follow:

- "German Army Forced to Lay Down Weapons due to 'Overtime Limits.'" *The Telegraph*, April 10, 2016.
- Immediate client service turnaround? *Mais non!* "France Might Pass a Law That Makes It Illegal to Send After-Hours Work Emails." *Washington Post*, May 12, 2016.
- European Union regulators have ordered symphony orchestras to reduce the decibel level of many standard works in the concert repertoire, lest musicians suffer hearing loss. "Music; the Shushing of the Symphony." *New York Times*, January 11, 2004.
- Executives at Air France and the French national railway admit that labor law has made it impossible to dismiss some employees they suspect of Islamic radicalization, who thus remain on the job. *New York Times*, February 20, 2016.

The sad irony is that even as the United States has moved rapidly toward more "European" labor policies, many countries in Europe itself, including Germany, Portugal, and Spain, have reacted to signs of growing dysfunction by reintroducing significant elements of free-market reform.

All of these changes were given teeth because private attorneys seeking damages and fees were beginning to propel many workplace disputes—akin to one of the roles formerly filled by unions but without unions' institutional commitment to stick around for the long term. With new causes of action and entitlements to damages multiplying, litigation—both by individual employees and in the form of class actions—grew steadily during the past half century, becoming a substantial share of the dockets of federal courts.

While lawyers prospected the new terrain, they also discovered rich veins to exploit in older labor law as well. For example, the Fair Labor Standards Act of 1938 and similar state laws said that managers and professional employees generally did not have to be paid overtime. Did that category cover stockbrokers? Insurance agents? Junior news reporters? Companies that guessed wrong began paying out millions and even

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tens of millions of dollars in class-action lawsuits. Disputes proliferated over whether or not one or another bit of work-related effort had to be kept on the clock. Were employers breaking the law by not putting employees on the clock for time spent donning and doffing work clothing? Looking at a spreadsheet while eating lunch? Taking a phone call from the office on the weekend?

How It All Backfires

All these interventions tend to backfire. Economic research suggests that the overall portion of employer revenue paid toward labor costs tends to self-adjust based on factors of supply and demand, so that if legislation or litigation requires new outlays on a certain benefit, other elements of the compensation packet will tend to stagnate or even shrink to make room. In fact, the effect may be specifically felt by particular classes of workers singled out as intended beneficiaries of such laws, assuming the employer can foresee that such a class of workers will be more expensive.

Mandating benefits, for example, tends to slow the growth of take-home pay, leaving the overall share of national income going to labor unchanged. When legal changes expand overtime entitlements, many employers can dodge a permanent upward jump in payroll costs by suppressing the level of base pay or rearranging schedules. When minimum wages rise, employers invest less in training and on-the-job amenities. And of course, they employ fewer unskilled applicants and newcomers: indeed, notes economist Deirdre McCloskey, "The minimum wage arose in the early 20th century as a Progressive policy designed to [harm] low-wage workers." The nationwide federal minimum wage has also served as a weapon in sectional warfare, allowing economic interests from high-cost regions such as the urban Northeast to hinder the migration of workplaces and jobs to lower-cost areas of the country.

Few policies make less sense than minimum wage laws as a way of assisting the poor. To begin with, most persons who hold those jobs live in families that are not poor: the average family income of minimum wage workers under age 25 was $65,900 as of 2012. The Congressional Budget Office analyzed a proposed rise in the federal minimum wage and found that only 19 percent of the rise in wages would go to families below the poverty line. So persuasive is the economic case against the minimum wage that a *New York Times* editorial in the 1980s famously bore the headline, "The Right Minimum Wage: $0.00."

Discrimination law, too, often fails to confer the intended benefits on protected groups—or even makes things worse. Notoriously, labor force participation by disabled persons plunged after the 1990 enactment of the Americans with Disabilities Act, with its mandates for accommodation and other new sources of legal risk. When government makes it obligatory to underwrite costly benefits such as paid parental leave, employers tend to hire fewer persons they rationally predict are likely to use those benefits.

Of all these categories, age discrimination law may be the most self-defeating: the group most likely to wring money out of bosses through such claims is well-paid older males in managerial and professional jobs. Since the law was passed, that very group has suffered one of the steepest declines in labor force participation, often replaced with involuntary joblessness. After all, why should an employer hire an expensive 61-year-old who might need a pricey buyout if things don't work out? Better to fish in other recruitment ponds.

Further defeating the assumptions of the carefully designed old regulatory schemes, new technologies, especially the internet, have changed the structures of the workplace itself. The 1930s-vintage laws envisioned a workplace in which two classes of employees, workers and management, gathered at a designated factory or office building, clocked in and out at specific times (so that minimum wage and overtime obligations could be calculated), and got paid at regular two-week or monthly intervals by a single employer on whom new regulatory obligations could periodically be loaded.

Now, many of those distinctions have blurred. If you have five work tabs and six personal tabs open on your browser, are you "on the job"? Does it matter whether you are at your office workstation, on a lunch break, aboard a plane, or stretched out on your sofa at home? What if your pay is assembled from multiple gig assignments with clients, rather than a single, stable boss? Even as computer-aided manufacturing has erased old lines between blue- and white-collar on the factory floor, so, too, team organization concepts have blurred distinctions between managers, peers, and subordinates.

In a rational world, all of this should have led to a reexamination and often repeal of the old laws. The federal Fair Labor Standards Act—with its high-stakes litigation arising from elaborate guessing games about how to classify and categorize employees—should have been the first to go. And while expected economic impact on protected groups is not the only reason for enacting employment discrimination laws, legislatures should at least have revisited areas of the law where members of protected groups actually lost ground in the workplace after the law was extended to cover them—as with age and disability.

But no such luck. Critics of these laws mostly did not agitate for their repeal, and since the turn of the millennium, a newly invigorated left has taken up the slack and pushed for a massive, symbolic expansion of these laws—whether or not they work as intended. The most weirdly popular idea of all has been to hike the minimum wage to a level high enough to put major economic sectors and whole states far out of compliance—$15 an hour was the popular slogan for a while, and now some proposals go to $22 or higher. That scheme does considerable economic damage even when enacted in cities with some of the nation's highest wage levels already, like New York, San Francisco, and Seattle. As a nationwide standard that would bind low-wage regions, the more ambitious benchmarks would appear almost insane. In Mississippi, for example, the median wage for *all* hourly jobs in 2014 was $13.76, which means a $15 standard would have put the typical job out of compliance.

Among the Obama and Biden administrations' signature initiatives was to use executive orders, administrative actions, and the nominally independent National Labor Relations Board to drive a much-intensified regime of labor and workplace regulation without asking Congress. Biden, for example, decreed a $15 minimum and the abolition of the tipped wage for federal contractors. The National Labor Relations Board, for its part, has extended labor law liability across subcontractor and franchisee relationships, created new election procedures to speed up unionization, declared insubordination to be a protected right, declared many common employer handbook policies an unlawful entrenchment on collective action, tried to push temporary workers and religious college faculty into collective bargaining, and much more.

Meanwhile, the Department of Labor has been no less active, pushing through a range of unilateral initiatives. The most controversial was a doubling of the salary threshold (from $23,660 to $47,476), below which most employers must pay time-and-a-half overtime to white-collar workers (it also indexed the new threshold to future advances in the wage level). Small businesses, restaurants, retail chains, finance, computer services, and colleges are among the sectors expected to be badly hurt by this move.

Like the earlier attempts at regulating the workplace, obligatory overtime pay for managerial and technical employees is pretty much guaranteed to backfire. With much more of the white-collar workforce on the clock, employers will be under legal pressure to revoke telecommuting arrangements, restrict access to company cellphones and email after business hours, and disallow comp time setups that make a day with the kids possible. Aside from sowing widespread disruption, the rules will frustrate ambitious individuals who tend to prefer the freedom and perks of salaried status and willingly tackle long hours to learn skills and rise into the management ranks. One big, if unstated, ideological aim is to get more people to think of themselves as clock-punching subordinates, free from the politically unproductive "management mentality" of salaried types.

Who Is Harmed by the Fair Labor Standards Act?

Coverage of overtime and minimum wage debates tends to acknowledge that employers are harmed. Sometimes, the coverage also notes that workers are left idle by being priced out of jobs. But that's just the start. Others lose out as well:

- grocery co-ops that rely on member volunteers to stock shelves;
- developmentally disabled persons in community employment;
- workers asked to surrender company cellphones and stop using company online services after hours;
- elders for whom overnight home attendants—suddenly unaffordable under an overtime mandate—had been the alternative to nursing home care;
- restaurant, airport, and other service workers who made far more under a tip system;
- interns and first jobholders in competitive, sought-after fields like fashion journalism and political campaign work;
- drivers left with a choice of a machine car wash or nothing because by-hand washes are unsustainable when a tip system gives way to a $15 minimum wage;
- disabled persons who rely on now-unaffordable personal care assistants;
- small wineries with community volunteer programs; and
- telecommuters recalled to in-office assignments only.

Why don't these groups and their experiences count for more in the legislative process?

Conclusion

The U.S. Constitution enumerates no general federal government power to regulate national labor markets. Congress should take its oath to the Constitution seriously and execute a broad retreat from this area.

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—Prepared by Walter Olson

54. BIG TECH ANTITRUST

Congress, the Federal Trade Commission, the Department of Justice, and state attorneys general should

- recognize the huge consumer surplus generated by major digital technology platforms' ecosystems;
- avoid antitrust enforcement or legislative efforts that sacrifice the consumer welfare standard;
- refrain from passing legislation that treats digital platforms differently from other firms and industries;
- avoid new laws that presume "self-preferencing" is inherently anti-competitive or that enforce interoperability requirements on platforms; and
- recognize that antitrust laws are inappropriate tools for dealing with noneconomic concerns, such as privacy, national security, online harms, free speech, or "democracy."

Many U.S. politicians, scholars, and lawyers believe that major tech platforms are too big and engage in anti-competitive conduct. Alphabet (Google), Meta (Facebook), Apple, and Amazon find themselves in the cross hairs, with critics calling for stricter antitrust enforcement or new legislation to break up the companies, ban certain conduct, or enforce interoperability requirements on their platforms. This sentiment has found expression at the Federal Trade Commission, in congressional legislation, and in lawsuits.

A wide number of economic complaints are leveled against the major online platforms. Google stands accused of monopolizing the digital advertising technology industry and that of user search, while self-preferencing its own products in an exclusionary manner. Meta is said to have gobbled up its social networking competition through anti-competitive acquisitions. Apple is believed to be extracting rents from app producers through a gatekeeper role on its operating system. Amazon is described as engaging in predatory pricing, unfairly harnessing third-party business data to gain a competitive edge, and self-preferencing its own products in ways harmful to competition.

In addition, there is angst about these companies' size and impact that clearly extends beyond economic concerns to worries about their privacy policies, data collection, social harms, and content moderation.

As a result, the political agenda to rein in Big Tech through antitrust laws often challenges long-standing assumptions about what those laws should be or how current laws should be interpreted or enforced. For example, some Big Tech critics use the case studies of these firms to support abandoning consumer welfare as the notional lodestar of antitrust enforcement, in favor of a more prescriptive view of how markets should be structured.

The sheer size of these companies bestows on them "psychological monopoly" status among much of the public. Yet examination of their activities shows that they compete fiercely with one another across multiple subsectors, including that of messaging apps, smart speakers, e-commerce platforms, and digital advertising. All these firms invest hugely in frontier research and development too, which is not indicative of companies confident in their entrenched monopoly status and merely trying to suppress costs. In any case, critics often seem to find it difficult to define exactly what markets any of them are supposed to be monopolizing.

Consumer Surplus

An underappreciated empirical observation is that products in large tech companies' ecosystems generate large consumer surpluses—the difference between the price a consumer pays for an item and the price they would be willing to pay.

Google Search, Gmail, Apple's Safari, Apple and Google Maps, Amazon's cataloging, and Meta's Facebook, WhatsApp, and Instagram products are free at the point of use for U.S. users and offer time savings, better product matching, or substantial online entertainment. A range of other free products and services are often bundled with pay-for products on the platforms too.

These products are valuable. Economists Erik Brynjolfsson of Stanford University and Avinash Collis of the University of Texas have estimated that the median U.S. user values search engines at $17,530 per year, would require $8,414 to lose access to email, $3,648 to go without digital maps, and $322 to go without social media.

Older studies estimate Amazon's e-commerce foray as an online bookstore lowered consumer prices by more than 10 percent, while expanding the number of titles available by 23 times a typical Barnes and Noble superstore. Some European experiment participants valued WhatsApp at $580 per month. These figures are variable and highly subjective, but the overall consumer surplus generated by these firms' products is clearly huge.

For Meta and Google, the primary paying customers are those purchasing advertising space. Yet even here, the digital revolution associated with these firms' innovation has slashed advertising costs and brought improvements in advertising quality, given the opportunities of targeting. Research by Michael Mandel of the Progressive Policy Institute suggests that every $3 spent on digital advertising now holds an equivalent impact of spending $5 on print ads.

Although this targeted advertising is sometimes seen as an iniquitous use of "our data," users seeing advertisements that relate to their interests brings obvious benefits to them. To the extent that there is any tradeoff between less individual user privacy and obtaining zero-cost products, users generally appear to be comfortable with it.

These observations do not prove that Big Tech platforms never engage in harmful, anti-competitive conduct. It is theoretically plausible that customers would have seen even better services, more innovation, and cheaper advertising if forms of genuinely exclusionary conduct or anti-competitive acts were eliminated in markets where these firms had a large dose of monopoly power.

Yet the obvious value creation we've seen suggests we need convincing evidence that breaking up these companies or restraining their conduct would substantially benefit consumers. Indeed, the obvious network effects of search, social media, and online marketplaces—the idea that the utility of a platform to a user increases with the total number of users—imply that a company having a high market share might be efficient, rather than a problem.

Skepticism of Antitrust

Existing antitrust legislation and its enforcement should not be immune from criticism. Old, murky statutes and conflicting case law mean that, over long periods of time, business practices risk becoming treated as violations, creating uncertainty for businesses.

Political power and ideological interpretation of law infuse much of antitrust's historic application. Actual cases often hinge on very contestable concepts, such as how to precisely define the scope of the relevant market for the product in question. The Brookings Institution's Cliff Winston, in a detailed review, found scant evidence that the real-world application of antitrust policies with regard to monopolization, mergers, and collusion has done much to improve consumer welfare over time.

That said, the application of antitrust laws could be so much more economically dangerous than we have seen in recent decades. Over the past 40 years, enforcement has at least been largely based on the consumer welfare standard that seeks to judge tangible harms of conduct or mergers through the prism of economic efficiency.

Before this economic focus, a "big is bad" default assumption about companies permeated case law, with firms deemed violators based on their market concentration, while preferential downstream contracting or bundling of products by firms was often just assumed to be anti-competitive, despite the possibility of benefits to consumers.

The result was a range of decisions in which the complaints of business competitors were prioritized over consumers' interests. This response left the laws open to abuse and corporate rent seeking, with subsequent empirical studies finding that lots of behavior deemed anti-competitive would have reduced prices or improved product quality. Unfortunately, the current zeitgeist appears to have forgotten these lessons of experience.

The Big Tech Reform Push

Big Tech's critics have struggled both to show that these companies monopolize actual relevant product markets and to prove that their conduct harms consumer welfare.

Adamant that these firms are dangerous to economic well-being anyway, campaigners argue that Big Tech's purported power is itself proof that the consumer welfare standard is an inadequate metric for judging their conduct, or that inherent features of these digital platforms mean that consumer harm is likely in the future if these companies are allowed to continue unchecked.

As a result of these starting points, reform proposals have included abandoning the consumer welfare standard; outlawing a range of business conduct and putting the burden of proof on defendants to defend or justify why it is necessary; creating a new federal regulator to manage competition for digital platforms; breaking up digital firms over a certain size, irrespective of the impact on consumers; and imposing merger bans for specific firms in certain markets.

Worse still, many such proposals would create a two-tier legal system whereby online digital tech companies with a certain number of users or degree of market capitalization face a different regulatory regime for business conduct or merger activity than smaller firms or those in other sectors. This approach would clearly distort competition, not enhance it.

Monopoly Fatalism

History suggests that any long-term monopoly fatalism about Big Tech companies is misguided. Throughout the 20th century, the Great Atlantic and Pacific Tea Company (A&P), Myspace, Nokia, Kodak, Apple's iTunes, Microsoft's

Internet Explorer, and more were all said to have strategic economic advantages that meant they had unassailable dominance. Yet all saw their market shares disintegrate in the face of innovative new products or technologies, despite the supposed benefits of economies of scale, lock-in, network effects, and more that they enjoyed. The clear lesson is that reining in companies on the basis of speculative projections of future harms would be extremely foolish.

In the face of the longer-term forces of creative destruction, the welfare gains from attempting to eliminate all forms of wrongdoing and their static inefficiencies are likely to be small. This, then, must be weighed against the risk that overzealous antitrust enforcement or new legislation will chill the development of products or services that would have raised consumer welfare.

The Costs of Trustbusting

All of the major ideas for legislative and enforcement change for antitrust in relation to Big Tech bring significant economic risks.

Abandoning the consumer welfare standard entirely would either amount to a regression toward use of crude market structure analysis that harmed consumers in the past, or push antitrust law toward delivering on contradictory, unclear objectives. The latter, especially, would embolden antitrust agencies and courts to apply laws more subjectively, opening up extensive opportunities for rent seeking.

Shifting the burden of proof to defendants for conduct would clearly stifle innovation by creating a guilty-until-proved-innocent standard. Given the digitization of the economy, a new federal regulator for online platforms would also result in the government's regulating more and more of the economy over time.

Breaking up companies irrespective of the network benefits or economies of scale they can harness would raise costs and deteriorate product quality. If Google were forced to dispense with YouTube, for example, consumers would likely suffer from worse search integration over time.

Meanwhile, preemptively banning mergers for Big Tech could create large downstream disincentives for innovation. A lot of focus has been put on Facebook's acquisitions of WhatsApp and Instagram as supposedly anti-competitive attempts to quash threats. This view reflects hindsight bias and counterfactual speculation. It was not obvious that these companies would have threatened Facebook's digital advertising or social network dominance, nor that these products would have improved as they did without Facebook's ownership.

More broadly, though, one payoff for tech entrepreneurs is to cash out in mergers or acquisitions by selling valuable adjacent products to enhance the bigger tech ecosystems. Banning mergers or acquisitions for Big Tech companies could therefore disincentivize consumer welfare–enhancing innovation by other startups.

For all these reasons, legislators should avoid revising the purpose of antitrust law or creating two-tier legal systems where Big Tech is treated differently from other industries.

Self-Preferencing and Interoperability

Critics of Big Tech companies often cite discriminatory self-preferencing on their platforms as evidence of damaging anti-competitive conduct.

They deem it unjust, for example, for Google to bump up Google Maps results in its search rankings, for Amazon to use data acquired through third-party sales on its Marketplace to improve its own products, or for Apple iPhones to come preloaded with Apple apps that compete with others on the App Store.

The implicit assumption is that it is "pro-competitive" to insist that all large platforms are as open and neutral between users and businesses as possible, and that so-called vertical restraints—instances where platforms bundle, tie, or self-preference their own products within their platform or marketplace—are inherently damaging to consumers.

This concern has led to two types of ideas for legislative proposals: banning certain forms of self-preferencing conduct unless firms can prove it is core to their business or necessary for privacy or security reasons, and enforcing interoperability between different platforms in the same sector.

Such legislation is based on a false premise and would be economically damaging. The false premise is that these companies are monopolies. But Google Search clearly competes with Bing, Amazon Marketplace with eBay, Meta with TikTok and Snap, and Apple with Samsung, Google, and Microsoft. It's a mistake to believe we need every platform to have an enforced level playing field of competition for products sold when there is ongoing competitive pressure *for* the platform marketplace.

More significantly, self-preferencing is common practice throughout different industries. Supermarkets and other retailers, farmers' markets, shopping malls, and sports stadiums regularly sell their own products, marketing them favorably alongside those of third-party businesses within their venues or marketplaces. As antitrust expert Herbert Hovenkamp of the University of Pennsylvania has implied, vertical integration is the ultimate form of self-preferencing and is obviously common: "Standard does not pump Texaco gas; KFC does not sell Dairy Queen."

Nor is self-preferencing synonymous with consumer harm. For example, research has concluded that Google's entry into the camera app subsector benefited consumers by encouraging significant innovation in competitor apps on Google's Android platform.

More importantly, consumers often do not just want neutral platforms. Yes, they value an array of products available at low cost. But they also want a trustworthy interface, support services, efficient payment and review systems, accurate searches, speedy access to useful information, and, occasionally, privacy protections.

Microsoft Windows is more open and compatible with third-party software than Apple's macOS, but it is also more susceptible to viruses. Bills that ban self-preferencing or enforce openness might therefore undermine platform innovations that create different bundles of these features to suit different consumers. All digital platforms must try to strike a balance between attracting third-party business users and offering consumers low prices and a range of products in pursuit of profit.

Often, self-preferencing and other vertical restraints can even enhance competition in other sectors. First, self-preferencing—by granting the host preferential access to an existing set of users—can allow the platform host to launch into wholly new sectors and compete with incumbents. Existing captive user bases and platforms allowed Apple to launch Apple TV Plus, Amazon to launch Prime Video, and Google to launch Chrome, for example.

Second, if self-preferencing behavior can encourage participation on a platform, then in the presence of indirect network effects, business users can reach new customers and compete in new markets. For example, if Apple's free apps encourage iPhone sales, then Apple app developers benefit from access to a much bigger market.

Similar logic explains why the push for enforced interoperability between different platforms—the idea that you should be able to move your content seamlessly or that platforms should use the same hardware—is misguided.

In time, if consumers desire an ability to switch between platforms easily, companies will be incentivized to provide that functionality. But interoperability can bring tradeoffs regarding the safety and security of the businesses' products or services.

Furthermore, if enforced through legislation, interoperability can actually deter product innovation, as businesses may face weaker incentives to improve products that coexist with or are shared alongside rivals' products.

Policymakers should therefore avoid legislation that assumes self-preferencing behavior is anti-competitive or that open, neutral platforms are always desirable.

Keep Antitrust Focused on Economics

Finally, policymakers should recognize that antitrust and competition laws are bad tools for dealing with noneconomic issues, such as privacy, national security, free speech, and political influence.

Many Big Tech critics write as if it is obvious that tougher antitrust laws would improve these outcomes. The mistaken belief is that tougher antitrust enforcement would deconcentrate markets and thus foster more competition to weed out platforms with undesirable user policies.

But there is no inherent economic reason we should expect this result. Larger companies that can invest in expensive technologies might be more efficient in dealing with bad actors online. For example, one might imagine Google is better placed to keep YouTube "clean" than if the site had remained an independent company.

Content moderation and the value of privacy are also—as we have seen in the political arena—highly subjective. If given policing powers over content on large platforms, the Federal Trade Commission and Department of Justice might vigorously attack crackdowns on "free speech" one year, but then promote moderation of "hate speech" the next. By entrenching such power in those agencies, politicians and political appointees would be using antitrust laws as a threat to try to mold platforms to their political beliefs and interests, rather than to the demands of customers.

Conclusion

Big Tech companies have been under attack from a new antitrust movement that sees them as anti-competitive monopolies. In actuality, these firms all run large ecosystems of activity or platforms that have produced significant value to consumers, and they compete with one another across numerous different domains.

Critics appear to think that tech platforms are inherently different from other industries, or that their dominance justifies overhauling antitrust laws or enforcement entirely. Proposals for reform are numerous, but one common feature is for a shift away from judging these businesses' conduct according to the consumer welfare standard. Although current antitrust laws are flawed, this shift would risk undermining the competitive market process, eliminate options that consumers prefer, and quell innovation in the digital sector.

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—Prepared by Ryan Bourne

55. MONETARY POLICY

Congress should

- replace the Federal Reserve's dual mandate with a single stable-spending mandate;
- require the Fed to adopt an explicit rule consistent with fulfilling that mandate;
- reform the Fed's standing lending facilities so that ad hoc emergency Fed lending, either to banks or to nonbanks, is unnecessary;
- broaden the Government Accountability Office's powers to "audit" the Fed, especially by allowing the agency to investigate violations of the Fed's monetary rule, extraordinary lending, and large-scale open-market purchases;
- end the Fed's "floor" operating system by enforcing the 2006 Financial Services Regulatory Relief Act's provision stipulating that the rate of interest the Fed pays on reserve balances should not "exceed the general level of short-term interest rates," where that "general level" is understood to refer to risk-free overnight market rates;
- encourage the Fed to establish a truly "level playing field" between bank-supplied payment media and nonbank digital alternatives, especially by allowing nonbank "fintech" firms to have master accounts with it; and
- prevent the Fed from issuing its own "digital" currency, or from allowing ordinary persons to have accounts with it, to encourage competition and innovation in the dollar digital currency market, which is the best means for ensuring that the U.S. dollar remains the world's most efficient currency medium.

The Federal Reserve (the Fed) is the ultimate source of the nation's most liquid financial assets: bank reserves and circulating currency. As such, its overarching responsibility is to prevent liquidity shortages from causing unemployment or otherwise disrupting economic activity, while avoiding the unwanted inflation and unsustainable booms that can result from excessive liquidity creation.

Replace the Dual Mandate with a Single Stable-Spending Mandate

The Fed currently operates under a mandate from Congress, calling for it to pursue both maximum employment and stable prices. This “dual” mandate can be interpreted as being at least roughly consistent with responsible liquidity management. But the dual mandate’s ambiguity prevents it from clearly delimiting the Fed’s duties, as understood by Congress, much less as serving as a guide to whether the Fed is performing those duties well.

A single mandate to achieve *either* maximum employment *or* stable prices is not a good alternative. A simple maximum employment mandate might be understood as calling on the Fed to create liquidity to boost employment even when doing so would aggravate the boom-bust cycle or generate undesirable inflation. A price stability mandate, on the other hand, might compel the Fed to stabilize prices even when doing so does more harm than good, as is especially likely to happen when prices are prevented from rising in response to adverse supply shocks.

Instead, Congress should replace the dual mandate with a single “stable spending” mandate, calling on the Fed to maintain a stable, if steadily rising, level of spending on goods and services or, in other words, a stable dollar value of national income. By creating sufficient reserves and currency to stabilize spending, the Fed will avoid unemployment linked to liquidity shortages, while also avoiding unsustainable booms and general inflation caused not by genuine changes in goods’ overall scarcity but by excessive supplies of money and credit.

Require the Fed to Abide by an Explicit Monetary Rule

Monetary policy works best when monetary authorities have a clear mission and can be trusted to stick to that mission. Otherwise, the public’s fear that the authorities will veer from their assigned task can itself add to the challenge of avoiding monetary instability.

Both experience and theory show, however, that mere promises on the part of the authorities are not sufficient to gain the public’s confidence. To make such promises credible, authorities must be held accountable for failing to keep them. Accountability can best be achieved by requiring monetary authorities to adopt explicit monetary policy rules, consisting of specific statistics they plan to target and steps to be taken when they fail to meet those targets.

Designing a rule appropriate to a stable-spending mandate is, fortunately, very straightforward. The simplest option is for Congress to require the Federal Reserve to commit itself to maintaining a specific growth rate for nominal gross domestic product (GDP)—a popular measure of total spending. The specific rate, as well as other details, might be left to Fed officials to decide, but most experts would place the desirable growth rate of nominal GDP somewhere in the range of 3 to 5 percent. Meaningful incentives by which to enforce the rule could consist of performance-based rewards to the Fed's chair, and perhaps also to members of the Federal Open Market Committee—the committee within the Federal Reserve System that determines the direction of monetary policy. For example, the chair could be assigned a very modest base salary, with bonuses dependent on his or her success in meeting the Fed's policy targets.

Eliminate the Rationale for Ad Hoc Lending Facilities with Flexible Standing Facilities

Following the Great Recession, the Dodd-Frank Act reformed Fed emergency lending by limiting it to programs and facilities with "broad-based eligibility" while prohibiting lending to insolvent entities. But as the subsequent COVID-19 crisis showed, that reform still allowed the Fed to engage in all sorts of emergency lending, including lending to ordinary (Main Street) businesses, administered through various temporary and "ad hoc" lending facilities.

Although it may be less controversial than direct Fed lending to specific firms, the Fed's reliance upon ad hoc lending facilities is itself problematic, because it can arbitrarily favor certain *groups* of borrowers, because it can result in wasteful lending, and because it may mean costly delays in getting funds where they are needed. All these shortcomings were still evident during the 2020 crisis.

"Flexible" Fed standing facilities are an alternative to both direct Fed lending to individual firms and broad-based but ad hoc lending facilities. The Fed took an important step in this direction when it established its "Standing Repo Facility" in 2021. That facility allows banks to make up for reserve shortages by temporarily exchanging Treasury securities for them, at an interest rate set slightly above the upper limit of the Fed's target range. To absolutely dispense with any potential need for ad hoc facilities, the Fed should consider making a similar standing facility available to various nonbank counterparties, including municipalities, while also extending the range of collateral it stands ready to repo, subject to appropriate discounts or "haircuts" reflecting the illiquidity and riskiness of accepted collateral. Consistent with the Dodd-Frank requirements, the Fed should not under any circumstances be allowed to make risky loans, though it might assist in administering risky loans that are fully funded by Congress.

A sufficiently flexible set of Fed standing facilities should allow the Fed to address even extreme liquidity needs, automatically and without delay, and without appearing to favor particular groups of borrowers, with no need for supplementary lending arrangements.

Audit the Fed's Performance

As an agency empowered by Congress to maintain a liquid financial system, the Federal Reserve should, like all other government agencies, be accountable to Congress. In practice, that means Congress must, at the very least, be able to monitor the Fed's success in performing its official duties and report on whether it has employed the necessary and proper means in performing them.

The Government Accountability Office (GAO) exists precisely for the purpose of evaluating, on behalf of Congress, the performance of government agencies. As a nonpartisan agency itself, the GAO is able to provide evaluations uninfluenced by partisanship, in response to specific requests. The Fed's current exemption from all GAO inquiries pertaining to its open-market operations and its dealings with foreign central banks thus represents an anomaly—one that Congress ought to correct. If extended to the reforms proposed here, the exemption would amount to a virtual ban on any GAO evaluation of the Fed's performance of its duties, since those duties would be performed exclusively by means of various open-market operations.

Fed officials, among others, complain that, by allowing the GAO to investigate ("audit") Federal Reserve undertakings, Congress would pave the way for unwanted congressional interference with the Fed's setting of monetary policy. Such complaints are misguided for several reasons. First, GAO investigations simply provide information to Congress; they do not alter Congress's ability to challenge Federal Reserve policies. Second, Congress—having empowered the Fed in the first place—has the right, and indeed the duty, to assess the Fed's performance.

The best way to avoid such unwanted interference is by clarifying the Fed's mission and responsibilities. By doing so, Congress would rule out politically motivated attempts to creatively "reinterpret" the Fed's responsibilities without having to exempt the Fed from ordinary congressional oversight. Such clarification is especially important today owing to the Fed's switch to a "floor" operating system during the Great Recession. Under the new system, the Fed enjoys practically unlimited powers of quantitative easing (QE), meaning that it can buy as many assets as it likes while still controlling inflation with appropriate changes in the interest rates it pays on bank reserve balances and on its "reverse" repos. The Fed's heightened QE powers will increasingly tempt politicians to try to get the Fed to employ them to finance backdoor spending, and not solely for macroeconomic purposes.

Reestablish a Scarce Reserve Operating System

Mainly as a result of various rounds of QE, the Fed's balance sheet is now roughly 10 times its size in 2007. That growth has included an almost equal increase in banks' reserve balances. Although nominal bank reserves are bound to increase as the Fed's balance sheet grows, the fact that the banks' *real* (inflation-adjusted) reserve balances have also grown substantially reflects the influence of the Fed's decision to pay interest on bank reserves at a rate generally exceeding risk-free short-term lending rates, which has made reserves more attractive relative to other assets banks might otherwise acquire.

After the Great Recession, the Fed made an effort to shrink or "unwind" its enlarged balance sheet to the smallest size consistent with a "floor" operating system. But before the unwind went very far, reserve shortages broke out that brought it to a premature conclusion. Today, thanks to the Fed's Standing Repo Facility, there is no reason why the Fed should not be able to eventually undo *all of* the post-COVID-19 growth on its balance sheet.

But the Fed should be encouraged to go further, by continuing its unwind with the aim of reestablishing a "scarce" reserve regime. In such a regime, instead of holding substantial reserve balances, banks would economize on reserves while turning more often to either the private repo market or the Fed's Standing Repo Facility to make up for temporary reserve shortages. The Fed's QE powers would then be correspondingly limited: although those powers would remain substantial so long as rates are at their "zero lower bound"—the only circumstance in which QE may be macroeconomically warranted—it would not possess them otherwise. A scarce reserve regime therefore enjoys the distinct advantage over a "floor" system of avoiding the risk that the Fed's QE powers will be abused for nonmacroeconomic purposes.

Congress has the power to compel the Fed to return to a scarce reserve regime. To do so, it merely has to enforce the 2006 Financial Services Regulatory Relief Act's provision stipulating that the rate of interest the Fed pays on reserve balances should not "exceed the general level of short-term interest rates." At present, the Fed is violating the spirit of that law by allowing itself to treat its own, administered "discount rate," which it sets well above equivalent private market rates, as representing "the general level of short-term rates." Congress should put a stop to this unlawful sham.

Establish a Level Currency Playing Field

Congress could further encourage the Fed to manage the dollar responsibly by establishing a level playing field between the U.S. dollar and its potential rivals. This move would also make it easier for U.S. citizens to use alternative means of payment when doing so makes them better off.

To level the field on which the dollar competes with other potential means of payment, Congress should repeal 31 U.S.C. § 5103, which makes Federal Reserve notes and Treasury coins "legal tender for all debts, public charges, taxes, and dues." Specific performance of contracted obligations should instead be the sole remedy for breach-of-debt contracts, no matter what means of payment they specify. Congress should also prohibit any taxation of private exchange media, whether physical or digital, that would make using such media more costly than using dollar-based monies. Among other things, that would mean exempting alternative exchange media from capital gains taxes. Congress should also repeal those parts of the U.S. Code, Title 18, that make it illegal to make, possess, or circulate private metal coins or tokens that resemble ("government-issued" or something similar) coins. Although Congress has good reason to prohibit the actual counterfeiting of official coins, such counterfeiting is separately and adequately dealt with by 18 U.S.C. § 485.

Congress should also make it easier for nonbank financial technology firms, or "fintechs," to compete with banks in supplying dollar-based digital media. In particular, it should encourage the Office of the Comptroller of the Currency to renew its efforts to provide fintechs with charters especially designed to accommodate their business models, and the risks those models entail; it should also encourage the Fed to make it easier for nonbank firms possessing such charters to open Master Accounts with it.

Finally, Congress should prohibit the Fed from issuing its own digital currency or supplying retail accounts to ordinary citizens. Direct Fed competition with private digital payment media suppliers will tend to stifle entry into the digital currency market, with the long-run consequence of reduced payments system efficiency and innovation. In the long run, a vigorously competitive, private market for digital dollars, rather than one dominated by a public monopoly, is our best hope for preserving the dollar's status as the world's preferred official currency medium.

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—Prepared by George Selgin

56. FINANCIAL REGULATION

Congress should

- repeal the Dodd-Frank Act;
- short of repeal, make major modifications to Titles I, II, VIII, and X of Dodd-Frank, which cover the Financial Stability Oversight Council, orderly liquidation authority, financial services as a public utility, and the Consumer Financial Protection Bureau;
- wind down Fannie Mae and Freddie Mac without establishing a new guarantee for mortgage risk;
- reform the Federal Housing Administration;
- roll back recent expansions in federal deposit insurance;
- repeal the Community Reinvestment Act of 1977; and
- eliminate the Exchange Stabilization Fund.

From its earliest days, the American system of banking regulation has been characterized by state and federal authorities that bestow market power on banks through restrictions on the entry of competing firms into the market and through limitations on acquisitions and diversification. These entry and structural barriers have created profit opportunities for existing market players and resulted in a more fragile banking system. Examples of such restrictions include limitations on the geographical and product diversity of bank portfolios.

The relative fragility of the U.S. banking sector, a direct result of the restrictions, led to the creation of government safety nets, such as the Federal Reserve and the Federal Deposit Insurance Corporation. Countries that have avoided these types of restrictions on geographical and product diversity, such as Australia and Canada, have exhibited greater stability; they adopted government safety nets for their banking systems much later, if at all. Moreover, entry barriers have created economic rents or excess profits (a point that politicians have not ignored). A significant portion of modern banking regulation involves the redistribution of those excess profits, though, of course, the amount is difficult to measure. We are quickly reaching—and may have already passed—

the point at which the redistribution of rents and the costs of other regulations outweigh the benefits that banks receive from both the safety net and entry barriers.

Any credible attempt to reform our system of banking regulation must address all these factors. A free, competitive, and healthy banking system is one with few barriers to entry, no government safety net, and no redistribution of wealth or income. As long as government safety nets are extensive, the resulting moral hazard will necessitate prudential regulation. Since prudential regulation is inferior to market discipline, an extensive bank safety net almost certainly will lead to a financial crisis.

Dodd-Frank

The Dodd-Frank Act expands the government safety net and continues to use the banking system as an avenue to redistribute wealth. Dodd-Frank will likely increase both the frequency and severity of financial crises by further reducing market discipline and increasing the political control of our financial system. The best solution would be to repeal the entire Dodd-Frank Act. Short of that, policymakers should focus on Titles I, II, VIII, and X.

Title I—Financial Stability Oversight Council

The Financial Stability Oversight Council is tasked with labeling companies, including nonbank financial companies, as "systemically important"—that is, "too big to fail." That role gives regulators significant supervisory power over all large financial institutions and creates an implied government backstop for firms so labeled. To end the perception of "too big to fail," we must end the use of such labeling by government.

Title II—Orderly Liquidation Authority

Orderly liquidation authority (OLA) empowers the federal government, via the Federal Deposit Insurance Corporation (FDIC), to take over and "resolve" failing nonbank financial companies and bank holding companies. That authority creates confusion and uncertainty in a crisis and codifies the potential for the regulators to discriminate between different classes of creditors or rescue creditors. The use of OLA is at the discretion of the Treasury secretary, which means it is unlikely to be used, particularly if the Treasury can rely on other sources of funding to keep failing institutions afloat. All the necessary tools to implement the resolution of a large systemic bank or other financial company can be achieved with some modifications to the U.S. Bankruptcy Code, such as creating a new Chapter 14 in the code.

Title VIII—Payment, Clearing, and Settlement Supervision

Title VIII creates a new regulatory framework for certain payment, clearing, and settlement companies. This new regime is similar to the special regulatory framework that Title I creates for systemically important financial institutions. Title VIII broadens the concept of what constitutes a public utility to include companies in the financial industry (now) legally referred to as "financial market utilities," a term that conveys a special status for one segment of financial markets. Title VIII ultimately restricts competition among financial firms, increases consumer prices, concentrates financial risk, and invites taxpayer bailouts.

Title X—Consumer Financial Protection Bureau

The Consumer Financial Protection Bureau (CFPB) promises to do for nonbank financial companies what the federal government has done for banks: subject them to political pressure to follow noneconomic lending standards. The CFPB also attempts to do to other forms of finance what the federal government has done to the mortgage market, namely, turn them into a source of systemic risk. Although structural changes—such as putting the agency under a five-member commission—would be modest improvements, they fall short of correcting the worst flaws of the CFPB. Thus, full repeal is needed along with repeal of the various "protection" statutes mentioned earlier. Short of abolishing the CFPB, Congress should place the CFPB within the congressional appropriations process; change its governance structure to a board rather than a director; direct the CFPB to define "abusive" with a notice-and-comment rulemaking process; require cost-benefit analysis for all CFPB rules; have a chief economist report directly to CFPB leadership; remove CFPB involvement with the FDIC; and require the CFPB to include safety and soundness considerations in its rulemakings.

Mortgage Finance

Given their prominent role in the financial crisis, the federally backed mortgage companies Fannie Mae and Freddie Mac should be wound down over a brief number of years. That end can be accomplished by using the receivership mechanism in the Housing and Economic Recovery Act of 2008 (HERA). Because HERA does not abolish their charters, Congress should sunset those charters while also setting a path to reduce loan limits, increase down payments, and raise guarantee fees for Fannie Mae and Freddie Mac. The remainder of our financial system has sufficient capacity to absorb the activities of Fannie Mae and Freddie Mac and to do so in a manner with significantly less leverage.

Essentially, Fannie Mae and Freddie Mac are avenues for banks to transfer mortgage credit risk from themselves to the taxpayers. Such a transfer increases the amount of credit risk in the system, so those guarantees should be ended and not replaced. If policymakers believe the companies have some economic value, their charters could be converted to bank holding companies, subjecting them to the same competitive and regulatory environment as commercial banks.

Federal mortgage subsidies—predominantly in the form of Federal Housing Administration (FHA) guarantees, have long led the mortgage market in the direction of riskier underwriting standards. The FHA has paved the way for both very low down-payment and low borrower-credit lending. A significant portion of FHA loans would not be made by any lender under the current terms without a government guarantee. That means those loans should not be made because they leave the taxpayer and the financial system at considerable risk. Although the long-term goal should be the elimination of the FHA, Congress in the interim should immediately require borrowers to make a 5 percent cash down payment; require the FHA to allow only reasonable debt-to-income ratios of no more than 30 percent; restrict loans to borrowers with a credit history no worse than a 600 FICO equivalent; and require in-person prepurchase counseling for FHA borrowers with FICO equivalents of between 600 and 680. Eligibility should also be limited to borrowers whose incomes do not exceed 115 percent of the state median income.

Federal Deposit Insurance

Discussions of moral hazard during the financial crisis generally focused on the incentives of management and equity holders, yet far more moral hazard results from a reduction in monitoring by creditors. The most important creditor class for a commercial bank is depositors, who provide about 81 percent of funding for the total banking system (the rest coming from equity and borrowed funds). Substantial academic literature demonstrates that depositors are capable of monitoring banks and that government-provided deposit insurance reduces that monitoring and results in greater risk taking by banks.

The public interest would be best served if Congress were to reduce federal deposit insurance coverage to the pre–savings and loan crisis limit of $40,000. To further the goal of reducing systemic risk, Congress should also limit the total deposit insurance coverage of any one bank to 5 percent of total insured deposits.

As of September 30, 2021, the FDIC backs $9.6 trillion in deposits. That amount represents about 54 percent of outstanding U.S. domestic deposits. It also represents a more than 50 percent increase in insured deposits since 2015. Part of the increase was due to the Federal Deposit Insurance Reform Act of

2005, which raised the limit for deposit insurance for retirement accounts to $250,000. Congress should repeal those provisions of the 2005 act. Within the Troubled Asset Relief Program (TARP), Congress also raised the deposit insurance cap to $250,000 until January 1, 2010. Dodd-Frank made the coverage expansion contained in TARP permanent.

Dodd-Frank's Section 335 extends the 2005 retirement coverage limit of $250,000 to all accounts. According to the Federal Reserve's Survey of Consumer Finance, as of 2019, the median U.S. household held just $5,300 in a transaction account (checking, savings, money market, call accounts, and prepaid debit cards). For the fewer than 10 percent that held certificates of deposit, the median holding was just $25,000. A cap of $40,000 (the pre–savings and loan crisis limit) would more than adequately cover the vast majority of U.S. households, while also greatly improving market discipline on U.S. banks. Even with significantly reduced deposit insurance coverage, middle- and low-income families could still be completely protected.

The argument behind expanding deposit insurance is that it reduces panics or bank runs. That may well be true in the short run, yet it comes at the cost of a tremendous reduction in market discipline. A World Bank study across more than 150 countries found that, all else being equal, those countries with more-generous deposit insurance schemes suffered more frequent banking crises. Similar results hold for the United States, as various academic studies have found that U.S. uninsured deposits provide substantial monitoring of bank health. The related decline in market discipline that results from deposit insurance has been documented across time and differing regulatory structures. Few relationships in economics have been found in so many different settings as the link between expanded deposit insurance and bank instability.

Community Reinvestment Act of 1977

A variety of statutes are intended to encourage banks either to make loans they would not otherwise make or to make loans available on terms they would not have made otherwise. Many of these statutes add considerable uncertainty to the lending process by giving borrowers an avenue to escape their obligations (or litigate) in the event of nonmaterial violations of these federal laws. The result is often to force lenders toward average cost pricing, such that better quality borrowers cross-subsidize poor-credit borrowers. These statutes are sometimes "justified" on the basis of the safety net benefits that banks receive from the government. Congress should roll back that safety net and repeal the Community Reinvestment Act (CRA).

The CRA was passed to nudge banks into making loans to less creditworthy borrowers within their service areas. The law was enacted at a time when local banks restricted the supply of loans because of their local market power. Initially designed as a "process-oriented" measure, in the 1990s the CRA began to resemble a quota system for lending. The CRA now represents a transfer from banks and higher-credit borrowers to lower-credit borrowers. Economist Jeffrey Gunther also found evidence that increased CRA activity comes at the expense of bank safety and soundness. Accordingly, the transfers inherent in the CRA may well end up coming from the taxpayer. The act should be eliminated.

Exchange Stabilization Fund

Housed within the Treasury Department, the Exchange Stabilization Fund (ESF) was created to manage the gold-dollar parity, an activity that was abandoned decades ago. At this point, the ESF largely serves as a $500 billion slush fund for the Treasury. In the absence of outright elimination of the fund (the preferred option), significant limitations should be placed on Treasury's power to use it. For example, the ESF should be used only to provide temporary, fully collateralized liquidity to solvent institutions. Treasury should not be entitled to use the fund to obtain equity stakes in, provide guarantees for, or otherwise assist insolvent institutions. Congress would also serve the public interest by prohibiting the use of the ESF to provide direct assistance to financial institutions; that is, the ESF could better target its intended purpose: exchange rate stability.

Conclusion

America continues a relatively slow, weak recovery from the financial crisis. The legislative response to the crisis, most particularly the Dodd-Frank Act, has largely ignored the drivers of the crisis, leaving our financial system and economy as vulnerable as ever. To add insult to injury, financial regulatory reform postcrisis has greatly extended both explicit and implicit government guarantees of financial market risk taking, making future crises all the more likely. Our financial regulatory system is in dire need of wholesale reform. The proposals offered here are a starting point for such efforts. Additional reforms to impose market discipline and to reduce political interference with our financial system are also needed if we are to achieve both robust economic growth and financial stability.

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—Prepared by Norbert Michel, Nicholas Anthony, and Mark A. Calabria

57. SECURITIES REGULATION

Congress should

- repeal all legislation and regulations that mandate public disclosures relating to the purchase and sale of securities;
- replace those laws, if necessary, only with disclosure requirements that have been shown to actually promote price discovery or deter fraud without undue cost;
- support initial public offerings by limiting disclosure obligations and promoting innovation in offering types;
- open all private offerings to investment from any investor regardless of wealth; and
- create a *de minimis* exemption for any offering of less than $500,000.

The world benefits from the innovations brought to market by the companies that develop new medical treatments, safety features, communication technologies, and other products and services that make modern life as safe and comfortable as it is. These companies, both in the United States and abroad, rely on the U.S. capital markets to fund their work. Capital markets exist to funnel resources to their best use. When functioning properly, the markets ensure that companies with the best ideas and best business models will attract the most resources.

Regulation, however, can snarl these processes, leading companies to waste resources in complying with inefficient or even counterproductive rules. During the roughly 100 years since the introduction of government-directed securities regulation, the securities laws and implementing rules have needlessly encumbered and often profoundly distorted the proper functioning of the capital markets. Those who advocate for increased regulation typically invoke the need for improved "investor protection" or, since the 2008 financial crisis, "financial stability." But many of the existing rules, at best, have no bearing on investor protection and, at worst, harm investors by limiting the amount of risk (which includes the opportunity for gain) they may take on. Even rules that may promote investor protection are rarely evaluated to determine the harm they may pose to the greater society. Such rules may be reducing the ability of companies to bring lifesaving products to market or limiting growth, leading to lower employment levels and impaired economic growth.

Existing regulation of registered securities should be dramatically pared back. Ideally, each exchange would set the rules for what disclosures are required for listed securities. Investors interested in the kind of protection afforded by mandated disclosures could restrict themselves to investing in the securities on the exchanges whose rules they find best meet their needs. To the extent federally mandated disclosures continue, the information required should be only the minimum needed to deter fraud and promote price discovery. No disclosure should be required unless the benefit it imparts outweighs the burden it places on all parties. Recommendations for specific regulatory reform follow; however, the entire disclosure structure is ripe for overhaul.

Halt the Expansion of the Current Disclosure Regime

The federal securities laws are a disclosure regime. Instead of requiring that offerings be approved by the Securities and Exchange Commission (SEC) as "fair, just, and equitable to the investor," as many state-level "merit review" regimes require, the Securities Act of 1933 and the Securities Exchange Act of 1934 require only that issuers provide certain disclosures to the public as part of registering an offering for public sale. The scope of these disclosures has long been understood to encompass information necessary for investors to value securities, primarily a company's financial performance and information about its business. These disclosures are generally limited to *material* information—information for which there exists "a substantial likelihood that the disclosure . . . would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

In recent years, though, public companies' mandatory disclosures have expanded, at times serving as vehicles to promote policy goals wholly unrelated to the original purpose of these disclosures. That sets a dangerous precedent. Congress should repeal rules currently in place and commit to enacting no future legislation with similar rules.

Notably, the 2010 Dodd-Frank Act included rulemaking requirements related to policy goals beyond the traditional ambit of the securities laws. The most notorious, the "conflict minerals" rule, mandates that public companies disclose whether certain minerals used in their products were sourced from specific geographic areas. The motivation behind the disclosure was, according to the SEC, congressional "concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the [Democratic Republic of the Congo] and is contributing to an emergency humanitarian crisis." A second, similarly misguided new rule requires public companies to disclose the ratio of the chief executive's pay to that of the company's average worker. Whatever the merits of these policy aims, they stray far from the securities regulatory framework of providing information relevant to price discovery and are outside the SEC's expertise.

In the years since Dodd-Frank, the calls for mandatory public disclosure of a wide variety of information have multiplied and intensified as environmental, social, and governance (ESG) investing has gained steam. ESG, which is shorthand for a number of investment strategies or theories, refers generally to taking into account a company's environmental, social, and governance factors when making an investment decision. Although many companies voluntarily disclose ESG factors, the SEC is considering mandating disclosures from companies on issues ranging from climate change and workforce diversity to corporate political contributions and beyond.

Such disclosure requirements present two problems. The first and most pressing is that, if the SEC's disclosure regime becomes entirely untethered from its original, price-discovery function, it can be bent to any purpose at all. Americans should feel secure that any disclosures the government requires are carefully cabined to encompass only that information directly related to the legislation's initial intent.

Second, these disclosures often have unintended consequences, particularly where the purpose of the disclosure is to drive non-securities-related policy change. In addition, any disclosure by a public company carries the risk of litigation if the statement is found to be either false or missing key information, a risk that is heightened when the information required to be disclosed is qualitative or subject to evolving views about its usefulness.

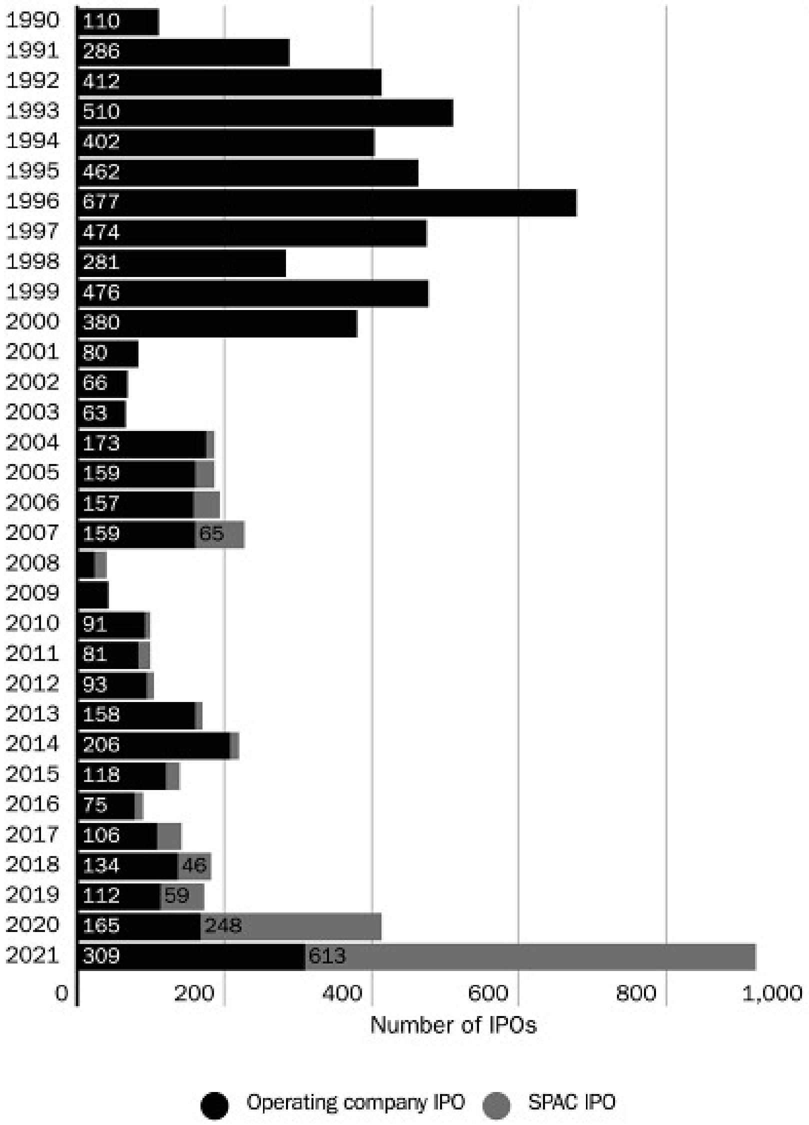
Congress should clearly delineate the scope of disclosures that the SEC may require, tying them tightly to information relevant to a company's prospects for financial success as originally contemplated by the 1933 and 1934 acts and preventing the SEC from enacting most ESG-related disclosures. It should also repeal those sections of Dodd-Frank that directed the SEC to promulgate the conflict minerals and pay-ratio disclosure rules and direct the SEC to repeal the relevant implementing regulations.

Streamline IPO Process

The U.S. capital markets are the envy of the world. But over the past 20 years, fewer companies have gone public, and those that have done so have tended to be well past their high-growth phases.

Figure 1

Number of IPOs (SPAC and non-SPAC) in the United States



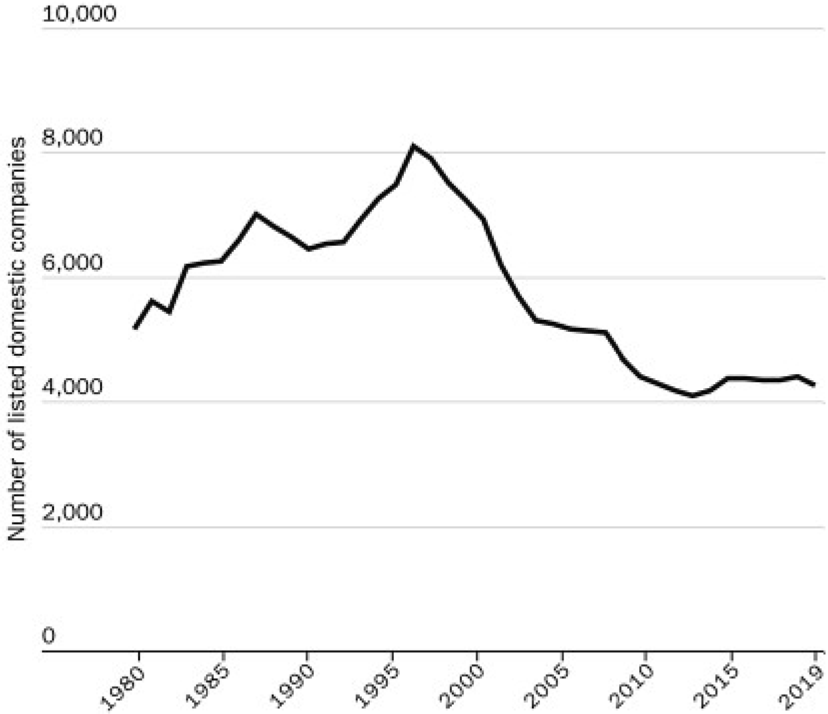
Source: Jay R. Riter, "Special Purpose Acquisition Company (SPAC) IPOs through 2021," University of Florida, December 30, 2021.

Note: IPO = initial public offering; SPAC = special-purpose acquisition company.

Beginning in 2000, the number of companies opting to go public was in steep decline. Although the number of initial public offerings (IPOs) has recently been more robust—in large part due to special-purpose acquisition companies (SPACs) raising money with the intention of merging with private

Figure 2

Total listed domestic companies (United States, 1980–2019)



Source: "Listed Domestic Companies, Total," World Bank, https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=US.

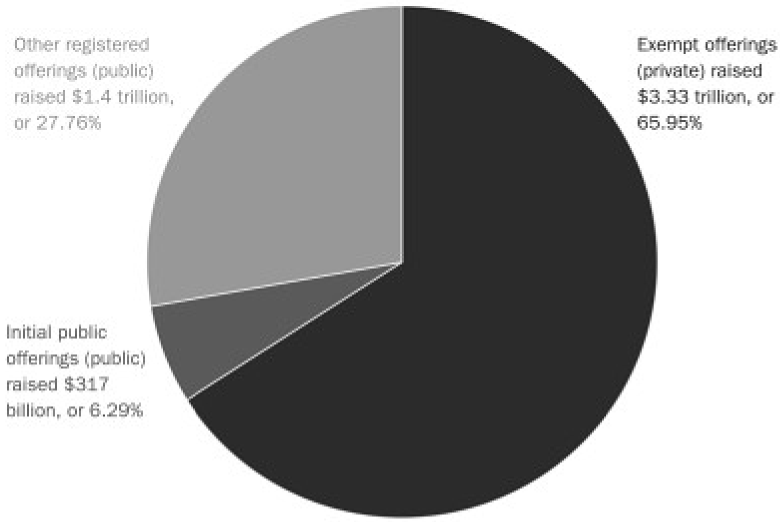
companies—there are still far fewer public companies today than in years past (see Figures 1 and 2). Because private investments are limited principally to institutions and wealthy individuals, the decline in public companies contributes to wealth inequality by allowing only the wealthy to share directly in yet-to-be-public companies' most explosive early growth.

Importantly, the IPO decline has not been caused by negative factors alone. For example, accessing private investment has become easier since the 2012 passage of the Jumpstart Our Business Startups (JOBS) Act. The capital raised through private offerings dwarfs the amounts raised through public (i.e., registered) offerings (see Figure 3). But the drop in IPOs cannot be attributed solely to companies freely choosing to raise only private capital.

Corporate leaders express frustration at both real and perceived burdens imposed on public firms, and scholars commonly cite increased regulation as a reason for the decline in IPOs. Decreasing the number and type of mandated public disclosures, as previously described, should alleviate some of these

Figure 3

Breakdown of public versus private capital-raising methods (July 2020–June 2021)



Source: Office of the Advocate for Small Business Capital Formation, *Annual Report for Fiscal Year 2021* (Washington: Securities and Exchange Commission), https://www.sec.gov/files/2021-OASB-Annual-Report.pdf.

burdens. But the IPO process itself presents unique challenges to private companies that would otherwise choose to become public, including substantial burdens in time and money, heightened liability, and inefficient pricing for the securities they offer to the public.

IPO activity has recently been increasing, and while it remains to be seen if that increase will be sustained, at least some portion of that increase is due to recent innovations in the path to public listing. A large part of the increase has been driven by the popularity of SPACs. A SPAC raises money through an IPO with the intention of completing a merger with a private company, which then assumes the SPAC's place as a publicly traded company–a particularly attractive option for private companies that have capital-raising needs pinned on technological advancement or other innovations. Although the SPAC boom is unlikely to provide a path to public listing for as many private companies as there are SPACs, it is indicative of the fact that the IPO process creates burdensome hurdles for private companies that would otherwise want to be public.

Direct listings—another recent innovation—have contributed to increased public listings on a smaller scale. This path permits companies to list directly on an exchange without engaging an underwriter; it has been viewed as attractive by providing cost savings to the listing company, by allowing companies to achieve more efficient pricing for their listed shares, and by permitting early investors an easier path to earning a return on their investment.

Although some aspects of the IPO process are governed by tradition, rather than mandatory legal requirements, supporting alternative paths to public listing is important to permit competition that drives changes to the traditional IPO process. It also implements the securities disclosure regime, which does not endorse any particular path or method for public listing. Efforts to conform these innovations to the existing traditional IPO process—either through interpretation or regulation—should be opposed.

Enticing more companies to pursue public listing will provide more choices to investors, and ensuring that companies can do so before they have passed their high-growth phases will create more opportunities for wealth creation among retail investors.

Open Private Offerings to All Investors

Private offerings have become increasingly popular with issuers and investors alike (see Figure 4). In fact, far more capital is raised in private offerings than by IPOs; for example, between July 1, 2020, and June 30, 2021, IPOs raised approximately $317 billion, whereas private offerings raised more than $3.2 *trillion*.

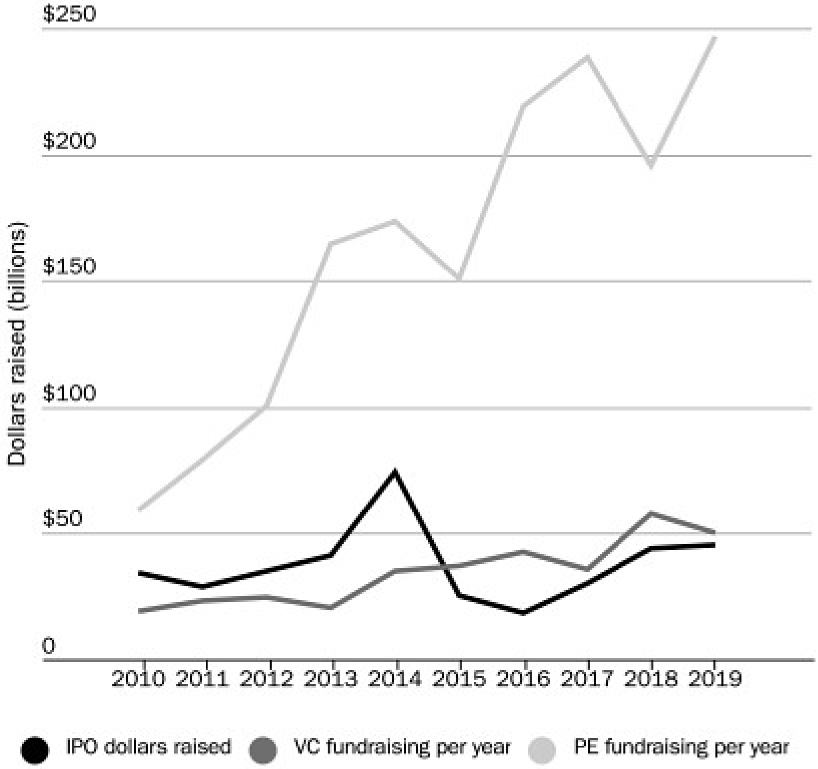
Private offerings are characterized by their lack of required disclosures, making them both cheaper to issue and less transparent to competitors. Most are offered under Regulation D, a 1982 regulation that exempts private offerings from state-level registration requirements. More than $1.9 trillion was raised through Regulation D offerings between July 1, 2020, and June 30, 2021.

Participation in most private offerings is restricted to certain "accredited" investors. Currently, only individuals with more than $200,000 in annual income (or $300,000 jointly with a spouse) or assets in excess of $1 million excluding primary residence, and certain institutions, may invest directly in private offerings. The rule was recently amended to permit a limited number of individuals who hold certain securities licenses to invest in these offerings without regard to their income or assets.

The focus on the individual investor's wealth has created a regime in which investors are arbitrarily barred from investing in certain offerings. The focus on wealth does not protect investors from fraud but rather from losses that they purportedly cannot afford. Making the SEC the judge of who is and is not fit to invest subverts the federal securities laws' disclosure regime that permits making any offering to the public if the issuer provides the right disclosures.

Figure 4

Private equity, venture capital, and IPO dollars raised 2010–2019



Source: Data compiled from Statista and Pitchbook.

Note: IPO = initial public offering; PE = private equity; VC = venture capital.

In addition, these restrictions—especially when paired with reduced IPO volume and longer waits for companies to tap the public markets—can exacerbate wealth inequalities by limiting investment opportunities in potentially higher-growth enterprises. These restrictions also dampen growth in small businesses by limiting the pool of investors available to entrepreneurs; that effect is borne disproportionately by would-be entrepreneurs in less wealthy communities, both minority and rural, who have fewer opportunities to recruit investors from their own communities.

Congress should open investment in private offerings to all investors. It could require that anyone offering securities in a private offering disclose to potential investors that the offering is private and that it therefore lacks the protections afforded by public offerings. Investors could then choose for themselves whether to invest only in public offerings—if they prefer the protections in the 1933 and 1934 acts—or in more loosely regulated private offerings.

Exempt Family and Friends Offerings

Although past guidance recommended a consideration of all facts surrounding an offering to determine whether it is "public," this understanding has largely faded. Regulation D and its predecessors helped cement the notion that whether an offering is public or private turns principally on whether or not the investors are rich. The absurd result is that even a tiny offering to a tiny group of investors who are close personal friends and relatives of the issuer's executives may still be deemed a "public" offering, requiring registration. These offerings—in which an aspiring restaurateur or a couple of friends building an app ask their parents, cousins, and good friends to "go in on" the enterprise with the hope of getting "a cut of the profits" down the road—still happen, however. And they happen without registration, often without the issuer ever understanding that the transaction being proposed is in fact a sale of securities.

It is arguably within the SEC's authority to deem such offerings exempt, either as nonpublic offerings or through its authority to exempt "any class of securities . . . if it finds that the enforcement of [the registration requirements of the Securities Act] with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering." The SEC has not, however, used this authority to provide such an exemption and considers these offerings to be in violation of the securities laws.

It is unclear, however, why the SEC should be involved with extremely small offerings, especially if those offerings are made exclusively to friends and family. Because few issuers are even aware that their actions are governed by securities laws, the current proscriptions do little to prevent such offerings. Instead, they only complicate the process when an issuer grows and moves on to more formal methods of raising capital, often resulting in having to unwind those early investments.

A better solution would be for Congress to enact an explicit *de minimis* exemption. The exemption could include a cap, for example $500,000, on the amount raised. This type of exemption would free the offerings that have already happened, and will continue to happen, of legal encumbrance, allowing entrepreneurs to focus on building the business and ensuring that their friends' and families' investments are sound ones.

Conclusion

Capital markets direct the flow of resources to enterprises. Ideally, these resources flow freely, attracted to the companies that will put them to best use based on the needs and wants of consumers. Regulation functions like rocks in a stream, redirecting the flow. Too much regulation—especially regulation implemented without regard to its effects—risks choking the flow of capital entirely or artificially flooding one area of the economy while leaving another dry. The trend toward ever more regulation in the financial sector has resulted in regulation that provides little good while imposing great cost. Continued economic growth and progress toward healthier, more comfortable lives depend on eliminating those regulations that neither deter fraud nor improve price and only serve to stymie growth and innovation.

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—Prepared by Jennifer J. Schulp

58. HEALTH AND SAFETY POLICY

Congress should

- limit health and safety regulations to cases where clear market failures exist; and
- mandate that all health and safety regulations must pass a cost-benefit analysis, and do so by a considerable margin.

Before the 1970s, federal health and safety regulations did not exist, with the exception of certain regulations for food safety and prescription drugs. Ralph Nader's 1965 book *Unsafe at Any Speed*, about motor vehicle safety, started the modern politicized safety and health movement and led to the establishment of the National Highway Traffic Safety Administration in 1966. The Occupational Safety and Health Administration followed in 1970, the Consumer Product Safety Commission in 1972, the Nuclear Regulatory Commission in 1974, and the Toxic Substances Control Act in 1976.

Should the Government Regulate Risk?

People make many private decisions about their health and safety. Why should government become involved in those decisions? Proponents of government regulation argue that people sometimes make bad decisions as a result of insufficient knowledge about the harms they face or because their decision-making ability itself is flawed. Are those proponents correct?

When Risks Are Known

In many markets, safety risks are well known. Using detailed data on wages and fatality risks across occupations, economists have estimated people's trade-offs between money and fatality risk, thus establishing the "value of a statistical life"—that is, how much money people require in extra compensation to accept an increased statistical risk of death. Recent estimates suggest workers require a risk premium that ranges from $280 to $1,000 to accept an additional annual work-related fatality risk of 1 chance in 10,000 ($2.8 to $10.0 million per statistical life).

Market forces create safety incentives—employers must either pay the premium or pay for safety precautions that reduce the risk. An unregulated world is not a world without incentive to promote safety. Because workers and employers are already using market forces to resolve their differences on the taking of known risks, government should not use regulations to override those resolutions.

When Risks Are Unknown

But what of unknown risks? Say a new drug has been invented. Won't consumers demand that a government agency determine whether the drug is safe before it is put on the market?

Some people are risk averse; others are not. Some people would refrain from using the drug until it has undergone clinical trials with random assignment of subjects, whereas others would simply accept recommendations from friends and relatives. And the risk averse may have questions and concerns that will take an extensive period of clinical research to address (and may never be addressed to their satisfaction). If someone uses the product daily for 40 years, would their life quality or expectancy be reduced or enhanced?

The beauty of markets is that they can accommodate all those possibilities simultaneously for private goods. One firm can offer something for sale with "evidence," while other firms can offer things for sale without "evidence." UL (formerly Underwriters Laboratories) and kosher certifications are examples of the private provision of quality evidence. Such a state of affairs is called a "separating equilibrium": differing degrees of quality and safety are provided at different prices, and consumers choose the package of price and quality that they prefer.

A market that does not separate is said to "pool." In a pooled market, price and quality variation are not sustainable: either consumers are unwilling to pay for the costs of quality differences, or market characteristics prevent firms from credibly committing to quality. In that last category, consumers have difficulty differentiating good- from poor-quality products. Only then is it possible for government intervention to improve human welfare.

Pooling and Safety Regulation

An example of a pooled market is one that consists of numerous small-scale, anonymous producers whose output is combined without branding. In such a market, consumers can't identify—and reward—producers that supply good products. Traditionally, many agricultural products have been sold this way.

When a safety scandal occurs in an anonymous pooled market, the government responds with regulation and inspection. Consumers are reassured. But the inspection budgets and systems are inadequate to prevent future safety and health events. New safety incidents occur and the cycle repeats.

Congress has responded to two health and safety episodes in this fashion. Lead paint was discovered on children's toys imported from China, and a salmonella outbreak was linked to peppers imported from Mexico. Those developments induced Congress in 2008 to pass new consumer product safety legislation and President George W. Bush to increase the appropriation request for the Food and Drug Administration (FDA) for fiscal year 2009 by $275 million.

Such responses reinforce the mistaken belief that markets are incapable of credibly providing adequately safe products. The toy market isn't just anonymous producers from China. American manufacturers emphasize quality and safety in return for a higher price. But consumers deserted such products, often sold in small independent stores, and bought imports from China that were sold for less at large chain stores.

When the lead paint came to light, toy suppliers didn't respond by shifting to U.S.-made toys. Rather, the large importers requested that the Consumer Product Safety Commission increase its regulation of the industry. The importers wanted to use regulation to force the market to pool again—to convince the consumer not to think about price and quality tradeoffs because of government assurances of quality. That is a clear form of corporate welfare.

The use of regulation by some firms to provide quality assurance exacerbates the tendency of consumers to think that everything for sale should be approved by the government. That tendency, in turn, increases the probability that low- and high-quality products will pool rather than separate, which undermines the market provision of safety.

Separation and Market Provision of Safety

The decisions of five firms illustrate how markets can provide safety and health benefits when they separate rather than pool:

- In 2012, Johnson & Johnson announced the elimination of three ingredients in its products in response to consumer concerns: phthalates, preservatives that result in the formation of formaldehyde, and triclosan, an antibacterial agent used in soaps. Each of those ingredients had come under public scrutiny because of safety concerns.
- In 2013, Whole Foods became the first retailer in the United States to require labeling of all genetically modified foods sold in its stores because

of consumer demand. Some of its vendors have seen a 15 percent increase in sales since they labeled their products as not having such ingredients. It should be noted that no scientific basis exists for concerns about genetically modified foods, but markets respond to preferences regardless of their scientific validity.

- Animal welfare advocates and those concerned about the development of antibiotic-resistant bacteria have long condemned the widespread use of antibiotics in animals raised for food to increase their growth rates and prevent disease. They have also called for regulation to implement their views, but the FDA issued only voluntary guidelines in 2012. In 2015, poultry processor Perdue Farms ran an ad campaign to promote its antibiotic-free chicken. In 2016, Perdue announced new animal welfare standards, including more light and space for the animals and the use of anesthesia before slaughter.
- Annie's Macaroni and Cheese and Taco Bell both pledged in 2021 to eliminate a controversial class of chemicals, ortho-phthalates, from their food packaging and products even though FDA researchers concluded in 2018 that "there have been no studies to date which show any connection between human dietary exposure to phthalates and adverse health effects."

When consumers care about, are informed (and even misinformed) about, and are willing to pay for health and safety, firms have incentive to provide it.

The Development and Provision of Knowledge

Current federal policy treats the development of knowledge about health and safety effects inconsistently across products. Pharmaceuticals must undergo clinical trials before the FDA will even consider allowing their sale. But surgery is completely unregulated. And food supplements are sold with a label that states: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease."

Given the earlier discussion of market demand for safety, one might expect makers of unregulated products like supplements to engage in rigorous private development and certification of knowledge and efficacy. Unfortunately, they do not. Thus, those products are susceptible to the "scandal–regulate–rinse–repeat" cycle described earlier.

Even the existence of regulation does not necessarily result in the development of knowledge necessary for consumers to make informed decisions about safety and health. For instance, the Toxic Substances Control Act of 1976 gave the Environmental Protection Agency (EPA) limited powers to regulate "existing" chemicals—those substances that were in commerce at the time of enactment (roughly 60,000 in number). The EPA could regulate an existing chemical if it first determined that the chemical posed an unreasonable risk. But to make that determination, the agency had to gather significant amounts of data, which were simply unavailable. Producers, of course, now had *dis*incentive to gather that information because it could lead to their products being prohibited. Without any information, the EPA could not regulate. This stalemate lasted for 40 years. Markets cannot possibly operate to reduce risk under such circumstances: the information that would aid decisionmaking is actively suppressed by the disincentives created by the law.

Other players—including other countries, U.S. states, major retailers and consumer product companies, and trial lawyers—filled the gap created by the federal stalemate. But chemical companies did not want an arms race to develop among those actors in which the companies might have to respond to strong anti-chemical preferences. Congress finally reacted in 2016 by granting the EPA increased powers (and fewer hurdles) to gather knowledge about existing chemicals in return for greater preemption of potentially more-hostile state action. Once the EPA makes a final decision about one of the existing chemicals, states lose their regulatory authority over that chemical.

Preemption of state regulation is also the driving force behind congressional action on the labeling of foods with genetically modified ingredients. Like the stalemate with the Toxic Substances Control Act, the lack of federal action on this issue over the years has led to political pressure at the state level. A Vermont law requiring the labeling of foods with genetically modified ingredients went into effect on July 1, 2016. But national food processors want uniform national labeling and preemption of state action. So even though the National Academies of Sciences, Engineering, and Medicine reported finding no scientific basis for linking genetically modified crops to any adverse health effects, Congress enacted legislation to preempt the Vermont effort.

Federal policy toward genetically modified organisms is contradictory. Compare the Vermont labeling case with that of salmon. The scientific consensus is that no health or environmental consequences exist as a result of the genetic modification of salmon, which allows the fish to grow to market weight faster. In 2015, the FDA approved the sale of genetically modified salmon and concluded that the fish would not have to be labeled as such because of the scientific consensus.

Assessing Regulatory Performance

Table 1 lists various health and safety regulations and their estimated opportunity cost per life saved (in 2002 dollars). Because the legislative mandates vary, great variance also exists in the cost per life saved. Indeed, the cost varies even within certain regulatory agencies. For example, the EPA's regulation of trihalomethane in drinking water has an estimated cost per statistical life saved of only $300,000, whereas the regulation of sewage sludge disposal has an estimated cost per life saved of $530 million. A regulatory system based on sound economic principles would not spend more than the risk premium found in private markets to value a statistical life (from approximately $3 to $10 million), and it would also reallocate resources from the high- to the low-cost regulations. Such a system would result in more lives saved at the same cost to society (or equivalently, shifting resources could result in the same number of lives saved at a lower cost to society).

Table 1

Opportunity costs per statistical life saved (millions of 2002 dollars)

Regulation	Year issued	Agency	Opportunity cost per statistical life saved, in dollars
Childproof lighters	1993	CPSC	0.10
Unvented space heaters	1980	CPSC	0.20
Trihalomethane	1979	EPA	0.30
Food-labeling regulations	1993	FDA	0.40
Children's sleepwear flammability	1973	CPSC	2.20
Child restraints	1999	NHTSA	3.30
Grain dust	1988	OSHA	11.00
Benzene	1987	OSHA	22.00
Coke ovens	1976	OSHA	51.00
Asbestos ban	1989	EPA	78.00
DES (cattle feed)	1979	FDA	170.00
Sewage sludge disposal	1993	EPA	530.00
Land disposal restrictions: Phase II	1994	EPA	2,600.00
Drinking water: Phase II	1992	EPA	19,000.00
Formaldehyde	1987	OSHA	78,000.00
Solid waste disposal facility criteria	1991	EPA	100,000.00

Source: W. Kip Viscusi, "Regulation of Health, Safety, and Environmental Risks," National Bureau of Economic Research Working Paper no. 11934, January 2006.

Note: CPSC = Consumer Product Safety Commission; DES = diethylstilbestrol; EPA = Environmental Protection Agency; FDA = Food and Drug Administration; NHTSA = National Highway Traffic Safety Administration; OSHA = Occupational Safety and Health Administration.

Effect of Regulation on Accident Rates

What has been the overall effect of the emergence of health and safety regulations since the early 1970s? One yardstick of performance is whether accident rates have declined. Figures 1–3 summarize fatality rates from accidents. The basic message is that accident rates have declined throughout the past 90 years (that trend has recently stopped because of an increase in drug overdoses included in "poisonings"). The improvement in our safety is not a new phenomenon that began with the advent of regulatory agencies commissioned to protect the citizenry.

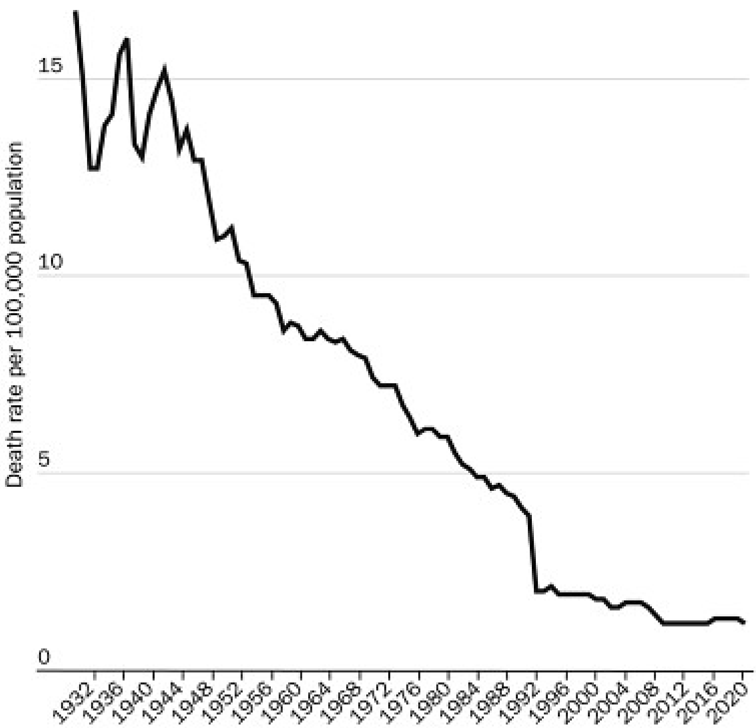
Figure 1

Unintentional injury deaths in the United States, 1930–2020: all accidents

Source: "Historical Preventable Fatality Trends: Standardized Rate," Injury Facts, National Safety Council.

Figure 2

Age-adjusted unintentional injury deaths in the United States, 1930–2020: work



Source: "Historical Preventable Fatality Trends: Standardized Rate," Injury Facts, National Safety Council.

Figure 3

Age-adjusted unintentional injury deaths in the United States, 1930–2020: motor vehicle

Source: "Historical Preventable Fatality Trends: Standardized Rate," Injury Facts, National Safety Council.

The steady decrease in risk over time supports the hypothesis that market forces rather than regulatory policy have likely been the most important contributor to safety improvements.

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—Prepared by Peter van Doren

59. ENVIRONMENTAL POLICY

Congress should

- repeal national air and water quality laws and regulations that involve localized pollution; and
- set a price on emissions or limits on the quantity of emissions and funnel the proceeds from the sales to those who are exposed to pollutants.

Current federal air pollution regulations are heavily influenced by concerns about particulate matter (PM). According to the U.S. Environmental Protection Agency (EPA), "particle pollution is made up of a number of components, including acids (such as nitrates and sulfates), organic chemicals, metals, and soil or dust particles." These emissions are linked to a number of different negative health effects. Reducing exposure to fine particulate matter often accounts for 90 percent of the estimated benefits of air regulations, according to the EPA.

How much should we reduce PM? Because pollution decisions necessarily involve one choice for many people, conflict arises when answering that question. Normal public-sector budgetary struggles result from participants having different preferences and willingness to pay for desired outcomes, with policymakers ultimately making choices that more or less correspond to the preferences of the median voter. But environmental policy conflict manifests itself as struggles over science. You can't just want cleaner (or dirtier) air because of your willingness (or lack thereof) to pay for it. Instead, your preferences must be supported by scientific estimates.

Science plays a disproportionate role in environmental quality policy disputes because the federal Clean Air Act demands it. Every five years, the EPA must prepare a document that "accurately reflects the latest scientific knowledge" on the health effects of exposure. It must then set a standard that is "requisite to protect the public health, . . . allowing an adequate margin of safety" to ensure "an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups." In 2001, the Supreme Court ruled in *Whitman v. American Trucking Association* that the Clean Air Act "unambiguously bars cost considerations from the [pollution limits]-setting process." Thus, EPA decisions on conventional pollutants are all about the benefits of emission reduction as ascertained by science because that is exactly what the law instructs the EPA to do.

Science also plays a disproportionate role in environmental policy because of political benefits. Delegating decisions to the EPA and "science" allows members of Congress to avoid making explicit decisions about environmental benefits and their costs.

Estimates of the effects of reduction in exposure to PM come from two studies: the American Cancer Society (ACS) study and the Harvard Six Cities Study (SCS). The ACS study follows 500,000 adults and the SCS follows 8,000 adults over time, estimating their relative risk of dying prematurely given their differing levels of exposure to PM.

The two studies have been the subject of much criticism. The Health Effects Institute—an air pollution research institute funded by both the EPA and the auto industry—reanalyzed the ACS study in 2000 and found anomalies. Increased PM exposure was associated with increased mortality for men but not women, those with high school or less education but not college graduates, and those who were moderately active but not sedentary or very active. Such variation is difficult to explain biologically.

When migration rates were included as a control variable in the statistical analyses, the PM effect disappeared. Cities that lost population in the 1980s were Rust Belt cities that had higher PM levels. People who migrated from those cities were healthier and younger. The PM effect was more likely nonrandom migration from older cities rather than an actual pollution-exposure effect.

Over time, PM levels have decreased and medical advances have increased. Thus, the reduction in mortality associated with fine-particle exposure could also be the result of better medical care rather than fine-particle reduction.

Pollution epidemiology research usually involves associations of *levels* of exposure with mortality rates. The association between higher PM concentrations and mortality rates is a cross-sectional relationship across cities with different levels of PM and different mortality rates. And yet the policy question is whether *changes* in exposure produce *changes* in health outcomes. It is certainly true that mortality rates among the elderly are higher in locations with higher PM levels. But *increases* in PM concentrations from one year to the next are *negatively* associated with changes in mortality.

As part of its policymaking, the EPA also uses a consulting firm to survey 12 experts (including three of the authors of the ACS study and the SCS) to ascertain their confidence in whether the statistical relationship between PM exposure and premature mortality found in the studies was causal. Four of the 12 experts said there was a probability of 10–65 percent that no causal relationship existed between PM concentration and mortality. Three experts said there was a 5 percent probability of noncausality, whereas another five experts said there was a probability of between 0 and 2 percent. Only one of those five said there was a 0 percent probability of noncausality. Under the standard requirement of keeping the probability of false positive effects to less than 5 percent, the majority of the surveyed experts did not reject a null hypothesis of noncausality. A 95 percent confidence interval would include a zero mortality effect for any reductions below 16 micrograms per cubic meter. Yet despite this "science," in December 2012, the EPA set a fine-PM standard of 12 micrograms per cubic meter of air, to be met by 2020. The Trump administration reaffirmed the 12-microgram standard in December 2020.

During the Trump administration, the fight over PM exposure had two manifestations: data transparency and cobenefits. Data transparency would have required the EPA to use scientific research when setting pollution exposure standards only if the original data were publicly available, allowing other researchers to examine and replicate findings. Although data access and reproducibility of results are the very essence of the scientific method, the transparency rule was also a clever attempt to undermine the current basis for EPA regulation of PM by excluding the SCS and ACS studies. In early 2021, a federal judge vacated the rule on procedural grounds.

The term "cobenefits" refers to the practice of counting benefits from PM and nitrogen oxide emission reduction that result indirectly from reducing toxic emissions—in this case mercury—from coal combustion. The Obama administration estimated that installation of mercury control technology would cost $9.6 billion a year while resulting in only $6 million in annual health benefits. But if reductions of PM and nitrogen oxide emissions were considered, an additional $80 billion in health benefits would occur as a side effect of controlling mercury emissions. The Trump EPA issued a rule requiring separate accounting of direct benefits and cobenefits in regulatory cost–benefit analyses. The Biden administration repealed the Trump rule in May 2021 and proposed to reinstate the lack of distinction between direct and cobenefits in February 2022.

In the absence of any revisions in environmental statutes, such environmental regulatory Ping-Pong will take place with any change in party at the presidential level.

Scientific Disputes Signal Trading Possibilities

Critics of environmental regulation typically argue that "sound science" supports less stringent requirements. According to that view, if more people understood the tenuous nature of the evidence linking reduction in current pollution exposure to improved morbidity and mortality, political support for the current environmental policy regime would diminish.

But work by Yale law professor and cultural theorist Dan Kahan suggests that people's views about environmental policy relate to their cultural group identity, not scientific literacy. Those who are *more* scientific and numerate disagree *more* about environmental policy than those who are less informed. When acceptance of scientific evidence conflicts with group values, science loses and group values win.

So when you hear someone invoke the term "sound science," don't think of it as a call for another review of the literature by the National Academy of Sciences. Instead, think about "sound science" as a signal about a struggle over the initial allocation of property rights—that is, the right to differing levels of environmental quality—and the possibility that people can realize large benefits from being able to trade those rights, even if they have strong preferences for different pollution levels.

In this view, the Clean Air Act gives implicit property rights to people who want very low pollution levels. Notice the language quoted earlier that the EPA must set standards that ensure "an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups." Entities that would prefer a lower level of environmental quality would be willing to pay a large amount to have relaxed requirements. "Persons in sensitive groups"—that is, people especially concerned about pollution (e.g., asthmatics)—might well accept such a payment in lieu of the EPA-required emissions reduction.

From this perspective, the most important irrationality of environmental regulation is not its allocation of rights to a pristine environment backed by questionable scientific evidence, but its not allowing those initial decisions to be altered by subsequent trading. In this view, the role of government is to facilitate the development of secondary markets for public goods that would enable flows of money in the form of emissions fees or rights transfers that go directly from emitters to citizens in return for consent to change ambient air quality.

What level of government should facilitate such bargains? Before the nationalization of environmental policy in 1970, environmental quality was a local issue. Some areas were dirty and others were not. But under the imposition of federal pollution requirements in 1970, the cheapest way for local areas to comply was to mandate dramatically taller smokestacks, which in essence transferred local pollution to downwind areas. As long as smokestack heights are low and transport is minimal, environmental quality is a local issue. Thus, the relevant unit of government to facilitate these bargains is probably at the metropolitan level.

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—Prepared by Peter Van Doren

60. THE MINIMUM WAGE

Congress should

- repeal the federal minimum wage; and
- using its authority under the Commerce Clause, prohibit state and local governments from establishing minimum wages.

State and local lawmakers should

- repeal state and local minimum wage laws.

The "Fight for $15" movement has generated momentum in the past 13 years, with many states aggressively increasing their minimum wage rates and a $15 per hour federal minimum wage close to obtaining the political support necessary for congressional passage.

Supporters of higher minimum wages argue that they are necessary to boost living standards for the working poor. Opponents have traditionally responded that minimum wage hikes would harm critical entry-level employment opportunities for low-skilled and inexperienced workers. As possibly the most studied economic policy issue, both sides can cite economic theories and empirical studies to back their positions.

Yet, despite claims to the contrary, the preponderance of the scholarly literature remains on the critics' side. A recent University of Chicago Initiative on Global Markets poll of leading academic economists found that 50 percent agreed with the statement that "a federal minimum wage of $15 per hour would lower employment for low-wage workers in many states," with only 16 percent disagreeing. Newer lines of research establish that a higher minimum wage can harm the public welfare in other, less discernible ways too.

This chapter, therefore, argues that, far from minimum wages being increased, minimum wage laws should be *repealed*. For their mutual benefit, laborers and employers should be free to strike voluntary work agreements at any wage rate.

Economic Theory

Both supporters and critics of minimum wage laws cite classical price theory—the interaction of supply and demand—to support their positions. They differ, however, on important assumptions about real-world conditions: specifically, whether employers have significant "market power" over labor pools such that businesses can pay wages below competitive market rates.

The standard competitive model of the labor market assumes there are many potential workers and businesses seeking out labor. These "consumers" and "suppliers" of labor decide whether to buy and sell based on the price they would pay or receive for work: if the wage rate is too high, businesses will buy less labor, and if it is too low, fewer workers will make themselves available. Such decisions result in an equilibrium wage and quantity of labor exchanged in the market.

The model predicts that a minimum wage enforced at a level above the market-determined equilibrium creates unemployment: the quantity of labor supplied rises due to the higher wage on offer, but the quantity of labor demanded falls given the higher wage costs to firms. Some jobs simply aren't profitable enough, or labor isn't valuable enough, for businesses to justify paying the minimum wage plus other costs that employers must bear for workers (e.g., payroll taxes, training costs, health care and other benefits, and liability insurance).

The standard model expects the least productive or experienced workers to be the ones most likely to be laid off, have their hours cut, or find it more difficult getting hired when a minimum wage is set at a high level. That means the loss of crucial work experience or opportunities to learn soft skills and accumulate on-the-job human capital from employment. The banning of mutually beneficial trades—of would-be employees willing to work for wage rates that employers are happy to pay—makes us poorer as a society while also harming many of the workers this policy intends to help.

The theoretical argument that minimum wages are actually good for efficiency stems from the idea that low-wage labor markets are not competitive but "monopsonistic." This view says that businesses hold enough power over workers to pay lower wages when they hire fewer of them, such that the benefit from lower labor costs outweighs the cost of forgone output and revenue. If a market exists where employers have such market power, a minimum wage carefully set to bring the wage rate closer to a competitive market level can provide the double dividend of higher hourly wages *and more* employment. There is no tradeoff between raising pay and jobs, at least provided that minimum wages are not increased beyond the competitive wage rate.

Empirical Evidence

Both theories are prima facie plausible. They are also empirically testable. If minimum wage supporters are correct, increasing the wage would increase employment; if critics are correct, raising the minimum wage would result in *less* employment (whether that manifests through fewer jobs or hours worked).

Minimum wage supporters frequently cite a 1994 paper by economists David Card and Alan Krueger as evidence in their favor. That paper found that a 1992 New Jersey minimum wage increase resulted in higher fast-food restaurant employment in that state's side of the Philadelphia metropolitan area relative to the Pennsylvania side. Yet this paper itself was soon challenged by other academics on data grounds and is not representative of the academic literature as a whole.

In a recent meta-analysis, economists David Neumark and Peter Shirley assembled the entire set of papers examining the impact of minimum wage hikes at the state and local level since 1992. Just 5.8 percent of those studies found that minimum wage hikes increased employment. The overwhelming majority (79.3 percent) found that hikes had a negative effect, with the impact stronger for teens, young adults, and less-educated workers. Perhaps unsurprisingly, economists Jeffrey Clemens and Michael Strain have found that large minimum wage hikes have significantly larger negative effects than small hikes.

It's certainly true that a significant minority of studies, particularly those assessing the impact of modest minimum wage hikes in growing economies, have found little overall impact on jobs. A lot of these results hinge on methodological choices, such as time frames or industries examined, and how one defines the counterfactual—that is, what control groups are used to judge the impact of the policy.

Studies on impacts on the retail and restaurant industries have been less likely to find immediate negative effects from minimum wage hikes, for example. But those examining broader changes to employment rates in the longer term—job growth—have tended to find much larger harmful effects from minimum wage increases.

The fairest assessment of the empirical literature is that very few studies find that minimum wages boost employment and that a significant minority find no to small employment effects. But the majority of papers find negative effects that are larger for low-skilled workers and during downturns.

Non-Wage Impacts of Minimum Wage Hikes

Not every business will react to a minimum wage hike by laying off workers, reducing its hiring, or cutting worker hours. But unless there is a costless way that companies can use the wage hike to improve worker productivity, these other adjustments harm a business's bottom line or else lead to adverse effects for the worker that aren't picked up by studies assessing the simple pay-employment tradeoff.

Some companies will pass some or all the minimum wage increase onto consumers via higher prices, for example. A recent study by economists Orley Ashenfelter and Štěpán Jurajda examining how McDonald's reacted to minimum wage hikes found evidence "consistent with near-full price pass-through of minimum wages in McDonald's restaurants." The ability to do this will depend on the industry and its competitive conditions, and this certainly doesn't occur across the board. But if minimum wage hikes raise the cost of certain products, such as takeout foods and hospitality services, this will reduce the real income gains that low-income households with minimum wage workers might expect from the wage hike.

Other companies will tough it out in the short term by bearing the higher labor costs through reduced profits. But that's not economically costless at the economy-wide level either. Weaker profits will increase the likelihood of firm deaths, thus risking jobs. A study of Yelp data, for example, found that minimum wage increases in San Francisco predict increases in exit among low-rated restaurants. Lower profit rates will discourage business startups and firm entry, reducing future job opportunities or consumer welfare. Again, there is no free lunch.

Given that businesses are not charities, it is more likely they will adjust on other margins, such that the pay gains for workers are offset by other changes to their compensation or work conditions. Non-wage aspects of jobs that can be costly to firms, such as the convenience of schedules, security of work hours, health insurance quality, retirement benefits, payments-in-kind, and workplace conditions are important to workers.

The economic literature on these adjustments is less advanced. But analyses of more recent minimum wage changes tend to find negative effects of minimum wage hikes on the generosity of the employer-funded health insurance they are offered. Evidence from the retail sector suggests that companies have reduced employees' work hours, making them ineligible for other in-work benefits as a means of better controlling labor costs when the minimum wage was raised. Fast-food outlets have likewise reduced generosity by stripping their staff of free food benefits after major minimum wage hikes. Other research finds minimum wage hikes make it more likely companies find other ways to control their labor costs (such as unusual contracts that do not guarantee set hours) or keep workers more attached to firms (such as non-compete provisions in contracts).

Finally, some businesses will react to higher mandated pay by trying to improve the productivity of their workforce. But this is not costless either.

Raising productivity may require replacing inexperienced low-skilled employees with more experienced employees, or else investing in labor-saving devices. These bring search, turnover, and upfront "lumpy" costs while still reducing work opportunities for lower-skilled workers. Raising productivity might also entail requiring more effort of workers by imposing ambitious targets or stripping away work breaks. That may raise their output to justify the higher wage but at the same time make their work more stressful or unpleasant, which represents a decline in their quality-adjusted wage.

The Minimum Wage as Social Policy

Given the empirical evidence, some minimum wage supporters concede that, yes, these laws might reduce job opportunities or have other unintended consequences. But, they say, the lost jobs or hours are a worthwhile tradeoff for higher wages for low-skilled workers who remain employed, thereby reducing poverty.

Although the Congressional Budget Office has indeed found that a $15 per hour minimum wage probably would reduce the level of poverty somewhat, it would be a far blunter tool than its proponents imagine.

First, those with the lowest skill levels are the most likely to be made unemployed or find it more difficult to get a first job due to minimum wage hikes, which risks more entrenched poverty. David Neumark's research has found that high minimum wage rates when young scars the labor market prospects for lower-paid black workers in particular.

Second, a lot of people who earn the federal minimum wage, or just above it, are not members of *households* that are poor. They might be working students or second earners in relatively affluent households who are working part time.

Third, a lot of the cost pass-through into consumer prices will tend to occur for products that the poor buy disproportionately or which might affect them most harshly—for instance, fast-food or labor-intensive services such as home-based childcare.

A full picture of the distributional aspects of the minimum wage would need to account for all this rather than just looking at the impact on earnings for those who maintain their jobs or hours. But no aggregated analysis will be able to account for the multitude of effects on individuals, given their very different circumstances and life opportunities.

Minimum wage hikes will no doubt raise incomes for many, but they also raise risks of fewer work opportunities for teenagers who want an after-school job, first-time workers who are willing to "pay their dues" to pursue higher ambitions, young workers with low living costs, idealists who will accept a low wage to work for a cause, and people who want to make a little money while helping an entrepreneurial friend.

For all these reasons and more, as a price control, economists still tend to believe that minimum wages are inefficient and reduce the overall output and public welfare.

Minimum Wage Federalism

As of the start of 2022, 30 states had higher minimum wage rates than the federal minimum of $7.25, and a host of cities and localities have much higher statutory wage floors still. New York City had a $15 per hour minimum wage for businesses with 11 or more employees, while Seattle had a $17.27 per hour minimum wage for employers with more than 500 employees globally.

The underlying economic considerations over these state and local minimum wages are the same as those at the federal level. But one insight gleaned from studies of minimum wage increases in Seattle is that the level at which the minimum wage is set relative to local economic conditions matters.

A University of Washington study found that a minimum wage increase from $9.47 per hour to $11 per hour in 2015 resulted in no significant change in labor market outcomes, whereas the subsequent increase to $13 in 2016 reduced overall hours worked by 6.9 percent, with employers cutting back on hiring inexperienced low-wage employees relative to a control region. When the minimum wage bites harder compared to other local wages, the effects on employment are more negative.

Another insight from those same studies is that local minimum wage hikes can have very different job impacts depending on the industries and sets of employees examined. The University of Washington study found no negative employment effects of the hike to $13 per hour for the restaurant sector, for example. But it found large negative effects when focusing on low-wage employment more generally.

Given the different industrial compositions of states and their very different labor markets, the effects of a huge increase in the federal minimum wage would therefore be much riskier in poorer places or those with a high share of entry-level workers. A $15 federal minimum wage would likely have a much more damaging impact on job prospects in, say, Mississippi, where a $15 wage rate is 95 percent of median hourly wages, than New York, where it is 63 percent.

Even if you think the tradeoffs of having a relatively high wage floor are worth it, economic insights would suggest setting them at the local level, given this huge divergence across the country in productivity levels. Indeed, the whole concept of a federal minimum wage makes little sense if the argument is that policymakers are trying to set a minimum wage rate to correct for highly localized instances of monopsony power.

The negative impacts of a uniform *federal* minimum wage increase can be especially large when the labor market is weak or located in places where market wage levels are lower. Jeff Clemens's research with Michael Wither examining the impact of the federal minimum wage hike during the Great Recession found that where the state minimum wage was not already higher than the new federal level, there were significantly higher job losses.

It's important to remember that although local minimum wage setting is better institutionally than a high, blanket federal minimum wage, there are still workers who would be harmed by state and local wage floors. It is preferable to eliminate all wage floors and to have a free market in setting wages to avoid such consequences.

Conclusion

The U.S. economy provides a wide variety of jobs at many different wage rates. To get better-paying jobs, workers need entry-level opportunities that allow them to build skills and establish work histories. And if a job is too demanding for the wage offered, a worker is free not to accept it or to quit. Politicians shouldn't interfere in those workers' and employers' freely determined, private agreements. Given that wage floors eliminate many individual opportunities for mutually beneficial trades, the minimum wage shouldn't be raised—it should be repealed.

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—Prepared by Ryan Bourne

61. IMMIGRATION

Congress should

- expand and deregulate H-2A and H-2B seasonal work visas;
- permit visas for year-round agricultural and nonagricultural workers;
- create a private refugee sponsorship program;
- streamline and expand high-skilled immigration;
- allow states and localities to sponsor immigrants;
- repeal the 3- and-10-year bars;
- create a "statute of limitations" for deportable violations of immigration law;
- permit asylum processing at ports of entry;
- restrict the right of noncitizens to access welfare benefits; and
- restrict the power of the executive to limit legal immigration.

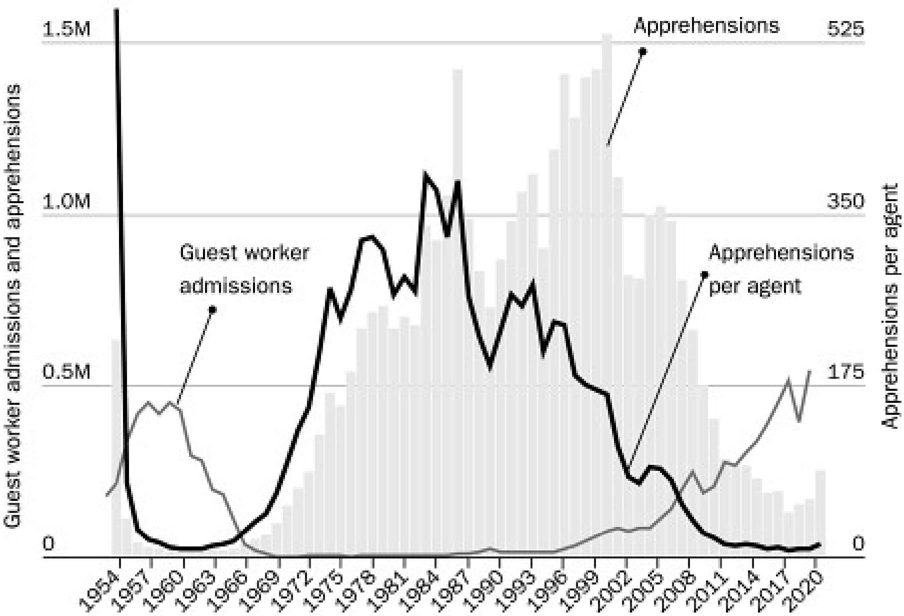
The U.S. immigration system is too restrictive and bureaucratic. The result is chaos along the U.S.-Mexico border, wait times for legal visas that sometimes extend for decades, and a reduction in economic and cultural vitality. The reforms discussed in this chapter, if enacted, will reduce chaos in the immigration system by restoring government control over the border, liberalize legal immigration, and reduce institutional deficiencies in the immigration system.

Expand Lesser-Skilled Work Visas

Congress should greatly expand visas for lesser-skilled workers. Figure 1 demonstrates that the admission of more legal workers reduces illegal Mexican migration along the border. Visas reduce illegal crossings in two ways: first, workers who obtain visas no longer need to cross illegally, and second, workers who fail to obtain visas still have a reasonable prospect of obtaining them in the future if they choose not to enter illegally.

Figure 1

Mexican guest worker admissions and apprehensions of Mexicans at the border, FY 1954–2020



Sources: Customs and Border Protection, "Southwest Border Migration," 2019; "U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector," 2007–2018; Department of Homeland Security, "Apprehensions by the U.S. Border Patrol," 2005–2006; Congressional Research Service, "Border Security: Apprehensions of 'Other Than Mexican' Aliens," 2002–2004; Walter A. Ewing, "Border Insecurity: US Border-Enforcement Policies and National Security," 1999–2001; Department of Homeland Security, "Yearbooks of Immigration Statistics," 1991–1998; Immigration and Naturalization Service, "Yearbooks of Immigration Statistics," 1981–1996 (available under "General Collection"). Mexican guest worker admissions: Department of Homeland Security, "Yearbooks of Immigration Statistics," 1997–2017; Immigration and Naturalization Service, "Yearbooks of Immigration Statistics," 1979–1996 (available under "General Collection").

Note: Apprehensions include only those Mexicans arrested at the southwest border (excluding worksite raids before 1990). Guest workers include bracero and H admissions (1979–1980 as well as 1997 and 2005 were linearly interpolated). FY = fiscal year.

Expand and Deregulate H-2A Agricultural Work Visas

The H-2A program provides farmers with a way to hire legal guest workers. The program is numerically uncapped, but it is among the most complex and expensive visa programs. Many farms cannot use the H-2A program at all because workers with that visa can work only in seasonal or temporary jobs, meaning that the statute prohibits dairies and other animal farms with generally year-round labor demands. Congress should not limit farms to only seasonal or temporary workers (8 U.S.C. 1101(a)(15)(H)(ii)(A); 8 U.S.C. 1188(h)), and it should end the regulatory requirement that H-2A workers leave after three continuous years in status.

Congress should streamline the lengthy H-2A visa process that includes duplicative reviews by the three agencies that must search for U.S. farm workers who rarely exist. Congress should require a single filing portal in which each field is reviewed only once by the relevant agency (see H.R. 1603, 117th Congress). By far the most burdensome H-2A regulation is the Adverse Effect Wage Rate (AEWR), which sets wages far above market rates (20 CFR § 655.120). Congress should not allow the AEWR to increase more than the rate of inflation.

Congress and agencies should also repeal rules that require farmers to provide H-2A workers free housing, transportation to and from their home country, and daily transit to the job site. Employers should be able to at least split the cost of these items with their employees. The main reason for these regulations is to prevent farmers from taking advantage of H-2A workers because they cannot easily find other jobs once in the United States. As an alternative to these rules, Congress should allow workers to change farming jobs without prior government permission and to create a grace period to look for a new job while unemployed (see H.R. 1603, 117th Congress).

Expand and Deregulate H-2B Nonagricultural Temporary Work Visas

The H-2B program allows nonagricultural employers to hire foreign workers legally when U.S. workers reject a seasonal or temporary job. The H-2B program is a maze of bureaucratic requirements (Figure 2 at www.cato.org/handbook) that includes a numerical cap of 66,000 annually (8 U.S.C. 1184(g)(1)(B)). The H-2B cap has been filled every year since 2015 and guarantees that job openings go unfilled. Congress should rescind the cap entirely to mimic the flexibility of the H-2A program. If ending the cap is impossible, Congress should permanently exempt workers returning to the same job that they held in a past year—a policy that was used to add cap space in individual years from 2004 to 2007 and then again in 2016 (8 USC 1184(g)(9)(A)).

Congress should allow employers to advertise an H-2B recurring position across multiple years and to accept offers from workers who commit to returning year after year. Treating workers returning to the same position year after year as existing employees would effectively exempt them from both the H-2B cap and the onerous labor certification processes after their initial hire. Congress should also reform the H-2B prevailing wage—the H-2B minimum wage—by allowing employers to pay workers on the basis of their skill level, as opposed to the average rate for the entire occupation, as was permitted until 2013 and is still used under other immigration programs.

Permit Visas for Year-Round Lesser-Skilled Workers

Congress should create a visa program for year-round, nonfarm jobs that do not require a college degree. In 1990, Congress had assumed that most illegal immigrants would remain employed in a few seasonal jobs as they had for decades, so it failed to create any program for year-round jobs in other sectors of the economy. This oversight became the primary driver of permanent illegal immigration. Today, employers in meatpacking and processing, restaurants, construction, and other year-round industries need a streamlined process to hire foreign workers. A year-round program would allow these businesses to fill open positions without hiring illegal immigrants with fraudulent, borrowed, stolen, or no documents.

Private Refugee Resettlement

The refugee program allows immigrants facing persecution in their home countries to resettle in the United States. Currently, the government selects all facets of refugee resettlement: the numbers, the locations, and the individuals. Instead, Congress should also allow individuals and nonprofits to sponsor refugees as they can in Canada. This method would allow private parties to sponsor refugees for resettlement in the United States without the president's approval. Similarly, any refugee whom a U.S. family member sponsors for a green card should be exempt from the family-sponsored green card limits so they can immediately enter. The United States should not leave family members of U.S. citizens or legal permanent residents to suffer persecution abroad.

Streamline and Expand High-Skilled Immigration

Congress should expand visas for high-skilled workers. The number of employment-based green cards stands at just 140,000, with a majority being used by the employees' spouses and minor children. That low cap, set by Congress in 1990, created a backlog of nearly a million workers and their families. Because the law caps the number of green cards that immigrants from any individual country receive—and India is by far the most common country of origin—nearly all backlogged immigrants are from India, with most facing decades-long wait times.

Congress should eliminate the overall caps on skilled immigration (8 U.S.C. 1151(d)) and the country caps (8 U.S.C. 1152(a)(2)). Failing this, Congress should at least exempt the spouses and minor children of workers from these caps, effectively doubling the visas for workers (see S. 3721, 117th Congress).

In addition, Congress should exempt anyone with advanced degrees in science, technology, engineering, and mathematics (STEM) and anyone with a PhD in any field from a U.S. university (see S. 744, 113th Congress). If Congress insists on having a numerical cap, it should index the employment-based visa cap to economic growth and guarantee a green card within five years to qualified applicants so that lengthy waits cannot recur and the system remains flexible.

Let States or Localities Sponsor Immigrants

Congress should allow states or localities to sponsor legal immigrants under whatever criteria they choose (see H.R. 5174, 116th Congress). This decentralized system, modeled on Canada's immigration system, would allow state or local authorities to address changing local conditions that vary across regions. Under a state or local sponsorship program, state and local governments in partnership with local residents could submit applications to sponsor immigrants for whatever need they see in their communities in the same manner employers sponsor workers to fill their needs. Immigrants could be required to commit to living in the area for a certain number of years but work for any employer or industry.

Repeal the 3-Year and 10-Year Bars

The law should allow any illegal immigrants who are eligible for legal permanent residence to return to their home country to obtain an immigrant visa and return lawfully. Current law bars anyone with at least 180 days of illegal presence in the United States from receiving legal status for 3 years and anyone with a year of illegal presence for 10 years, even if they return to their home country (8 U.S.C. 1182(a)(9)). The 3- and 10-year bars disincentivize compliance with the law and result in a larger illegal immigrant population, so Congress should repeal them (H.R. 3799, 116th Congress).

Create a Statute of Limitations for Deportation

Congress should only permit deportations of noncriminal illegal immigrants if they have resided in the country for fewer than 10 years, creating a de facto statute of limitations on deportations for immigration offenses. From 1929 to 1986, Congress repeatedly passed laws that allowed immigrants to receive legal status if they had not committed any serious crimes and resided in the United States before a set date (8 U.S.C. 1259(a)). A better approach would be to establish a permanent time limit of 10 years to carry out a deportation. This approach would focus all enforcement resources on more recent entrants and serious criminal offenders, creating a stronger deterrent to violate the law and allow long-term peaceful residents to resolve their violations of the law. Both effects would reduce the illegal immigrant population.

Permit Asylum Processing at Ports of Entry

Congress should require admittance of asylum seekers at legal ports of entry. Many immigrants cross the border illegally to request asylum because the U.S. government blocks entry of asylum seekers at lawful ports of entry. For many years prior to 2017, U.S. ports provided exceptions for asylum seekers from Cuba and Haiti and allowed them to enter and pursue their asylum cases with a lawful "parole" status in the United States. Nearly 100 percent of Cubans and Haitians entered legally during those years, but now they are banned altogether. This ban caused nearly 100 percent of Cuban and Haitian asylum seekers to cross illegally.

Restrict Noncitizen Access to Welfare

Congress should reserve access to all welfare and entitlement programs to U.S. citizens only (see H.R. 848, 116th Congress). In 1996, Congress limited welfare use to those noncitizens with at least five years of legal permanent resident status and those with status based on humanitarian grounds, and no evidence exists that this deterred future immigrants from coming or even increased poverty. Immigrants who choose to come to the United States accept the obligation to support themselves. Immigrants generally pay more in taxes than they receive in benefits; however, the exceptions impose genuine and avoidable costs on U.S. taxpayers. Additionally, noncitizen receipt of government benefits significantly undermines Americans' support for immigration. Nearly all immigrants come to the United States to seek jobs, not welfare, but further reform would make restriction of legal immigration even more politically difficult and save taxpayer money.

Restrict Executive Authority to Limit Immigration

A determined president can use the broad discretion granted by Congress to effectively undo the entire legal immigration system (8 U.S.C. 1182(f)). The Trump administration halted nearly all legal immigration. Congress should prohibit bans based on nationality or religion and raise the evidentiary standard to justify other bans. Presidential discretion to stop immigration should respond only to truly extraordinary problems, not changes in unemployment or ordinary security concerns (see H.R.1333, 117th Congress). To enforce these requirements, Congress should create a visa appeals board to allow visa applicants abroad to appeal visa refusals (see Title II of H.R. 750, 110th Congress). Finally, Congress should enact an overarching rule that courts should interpret executive discretion as narrowly as possible when used to stop immigrants from accessing the legal system and repeal each instance where it has blocked judicial review of agency immigration actions.

Conclusion

Immigration is an important public policy issue that will only be resolved with expanded legal immigration opportunities, legalization, and welfare reform. The U.S. immigration system excludes the vast majority of potential immigrants. The basic presumption of the legal immigration system is that no one may immigrate legally unless they fall into very narrow exceptions. By walking through these exceptions and how to improve them, this chapter demonstrates that the strict criteria keep out nearly all immigrants who wish to come legally. The Biden administration should loosen whatever restrictions that it has imposed above and beyond what Congress has required.

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—Prepared by David J. Bier and Alex Nowrasteh

62. HOUSING AFFORDABILITY

State and local governments should

- reduce and eliminate zoning regulations and reduce permitting fees;
- establish an annual review of housing permitting and new construction figures to measure the effectiveness of state and local reforms; and
- overhaul local regulation to ensure fair and equal treatment of manufactured housing alongside traditional stick-built housing.

Congress should

- reform trade laws that lead to tariffs on key building inputs like lumber, cement, plywood, quartz, washing machines, wooden cabinets, and shelving units (for example, adding a "public interest" check prior to duties' implementation could prevent shortages of critical building materials);
- increase housing affordability and supply by making Tax Cut and Jobs Act reforms to mortgage interest and state and local tax deductions permanent and eliminating these deductions long term;
- revise depreciation schedules to allow for more rapid or immediate expensing of structures to encourage housing development;
- pass legislation so that federal lands that are not specially designated can be returned to state and local governments and used for new housing development;
- relax the definition of manufactured housing outlined in the National Manufactured Housing Construction and Safety Standards Act of 1974;
- eliminate the Department of Housing and Urban Development's "HUD Code," which unfairly targets manufactured housing for federal regulation; and

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- relax the Department of Energy's appliance and equipment standards to allow state and local governments to set their own standards.

The administration should

- eliminate Section 232 tariffs on steel and aluminum and Section 301 tariffs on Chinese imports via executive order to reduce the cost of construction materials and related products;
- abandon recent Department of Commerce policy changes that effectively ensure punitive duties on subject imports, including construction materials; and
- consider refraining from supporting projects for which the goal of efficient housing assistance is defeated by restrictive local regulation.

America has an acute housing imbalance. For many years, and in many places, housing supply has not met housing demand, and this has resulted in high and growing prices, especially in places like New York City, San Francisco, and Washington, DC.

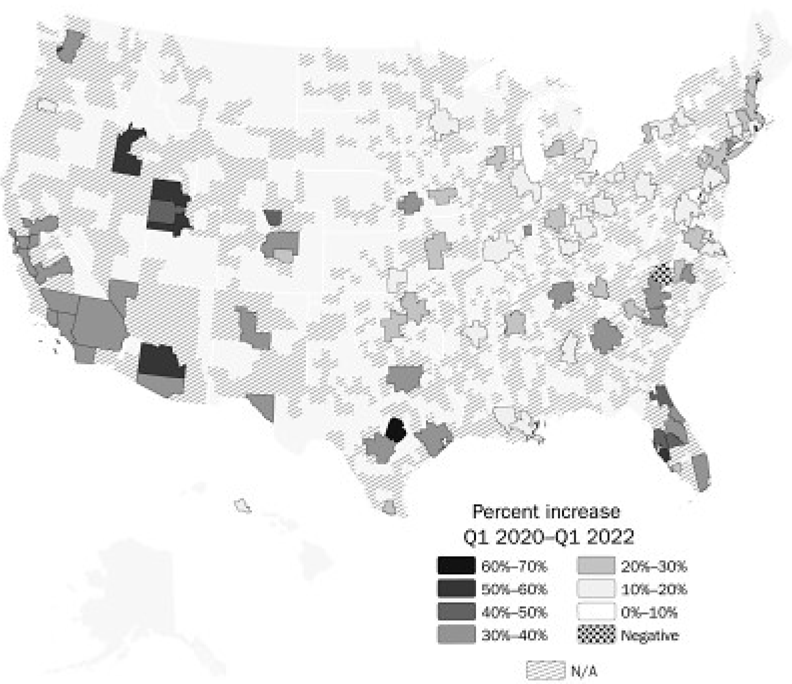
Housing supply challenges intensified during the COVID-19 pandemic. The number of “missing” housing units—or the number of units required to keep up with household formation minus existing units—grew from an estimated 2.8 million units in 2018 to 3.8 million units at the end of 2020. Housing inventory, another indicator of housing supply, plunged at the end of 2021 and was down more than 40 percent between December 2021 and the same month in 2019.

As housing inventory dwindled, prices rose (Figure 1). Prices for homes are up more than 20 percent from the beginning of the pandemic to the end of 2021, and rents are up over 15 percent during the same period. In markets with high levels of in-migration, including Florida and Sun Belt cities like Las Vegas, Miami, and Phoenix, price gains are even more extreme, with rents growing between 25 and 30 percent, year-over-year.

To improve housing affordability, it is necessary to build more housing. Escalating prices reflect a demand–supply mismatch resulting from a variety of factors, including substantial migration to Southern and Western cities, out-migration from central cities to surrounding areas, pandemic labor shortages, supply chain delays, and rising prices for construction materials like lumber and steel, all of which combine to limit the supply of new and existing homes.

Figure 1

During the pandemic, median home sales prices increased dramatically in many large U.S. metro areas



Source: "List and Sale Prices: Median Sales Price (Raw, All Homes, Monthly)," Zillow Research, https://www.zillow.com/research/data/.

Federal Policy Issues

Several of these factors, however, are exacerbated by preexisting federal policy. For example, tariffs have increased the cost of a wide variety of construction materials, including lumber, aluminum, and steel. These tariffs have worsened over time, and late in 2021, the U.S. Commerce Department increased duties on Canadian softwood lumber from 9 percent to 18 percent. Tariffs collected on carpets, flooring, countertops, and ceramic products have also increased in recent years. Recent economic analysis finds that U.S. tariff actions cause domestic construction material prices to increase significantly.

Federal tax deductions for property tax and mortgage interest also increase home prices, particularly in metropolitan areas with inelastic housing supply. These tax deductions make houses more valuable and increase people's willingness to pay, thereby making it harder for first-time homebuyers to afford a down payment. Although the deductions were curtailed by the 2017 Tax Cut and Jobs Act (TCJA), under existing policy the TCJA limitations on itemized deductions are set to expire, and a portion of both mortgage interest and state and local tax deductions remain.

Federal tax law affects housing in other ways. Current policy, for example, requires developers to write off the construction costs for new apartments over decades, which, because of inflation and the time value of money, raises the cost of development substantially. This feature of the tax code also has the unfortunate consequence of making non-real-estate investments with more favorable tax treatment more attractive than housing development, even when additional housing development is desperately needed. As a result, low-cost housing suffers as developers focus on luxury units, which have higher margins and can more easily absorb the additional cost.

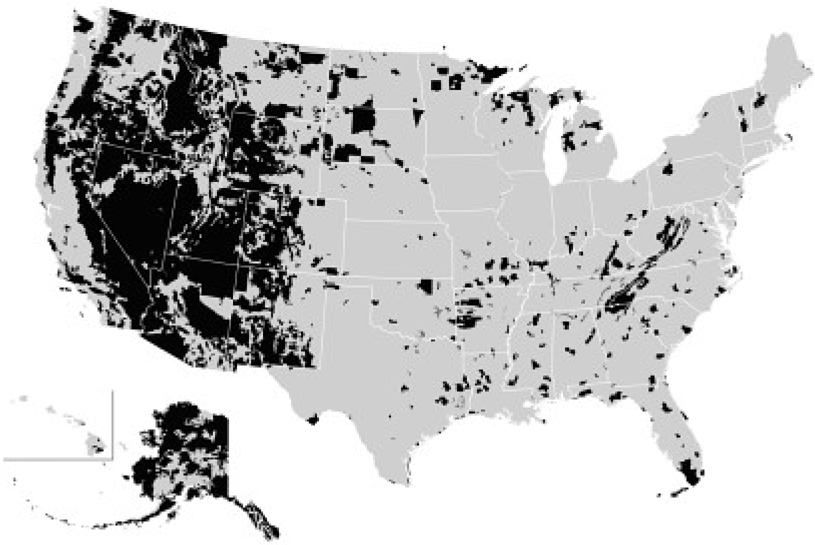
Federal policy also reduces the supply of land available for housing. In Western and Southwestern states with high in-migration, the federal government owns a large amount of state land (see Figure 2), making it unavailable for development of any kind, including housing development. For example, in Nevada, Utah, and Idaho, the federal government respectively owns 80 percent, 63 percent, and 60 percent of the land. In other states, including Montana, New Mexico, Oregon, and Wyoming, the federal government owns about half to one-third of available land.

In fast-growing states, these federal lands frequently touch urban or suburban areas—thus acting as a hard barrier to the localities' expansion. For example, the real estate intelligence platform Geomancer estimates that 217,000 acres of U.S. Forest Service (USFS) and Bureau of Land Management (BLM) lands are *within* Utah city boundaries, and 650,000 acres of USFS and BLM lands are within one mile of city borders. As demand for housing increases in areas bordering—and thus constrained by—federal lands, prices are sure to rise.

Finally, federal policy and industry lobbyists have worked overtime to put low-cost manufactured housing at a disadvantage. Specifically, the provision of low-rate Section 235 mortgage loans for traditional stick-built homes only and the regulation of typically cheaper manufactured homes through the Department of Housing and Urban Development's Manufactured Home Construction and Safety Standards—more commonly known as the HUD Code or national building code—have made it more difficult for manufactured housing to compete with their stick-built counterparts. Although the Section 235 program is now obsolete, HUD still requires manufactured housing to be attached to a chassis, or metal base frame (typically of a motor vehicle), which allows local governments to regulate manufactured homes more restrictively, as if they were mobile homes. Such restrictions deny American workers more affordable manufactured housing options.

Figure 2

The federal government owns large amounts of land in Western states with high in-migration



Source: "USA Federal Lands," ArcGIS Living Atlas of the World, updated May 23, 2022.

Other federal laws and regulations, such as the Department of Energy's appliance and equipment efficiency standards, presumably also raise the cost of housing.

State and Local Policy Issues

Arguably more important than any policy at the federal level, however, are ever-increasing state and local regulatory constraints: ultimately, the way to improve housing affordability is to allow people to build housing. Unfortunately, land-use regulation continues to limit housing supply by increasing development costs, creating uncertainty, and producing delays. These regulations determine everything from the height, width, and architectural features to the use of a given property, and they subject development to lengthy review processes with many veto points. Together, zoning regulations effectively freeze preexisting development patterns, which makes it difficult to grow or accommodate new residents.

Scores of research papers tie land-use regulations to increased housing prices. One study found, for example, that zoning regulations pushed up the cost of apartments by about 50 percent in Manhattan, New York, and San Francisco and San Jose, California. This figure has likely only grown as regulatory constraints and demand have increased in recent years.

In addition to increasing regulatory obstacles, developer impact fees have grown over time. One survey found that the fees had grown by 45 percent between 2005 and 2016 to an average of $21,000. These fees land hard on starter homes, where would-be tenants are less able to absorb the costs.

Meanwhile, local building codes—which include structural, plumbing, mechanical, electrical, accessibility, and energy-related requirements—also raise the cost of housing. Although their original purpose was to protect public health and safety, building codes have strayed from that goal and are used to achieve other objectives, like increasing perceived housing quality or pursuing environmental goals, with costly consequences. For example, stricter state building energy codes aimed at reducing energy-related environmental externalities have been observed to reduce the number of bedrooms and square footage of homes at the lowest end of the income distribution.

These policies and others that restrict housing development are important to Americans for many reasons, including that housing availability and affordability continue to influence employment opportunities for the roughly three-quarters of workers who work onsite full- or part-time. In the past, research found that less skilled workers could not afford the higher housing costs in heavily regulated cities with strong economic opportunities, and so these workers became stuck in lower-cost areas that have fewer job opportunities. Although remote work is changing the geography of work opportunities for some workers, it seems unavoidable that housing will continue to function as a de facto gateway to vital economic, educational, and social opportunities for many years to come.

Policy Recommendations

Although migration patterns, supply chain delays, and inflation will continue to put pressure on U.S. housing prices, smart policy reforms can serve as an essential release valve. Policymakers should pursue market-oriented reforms that will increase residential construction and lower housing prices for all Americans.

At the federal level, trade policy should be reformed to reduce the cost of housing materials. Although U.S. antidumping and countervailing duties are difficult to eliminate, the administration should work with Congress to reform the process that led to these tariffs in the first place (e.g., by allowing administering agencies to consider the consumer and broader economic harms of proposed duties). The administration also can and should unilaterally eliminate Section 232 tariffs on steel and aluminum imports, as well as Section 301 tariffs on Chinese imports of various building materials and appliances. And the administration should relax or eliminate federal appliance and equipment efficiency standards that add to the expense of housing.

Congress can also play an important role in improving housing supply and affordability. For example, Congress should make permanent the limits that the TCJA placed on state and local tax deductions and the mortgage interest deduction and should in the long term work to eliminate these deductions. To encourage housing development, Congress should reform the tax treatment for development by allowing more rapid, ideally immediate, expensing of structures. According to Tax Foundation estimates, a more neutral tax approach would reduce construction costs by about 11 percent, which would make low-income units both more affordable and more likely to be built.

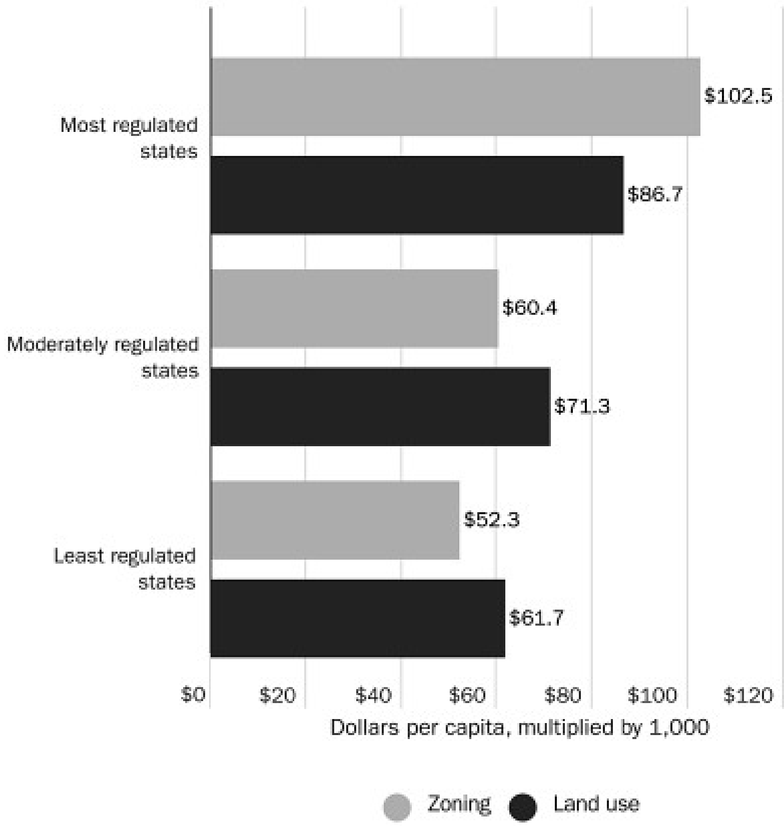
Congress should also increase the amount of land available for housing and development in Western and Southwestern states that are experiencing high levels of in-migration. To that end, Congress could pass a law that requires the federal government to return some of the 640 million acres of federally owned land to state and local governments or private owners. Such a law could apply to lands that are not specially designated or sensitive (lands that are not national monuments, critical areas, national recreation areas, etc.).

The Southern Nevada Public Land Management Act (SNPLMA) is an example of an existing program that returns federal land to private hands, and this program could be used as a template. The program makes federal public land in Clark County, Nevada, available for auction. Under the SNPLMA, the revenue resulting from the sale of federal lands is returned to the secretary of the interior to be used for environmental conservation and projects, to the state of Nevada to be used for educational purposes, and to the Southern Nevada Water Authority. As a result, many interested stakeholders benefit from the sale of federal public lands.

A new bill with objectives similar to the SNPLMA but with more of a focus on housing development—the Helping Open Underutilized Space to Ensure Shelter Act (HOUSES Act)—was introduced earlier this year. This bill or something like it could increase the amount of developable land in Western states.

Although zoning reform is mostly a state and local issue, some policymakers and analysts have suggested federal reforms to encourage states and localities to deregulate more comprehensively. For example, federal housing subsidies are concentrated in the most restrictively regulated states (see Figure 3), which means that states and cities that actively create housing affordability issues via restrictive zoning practices are rewarded for doing so.

Figure 3
Federal housing affordability subsidies are largest in the most regulated states



Source: Vanessa Brown Calder, "Zoning, Land-Use Planning, and Housing Affordability," Cato Institute Policy Analysis no. 823, October 18, 2017.

Unfortunately, current federal programs provide incentives for state and local governments to ignore local contributions to the housing affordability crisis. Federal money cannot adequately compensate for the effect of local zoning and land-use regulations on housing affordability (and even if it could, using federal funds to back damaging local policy is wasteful).

To align incentives, housing affordability programs should ideally be funded and administered by state and local governments. In the meantime, federal agencies should consider refraining from supporting projects for which the goal of efficient housing assistance is defeated by restrictive local regulation.

Finally, governments should remove disparate regulatory burdens on manufactured housing. In its Housing Supply Action Plan, the Biden administration indicates its intent to update the HUD Code regulating manufactured housing "to allow manufacturers to modernize and expand their production lines," among other reforms. This proposal appears well-intentioned, but its scope and timing are unclear. Congress should take action to eliminate the requirements mandating that manufactured housing be attached to an unnecessary, permanent chassis, as well as HUD's national building code, which unfairly targets and regulates manufactured housing. Meanwhile, local governments should review and overhaul relevant regulations to ensure that manufactured housing is treated the same as other housing types.

At the state and local level, policymakers must continue to find ways to relax zoning and building requirements and reduce permitting costs. In recent years, some states and cities—such as California, Connecticut, and Minneapolis, Minnesota—have upzoned areas from low to moderate density, relaxed regulations like parking requirements, and legalized accessory dwelling units (colloquially "granny flats") to increase housing supply and reduce costs. Unfortunately, these changes often exist within the context of broader restrictions on building height and size that make increasing density unprofitable; additional regulatory and process reforms are needed.

Conclusion

Government policy has contributed to high and rising home prices in numerous ways. Fortunately, federal, state, and local officials could do much to improve housing affordability. To moderate future home price increases and improve economic opportunity for all workers, governments at all levels should reform policy to lower construction costs, increase housing supply, and correct demand distortions.

Suggested Readings

Barattieri, Alessandro, and Matteo Cacciatore. "American Protectionism and Construction Materials Costs." Cato Institute Briefing Paper no. 133, February 9, 2022.

Calder, Vanessa Brown. "Zoning, Land-Use Planning, and Housing Affordability." Cato Institute Policy Analysis no. 823, October 18, 2017.

Elmendorf, Chris. "Recalibrating Local Politics to Increase the Supply of Housing." *Regulation* 42, no.2, Summer 2019, pp. 38–55.

Gray, M. Nolan. *Arbitrary Lines: How Zoning Broke the American City and How to Fix It.* Washington: Island Press, 2022.

Kendall, Ross, and Peter Tulip. "The Effect of Zoning on Housing Prices." Cato Institute Research Briefs in Economic Policy no. 124, August 1, 2018.

—Prepared by Vanessa Brown Calder

HEALTH CARE

63. HEALTH CARE REGULATION

State governments should

- eliminate government licensing of medical professionals—or, as a preliminary step, recognize licenses from other states and third-party credentialing organizations;
- eliminate "certificate of need" laws;
- eliminate price controls, including "parity" laws for telehealth and other services; and
- direct courts to enforce private contracts in which patients and providers agree on alternative medical malpractice liability rules.

Congress should

- eliminate states' ability to use licensing laws as a barrier to entry by medical professionals who hold licenses from other states;
- eliminate the U.S. Food and Drug Administration (FDA)—or, as preliminary steps,
  - eliminate the FDA's premarket-approval requirements for drugs and medical devices,
  - eliminate the FDA's power to mandate prescriptions for drugs and medical devices, and
  - eliminate the FDA's power to limit truthful speech;
- recognize drug and device approvals by other third-party organizations, including foreign regulators; and
- reject federal medical malpractice reforms.

The most important health care right is the right to make one's own health decisions. When government regulations deny consumers their choice of providers and treatments, or when government refuses to enforce certain contracts, it violates patients' rights to make their own health decisions and reduces access to care.

Making health care better, more affordable, and more secure, particularly for the most vulnerable, requires restoring those rights. Policymakers must eliminate regulations that deny consumers the right to make their own health decisions and must honor contracts between competent patients and providers.

End Government Licensing of Medical Professionals

Government licensing of clinicians violates the right of patients to choose their providers, makes health care less accessible by increasing prices, and reduces the quality of medical care.

Markets make medical care more affordable in part by allowing competent clinicians with less training than physicians, such as nurse practitioners and physician assistants, to perform progressively more tasks. Markets improve quality in part by allowing clinicians to combine their skills in various ways. Among the quality-improving innovations that markets have produced are integrated group health plans that coordinate care and offer other efficiencies. Patients have a right to choose to receive medical care from independent nurse practitioners, integrated group plans, or any other arrangement entrepreneurs offer.

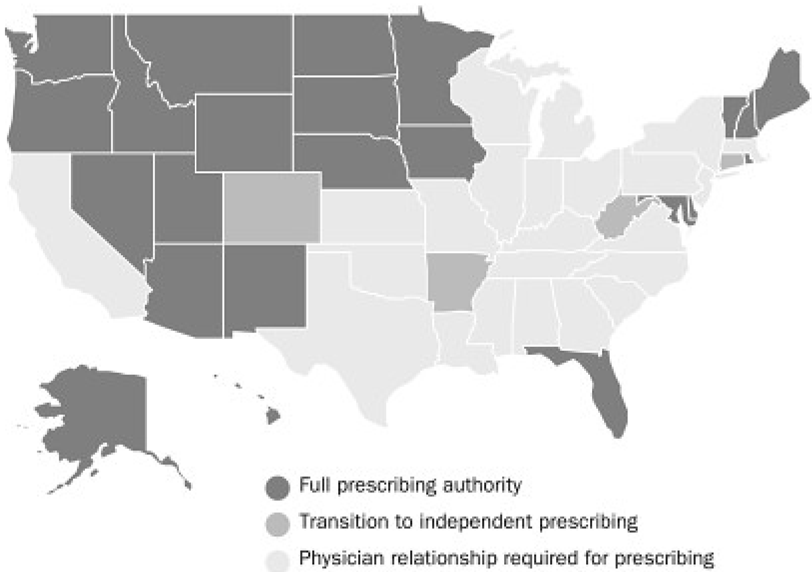
Clinician licensing blocks entry by these and other providers. It therefore blocks the market processes that make health care better, more affordable, and more secure.

To practice medicine in a state, clinicians—physicians, nurse practitioners, physician assistants, dentists, dental hygienists, and others—must obtain a license from that state. Each state defines which clinician categories may exist. The states mandate minimum educational requirements for each profession. They define the list of tasks, or "scope of practice," that each license allows members of that profession to perform. States delegate these highly technical decisions to members of the health professions—typically physicians or dentists, who have the greatest understanding of the science of medicine and dentistry.

These are not scientific decisions. If they were, all states would have identical rules. Instead, state licensing laws vary dramatically on whether they allow nurse practitioners to prescribe medication (see Figure 1) or practice independently (see Figure 2), whether they allow dental therapists to practice at all (see Figure 3), and other dimensions of medical and dental practice.

Licensing gives self-interested incumbents—typically, physicians and dentists—the power to set rules for new entrants into their own profession and other health professions. In other words, it empowers incumbent clinicians to create barriers to entry for their competitors.

Figure 1
Prescriptive authority of nurse practitioners by state



Source: "Nurse Practitioners: Prescriptive Authority," Scope of Practice Policy, National Conference of State Legislatures.

Licensing gives self-interested incumbents—typically, physicians and dentists—the power to set rules for new entrants into their own profession and other health professions. In other words, it empowers incumbent clinicians to create barriers to entry for their competitors.

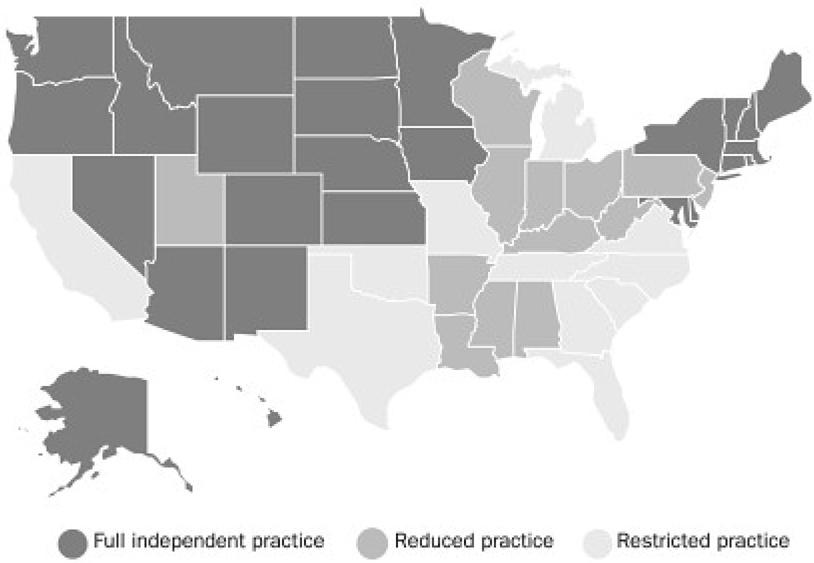
It should come as no surprise, therefore, that licensing typically leads to "steadily rising requirements" for entry into the health professions and that incumbents use licensing laws to block their competitors from providing particular services. The American Medical Association lobbies on behalf of physicians. It boasts that it has blocked more than 100 attempts to expand midlevel clinicians' scopes of practice since 2019.

Those barriers may prevent incompetent clinicians from entering the market and thereby protect some patients from low-quality care. That is the ostensible purpose of such laws.

Yet clinician licensing also reduces access to quality care in several ways. First, it increases prices. Licensing increases prices within each profession by increasing the cost of entering that profession. "As you increase the cost of the license to practice medicine you increase the price at which medical service must be sold and you correspondingly decrease the number of people who can afford to buy the medical service."

Figure 2

Scope-of-practice restrictions on nurse practitioners by state



Source: "State Practice Environment," American Association of Nurse Practitioners, April 15, 2022.

Licensing increases prices by requiring patients to obtain services from more-expensive clinicians. Basic primary care generally costs 30 percent less in nurse practitioner–staffed retail clinics than in physicians' offices. States that prohibit nurse practitioners from practicing independently (see Figure 2) require them to pay up to $15,000 annually to collaborate with a physician, which increases prices for those services. The American Medical Association advocates such restrictions even as it grudgingly admits that midlevel clinicians can provide services within their training at a level of quality comparable to when physicians provide the same services.

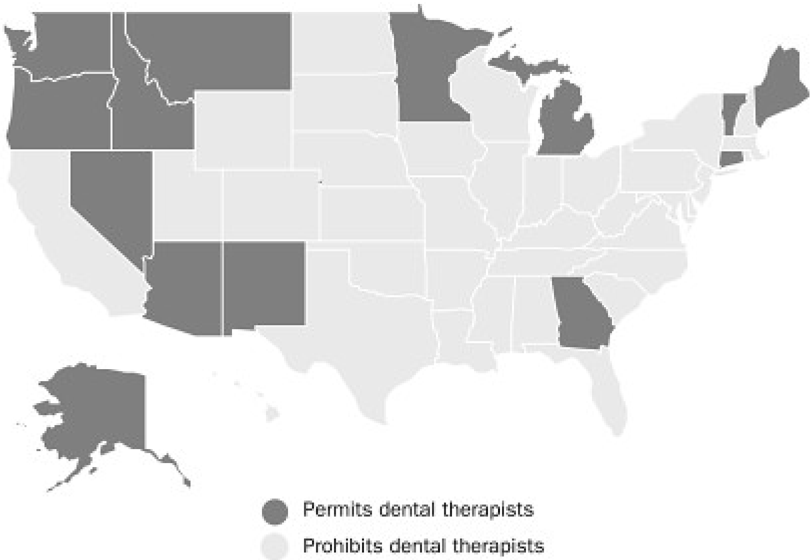
Licensing increases prices by prohibiting many health professions outright. Only 14 states allow dental therapists to practice at all (see Figure 3). Patients in the remaining states must see higher-cost dentists for the same services.

Second, licensing blocks access to quality care by reducing the supply of high-quality providers as well as low-quality providers. Licensing may actually reduce the average quality of medical care by inhibiting higher-quality forms of health care delivery.

Licensing blocks free medical care for the poor. The charitable organization Remote Area Medical (RAM) has turned away thousands of patients in need because licensing laws blocked highly qualified volunteer clinicians from around the country from practicing in states where RAM held clinics. "RAM treated 7,000 patients in one week in Los Angeles, but turned away thousands more

Figure 3

Status of dental therapists by state



Source: "Oral Health Providers: Dental Therapists," Scope of Practice Policy, National Conference of State Legislatures.

due to a shortage of California-licensed volunteers." After a tornado struck Missouri in 2011, RAM "went to Joplin, Mo., with a mobile eyeglass lab. But they were not allowed to make free glasses because their volunteer optometrists and opticians were not licensed in the state." Licensing often prevents such organizations from even holding clinics at all. RAM's late founder Stan Brock explained: "We've certainly talked to the New York authorities about holding one . . . in the Bronx. . . . But again the permission was denied on the licensing issue." There is no quality-based argument for blocking clinicians with licenses from other states from providing free medical care to the poor.

Licensing blocks access to quality care by reducing the overall supply of clinicians, leaving many patients with no access to care at all. Between 1900 and 1930, shortly after states began controlling entry into the medical profession, the number of physicians per capita fell by 28 percent. One analysis found that "more than a third of 910 small towns that had physicians in 1914 had been abandoned by doctors by 1925." It was not just low-quality doctors that licensing blocked from the profession. As licensing laws took effect over this period, "the high costs of medical education and more stringent requirements limited the entry of students from the lower and working classes." Licensing boards closed many medical schools, including five of only seven historically black medical schools. The artificial shortage of medical school slots facilitated discrimination against immigrants, African Americans, women, and Jews in admissions. It should go without saying that preventing these groups from entering the profession has nothing to do with improving quality and instead reduced quality. The legacy of such quality-reducing discrimination persists to this day.

Licensing blocks access to the highest-quality providers in the country, forcing patients to settle for whatever clinicians happen to hold a license in their state. Patients have a right to travel to receive treatment from top specialists at the Cleveland Clinic, Memorial Sloan Kettering Cancer Center, the Mayo Clinic, or other leading medical centers across the country. Licensing denies patients their right to consult those same clinicians via telehealth without leaving home.

Licensing reduces access to high-quality care by blocking entry from integrated, prepaid group plans like Kaiser Permanente. Such systems are strong on dimensions of quality such as coordinating care, conducting comparative-effectiveness research, and offering conveniences like electronic communications, scheduling, and medical records. Many consumers appreciate and embrace this model. Such systems compete on price by making fuller use of mid-level clinicians. Scope-of-practice restrictions disproportionately hinder such systems by depriving them of a key competitive advantage and by requiring them to develop new workflows to conform to each state's different and ever-changing scope-of-practice rules. Incumbent physicians have even stripped licenses from the physician who founded Kaiser Permanente and others whose only crime was to found or participate in similar plans across the country. The legacy of such discrimination also persists.

States use licensing laws to restrict access to care for reasons that have nothing to do with quality. At least 19 states reduce the supply of clinicians by revoking licenses of clinicians who default on student loans.

Finally, licensing does little to discipline clinicians who actually harm patients. A study by the consumer watchdog Public Citizen found that between 1990 and 2005, "only 33.26 percent of doctors who made 10 or more malpractice payments were disciplined by their state board—meaning two-thirds of doctors in this group of egregious repeat offenders were not disciplined at all."

Licensing does more to protect the incomes of incumbent clinicians than to protect patients from low-quality care. It adds little if anything to the protections that the medical malpractice liability system and market forces provide. In the absence of clinician licensing, courts would continue to hold individual clinicians and health care organizations accountable for the harm they cause. Hospitals, health plans, and other organizations would continue to evaluate the competence of clinicians via board certification, private credentialing organizations, and their own internal processes.

In the absence of clinician licensing, market forces could provide even greater quality protections. Eliminating licensing would allow greater innovation and competition in health care delivery. Integrated, prepaid group plans could improve quality directly through greater care coordination and health services research. Greater demand for private credentialing and the desire to protect brand names and reputations together would do more than licensing does to safeguard patients from incompetent providers.

Repeal Medical Licensing

Clinician-licensing laws are a mistake that has done enormous harm to patients. Mere tinkering cannot fix them. Government cannot insulate such laws from the influence of incumbent clinicians. Even if it could, government would remain incapable of striking a proper balance between access and safety for millions of patients across billions of medical encounters.

State governments should repeal clinician-licensing laws. At a minimum, states should recognize clinician licenses from other states and other third-party credentialing organizations.

Repealing clinician licensing would reduce the cost of medical care while improving quality. In the absence of licensing, innovators would develop new ways to use midlevel clinicians. Consumers would benefit from greater choice and competition among different delivery and payment systems. Prices would fall for everything from medical education, primary, specialty, and hospital care to health insurance. Repealing licensing would bring health insurance and medical care within reach of many more low-income Americans. It would reduce the number of patients who cannot afford the care they need and reduce the cost of subsidizing those who remain.

Entry by new, higher-quality delivery systems, plus the health-services research and competition they would generate, would improve quality. Such competition would add to the quality assurance mechanisms that would continue to operate in the absence of licensing, including the medical malpractice liability system, board certification, and private credentialing organizations. If repealing clinician licensing is politically infeasible, policymakers must stop licensing laws from acting as a barrier to entry for clinicians licensed by other states.

States must stop licensing from blocking free charitable care for the poor. RAM founder Brock wrote, "In the United States . . . for some extraordinary reason, practitioners educated and licensed in one state are not allowed to cross state lines to provide free care for needy Americans." States should enact Good Samaritan laws like those that Connecticut, Illinois, Missouri, and Tennessee pioneered so that clinicians from other states can give away free medical care to the poor. As Brock once testified: "One of the saddest parts of trying to help these people is on the last day of a free RAM event we always have to tell some of them we are sorry, but we cannot see any more patients. . . . If the government would allow willing volunteer practitioners to cross state lines, fewer people will be turned away." Volunteer clinicians would still be liable for malpractice under the laws of the patient's state or the contractual liability rules the patient and clinicians agree to honor.

States must give rural and other patients access to top specialists by recognizing the licenses of telehealth providers in other states. One way to do so is to redefine the location of care from that of the patient to that of the provider—that is, the state where the provider already holds a license.

States can accomplish both of those reforms at once by recognizing clinician licenses from all other states. Arizona has enacted a law that greatly reduces the barriers to out-of-state clinicians practicing in the state.

Congress can use its power under the Commerce Clause to require states to recognize medical licenses issued by other states. In a narrower fashion, Congress can use its power under the Commerce Clause to promote telehealth by redefining the location of the practice of medicine to be that of the clinician.

Medical Facilities

Markets also make medical care better, cheaper, and safer through competition between medical facilities—between retail clinics and physician offices; between urgent care clinics and hospital emergency departments; between standalone imaging centers, radiology practices, and hospital imaging facilities; and between ambulatory surgical centers, specialty hospitals, and general hospitals.

Many states impose laws requiring hospitals, nursing homes, and even physician offices to obtain a "certificate of need" (CON) from a state planning agency before opening or expanding a medical facility or investing in new equipment. CON laws violate the right of patients to choose which medical facilities they patronize. They are a leading barrier to the sort of competition that reduces prices and improves quality.

The rationale for CON laws is that by restraining the supply of hospital beds, the government could restrain medical spending. In 1974, the federal government encouraged states to adopt CON planning.

CON laws failed to slow the growth of medical spending. In a survey of the empirical literature on CON laws, health economist Michael Morrisey writes that those studies "find virtually no cost-containment effects. . . . If anything, CON programs tended to increase costs." The failure of CON laws to achieve their stated aims led the federal government to lift its CON-planning mandate in 1987 and also led many states to eliminate their laws. Yet many states have maintained and even expanded their CON requirements.

Nor do CON laws appear to have increased the quality of care. Examining cost and outcomes data for coronary artery bypass grafts, economists Vivian Ho and Meei-Hsiang Ku-Goto found, "CON regulations . . . may not be justified in terms of either improving quality or controlling cost growth." Physician-economist Daniel Polsky and colleagues found that laws imposing CON on home-health agencies have "negligible" effects on quality or costs.

Repeal Incumbent-Veto Laws

Perhaps because CON laws have done nothing to contain spending, they have been a boon for incumbent health care providers. Like clinician-licensing laws, CON laws empower incumbents to block new entrants and thereby protect themselves from competition. Morrisey explains:

> A reasonably large body of evidence suggests that CON has been used to the benefit of existing hospitals. Prices and costs were higher in the presence of CON, investor-owned hospitals were less likely to enter the market, multihospital systems were less likely to be formed, and hospitals were less likely to be managed under for-profit contract. . . . The continued existence of CON and, indeed, its reintroduction and expansion despite overwhelming evidence of its ineffectiveness as a cost-control device suggest that something other than the public interest is being sought. The provider self-interest view is worthy of examination.

Indeed, when new entrants apply for certificates of need, incumbent hospitals and other providers object the loudest. Law professor Sallyanne Payton and physician Rhoda M. Powsner explain that although the stated rationale of CON laws is to reduce health care spending, this claim "has diverted attention from the actual economic and political imperatives that led to and presently sustain certificate-of-need regulation. To attribute CON legislation to [cost reduction] is to mistake a convenient theoretical justification for an actual motivation."

States should eliminate CON laws immediately without any concessions to the inefficient incumbent providers they protect from competition. CON laws harm consumers and taxpayers by increasing health care prices without improving quality. They deny patients their right to choose their medical facilities and the benefits of new forms of health care delivery. There is no justification for them and no place in a market economy for such top-down economic planning.

State officials concerned about runaway health expenditures should reduce or eliminate the government subsidies that fuel such spending. (See "The Tax Treatment of Health Care" and "Medicare.")

Pharmaceutical Regulation

To market a drug or medical device in the United States, manufacturers must first prove to the satisfaction of the U.S. Food and Drug Administration (FDA) that the product is safe and effective for the indication that will go on the product's label.

The FDA helps patients when it approves beneficial drugs and blocks harmful drugs. Yet the agency can also harm patients, by either approving harmful drugs (a "Type I error") or denying approval to beneficial drugs (a "Type II error"). Both Type I and Type II errors can cause suffering and death. Economist Ernst Berndt writes, "A central tradeoff facing the FDA involves balancing its two goals—protecting public health by assuring the safety and efficacy of drugs, and advancing the public health by helping to secure and speed access to new innovations."

The tradeoff between the number of harmful drugs the FDA approves and the number of beneficial drugs it delays or rejects—that is, between Type I and Type II errors—is unavoidable. Reducing the number of harmful drugs (Type I errors) requires higher standards of evidence, more testing, more time, and more expense. Those measures necessarily increase the number of beneficial drugs the FDA delays or rejects, and they reduce the number of beneficial drugs that manufacturers develop (Type II errors). Conversely, reducing the number of beneficial drugs the FDA delays or rejects (Type II errors) requires easing those barriers to market entry, which inevitably leads to the approval of a greater number of harmful drugs (Type I errors).

As an agency that responds to Congress rather than to patients, the FDA faces an inherent information problem that inevitably leads to unnecessary patient suffering and death. Though Type I and Type II errors can be equally dangerous, Table 1 illustrates a very important difference from the FDA's perspective. The political system penalizes FDA officials when a patient dies from a harmful drug the officials approved (Type I error). It far less often penalizes agency officials when a patient dies because they blocked or discouraged the development of a beneficial drug (Type II error).

- Type I errors bring swift and certain retribution down on agency officials. The victims are easily identifiable. Patients and the public can easily trace the victims' injuries to the FDA's decision. The victims, their loved ones,

Table 1
The Food and Drug Administration's information problem

FDA decision	Helpful drug	Harmful drug
Approve	Patients benefit.	Patients suffer. Victims/others can trace injury to FDA officials.
Delay/reject	Patients suffer. Victims/others cannot trace injury to FDA officials.	Patients benefit.

Note: FDA = Food and Drug Administration.

the media, and Congress can hold FDA officials to account for approving a harmful product. Importantly, FDA officials *know* Type I errors lead to congressional hearings, public disgrace, and possibly the end of their careers.

- Type II errors bring almost no consequences for FDA officials. Even though delaying or blocking beneficial drugs can harm patients as much as approving unsafe drugs can, it is typically impossible to hold FDA officials to account for Type II errors. Victims of Type II errors are much harder to identify. It appears the disease, not the FDA, killed them. Typically, neither the victims, nor their loved ones, nor FDA officials can identify which patients an unapproved but beneficial drug might have helped. Victims and their families may never have heard of the drug, perhaps because the high cost of avoiding Type I errors deterred companies from ever developing it.

As a result of this fundamental information asymmetry, the political system can discipline FDA officials only when their decisions cause patients to suffer or die from Type I errors. It effectively cannot discipline FDA officials when their decisions cause patients to suffer and die from Type II errors. Dr. Henry Miller, a former FDA official, describes how this information asymmetry affects the decisions of FDA officials:

> In the early 1980s, when I headed the team at the FDA that was reviewing the [new drug application] for recombinant human insulin, the first drug made with gene-splicing techniques, we were ready to recommend approval a mere four months after the application was submitted (at a time when the average time for [new drug application] review was more than two and a half years). . . . My supervisor refused to sign off on the approval—even though he agreed that the data provided compelling evidence of the drug's safety and effectiveness. "If anything goes wrong," he argued, "think how bad it will look that we

> approved the drug so quickly.". . . The supervisor was more concerned with not looking bad in case of an unforeseen mishap than with getting an important new product to patients who needed it.

As a result of this information problem and the perverse incentives it creates, the FDA typically tolerates only a 2.5 percent chance of Type I error when determining whether to approve new drugs. Biostatistician Leah Isakov and colleagues estimate that if the agency's goal is to save lives, it should be much more tolerant of Type I errors. They estimate that for hypertensive disease, the agency should tolerate a 7.6–9.4 percent chance of Type I errors. For cirrhosis of the liver, it should tolerate a 15.3–17.7 percent chance. For pancreatic cancer, it should tolerate as much as a 27.8 percent chance.

Indeed, cost–benefit analyses consistently find that, at the margin, FDA regulation on balance *harms* patients' health.

- Economist Mary K. Olson estimates that when additional revenue from user fees enabled the FDA to review drugs more quickly, the health benefits of quicker access to new drugs were roughly 12 times greater than the costs from additional adverse drug reactions. In other words, the FDA was inflicting 12 times as much harm on patients through Type II errors as it was sparing patients by avoiding Type I errors.
- Economist Tomas Philipson and colleagues found that quicker reviews brought significant health benefits but "did not, in fact, have any effect on drug safety." This finding implies that the FDA will inflict additional deaths due to Type II errors even if doing so produces no reduction in deaths due to Type I errors.

If FDA officials want to promote health, they should regulate less. They should approve new drugs faster and with less evidence of safety and effectiveness.

Unfortunately, this information asymmetry affects more than just the FDA. Despite such research, many in Congress have sought to give the FDA additional powers to reduce Type I errors.

Government-Imposed Prescription Requirements

Congress also empowers the FDA to determine whether consumers must obtain a prescription before accessing certain drugs. Government-imposed prescription requirements violate the rights of individuals to make their own health decisions. Here again, the agency's incentives lead it to impose rules that on balance harm rather than protect patients.

The FDA has used its power to impose prescription requirements to steer consumers toward *more* dangerous drugs. For years, the agency required pres criptions for nonsedating antihistamines while allowing over-the-counter access to sedating antihistamines, a policy that likely caused air- and auto-travel crashes and fatalities. The FDA blocked access to "Plan B" emergency contraception for more than 12 years. FDA-imposed prescription requirements continue to block access to routine-use oral contraceptives—which are available without prescription in more than 100 countries—and to life-saving drugs such as naloxone.

Government-imposed prescription requirements make patients less safe, not more. Economist Sam Peltzman found:

- "Enforcement of prescription regulation *increases* poisoning mortality by 50 to 100 percent";
- "No . . . statistically significant difference in infectious disease mortality between countries that enforce prescription requirements for antibiotics and those that do not"; and
- "[Prescription] regulation did not reduce—indeed, may have increased—poisoning mortality from drug consumption . . . poisoning mortality is higher, all else remaining the same, in countries that enforce prescription regulation."

Since "the FDA would instruct firms to remove from their labels any remaining information that might guide lay users of prescription drugs," economist Peter Temin argued that government-imposed prescription requirements make consumers more vulnerable to harm by making them more ignorant about health and medicines. "Some part of the gap between the drug knowledge of the average doctor and the average consumer is the product of regulation." Public health professor Julie Donohue notes this power created "a paradoxical situation . . . in which potentially dangerous prescription drugs were dispensed to consumers with less accompanying information than [over-the-counter] drugs carried."

A Better Way of Certifying and Monitoring Drugs and Medical Devices

The FDA's information problem guarantees that the agency will always value some lives more than others and tolerate unnecessary suffering and death. Fortunately, there is a voluntary, market-based alternative that does not suffer from the FDA's information problem and that respects the right of patients to make their own medical decisions.

Nobel Prize–winning economist Gary Becker advocated eliminating the FDA's efficacy standard and returning the FDA to the *status quo ante* 1962, when the FDA had the power only to block drugs it believed to be unsafe.

Peltzman argues that even the safety requirement delivers more harm than benefit. Another Nobel Prize–winning economist, Milton Friedman, proposed eliminating the FDA entirely. As long as a government agency exists whose purpose is to protect patients from harmful drugs, it will always focus disproportionately on Type I errors at the expense of overall patient health.

Congress would do better to eliminate any role for the FDA in certifying the safety and efficacy of drugs or in determining which drugs consumers should need prescriptions to purchase.

Eliminating the FDA would increase patient demand for private certification of safety and efficacy, which currently exists only informally. The threat of liability for harmful products would create powerful incentives for pharmaceutical manufacturers to conduct appropriate testing and seek private certification.

Integrated, prepaid group plans like Kaiser Permanente are uniquely capable of performing safety and efficacy certification. When the FDA wanted to determine whether the pain reliever Vioxx (which it had approved) was causing heart attacks, the agency could not conduct that research itself. It turned to Kaiser Permanente of Northern and Southern California. With liberalization of clinician-licensing laws and reforms that allow consumers to control health spending (see "The Tax Treatment of Health Care" and "Medicare"), additional integrated, prepaid plans could enter the market and offer competing safety and efficacy certifications. Different plans would cater to different risk preferences by applying different approval requirements. Each plan's reputation for quality (and ability to attract enrollees) would depend on the perceived value of its seal of approval. Unlike the FDA, prepaid group plans could consider cost-effectiveness as a criterion for approval. Unlike the FDA, they could closely monitor drug safety and efficacy after approval and could more quickly detect adverse drug reactions. Patients within or outside such plans would rely on whichever plan's seal of approval fit their own risk preferences.

Market-based certification would save more lives by striking a better balance between Type I and Type II errors. No one would have the power to force patients to suffer Type II errors. Market-based certification respects the freedom of doctors and patients to make treatment decisions according to individual circumstances.

The first step toward reforming the regulation of drugs and medical devices may therefore be to eliminate the barriers that Congress and state legislatures have erected to integrated, prepaid group plans. (See "Health Insurance Regulation," "The Tax Treatment of Health Care," and "Medicare.")

Concurrently, Congress could allow alternative ways of certifying the safety and efficacy of medical products by granting marketing approval to products approved by other countries' regulatory bodies.

The next step would be to eliminate either the efficacy standard or the FDA entirely. Either would save lives, on balance, because patients would get quicker access to more beneficial new drugs. While patients would also have quicker access to harmful drugs, at least three factors make that unfortunate effect tolerable. First, more patients would live and thrive thanks to greater innovation and quicker access to helpful drugs than would suffer as a result of harmful drugs. Second, eliminating either the efficacy standard or the FDA itself would lead to greater skepticism of new drugs by doctors and patients. Third, innovations by prepaid group plans and others would more quickly detect and stop adverse drug reactions.

Medical Liability Reform

The right to sue health care providers for medical malpractice is a crucial civil right. Individuals are not free to make their own health decisions if health care providers can impose unwanted costs on patients.

The right to sue for medical malpractice is also an important tool for protecting patients from injury due to negligent care. Patients typically have little information about the quality of care. To the extent that the medical malpractice "system" imposes the costs of negligent care on providers, it encourages providers to take steps to improve quality.

Nevertheless, many people in the United States complain—with some justification—that this system performs poorly. "The medical malpractice system is slow, expensive . . . stressful to both sides, contentious, prone to error in both directions (i.e., payment for weak claims and nonpayment for strong claims), and perceived by everyone involved as inhumane." According to one estimate, "it costs $1.33 in overhead to deliver $1 to negligently injured plaintiffs." Even so, research suggests the system does not do enough to discourage negligent care. Physicians and other providers—who see often-dramatic increases in malpractice insurance premiums—have intermittently declared this system to be in "crisis" for more than 30 years.

Scholars have proposed various reforms. California and Texas have limited the amount patients can recover for noneconomic damages to $250,000 per injury. Other proposals include legislative limits on contingency fees for plaintiffs' attorneys; "no-fault" compensation systems for medical injuries, such as the limited programs adopted in Florida and Virginia; alternative forms of dispute resolution, such as arbitration and special medical courts; the English rule of costs ("loser pays"); and reform of the collateral source rule.

Each of these reforms would leave some patients better off—typically by reducing prices for medical care—at the cost of leaving other patients worse off. "Loser pays" reforms often reallocate the costs of frivolous lawsuits to the correct party. However, that rule deters less affluent patients from seeking legal redress for legitimate grievances. Limits on contingency fees could expand access to medical care by reducing prices, but at the cost of denying compensation to injured patients whose cases plaintiffs' attorneys deem too expensive to pursue. Perhaps most important, any reduction in provider liability potentially jeopardizes patient safety by reducing the incentives for providers to avoid negligent care.

In particular, caps on damages could expand access to health care by reducing payouts and liability insurance premiums, but at the cost of leaving some injured patients with uncompensated losses. Damage caps in California and Texas force patients to bear the cost of any noneconomic losses they suffer in excess of $250,000.

Moreover, damage caps do not appear to solve the system's problems or even deliver on the promises of supporters (disproportionately, physicians) that they will increase physician supply or reduce health care spending. A series of empirical studies on Texas's damage caps concluded:

> Texas's damage cap dramatically reduced the number of medical malpractice cases and total payouts to plaintiffs, with an especially strong effect on elderly plaintiffs. But Texas's tort reform package had no discernible, favorable impact on broader measures of health system performance. Health care spending growth did not slow, and physician supply did not increase. . . . While reform strongly benefited providers, the evidence that it had significant benefits for the broader health care system is simply not there.

Like clinician-licensing regulation, much of what physician groups propose with regard to medical malpractice liability benefits physicians at the expense of patients.

Many Republicans want Congress to enact a nationwide set of limits on malpractice liability. The U.S. Constitution does not authorize Congress to impose substantive rules of tort law on the states. Though the federal government may enact technical procedural changes to tort law, state legislatures are the proper venue for correcting excesses in their civil justice systems. The fact that medical professionals can avoid states with inhospitable civil justice systems gives them significant leverage when advocating state-level medical liability reforms and gives states incentives to enact such reforms. Indeed, many states have.

Though state action is preferable to federal action, state-imposed medical malpractice reforms share two flaws with federal reform. First, imposing on all patients and providers any single set of limits on the right to sue for medical malpractice will help some patients but hurt others. Second, though patients should be free to avoid harmful rules, making any single set of rules mandatory and codifying them in statute makes removing harmful rules extremely difficult.

A more patient-friendly and liberty-enhancing approach would allow patients and providers to write their own medical malpractice reforms into legally enforceable contracts. For cases of ordinary negligence, patients could choose the level of protection they desire, rather than have government impose on them a uniform level of protection (and the accompanying price tag). Providers could offer discounts to patients who agree to limits on compensation in the event of an injury. Patients who don't agree could pay the higher, nondiscounted price or seek a better deal from another provider. Freedom of contract would thus make medical care more affordable to many low-income patients.

Insurance companies could facilitate such contracts on behalf of their enrollees. Those companies would have strong incentives to ensure that such contracts provide adequate protection; otherwise, the insurers could face higher claims from injured patients who could not collect the full extent of their damages.

Regular tort rules would continue to apply in cases where patients and providers could not or did not contract around them, where patients were subject to duress, or where providers were guilty of intentional wrongdoing or reckless behavior.

Freedom of contract would also enhance quality competition. Providers who invest in processes that avoid patient injuries could offer equivalent or more expansive malpractice protections than their competitors at a lower cost. Low-quality providers would not be able to do the same. They would therefore face strong financial incentives to improve quality.

Such contracts are not possible today because courts have invalidated them as "contracts of adhesion" or "against public policy." The courts' refusal to honor those contracts restricts the freedom of adults to make mutually beneficial exchanges that hurt no one else. It also increases the cost of providing medical care to the poor, which has undoubtedly reduced their access to care.

To remedy this undue and costly restriction on liberty, courts should abandon their current policy and enforce contractual limitations on the right to sue for medical malpractice. If courts refuse, state legislatures should require them to do so. Nobel Prize–winning economist Richard Thaler and law professor Cass Sunstein write:

> In our view, state lawmakers should think seriously about increasing freedom of contract in the domain of medical malpractice, if only to see whether such experiments would reduce the cost of health care without decreasing its quality. Increasing contractual freedom won't solve the health care crisis. But it might well help—and in this domain every little bit of help counts.

The medical malpractice system does a poor job of providing relief to injured patients, preventing frivolous lawsuits, or discouraging negligence. The remedies for these shortcomings are not obvious. A dynamic marketplace that allows parties to experiment with—and abandon—different malpractice rules is the quickest and surest way to find those solutions.

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—Prepared by Michael F. Cannon

64. HEALTH INSURANCE REGULATION

State legislators should

- eliminate government licensing of health insurance;
- or, as preliminary steps, recognize insurance licenses from U.S. territories and other states;
- remove all restrictions on "short-term, limited-duration" health insurance; and
- remove "Farm Bureau" plans and "direct primary care" from the purview of state insurance regulators.

Congress should

- repeal the Patient Protection and Affordable Care Act and other federal laws restricting health insurance choice;
- eliminate states' ability to use licensing laws to prevent residents from purchasing insurance from out-of-state insurers; and
- relinquish any role as an insurance regulator.

Regulation Blocks Dependable Health Insurance

Federal and state governments impose countless regulations that increase health insurance premiums, reduce the quality of coverage for all consumers, and limit the right of consumers to purchase the health insurance plans of their choice.

Worse, the Patient Protection and Affordable Care Act's supposed "protections" for preexisting conditions *cause* discrimination against the sick. Such discrimination "completely undermines the goal of the ACA." Regulation-induced discrimination against the sick is so extensive, even "currently healthy consumers cannot be adequately insured against . . . one of the poorly covered chronic disease[s]."

Congress can and should make health insurance better, more affordable, and more secure by repealing the Patient Protection and Affordable Care Act

(ACA, or Obamacare) and other federal health insurance regulations. States likewise can and should eliminate state-level health insurance regulations. At the very least, states should free their residents to purchase insurance from states and U.S. territories with more consumer-friendly regulations.

Community Rating: High Premiums, Junk Coverage

The heart of Obamacare's supposed protections for patients with preexisting conditions is a requirement that insurers offer coverage to all applicants ("guaranteed issue") and price controls on the premiums that insurers can charge ("community rating"). Guaranteed issue requires insurers to offer coverage even to applicants with preexisting medical conditions that by definition are uninsurable.

Community rating limits the ability of insurers to set premiums according to the health risk of individual enrollees. Obamacare requires insurers to cover all comers and to charge all enrollees of a given age the same premium, regardless of health status. Insurers may charge older enrollees no more than three times the youngest enrollees, even though the oldest typically cost six or seven times more. Community rating reduces premiums for enrollees with preexisting conditions at the cost of higher premiums and worse coverage for everyone else.

Obamacare's community-rating price controls are the driving force behind the law's rising premiums. Under Obamacare, premiums in the individual market doubled in four years, an average annual increase of 20 percent. In states like Florida, premiums continue to rise an average 12 percent per year. Women ages 55–64 saw the largest premium increases:

> Total expected premiums and out of pocket expenses rose [in 2014] by 50 percent for women age 55 to 64—a much larger increase than for any other group—for policies on the federal exchanges relative to prices that individuals who bought individual insurance before health care reform went into effect. . . . Premiums for the second-lowest silver policy are 67 percent higher for a 55 to 64-year-old woman than they were pre-ACA.

By 2021, Congress was offering taxpayer subsidies of $12,000 to people earning $212,000 a year just to help them afford Obamacare plans.

Though the purpose of community rating is to make health insurance available to those who had never had health insurance or who lost it before they got sick, an unintended consequence is that it makes health insurance worse for everyone, even those who did purchase it before they got sick. Community rating degrades health insurance quality in several ways.

First, 83 percent of consumers value the freedom to choose when their coverage begins. Markets make this possible by allowing consumers to enroll and switch plans throughout the year. Community rating denies consumers this right by requiring insurers to sell coverage only during specific, brief periods. Outside those "open enrollment" periods, consumers may not purchase coverage. Obamacare's community-rating price controls deny sick and healthy consumers alike the right to enroll in coverage for 9–10 months of the year. In many cases, it denies consumers coverage when they need it most.

Second, community rating penalizes high-quality coverage. Obamacare's community-rating price controls penalize insurers if they offer high-quality coverage that attracts patients with nerve pain (penalty: $3,000 per patient), severe acne ($4,000 per patient), diabetes insipidus or hemophilia A ($5,000 per patient), substance abuse disorder ($6,000 per patient), multiple sclerosis ($14,000 per patient), infertility ($15,000 per patient), or other conditions.

The insurers who suffer those penalties are those that offer better coverage for the sick than their competitors. Community rating therefore forces insurers to eliminate health plans and plan features that sick people value to ensure that they provide *worse* coverage for the sick than their competitors. It even rewards insurers if they unintentionally make coverage worse for the sick, such as by not updating provider networks. If insurers fail to engage in such "backdoor discrimination," community rating threatens them with insolvency.

The result is a race to the bottom. Researchers have shown that community rating eliminated comprehensive health plans for employees of Harvard University, Stanford University, the Massachusetts Institute of Technology, the State of Minnesota, and the federal government. In Obamacare, patient advocacy groups have identified backdoor discrimination against patients with cancer, cystic fibrosis, hepatitis, HIV, and other illnesses as community rating generates "poor coverage for the medications demanded by [sick] patients," restricts patients' choice of doctors and hospitals, and rewards other plan features that make coverage worse for the sick.

Community rating's race to the bottom "undoes intended protections for preexisting conditions," creates a marketplace where even "currently healthy consumers cannot be adequately insured," and "completely undermines the goal of the ACA." Community rating replaces a form of discrimination that affects *few* patients with an arguably worse form of discrimination that harms *all* patients.

Prior to Obamacare, innovations like guaranteed renewability enabled insurers to profit by building up reserves and offering quality coverage for enrollees who became ill. Community rating led insurers to give those reserves away to healthy people. Insurers will always face incentives to renege on their commitments to the sick. Community rating increases those incentives.

Finally, community rating can ultimately cause health insurance markets to collapse, leaving consumers with no way to afford medical care. It has caused the total or partial collapse, for example, of health insurance markets in California, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, New York, Vermont, and Washington.

Obamacare's community-rating price controls caused markets for child-only health insurance to collapse totally in 17 states and partially in 22 states. Obamacare's community-rated long-term-care insurance program collapsed before launch. The Obama administration exempted U.S. territories from community rating lest those markets collapse as well.

The only thing keeping Obamacare from completely collapsing under the weight of community rating is $79 billion in annual taxpayer subsidies, including subsidies of $12,000 for people earning $212,000 a year.

Community Rating Blocks Affordable, Secure, Quality Coverage

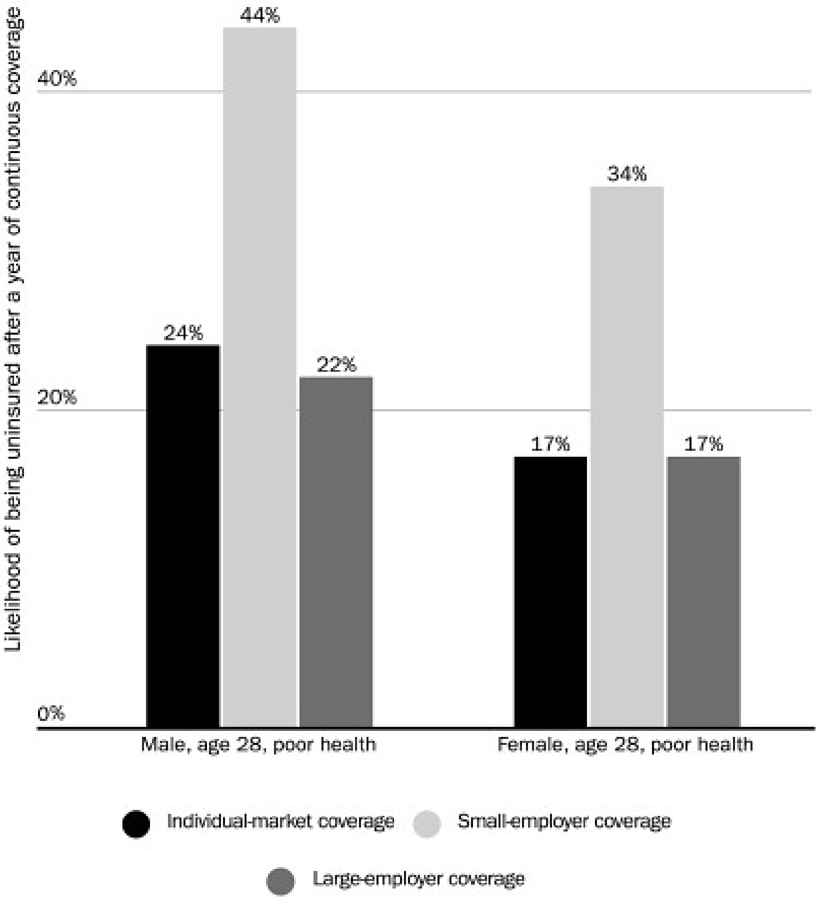
Community rating has destroyed innovative insurance products and prevented the development of further innovations that provide secure coverage to people who develop preexisting conditions.

Guaranteed-renewable health insurance is an innovation that allows consumers who develop preexisting conditions to keep purchasing coverage at healthy-person premiums. Prior to Obamacare, even though insurers could deny coverage or charge higher premiums to those with preexisting conditions, consumers in poor health with guaranteed renewable coverage were less likely to lose their coverage and end up uninsured than consumers in poor health who had employer-sponsored coverage (see Figure 1). Insurers build up reserves to cover those costs. When Obamacare imposed community rating, it made guaranteed-renewable health insurance impossible and transferred resources away from the sick. Blue Cross and Blue Shield of North Carolina, for example, had accumulated a $156 million guaranteed-renewability reserve fund to cover its sickest enrollees. Community rating led the insurer to return that money to policyholders as refunds averaging $725 each—that is, to take money that markets had set aside for the sick and give it away to the healthy.

Obamacare destroyed another innovation that markets had just begun to introduce. In 2008 and 2009, insurance regulators in 25 states approved the sale of "preexisting-conditions insurance." These products protected workers with employer-sponsored health insurance against higher premiums if they transitioned to an individual-market plan after falling ill. Like guaranteed renewability, preexisting-conditions insurance allowed those who developed

Figure 1

Guaranteed renewability makes individual-market coverage more secure than employer coverage, 2000–2004



Source: Mark V. Pauly and Robert D. Lieberthal, "How Risky Is Individual Health Insurance?," *Health Affairs* 27, no. 1 (2008), https://doi.org/10.1377/hlthaff.27.3.w242.
Note: Assumes family income of $50,000 annually, expecting a 4 percent increase in income.

an expensive, long-term medical condition to keep paying healthy-person premiums. UnitedHealth Group offered this revolutionary product for 20 percent of the cost of the underlying individual-market policy.

Community rating is blocking additional innovations. Two examples illustrate the possibilities. Law professors Peter Siegelman and Tom Baker explain how insurers could make health insurance more attractive to so-called young invincibles, and thus induce them to purchase it voluntarily, by offering cash back to people who don't file claims. Economist John Cochrane explains how insurers could offer total satisfaction guarantees. Insurance contracts could allow sick enrollees who grow dissatisfied with their coverage to fire their insurance company, receive a large cash payout, and then choose from among other carriers who would compete to cover rather than avoid them. Markets protect the sick from incentives that insurers face to renege on their commitments. Obamacare increases those incentives.

For all the damage guaranteed-issue and community-rating regulations cause, they appear to offer little benefit when it comes to expanding coverage to the sick. After studying community rating versus unregulated markets (i.e., before Obamacare-imposed community rating in all states), economist Mark Pauly and his colleagues concluded:

> We find that [community rating] modestly tempers the (already-small) relationship of premium to risk, and leads to a slight increase in the *relative* probability that high-risk people will obtain individual coverage. However, we also find that the increase in overall premiums from community rating slightly reduces the total number of people buying insurance. All of the effects of regulation are quite small, though. We conjecture that the reason for the minimal impact is that guaranteed renewability already accomplishes a large part of effective risk averaging (without the regulatory burden), so additional regulation has little left to change.

If Obamacare has expanded coverage, its vast subsidies for insurance companies are the reason.

Additional Harmful Regulations

State and federal governments have enacted additional health insurance regulations that harm patients.

"Any-willing-provider" laws increase prices for medical care and health insurance. Insurers frequently negotiate discounts from providers. In exchange, they steer enrollees toward those providers. More than half the states have enacted any-willing-provider laws, which require insurers to offer the same payment levels to all providers. "Any-willing-provider legislation removes the incentive to compete aggressively on a price basis," writes health economist Michael Morrisey. "No one has an incentive to offer much of a discount since discounts will result only in lower prices with little or no expanded volume." The results are higher prices for medical care and higher health insurance premiums.

State and federal governments make health insurance less affordable by requiring consumers to purchase coverage they do not want. Many states require consumers to purchase coverage for services that some may consider quackery, such as acupuncture, chiropractic, and naturopathy. Thirty-three states require consumers to purchase at least 40 types of mandated coverage. States have also required consumers to purchase coverage for medical treatments that later proved *harmful* to health, such as hormone replacement therapy and high-dose chemotherapy with autologous bone marrow transplant for breast cancer.

States impose many additional regulations on insurance pools, from premium taxes to rules that reduce insurers' ability to limit fraud and wasteful services. The nonpartisan Congressional Budget Office has estimated that, on average, state health insurance regulations increase premiums by 13 percent. States then prevent individuals and employers from avoiding unwanted regulatory costs by prohibiting them from purchasing health insurance from jurisdictions with more consumer-friendly regulations.

Repeal Obamacare

Congress should repeal Obamacare and replace it with reforms that allow better, more affordable, and more secure health care. Premiums would fall for millions of Americans who would no longer have to buy coverage they do not want or pay the hidden taxes that further increase their premiums. Consumers could purchase coverage that is more secure than either ACA coverage or employer-sponsored insurance. They would have the option to purchase preexisting-conditions insurance, which would provide protection from the financial costs of long-term illness at a fraction of the cost of a standard health insurance plan. Consumers could look forward to the day when health insurance comes with total-satisfaction guarantees that force insurers to compete aggressively on quality.

Merely repealing Obamacare is not enough to improve quality and expand access for everyone currently receiving subsidies under its auspices. Federal and state policymakers must take additional steps (see the remainder of this chapter plus "Health Care Regulation," "The Tax Treatment of Health Care," "Medicare," and "Medicaid and the Children's Health Insurance Program").

As Congress takes these steps to transition the U.S. health care sector from a government-run system to a market system, political necessity may require Congress to offer transitional assistance to the relatively small number who receive coverage under Obamacare but would not see their premiums fall after repeal. The block grants that "Medicaid and the Children's Health Insurance Program" recommends could provide such assistance. If repealing Obamacare is politically infeasible at the moment, state and federal lawmakers can allow alternatives to free consumers from Obamacare's junk coverage. Alternative coverage options can coexist alongside Obamacare, reduce its premiums by giving sicker patients a better alternative, and provide a benchmark against which to measure Obamacare's performance.

Congress already exempts certain health plans from Obamacare's harmful regulations. Federal law has exempted "short-term, limited-duration" insurance (STLDI) from nearly all federal regulation for decades. Such plans often cost 70 percent less than Obamacare plans and offer a broader choice of doctors and hospitals. In 2018, federal regulators clarified that the exemption is broad enough that insurers can pair these plans with renewal guarantees to provide secure, long-term coverage. (A better descriptor of such plans is "renewable, term health insurance.") Congress should encourage insurers to enter the market and prevent future regulators from later denying consumers these choices by codifying that interpretation. States should likewise exempt such plans from their own regulations and give consumers full flexibility to take advantage of these plans. Specifically, states should let consumers (1) purchase STLDI with an initial term of up to 12 months, (2) renew the initial STLDI contract for up to 36 months, and (3) purchase stand-alone "renewal guarantees" that protect them from reunderwriting in perpetuity.

The Obama administration allowed another alternative to Obamacare. In 2014, it ruled that Obamacare's most expensive regulations—"guaranteed availability, community rating, single risk pool, rate review, medical loss ratio and essential health benefits"—do not apply in U.S. territories. States can and should make health insurance better, more affordable, and more secure by allowing their residents (including employers) to purchase health plans available in American Samoa, Guam, the Northern Marianas Islands, Puerto Rico, or the U.S. Virgin Islands. Major insurers with networks in the 50 states—including Aetna, UnitedHealthcare, Humana, and Blue Cross Blue Shield—already do business in the territories. Restoring the right of state residents to purchase such plans would also provide an economic boost to struggling territories.

Several states allow associations of farmers ("Farm Bureaus") to offer health insurance free from costly state regulations. Farm Bureau coverage presents another opportunity for insurers to choose lower-cost plans that provide secure coverage through innovations such as renewal guarantees, and that can therefore improve Obamacare risk pools and reduce Obamacare premiums. All states should allow Farm Bureaus and other associations to offer such coverage.

State insurance regulators often inhibit entry by defining innovations in health care delivery as insurance, and therefore subjecting them to onerous and inappropriate regulation. "Direct primary care" (DPC) allows consumers to get quicker access to primary care by paying a monthly or yearly subscription fee. Since DPC involves some pooling of medical expenses, regulators often define it as insurance. Dozens of states have enacted laws putting DPC outside the reach of insurance regulators. All states should do so.

Repeal State Insurance-Licensing Laws

State insurance-licensing laws give each state's insurance regulators a monopoly over providing consumer protections to insurance purchasers. Regulators then do what all monopolists do: provide a low-quality product at an excessive cost.

The best solution is for states to repeal insurance-licensing laws. Full liberalization would maximize quality, affordability, and innovation. It would eliminate government's ability to use insurance regulations to redistribute income, or to shower rents on favored special interests. Competition and government enforcement of contracts would continue to provide the financial solvency protections and other safeguards that insurance purchasers demand.

If repealing insurance-licensing laws is politically infeasible, preliminary steps could provide nearly as much benefit to consumers. Under one approach, the federal or state governments would allow individuals and employers to purchase health insurance licensed by other states. If purchasers are content with their own state's consumer protections, they could continue to purchase a policy their state licenses. If their state imposes too many mandates, or prevents insurance pools from protecting participants from irresponsible or opportunistic behavior, they could choose an insurance plan from a state with more consumer-friendly regulations.

"Regulatory federalism" would increase competition in health insurance markets. Insurers would face lower barriers to introducing products into new states. As a result, consumers would have much greater choice among cost-saving features (e.g., cost sharing and care management), provider financial incentives (fee-for-service, prepayment, and hybrids of the two), and delivery systems (integrated, nonintegrated, and everything in between). (See "Health Care Regulation.") Insurance pools would be more stable, and consumers would have more freedom to obtain coverage that fits their needs.

Perhaps most important, regulatory federalism would force insurance *regulators* to compete with one another to provide the optimal level of regulation. States that impose unwanted regulatory costs on insurance purchasers would see their residents' business—and their premium tax revenue—go elsewhere. The desire to retain premium tax revenue would drive states to eliminate unwanted, costly regulations and retain only those regulations that consumers value. One or a handful of states would likely emerge as the dominant regulators in a national marketplace, just as Delaware created a niche for itself by offering a hospitable regulatory environment for corporate chartering, and South Dakota did the same with credit card operations.

Some critics claim that letting individuals and employers purchase coverage from other states would lead to a race to the bottom as states eager to attract premium tax revenue would eliminate all regulatory protections or skimp on enforcement. On the contrary, it is regulatory monopolies and specific regulations like community rating that create a race to the bottom. Competition *prevents* a race to the bottom. As producers of consumer protections, states are unlikely to attract or retain premium-tax revenue by offering an inferior product. Consumers and ultimately insurers would avoid states whose regulations prove inadequate. The first people to suffer from insufficient consumer protections, moreover, would be residents of that state, who would then demand that their legislators enact better consumer protections. Regulatory federalism would not produce a race to the bottom but a race to consumer satisfaction where states only adopt consumer protections whose benefits justify the costs.

To enforce consumer protections, states could require insurers to incorporate the licensing state's regulations into the insurance contract. That way, consumers could enforce other states' regulations in their own state, rather than in the state that licensed the insurance policy. Such "choice-of-law" decisions are complex but rest on extensive legal doctrine and precedent. A state's insurance regulators could even play a role in policing and enforcing other states' regulatory protections.

Ideally, each state would unilaterally give its residents the right to purchase insurance from any other state. All that each state and territory need do is deem insurance policies that hold licenses from other states or territories as being in compliance with that state's laws.

A surer approach might be for Congress to act. The U.S. Constitution grants Congress the power to regulate commerce among the states largely to prevent states from erecting trade barriers that keep out products from other states. Insurance-licensing laws are a clear example of such trade barriers. Congress need not alter any state's health insurance regulations. All that is necessary is for Congress to require states and territories to recognize the insurance licenses from other states and territories.

The Constitution does not grant Congress the power to regulate health insurance, however. Thus, the same legislation should relinquish any role for Congress as an insurance regulator. When Congress assumes that role, it becomes a monopoly provider of consumer protections. The result is high-cost, low-quality coverage that is far more difficult to dislodge than state regulation.

Any federal law aimed at regulatory federalism must do nothing more than allow consumers to purchase health insurance regulated by another state and ensure that those are the only regulations that govern. If Congress uses the opportunity to regulate health insurance itself, reform will not have been worth the effort.

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—Prepared by Michael F. Cannon

65. THE TAX TREATMENT OF HEALTH CARE

State legislators should

- avoid creating any preferential tax treatment for health insurance or medical care; and
- eliminate existing tax preferences for health insurance and medical care while reducing the overall tax burden.

Congress should

- avoid creating health insurance tax credits or any other preferential tax treatment for health insurance or medical care;
- replace all existing health-related tax preferences with an income- and payroll-tax exclusion for "large" health savings accounts; and subsequently
- adopt a new tax system that reduces tax rates by eliminating all tax preferences for particular forms of consumption.

One of the most far-reaching and damaging ways that government intervenes in the health sector of the economy is through tax laws. The U.S. government taxes incomes and payrolls. Many state governments tax incomes. In each case, governments exempt certain health-related uses of income from taxation. Treating health and nonhealth consumption differently under the tax code effectively penalizes taxpayers who do not spend their money on the goods and services government favors.

State and federal policymakers should eliminate all such targeted tax preferences, which have done enormous harm to consumers and patients. If government must tax incomes, it should tax all income equally.

The imperative of eliminating targeted tax preferences has bedeviled policymakers for decades. The best politically feasible option is to expand tax-free health savings accounts (HSAs).

The Tax Exclusion for Employer-Sponsored Health Insurance

By far the largest of these tax preferences is the exclusion from the federal income and payroll tax bases of employer-sponsored health insurance benefits. Workers who receive income from an employer in the form of health insurance pay no income or payroll tax on the money the employer pays toward the premium. Under so-called Section 125 plans, many workers pay no tax on the portion of the premium they pay, either. Federal and state governments exclude that spending from the income and payroll tax bases.

As a result of the tax exclusion for employer-sponsored health insurance, federal and state tax codes effectively penalize workers who choose not to enroll in employer-sponsored health insurance. Workers who do not enroll in such plans pay higher taxes than workers who do. If two jobs offer equivalent total compensation but one offers health coverage and the other offers higher cash wages, the tax code effectively penalizes the worker who chooses the job that offers higher cash wages. In 2021, the average annual premium for employer-sponsored family coverage was $22,221 (of which the employer pays $16,253 and the worker pays $5,969). Assuming a marginal tax rate of 33 percent, the tax code effectively penalizes the worker $7,333 for taking the second job. The additional income and payroll taxes the worker must pay are the functional equivalent of a penalty for making the "wrong" choice.

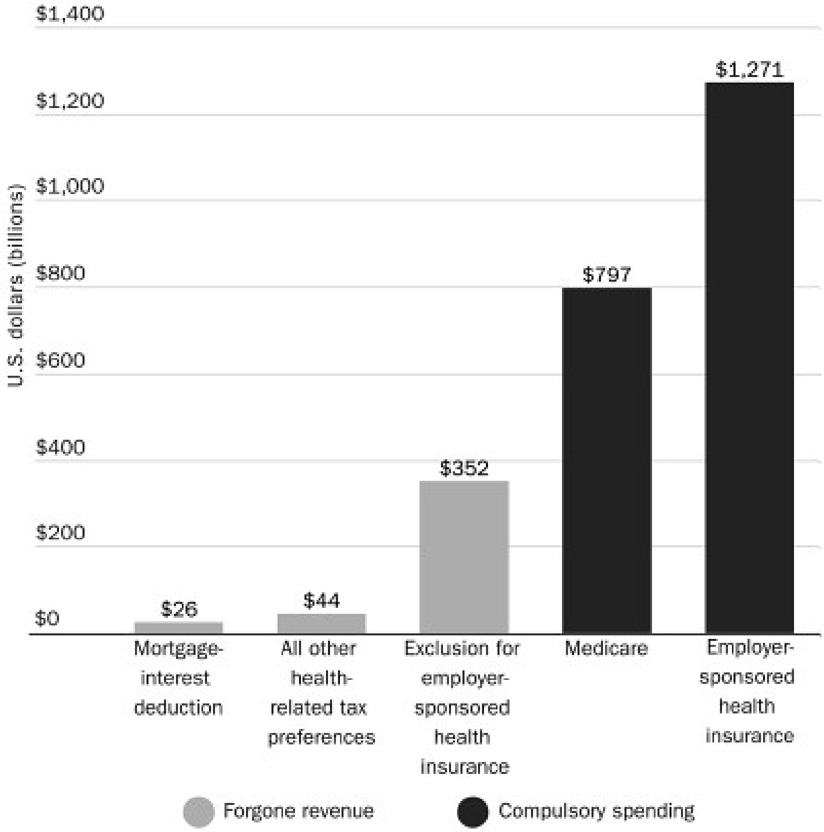
Economy-wide, employers and workers will spend $1.3 trillion on employee health benefits in 2022. Employers will pay $944 billion on their workers' behalf; workers will pay $327 billion directly. If all workers declined their health benefits, they would retain that $327 billion and a competitive labor market would return the remaining $944 billion to them. The tax code would then treat all $1.3 trillion as taxable income and force workers to pay roughly an additional $352 billion in taxes, effectively penalizing workers for not allowing their employers to control $1.3 trillion of their earnings and their health insurance decisions.

Policymakers and scholars describe the exclusion as a tax break. It is more accurate and useful to recognize that it turns income and payroll taxes into an implicit penalty on workers who do not (a) surrender control of a sizable portion of their earnings to an employer; (b) enroll in a health plan that their employers choose, control, and revoke upon separation; and (c) pay the balance of the premium directly. Those implicit penalties collectively deny workers control of $1 trillion of their earnings per year.

The tax exclusion for employer-sponsored health insurance is the largest source of compulsory spending in the United States, larger than the federal Medicare program (see Figure 1). It is the principal reason why the United States ranks far and away the highest among advanced nations in compulsory

Figure 1

Employer-sponsored health insurance is the largest source of compulsory health spending in the United States, 2022

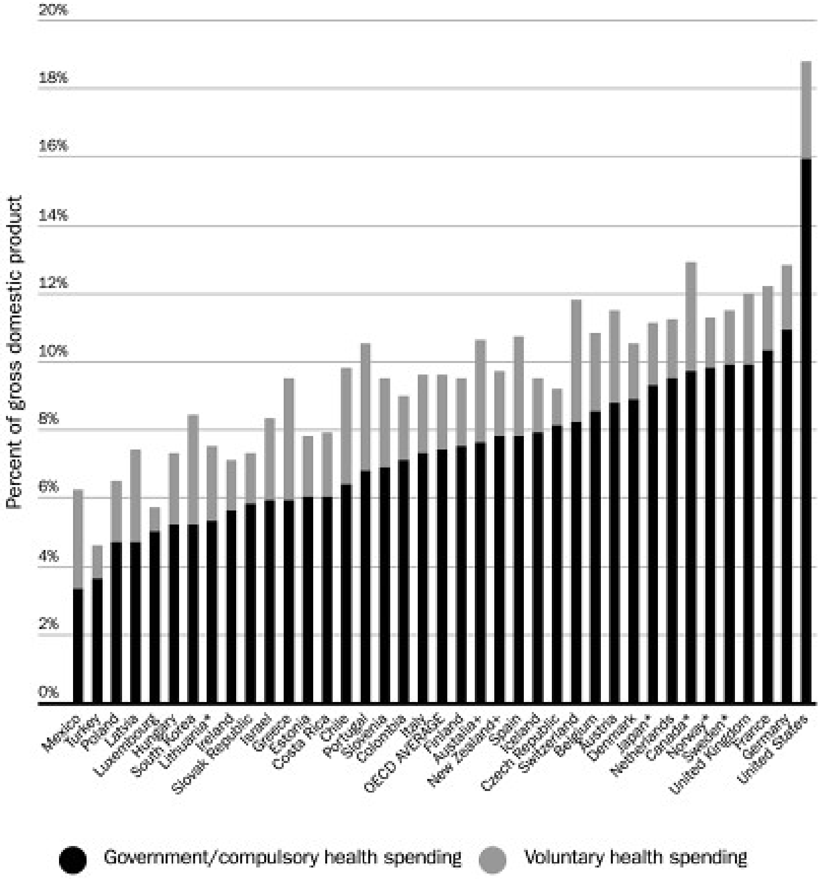


Sources: U.S. Office of Management and Budget, "Tax Expenditures," in *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2022* (Washington: Government Publishing Office, 2021), pp. 111, 113; "The Budget and Economic Outlook: 2021 to 2031," Congressional Budget Office, February 2021, p. 5; Boards of Trustees, "2021 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds," Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, August 31, 2021, p. 111; National Health Statistics Group, "Table 5-6—Private Health Insurance by Sponsor: Calendar Years 1987–2020," Office of the Actuary, Centers for Medicare & Medicaid Services, Department of Health and Human Services; National Health Statistics Group, "Table 16—National Health Expenditures (NHE), Amounts and Average Growth Annual Growth from Previous Year Shown, by Type or Sponsor, Selected Calendar Years 2011–2028," Office of the Actuary, Centers for Medicare & Medicaid Services, Department of Health and Human Services; and author's calculations.

health spending as a share of GDP (see Figure 2) and eighth highest among advanced nations in compulsory health spending as a share of total health spending (see Figure 3), why 56 percent of the U.S. population obtains health insurance through an employer, and why only 10 percent obtain it directly from an insurance company.

Figure 2

Government compels U.S. residents to spend a larger share of GDP on health care than residents of other OECD nations, 2020



Source: "Health spending Total/Government/compulsory, % of GDP, 2020," Organisation for Economic Co-operation and Development, https://data.oecd.org/chart/6Lr9.

Note: OECD = Organisation for Economic Co-operation and Development; GDP = gross domestic product.

*provisional data

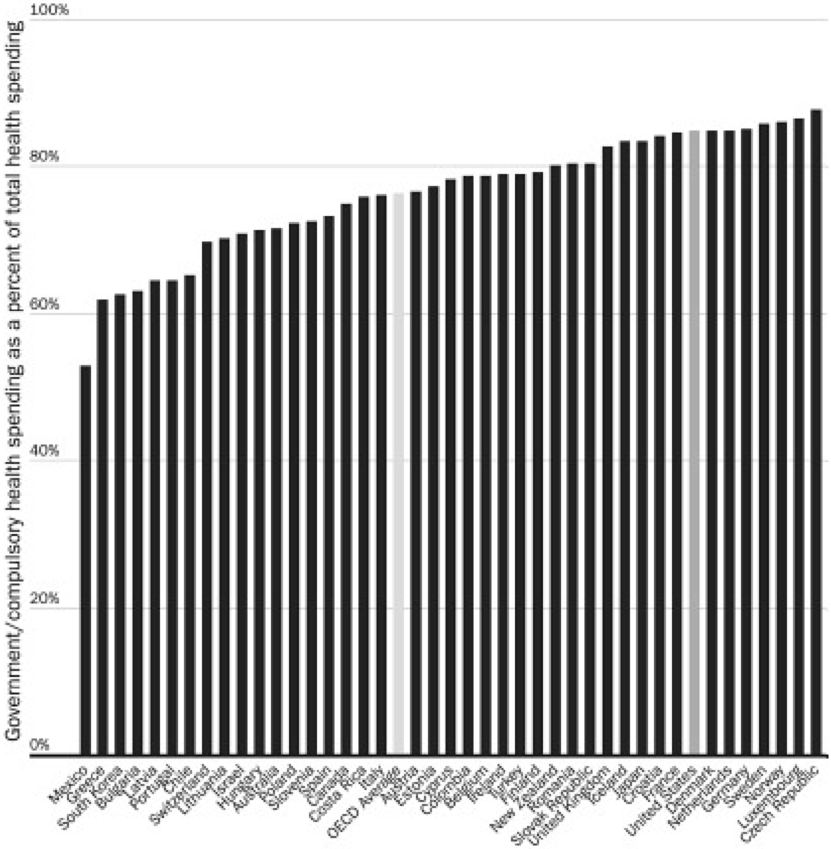
+estimated data

Harms of the Tax Exclusion

The exclusion does enormous harm to consumers and patients. It generates excessive prices, premiums, and preexisting conditions. It restricts consumer choice: 80 percent of covered workers have only one or two plan types from which to choose. It inhibits wage growth and improvements in health care quality. It makes workers more vulnerable to public-health crises. It reduces economic productivity on the order of 1 percent of GDP each year.

Figure 3

Compulsory spending comprises a larger share of health spending in the United States than in most other OECD nations, 2020



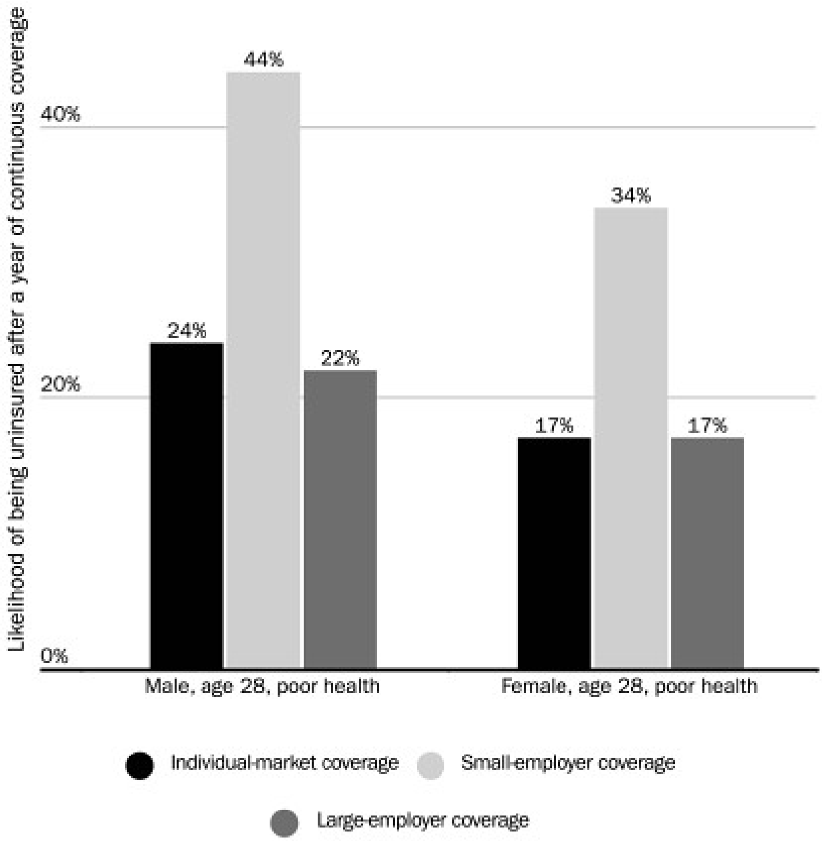
Source: "Health Spending: Government/Compulsory, % of Health Spending, 2020," Organisation for Economic Co-operation and Development, https://data.oecd.org/chart/6LrL.
Note: OECD = Organisation for Economic Co-operation and Development.

The exclusion leaves many workers who should and could have had secure health insurance coverage with uninsured and uninsurable preexisting conditions. The average worker changes jobs a dozen times by age 52. Health insurance that consumers purchase directly from an insurance company covers the policyholder between jobs and into retirement. In 1964, "many Americans over sixty-five were covered by health insurance policies that were guaranteed renewable for life" because more than 70 insurance companies offered such coverage.

The exclusion penalizes workers unless they enroll in health insurance that automatically disappears when they quit their job, lose their job, keep their job but lose their benefits, lose a spouse to divorce or death, age off a parent's

Figure 4

For enrollees in poor health, individual-market coverage is similarly or more secure than employer coverage, 2000–2004



Source: Mark V. Pauly and Robert D. Lieberthal, "How Risky Is Individual Health Insurance?," *Health Affairs* 27, no. 1 (2008).
Note: Assumes family income of $50,000 annually, expecting a 4 percent increase in income.

plan, retire, or become too sick to work. The exclusion thus strips workers of their coverage after they develop an expensive medical condition. Workers in poor health are roughly twice as likely to end up with no insurance if they obtained coverage from a small employer versus purchasing it themselves (see Figure 4). In 1964, the elderly had lower rates of health insurance than the overall population. A principal reason was "many . . . who had insurance coverage before retirement were unable to retain the coverage after retirement . . . because the policy was available to employed persons only." For decades, the tax code has literally penalized workers who choose more-secure health insurance.

Economists Martin Feldstein and Bernard Friedman write, "It can with justice be said that the tax [exclusion] has been responsible for much of the health care crisis."

One Mistake That Launched Hundreds More

The exclusion has prompted Congress to intervene in the health sector again and again to mitigate its harmful effects.

- In 1965, Congress created Medicare largely to help seniors whom the exclusion stripped of their insurance. Since Congress based Medicare coverage on the (excessive) coverage employers offered, the exclusion indirectly increased the cost of Medicare. (Meanwhile, Medicare's ever-rising payroll tax increased the exclusion's impact by increasing its implicit penalties.)
- Also in 1965, Congress created Medicaid to help patients who could not afford the excessive prices that were the result of the exclusion.
- In 1973, Congress passed the Health Maintenance Organization (HMO) Act to subsidize and require certain employers to offer health plans that the exclusion discourages.
- In 1974, Congress enacted the National Health Planning and Resources Development Act, which encouraged states to enact "certificate of need" laws to curb the excessive health spending the exclusion encourages.
- In 1978, Congress made employee payments toward employer-plan premiums eligible for the exclusion—thereby trying to make health insurance affordable by expanding a policy that makes it more expensive.
- In 1985, Congress enacted the Consolidated Omnibus Budget Reconciliation Act (COBRA) to aid workers whom the exclusion strips of their coverage.
- In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) to help those who lose the coverage the exclusion forced them to take.
- In 1997, Congress created the State Children's Health Insurance Program (SCHIP) to aid families for whom the exclusion made coverage too expensive.
- In 2009, Congress enacted the Health Information Technology for Economic and Clinical Health (HITECH) Act to encourage electronic medical records, which the exclusion discourages.
- In 2010, Congress passed the Patient Protection and Affordable Care Act (Obamacare) to aid patients whom the exclusion leaves with uninsurable preexisting conditions.

- In 2020, Congress passed the No Surprises Act to discourage surprise medical bills, which the exclusion encourages.

Since creating Medicare, Medicaid, SCHIP, and Obamacare, Congress has continuously expanded each to aid those who cannot afford health insurance or medical care at the excessive prices the exclusion generates. Federal antitrust authorities have repeatedly taken action against market consolidation that the exclusion encourages. Congress has enacted countless other pieces of legislation to counteract the exclusion's cost-increasing and quality-suppressing effects. Rather than resolve the situation, each of these efforts makes the exclusion's underlying problems worse.

Congress has also expanded the exclusion with various spending or savings vehicles that allow workers to purchase medical care tax-free. One of those vehicles—tax-free HSAs—creates an opportunity to return to workers control of the $1 trillion of their earnings that the exclusion denies them.

Reforming the Tax Exclusion with Large HSAs

Individuals have a right to choose for themselves whether, where, and how much health insurance and medical care to purchase without government penalizing them. The tax system should offer no special tax breaks or penalties for health-related expenditures or any other type of consumption.

The best way to eliminate tax-based distortions of workers' health care decisions is to eliminate income and payroll taxes, which have done enormous harm to workers. Barring that, federal lawmakers should eliminate the exclusion for employer-sponsored insurance and other health-related tax preferences. Those options do not appear politically feasible at present. The repeal of the "Cadillac tax," which would have merely limited the exclusion, suggests workers will resist reforms that merely eliminate health-related tax breaks.

The best politically feasible way to reform the tax treatment of health care is by changing the current exclusion into an exclusion for larger, more flexible HSAs.

HSAs enable workers to save money for their health care expenses tax-free. At present, employer contributions to a worker's HSA enjoy the same tax-free status as employer-paid insurance premiums. As a result, workers do not have to surrender those earnings to their employer to avoid the exclusion's implicit penalties. Taxpayers can also make tax-preferred contributions themselves. Account holders can use HSA funds to purchase qualified medical expenses, tax-free, from any source. HSA funds belong to the individual, follow the individual from job to job, and grow tax-free.

Still, HSAs enable workers to control only a small portion of the dollars and decisions that tax laws allow employers to control. HSAs create tax parity only for the funds that account holders contribute to the HSA to cover out-of-pocket medical expenses. If workers want to purchase their own health insurance, generally they must still pay the premiums with after-tax dollars. Only consumers with insurance that meets Congress's rigid definition of a "qualified high-deductible health plan" can make tax-free HSA deposits. HSAs are small comfort to workers whose employer doesn't offer them, or who dislike the one narrow type of health plan Congress permits HSA holders to obtain.

Nevertheless, HSAs present an opportunity to enact reforms that would make health care better, more affordable, and more secure. Congress should take these steps to expand HSAs:

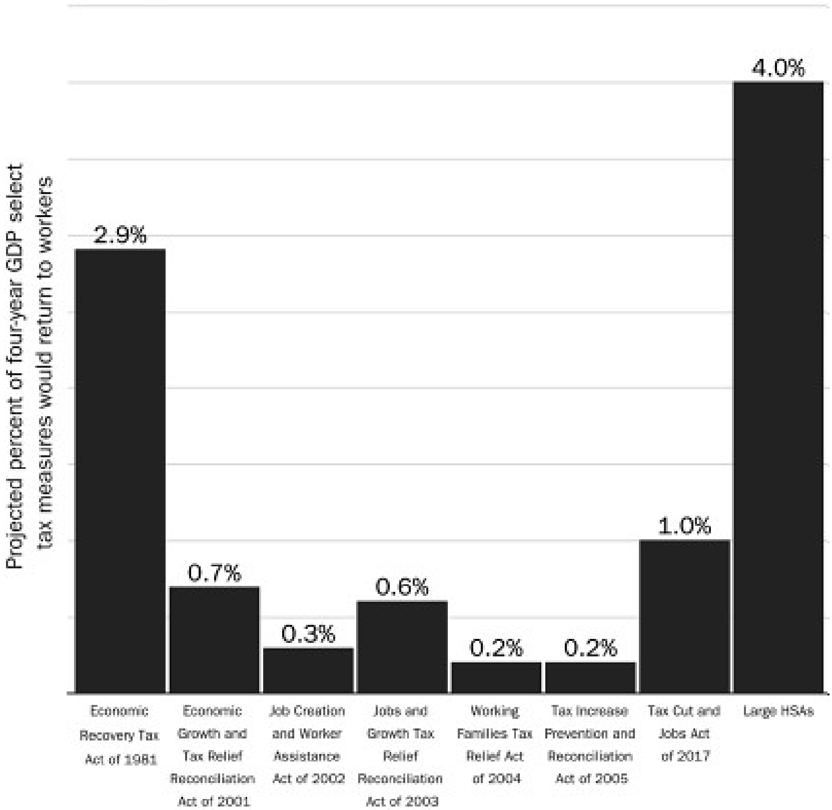
- eliminate all other health-related tax preferences;
- apply the tax exclusion for employer-sponsored health insurance solely to funds that individuals or employers contribute to an HSA;
- increase HSA contribution limits dramatically, from $3,650 for individuals and $7,300 for families to (say) $9,000 for individuals and $18,000 for families;
- remove the requirement that HSA holders obtain a qualified high-deductible health plan, or any health plan; and
- allow HSA holders to purchase health insurance, of any type and from any source, tax-free with HSA funds.

Replacing all existing health-related tax preferences with one tax break for "large" HSAs would limit the exclusion and all tax-based distortions of the health sector. It would free workers to choose their doctor and their health plans without penalty.

Large HSAs would minimize political resistance to reform. First, rather than increase taxes as the Cadillac tax did, large HSAs would give all workers an effective tax cut. Even if large HSAs were revenue neutral, and even though some workers whose prior health benefits spending exceeded the higher contribution limits would face a higher explicit tax liability, nearly all workers would receive an effective tax cut because they would get to control a large portion of their income that their employer currently controls. Workers with family coverage would gain control of an average $16,253 that they currently do not. That effective tax cut would swamp any additional tax liability that some workers might pay. Economy-wide, large HSAs would allow workers to gain control of $1 trillion of their earnings each year. Large HSAs are the only reform that includes a mechanism to return those earnings to workers immediately. They would return to workers a larger share of GDP than even the Reagan tax cuts

Figure 5

Expanding health savings accounts could return a larger share of GDP to workers than past tax cuts



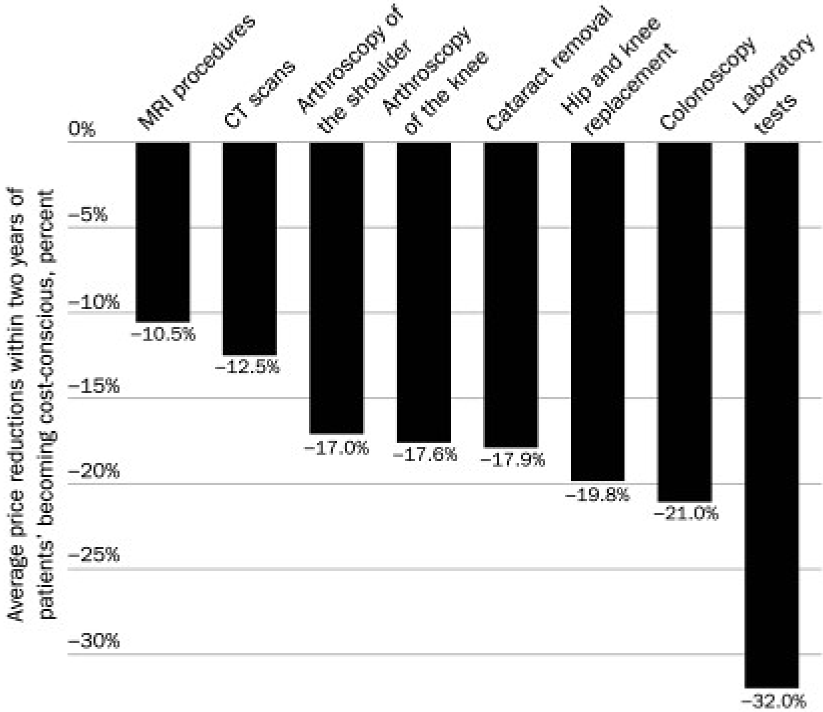
Sources: Jerry Tempalski, "Revenue Effects of Major Tax Bills, Updated Tables for All 2012 Bills," Office of Tax Analysis, Department of the Treasury, February 2013; National Health Statistics Group, "Table 5-6—Private Health Insurance by Sponsor: Calendar Years 1987–2020," Office of the Actuary, Centers for Medicare & Medicaid Services, Department of Health and Human Services; and National Health Statistics Group, "Table 16—National Health Expenditures (NHE), Amounts and Average Growth Annual Growth from Previous Year Shown, by Type or Sponsor, Selected Calendar Years 2011–2028," Office of the Actuary, Centers for Medicare & Medicaid Services, Department of Health and Human Services; Congressional Budget Office, "Re: Cost Estimate for the Conference Agreement on H.R. 1, a Bill to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018," letter to Kevin Brady (chair of the House Committee on Ways and Means), December 15, 2017; Office of Management and Budget, "Historical Tables, Budget of the United States Government, Fiscal Year 2019," February 12, 2018, p. 27; and author's calculations.

Notes: GDP = gross domestic product; HSA = health savings account.

of 1981 (see Figure 5). Second, workers and employers who like their current health insurance arrangements could keep them.

Large HSAs would reduce barriers to innovative insurance products. Workers could choose any health plan they like and would become cost-conscious when

Figure 6
Cost-consciousness lowers prices, 2008–2014



Source: James Robinson, Timothy Brown, and Christopher Whaley, "Reference Pricing Changes the 'Choice Architecture' of Health Care for Consumers," Health Affairs 36, no. 3 (March 2017): 524–30.

shopping for insurance in a way they have never been. This dynamic would eliminate the tax code's barriers to prepaid group plans and thereby bring innovations like comparative-effectiveness research, electronic medical records, and coordinated care within the reach of hundreds of millions of Americans. The change would drive down prices by encouraging the growth of retail clinics and removing barriers to reverse deductibles, which have saved consumers thousands of dollars on medical procedures (see Figure 6). Large HSAs could change the politics of health care by making consumers more conscious of the costs of government regulation.

Endgame: Tax Neutrality for Health Care

Large HSAs would facilitate the transition to a tax system that contains no special preferences—exclusions, deductions, exemptions, or credits—for health care or any other form of consumption. They would allow such fundamental tax reform to proceed in two steps. First, they would give workers immediate control of the $1 trillion that employers now spend on their workers' behalf. All other reforms of the exclusion create uncertainty about what will become of those funds. Large HSAs eliminate that uncertainty by immediately delivering those funds to workers. Second, once workers control those funds, Congress could enact fundamental reform without the obstacle of consumers' anxieties about whether they will be able to keep their health insurance or whether employers will return to them what is rightfully theirs. With large HSAs, it would be far easier for Congress to transition to a flat, fair, or national sales tax.

The tax exclusion for employer-sponsored health insurance is why the United States does not have, and never has had, a private or voluntary or market-based health insurance system. The United States will not have a consumer-centered health sector until workers control the $1.3 trillion of their earnings that the exclusion now lets employers control.

Congress should act immediately to eliminate the exclusion. At a minimum, it should reduce the harms that the exclusion causes by taking serious steps to reform it. Replacing the exclusion with large HSAs is the best politically feasible option.

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—Prepared by Michael F. Cannon

66. MEDICARE

Congress should

- phase out Medicare in favor of a better system as rapidly as possible;
- take every opportunity to cut Medicare spending;
- give Medicare's entire budget directly to enrollees as cash ("Medicare checks");
- give higher payments to enrollees with lower lifetime incomes and higher disease burdens, in a budget-neutral manner;
- eliminate quality-suppressing regulations (e.g., community-rating price controls) and regulations that favor particular levels or types of health insurance for Medicare enrollees;
- limit the growth of Medicare spending to gross domestic product growth (at most);
- allow current workers to save their Medicare payroll taxes in personal, inheritable accounts that would gradually replace Medicare checks; and
- fund any transition costs by reducing other government spending.

Since 1965, the U.S. Medicare program has denied workers the right to decide whether and how to spend their money on medical care. It has increased prices for medical care and health insurance, including for nonenrollees, and has reduced health care quality.

Congress finances Medicare spending by taxing younger workers. The program currently spends roughly $1 trillion per year to subsidize health care for 64 million enrollees who are elderly, are disabled, or who meet other criteria. In dollar terms, Medicare is the largest purchaser of medical care goods and services in the world—in part because it pays excessive prices to health care providers and wastes hundreds of billions of dollars on medical care that provides no value to enrollees.

Perhaps worst of all, Medicare is junk insurance. For more than 50 years, Medicare has had a negative impact on the quality of health care that both enrollees and nonenrollees receive. When researchers complain about fee-for-service payment, wasteful care, low-quality care, harmful care, medical errors, health care fraud, excessive profits, high administrative costs, federal deficits and debt, the time bomb of entitlement spending, special-interest influence over health care, or the lack of innovation in health care delivery, evidence-based medicine, electronic medical records, accountable care organizations, telemedicine, or coordinated care—in every case they are complaining about Medicare.

Though neither Republicans nor Democrats like to admit it, Medicare is already a voucher program that allows enrollees to choose to receive their subsidy either through a government-run health plan (traditional Medicare) or private insurers (Medicare Advantage).

The key to improving health care for Medicare enrollees and reducing the burden Medicare imposes on taxpayers is to make that voucher explicit and as flexible as possible—that is, to subsidize Medicare enrollees with cash and trust them to spend it, just as Social Security does.

A Result, and a Font, of Government Failure

Congress created Medicare in 1965 to fix a problem that Congress itself caused. By 1964, private health insurance that covered workers into retirement was widely available. More than 70 insurance companies offered such coverage and "many Americans over sixty-five were covered by health insurance policies that were guaranteed renewable for life." Yet only one-third to one-half of seniors had meaningful health insurance. Why?

For 45 years leading up to 1965, the federal tax code *penalized* workers if they purchased seamless health insurance plans that covered them into retirement. In 1964, the federal government wrote, "Several factors contribute to th[e] lack of coverage among elderly people," in particular, "many of these persons who had insurance coverage before retirement were unable to retain the coverage after retirement . . . because the policy was available to employed persons only." (See "The Tax Treatment of Health Care.")

Rather than fix the underlying problem that Congress itself created, Congress created Medicare, which made the underlying problem worse.

Low-Quality Medical Care

Much of the $1 trillion Medicare spends goes toward medical care that provides at least some value to patients. It would be difficult even for the federal government to spend that much money without producing any benefit. Yet Medicare spends vast sums on medical care that provides little or no benefit to patients. Medicare subsidies encourage the consumption of low-value care, while the rules Congress attaches to those subsidies reward low-quality care and discourage many quality improvements.

An enormous portion of what Medicare spends appears to produce no benefit at all. The *Dartmouth Atlas of Health Care* and other research estimate that one-third *or more* of Medicare spending provides no value whatsoever: it makes the patient no healthier or happier. Those estimates relate to medical services that provides *zero* value; they do not include spending on services that provide some benefit but whose benefits are so small that the patient would rather have spent the money on something else. Including those expenditures, even more than one-third of Medicare spending is on net harmful to society.

One potential reason so much Medicare spending does not benefit patients is that Medicare has had a profound negative impact on health care quality. Medicare notoriously pays providers more for low-quality care and less for high-quality care. In 2003, the Medicare Payment Advisory Commission warned Congress: "In the Medicare program, the payment system is largely neutral or negative towards quality. . . . At times providers are paid even more when quality is worse, such as when complications occur as the result of error." A 2016 study, for example, found Medicare paid low-quality hospitals an average of $2,698 more per patient than it paid high-quality hospitals.

A landmark study by economists Amy Finkelstein and Robin McKnight found that, although Medicare undoubtedly purchases some life-saving medical care, it does not appear to have saved any lives in its first 10 years and that on balance it may produce no net societal benefits:

> Using several different empirical approaches, we find no evidence that the introduction of nearly universal health insurance for the elderly had an impact on overall elderly mortality in its first 10 years. . . . Our findings suggest that Medicare did not play a role in the substantial declines in elderly mortality that immediately followed the introduction of Medicare.

In other words, from 1966 through 1975, Medicare appears to have spent $333 *billion* on medical care without saving a single life. Data limitations prevented the authors from estimating any other potential health benefits from that spending. The authors nevertheless found the benefits of reducing out-of-pocket medical spending among seniors could justify no more than 40 percent of Medicare's cost. The study raises the very real prospect that Medicare *as a whole* has been harmful on net to society.

Higher Taxes, Prices, Premiums, and Spending

Though Medicare heavily subsidizes medical care for enrollees, it makes health care harder for nonenrollees to afford. Medicare has dramatically increased taxes, private-sector medical prices, and premiums for private health insurance.

To keep pace with explosive Medicare spending, Congress has increased taxes on workers an average of once every two years. In part, this increase is to finance vast quantities of low- and zero-value medical care. Medicare also forces taxpayers to cover the excessive prices the program pays for low- and high-value care alike. Ambulatory surgical centers perform cataract surgeries for an average $1,000, for example, yet Medicare pays hospital outpatient departments an average $2,000 for the same services. The federal government reports, "The Medicare program pays nearly twice as much as it would pay for the same or similar drugs in other countries." From 2010 through 2017, the excessive prices Medicare paid hospitals for evaluation and management services in just eight states cost taxpayers at least $1.3 billion and enrollees in those states $334 million.

Medicare even drives up prices in the private sector, sticking nonenrollees with higher prices for everything from drugs to physician services. Economist Martin Feldstein found that "after introduction of Medicare and Medicaid, physicians' fees rose at 6.8 percent per year in 1967 and 1968 in comparison to a 3.2 percent annual rise in [prices]," while hospital prices increased by nearly 15 percent per year from 1966 to 1970. Those higher prices increase private insurance premiums.

Medicare also increases the volume of services nonenrollees receive, which also increases private health insurance premiums. Finkelstein found evidence that Medicare increased *total* hospital spending by 37 percent within five years. Much of that increase—perhaps 16 percentage points, or nearly half of the effect—was because Medicare increased hospital spending among *non*enrollees. How? When the average level of insurance coverage rises, providers treat all patients more intensively. "For example," Finkelstein writes, "if Medicare induces a hospital to incur the fixed cost of adopting a new technology, the new technology, once adopted, may also be used on nonelderly individuals." Medicare subsidies for elderly patients thus increased prices, health spending, and insurance premiums for nonelderly patients. Finkelstein further found that "the impact of Medicare on health spending rises over the second five years of its existence."

Efforts to improve quality or reduce spending in Medicare generally have not been successful.

Apply "Public Option" Principles to Medicare

Congress can reduce the burden Medicare imposes on taxpayers and reverse Medicare's negative impact on quality by applying traditionally Democratic "public option" principles to the program, such that traditional Medicare and private insurers compete on as level a playing field as possible.

One consequence of the mind-boggling complexity of medicine is that no single method of paying health care providers or organizing the delivery of medical care is capable of containing all costs or rewarding all dimensions of quality. Doing both requires open competition on a level playing field between different payment rules and modes of delivery. Public-option principles demand exactly that: a level playing field where consumers are the ultimate arbiters of quality and efficiency. Heavily favoring just one method of payment or delivery system, as Medicare does, predictably and persistently leads to excessive costs, rewards certain forms of low-quality care, and discourages improvement on those dimensions of quality.

Traditional Medicare is a government-run plan that already competes against private insurers. Economist Mark Pauly explains that Medicare "is essentially a risk-adjusted voucher program" that lets enrollees choose between a public option and private Medicare Advantage plans.

That playing field, however, is anything but level. Congress bars certain plans, tilts the playing field toward excessive coverage, and tilts the field against high-quality coverage. It further violates public-option principles by offering larger subsidies to healthy enrollees if they choose Medicare Advantage while offering larger subsidies to sicker enrollees if they choose traditional Medicare.

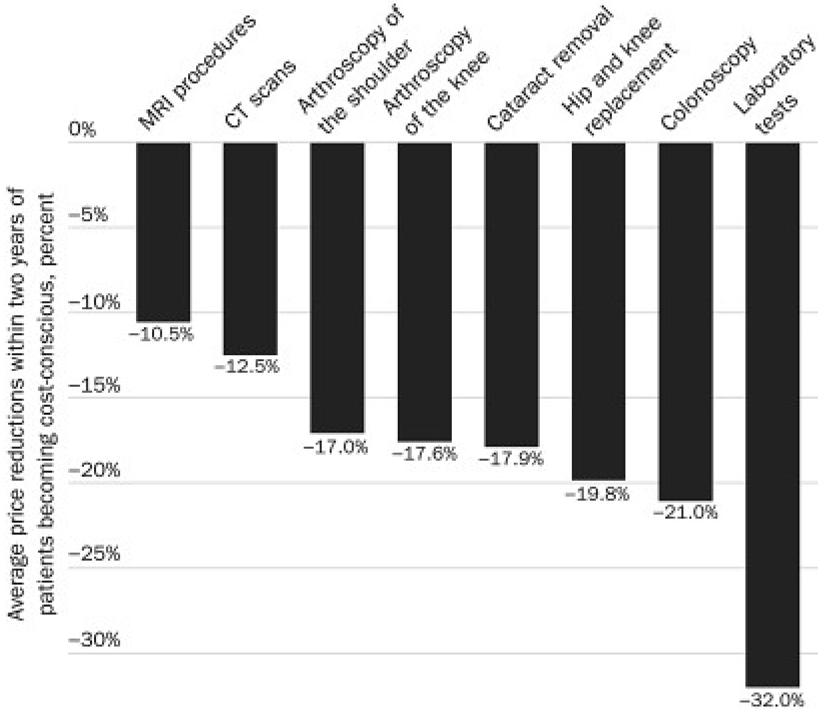
Public-option principles demand eliminating all such distortions, including the benefits mandates and community-rating price controls Congress imposes on private health insurance plans that serve Medicare enrollees.

Most important, public-option principles require that each enrollee's subsidy neither rise nor fall depending on which health plan, or how much coverage, the enrollee chooses. Only one type of subsidy can do that: cash.

Public-option principles thus *require* that Medicare mirror Social Security, which gives enrollees cash and trusts them to spend it. In 2022, Medicare will spend enough to give each enrollee an average cash subsidy of $12,100. Income- and risk-adjustment would give poorer and sicker enrollees thousands more than the average enrollee to ensure they could afford coverage.

Enrollees would spend that money better than government bureaucrats do. Evidence shows that cost-conscious patients force providers to reduce prices (see Figure 1) and that when seniors control their health decisions, even those with cognitive limitations make good choices.

Figure 1
Cost-consciousness lowers prices, 2008–2014



Source: James Robinson, Timothy Brown, and Christopher Whaley, "Reference Pricing Changes the 'Choice Architecture' of Health Care for Consumers," *Health Affairs* 36, no. 3 (March 2017): 524–30.

The size of individual enrollees' Medicare checks should vary with health status and income. When an individual enrolls, Medicare should use competitive bidding and its current risk-adjustment program to adjust the amount of that enrollee's check according to that individual enrollee's health status. It should use Social Security Administration data to adjust the amount of the enrollee's check according to the enrollee's lifetime income. Low-income and sicker enrollees would get Medicare checks large enough to enable them to afford a standard package of insurance benefits; healthier and higher-income enrollees would get smaller checks.

Congress should restrain overall Medicare spending by limiting per-enrollee Medicare spending to gross domestic product growth. Health care prices would likely fall so dramatically that Congress could reduce Medicare spending growth even more without harming access or enrollee health.

Critics worry that if risk adjustment is imperfect, some enrollees would have insufficient funds to purchase health plans. Yet Medicare's imperfect risk-adjustment formulas are already harming sick enrollees by punishing Medicare Advantage plans that provide high-quality coverage to those enrollees. Subsidizing enrollees with cash would benefit sick enrollees by reducing prices and creating incentives for insurers to find innovative ways to cover the sick, rather than to avoid them.

Prefund Retiree Health Care

After converting Medicare to a Social Security–like cash-transfer program, Congress should replace Medicare's inequitable system of intergenerational transfers with a system in which workers invest their Medicare taxes in personal accounts for their health needs in retirement.

Congress should allow workers to put their full Medicare payroll tax payment (generally 2.9 percent of earnings) in a personal savings account. Workers could invest those funds in a number of vehicles and augment those funds in retirement with other savings. For most workers, those savings could replace the subsidies they receive through Medicare. Over time, Congress could make contributions to these personal accounts voluntary.

As with some Social Security reform proposals (see "Social Security"), diverting workers' payroll tax payments into personal accounts would reduce federal revenues, making it more difficult to finance current Medicare subsidies. Public-option principles would go a long way toward solving this problem by reducing health care prices and encouraging enrollees to eliminate wasteful medical consumption, each of which would enable Congress to reduce overall Medicare outlays significantly. To the extent that these efficiency gains do not cover all transition costs, Congress should make up the gap by cutting other government spending (see "Cutting Federal Spending," "Special Interests and Corporate Welfare," and other chapters in this volume)—not by raising taxes.

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—Prepared by Michael F. Cannon

67. MEDICAID AND THE CHILDREN'S HEALTH INSURANCE PROGRAM

State legislators should

- reduce spending on Medicaid and the Children's Health Insurance Program (CHIP) whenever possible;
- refuse to implement the Medicaid expansion provisions of the Patient Protection and Affordable Care Act (i.e., Obamacare);
- conduct randomized, controlled experiments of the effects of Medicaid and CHIP with existing populations;
- reduce unmet medical need by deregulating medical care and health insurance; and
- demand that the federal government grant states flexibility with existing Medicaid and CHIP funds—not additional funds—to provide medical and long-term care to the needy.

Congress should

- eliminate or reform the tax exclusion for employer-sponsored health insurance;
- turn Medicare into a Social Security–like cash-transfer program;
- repeal Obamacare;
- deregulate health care and health insurance;
- permit states to conduct randomized, controlled experiments on the effects of Medicaid and CHIP coverage on existing populations;
- eliminate federal entitlements to Medicaid or CHIP benefits;
- freeze each state's Medicaid and CHIP funding at current-year levels;
- give states full flexibility to use Medicaid and CHIP funds to achieve a few broad goals; and
- begin phasing out Medicaid and CHIP federal funding.

The greatest economic safety net humans have devised is the market. A market system uses innovation to fill the cracks in the health care sector so that fewer vulnerable patients fall through with every passing day. It brings health care of ever-increasing quality within reach of an ever-increasing number of people. It drives prices for medical care and health insurance downward. It harnesses the self-interest of clinicians, administrators, insurers, and other patients to improve the quality of medical care and health insurance. It minimizes the problem of preexisting conditions.

When government tries to fill the cracks in the health sector, it creates new ones and causes existing cracks to widen. After decades of government's making medical care and health insurance more expensive with interventions like Medicare, the tax exclusion for employer-sponsored health insurance, and the licensing of clinicians and health insurance, far fewer low- and middle-income households can access health care than could in a market system.

Unfortunately, the government's response has been to intervene even further. As with Medicare, Congress created Medicaid and CHIP to solve problems that Congress itself either exacerbated or caused. Those programs have in turn further increased tax burdens and the cost of health care.

The most important thing policymakers can do to improve access to care for the poor is not to subsidize them. It is to liberalize the health care sector. Liberalizing the U.S. health care sector would do more to reduce unmet medical need than expanding or maintaining existing safety-net programs. It would make the problem of unmet need smaller and leave the rest of society wealthier and better able to help the shrinking number of patients who still could not help themselves.

The most important thing that policymakers can do to help the poor obtain health insurance and medical care is adopt policies that spur cost-saving innovations and lower prices. Falling prices do not involve a "Samaritan's dilemma." Whereas welfare can trap the poor in poverty; falling prices help them climb out. The reforms that would put the most downward pressure on health care prices are turning Medicare into a Social Security–like cash-transfer program (see "Medicare"), reforming the tax treatment of health care (see "Tax Treatment of Health Care"), and deregulating medicine (see "Health Care Regulation") and health insurance (see "Health Insurance Regulation").

In addition, federal and state governments operate three main programs to provide medical care to low-income Americans: Medicaid, the Children's Health Insurance Program (CHIP, previously the State Children's Health Insurance Program or SCHIP), and premium subsidies available through the health insurance "Exchanges" of the Patient Protection and Affordable Care Act. Congress should repeal or fundamentally reform each of these programs.

Medicaid

Medicaid spends $783 billion annually, ostensibly to provide health care to the poor. The federal government jointly administers Medicaid with state and territorial governments.

States that wish to participate in Medicaid must pay a portion of the cost of a federally mandated set of health benefits to a federally mandated population of eligible individuals. All states participate in the traditional Medicaid program, which primarily serves four low-income groups: mothers and their children, the disabled, the elderly, and those needing long-term care. Specific eligibility criteria vary by state, as does the exact rate at which the federal government matches state spending on Medicaid. Overall, the federal government finances 65 percent of total Medicaid outlays while states finance 35 percent.

In return for participating in Medicaid and financing a portion of program spending, each state receives matching federal funds to administer its program. When states spend money on mandatory populations—or make Medicaid benefits more comprehensive than the federal government requires or extend eligibility to more people than the federal government requires—the federal government matches what the state spends, seemingly without limit.

Obamacare gives states the option to expand their Medicaid programs to all adults with incomes below 138 percent of the federal poverty level. (The federal poverty level and Medicaid-expansion eligibility threshold rise with the number of household members and with time. As of 2022, the Medicaid-expansion eligibility threshold was $18,754 for single adults.) The principal beneficiaries of Obamacare's Medicaid expansion are able-bodied adults. Starting in 2014, the federal government paid 100 percent of the cost of a state's expansion population, gradually declining to 90 percent in 2020. Despite multiple attempts to sweeten the deal with additional federal matching funds, 12 states still refused to implement Obamacare's Medicaid expansion in 2022.

For beneficiaries, Medicaid is an entitlement. So long as they meet the eligibility criteria, they have a legally enforceable claim to benefits. People tend to cycle on and off Medicaid for various reasons. The federal government estimates that 81.5 million people will enroll in Medicaid during 2022.

Perverse Incentives

Financing Medicaid by having the federal government match state spending encourages fraud, creates perverse incentives for state officials, and encourages states to enroll people who don't need assistance. Because federal and state governments share the burden of Medicaid spending, neither side cares about waste, fraud, or induced dependence as much as they should care—or would care if either were to bear 100 percent of the cost.

The more a state spends on its Medicaid program, the more it receives in federal matching funds. When a state spends \$1, it receives between \$1 and \$9. States can thus double, triple, or even receive a ninefold return when they devote state funds to Medicaid rather than other priorities like education or roads.

Medicaid's matching-grant system encourages stunning amounts of fraud. The Government Accountability Office consistently designates Medicaid as a "high-risk" program, estimating that "Medicaid improper payments represented 21.4 percent of federal program spending—more than \$85 billion—in fiscal year 2020."

The system creates perverse incentives for state officials to stint on other priorities. Spending \$1 on police buys \$1 of police protection. Spending \$1 on Medicaid, however, buys \$2 to \$10 of medical or long-term care. Medicaid rewards states for spending the marginal dollar on medical and long-term care even when spending it on police, education, or transportation would provide greater benefit.

It also encourages states to cut other priorities to protect Medicaid spending. Unlike the federal government, nearly all state legislatures face constitutional or statutory requirements that they balance their operating budgets each year. States that want to do so by reducing state spending must cut "old" Medicaid outlays by \$2 million to \$5 million or cut Medicaid expansion outlays by \$10 million to achieve just \$1 million of budgetary savings. Medicaid encourages states to cut spending on police, education, and transportation, where \$1 million in budgetary savings requires only \$1 million of political pain, rather than on Medicaid, where \$1 million in budgetary savings requires inflicting \$2 million to \$10 million of political pain.

Obamacare's Medicaid expansion created additional perverse incentives to prioritize able-bodied adults over more-vulnerable enrollees. If states cut spending on mothers and children, the disabled, the elderly, and long-term care recipients, then achieving \$1 million in budgetary savings requires inflicting \$2 million of political pain. Achieving the same savings by cutting spending on able-bodied adults requires inflicting \$10 million of political pain.

Medicaid both pulls and pushes enrollees into dependence. Medicaid pushes people into dependence on government for their health care by making private health care less affordable. Economists Mark Duggan of Stanford and Fiona Scott Morton of Yale found, for example, that Medicaid's system of setting drug prices increases prices for private payers by 13 percent. The more federal and state governments expand Medicaid, the more expensive private medical care and health insurance become. Medicaid pulls enrollees into dependence on government by offering a valuable subsidy that disappears as income rises. Enrollees often see little or no economic benefit to working harder and increasing their incomes, which creates a powerful disincentive to becoming financially independent.

The State Children's Health Insurance Program

Congress created the State Children's Health Insurance Program in 1997 to expand health insurance coverage among children in families that earn too much to be eligible for Medicaid. The federal government funds each state's program much as it funds traditional Medicaid but with two main differences. First, states receive a larger federal match under CHIP than under traditional Medicaid. In 2022, the federal government will have financed at least 69 percent of the cost of each state's program. For every dollar that states invest in CHIP, they receive on average about $3 from the federal government (i.e., from taxpayers in other states).

Second, the federal government ostensibly limits the amount it will contribute to each state's program. But the cap is not as binding as it appears. States often burn through their federal CHIP funds before the end of the fiscal year and then demand additional funds. In effect, states *create* emergencies and then demand emergency funding, in effect daring Congress to deny their demands, which would strip coverage from sick children. Congress has repeatedly bailed out states that employ that gambit, which effectively rewards states for committing to spend more federal dollars than federal law allows.

As a result of these perverse incentives, states have expanded CHIP eligibility dramatically. Eighteen states and the District of Columbia offer CHIP to families of four with incomes of $83,000 or more. In New York, CHIP is available to families of four earning $112,000 annually. Because CHIP targets families higher up the income scale than Medicaid does, and because higher-income families are more likely to have health insurance to begin with, CHIP leads to an even greater "crowd-out" of private insurance than Medicaid.

Are Medicaid and CHIP Even Helping?

Remarkably, there is little reliable evidence that these programs have a net positive effect on health and absolutely no evidence that they are the best way to improve the health of targeted populations.

In 2008, the Oregon Health Insurance Experiment examined the effects of Medicaid by taking advantage of a policy that randomly assigned applicants to receive Medicaid or nothing and then comparing outcomes for the two groups. As it happens, the study examined a population that would receive coverage under Obamacare's Medicaid expansion. Random assignment made this experiment the most reliable study ever conducted on the effects of health insurance. The authors found that Medicaid coverage "did increase use of health care services, raise rates of diabetes detection and management, lower rates of depression, and reduce financial strain." But even though researchers chose measures of physical health that should have been amenable to treatment over a two-year period, Medicaid enrollment "generated no significant improvements in measured physical health outcomes in the first 2 years." The lack of any improvement in physical health outcomes among Medicaid enrollees should throw a stop sign in front of Medicaid generally and Obamacare's Medicaid expansion in particular.

Similarly, there is no evidence that Medicaid is cost-effective. The Oregon Health Insurance Experiment did find small improvements in self-reported mental health. But not even that study attempted to quantify whether Medicaid is a cost-effective way of achieving those gains—that is, whether state and federal governments could have purchased better health by spending those funds differently or enacting different reforms. Federal and state governments should not continue to take trillions of dollars from taxpayers to support these programs when they don't even know what they are getting in return.

Whether or not Medicaid, CHIP, or Obamacare's premium subsidies turn out to improve health for some populations, or to be a cost-effective way of doing so, these programs become increasingly less cost-effective the higher up the income scale they reach. Higher-income households have higher baseline access to health insurance and medical care. As these programs move up the income scale, they offer taxpayer-financed coverage to increasing numbers of people who already had private insurance. One study by Obamacare supporters estimated that the law's Medicaid expansion would lead to "high rates of crowd-out for Medicaid expansions aimed at working adults (82 percent), suggesting that the Medicaid expansion provisions . . . will shift workers and their families from private to public insurance without reducing the number of uninsured very much." That estimate suggests that Obamacare's Medicaid expansion could be covering fewer than 2 previously uninsured Americans for the price of 10.

Determine Whether Medicaid Actually Helps

Rather than expand Medicaid, federal and state policymakers should conduct further experiments to determine what benefits Medicaid and CHIP actually produce and whether other uses of those funds would produce greater gains in health and financial security. Policymakers should model these studies on the Oregon Health Insurance Experiment. States should conduct these studies with existing populations rather than new enrollees, so as not to impose additional burdens on taxpayers.

The federal government should grant waivers to states that conduct such studies. Where federal law does not provide authority for the secretary of health and human services to approve such waivers, Congress should grant it or enact legislation directly approving such studies.

Block Obamacare's Medicaid Expansion

States that have implemented Obamacare's Medicaid expansion are buckling under the expense. In those states, enrollment and per-enrollee spending have exceeded projections.

The 12 states that have still refused to implement Obamacare's Medicaid expansion in 2022 should continue to refuse. The 38 states that have implemented it should withdraw from the program—or at least conduct randomized experiments to determine what the program is delivering.

Repeal Obamacare

Congress should repeal Obamacare's Medicaid expansion along with the rest of the law. Repealing the Medicaid expansion alone would reduce federal spending and deficits by $1.4 trillion from 2022 through 2031 and eliminate the low-wage trap that the program creates. Repealing the remainder of Obamacare would eliminate the low-wage traps its Exchange subsidies create and reduce federal spending and deficits by a further $848 billion, while also reducing the cost of private health insurance for the vast majority of enrollees in those programs.

If the Medicaid expansion were popular, states would be willing to pay for it themselves. Not only did 0 states take that step, but 12 states have rejected it even with Congress pledging to pick up 90 percent of the tab. States that have rejected the Medicaid expansion have reduced federal spending, federal deficits, and the future tax burden of taxpayers in *all* states, saving taxpayers hundreds of billions of dollars. It is unfair to force taxpayers in states that have rejected the Medicaid expansion to pay for the expansion in other states.

Medicaid and CHIP

Repealing Obamacare is not enough, however. It makes little sense for taxpayers to send money to Washington only for Congress to send those funds back to their state capitols with strings and perverse incentives attached. Congress should devolve control over Medicaid and CHIP to the states.

In 1996, Congress eliminated the federal entitlement to a welfare check, placed a five-year limit on cash assistance, and froze federal spending on such assistance. It then distributed those funds to the states in the form of block grants with fewer federal restrictions. The results were unquestionably positive. Welfare rolls were cut in half, and poverty reached the lowest point in a generation.

The federal government should emulate that success by eliminating all federal entitlements to Medicaid and CHIP benefits, freezing federal Medicaid and CHIP spending at current levels, and distributing those funds to the states as unrestricted block grants. Block grants like those Congress used to reform cash assistance would eliminate the perverse incentives that induce dependence, favor Medicaid and CHIP spending over other priorities, lead states to tolerate widespread fraud, and encourage states themselves to defraud federal taxpayers. Congressional Budget Office projections indicate that simply freezing remaining federal Medicaid and CHIP spending at 2022 levels would produce $247 billion in savings and deficit reduction by 2032.

With full flexibility and full responsibility for the marginal Medicaid dollar, states could then decide whether and how to navigate the Samaritan's dilemma. States that want to focus only on their neediest residents could do so and put the savings toward other priorities or tax reduction. States that want to spend more on their Medicaid programs would be free to raise taxes to do so, and vice versa. States would learn from the successes and failures of each other's experiments. Since states would bear the full marginal cost of their reformed Medicaid programs or successor programs, they would be more likely to conduct randomized, controlled experiments to determine the most cost-effective uses of those funds.

Over time, the federal government should give the states full responsibility for Medicaid by eliminating federal Medicaid spending while concomitantly cutting federal taxes. States can hasten these reforms by pressuring the federal government for maximum flexibility in administering their Medicaid programs.

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—Prepared by Michael F. Cannon

68. VETERANS BENEFITS

Congress should

- direct federal actuaries to publish annual present-value estimates of the long-term cost of all veterans-benefits obligations;
- increase military pay to allow all active-duty military personnel to purchase, at actuarially fair rates, a standard package of private life, disability, and health insurance benefits comparable to those the Department of Veterans Affairs provides;
- privatize Veterans Health Administration facilities and physical capital by transferring ownership to veterans; and
- deliver benefits to current VHA-eligible veterans via risk-adjusted payments.

The Department of Veterans Affairs (VA) is never more than a few months away from scandal for the often poor service it provides veterans. Yet the reality of how the VA disserves veterans is far worse than the headlines suggest.

Overview

Veterans benefits are a form of compensation the U.S. government provides to employees of the U.S. armed forces. Benefits include life, disability, and health insurance, as well as assistance with housing, education, training, and rehabilitation. The VA will spend roughly $274 billion in 2022 to provide benefits to veterans, survivors, and dependents who meet various criteria.

The wars in Afghanistan and Iraq have caused a surge in spending on veterans benefits. "Federal expenditures to care for veterans doubled from 2.4 percent of the U.S. budget in FY 2001 to 4.9 percent in FY 2020, even as the total number of living veterans from all U.S. wars declined from 25.3 million to 18.5 million."

The VA provides health care directly to beneficiaries through the Veterans Health Administration (VHA). The VHA is an integrated health care delivery system. The federal government owns or operates “more than 1,700 hospitals, clinics, and other health care facilities,” where it employs 380,000 clinicians and other employees to serve 9.2 million enrollees. (Ironically, at the same time the government suppresses private integrated health systems—see “Health Care Regulation,” “Health Insurance Regulation,” “The Tax Treatment of Health Care,” and “Medicare”—the U.S. government operates the nation’s largest integrated delivery system.) In 2022, the VHA will spend roughly $104 billion.

Congress determines overall funding for veterans benefits and the allocation of VHA resources.

Quality

The VHA appears to outperform private health care providers on some quality measures. Studies generally find that the VHA does better on process measures of quality (such as providing evidence-based care) but no better on outcomes (such as risk-adjusted mortality). Yet such studies typically compare two types of government-run systems, rather than comparing a government-run system against a market system. The tax code, Medicare, Medicaid, and other government interventions give the government a comparable degree of control over “private” hospitals. Such studies say little about whether a market system would perform better or worse than a government-run system.

The quality of all VA benefits suffers because government administration of those benefits exposes veterans to political risk: veterans can lose benefits at the whim of politicians and bureaucrats. Health coverage cannot be high quality if it is not secure. If Congress adopts various Congressional Budget Office proposals to reduce VA spending, millions of veterans would see their VHA benefits disappear. If and when Congress ever gets serious about reducing federal spending, it could terminate benefits for even more veterans.

An Unresponsive Bureaucracy

The most notorious example of poor quality at the VHA is long waits for care. Wait times for care are longer in some areas and tend to persist because the VHA does not have a price mechanism to move resources from low- to high-value uses. Congress and the VA use a combination of politics and bureaucratic rationing to decide when and where to open and close VHA facilities, or how many clinicians to hire in each region of the country. The result is inevitable and persistent mismatches between demand and supply: shortages in some areas and gluts in others.

In 2014, whistleblowers and watchdogs discovered that 60 percent of VHA facilities were falsifying official records to make wait times appear shorter.

Veterans at one facility in Phoenix were waiting 115 days for appointments. Congress responded with $5 billion to hire additional clinicians and expand VHA capacity, and $10 billion to pay for veterans to see private-sector doctors at taxpayers' expense. The additional bureaucracy associated with this option left many veterans waiting even longer than before.

Despite a media firestorm, congressional oversight hearings, numerous VA officials losing their jobs, and federal legislation, in 2021 more than 810,000 veterans waited more than one month for appointments while nearly 197,000 waited more than six months. The problem of shortages and slow service extends beyond health benefits. In 2021, more than 215,000 veterans were waiting more than four months for disability and pension benefits determinations. In addition, the VHA does not yet track appointments and wait times accurately. In 2019, the Government Accountability Office reported that inaccuracies in the VHA's appointment scheduling processes hid the fact that "veterans could potentially wait up to 70 calendar days to see a [non-VHA] provider."

The flip side of shortages is gluts. Political and bureaucratic constraints make it difficult for the VHA to shut down, sell, or repurpose facilities. The VHA has increasingly turned to leasing properties, a process that makes it easier to open, close, and repurpose facilities. Yet the VHA's secrecy makes it difficult even to know whether this process is more or less efficient. According to the GAO, the "VA does not . . . assess and provide information to decision makers on how it has benefited from this flexibility. Without transparency on these benefits, VA and congressional decision makers may lack information to understand the need for these leases."

Costs

Idle capital is just one of the costs of the VHA. Supporters claim that for all its faults, the VHA provides care of comparable quality at a lower cost than Medicare or private insurance. The VHA's secrecy makes it difficult to make these comparisons. The Congressional Budget Office has testified to Congress:

> With few exceptions, VHA does not make either existing administrative data or clinical records (even with personal identifying information removed) available to researchers in other government agencies, universities, or elsewhere. . . . [I]t would be useful to know the average salaries, performance pay, and other elements of compensation that VHA provides for its physicians in various specialties and for its other clinicians; the number of patients its clinicians treat per unit of time (for example, in a typical week) and the length and intensity of those encounters; and the

average prices it pays for pharmaceutical products—but VHA does not report that information publicly.

Even so, it would not be particularly surprising if a health care system subject to bureaucratic rationing and tolerant of long waits for care had lower per unit costs, given the excessive prices government intervention allows to persist in the private sector (see "Health Care Regulation" and "The Tax Treatment of Health Care") and Medicare (see "Medicare").

The VA Abets Unnecessary Wars

The greatest harms the VA inflicts on veterans stem not from the services it provides, but from how it helps Congress and the president start, enter, and perpetuate war.

Veterans benefits are some of the most expensive financial costs of war. The VA reports that the present value of just the compensation and burial benefits that Congress has promised to current veterans reached $4.5 trillion in 2021, which amounts to 20 percent of U.S. gross domestic product and more than the federal government collected in revenue that year. That figure does not include the accrued liabilities of health care, long-term care, or life insurance benefits.

The majority of spending on veterans benefits occurs decades after Congress incurs those obligations. Disability payments, for example, typically do not peak until 40 or 50 years after the end of a military conflict.

Since the federal government does not fund veterans benefits until they come due, Congress and the president can commit U.S. armed forces to battle without having to pay or even acknowledge those costs. The VA enables elected officials who send U.S. troops to war to pretend that one of the largest financial costs of that decision does not exist.

If Congress funded those obligations as it accrued them, it would have to raise revenue every year to fund future veterans benefits. In years when it was sending troops into battle, Congress would have to raise even more revenue because future veterans benefits claims would be higher. Having to budget for the cost of those additional veterans benefits and weigh those costs against other priorities would make Congress more conservative about starting, entering, or perpetuating wars. When the decision to authorize military force is a close call, having to finance those costs up front could even prevent wars.

Instead, the VA system allows Congress to ignore these costs. It therefore eliminates a constraint that could prevent unnecessary wars. The very agency that exists to care for sick and disabled veterans and their survivors perversely makes it more likely that veterans will end up sick, disabled, or dead.

Report the Cost of Accrued Veterans Benefits

Requiring transparency about the cost of future veterans benefits would be an important step toward improving veterans benefits. Congress should immediately direct federal actuaries, at the GAO, the VA, or other agencies, to project and report regularly on the present-value cost of all veterans benefits obligations, just as the Social Security and Medicare trustees report on those programs' accrued obligations. Simply having better information would improve debates over veterans benefits, the U.S. military, and foreign policy.

Prefund Veterans Benefits

Congress must do more than make the current VA system transparent. Protecting veterans, active-duty personnel, and civilians requires a complete overhaul of veterans benefits.

One reform would deliver better, more reliable benefits for veterans and force Congress and the president to make more careful decisions affecting the lives of active-duty personnel.

Congress should fund veterans benefits in advance by increasing salaries for all active-duty personnel. All service members would receive a pay raise sufficient to allow them to purchase, from private insurers at actuarially fair rates, a statutorily defined package of life, disability, and health care benefits comparable to what the VA offers. Benefits would cover losses related to an enlistment or commission, beginning when they leave active duty. Military personnel would be free to purchase more or less coverage than the standard benefits package. Upon leaving active duty, veterans could receive benefits from the insurance carriers and health care providers of their choice, rather than just a single government-run health system.

Congress should use competitive bidding by insurers to determine the salary increases for active-duty personnel. Bids by insurers would allow Congress to peg pay raises for each job type to the actual premiums that competing insurers charge to cover personnel in each position. (Congress could peg salary increases to the second-lowest, median, or average premium bid.) Since insurers would be free to set actuarially fair premiums, premiums and the corresponding pay raises would be higher for paratroopers than desk jockeys, which would enable all personnel to afford the same package of benefits. The differences in premiums across job types would allow military personnel to compare the relative risks of different military jobs and careers.

This veteran-centered system would provide future veterans with better benefits. Rather than benefits that can disappear at the whim of politicians and bureaucrats, veterans would have a legally enforceable contract. If you lose your benefits under the current system, the government works against you. If you lost them under a veteran-centered system, the government would work with you to restore those benefits.

If things ever got that far. Private insurers and health care providers would be more responsive to veterans' needs under such a system because if they were not, veterans could fire them. Insurers who developed a reputation for mistreating veterans comparable to that of the VA would have a difficult time enrolling new active-duty personnel. If Congress privatized the VHA system by transferring ownership to veterans themselves (see next section), then veterans would have the option of using an integrated health system run by veterans, for veterans.

Most important, prefunding veterans benefits in this manner would make Congress and the president more cautious about using military force. Military action would cause insurers to increase premiums for life, disability, and health benefits to cover the increased risk. Those higher premiums would trigger mandatory salary increases for military personnel. Not only would this be a more honest and transparent way of providing veterans benefits, but Congress and the president would be more cautious about engaging in military action because they would have to give up more to get it. Revealing the costs of war to policymakers can *only* lead to better decisions about when to begin and end wars.

Putting those funds directly in the hands of military personnel is an indispensable component of a prefunded system. Creating yet another government trust fund would merely allow Congress to continue to hide this cost of war.

A prefunded system of veterans benefits could also aid recruiting. It would give military personnel more information about various jobs and more peace of mind about their veterans benefits. Competition among insurers and providers for cost-conscious active-duty personnel and veterans would help drive inflated private prices downward.

Privatize VHA Facilities

To reward current veterans and to enable even greater competition in the provision of their medical benefits, Congress should privatize VHA facilities by transferring ownership of the VHA to veterans themselves. Privatization would be a large wealth transfer to veterans. The VA estimates the value of its physical capital and investments at $35 billion in 2021.

Congress should incorporate the VHA and give ownership shares to VHA-eligible veterans on the basis of income, length of service, reliance on VA benefits, or similar criteria. The exact manner in which Congress transfers ownership of the VHA system to veterans is less important than its doing so as soon as possible.

Veteran-shareholders would then select a management team, perhaps from current VHA personnel, veterans groups, private health systems, and insurers or other financial institutions with a record of serving military personnel. A privatized VHA could continue to serve only veterans or opt to serve nonveteran patients (and thereby enrich its veteran-shareholders). The VHA could pursue different strategies in different parts of the country.

Privatization of the VHA could improve health care for veterans and nonveterans alike. Because the VHA is the largest integrated health system in the nation, privatizing it would force incumbent health care providers to compete with a financing and delivery system that does not exist in most markets.

Choice for Current VHA Enrollees

To maintain benefits for current veterans after privatization, Congress should provide risk-adjusted payments that enable VHA-eligible veterans to purchase a comparable level of health coverage from private providers. This approach could be similar to the salary increases for active-duty personnel or the Medicare reforms in the “Medicare” chapter. With risk adjustment, current veterans could afford to purchase health coverage at actuarially fair premiums.

Liberalizing and privatizing veterans benefits will result in better, more affordable, and more secure health care for veterans. Most important, it would protect active-duty personnel from harm by forcing Congress and the president to make more careful decisions about military conflicts.

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—Prepared by Michael F. Cannon

69. THE OVERDOSE CRISIS

Congress should

- repeal 21 U.S.C. Section 856, known as the "crack house statute";
- permit health care practitioners to prescribe methadone for medication-assisted treatment (MAT) of addiction to patients on an outpatient basis in lieu of their having to visit methadone clinics regulated by the Drug Enforcement Administration;
- repeal the so-called X-waiver required of licensed health care practitioners who wish to prescribe buprenorphine as MAT of addiction on an outpatient basis and eliminate restrictions on the number of patients they may treat;
- reschedule diamorphine from Schedule I to Schedule II of the Controlled Substances Act to allow for its use in MAT of addiction; and
- reclassify the opioid overdose antidote naloxone from prescription-only to over the counter.

States should

- repeal drug paraphernalia laws so that harm-reduction strategies, such as syringe services programs, can develop and function efficiently.

Fifty-one years after President Richard M. Nixon declared a "war on drugs," overdose deaths from illicit drug use have climbed to record levels. Last November, the Centers for Disease Control and Prevention reported 100,000 overdose deaths for the 12-month period ending in April 2021, a 28.5 percent increase over the year before. Nearly 76,000 of those deaths were opioid related, and 83 percent of opioid-related deaths involved illicit fentanyl.

Fentanyl is a highly potent opioid—about 50 times stronger than heroin—that can easily cause overdoses, particularly if users don't know if it is in their drug supply or how much. Over the past decade, drug traffickers have increasingly preferred fentanyl because of its compact size. The smuggler's preference for higher potency drugs is a manifestation of the "iron law of prohibition," and it is almost the entire reason fentanyl has poisoned the American drug supply. The iron law of prohibition states that, all things being equal, as enforcement ramps up, smugglers prefer higher potency forms of a drug for the same reason those who sneak alcohol into a football game prefer hard alcohol in flasks to 12-packs of beer. The lethal logic of the iron law of prohibition means that we cannot enforce our way out of the opioid crisis. And if fentanyl smugglers bexcome somehow easy to catch, there's always carfentanil, which is about 100 times more potent than fentanyl and has already been showing up in America's drug supply.

In 2018, researchers at the Centers for Disease Control and Prevention and the University of Pittsburgh Graduate School of Public Health reported, "The U.S. drug overdose epidemic has inexorably been tracking along an exponential growth curve since at least 1979." A September 2019 report by the Joint Economic Committee of Congress places the trend's start in 1959. Policymakers from across the political spectrum have grown more receptive to adopting harm-reduction strategies that have worked for decades in Europe, Canada, Australia, and much of the developed world to reduce deaths and the spread of communicable diseases. The harm-reduction strategy is based on the realistic understanding that a drug-free society is unattainable and focuses nonjudgmentally on reducing the harms that come from using prohibited drugs obtained in the dangerous black market. Unfortunately, in the United States federal and state laws block harm-reduction organizations—many of which are privately funded nonprofit concerns—from fulfilling their missions.

The ultimate solution to the overdose crisis is to legalize and regulate currently illegal drugs, as was done after alcohol prohibition. "Legal" can mean many things, from prescriptions to over the counter (OTC). How that looks in practice can vary between states, just as with alcohol. Yet some sort of safe supply of opioids is needed to prevent deaths resulting from the adulteration of black-market drugs, which are most of them. In the meantime, government should get out of the way of harm-reduction organizations that want to save lives.

Safe Consumption Sites and the "Crack House" Statute

Safe consumption sites (also called "safe injection sites" and "overdose prevention sites") have established a track record of saving lives and preventing the spread of HIV, hepatitis, and other infectious diseases since the late 1980s. This harm-reduction strategy is used throughout Europe, Canada (which now has 38 sites), and Australia. In fact, the United States is an outlier among developed countries—federal law, 21 U.S.C. Section 856, dubbed the "crack house statute," outlaws knowingly maintaining premises where controlled substances are used or stored.

Since 2014, a safe consumption site has been secretly saving lives in the United States while being monitored by researchers at an independent nonprofit research institute based in North Carolina. The researchers provide data in the peer-reviewed medical literature that they update regularly, while keeping the name and location of the site confidential. To avoid interdiction, the site is only able to operate part-time.

In July 2020, the researchers provided five years (2014–2019) of data in the *New England Journal of Medicine*. There were 10,514 injections through 2019, with 33 overdoses during the five-year period—all of which were reversed. They reported that the types of drugs changed over that period, with combinations of opioids and stimulants composing 5 percent of injections in 2014 and 60 percent of injections in 2019.

In January 2022, these researchers reported in the *Journal of General Internal Medicine* that facility users were 27 percent less likely to visit emergency departments, had 54 percent fewer emergency department visits, and were 32 percent less likely to be hospitalized. Those who were hospitalized spent 50 percent fewer nights in the hospital. Therefore, in addition to saving the lives of people who inject drugs, safe consumption sites can reduce stress on the health care system.

When a private, self-funded organization in Philadelphia sought, with the city council's endorsement, to open Safehouse in the city's Kensington district, it was thwarted by the Trump administration's Department of Justice (DOJ). Under the DOJ's interpretation of the statute, Safehouse was no different than a crack house operating under a different name. After Safehouse's principals lost in the Third Circuit, the Supreme Court refused to hear their case. In July 2021, defying federal law, the governor of Rhode Island signed a bill permitting privately funded safe consumption sites beginning in the spring of 2022. New York City opened two safe consumption sites in November 2021 and plans to open others. The California legislature is entertaining a bill to legalize safe consumption sites statewide starting in 2023. The Biden administration's DOJ is seeking a way to accommodate the demand for safe consumption sites when they have been held to violate 21 U.S.C. Section 856.

But selective nonenforcement is a tenuous thing for safe consumption organizations to depend on. Congress should repeal or amend the crack house statute. Short of outright repeal, the statute can be amended to explicitly exempt safe consumption sites that have clear medical and harm-reduction purposes and to get the federal government out of the way of state and local organizations that, unconditionally, want to save their neighbors' lives.

Medication-Assisted Treatment with Methadone

Researchers at Harvard University Medical School recently published comparative effectiveness data finding medication-assisted treatment with either methadone or buprenorphine the only addiction treatments "associated with reduced overdose and opioid-related morbidity." The study evaluated methadone and buprenorphine MAT against five other mutually exclusive treatment pathways: no treatment, inpatient detox or residential services, intensive behavioral health, naltrexone, and nonintensive behavioral health. Unfortunately, federal law prevents addiction therapists from using MAT to its full potential.

Even though doctors in Canada, the United Kingdom, and Australia have been prescribing their clinic patients methadone to take home and use as directed since the late 1960s, the Drug Enforcement Administration (DEA) places very severe restrictions on methadone treatment, regulating and licensing stationary clinics called narcotics treatment programs (NTPs). Under DEA rules, patients must visit the NTPs daily to take their methadone in the presence of designated NTP staff. These onerous requirements hinder patient compliance and reduce access to treatment. In some cases, patients are expected to travel several miles every day to receive their dose of methadone. Yet the DEA permits health care practitioners to prescribe take-home buprenorphine as MAT.

The DEA temporarily relaxed some of these regulations for the duration of the COVID-19 public health emergency, allowing "stable" patients a 28-day take-home supply of methadone—a tacit admission that it is possible to successfully administer a take-home methadone program. Research published in early 2021 showed no evidence of increased methadone diversion to the black market because of the relaxed rules.

A Boston-area pilot program in which primary care practitioners prescribed take-home methadone—reported in the *New England Journal of Medicine* in 2018—proved successful. Last year, the National Academies of Sciences, Engineering, and Medicine urged policymakers to allow primary care practitioners to prescribe take-home methadone to patients in their clinics.

Congress should enact legislation allowing health care practitioners to prescribe methadone to patients to take home, as was allowed during the public health emergency and is permitted when buprenorphine is used for MAT.

Medication-Assisted Treatment with Buprenorphine

The so-called X-waiver is part of the Drug Addiction Treatment Act of 2000. It requires doctors who want to prescribe buprenorphine for opioid use disorder to take an eight-hour training course. It is a needless requirement that is unique to buprenorphine. Physicians can freely prescribe hundreds of more dangerous drugs without supplemental training.

In the closing days of the Trump administration, the Department of Health and Human Services (HHS) announced that it was relaxing the X-waiver as an emergency action to address the worsening drug overdose rate. The action applied only to physicians and limited them to 30 patients at any given time. In late January 2021, the Biden administration rescinded the order.

In April 2021, the secretary of HHS announced new guidelines that again suspend the X-waiver requirement for physicians treating up to 30 patients within their states. The guidelines go a step further by also permitting physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, and certified nurse midwives to use buprenorphine for MAT as well, without having to go through the ordeal of qualifying for an X-waiver on their narcotics prescribing license from the DEA. Providers who wish to take on more than 30 patients must go through the onerous waiver process.

The American Medical Association, the National Academies of Sciences, Engineering, and Medicine, and many addiction specialists have called for eliminating the X-waiver program entirely.

There has been bipartisan support for eliminating the X-waiver requirement for health care practitioners in previous sessions of Congress. Congress should seize the momentum from the new HHS guidance and end the X-waiver program for good, as well as the 30-patient cap on prescriptions.

Reschedule Diamorphine to Schedule II

Diamorphine is a semi-synthetic opioid that was developed in the 1890s as a slightly more potent form of morphine that takes effect more rapidly. It was manufactured by Bayer under the brand name Heroin. It is roughly two and a half times more potent than morphine, one-half as potent as legal hydromorphone (Dilaudid), and one-fiftieth the potency of legal fentanyl. It was fully banned in the United States in 1924 despite protests from the medical professional community and, pursuant to the Controlled Substances Act of 1970, is classified by the DEA as a Schedule I drug (highly addictive with no known medical use). Diamorphine remains on the formularies of many developed countries, including Switzerland, Germany, the UK, the Netherlands, and Canada.

Moving a drug from Schedule I to Schedule II is a form of "legalization," but for those concerned about having "legal heroin," it's an innocuous one. Fentanyl is a Schedule II drug that is prescribed by physicians thousands of times a day. Cocaine and methamphetamine are also Schedule II drugs. Both are more legal than heroin, which only researchers can possess legally. Moving a drug to Schedule II simply acknowledges that it has legitimate medical uses, which heroin unquestionably does, either as a pain killer or as a useful treatment for opioid use disorder.

Although it might seem crazy to prescribe heroin to those who compulsively use heroin, that view misunderstands drug addiction and the dangers that users face from the black market. Many compulsive users of heroin spend their days searching for a fix and then experience great relief when they find it. That search-and-relief process can make the dependency even stronger. Additionally, users have no idea what is in black-market drugs. The heroin can be highly variable in strength and, as discussed, is often tainted with fentanyl, which can easily cause overdoses.

Moreover, legal access to a safe supply of heroin for compulsive users can help drug users do other things with their lives—things that might have been crowded out by the search-and-relief process of the black market. It becomes easier to attend counseling, keep a job, and associate positively with loved ones when a safe supply of heroin is available. Finding other sources of happiness is one of the best ways to help compulsive users.

Diamorphine has been used since the 1920s in the UK, and since the 1990s in Switzerland, Germany, and other European countries as a form of MAT for patients who have not responded well to methadone or buprenorphine MAT. Canada began heroin MAT pilot programs in the cities of Vancouver and Montreal in 2009. A 2011 Cochrane systematic review concluded:

> The available evidence suggests an added value of heroin prescribed alongside flexible doses of methadone for long-term, treatment refractory, opioid users, to reach a decrease in the use of illicit substances, involvement in criminal activity and incarceration, a possible reduction in mortality; and an increase in retention in treatment.

Congress should reschedule diamorphine to Schedule II, because it is less potent than several legal semi-synthetic and synthetic opioids, is used widely in developed countries for medicinal purposes, and can make a vital contribution to addiction treatment. Rescheduling will allow harm-reduction organizations to develop pilot diamorphine MAT programs and study their effectiveness as an addiction treatment tool.

Reclassify Naloxone to Over the Counter

The opioid overdose antidote naloxone is still classified by the Food and Drug Administration (FDA) as "prescription-only." States have developed workarounds to make it easier for patients to obtain the lifesaving drug without going to a doctor for a prescription. In many states, the state director of health is a licensed physician who issues a "standing order" and assumes responsibility as the prescriber. In states where the director of health is not a licensed physician, pharmacists are granted authorization to prescribe naloxone. Therefore, in most states, patients can get naloxone by going up to the counter and asking the pharmacist. However, some states prohibit third parties from obtaining a prescription for another person. People in those states who wish to have naloxone available because they have a friend or relative who uses opioids cannot obtain it. Experience also shows that many pharmacists choose not to stock naloxone or participate in any distribution program. Some fear they are condoning or enabling opioid use. Furthermore, the stigma now attached to opioid use has deterred many patients from going up to the pharmacy counter and explaining to a pharmacist why they need naloxone.

To get around such obstacles, Australia and Italy have designated naloxone as a truly over-the-counter drug. People can discreetly buy it off the shelf and check out at the cash register. If naloxone were available OTC in the United States, it could be marketed in convenience stores and vending machines, making acquisition more accessible and private.

The FDA is on record since at least 2016 as believing that it is probably appropriate for naloxone to be rescheduled as OTC and has encouraged manufacturers to petition the FDA to that end. In January 2019, then FDA commissioner Scott Gottlieb announced that the FDA had even gone to the trouble of designing Drug Facts labels required of manufacturers for their products to be sold OTC, and had even tested those labels for "consumer comprehension" in front of focus groups. The commissioner stated in the announcement that this represented an unprecedented effort to facilitate and accelerate the reclassification of naloxone from prescription-only to OTC.

The FDA commissioner does not have to wait for manufacturers, who may lack the incentive, to request the move to OTC. Under FDA regulations, the FDA can undertake reclassification review at the request of "any interested person," or the commissioner may act unilaterally. The FDA should no longer wait for manufacturers to ask them to make this lifesaving drug more accessible to those in need. If all else fails, Congress should order the reclassification.

State Lawmakers Should Repeal Drug Paraphernalia Laws

State-level drug paraphernalia laws prevent people who use drugs from doing so safely. They prevent individuals from defending themselves against many of the risks of State-level drug paraphernalia laws prevent people who use drugs from doing so safely. They prevent individuals from defending themselves against many of the risks of using drugs obtained in the black market. Some paraphernalia laws deny drug users access to fentanyl test strips, a vital means of screening drugs for contamination with the dangerous opioid responsible for the great majority of opioid-related overdose deaths. Some paraphernalia laws restrict people from purchasing or possessing clean needles and syringes. Drug paraphernalia laws also threaten to punish others involved in harm reduction, such as those attempting to help people who use illicit drugs. People risk incarceration if they give out or obtain clean needles and syringes, test strips to check for dangerous additives or contaminants in drugs obtained on the black market, or materials used to clean drug use equipment. Several paraphernalia laws prevent governmental and nongovernmental organizations from creating syringe services programs (SSPs), which some call "needle exchange" programs. These programs reduce the spread of HIV, hepatitis, other blood-borne infectious diseases, and soft tissue infections. More recently, they have proved helpful in reducing drug overdoses.

Federal law does not interfere with states' operating or permitting privately run SSPs. However, many state drug paraphernalia laws prohibit them. Most states have carve-outs in their drug paraphernalia laws that authorize SSPs. Many of those carve-outs place restrictions on their number, the entities allowed to operate them, and conditions they must meet. Alaska is the only state without drug paraphernalia laws.

The Centers for Disease Control and Prevention endorses and promotes the implementation of syringe services programs with guidance and, in some cases, provides financial assistance to local jurisdictions. The World Health Organization, the American Medical Association, the American Public Health Association, the American Society of Addiction Medicine, and the American Psychiatric Association all support and encourage SSPs. The Substance Abuse and Mental Health Services Administration and the National Academies of Sciences, Engineering, and Medicine endorse SSPs. Former U.S. surgeon general Jerome Adams, who served during the Trump administration, gave many public presentations in support of SSPs.

State lawmakers should emulate Alaska and eliminate their states' drug paraphernalia laws so that harm-reduction organizations can effectively implement lifesaving measures.

Conclusion

For over 100 years, our drug laws surrounding opioids have pushed users to consume more dangerous drugs and have denied them the harm-reduction goods and programs that could not only save their lives but help them recover. It's time to treat opioid use disorder like alcoholism, with care rather than neglect and callousness.

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—Prepared by Jeffrey A. Singer and Trevor Burrus

FISCAL POLICY

70. AVERTING NATIONAL BANKRUPTCY

Congress should

- raise the age of eligibility for Medicare and Social Security;
- phase in higher deductibles and copayments for Medicare, Medicaid, and Obamacare; and
- freeze Social Security benefits per capita at the current (inflation-adjusted) value.

The United States' debt is on an unsustainable path; that is, the United States is in extreme fiscal imbalance. In particular, the four main entitlement programs (Medicare, Medicaid, Obamacare, and Social Security) are collectively growing far faster than any plausible path for gross domestic product (GDP). Congress should curtail these programs to avoid fiscal Armageddon.

Background

The United States faces a challenging fiscal future. According to the Congressional Budget Office (CBO), the debt-to-GDP ratio crossed 100 percent in 2020. Projections indicate it will hit 185 percent by 2052 and continue to climb unless the nation adjusts its tax and spending policies. If no policy changes occur and the debt ratio continues on its projected path for an extended period, the United States will eventually face rising interest rates on its debt, an even steeper debt path, and a fiscal crisis. This outcome is not inevitable; the United States likely has decades to adjust its policies. Few dispute, however, that unless the CBO's projections are substantially too pessimistic, the United States needs major adjustments in spending or tax policies to avoid a fiscal meltdown.

Despite widespread agreement that spending or tax policies must change, however, appropriate adjustments have so far not occurred. Indeed, many recent policy changes have worsened the U.S. fiscal situation. They include the creation of Medicare Part D ($91.7 billion in 2020); new subsidies under the Affordable Care Act, often called Obamacare ($65.0 billion in 2020); the expansion of Medicaid under Obamacare (from $374.7 billion in 2009 to $671.2 billion in 2020); higher defense spending (from $304.7 billion in 2001 to $754.8 billion in 2021); increased spending on veterans' benefits and services (from $45.0 billion in 2001 to $234.3 billion in 2021); and greater spending on energy programs (average annual spending rose from $0.58 billion over 1997–2001 to $4.83 billion over 2017–2021). Politicians across the spectrum, moreover, propose additional spending all the time.

Since spring 2020, federal spending has boomed in response to the COVID-19 pandemic. Over two years, Congress enacted six major spendings bills to mitigate the economic and public health effects of COVID-19, which totaled $4.3 trillion in obligations as of July 2022. They include the Paycheck Protection Program (PPP) and Health Care Enhancement Act, the American Rescue Plan Act, and the CARES Act—the largest economic relief package in U.S. history. The most expensive programs included $844 billion in direct stimulus checks, $828 billion in PPP loans to businesses, and $666 billion in increased unemployment compensation. This drastic increase in spending and the concurrent recession caused the largest year-over-year increase in federal debt on record.

"Fiscal imbalance" is the excess of what we expect to spend, including repayment of our debt, over what government expects to receive in revenue. A plausible explanation for America's failure to address its fiscal imbalance is a belief that "this time is no different," since earlier alarms have not ended in a fiscal meltdown. In the 1980s, for example, the government experienced a large buildup of federal debt due to President Ronald Reagan's tax cuts and increases in military spending. Concern arose over the spiraling debt, causing congressional budget showdowns during President Bill Clinton's first term. But ultimately, no serious fiscal crisis ensued.

In 2011, fears of a U.S. government default arose during the debt-ceiling crisis. Disagreements between members of Congress resulted in a political stalemate, massive public apprehension, and a one-notch downgrade of the U.S. credit rating. Just before the deadline, however, the Budget Control Act was signed into law, raising the debt ceiling by more than $2.1 trillion and staving off the threat of immediate default. A similar crisis loomed in 2013 when Congress's inability to rein in the federal deficit almost triggered a "fiscal cliff"—a series of deep, automatic cuts to federal spending. Once again, with only hours to spare, lawmakers reached a compromise and averted larger economic consequences. Overall, the past 30 years reveal a clear trend: time and time again, alarm erupts over the rising federal debt level, but a full fiscal meltdown never materializes. Thus, many people dismiss claims that the U.S. fiscal balance is a calamity in waiting, believing "this time is no different."

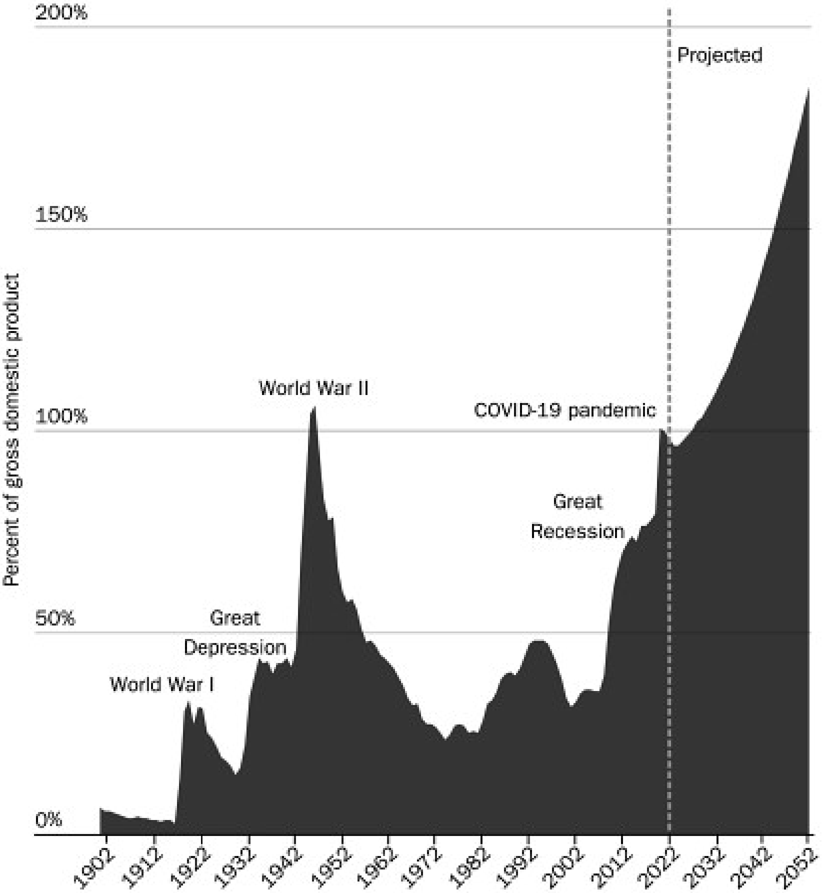
In truth, this time *is* different. Although a fiscal meltdown is not imminent, the nation's fiscal situation has been deteriorating since the mid-1960s, is far worse than ever before, and will worsen as time passes if no adjustments occur. This view follows from looking not just at current deficits and the current value of the debt; these are incomplete measures of the government's fiscal situation because they account only for past expenditure relative to tax revenue. The true impact of existing expenditure and tax policies also depends on the projected paths of future expenditure and tax revenues. The standard measure of the overall fiscal situation is known as fiscal imbalance, which adds up (in a way that adjusts for interest rates) all future expenditures, minus future tax revenues, plus the explicit debt. The projected path of the debt-to-GDP ratio—which divides total federal debt held by the public by the GDP—is a simple proxy for the degree of imbalance.

Figure 1 presents the historical and projected U.S. debt-to-GDP ratio for the period 1900–2052. The ratio has risen enormously since the Great Recession and is projected to rise dramatically going forward, reaching 185 percent in 2052. Moreover, outside studies and the CBO's own evaluation show that, at least in the past decade, the CBO's forecasts tend to underestimate the future debt-to-GDP ratio. Annual budget surpluses from 1998 to 2001 fueled a period of overestimation in the 1990s, but the United States has not seen an annual surplus since.

The reason for the persistent increase in fiscal imbalance is that the composition of federal expenditure has shifted markedly since 1965, especially from defense spending to mandatory health and retirement spending—that is, entitlements. Defense spending has declined relative to GDP over the post–World War II period; this spending could increase in the future but is unlikely to grow without bound. Entitlement spending, however, not only consumes a large fraction of the federal budget but also is likely to grow faster than GDP, indefinitely, under current law. This excess growth reflects the increasing share of the population collecting benefits relative to younger people paying taxes, as well as the impact of subsidized health insurance on health care cost inflation. Thus, the CBO forecasts that health and retirement spending will increase substantially faster than GDP going forward.

In principle, the United States has three options for restoring fiscal balance: faster economic growth, higher taxes, or slower expenditure growth. In practice, only slower growth of entitlement spending can make a significant difference. Even if economic growth achieved its highest historical levels, that would not reduce imbalance materially. Similarly, even if taxes were raised substantially above their postwar average—and had no adverse effect on growth—fiscal imbalance would still be large.

Figure 1
Federal debt held by the public, 1900–2052



Source: "The Budget and Economic Outlook: 2022 to 2032," Congressional Budget Office, May 25, 2022, https://www.cbo.gov/publication/57950.

That leaves expenditure cuts as the only viable way to significantly reduce fiscal imbalance. And the cuts must target entitlements, since those programs are large and are the ones growing relative to GDP. Even the drastic increase in COVID-19 spending is only expected to raise the *level* of the debt-to-GDP ratio, not its growth rate. A crucial difference between expenditure cuts and tax hikes is that the former could plausibly increase the level or growth of GDP, by reducing distortions in health and retirement decisions, whereas the latter would almost certainly reduce growth, making imbalance worse. Thus, cutting the growth of federal health and retirement expenditure is a win-win. Congress has three main options for cutting entitlements and averting bankruptcy.

Raise the Eligibility Age for Social Security and Medicare

The original justification for Social Security and Medicare was to help citizens who could no longer care for themselves. When Congress created Social Security in 1935, life expectancy was 63 and the age of eligibility was 65, so Social Security was insurance against "living too long." Similarly, when Congress adopted Medicare in 1965, life expectancy was about 70 and the age of eligibility was again 65, so most beneficiaries expected only a few years of subsidized health care. Today's average life expectancy, however, has reached 77. Social Security's age of "normal retirement" has increased by only two years since 1965, and Medicare's is still 65. Unsurprisingly, the total number of Social Security beneficiaries has skyrocketed; 25 million Americans received Social Security benefits in 1970, compared with 65 million in 2021.

Thus, as life expectancy has steadily increased, and health conditional on age has improved, Social Security and Medicare have evolved from helping only those in serious need to also providing income support and subsidized health insurance, over decades, for middle- and upper-income households. Simultaneously, the fraction of the population receiving benefits has grown relative to the fraction paying taxes, making these programs fiscally unsustainable. Thus, under current parameters, both programs have grown far beyond their original intent and have become unaffordable.

Congress should raise the age of eligibility in both programs, by at least enough to offset the increase in life expectancy since creating each program. The higher ages could be phased in gradually—for example, by six months every year for some number of years, with the higher age affecting only those below some cutoff, such as age 50. Thus, the higher eligibility ages would not affect those already receiving benefits or even those within 15 years of current eligibility. Congress should also index the eligibility age to future increases in life expectancy; doing so would help avoid future expansions of Social Security and Medicare relative to the size of the economy.

Increase Deductibles and Copayments for Medicare, Obamacare, and Medicaid

Standard economics explains that people demand health insurance to financially protect themselves in case of major illnesses or accidents, not to cover routine expenditures, such as for checkups, medications, and other moderate and predictable outlays. This insight implies that economically efficient health insurance should have substantial deductibles.

Standard economics also suggests that economically efficient health insurance should come with significant copays. Insurance can generate excessive health expenditure because the insured do not pay the costs of their care (a phenomenon known as moral hazard). One remedy is deductibles; a second is copays, the portion of a health expenditure paid by the insured person after the deductible has been met. Copays do not fully balance the costs of care against the benefits, but they nudge health care decisions in the right direction while still reducing the risk of large outlays for the insured.

Thus, Congress should modify Medicare, Obamacare, and Medicaid to incorporate significantly higher deductibles and copays. The appropriate adjustments differ across programs, but increases of at least 50 to 100 percent, or more, make sense in many cases. For example, the yearly deductible for Medicare Part A is only $1,556 and for Part B only $233. Obamacare caps yearly out-of-pocket spending for deductibles and copays at $8,700 for self-only coverage and $17,400 for family coverage. Medicaid charges minimal copays for those below 150 percent of the federal poverty level.

Freeze (Real) Social Security Benefits

Under current policy, the level of Social Security benefits that an individual receives is a function of that individual's earnings history. In market economies, wages tend to rise with worker productivity (which in turn reflects technological progress), so that as an economy experiences productivity growth, real wages rise. Thus, the inflation-adjusted level of Social Security benefits grows along with the economy's increase in overall productivity. Indeed, over the past five decades, the average annual Social Security benefit for retired workers (in real terms) has more than doubled, from $8,654 per recipient in 1970 to $19,896 in 2022 (constant 2022 dollars).

Assuming Social Security exists to prevent poverty, the ongoing increase in benefit levels is excessive. Instead, society should determine a level of benefits that allows those without other income to attain some modest standard of living. Congress should keep that level in place over time.

Congress should therefore freeze the level of real benefits at its current value; this amounts to indexing the level of new benefits to price rather than wage inflation. Under this approach, Social Security expenditure would grow far more slowly than under the current system because it would only reflect increases in the population age 65 and older, rather than also increasing with productivity.

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—Prepared by Jeffrey Miron

71. FISCAL RULES THAT WORK

Congress should

- adopt a spending cap–based balanced-budget rule to reduce the ratchet of federal spending and avert a long-run fiscal crisis caused by demographics and entitlement programs.

The COVID-19 pandemic caused another round of explosive growth in government borrowing. Federal debt held by the public increased from 79 percent of gross domestic product (GDP) in 2019 to 100 percent just two years later. As a result, the accumulated federal debt burden now stands just below its highest level relative to the size of the economy, which was seen just after World War II.

After 1945, the federal government slashed spending as the country demobilized. Strong growth prospects and damaging inflationary bursts helped further erode the effective federal debt burden. But this time the context is different: the United States entered the pandemic with a budget deficit, as federal government spending exceeded tax revenues by 4.7 percent of GDP. With unchanged policies, an aging population will require additional entitlement spending that will drive up red ink further.

As a result of the interaction of entitlement eligibility with these demographic trends, the Congressional Budget Office estimates (on cautious assumptions relating to unchanged policies) that the federal debt burden relative to GDP could near double again over the next 30 years.

Such debt levels would be truly unprecedented and, as such, bring unpredictable consequences. We might worry about a fiscal crisis with borrowing costs that spiral as bond investors doubt the federal government's ability to repay its debts. Another possibility is just very slow economic growth, which means poorer living standards for Americans. Either way, it is prudent to avoid such risks. Doing so effectively requires more fiscal discipline—sooner rather than later.

The Need for Long-Run Spending Restraint

Although today's budget numbers are grim, the outlook for the future is truly unsustainable. The cause is clear and obvious: rising spending, not falling tax revenues, is putting upward pressure on debt.

Between 1960 and 2019, federal spending averaged 20.2 percent of GDP per year while federal revenues averaged 17.3 percent. With unchanged policies, overall federal spending is forecast to rise to 23.2 percent of GDP by 2032, even as tax revenues hold relatively steady at 18.1 percent of GDP. This is entirely driven by increased obligations to Social Security and Medicare, a trend that is projected to accelerate further in the following decades.

Direct reforms of these entitlement programs are the best way to fully defuse this long-term debt time bomb. But experience globally suggests that fiscal rules that cap the growth of federal spending can provide a helpful budgeting framework to incentivize a gradual adjustment to ease these pressures on the government debt burden.

Fortunately, devising spending caps that achieve these objectives need not result in harsh austerity. Even if the economy is weak, past experience suggests nominal economic output will expand by an average of about 4 percent annually (meaning about 2 percent "real" GDP growth). That means about 4 to 5 percent more tax revenue every year. It's possible to slowly control—and eventually shrink—the burden of federal debt if policymakers can figure out ways to ensure outlays grow more slowly than nominal GDP.

The Debt Limit Does Not Limit Debt

If rising debt is the concern, some might ask: Does it not make sense to limit its accumulation directly? The federal debt is already notionally restrained by the debt limit, or debt ceiling, which was created in 1917. This is a cap on the total amount that the federal government is authorized to borrow to meet its existing obligations.

But the debt limit has not been an effective means of limiting either the debt run-up or the unsustainable future entitlement promises. Congress has raised, extended, or revised the debt limit 80 times since 1960. This is not surprising: breaching it would represent a failure to finance existing commitments—effectively meaning a form of default, either to creditors directly or on promises to citizens. That's why economists think the debt ceiling is bad policy: 97 percent of them in an Initiative of Global Markets poll opposed the debt ceiling as a fiscal control measure.

On occasion, the debt limit has certainly been a useful tool for bringing attention to our fiscal plight. Its proponents would point out that, since 1985, most of the major deficit reduction laws we have seen have been attached to a debt limit increase. But in recent years the debt ceiling has clearly been used for political brinkmanship, rather than prudent policy. Any deficit reduction commitments arising from debt limit standoffs have not proven to be lasting.

Rather than asking politicians to vote to finance spending commitments they have already made, we need a rule that binds their hands and confronts them with the tradeoffs associated with new spending *before* they vote for it.

Balanced Budget and Deficit Rules Are Not Enduring

Advocates of fiscal responsibility have traditionally focused on the need for a balanced-budget constitutional amendment, or balanced-budget rule, as a way of preventing federal deficits—the difference between spending and revenues—adding further to debt.

A constitutional reform against annual borrowing would help indirectly limit federal spending for a given level of tax revenues and effectively bar new debt (outside exceptional circumstances). Some proposals for this type of amendment would tie the balanced-budget requirement to provisions for a maximum tax burden, too, as a means of using the rule to limit the overall size of the federal government.

There are steep hurdles to delivering a balanced-budget amendment and undesirable consequences of insisting on year-to-year balance in practice. Constitutional reform would require two-thirds support in both the House and Senate, followed by support from three-fourths of state legislatures. This high bar would be even more difficult to achieve if the amendment explicitly constrained the overall size of government by capping the level of tax revenues too.

What's more, unless they are extremely tightly written, balanced-budget rules, or even just deficit targets, also tend to be abandoned or watered down in practice, with politicians finding ingenious ways around them. Looking at the states, 49 out of 50 have some sort of balanced-budget requirement already. Those rules have not protected states such as California, Illinois, and New Jersey from either bloated public sectors or large levels of debt.

A similar story is seen around the world with rules that target balanced budgets or low deficits. In the European Union, the so-called Maastricht rules (also known as the Stability and Growth Pact) were imposed to prevent nations from having budget deficits of more than 3 percent of GDP. These rules have not prevented unaffordable welfare states or rising levels of red ink in countries such as France, Italy, and Greece. The UK used deficit targets to reduce its borrowing through the 2010s but then never quite balanced the books before abandoning the rules entirely.

The U.S. federal government's own experience with statutory deficit targets shows that they tend to be abandoned. A constitutional grounding would give any such rule more teeth, of course. But even if this practical experience could be altered, constitutional restrictions seeking balance year-on-year could bring undesirable economic harm.

The Boom-Bust Cycle and Ratchet Effect

The simple reason that pure balanced-budget amendments or strict deficit rules tend to fail is that they do not prove to be robust to the business cycle.

When a recession occurs and revenues drop, a balanced-budget mandate or low-deficit rule requires politicians to tighten budgets quickly at a time when they are especially reluctant to either raise taxes or slash spending. Such a reaction can be economically costly anyway: volatile tax rates, for example, can create needless uncertainty and bad incentives for work, saving, and investment. There are virtues to so-called tax smoothing.

On the flipside, when the economy is enjoying strong growth and producing a lot of tax revenue, a balanced-budget requirement or low-deficit rule doesn't impose much restraint on spending either. Together, this creates an unfortunate cycle. Politicians spend a lot of money during the good years, creating expectations of more and more resources being available for various interest groups. When a recession occurs, an annual balanced-budget rule or low-deficit rule means the politicians are supposed to slam on the brakes.

Usually, they are unwilling to do so, creating an overall "deficit bias," with each crisis or recession raising the overall level of debt. Even if they do cut spending in the aftermath of crises, it is rarely reduced to the same level seen prior to the upswing. Some tax rises are also included as part of the anti-deficit efforts. Over the long run, these cycles therefore create a ratchet effect, with the burden of government reaching new plateaus and debt levels jumping.

The Case for Spending-Based Rules

Given the poor track record of rules that attempt to eliminate deficits or enforce balanced budgets, it is better to focus on the underlying problem of excessive federal spending.

To do so effectively, any spending rules must incorporate provisions to deal with recessions. Requiring spending to just equal tax revenues every single year is too inflexible, as it would lead to extremely volatile spending and tax rate changes, which politicians are rarely willing to deliver and which risk exacerbating economic output volatility.

A better rule would therefore simply seek to cap overall expenditure each year in advance of budgeting decisions, in a way that is not linked to the business cycle. A gradually falling debt-to-GDP ratio can be delivered through balancing government spending and revenues over the economic cycle. This can be roughly achieved by capping spending each year to a trend in tax revenues: for instance, by setting an annual spending cap equal to the average of tax revenues over the past three years, adjusted upward by population growth and inflation.

Alternatively, one could adopt a technocratic estimate of what tax revenues would be if the economy was operating at its full potential and then cap spending to that level. By design, these sorts of rules would allow for deficits in downturns and enforce surpluses when the economy is strong. It would smooth spending around a medium-term revenue trend.

To minimize gaming, as much government spending as possible should be covered within the annual cap. Given it is the major source of upward spending pressures in the United States, it is especially important that entitlement spending on seniors is covered. The only forms of spending you might want to omit would be the purer automatic stabilizers, such as unemployment insurance.

To be robust to all circumstances, such a fiscal framework must still be well designed. While inevitably it must include an escape clause for genuine emergency situations (such as wars or pandemics), this provision should require a high-threshold congressional vote, with a well-defined path back to structural fiscal balance.

Ordinary within-year deviations in spending from caps should not be ignored either. If spending comes in higher than expected, the future spending caps should adjust downward to ensure that the overall budget really does balance over the economic cycle, and vice versa.

Formulaic rules, which use the hard data of observed trends in tax revenues, tend to be the most honest and transparent way of setting spending caps. Not having to rely on forecasts about the future has two key benefits. First, it prevents government overoptimism about future economic health that often leads to huge increases in current spending. Second, it forces politicians to raise taxes in advance of passing significant new spending programs in later years, thus bringing the price of government action to the attention of the public.

If this type of fiscal rule were passed and adhered to, then the U.S. debt-to-GDP ratio would practically be guaranteed to fall over time, albeit with emergency periods lifting the level of debt at semi-regular intervals. If it were in place for a prolonged period, politicians would eventually be forced into entitlement reform as the structural pressure on budgets caused by an aging population grew.

Unless constitutionally grounded, such a rule would be just as susceptible to the changing political tides as any deficit target. While the best form of fiscal rules, spending caps are only as good as political commitment to deliver them. But in order to obtain credibility for such a rule, the politicians introducing it would at least need to get to a stage where it was operational. That means providing a glide path toward structural balance, given that federal spending is now far in excess of the revenue trend.

The Swiss Spending Cap–Based Rule

Very few governments have imposed direct spending caps as their main fiscal rule. But where these types of rules have been in place, the results are promising.

In Switzerland, voters used a referendum in 2001 to impose a constitutional "debt brake," which operates functionally as a spending cap, in turn delivering a structural balanced budget over time. A large proportion of annual federal spending is capped to estimated tax revenues multiplied by a business cycle adjustment factor. The consequence is that spending remains largely independent of the near-term state of the economy and so is stabilized around a smoothed trend in revenue.

Since it was introduced in 2003, World Bank data show that Swiss general government net debt, despite the financial crisis and then COVID-19, has fallen from 44.4 percent of GDP in 2004 to an estimated 22.6 percent in 2020. Prior to the pandemic, overall Swiss government expenditure was lower (as a share of GDP) in 2019 than in 2004. One academic study compared outcomes in Switzerland to a synthetic control of similar countries. It found that, by 2010, central government debt was around 10 percentage points of GDP lower than it would have been because of the debt brake's introduction.

One of the reasons the Swiss brake has been successful is that politicians are constrained from boosting spending during boom years when tax receipts are strong. As a 2011 government report on the debt brake explained:

> In the past, economic booms tended to contribute to an increase in spending. . . . This has not been the case since the implementation of the fiscal rule, and budget surpluses have become commonplace. . . . The introduction of the debt brake has changed the budget process in such a way that the target for expenditures is defined at the beginning of the process, which must not exceed the ceiling provided by the fiscal rule. It has thus become a top-down process.

Evidence for Spending Caps

The Swiss rule has teeth because it is constitutionally grounded. It is effective in controlling spending in part because the main tax rates in Switzerland are constitutionally restricted and require a complex process for adjusting, but also because the rule is precise, the scope of spending broad, and the sanction mechanisms clear. As outlined, the U.S. process for constitutional amendments is itself arduous. Without that backing, a spending cap enforced by law will only last as long as there remains political buy-in for fiscal restraint.

Such a commitment clearly does not exist right now, especially in the aftermath of the COVID-19 pandemic. In fact, fiscal discipline is out of vogue. But if, in the coming years, the political environment does become more conducive to such laws, there's strong supportive evidence from the International Monetary Fund (IMF) and the Organisation for Economic Co-operation and Development (OECD) that spending caps are more effective than deficit rules or other fiscal targets to control red ink.

In February 2015, the IMF delivered this favorable assessment:

> Expenditure rules have a better compliance record than budget balance and debt rules. . . . The higher compliance rate with expenditure rules is consistent with the fact that these rules are easy to monitor and that they immediately map into an enforceable mechanism—the annual budget itself. Besides, expenditure rules are most directly connected to instruments that the policymakers effectively control. By contrast, the budget balance, and even more so public debt, is more exposed to shocks, both positive and negative, out of the government's control.

The IMF especially emphasized the way in which a spending cap–based rule imposes discipline in the boom years:

> One of the desirable features of expenditure rules compared to other rules is that they are not only binding in bad but also in good economic times. . . . In contrast to other fiscal rules, countries also have incentives to break an expenditure rule in periods of high economic growth with increasing spending pressures. . . . Two design features are in particular associated with higher compliance rates. . . . Compliance is higher if the government directly controls the expenditure target. . . . Specific ceilings have the best performance record.

In July 2015, the OECD wrote:

> Well-designed expenditure rules appear decisive in ensuring the effectiveness of a budget balance rule. Carnot (2014) shows also that a binding spending rule can promote fiscal discipline while allowing for stabilisation policies. . . . Spending rules entail no trade-off between minimising recession risks and

> minimising debt uncertainties. They can boost potential growth and hence reduce the recession risk without any adverse effect on debt. Indeed, estimations show that public spending restraint is associated with higher potential growth.

The United States has not recently used broad spending caps. However, the 2011 Budget Control Act did set notional caps on discretionary spending that worked in reducing discretionary spending levels relative to GDP significantly between 2013 and 2017. Since then, various budget deals have busted the caps by wide margins, showing that, absent a constitutional amendment, laws are only as binding as the political support for them. In the coming decades, the scale of rising entitlement obligations means that caps on discretionary spending will be insufficient as a means of controlling overall spending.

Conclusion

The United States faces a grim debt outlook over the coming decades, which will require significant federal spending restraint to avoid. Provided there is first a political consensus that rising debt is a problem, evidence suggests that spending caps are the best means of framing budgets to avoid this upward ratchet in spending and debt.

Spending caps tend to be more enduring than deficit targets in reducing borrowing because the latter get completely abandoned when economic downturns or recessions hit. A federal spending cap that incorporates entitlement spending and provides a temporary escape clause for genuine emergencies would be simple and easy to understand, while targeting the real driver of our growing debts: excessive spending.

If the United States could ratify a constitutional amendment like the Swiss debt brake, which operates as a spending cap–based balanced-budget rule over the economic cycle, then that would be ideal. Absent that, Congress should introduce a law to similar effect that could shape budgeting decisions for legislators.

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—Prepared by Ryan Bourne

72. FEDERAL TAX REFORM

Congress should

- cut individual income tax rates to 10 and 25 percent;
- repeal nearly all individual deductions and credits;
- create universal savings accounts to encourage families to build wealth;
- cut the top dividend and capital gains tax rates to 15 percent;
- cut the corporate income tax rate to 15 percent;
- replace depreciation deductions with capital expensing;
- repeal the estate tax; and
- cut spending to reduce pressure to raise taxes.

At the beginning of the 20th century, federal tax revenues were 3 percent of gross domestic product (GDP), and federal tax rules filled just a few hundred pages. Today, federal tax revenues are 18 percent of GDP, and federal tax rules span about 75,000 pages.

The federal government will extract $4.8 trillion in taxes from families and businesses in 2022. Individuals will be left with less income to buy food, clothing, and other needed items, while businesses will be left with less income to hire workers and build factories.

Federal taxation is costly in other ways. The tax code's complexity creates a compliance burden on individuals and businesses, and it makes financial and investment planning more difficult. Tax complexity is partly driven by special-interest breaks, which create unequal treatment and breed a distrust of government.

Another cost of the tax system is the damage to economic growth. High tax rates reduce productive activities, such as working and investing, and the unequal treatment of different industries and activities steers resources into lower-valued uses. The 2017 Tax Cuts and Jobs Act (TCJA) slashed the corporate tax rate and trimmed individual tax rates, but it did not do enough to simplify the tax code.

Looking ahead, Congress should reform the tax code with three goals in mind: simplification, transparency, and increased economic growth.

Simplification

In 1976, president-to-be Jimmy Carter called for "a complete overhaul of our income tax system. I feel it's a disgrace to the human race." Since that call for reform, the number of pages of federal tax rules has tripled, according to the tax information firm CCH. Congress continues to create new credits and other narrow breaks, while the Treasury Department churns out an endless stream of tax regulations. Tax complexity generates at least five costs.

1. Compliance and administrative burdens. Americans spend more than six billion hours annually filling out tax forms, keeping records, and learning tax rules, according to the Office of Management and Budget. The paperwork for a corporate tax return can be tens of thousands of pages in length. In addition to the costs of filing, taxpayers face a burden from audits, notices, liens, levies, seizures, and millions of penalties assessed each year by the Internal Revenue Service (IRS). Complying with the federal tax code costs the economy hundreds of billions of dollars annually in the value of lost time and the expenses for accounting and legal services.

The IRS has been overwhelmed in recent years, not only because the pandemic slowed the agency's workflow but also because Congress has added and expanded numerous breaks, such as child tax credits and recovery rebate credits. Millions of unprocessed tax returns have piled up at IRS facilities, taxpayer phone calls to the IRS for help have skyrocketed, and IRS computers are generating automated notices to taxpayers that are outdated or in error. The recent IRS mess illustrates that the tax code has become so complicated it is becoming impossible to properly administer.

2. Errors. Tax complexity and constantly changing rules cause taxpayers to make frequent and costly errors. In recent years, less than one-third of the taxpayers calling the IRS with questions have gotten through, and those that do often receive inaccurate answers. The error and fraud rate on the complex $70 billion earned income tax credit has long been above 20 percent. The IRS makes many mistakes as well, and the number of disputes between the IRS and taxpayers has been rising. In its 2021 report to Congress, the National Taxpayer Advocate found that only 73 percent of people "trust the IRS to fairly enforce the tax laws" and that only 69 percent "trust the IRS to help them understand tax obligations."

3. Economic decisionmaking. Tax complexity and frequent rule changes impede efficient decisionmaking. For individuals, choosing the wrong savings vehicle may result in higher taxes, lower returns, less liquidity, or penalties on withdrawals. For businesses, tax complexity injects uncertainty into hiring, capital investment, and other important decisions.

4. Inequality and unfairness. Although equality under the law is a bedrock principle of justice, taxpayers can pay greatly different tax rates. Households with similar incomes are often treated unequally as a result of exemptions, deductions, and credits related to such factors as education, homeownership, and children. Households are also subject to different tax rates because of their different incomes. IRS data for 2019 show that income taxes averaged 26 percent of adjusted gross income for the top 1 percent of households, but just 6 percent for households in the middle of the income distribution. It is true that middle-income households pay heavy payroll taxes, but households at the top still pay much higher overall effective tax rates. Looking at all federal taxes, the Congressional Budget Office found that the top fifth of households had an average tax rate of 24 percent in 2018, compared with 13 percent for the middle fifth of households.

5. Avoidance and evasion. Some members of Congress want to increase IRS powers to try to reduce avoidance and evasion. They want to expand mandatory information collection and reduce procedural safeguards for taxpayers to defend themselves against the IRS. But such policies would undermine civil liberties, and they are not needed in order to improve compliance. Instead, Congress should simplify the tax code and eliminate special-interest provisions, which are often manipulated and used in unplanned ways. The Low-Income Housing Tax Credit, for example, is intensely complicated and difficult for the IRS to oversee, and that has led to its being riddled with fraud by housing developers. The credit is unneeded and should be repealed.

Cutting overall tax burdens would also reduce avoidance and evasion. In a study using data across 157 countries, Mai Hassan and Friedrich Schneider noted: "It is widely accepted in the literature that the most important cause leading to the proliferation of the shadow economy is the tax burden. The higher the overall tax burden, the stronger are the incentives to operate informally in order to avoid paying the taxes." With lower taxes and a simpler tax base, individuals and businesses would focus more on productive activities and less on tax avoidance and evasion.

Transparency

A simple and transparent tax system would give citizens a clear picture of the burden of government. If the federal government imposed a single tax at a single rate, it would be easy for people to compare the cost of government with the costs of other items in their budget, such as food and housing.

However, policymakers use many techniques to hide the burden of government. They run deficits, which defer taxes until the future. They collect income and payroll taxes through employer withholding to make paying taxes less obvious. And they conceal the size of the overall tax load by spreading the burden across multiple tax bases.

Policymakers also hide the tax burden from individuals by imposing taxes on businesses. The largest hidden tax is the employer half of the 15.3 percent payroll tax that funds Social Security and Medicare. This tax is not reported on worker pay stubs, but economists agree that the burden falls on workers in the form of lower wages. Another hidden tax is the corporate income tax, which is passed through to individuals in the form of higher prices, lower wages, and reduced returns on savings.

When tax burdens are hidden, people perceive the price of federal spending to be artificially low, and they demand too much of it. A major thrust of tax reform should be to make taxes simpler and more transparent so that people better understand the cost of government. For the payroll tax, one reform would be to show the entire tax on worker pay stubs and IRS W-2 forms so that the costs of Social Security and Medicare are more visible. For the income tax, the number of rate brackets should be reduced and as many deductions and credits eliminated as possible.

Economic Growth

American incomes would be higher and growth more robust if the size of the federal government was reduced. But it is also true that for any particular size of government, the economy would be stronger if marginal tax rates were lower and the tax base simpler and more neutral. Such reforms would minimize tax distortions that undermine working, saving, investing, and entrepreneurship.

The income tax distorts individual and business activities, which creates losses to the economy and individual welfare called "deadweight losses." The size of these losses rises rapidly as marginal tax rates rise. Harvard University's Greg Mankiw explains: "It is a standard proposition in economics that the deadweight loss of a tax rises approximately with the square of the tax rate. . . . If we double the size of a tax, the deadweight loss increases four-fold." Thus, a high-rate tax structure is much more damaging than a low-rate structure.

The highest rates are typically paid by individuals with the highest incomes, many of whom have unique and valuable skills. If higher tax rates induce doctors, for example, to work fewer hours and retire earlier, it would impose harm on patients and the overall economy. Or consider the effects of taxes on entrepreneurs. More than four-fifths of the top 0.1 percent of federal taxpayers report small-business income, and those taxpayers respond to tax changes by adjusting their working, hiring, and investing activities.

For every $1 billion tax increase, the harm to the private economy is more than $1 billion because of deadweight losses created by these taxpayer responses. The Congressional Budget Office found that "typical estimates of the economic [or deadweight] cost of a dollar of tax revenue range from 20 cents to 60 cents over and above the revenue raised." Former Harvard University professor Martin Feldstein estimated that deadweight losses from a marginal tax rate increase "may exceed one dollar per dollar of revenue raised, making the cost of incremental governmental spending more than two dollars for each dollar of government spending."

Tax reforms should reduce tax rates, but they should also reduce the tax code's bias against savings and investment. If individuals use their after-tax earnings for consumption, they pay no further income tax, but if they save their earnings for future consumption, they will pay further taxes on their returns to saving. To the extent this tax code bias reduces savings and investment, it reduces economic growth and, ultimately, worker incomes. Tax reforms should transition the tax code from an income tax base to a consumption base, which would make it neutral with respect to savings and investment.

For individuals, the tax code should be moved toward a consumption base by enacting universal savings accounts (USAs). Contributions to USAs would come from after-tax income, but all account earnings would be tax free. Individuals could withdraw funds tax free at any time for any reason, which would increase liquidity and encourage saving. Both Canada and the United Kingdom have enacted such accounts, and they have been hugely popular with individuals at all income levels. USAs would encourage people to build larger nest eggs and increase their personal financial security.

For businesses, the tax code should be moved toward a consumption base by substituting capital expensing for depreciation. Under expensing, businesses immediately deduct the costs of equipment and structures they purchase, rather than deducting the costs over a period of years. The TCJA allowed for full expensing of machinery and equipment but not structures, and the provision is only effective for five years before phasing out.

Tax Reform Steps

Simplify the tax-rate structure. Congress should reduce the number of tax-rate brackets and lower rates. A good initial goal would be to collapse the seven current rates to two rates of 10 and 25 percent. The long-term goal should be a tax code with a single rate and a neutral base that treats all economic activities equally.

Cut dividend and capital gains rates. Corporate equity is currently taxed at both the corporate and individual levels, which biases the tax code in favor of debt. To alleviate this distortion and encourage investment, Congress should cut the top individual tax rates on dividends and capital gains to 15 percent.

End most deductions and credits. Repeal narrow and special-interest tax breaks, including the mortgage interest deduction, the state and local tax deduction, the exemption for interest on state and local bonds, and virtually all tax credits.

Cut the corporate tax rate. The U.S. corporate tax rate—including the 21 percent federal rate and the average state rate—is 27 percent. The average global rate in 2021 was 24 percent, according to accounting firm KPMG, so the United States is higher than average even after the TCJA reforms. We should aim to have the best climate in the world for investing and hiring, so Congress should cut the federal corporate tax rate to 15 percent. Governments and the private sector can both win from corporate tax-rate cuts. The average corporate tax rate among high-income countries today is only about half the average rate in the early 1980s, yet corporate tax revenues have risen as a share of GDP since then.

Extend capital expensing. Congress should make the expensing reforms in the TCJA permanent and extend expensing to structures in addition to machinery and equipment. The goal is to increase investment and productivity, which in turn raises worker wages. Also, since innovations are embodied in new machinery and equipment, cutting taxes on capital investment supports technological advances.

Enact universal savings accounts. Congress should enact these all-purpose savings accounts, which could be used to save for medical costs, college expenses, buying a home, covering spells of unemployment, starting a business, or any other purpose. All personal savings—not just retirement savings—should be encouraged.

Repeal the estate tax. The federal estate or death tax has a top rate of 40 percent. It raises just half a percent of federal revenues but creates substantial economic harm. It reduces savings and creates a wasteful estate planning industry to help people avoid it. The death tax may not raise any money for the government overall because it likely suppresses income tax collections by reducing earnings incentives and depressing growth.

Enact a consumption-based flat tax. In recent decades, proposals to replace the federal income tax with a consumption-based flat tax have gained support because such reforms would simplify taxation, increase savings and investment, and spur growth. The reform steps discussed here would move toward such a system. About two dozen nations have enacted tax systems with single rates, as discussed in the Cato book *Global Tax Revolution* and at https://flattaxes.blogspot.com.

Major tax reforms will be harder to implement if Congress does not get spending under control. Rising spending pushes up budget deficits and creates pressure to reverse the TCJA tax reforms and to increase taxes in damaging ways, such as by raising taxes on capital and raising marginal rates. Spending cuts not only would reduce pressure for tax increases, but also would spur growth by retaining more resources in the productive private sector.

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—Prepared by Chris Edwards

73. GLOBAL TAX COMPETITION

Congress should

- cut the federal corporate income tax rate to 15 percent; and
- withdraw from international agreements that limit competition, raise taxes, and increase compliance costs.

The flow of capital across international borders has soared since the 1980s. Corporations and individuals are moving their investments to countries with lower taxes and better growth opportunities. Governments have responded by cutting their tax rates to attract business activity and spur economic growth.

The average corporate income tax rate in the high-income nations of the Organisation for Economic Co-operation and Development (OECD) declined from 47 percent in 1980 to 23 percent in 2021. Many countries have also cut their tax rates on dividends, capital gains, and estates, and most countries that had annual wealth taxes have abolished them.

In a globalized economy, it makes sense for countries to cut taxes on capital because taxes on mobile bases are more distortionary than taxes on less mobile bases, such as labor. Because of international capital flows, the burden of capital taxes likely lands mainly on labor anyway, so it is simpler and more transparent to tax labor directly.

Before the Tax Cuts and Jobs Act (TCJA) of 2017, the United States deterred investment because it had one of the highest corporate tax rates among OECD countries. America also had an aggressive worldwide approach to taxing corporate foreign income. That approach encouraged U.S. companies to keep their earnings offshore, put them at a disadvantage in foreign markets compared with foreign-based companies, and induced some of them to restructure and move their headquarters abroad.

The TCJA addressed these problems. The law cut the federal corporate tax rate from 35 percent to 21 percent, which brought down our average federal-state rate to 26 percent. The TCJA also moved toward territorial treatment of foreign earnings, which generally allows corporations to repatriate earnings without an additional layer of tax. Finally, the law imposed rules to reduce profit shifting to low-tax countries, including what is called the global intangible low-taxed income (GILTI) rules, which impose a surtax on foreign subsidiary profits deemed excessive.

The foreign income provisions of the TCJA are very complex, but the law was generally a step in the right direction. Computer modeling by the Tax Foundation found that the TCJA mainly eliminated incentives for U.S. corporations to shift profits abroad. Similarly, an analysis using the Penn-Wharton budget model found that corporations repatriated an additional $140 billion from foreign subsidiaries in the three years after the TCJA was passed.

Corporate Tax Rates and Revenues

The Biden administration has a different view of corporate taxes than did the Trump administration. It favors higher taxes on corporations, more punitive treatment of foreign earnings, and the imposition of a global minimum tax. Treasury Secretary Janet Yellen has complained about a "30-year race to the bottom" in global corporate tax rates. She is right that corporate tax rates have fallen, but she does not appear to appreciate that these reforms have contributed to economic growth around the world.

Tax economists generally agree that the corporate income tax is a highly distortionary tax, and they warn against high rates. In a 2008 study comparing major taxes, OECD economists concluded, "Corporate taxes are found to be most harmful for growth." That is why it makes sense for countries to focus on corporate tax rate cuts. Cutting rates supports capital investment, which over time raises productivity and worker wages. Corporate tax rate cuts have been positive for the global economy, not the zero-sum game that Yellen seems to think.

Yellen and other critics of corporate tax cuts promote the false narrative that the reforms have starved governments of revenues. Yellen is pushing to limit tax competition and impose a global minimum corporate tax so that "governments have stable tax systems that raise sufficient revenue." Similarly, the OECD worries that tax "base erosion constitutes a serious risk to tax revenues" and that multinational corporations (MNCs) are "not paying their fair share of tax."

However, as corporate tax rates have fallen around the world, corporate tax revenues have risen. When rates fall, corporations reduce tax avoidance and increase investment, which boosts growth and expands the tax base. Over the years, many countries have also tightened tax regulations to broaden their corporate tax bases.

Figure 1
Corporate tax rates and ratio of revenues to GDP, average of 22 OECD countries

Source: OECD Statistics Database, "Table II.1. Statutory Corporate Income Tax Rate"; author estimates.
Note: GDP = gross domestic product; OECD = Organisation for Economic Co-operation and Development.

For 22 OECD countries that have good data back to 1980, I calculated average corporate tax revenues as a percentage of gross domestic product (GDP) and also average corporate tax rates including federal and state or provincial rates. For the 22 countries, the corporate tax rate averaged 46.2 percent in the 1980s, 37.5 percent in the 1990s, 31.3 percent in the 2000s, and 26.6 percent in the 2010s.

As rates fell, revenues trended upward, as shown in Figure 1. Corporate tax revenues for the 22 countries averaged 2.4 percent of GDP in the 1980s, 2.7 percent in the 1990s, 3.2 percent in the 2000s, and 2.9 percent in the 2010s. Revenues were down a bit in the 2010s from the 2000s, but they were up from the 1980s and 1990s.

A 2021 OECD report looks at corporate taxes in more than 100 countries. From 2000 to 2018, the average corporate tax rate fell from 28.3 percent to 20.0 percent, but corporate tax revenues as a percentage of GDP rose from 2.7 percent to 3.2 percent. Despite all the news stories decrying big corporations for not paying taxes, corporate tax revenues around the globe are at quite high levels even though rates are down. OECD studies often complain about "base erosion," but the data reveal that tax bases must have expanded because tax revenues are so buoyant.

Ignoring these realities, the Biden administration has proposed raising the federal corporate tax rate. It has also proposed increasing taxes on the foreign subsidiaries of U.S. corporations, which would hurt the U.S. economy because those subsidiaries often complement U.S. production. Corporations frequently establish subsidiaries to penetrate foreign markets, which helps boost U.S. exports. But Biden's approach would put U.S. companies operating abroad at a disadvantage compared with companies headquartered elsewhere. Tax Foundation modeling finds that Biden's proposed tax rate hike and foreign income proposals would increase the shifting of profits abroad, on net, not reduce it as the administration claims.

Creating a Global Tax Cartel

Multinational corporations are hugely important to the U.S. economy. They are responsible for three-quarters of all business research and development and more than half of U.S. exports. Taxing MNC profits is complex because determining where profits are actually earned can be difficult. Corporations can shift profits on paper from high-tax to low-tax jurisdictions in many ways. Today's MNCs are highly reliant on intellectual property, for which it is especially difficult to determine the proper location of profits.

As a result, an enormous amount of accounting and legal brainpower goes into tax planning, compliance, and administration for MNCs. Governments have layered ever more anti-avoidance tax rules onto MNCs, including rules for transfer pricing, interest deductibility, passive foreign income, and GILTI. Corporations have responded to the rules by engineering new ways of minimizing tax, which in turn has prompted governments to add more rules in a never-ending and wasteful cycle.

Given that the corporate income tax ultimately lands on individuals, the best solution to the increasingly complex corporate tax would be to fully repeal it and for governments to rely on simpler taxes, such as payroll taxes and consumption taxes. But a compromise is for governments to slash corporate tax rates to perhaps 15 percent or less, which would reduce incentives for tax avoidance and the need for such complex anti-avoidance rules.

Unfortunately, when news stories highlight a few famous corporations that have not paid taxes in some years, political leaders respond by layering on more regulations. As an example, the Inflation Reduction Act passed in August 2022 included a new 15 percent corporate minimum tax that will substantially increase business tax compliance costs because it is based on a different accounting system than the normal corporate income tax.

Another response has been for governments to support the OECD's push for global rules to limit the ability of countries to cut taxes and attract investment and profits. Since 2013, the OECD effort has gone under the name Inclusive Framework on Base Erosion and Profit Shifting (BEPS).

When the Democrats gained control of the White House in 2021, the OECD's BEPS effort moved into high gear. More than 100 countries agreed last year to the OECD's "Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy." To implement the proposals, countries will generally need to pass bills in their legislatures, and the European Union will need the unanimous support of its members. In the United States, a two-thirds vote in the Senate would be needed to approve the agreement as a treaty. But political leaders are pushing hard to make it happen in 2023, and the deal would affect countries even if they do not sign on.

This is the basic structure of the agreement:

- **Pillar 1.** For the 100 or so largest global corporations, 25 percent of profits above a 10 percent return on revenues would be reallocated for taxing purposes to governments around the world based on each company's sales in each country. The OECD estimates that about $125 billion a year in profits would be reallocated from governments of countries that are homes to large MNCs, such as the United States, to governments of countries where MNCs sell their products.
- **Pillar 2.** The agreement creates a global minimum tax of 15 percent on subsidiaries in each foreign country of each MNC that has annual revenues of more than €750 million. The pillar will be operationalized through three separate mechanisms. A carve-out is created for estimated earnings related to real activities based on tangible assets and payroll. The OECD estimates that this pillar would raise global taxes by $150 billion a year.

The workings of these mechanisms would be exceedingly complex. There are exceptions for certain industries and certain types of tax breaks; the rules mix tax and financial statement accounting, there are dispute mechanisms, and the whole structure would be layered on top of existing tax systems. Companies and tax authorities would need to make many complex calculations with rules that would be gray, not black and white.

If this global tax structure is created, corporations would likely respond with new tax avoidance efforts. Politicians would then push to add more rules and to increase the 15 percent minimum tax rate. Indeed, the OECD Two-Pillar document discusses ways to "expand the scope" of the rules over time, including increasing the number of companies in Pillar 1. If governments move ahead, the OECD structure could ultimately become something like an Internal Revenue Service for the world.

Supporters of the agreement use language that is vague and emotional, not scientific. Yellen mimics the OECD in saying that a global deal is needed for "ensuring corporations pay their fair share." But "fair share" is never defined, and corporate tax revenues as a percentage of GDP are up, not down. Besides, the corporate tax burden ultimately falls on individuals as shareholders, workers, or consumers. As such, it is meaningless to talk about the corporate "fair" share.

Also, the Two-Pillar report mixes up governments and countries. The report says, "All types of economies . . . will benefit from extra tax revenues" under the global tax deal. Governments may gain, but overall economies will not gain as more taxes are extracted from the private sector. The report says that corporate tax avoidance "costs countries" in lost tax revenues. Avoidance may cost governments, but it represents savings to businesses, and thus savings to shareholders, workers, and consumers. With regard to the overall economy, the Two-Pillar deal itself would impose costs because higher corporate taxes and more tax regulations would reduce investment and increase wasteful compliance burdens.

Finally, the OECD Two-Pillar deal may not even generate added revenues for the U.S. government. First, with the TCJA in place, the United States already has strong incentives for MNCs to invest at home, to repatriate profits, and not to shift paper profits abroad. Second, the purpose of Pillar 1 is to transfer tax revenues from countries that are home to MNCs to other countries where products are consumed. The United States is home to many MNCs and thus may be a revenue loser from Pillar 1. Third, low-tax nations will likely respond to the Pillar 2 global minimum tax by raising their income tax rates, which through the foreign tax credit mechanism would reduce U.S. tax revenues. Tax Foundation modeling finds that if low-tax nations raised their tax rates to the new global minimum, the U.S. government would lose revenue overall.

Advantages of Tax Competition

Monopolies in business usually generate bloated costs and higher prices. As such, economists favor subjecting industries to competition to reduce prices and improve efficiencies. Governments are monopolies, and they also get bloated, so we should look for ways to subject them to competition.

International competition for investment dollars is one way to do it. Taxes are an important driver of investment flows, so political leaders wishing to spur economic growth are under some pressure to restrain them. Cutting tax rates on capital would be beneficial even without globalization, but international competition has helped nudge policymakers in the right direction on reforms.

Yellen and the OECD are aiming to create an international cartel to protect government as a high-cost monopoly, just as the Organization of the Petroleum Exporting Countries (OPEC) cartel limits competition to keep oil prices high. In backing the OECD effort in May 2021, the Yellen Treasury said it wanted to "end the pressures of corporate tax competition." But many economists disagree with that direction. In a 2001 letter, 200 economists—including Nobel Prize winners Milton Friedman and James Buchanan—advised President George W. Bush that the United States should not support the OECD's "tax cartel" efforts because "tax competition is a liberalizing force in the world economy, something that should be celebrated rather than persecuted."

The OECD's efforts are based on the false theory that governments left alone will always act in the public interest and produce optimal tax policy. But Nobel Prize–winning economist Gary Becker once observed that "competition among nations tends to produce a race to the top rather than to the bottom by limiting the ability of powerful and voracious groups and politicians in each nation to impose their will at the expense of the interests of the vast majority of their populations." Becker recognized that policymakers don't always act in the public interest, and so external competition is a useful constraint. Globalization puts beneficial pressure on policymakers to raise taxes only when really necessary.

The OECD does not see it that way. It calls tax competition that it does not favor "harmful" and "unhealthy." It worries that when tax rates are not harmonized across countries, investment flows are distorted. But the OECD could seek harmonization by asking high-tax countries to slash their tax rates to equalize them with low-tax countries. It could push for a global *maximum* tax rate of 15 percent, rather than a minimum. Or it could call for countries to abolish corporate income taxes altogether, since those are highly inefficient taxes in today's global economy. Instead, the OECD effort is one-sided in favoring more taxing power and bigger government.

Consider that many policy differences between countries drive investment flows across international borders, including differences in education, infrastructure, and the rule of law. For instance, one could say that America engages in "harmful education competition" because our top universities attract many foreign students. If the OECD applied its anti-competition reasoning, it would demand that we end this "unfair" advantage and reduce our university quality to match the lower standards abroad.

The OECD's tax cartel effort can be contrasted with the efforts of the World Trade Organization (WTO) to liberalize trade. Trade barriers are like taxes that reduce cross-border activity. Part of the WTO's role is to be a facilitator in reducing these taxes and expanding global trade to every country's benefit. If a country cuts its trade barriers and generates more trade, the effort is not criticized by economists as "harmful trade competition," and the country is not ostracized as a "trade haven." With its tax cartel efforts, the OECD is like an anti-WTO.

Why the difference in tax and trade politics? Trade theorists properly focus on the benefits to the private sector of less government and more trade. But the OECD's tax advocacy defends governments at the expense of the private sector. In a study on the OECD, Andrew Morriss and Lotta Moberg describe how the organization previously advocated for competition, labor market flexibility, fiscal discipline, and open markets. But on tax policy, it changed direction in the 1990s and began calling to restrict competition. Morriss and Moberg note that the "OECD evolved from a forum focused on lowering transactions costs to increase private sector competition across borders into a cartel aimed at restricting competition among states."

The authors attribute the change partly to the influence of some large and high-tax OECD countries. The governments of France and Germany, for example, have not appreciated rising tax competition from smaller, lower-tax nations. Ireland, for instance, has generated stiff competition in Europe with its 12.5 percent corporate tax rate. Just a few decades ago, Ireland was much poorer than the largest economies in Europe, but its enactment of a low corporate tax rate and other reforms has attracted booming inward investment, which has helped the Celtic Tiger grow strongly and surpass the living standards of nearly all other countries in Europe.

The OECD global tax deal would limit the ability of other nations to adopt Ireland's successful growth strategy. Estonia is another small country that has enacted a low and efficient corporate tax system. Such reform successes should be emulated, not condemned. Although Yellen and the OECD often talk about "fairness" in taxation, their push to impose a global tax cartel can be viewed as an arrogant move by the governments of big and powerful countries to limit the growth opportunities of smaller and poorer nations.

Policy Options

America's role in the world economy should be to foster competition, not to join monopolistic cartels aimed at punishing countries that adopt pro-growth tax reforms. The United States should pull out of the OECD Two-Pillar effort and other initiatives that would limit tax competition and undermine national sovereignty. Taxation is a core power of government and a lever of citizen control over government in a democracy. We should not outsource that power to an international bureaucracy.

At the same time, Congress should work on tax reforms here at home. The Tax Foundation's International Tax Competitiveness Index places the United States just 21st out of 37 countries. Policymakers should build on the TCJA and cut the federal corporate tax rate from 21 percent to 15 percent, which would spur growth and further reduce incentives to shift profits abroad. Policymakers should strive to make America the best place in the world for investment, business creation, and worker opportunities.

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—Prepared by Chris Edwards

74. FISCAL FEDERALISM

Congress should

- cut federal aid programs, which give state and local governments hundreds of billions of dollars a year for education, highways, housing, transit, and other activities.

Under the U.S. Constitution, the federal government was assigned specific, limited powers, and most government functions were left to the states. To emphasize the limits on federal power, the nation's Founders added the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment embodies federalism, the idea that federal and state governments have separate policy areas and that federal activities are "few and defined," as James Madison noted in *Federalist no. 45*.

The federal government generally kept out of state and local fiscal affairs until the mid-20th century. But since then, Congress has increasingly intervened with "grant-in-aid" programs, which are subsidies to the states coupled with top-down regulations. Today, there are more than 1,300 federal aid programs for education, housing, health care, highways, transit, and many other activities.

Federal aid to the states totaled $721 billion in 2019. Then Congress boosted aid enormously during the pandemic to $829 billion in 2020, $1.25 trillion in 2021, and an estimated $1.23 trillion in 2022. These are fiscal years. As it turned out, most of this aid was not needed because state and local tax revenues have grown strongly the past two years, providing governments the resources to handle the crisis.

The states have become far too dependent on federal aid. State governments are not regional subdivisions of the federal government. The aid system generates excessive spending, creates costly bureaucracy, reduces political accountability, stifles diversity, and undermines local democratic control. The following discussion explores nine reasons why federal aid should be cut.

Nine Reasons to Cut Federal Aid

1. Aid induces excess spending. Federal aid supporters often talk as if state governments lack resources to fund programs, whereas the federal government seemingly has endlessly deep pockets. The federal government is able to run large deficits, which gives the illusion of deep pockets, but every dollar of federal aid for state programs ultimately comes from taxpayers who live in the states. It is better to fund state activities at the state level because state governments must balance their budgets, limit debt issuance, and be more fiscally prudent than the federal government.

When states fund their own programs, state policymakers balance the benefits of spending with the costs of raising taxes to pay for those programs. But if a program is partly funded with federal aid, both federal and state policymakers claim credit for the spending yet are only partly responsible for the tax cost. In this way, federal aid inflates the ratio of political benefits from spending to the tax costs, which induces excess spending.

A further problem is that many federal aid programs require states to partly match the funding, which stimulates additional spending. When the federal match is open-ended, as with Medicaid, states have an incentive to continually expand programs because it draws additional federal cash. Converting matching programs to fixed block grants would reduce overspending incentives.

2. Aid distorts spending choices. Supporters of aid hope that federal experts can efficiently allocate funds to high-value activities across the nation. But there is no reason to think that federal officials are better able than state officials to target resources for education, housing, transportation, and other activities. Indeed, pork barrel politics and faulty formulas often undermine efficient allocation of federal aid.

With highways, some growing states such as Texas get shortchanged on aid relative to the gas tax dollars that they put into the federal highway fund. With airports, federal aid is tilted toward smaller airports and away from larger airports where it would generate more benefits. Similarly, homeland security aid has been tilted toward rural areas with low terrorism risks.

People may think that federal aid is aimed at less fortunate regions of the country, but that is often not the case. In 2019, the 10 highest-income states received $2,354 per capita of federal aid, whereas the 10 lowest-income states received $2,068, based on my calculations. One cause of this situation is that Medicaid's matching formula has encouraged wealthier states to expand the program more than poorer states, so wealthier states end up receiving more matching dollars from Washington.

Federal aid induces states to spend more on federally subsidized activities, and less on other activities that state residents may prefer. For example, federal transit aid goes mainly for capital costs not operational costs, which has induced dozens of cities to purchase expensive rail systems rather than more efficient bus systems.

Federal aid has prompted the states to make spending decisions that are divorced from the needs of their own citizens. A classic example was the urban renewal or "slum clearing" of the mid-20th century, which used billions of federal aid dollars to bulldoze poor neighborhoods in favor of failed redevelopment schemes. In *The Death and Life of Great American Cities*, Jane Jacobs said of these projects: "This is not the rebuilding of cities. This is the sacking of cities."

3. Aid generates bureaucracy. Aid programs need legions of administrators, accountants, and lawyers to prepare applications, draft procedures, file reports, submit waivers, audit recipients, litigate disagreements, and comply with regulations. Federal rules for aid programs can run hundreds or even thousands of pages, and just applying for federal aid is a major effort. The Obama administration, for example, handed out $4.3 billion in Race to the Top school grants to selected states, but states were required to fill out applications for the funding that were generally more than 600 pages in length.

The federal administrative costs of aid programs can consume up to 10 percent of program spending, which is in addition to the state and local administrative costs. For example, the Government Accountability Office (GAO) found that local governments spent an average of 17 percent of Community Development Block Grant funds on administration. Bureaucracy expert Paul Light estimated in his studies on the "true size of government" that millions of state and local government workers are needed to handle federal aid spending and related regulations.

4. Aid creates fraud and abuse. Many federal aid programs suffer from high levels of waste, fraud, and abuse. State administrators have little incentive to reduce such costs because the funds come "free" from Washington. At the same time, members of Congress have little incentive to reduce such waste because all federal spending in their districts is viewed as a political positive.

Consider the largest aid program, Medicaid. The GAO estimates that 21 percent, or $85 billion, of the program's spending in 2020 was improper, meaning erroneous or fraudulent. As a matching program, state administrators have less incentive to cut Medicaid waste because they would need to find more than two dollars of waste to save state taxpayers one dollar. Indeed, the states themselves abuse Medicaid with dubious schemes to inflate the matching dollars they receive from Washington.

Federal aid for the School Lunch and School Breakfast programs is also subject to widespread abuse. In 2019, the GAO reported that the improper payment rate was 16 percent for school lunches and 23 percent for school breakfasts. Local administrators do little verification of recipient eligibility because they have no incentive to. Indeed, administrators have an incentive to inflate the number of children receiving benefits.

Finally, budget overruns plague infrastructure projects funded with federal aid because there is not enough incentive to control costs. Boston's Big Dig highway project more than quadrupled in cost from $2.6 billion to $14.6 billion, of which $8.5 billion came from the federal government. In his 2018 book *Romance of the Rails*, Randal O'Toole found that cost overruns averaged 43 percent on 64 major urban rail projects funded by the federal government.

5. Aid is tied to costly regulations. Since the first aid program in 1862 for land-grant colleges, the federal government has imposed regulations on state and local agencies running the programs. Today, the federal government loads piles of labor, environmental, safety, and other requirements on aid recipients. These regulations raise the costs of projects. For example, Davis-Bacon rules require that workers on federally funded construction projects must generally receive higher union wages, a requirement that increases wage costs on projects by about 20 percent. Federal environmental rules tied to aid also cause project delays. The average time to gain federal environmental approvals for infrastructure projects has risen from 2.2 years in the 1970s to about 6.6 years today.

6. Aid squelches policy diversity. Residents of each state may have different policy preferences for education, highways, transit, taxes, and other items. In America's federal system, state and local governments can maximize value by tailoring policies to the preferences of their residents, and individuals can improve their lives by moving to jurisdictions that better suit them.

Federal aid and related regulations undermine beneficial state policy diversity and local choices. A good example was the 55-mile-per-hour national speed limit, which was enforced between 1974 and 1995 by federal threats of withdrawing highway aid. Such one-size-fits-all rules destroy value because they ignore state variations in geography, traditions, and resident values.

In 1987, President Ronald Reagan's Executive Order 12612 on federalism stated: "The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues." But the states cannot be free to experiment if Washington is calling the shots through aid programs.

Reagan was a conservative, but policy diversity has also been a social ideal championed by liberals. It was liberal Supreme Court Justice Louis Brandeis who said in 1932 that with federalism each state can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." It is less risky to pursue policy experiments at the state level than at the federal level because when federal politicians make big mistakes, it harms the whole nation. A good example is the high-rise public housing projects of the mid-20th century, which are now regarded as a policy disaster. Why did many American cities bulldoze neighborhoods and erect unsightly concrete fortresses for the poor? Because the federal government was paying for the projects and promoting them.

7. Aid undermines democracy. With federal aid programs, policy decisions are often made by unelected officials in Washington rather than by elected officials locally. Aid programs move decisions away from the nation's more than 500,000 elected state and local officials to thousands of unknown and inaccessible federal agency employees.

In theory, the 535 elected members of Congress oversee aid programs, but they have delegated much of their power to the federal bureaucracies. If you do not like a policy in your child's public school, you can voice your concern to local officials. But if the policy was imposed by Washington, you will have a hard time making your concerns heard.

Furthermore, the sheer size of the federal government works against democratic involvement. The federal budget is 100 times larger than the average state budget, so federal policymakers have less time to handle citizen concerns about a program than state and local policymakers do. "Citizens are effectively disenfranchised" because of the federal aid system, noted former U.S. Sen. James L. Buckley in his 2014 book, *Saving Congress from Itself: Emancipating the States and Empowering Their People*.

The U.S. Constitution guarantees to each state a "republican form of government," meaning a representative democracy, but that promise is undermined to the extent that the states become subdivisions of the federal government. Federal aid accounts for one-quarter of state and local government budgets, and because of federal regulatory power, that one-quarter is the tail that wags the dog for overall program control.

The George W. Bush administration imposed a slew of top-down mandates on public schools with its No Child Left Behind program. The Barack Obama administration tried to micromanage neighborhoods through control over federal housing dollars. The Donald Trump administration threatened to cut aid to public schools that did not follow its approach to reopening during COVID-19. A better approach in all these cases would have been to repeal the underlying aid programs and allow the states to fund and control their own programs.

8. Aid destroys accountability. Originally, the three levels of American government—federal, state, and local—were like a tidy layer cake with each layer handling separate functions. Citizens knew whom to praise or blame for policy actions. But with the rise of aid, government has become like a marble cake with responsibilities for policy areas mixed across layers. In his February 1982 budget message to Congress, Reagan complained, "During the past 20 years, what had been a classic division of functions between the Federal Government and the States and localities has become a confused mess."

The confused mess has made it harder for citizens to hold politicians accountable. When failures occur, politicians point fingers of blame at other levels of government. They blame others for substandard public school results, inadequate responses to disasters, and many other disappointments. When every government has a hand in an activity, no government takes responsibility for failures.

9. Aid crowds out private activities. Federal aid induces the states to displace or "crowd out" the private provision of services. This problem can be seen with infrastructure investment in bridges, transit systems, and airports.

The expansion of federal aid crowded out private highway bridges. Most toll bridges in America used to be privately owned, noted Robert Poole in *Rethinking America's Highways: A 21st-Century Vision for Better Infrastructure*. But then in the 1930s, federal and state governments began handing out subsidies to government-owned bridges, which put private bridges at a competitive disadvantage, and many of them were taken over by governments.

Urban transit systems in most American cities were privately owned and operated until the 1960s, but then private transit went into decline. The rise of automobiles undermined private transit, but the nail in the coffin was the Urban Mass Transportation Act of 1964, which provided federal aid to government-owned bus and rail systems, which, in turn, encouraged governments to take over the private systems.

A similar thing happened in aviation. About half of U.S. airports were privately owned in the early years of commercial aviation in the 1920s and 1930s, including the main airports in Los Angeles, Miami, Philadelphia, and Washington, D.C. The airports were successful and innovative, but they lost ground from unfair government competition. Government airports could issue tax-exempt bonds and did not have to pay taxes. And then in 1946, the federal government began regular aid payments to government-owned airports, and that placed private commercial airports at a disadvantage and ultimately put them out of business.

In conclusion, the federal aid system is a roundabout and inefficient way to fund state and local activities. The aid system generates overspending and bureaucracy. It undermines policy diversity and democratic control. It is a triumph of expenditure without responsibility, and it should be cut and eventually eliminated altogether.

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—Prepared by Chris Edwards

ENTITLEMENTS

75. SOCIAL SECURITY

Congress should

- restore Social Security to long-term sustainable solvency; and
- allow younger workers to privately invest a portion of their Social Security payroll taxes through individual accounts.

The United States is drowning in a sea of red ink. America's national debt now exceeds $30 trillion and is growing. The economic consequences of this bipartisan profligacy are becoming increasingly apparent. But as massive as today's debt is, it represents just the tip of the iceberg. Soon, entitlement programs, notably Social Security and Medicare, will begin to add trillions to the debt.

Social Security's long-term unfunded liabilities now total $42.2 trillion. Congress's failure to act is threatening America's economic stability and promises to bury our children and grandchildren under a mountain of debt. Reform is not an option; it is a necessity. And Congress should act now.

But not all Social Security reforms are equal. Raising taxes and cutting benefits would have their own economic costs and would make a bad deal even worse for today's younger workers. However, by allowing younger workers to privately invest their Social Security taxes through individual accounts, the United States could

- help restore Social Security to long-term solvency, without massive tax increases;
- provide workers with higher benefits than Social Security would otherwise be able to pay;
- create a system that treats women, minorities, and young people more fairly;
- increase national savings and economic growth;
- allow low-income workers to accumulate real, inheritable wealth for the first time in their lives; and
- give workers ownership and control over their retirement funds.

The Looming Crisis

Social Security is a "pay-as-you-go" program, in which Social Security taxes are used to immediately pay benefits for current retirees. It is not a "funded plan," in which contributions are collected and invested in financial assets and then liquidated and converted into a pension at retirement. Rather, it is a simple wealth transfer from current workers to current retirees.

Table 1 shows a basic model of overlapping generations: people are born in every time period, live for two periods (the first as workers, the second as retirees), and finally die. As time passes, older generations are replaced by younger generations. The columns represent successive time periods, and the rows represent successive generations. Each generation is labeled by the period of its birth, so that Generation 1 is born in Period 1, and so on. In each period, two generations overlap, with younger workers coexisting with older retirees.

In Table 1, a pay-as-you-go pension system provides a startup bonus to Generation 0 retirees by taking contributions from Generation 1 workers to pay benefits to those already retired. Thus, Generation 0 retirees receive a windfall because they never paid taxes into the system. Subsequent generations both pay taxes and receive benefits. There is no direct relationship between taxes paid and benefits received.

As long as the wage base supporting Social Security grows faster than the number of recipients, the program can continue to pay higher benefits to those recipients. But the growth in the labor force has slowed dramatically. In 1950, for example, there were 16.5 covered workers for every retiree receiving benefits from the program. Since then, Americans have been living longer and having fewer babies. As a result, there are now just 2.7 covered workers per beneficiary; and by 2040, there will be only 2.2 (Figure 1). Real wage growth (especially

Table 1

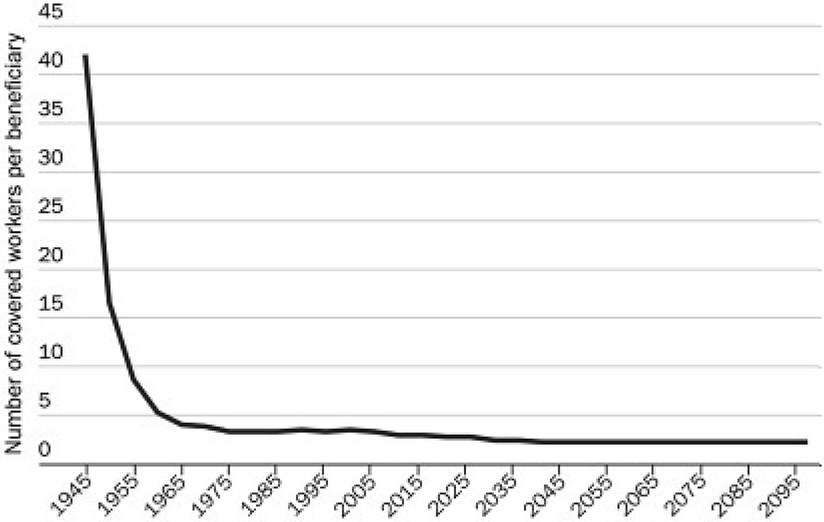
Pay-as-you-go Social Security system

Generation	Period 1	Period 2	Period 3	Period 4
0	Retired (benefits)	Dead	Dead	Dead
1	↑ Working (contributions)	Retired (benefits)	Dead	Dead
2	Unborn	↑ Working (contributions)	Retired (benefits)	Dead
3	Unborn	Unborn	↑ Working (contributions)	Retired (benefits)
4	Unborn	Unborn	Unborn	↑ Working (contributions)

Source: Thomas Siems, "Reengineering Social Security for the New Economy," Cato Institute Social Security Paper no. 22, January 23, 2001.

Figure 1

Worker to beneficiary ratio, historical and projections, 1945–2095



Source: Social Security Administration, "The 2021 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds," Table IV.B3, Covered Workers and Beneficiaries, Calendar Years 1945–2090. Washington: Government Printing Office, 2021.

in wages below the payroll tax cap) has not been nearly fast enough to offset this demographic shift.

As Figure 2 shows, Social Security is already running a cash-flow deficit. In 2020, for instance, the program had paid out roughly $65 billion more in benefits than it took in through taxes. That might seem a small amount of money in a world of trillion-dollar deficits, but without reform, this shortfall will continue to grow. Very soon, Social Security's deficit will reach levels that threaten to explode our overall budget deficit. Along with Medicare and Medicaid, Social Security will be one of the major drivers of our country's long-term debt.

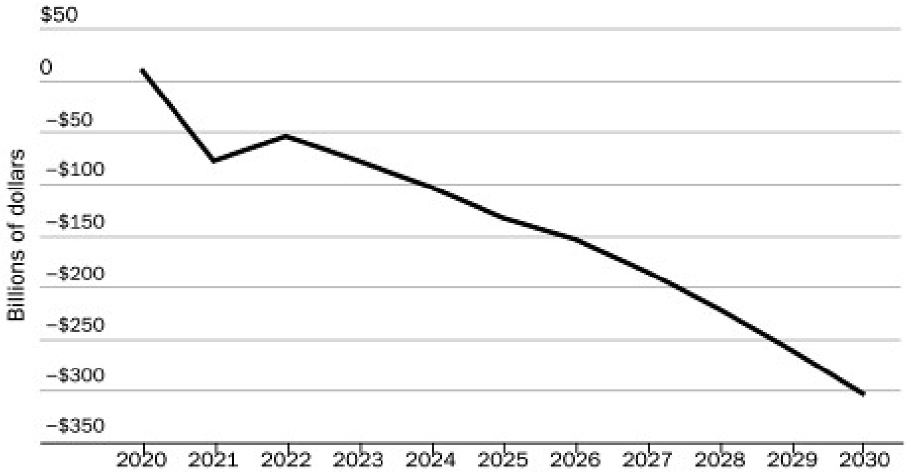
In theory, of course, Social Security is supposed to continue paying benefits by drawing on the Social Security Trust Fund until 2034, after which the Trust Fund will be exhausted. At that point, *by law*, Social Security benefits will have to be cut by approximately 22 percent.

In reality, the Social Security Trust Fund is not an asset that can be used to pay benefits. Perhaps the best description of the Trust Fund can be found in the Clinton administration's fiscal year 2000 budget:

> These [Trust Fund] balances are available to finance future benefit payments and other Trust Fund expenditures—but only in a bookkeeping sense. . . . They do not consist of real economic assets that can be drawn down in the future to fund benefits. Instead, they are claims on the Treasury that, when redeemed,

Figure 2

Cash-flow deficit in Social Security Trust Funds, historical data and projections, 2020–2030



Source: Social Security Administration, "The 2021 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds," Table IV.A3, Operations of the Combined OASI and DI Trust Funds, Calendar Years 2016–2030. Washington: Government Printing Office, 2021.

> will have to be financed by raising taxes, borrowing from the public, or reducing benefits or other expenditures. The existence of large Trust Fund balances, therefore, does not, by itself, have any impact on the Government's ability to pay benefits.

Even if Congress can find a way to redeem the bonds, the Trust Fund surplus will be completely exhausted by 2034. At that point, Social Security will have to rely solely on revenue from the payroll tax—but that revenue will not be sufficient to pay all promised benefits. Overall, Social Security faces unfunded liabilities of $42.2 trillion over the infinite horizon. Clearly, Social Security is not sustainable in its current form. That means that Congress will again be forced to resort to raising taxes and/or cutting benefits to enable the program to stumble along.

Other Issues with Social Security

Social Security taxes are already so high, relative to benefits, that Social Security has quite simply become a bad deal for younger workers, providing a poor, below-market rate of return. This poor rate of return means that many young workers' retirement benefits will be far lower than if they were able to invest those funds privately.

In addition, Social Security taxes displace private saving options, resulting in a large net loss of national savings, reducing capital investment, wages, national income, and economic growth. Moreover, by increasing the cost of hiring workers, the payroll tax substantially reduces wages, employment, and economic growth.

After all the economic analysis, however, perhaps the single most important reason for transforming Social Security into a system of individual accounts is that it would give American workers true ownership of and control over their retirement benefits.

Many Americans believe that Social Security is an "earned right." That is, because they have paid Social Security taxes, they are entitled to receive Social Security benefits. The government encourages this belief by referring to Social Security taxes as "contributions," as in the Federal Insurance Contributions Act (or FICA). However, in the 1960 case of *Flemming v. Nestor*, the U.S. Supreme Court ruled that workers have no legally binding contractual or property right to their Social Security benefits and that those benefits can be changed, cut, or even taken away at any time.

As the Court stated, "To engraft upon Social Security a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever changing conditions which it demands." That decision built on a previous case from 1937, *Helvering v. Davis*, in which the Court had ruled that Social Security is not a contributory insurance program, stating that "the proceeds of both the employer and employee taxes are to be paid into the Treasury like any other internal revenue generally, and are not earmarked in any way."

In fact, the Social Security statement mailed to workers contains this caveat:

> Your estimated benefits are based on current law. Congress has made changes to the law in the past and can do so at any time. The law governing benefit amounts may change because, by 2034, the payroll taxes collected will be enough to pay only about 78 percent of scheduled benefits.

In effect, Social Security turns older Americans into supplicants, dependent on the political process for their retirement benefits. If they work hard, play by the rules, and pay Social Security taxes their entire lives, they earn the privilege of going hat in hand to the government and hoping that politicians decide to give them some money for retirement.

Options for Reform

There are few options for dealing with the problem. This is not an opinion shared only by supporters of individual accounts. As former president Bill Clinton pointed out, the only ways to keep Social Security solvent are to

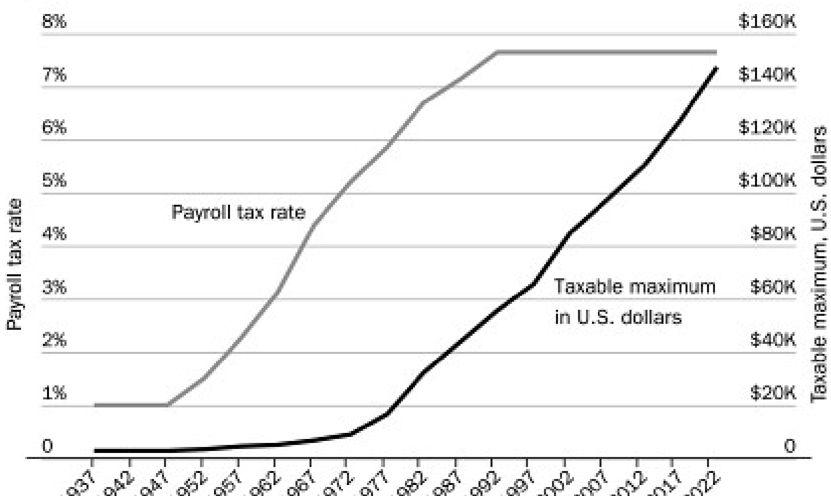
1. raise taxes;
2. cut benefits; or
3. get a higher rate of return through private capital investment.

Certainly, throughout its history, Social Security taxes have been raised frequently to keep the system financially viable. The initial Social Security tax was 2 percent (split between the employer and employee), capped at $3,000 of earnings. That made for a maximum tax of $60. Since then, as Figure 3 shows, the payroll tax rate and the ceiling at which wages are subject to the tax have been raised a combined total of 67 times. Today, the tax is 12.4 percent, capped at $147,000, for a maximum tax of $18,228. Even adjusting for inflation, that represents more than a 1,456 percent increase.

Alternatively, Congress can reduce Social Security benefits. Restoring the program to solvency would require an immediate 21 percent cut to benefits. Suggested changes include raising the retirement age further, trimming cost-of-living adjustments, means testing, or changing the wage-price indexing formula.

Obviously, there are better and worse ways to make these changes. But, as described above, most younger workers will receive returns far below those provided by private investment. Some will actually receive less in benefits than they pay into the system—a negative return. Both tax hikes and benefit reductions further reduce the return that workers can expect on their contributions (taxes).

Figure 3
Payroll tax rate and taxable maximum increases, 1937–2022



Source: Social Security Administration, "Social Security & Medicare Tax Rates," FICA & SECA Tax Rates, Social Security Administration; Social Security Administration, "Contribution And Benefit Base," Social Security Administration.

Perhaps the best way to reduce Social Security benefits would be to change the formula used to calculate the initial benefit so that benefits are indexed to price inflation rather than national wage growth. Since wages over the long run have tended to grow at a rate roughly 1 percentage point faster than prices, such a change would hold future Social Security benefits constant in real terms but would eliminate the benefit escalation that is built into the current formula. The Congressional Budget Office (CBO) estimates that this change would reduce scheduled outlays by 7 percent in 2040 and 40 percent by 2080. This reform would result in the largest reduction in the actuarial shortfall of any options that the CBO analyzed, representing an 80 percent improvement. Variations on this approach would apply the formula change only to higher-income seniors, preserving the current wage-indexed formula for low-income seniors.

Better Reform: Personal Accounts

Ultimately, benefit reductions or tax increases are the only ways to restore Social Security to permanent sustainable solvency. But Social Security taxes are already so high relative to benefits that Social Security has quite simply become a bad deal for younger workers, providing a low, below-market rate of return. It makes sense, therefore, to combine any reduction in government-provided benefits with an option for younger workers to save and invest a portion of their Social Security taxes through individual accounts.

Table 2 shows what that would mean. Unlike the current Social Security system, each working generation's contributions would actually be saved and would accumulate as time passes. The accumulated funds, including the returns earned through real investment, would then be used to pay that generation's benefits when they retire. Under a funded system, there would be no transfer from current workers to current retirees. Each generation pays for its own retirement.

In a funded system, there is a direct link between contributions and benefits. Each generation receives benefits equal to its contribution plus the returns the investments earn. And because real investment takes place and the rate of return on capital investment can be expected to exceed the growth in wages, workers can expect to receive higher returns than under the current system.

Moving to a system of individual accounts would allow workers to take advantage of the potentially higher returns available from capital investment. In a dynamically efficient economy, the return on capital will exceed the rate of return on labor and therefore will be higher than the benefits that Social

Table 2

Funded Social Security system

Generation	Period 1	Period 2	Period 3	Period 4
0	Retired	Dead	Dead	Dead
1	→ Working (contributions)	Retired (benefits)	Dead	Dead
2	Unborn	→ Working (contributions)	Retired (benefits)	Dead
3	Unborn	Unborn	→ Working (contributions)	Retired (benefits)
4	Unborn	Unborn	Unborn	→ Working (contributions)

Source: Thomas Siems, "Reengineering Social Security for the New Economy," Cato Institute Social Security Paper no. 22, January 23, 2001.

Security can afford to pay. In the United States, the return on capital has generally run about 2.5 percentage points higher than the return on labor.

True, capital markets are both risky and volatile. But private capital investment remains remarkably safe over the long term. For example, a 2012 Cato Institute study looked at a worker retiring in 2011, near the nadir of the stock market's recession-era decline. If that worker had been allowed to invest the employee half of the Social Security payroll tax over his working lifetime, he would have retired with *more* income than if he relied on Social Security. Indeed, even in the worst-case scenario—a low-wage worker who invested entirely in bonds—the benefits from private investment would equal those from traditional Social Security. Although there are limits and caveats to this type of analysis, it clearly shows that the argument that private investment is too risky compared with Social Security does not hold up.

Low-income workers would be among the biggest winners under a system of privately invested individual accounts. Private investment would pay low-income workers significantly higher benefits than can be paid by Social Security. And that does not take into account the fact that black people, other minorities, and people who are poor have below-average life expectancies. As a result, they tend to live fewer years in retirement and collect less in Social Security benefits than do white people. In a system of individual accounts, they would each retain control over the funds paid in and could pay themselves higher benefits over their fewer retirement years, or leave more to their children or other heirs.

The higher returns and benefits of a private, invested system would be most important to low-income families, as they most need the extra funds. The funds saved in the individual retirement accounts, which could be left to the children of the poor, would also greatly help families break out of the cycle of poverty. Similarly, the improved economic growth, higher wages, and increased jobs that would result from an investment-based Social Security system would be most important to people who are poor. Without reform, low-income workers will be hurt the most by the higher taxes or reduced benefits that will be necessary if we continue our current course.

In addition, with average- and low-wage workers accumulating large sums in their own investment accounts, the distribution of wealth throughout society would become far broader than it is today. No policy proposed in recent years would do more to expand capital ownership than allowing younger workers to invest a portion of their Social Security taxes through personal accounts. Even the lowest-paid American worker would benefit from capital investment.

It should be noted that individual accounts do not, by themselves, fix Social Security's solvency. Rather they compensate younger workers for benefit cuts that will be necessary to restore the system to fiscal solvency. Indeed, there will be a period of transition that requires younger workers both to bear the cost of the new system of individual accounts and to support the existing system for current recipients. Still, on net, younger workers will be better off when compared with the level of benefits that the existing system can pay given current taxes.

Cato's Social Security Plan

- Individuals will be able to privately invest "the amount they contribute through their portion of the payroll taxes, 6.2 percent of wages" in individual accounts. Those who choose to do so will forfeit all future accrual of Social Security benefits.
- Individuals who choose individual accounts will receive a recognition bond based on past contributions to Social Security. The zero coupon bonds will be offered to all workers who have contributed to Social Security, regardless of how long they have been in the system, but will be offered on a discounted basis.
- Allowable investment options for the individual accounts will be based on a three-tiered system: a centralized, pooled collection and holding point; a limited series of investment options, with a life-cycle fund as a default mechanism; and a wider range of investment options for individuals who accumulate a minimum level in their accounts.
- At retirement, individuals will be given the option of purchasing a family annuity or taking a programmed withdrawal. The two options will be mandated only to the level needed to provide an income above a certain minimum. Funds in excess of the amount required to achieve that minimum level of retirement income can be withdrawn in a lump sum.

- Individuals who accumulate sufficient funds within their account to allow them to purchase an annuity that will keep them above a minimum income level in retirement will be able to opt out of the Social Security system in its entirety.
- The remaining 6.2 percentage points of payroll taxes that are paid by the employer will be used to pay transition costs and to fund disability and survivor benefits. Once, far in the future, transition costs are fully paid for, this portion of the payroll tax will be reduced to the level necessary to pay survivor and disability benefits.
- The Social Security system will be restored to a solvent pay-as-you-go program before individual accounts are developed and implemented. Workers who choose to remain in the traditional Social Security system will receive whatever level of benefits Social Security can pay with existing Trust Fund levels. The best method for restoring the system's solvency is to change the initial benefit formula from wage indexing to price indexing.

Conclusion

Social Security is not sustainable without reform. Simply put, it cannot pay promised future benefits with current levels of taxation. Every year that we delay reforming the system increases the size of Social Security's shortfall and makes the inevitable changes more painful.

Raising taxes or cutting benefits alone will only make a bad deal worse. At the same time, workers have no ownership of their benefits, and Social Security benefits are not inheritable. That reality is particularly problematic for low-wage workers and minorities. Perhaps most important, the current Social Security system gives workers no choice or control over their financial future.

It is long past time for Congress to act.

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—Prepared by Michael D. Tanner

76. EARNED INCOME TAX CREDIT

Congress should

- cut the earned income tax credit because it imposes a $69 billion annual cost on taxpayers, has a high error rate, and creates a disincentive for many workers to increase earnings; and
- enact reforms to boost market wages, such as cutting taxes on business investment.

The earned income tax credit (EITC) is a large federal aid program administered through the tax system. Benefits are available to households with earnings from employment. In 2021, the program provided $71 billion in benefits to 27 million recipients. The EITC is mainly a spending program, not a tax-cutting program. The credit is "refundable," meaning that individuals who pay no income taxes receive payments from the government. About $69 billion of the benefits in 2021 were refundable.

The EITC has a high error and fraud rate, and for many recipients it creates a disincentive to increase earnings. Also, the refundable or spending part of the EITC imposes a cost on the people who pay the taxes that fund the benefits.

Growth of the EITC

In the 1970s, policymakers considered ways to reduce the anti-work effects of the growing welfare state. One way would have been to cut the size of the welfare state, but policymakers instead decided to expand it by enacting the EITC in 1975. Initially, the program was a 10 percent wage credit with a maximum value of $400. Only workers with children were eligible.

Over the decades, Congress expanded the size and scope of the EITC. It now has credit rates of up to 45 percent and had a maximum value of $6,728 in 2021. It provides benefits to workers with and without children.

EITC expansions in 1986, 1990, 1993, and 2009 increased the program's cost. Total benefits in constant 2021 dollars rose from $16 billion in 1990 to

$71 billion in 2021. The number of recipients rose from 12.5 million in 1990 to 27 million in 2021. The American Rescue Plan of 2021 increased EITC benefits for childless workers for one year.

Structure of the EITC

EITC benefits vary depending on the number of children, income level, and filing status (single or married). Initially, the credit rises with income (the phase-in range). Then, it reaches the maximum amount and is constant for a range (the flat range). Finally, the credit falls as income rises further (the phase-out range).

Consider a single mother with two children in 2021. The maximum credit would have been $5,980 if she had earned between $14,950 and $19,520. Above that, the credit would phase out and ultimately be eliminated when earnings topped $47,915. The phase-out rate is 21.06 percent. So during the large phase-out range, the parent faces a disincentive to increase work effort since she loses $210 in EITC benefits for every additional $1,000 earned. The pattern of EITC benefits—rising, flat, then falling—is similar for other types of families.

EITC Reduces Market Wages

The EITC is supposed to strengthen work incentives for low-income individuals. If the program is successful, it increases their labor supply. On a simple supply-and-demand diagram, the labor supply curve shifts to the right, which has the effect of reducing market wages.

A growing labor supply and falling market wages induce employers to hire additional workers. Workers who receive the EITC are better off than before with the combination of a lower market wage and the EITC. But it is interesting that proponents of a larger EITC implicitly favor cutting market wages for low-income earners.

One side effect of the EITC is that, to the extent it works by pushing down market wages, it may hurt low-income earners who receive no EITC or just a small EITC. The labor-supply effect of the EITC also means the program acts as a subsidy to businesses that hire lower-skilled workers because they can pay reduced market wages.

Work Incentives and Disincentives

The EITC affects work incentives in two ways. First, it affects *labor force participation*, or the incentive for nonworkers to gain employment. Second, it affects the *number of hours worked* by people who are working. The EITC affects these factors in different ways for different people, creating both positive and negative effects. More than 30 states have their own EITCs layered on top of the federal program, and these amplify both the positive and negative effects of the federal program.

The EITC encourages individuals who are not working to find a job because the credit increases the financial reward for working. Most economists think that the EITC particularly encourages low-income single mothers to join the labor force, and there is solid empirical support for that positive effect.

However, there is doubt about the strength of this effect. EITC supporters point to gains in labor force participation among single mothers in the 1990s as evidence of the credit's benefits. The number of EITC recipients soared between 1987 and 1994 but was flat in the late 1990s. Yet from 1994 forward, labor force participation by single mothers grew strongly. So other factors aside from the EITC probably caused that late-1990s increase—perhaps the strong economy at the time and federal welfare reforms that increased work requirements.

For workers already in the labor force, the EITC creates a mix of incentives to either increase or decrease hours worked. Workers face an "income effect," which may cause some individuals to reduce work because the EITC allows them to meet their income needs with less work. Workers also face a "substitution effect," meaning the EITC makes working more valuable compared with not working. The substitution effect varies depending on whether individuals are in the phase-in, flat, or phase-out range of the EITC. As a result, people may respond to the credit by working either more or less at different income levels. People have an incentive to reduce hours worked in both the flat and phase-out ranges of the credit, and most people taking the EITC are in those two ranges. Thus, most people taking the EITC have an incentive to work less, not more.

The EITC is only one of the many government programs that alter incentives to work and earn additional income. A study by Elaine Maag and colleagues at the Urban-Brookings Tax Policy Center examined work incentives for a hypothetical low-income single mother with two children in each of the 50 states. As this mother's earnings rise, she pays more payroll taxes and possibly more income taxes, and she receives reduced benefits from the EITC, food stamps, and Temporary Assistance for Needy Families. On average, across the states, the study found that the parent would face a marginal tax rate of about 50 percent in moving from a poverty level of income to twice the poverty level. Here, "marginal tax rate" means the higher taxes paid as income rises combined with the reduction in various government benefits.

Other scholars have found similarly high marginal tax rates from the combined effects of taxation and benefit programs such as the EITC. Economist

Casey Mulligan of the University of Chicago found that the average marginal tax rate on labor income for the median-income household is above 45 percent. Similarly, a study by David Altig of the Federal Reserve Bank of Atlanta and coauthors constructed a detailed model of federal and state tax and spending programs and found that "across all age groups, the median lifetime marginal net tax rate is 46.6 percent for those in the lowest resource quintile" and that "one in four low-wage workers face marginal net tax rates above 70 percent, effectively locking them into poverty."

Errors and Complexity

The EITC has a high rate of improper payments caused by math errors, fraud, and misunderstanding of the rules. The Government Accountability Office reports that the EITC error and fraud rate averaged 24 percent between 2016 and 2020, or about $16 billion a year. People are receiving excess EITC payments based on false information about such items as their income level, filing status, and qualifying children. The EITC is an easy target for dishonest filers because it is refundable, meaning that people can simply file false tax returns and wait for the U.S. Treasury Department to send them a check.

In a 2019 statement, the National Taxpayer Advocate (NTA) noted that a "principal cause of the EITC improper payment rate is the complexity of the rules." EITC benefits change as income rises, and the credit has multiple phase-in and phase-out rates. It is adjusted by filing status and number of children. The rules regarding child eligibility are complex because of such issues as separation and divorce. The rampant errors in EITC filing consume substantial IRS resources. The NTA statement said that for 2017, "35 percent of all individual returns selected for audit were selected on the basis of an EITC claim."

The EITC error and fraud problems have persisted for decades, despite large IRS resources devoted to solving them. This is one good reason to cut or end the EITC. It is unfair to the taxpayers who fund the program for the government to misspend so much of their money year after year.

High Cost on Taxpayers

The EITC is mainly a spending program. Nearly all the EITC benefits—$69 billion in 2021—go to people who owe no income tax. Extracting the taxes to fund these benefits damages the economy by reducing productive activities, such as working and investing. This damage is called "deadweight losses." For the federal income tax, studies have found that the deadweight loss of raising taxes by a dollar is roughly 50 cents.

Suppose that Congress expands EITC spending by $10 billion. Does the expansion make any economic sense? The benefits would have to be higher than the total cost of about $15 billion, which includes the $10 billion direct cost to taxpayers plus another $5 billion or so in deadweight losses.

EITC supporters often say that the program pulls six million or so people out of poverty. But that is a dubious statistic. If the government gives low-income individuals $69 billion, of course they will have more money in their pockets, and fewer of them will be below a measured poverty line.

Why not double or triple EITC benefits and move even more people above the poverty line? The answer is because we need to worry about the costs of federal programs, which are the harms done to other citizens and the overall economy. Expanding the EITC would create higher deadweight losses, more fraud, and added disincentives to increase work in the credit's phase-out range.

Reform Options

Policymakers should cut the EITC by reining in benefit levels and narrowing eligibility. At the same time, they should pursue reforms to boost market wages. Wages across the economy rise over time as worker productivity increases. As such, policymakers should adopt policies favorable to capital investment and innovation. They should minimize tax rates on business income, provide favorable rules for venture capital and angel investment, and reduce regulatory barriers to competition and new investment.

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—Prepared by Chris Edwards

77. POVERTY AND WELFARE

Congress should

- consolidate current welfare and anti-poverty programs;
- transition from in-kind benefits to cash grants;
- reform the earned income tax credit;
- shift programs to states with as few strings as possible; and
- emphasize metrics of success, rather than funding or enrollment.

Although the exact number fluctuates from year to year, the federal government funds more than 100 separate anti-poverty programs. Some 70 of them provide cash or in-kind benefits to individuals, while the remainder target specific groups or disadvantaged neighborhoods or communities.

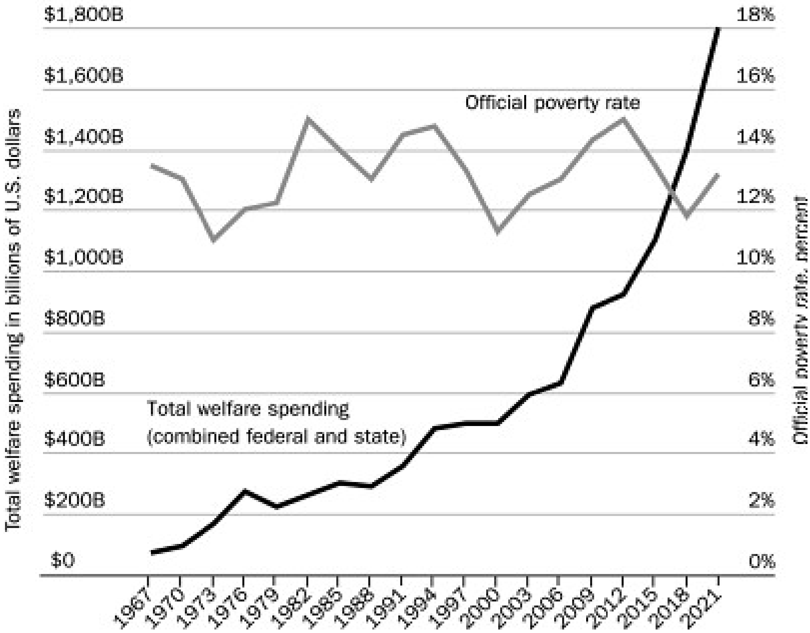
There are eight different health care programs administered by five separate agencies within the Department of Health and Human Services. Six cabinet departments and five independent agencies oversee 27 cash or general-assistance programs. Altogether, seven different cabinet agencies and six independent agencies administer at least one anti-poverty program. And those are just the programs specifically aimed at poverty. That doesn't include more universal social welfare programs or social insurance programs, such as unemployment insurance, Medicare, or Social Security.

Altogether, the federal government spends more than $1.1 trillion a year on 134 welfare programs. State and local governments add about $744 billion more. Thus, government at all levels is spending roughly $1.8 trillion per year to fight poverty (Figure 1). Stretching back to 1965, when President Lyndon Johnson first declared a "war on poverty," anti-poverty spending has totaled more than $30 trillion.

In relation to material deprivation, welfare payments have reduced poverty. In fact, a 2018 study by John Early for the Cato Institute suggests that if all benefits and other factors are fully accounted for, the true poverty rate may be under 3 percent. (The Census Bureau calculates the official poverty measure by comparing pretax monetary income to the cost of a minimum food diet.

Figure 1

Welfare spending versus poverty rate, 1967–2021



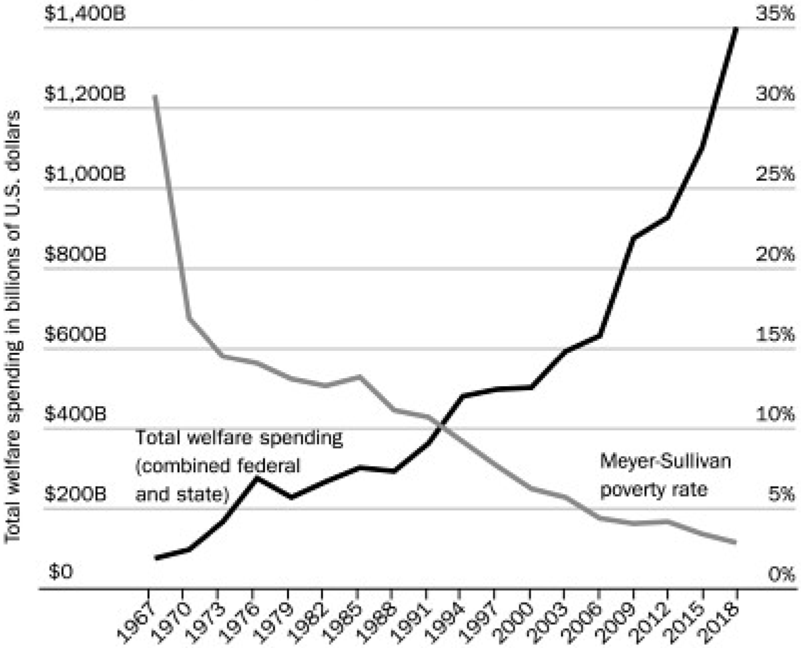
Sources: U.S. Census Bureau, Number in Poverty and Poverty Rate: 1959 to 2020 § (2021); Michael D. Tanner, "What's Missing in the War on Poverty?," Commentary, Cato Institute, January 23, 2019; Rachel Sheffield and Robert Rector, "The War on Poverty after 50 Years," Poverty and Inequality, Heritage Foundation, September 15, 2014; "Budget Digest: CBO Report on Federal Spending for Anti-poverty Programs," Budget Digests, House Budget Committee, June 24, 2019; and "Public Welfare Expenditures," State and Local Backgrounders, Urban Institute, March 20, 2022.

The poverty rate does not take noncash benefits into account.) Other studies are more cautious but still suggest that welfare programs reduce poverty rates by half or more. Then again, those studies also suggest that most of the gains took place in the early years of those programs and that the marginal gains of additional spending in recent years have been minimal (Figure 2).

More importantly, our current welfare system is far less successful when it comes to helping people get out and stay out of poverty. Most of our efforts have been focused on making poverty less miserable, by making sure that people who are poor have food, shelter, medical care, and other necessities. This approach hardly represents a sufficient anti-poverty policy. Perhaps *The Economist* expressed it best, stating: "If reducing poverty amounts to just ushering Americans to a somewhat less meagre existence, it may be a worthwhile endeavour but it is hardly satisfying. The objective, of course, should be a system that encourages people to work their way out of penury."

Figure 2

Welfare spending versus Meyer-Sullivan poverty rate, 1967–2018



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Much of the debate over poverty remains remarkably sterile and frozen in time. Arguing over whether we should increase or decrease spending on some program by another billion dollars will do little to change the underlying dynamics of a failed system.

Many of the changes that would be most effective in reducing poverty will have to take place outside the welfare system, and many require state governments to take the lead. They include reforming the criminal justice and school systems and repealing exclusionary zoning laws, as well as reducing taxes and regulations to increase the availability of jobs. Those reforms are discussed elsewhere in this volume. Still, there are several steps that Congress can take to reform our welfare system.

Simplify and Consolidate

The magnitude of the current welfare system, with its multitude of overlapping programs—often with contradictory eligibility requirements, differing rules, mixed oversight, and divided management—is a bureaucratic nightmare.

The complexity and lack of transparency make it difficult to measure whether programs are accomplishing their goals. Many existing programs have become little more than fiefs for special interests, providing a bureaucratic roadblock to reform. And while the overhead and administrative costs for most programs are modest— generally less than 5 percent—the costs do add up.

Moreover, the sheer number of programs works to suck more people into the welfare system, increasing both cost and enrollment (dependency) without necessarily targeting those efforts to the people most in need. As a result, many of the people receiving benefits are not necessarily poor, while many people who are legitimately poor do not receive assistance.

Some households in or near poverty that do receive assistance and participate in multiple programs can face marginal effective tax rates that are counterproductive: they are so high that they can act as poverty traps, deterring work effort or putting a low ceiling on how much those families can increase their standard of living. In those cases, the majority of each additional dollar earned is clawed back through higher taxes or reduced benefits.

Participants in the current welfare system can find it both demeaning and difficult to navigate. Those applying for benefits must deal with multiple forms, often-conflicting eligibility standards, and intrusive program administrators. Andrea Louise Campbell described the struggles of her disabled sister-in-law in her book *Trapped in America's Safety Net: One Family's Struggle*. Campbell notes that she, a professor at the Massachusetts Institute of Technology, found the welfare maze "incredibly complex and confusing." For more typical applicants with far less education and fewer coping skills, the process must be daunting indeed.

Receipt of benefits, therefore, often becomes a question not of need but of ability to game the system. Those groups and constituencies best able to maneuver through the bureaucracy are most likely to collect benefits—often multiple benefits; similarly situated individuals (or even those with greater need) who lack such skills are often left out.

There is no legitimate reason to continue to fund multiple programs that essentially do the same thing. Therefore, Congress should consolidate programs with similar functions, such as nutrition, health care, education, and so on.

Provide Cash, Not In-Kind Benefits

The vast majority of welfare benefits today are provided not in cash but rather as "in-kind" benefits. Indeed, direct cash assistance programs, including refundable tax credits, made up 22 percent of federal assistance in 2020, down from roughly 29 percent two decades ago. In-kind programs—such as food stamps, housing assistance, and Medicaid—provide people with assistance, but only for specific purposes. In most cases, the payments are made directly to providers. The person being helped never even sees the money.

The emphasis on in-kind benefits effectively infantilizes people who are poor. These people are not expected to budget or choose among competing priorities the way people who are not on welfare are expected to. Rather, in-kind benefits substitute the government's choices, values, and priorities for those of the people.

Virtually all programs go even further in limiting the use of benefits to government-approved purchases. For example, the Special Supplemental Nutrition Program for Women, Infants, and Children (often called WIC) can only be used to purchase certain foods determined by government regulation. Food stamp use is being restricted to stores that stock a certain level of healthy food products, often eliminating the eligibility of small neighborhood stores. Even with cash programs like Temporary Assistance for Needy Families, state lawmakers have enacted a host of restrictions around things like the locations where electronic benefit transfer cards may be used to access ATMs.

While it is reasonable for taxpayers, who are ultimately paying for these benefits, to seek accountability for how the funds are used, this paternalism may be both unnecessary and, worse, self-defeating. Shouldn't people decide for themselves how much of their income should be allocated to rent or food or education or transportation? Perhaps they may even choose to save more or invest in learning new skills that will help them earn more in the future. You can't expect people to behave responsibly if they are never given any responsibility.

Some might argue that people who are poor can't be trusted with money. We are told they will blow it on booze, drugs, or whatever. But that attitude is too often based on erroneous and racially biased stereotypes. There is little evidence to suggest that these people misuse their resources. For example, studies from states that drug-test welfare recipients suggest that the use of drugs is no higher among welfare recipients than among the general population. In fact, numerous studies have shown that even when welfare recipients are given totally unrestricted cash, they do not increase their expenditure on "temptation goods" like tobacco or alcohol.

Giving people responsibility for managing their own lives means giving them more choices and opportunities. That, in turn, would help break up geographic concentrations of poverty that can isolate people who are poor from the rest of society and reinforce the worst aspects of the poverty culture. The current welfare system not only stigmatizes these people, increasing their isolation, but pushes them into narrowly concentrated neighborhoods clustered around subsidized housing because the system relies on providers who are willing to accept government benefits (e.g., landlords willing to take Section 8 vouchers).

Those neighborhoods often offer poor schools, few jobs, high crime rates, and a lack of role models. Cash would allow people to escape those neighborhoods the same way vouchers and tax credits allow children to escape bad schools.

And by taking the money away from the special interests that support the welfare industry, it would break up the coalitions that inevitably push for greater spending. (For example, increased food stamp spending is inevitably backed by a coalition of Democrats and farm state Republicans.)

Having consolidated welfare programs as suggested earlier, Congress should therefore transform as many of those programs as possible to cash grants provided directly to people who are poor.

Reform the Earned Income Tax Credit

One program that does provide cash directly to people who are poor is the earned income tax credit (EITC). Moreover, the EITC is specifically designed as a wage supplement. The EITC is tied directly to work, and it offsets the high marginal tax rate that many people encounter when they leave welfare for work. The evidence suggests that the EITC increases work effort. In particular, single mothers have seen significant labor force gains due to the EITC.

Studies also suggest that the EITC has been more successful than other welfare programs in actually reducing poverty. The Census Bureau suggests that the poverty rate would be 2.5 percent higher in the absence of the EITC and other refundable tax credits. In fact, as measured by the additional outlays needed to lift one million people out of poverty (using the supplemental poverty measure), refundable tax credits such as the EITC are clearly more cost-effective than other types of welfare programs.

However, as the EITC has grown, problems with the program have become more apparent. First, because the EITC focuses on families, the benefit level for childless workers is small and phases out quickly. The maximum credit available to a childless worker was only $1,502 in 2021, and all benefits phase out before earned income hits $21,430 (for comparison, the maximum credit for a single parent with one child was $3,618). Childless workers under age 25 are not allowed to claim the EITC at all. As a result, childless adults accounted for only 3 percent of all EITC funding.

Second, as the Tax Policy Center notes: "The EITC imposes significant marriage penalties on some families. If a single parent receiving the EITC marries, the addition of the spouse's income may reduce or eliminate the credit." In some cases, if a single mother eligible for the EITC marries someone with enough earnings to bring them just above the eligibility threshold, then the entire household will no longer receive anything from the EITC; if the couple decided to cohabitate and remain unmarried, they could continue to receive some credit.

Because the credit is mostly determined by the number of children in a family, the maximum credit is the same for a single parent as it is for a married couple with the same number of children. For example, for a married couple with two children, the maximum credit is $5,980—the same as for a single filer with two children.

It is also useful to look at the breakeven points, the earned income level at which EITC benefits are exhausted. For the same two-child household, the breakeven point for a single parent is $47,915, and for married parents it is only a little higher at $53,665. In essence, the single parent can continue to receive benefits at higher income levels relative to the poverty level than can married couples, and the credit is more generous since the benefits are being distributed among the three people, rather than four, in the household.

Third, as a refundable tax credit, the EITC is paid annually, in the manner of a tax refund. While such a lump-sum payment can certainly help many low-income families, it still leaves those families relying on low wages throughout much of the year. That is, in its current form, the EITC represents an income supplement, not a wage supplement.

Therefore, Congress should reform the EITC to turn it into a pure wage supplement. Benefits should be available to childless adults and should not rise with the number of children in a family. Payments should arrive monthly rather than in an annual lump sum. Any additional cost due to expansion should be paid for by reductions in other welfare programs.

Use the Laboratories of Democracy

Given the failure of more than 50 years of federal welfare policy to significantly reduce poverty or increase economic mobility, it should be apparent that the federal government does not know best. Nor have we demonstrated that we know enough about exactly how to reduce poverty to impose a one-size-fits-all policy everywhere in the country. Five decades of failure should have taught us to be modest.

Wherever possible, therefore, Congress should shift both the funding and the operational authority for welfare and other anti-poverty programs to the 50 states. The "laboratories of democracy," as Justice Louis Brandeis described them, should be the primary focus of anti-poverty efforts, not an afterthought. That means more than simply giving states the authority to tinker with programs as they exist today. It means that federal funding, even in block grant form, should not be accompanied by a large number of federal strings. Instead, states should be given control over broad categories of funding, with the ability to shift funds freely between programs—at their discretion but within a framework in which their efforts are rigorously evaluated and they are held accountable for achieving results. Some states, for instance, may wish to emphasize job training or public service jobs. Others may feel that education provides the biggest bang for the buck. In some states, housing may be a priority; in others, the need for nutrition assistance may be greater. Some states may wish to impose strict eligibility requirements, whereas others may choose to experiment with unconditional benefits, even a universal basic income.

Moreover, states that have successfully reduced poverty while also reducing the number of people on the welfare rolls, for instance, should be allowed to shift funds to other priorities entirely, such as education or transportation. Success should be rewarded. At the same time, states that fail to achieve results, after the federal government accounts for factors beyond their control, should have their funding reduced, with any shortfall made up from state funds. Failure should not be subsidized.

In 2016, Sen. Marco Rubio of Florida introduced a proposal that would have replaced most current federal welfare programs with a single state-run "Flex Fund," under which states could provide benefits the way they want. Rubio's proposal specifically urged states to replace in-kind programs with cash benefits, although he would have left the final decision up to the states. In fact, the Rubio proposal imposed few mandates on how the states used the money. For example, while Rubio noted the importance of work requirements as a condition for receiving assistance, he would have allowed states to decide whether or not to impose such restrictions. Reviving that proposal would be a good starting point for debate.

Create Standards and Metrics of Success

The lack of federal strings should not mean a lack of accountability. Too often, the federal government defines success in anti-poverty programs by looking at the inputs, such as how many people are enrolled or how much is spent, instead of measuring the effectiveness of the programs and whether they actually help the participants in their pursuit of the American dream. Anecdotes and good intentions are no substitute for evidence. Therefore, designing better outcome measures is central to the goal of making the welfare system more effective in helping people transition out of the programs and avoid becoming mired in long-term poverty.

In some programs, states have been able to use exemptions, credits, and other maneuvers to dilute the effectiveness of work requirements; those states end up putting fewer people on the path toward the meaningful work they need to provide for their families. In the applicable programs, shifting from a focus on caseloads to outcome measures that focus on job placements and job retention would incentivize states to help participants move into work and get to the point where they no longer need those programs.

Another aspect of refining the metrics used to evaluate implementation and administration in the states is to improve the enforcement mechanisms and better align incentives between states and the federal government. Because of the financing structure of some programs, states have an incentive to shift people to programs that are federally funded and have little incentive to improve program performance for jointly funded programs in which financing is based on caseload. Congress should establish a framework that rewards states for effectively helping people transition out of the programs and penalizes them when they fall short of established program goals. Such a framework would encourage states to improve performance and reduce inefficiencies, which would save resources and better serve program recipients.

The tangled web of ineffective programs that make up the current system fails everyone involved: the programs are a waste of taxpayer dollars, and they impose real human costs on participants in the form of material hardship, unrealized potential, and dreams deferred. Without mechanisms in place to better determine whether programs are meeting their goals, more money will be channeled to efforts that could end up being unsuccessful or even counterproductive.

This problem is not confined to welfare programs. One report from the Government Accountability Office found that fewer than two-fifths of managers throughout the federal government reported that their programs had been evaluated in the past five years. Thoroughly evaluating these programs would help policymakers and researchers determine which programs are effectively meeting their goals. With that information, finite funding could flow to higher-quality programs while those that do not have a meaningful impact could be deemphasized. Evaluations would also help policymakers better understand the unintended adverse consequences that the current structure of the welfare system can sometimes create, such as trapping participant families in poverty.

Using rigorous evaluation and research to guide policy would allow the welfare system to adopt best practices and phase out ineffective programs. Programs that fail to deliver results would no longer continue to be funded year after year without regard for outcomes. In a framework in which states have more flexibility to innovate and tailor their anti-poverty programs to their specific populations, understanding which programs have seen positive results would be even more important.

To date, the war on poverty has placed intentions above results, and the people most harmed by its failures are the programs' intended beneficiaries. Reforming the welfare system to better align incentives for different levels of government and the participants involved, establishing clearly defined outcome measures that ensure that these programs help put people on the path to self-sufficient prosperity, and shifting to a more evidence-based approach will lead to a more effective, responsive system.

Suggested Readings

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