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What Congress's Repeal Efforts Can Teach Us About Regulatory Reform

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Major legislative actions during the early part of the 115th Congress have undermined the central argument for regulatory reform measures such as the REINS Act, a bill that would require congressional approval of all new major regulations. Proponents of the REINS Act argue that it would make the federal regulatory system more democratic by shifting responsibility for regulatory decisions away from unelected bureaucrats and toward the people's representatives in Congress. But separate legislative actions in the opening of the 115th Congress only call this argument into question. Congress's most significant initiatives during this period—its derailed attempts to repeal and replace the Affordable Care Act and its successful efforts to repeal fifteen regulations under the Congressional Review Act—exhibited a startling lack of democratic deliberation. These repeal efforts reveal how the REINS Act would counterintuitively undermine key democratic elements of the current regulatory process by rendering it less transparent and deliberative.

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"Insane."[1] "Secret."[2] "Not a responsible way to legislate."[3] These are just some of the ways that Republicans in Congress have described their own party's efforts in 2017 to repeal the Affordable Care Act (ACA). Not only did Republicans ultimately stumble in repealing and replacing the Act, but the legislative process they followed undermined, however unintentionally, the rationale for another one of their legislative priorities: regulatory reform.

One of the most prominent regulatory reform bills currently being advanced by Republicans—the Regulations from the Executive in Need of Scrutiny (REINS) Act—would dramatically increase congressional involvement in the rulemaking process by requiring Congress to approve all major agency rules before they could become law.[4] Proponents of this bill argue that it would make the federal regulatory system more transparent and democratic by shifting responsibility away from unelected bureaucrats and requiring direct deliberation by the people's representatives in Congress.[5]

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[1] Benjamin Hart, *The Best GOP Reactions to the Death of Trumpcare*, DAILY INTELLIGENCER (July 18, 2017, 8:46 PM), http://nymag.com/daily/intelligencer/2017/07/the-best-gop-reactions-to-the-death-of-trumpcare.html.

[2] Paulina Firozi, *Rand Paul Blasts GOP for Keeping ObamaCare Bill in 'Secure Location,'* THE HILL (Mar. 2, 2017, 11:17 AM), http://thehill.com/policy/healthcare/321990-paul-blasts-house-gop-for-keeping-obamacare-bill-in-secure-location.

[3] Joe Lawlor, *Sen. Susan Collins Criticizes Secretive Process of Senate Health Care Replacement Bill*, PORTLAND PRESS HERALD (June 16, 2017), http://www.pressherald.com/2017/06/16/susan-collins-criticizes-secretive-process-of-senate-health-care-replacement-bill/.

[4] Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. § 3 (2017).

[5] *See, e.g.*, *Senators Reintroduce REINS Act*, U.S. SENATOR RAND PAUL OF KENTUCKY (Jan. 5, 2017), https://www.paul.senate.gov/news/press/senators-reintroduce-reins-act, (describing regulatory agencies as "wreaking havoc" on the nation and arguing that the REINS Act would ensure proper "accountability, oversight, and transparency"); Jonathan H. Adler, Placing "REINS" on Regulations: Assessing the Proposed REINS Act, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 36 (2013) (arguing that "[t]he REINS Act forces major regulatory decisions onto the floor of Congress, and into the open, which provides greater transparency than backroom dealmaking or the administrative rulemaking process" and which "provides a means of enhancing political accountability for regulatory policy").

But in certain key respects, the process used by agencies to create regulations is generally more democratic than the way Congress tends to operate.[6] Congress's recent actions—in particular, its attempts to repeal and replace the ACA, as well as the way in which it repealed fifteen regulations under the Congressional Review Act—show that efforts to shift regulatory decision-making into the legislative process would in reality weaken democratic deliberation and result in less thoughtful regulatory decisions. If the nation wants its regulatory system to reflect robust public deliberation, then passing legislation that would further entangle regulatory decision-making in legislative politics is likely to prove counterproductive.

Congress, Agencies, and Democracy

In a nation dedicated to democratic principles, it may seem surprising that most federal law in the United States today consists of rules or regulations issued by administrative agencies, rather than statutes written by Congress. Each year, agencies such as the Department of Transportation and the Securities and Exchange Commission collectively issue thousands of regulations,[7] compared to roughly a hundred or fewer substantive statutes passed by Congress.[8]

Although the administrators who head federal bureaucracies never stand for election, they are of course still accountable to elected officials in multiple ways. Appointed by the President, most administrators continue to serve only at the President's pleasure and under the oversight of the White House. Moreover, the Senate must confirm the heads of agencies before they can take office. Congress must also expressly delegate to agencies the legal

[6] To be sure, agencies might seem at first glance to be less democratic simply because they are headed by unelected officials. But that narrow view fails to account for the fact that agencies are in important ways tied closely to the electorate through the President, not to mention through ongoing congressional oversight. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) ("[P]residential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."). Moreover, electoral accountability is only one facet of democratic governance; another is the quality of democratic deliberation in policy decision-making. *See, e.g.*, Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in JON ELSTER & AANUND HYLLAND, EDS., FOUNDATIONS OF SOCIAL CHOICE THEORY 103-32 (1989) (discussing deliberation as one core conception of democracy).

[7] MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER*, 1 (2016).

[8] Drew DeSilver, *Congress' Productivity Improves Somewhat in 2015*, FACTANK/PEW RESEARCH CENTER (Dec. 29, 2015), http://www.pewresearch.org/fact-tank/2015/12/29/congress-productivity-improves-somewhat-in-2015/.

authority to create rules. When agencies issue rules, they must follow well-specified procedures that, among other things, require that the public receive notice and have an opportunity to comment on proposed rules before they can be made final.[9] Agencies must stay within the bounds of these statutory guidelines or else the courts will strike down their regulations.

Congress gives agencies the authority to issue legally binding rules because, among other reasons, legislators have neither the time nor the expertise to make all the highly technical policy judgments needed to enact sensible, effective regulations. Congress can call for greater safety in consumer products or reductions in water pollution, but figuring out exactly how to achieve these goals demands an in-depth understanding of regulated industries and an ability to establish more fine-grained policies.[10] Administrative agencies—staffed as they are with career professionals, many with backgrounds in science and economics—constitute what Cass Sunstein has called the "most knowledgeable branch" of government.[11] The officials in these agencies can take the time and devote the resources needed to gather public input and craft rules designed to implement the goals contained in statutes.

Although it makes sense for Congress to give regulatory authority to agencies, when Congress does so, it effectively gives up some degree of control over public policy decisions and their implementation. Congress still maintains control over agency budgets and continues to oversee what agencies do, but the officials who run that agency nevertheless possess considerable lawful discretion in deciding how to design regulatory standards. That agency discretion, in turn, enables the federal government to be more responsive to public concerns.[12]

In an effort to retain more meaningful control over regulations, Congress used to insert legislative veto clauses into regulatory statutes, providing that agency regulations could be rejected by a majority vote of sometimes just a single chamber of Congress. But in 1983, the Supreme Court declared these

[9] 5 U.S.C. § 553(b)–(c) (2012).
[10] Cary Coglianese, Richard Zeckhauser, and Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policy Making*, 89 MINN. L. REV. 277 (2004).
[11] Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1607 (2016).
[12] Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985) (arguing for giving "authority to administrators as a device for improving the responsiveness government to the desires of the electorate").

legislative veto provisions unconstitutional in *Immigration and Naturalization Service v. Chadha*.[13] The Court said that if Congress wishes to override agency decisions, then both chambers of Congress must pass legislation voiding or changing the regulation—and that legislation either must win the president's signature or be passed with sufficient majorities to override his veto. In short, if Congress does not like the law that an agency creates, then it must follow the process outlined in the Constitution for adopting legislation.

As a practical matter, this means that Congress needs veto-proof majorities to pass legislation overriding an agency regulation, since presidents can be expected to veto legislation rejecting the regulations created by agencies within their own administrations. After all, the heads of agencies are the president's appointees and, for most agencies, significant rules only go forward if they receive the blessing of the White House.[14]

Congress responded to the Court's ruling in *Chadha* over a decade later by enacting the Congressional Review Act (CRA).[15] The CRA does not obviate the constitutional requirements for passing legislation, but it establishes a special fast-track process that enables Congress to repeal recent agency regulations by following special internal procedures, which most notably limit filibusters in the Senate. After an agency notifies Congress of a new regulation it has adopted, if Congress wishes to avail itself of the CRA's procedures, then it has sixty session days to pass a resolution disapproving the regulation. If the resolution passes both houses and is signed by the president, then the disapproved regulation is formally repealed. Furthermore, if a rule is repealed under the CRA, then the agency is barred from adopting any other regulation in the future that is "substantially the same," unless Congress adopts new legislation that specifically gives the agency permission to do so.[16]

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[13] 462 U.S. 919, 959 (1983).
[14] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
[15] 5 U.S.C. § 801 et seq. (2012).
[16] *See* Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 710 (2011). What constitutes a rule that is "substantially the same" has yet to be decided in the courts, but the issue may well be litigated in the coming years. *See* Michael Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe 'Substantially the Same,' and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009317.

Of course, presidents can still veto disapproval resolutions, which presumably they would do for any regulations emanating from their own administrations. For this reason, the CRA as a practical matter has generally come into play only shortly following presidential transitions, since it offers the new President a short window to overturn regulations that were issued toward the end of the previous administration.[17]

In recent years, Republican members of Congress have been trying to pass additional bills that would give Congress more practical influence over agency regulations. For example, the House of Representatives recently passed a bill that would expand the scope of the CRA by allowing Congress to repeal multiple regulations at once by voting on a single resolution of disapproval, rather than just proceeding one regulation at a time as provided in the CRA.[18]

The REINS Act would go still further. Instead of Congress just having the power to disapprove of regulations *after* agencies have already issued them, the REINS Act would require that Congress take affirmative action to approve new regulations *before* they could take effect.[19] This bill's requirement for legislative approval would apply only to "major rules," which generally are those with economic effects above $100 million annually.[20] For such regulations, the REINS Act would turn an otherwise final agency rule into merely a legislative proposal, subject to an up-or-down vote. The House passed the REINS Act in January,[21] and President Trump has reportedly said that he will sign it if it reaches his desk.[22]

Stark Lessons from "Repeal and Replace"

Ostensibly, the REINS Act is designed to make regulations more democratic by increasing Congress's role in the regulatory process. Yet the way that Congress has handled its legislative affairs undermines the case for legislation requiring greater congressional involvement in the regulatory

[17] MAEVE P. CAREY, ALISSA M. DOLAN, & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS, CRS REPORT (Nov. 17, 5 (2016), https://fas.org/sgp/crs/misc/R43992.pdf.).
[18] Midnight Rules Relief Act of 2017, H.R. 21, 115th Cong. § 2(b) (2017-2018).
[19] Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. § 3 (2017).
[20] *Id*.
[21] *Final Vote Results for Roll Call 23*, H.R. 26, 115th Cong. (2017).
[22] Phil Kerpen, *It's Time to Rein in Regulators*, USA TODAY (Dec. 30, 2016, 8:29 PM), https://www.usatoday.com/story/opinion/2016/12/30/s-time-rein-regulators/96001658/.

process. Recent efforts to repeal and replace the ACA illustrate all too well how increased legislative involvement would serve to weaken democratic deliberation over government regulation.

Members of Congress from both parties, as well as longtime observers of congressional politics, have expressed shock at how congressional leaders conducted the process to try to repeal and replace the ACA.[23] House Republicans narrowly passed a repeal-and-replace bill in May 2017 that had only been released the night before the vote.[24] House leaders thus not only short-circuited any opportunity for public deliberation, but they did not even wait for members to read and digest the legislation or to benefit from the scoring of the legislation typically provided by the Congressional Budget Office (CBO).[25] As Senator Lindsey O. Graham (R-SC) commented at the time, "any bill that has been posted less than 24 hours—going to be debated three or four hours, not scored—needs to be viewed with suspicion."[26]

When attention turned to the Senate during the summer months, the process was no more transparent or deliberative. Majority Leader Mitch McConnell (R-KY) crafted the Senate's version of the legislation in complete secrecy, prompting Senator Ron Johnson (R-WI) to complain that Senate leaders were trying to "jam this thing through" before the Fourth of July recess.[27] Johnson emphasized the need for more information about the bill, lamenting

[23] Julie Rovner, *I Have Covered Every Health Bill*, TWITTER (July 24, 2017, 4:56 PM), https://twitter.com/jrovner/status/889635369418973188?refsrc=email&s=11; Jackie Calmes, *Forget Trump a Sec*, TWITTER (July 25, 2017, 7:53 AM), https://twitter.com/jackiekcalmes/status/889861274129059840?wpisrc=nl_wonk&wpmm=1.

[24] Rachel Sachs, *Why Process Matters: Health Care Reform Edition*, TAKE CARE BLOG (June 9, 2017), https://takecareblog.com/blog/why-process-matters-health-care-reform-edition.

[25] Sarah Kliff, *Congress is Voting Thursday on a Bill to Replace Obamacare; The CBO Still Hasn't Scored It.*, VOX (May 3, 2017, 7:31 PM), https://www.vox.com/policy-and-politics/2017/5/3/15536680/voxcare-ahca-vote-cbo-score-absurd.

[26] Matt Flegenheimer, *The Next Step for the Republican Health Care Bill: A Skeptical Senate*, THE N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/us/politics/senate-health-care-bill.html. Of course, a few months later, Senator Graham would find himself putting forth a hastily drafted bill as part of a failed, last-ditch effort to undo the Affordable Care Act.

[27] Jack O'Brien, *Ron Johnson on Senate Healthcare Bill: Leadership Wants 'to Jam this Thing Through'*, WASHINGTON EXAMINER (Aug. 25, 2017), http://www.washingtonexaminer.com/ron-johnson-on-senate-healthcare-bill-leadership-wants-to-jam-this-thing-through/article/2627088.

that informed debate "seems to be foreign to this place."[28]

Despite such complaints, when McConnell tried to move the legislation forward after the July holiday recess, the process proved no more informed than before. Republicans approved a motion to proceed with debate on a bill before a bill had even been settled upon.[29] In a widely-lauded speech on the Senate floor, Senator John McCain (R-AZ) decried McConnell's strategy of "coming up with a proposal behind closed doors" and "then springing it on skeptical members"—although he, too, supported the initial motion to proceed.[30]

McConnell's gambit ultimately failed—with Senators Susan Collins (R-ME), Lisa Murkowski (R-AK), and, most dramatically, Senator McCain casting the decisive votes to kill the legislation. Down to the very end, the tactics were the same. The underlying "skinny repeal" bill—which the Congressional Budget Office estimated would have left 16 million people uninsured and raised premiums in the exchanges by 20 percent—was released only a few hours before the decisive vote.[31] Senator Graham called the bill a "disaster" and a "fraud."[32] He and two other Republican Senators said they would vote for it only if they received assurances that it would never become law.[33]

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[28] *More Time, Information Needed on Bill: GOP Senator*, MORING JOE (MSNBC television broadcast June 28, 2017), http://www.msnbc.com/morning-joe/watch/more-time-information-needed-on-bill-gop-senator-977889859851.

[29] Sean Sullivan, Kelsey Snell, Ed O'Keefe and John Wagner, *McCain's Return to Senate Injects Momentum into GOP Health-Care Battle*, WASH. POST (July 24, 2017), https://www.washingtonpost.com/powerpost/trumps-tough-talk-on-health-care-aims-to-revive-flagging-senate-effort/2017/07/24/a8acdb3e-7091-11e7-9eac-d56bd5568db8_story.html (noting widespread "confusion Monday about exactly which direction senators would go on Tuesday when and if the voting starts" and reporting Senator Rand Paul (R-KY) as asking about the motion to proceed, "What are we proceeding to?").

[30] *McCain's Speech on the Senate Floor*, CNN (July 25, 2017), http://www.cnn.com/2017/07/25/politics/john-mccain-speech-full-text-senate/index.html.

[31] CONGRESSIONAL BUDGET OFFICE, ESTIMATE OF DIRECT SPENDING AND REVENUE EFFECTS OF H.R. 1628, THE HEALTHCARE FREEDOM ACT OF 2017, AN AMENDMENT IN THE NATURE OF A SUBSTITUTE (S.A. 667) (July 27, 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/s.a.667.pdf.

[32] *Graham: 'Skinny' GOP Health-Care Bill is a 'Disaster,' 'Fraud*,' WASH. POST, https://www.washingtonpost.com/video/politics/graham-skinny-gop-health-care-bill-is-a-disaster-fraud/2017/07/27/c263b2dc-7311-11e7-8c17-533c52b2f014_video.html.

[33] These Senators demanded assurances from the House Speaker that he would not approve the exact same bill, so that they would have an opportunity to make further amendments in a conference committee. Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), https://

When Senator Graham and Senator Bill Cassidy (R-LA) revived the health care repeal effort in September, Senate Republicans once again tried to rush the bill to a vote as quickly as possible. This time, they released the final version of the Graham-Cassidy bill only a few days before the Senate was scheduled to vote on it. They held just a single legislative hearing—one at which the main witnesses called by the majority were other senators—and for which only five members of the public were reportedly allowed to attend after protests occurred in the hearing room.[34] Senate leaders also did not intend to wait for a complete CBO score, and they planned to allow only 90 seconds of floor debate.[35] Yet this effort too failed, as three Republicans vowed to vote against the bill, denying the majority needed to act under a special budget reconciliation process that is exempt from the Senate filibuster.

Whatever the future might bring for health care reform, the Republicans' repeal-and-replace saga is emblematic of a larger shift away from legislative procedures and traditions designed to ensure that Congress engages in robust deliberation.[36] Even though the process used to attempt to repeal the ACA might seem like an extreme example, the reality is that for years now, in of the face of growing political polarization, most controversial legislation under both Democratic and Republican leadership of Congress has often moved forward in what political scientist Barbara Sinclair aptly, if perhaps charitably, described as an "unorthodox" manner—driven by party leaders and often bypassing or dismissing the work of committees.[37] The REINS

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www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html.

[34] Dana Milbank, *Cassidy is 'Sorry' About the Cassidy-Graham Process. He Should Be.* WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/opinions/cassidy-is-sorry-about-the-cassidy-graham-process-he-should-be/2017/09/25/0cd234f0-a243-11e7-ade1-76d061d56efa_story.html.

[35] Bob Bryan, *The Latest Republican Obamacare Repeal is Being Pushed through the Senate at Lightening Speed*. BUSINESS INSIDER (Sept. 18, 2017), http://www.businessinsider.com/graham-cassidy-health-care-obamacare-repeal-vote-timeline-2017-9; Elise Viebeck, *Seven Ways the Latest Republican Health-Care Effort is Impulsive and Chaotic* WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/ powerpost/seven-ways-the-latest-republican-health-care-effort-is-impulsive-and-chaotic/2017/09/24/4451aaf4-9fa1-11e7-8ea1-ed975285475e_story.html.

[36] Republicans adopted a similar legislative strategy with their 2017 tax reform plan. *See* John Cassidy, *The Republican Tax Strategy: Speed, Subterfuge, and Diversion*, THE NEW YORKER (Nov. 17, 2017), https://www.newyorker.com/news/our-columnists/the-republican-tax-strategy-speed-subterfuge-and-diversion.

[37] BARBARA SINCLAIR, UNORTHODOX LAWMAKING NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2011).

Act, if enacted, would only risk infusing more unorthodoxy into major regulatory decisions.[38]

Further Lessons from the Congressional Review Act

Other legislative actions during 2017 presented a similarly revealing, if also disconcerting, picture of what greater congressional involvement in the regulatory process would look like. During the first ten months of the year, Congress used the CRA to repeal fifteen regulations that were designed to deliver important public protections on issues such as Internet privacy, gun safety, water quality, and fair business practices.[39] Senate Majority Leader McConnell has hailed the repeals of these rules as the most significant legislative achievements of the early part of the 115th Congress,[40] but a look at how Congress went about repealing these rules only reinforces the conclusion that the first branch of government suffers from a deliberative deficit.

Consider who participated in the development—and subsequent repeal—of the now-defunct rules. Based on the dockets for each of these fifteen regulations, the agencies that issued them reviewed a total of over 420,000 public comments. These comments came from a diverse collection of individual members of the public as well as from businesses, public interest groups, and state and local officials. By contrast, the process Congress used in repealing these rules appears to have been driven largely by just one segment of society: industry. The *New York Times* reported that industry lobbyists began working with Republican staff members on Capitol Hill "within days of the election" to decide which regulations to target for repeal.[41]

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[38] Some leading scholars have argued that the rulemaking process has seen its own recent introduction of unorthodox practices. Abbe R. Gluck, Anne Joseph O'Connell, and Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015). Even if this is the case, the REINS Act would still amount to a radical change in the rulemaking process.

[39] *CRA*, RULES AT RISK, http://rulesatrisk.org/ (accessed Sept. 20, 2017).

[40] Ryan Grim, *Mitch McConnell Has Run Out of Excuses for Not Accomplishing Anything*, THE INTERCEPT (July 18, 2017), https://theintercept.com/2017/07/18/mitch-mcconnell-has-run-out-of-excuses-for-not-accomplishing-anything/.

[41] Eric Lipton, *G.O.P. Hurries to Slash Oil and Gas Rules, Ending Industries' 8-Year Wait*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/us/politics/republicans-oil-gas-regulations.html.

Not only do agencies entertain a full array of public comments, they also must take the time to respond to these comments in writing as they prepare their analyses of their proposed rules.[42] Most significant rules must be separately reviewed by the Office of Information and Regulatory Affairs (OIRA) in the White House.[43] Such painstaking analysis and deliberation can take time—nearly two and a half years on average for the fifteen recently repealed rules. The final versions of these same regulations together contained over 1,700 pages of justification and analysis, all made available to the public.

Unlike agencies, Congress is not required to respond to public comments or to explain its decisions. Congress managed to repeal all 15 rules combined in fewer than 2,000 *words*—what amounts to roughly six double-spaced pages of text in total. Furthermore, by repealing these regulations under the CRA, Congress by extension banned agencies from adopting any substantially similar regulations in the future—all without explaining to the public how repealing these rules will affect their welfare.

In contrast to the years that agencies spent evaluating comments and analyzing their regulations, it took Congress a mere four *months* on average—including congressional recesses—for both chambers to vote to repeal the fifteen regulations, mostly on party-line votes. Even if Congress wanted to take a more deliberate approach, the CRA's fast-track procedures do limit the time for legislative consideration.[44]

Due to the time limits in the CRA, Congress can no longer use this law's special procedures to repeal regulations adopted by the Obama Administration. But this has not kept members of Congress from using the CRA to target additional regulatory actions adopted since January by independent agencies which are exempt from OIRA review and thus more insulated from White House influence. In October, Congress passed a resolution of disapproval overturning a Consumer Financial Protection Bureau (CFPB) regulation that would have blocked credit card companies and banks from inserting mandatory arbitration clauses into their contracts that keep consumers from taking legal action over complaints of institutional

[42] Administrative Procedure Act, 5 U.S.C. § 553 (2006).
[43] Exec. Order No. 12,866.
[44] *See supra* notes 15-16 and accompanying text.

abuses.[45] President Trump signed this resolution into law at a private signing ceremony reportedly attended by the heads of various bank lobbying groups.[46]

Until this year, the only previous occasion when Congress used the CRA to strike down a regulation occurred in 2001, when Congress repealed a major OSHA workplace safety rule adopted at the end of the Clinton Administration. At the time, Peg Seminario, the AFL-CIO's Director for Health and Safety, complained to the *New York Times*: "What's happening is stunning … This rule is ten years in the making, with ten weeks of public hearings on it, and now they want to wipe it out with not even one hearing and less than ten hours of debate. That's about as undemocratic a process as you can get."[47]

Conclusion

The REINS Act would go much farther than the CRA because it would require legislative approval of all major rules before they could take legal effect. It would also curtail democratic deliberation by Congress even more sharply than the CRA. Under the REINS Act, debate over a regulation in the House would be limited to one hour total, while the "world's greatest deliberative body"[48]—the Senate—would be afforded a whopping two hours.[49] With major public health and welfare consequences potentially hanging in the balance, such tight constraints on legislative debate are at odds with the REINS Act's ostensible goal of advancing sound, democratic decision-making.

Of course, time limits on debate can be viewed as understandable from another perspective: Congress has a lot on its plate. Agencies typically

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[45] David Sherfinski, *House Votes to undo Federal Consumer Bureau's Arbitration Rule*, WASHINGTON TIMES (July 25, 2017), http://www.washingtontimes.com/news/2017/jul/25/house-votes-to-undo-consumer-financial-protection-/.

[46] Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, THE HILL (Nov. 1, 2017), http://www.thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking.

[47] Lizette Alvarez & Steven Greenhouse, *Senate G.O.P. Moving to Nullify Clinton Rules on Worker Injuries*, N.Y. TIMES (March 3, 2001), http://www.nytimes.com/2001/03/03/us/senate-gop-moving-to-nullify-clinton-rules-on-worker-injuries.html.

[48] Paul Kane, *On the Death of the Senate and its Long History as the World's Greatest Deliberative Body*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/powerpost/on-the-death-of-the-senate-and-its-long-history-as-the-worlds-greatest-deliberative-body/2017/01/31/b99fcbda-e73a-11e6-bf6f-301b6b443624_story.html.

[49] REINS Act, *supra* note 19, at §§ 802(d)(2), 802(e).

produce close to 100 regulations each year that would be deemed "major" under the REINS Act and which would demand formal approval by Congress. Moreover, members of Congress are generalists.[50] That is one of the main reasons for Congress delegating regulatory responsibility to agency officials in the first place, as agencies have the time, resources, and expertise needed to analyze policy issues with care.[51] It is precisely because Congress does not have the time and resources to attend to the finer details of regulation that it has passed laws which delegate rulemaking responsibility to agencies, such as the Federal Food, Drug, and Cosmetic Act,[52] the National Traffic and Motor Vehicle Safety Act,[53] and the Clean Water Act.[54]

In fulfilling their statutory duties, agencies typically invest years of study and public engagement when developing major regulations and preparing the necessary underlying analyses of how the public will be affected by these new rules.[55] Under the REINS Act, the outcome of those extensive agency deliberations would ultimately hinge on a legislative process culminating in a mere three hours of floor debate.[56] Moreover, if the REINS Act were law, failure of both chambers to approve a regulation within seventy session days would mean that the regulation could not take effect, and no new approval resolution could be considered until after the next congressional election.[57] In emergencies, the president would be authorized to override the Act temporarily and allow the regulation to take effect—but only for 90 calendar days, after which the regulation would cease to have any legal impact again.[58]

If the Senate passes the REINS Act and President Trump signs it, then agencies' regulatory decision-making in the future could well become infected with some of the same dysfunctionalities that both Democrats and Republicans find afflict today's congressional process. Right now,

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[50] Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1455 (2015).
[51] *Id.*
[52] The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399 (2012).
[53] National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30183 (2012).
[54] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2012).
[55] CORNELIUS M. KERWIN AND SCOTT R. FURLONG. RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (4th ed. 2011) at 105-107 (summarizing research on EPA rules that showed "the average time that elapsed in rulemaking … ranged from slightly more than two years to just under five years.").
[56] REINS Act, *supra* note 19, at § 802.
[57] Levin, *supra* note 54, at 1452.
[58] *Id.* at 1453.

administrative law calls upon agencies to make decisions based on public input and analysis of how best to fulfill their statutory responsibilities and advance overall public value.[59] By adding a legal requirement for congressional approval before regulations can take effect, the REINS Act would effectively encourage agencies to base their decisions over highly complex and consequential regulations not on deliberations focused on the expected impacts on all segments of society, but instead on consideration of political strategems in Congress, be it controlled by Republicans or Democrats.

One thing is clear: Republican legislators have, through their actions in Congress over the first part of 2017, ironically made a case against one of the very regulatory reforms they favor. Through their handling of the most salient legislative debate in the new Congress—health care—and arguably their most significant early domestic policy accomplishment—the CRA repeals—they have unwittingly undercut the case for the REINS Act. Rather than inspire confidence that congressional involvement in regulation could enhance democratic values, the Republicans' repeal efforts have only underscored the rationale underlying earlier Congresses' decisions to vest administrative agencies with the primary responsibility for making important regulatory determinations.

[59] *See, e.g.*, Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983).