FREEDOM FORWARD

Limiting Government, Empowering Families, Strengthening American Industry

A pro-growth, limited government handbook for reigniting America's economic engine

THE CLUB FOR GROWTH FOUNDATION

Policy Handbook

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INTRODUCTION

By Dr. Samuel Gregg

America is seen by the rest of the world as epitomizing free market capitalism. Alas, the reality of today's American economy is far removed from this popular perception. The long-term interventionist legacies of the New Deal of the 1930s, plus the Great Society programs of the 1960s, continue to weigh heavily on the US economy.

Certainly, America leads the world in key areas of economic development, such as entrepreneurship. Yet in other spheres of American economic life, especially competition and trade policy, we have seen considerable erosion of free market principles over the past 10 years.

Across the American political spectrum, ideas and policies inimical to the workings of dynamic markets and market-driven economic growth have emerged and acquired widespread traction among legislators, policymakers, and large segments of the American public. Economic nationalism in the forms of protectionism and industrial policy, for example, now exerts influence on portions of the political Right. Meanwhile, on the political Left, stakeholder capitalism, corporatism, and environmental, social, and governance (ESG) investing are aggressively promoted—so much so that large swaths of corporate America have embraced these ideas.

Overlaid by these political, intellectual, and policy shifts, the US economy is increasingly characterized by cronyism. Politically connected businesses collaborate closely with legislators to lock potential competitors and new entrepreneurs out of markets by imposing regulations that are difficult for new entrants to navigate. These backroom deals distort capital investment decisions and undermine growth in all sectors of the economy. Further complicating matters is America's excessive reliance on loose monetary policy to spur economic growth. A lax monetary strategy may fuel growth for a while, but over time, it contributes to the steady buildup of inflationary pressures that inflict the most harm on Americans with low and fixed incomes.

America is thus far removed from the pro-market political and economic climate of ideas that prevailed from the late 1970s until the 2008 financial crisis. Far from being the default position of the political Right and much of the center Left, free market ideas (and their promoters) now find themselves playing defense. Once ascendent—at least rhetorically—over those who believe in extensive government intervention, free market principles are no longer in fashion.

> *The challenge faced by Americans who believe in the economic, political, and moral superiority of a market economy over the alternatives—ranging from neo-Keynesianism to soft forms of socialism, corporatism, and outright populism—is historic. In response, two defensive angles of attack seem prudent.*

The first angle of attack is to engage in the challenging task of reminding our citizenry of the past and ongoing failures of interventionist policies pushed by both sides of the political spectrum. Two truths to emphasize stand out: growth by intervention never succeeds, and unceasing increases in welfare and entitlement programs forever balloon the public debt. Extensive historical and economic research demonstrates that faith in mixed economies—those that retain the forms of private property and market exchange but envelop them in multiple layers of government intercession—is utterly misplaced.

Such research is of the long-term variety; the results of educating citizens in its results may not influence the conduct of public policy for decades. Nonetheless, the results lay the foundation for substantial policy changes in the future. Eminent 20th-century free market thinkers like F. A. Hayek and Milton Friedman spent years pursuing this type of intellectual agenda. Their efforts eventually paid off in the late 1970s, as America and much of the rest of the world turned away from neo-Keynesian policies to embrace free markets.

Action is required today as well; near-term activities, a second angle of attack, can also be undertaken to bolster pro-market policies in America. For instance, we should identify those issues that most worry Americans. We already know that one such concern is the strength of America's industrial sector; its declining share of the overall economy is driving many thinkers, policymakers, legislators, and citizens away from any commitment to free markets.

A second concern is the question of free trade. Economic nationalists on the Left and the Right have targeted our postwar commitment to the liberalization of trade across the world. The economic benefits to America of trade liberalization are hard to deny: the growth that flowed from the discipline imposed on the American economy by competition from abroad since the United States firmly committed to trade liberalization after World War II is clear. Nonetheless, economic nationalist skepticism persists. Factors like the rise of China as a major geopolitical actor have all contributed to a growing bias against free market thinking, as have (contested) claims about the effects on parts of the American economy from China's entry into the World Trade Organization, and the concern that specific regions and demographic groups in the United States have been net losers from economic globalization.

A third concern needing immediate policy attention is the rise of ESG investing and the associated agenda of stakeholder capitalism, both of which have been promoted by the political Left. The influence of ESG can be traced back several decades, but its successful inroads into corporate America over the past 15 years have been striking. These issues, and more like them, threaten to hide and even destroy any appreciation for the advantages of market competition and incentives. Foes are destroying our country's free market thinking from within.

Critiquing arguments for economic nationalism, ESG, and similar ideas is important. In itself, however, this is only a defensive exercise. Going forward, the centerpiece of the agenda for free markets must be an exciting and convincing case for capitalism. We have a tremendous opportunity to help more Americans grasp how market principles can reignite growth, bolster industrial competitiveness, and reshape an American economy aptly fitted for domestic and international challenges through—and for—the next generation! We must build on, not merely yearn for, the market conditions of the '80s and '90s.

What might be the implications, for example, of a renewed free market agenda for America's dysfunctional educational system? How should the state undertake vital activities like infrastructure development in ways that avoid incentivizing cronyism? What does an effort at systematic deregulation of the American economy at the federal, state, and local levels of government look like? How can we engage in tax reform in ways that reduce the government's endless demand for revenue while allowing capital and investment to flow freely and efficiently to the most productive parts of the US economy? What type of free market policies are likely to support high levels of employment over the long term?

These questions are especially relevant for American manufacturing. Economic nationalists insist that this particular economic sector needs tariff protection as well as invasive industrial policy-like subsidies. Such policies, however, have failed to bolster either manufacturing output or employment. In March 2018, for example, the federal government increased tariffs on steel and aluminum imports.[1] A Federal Reserve analysis of the impact of these increases released in December 2019 estimated that, on balance, these tariffs resulted in a net loss of approximately 75,000 jobs, the majority of which were blue-collar jobs located in mostly blue-collar towns. The reason: higher steel prices increased costs for industries consuming steel. Unsurprisingly, they responded by trimming their workforces and making greater use of technology.[2]

Better ways to bolster US manufacturing that are consistent with free market principles include enacting policies that would reduce the industry's regulatory and tax burdens. In parallel, free market advocates should pursue a levelheaded assessment of how existing industrial policies have incentivized manufacturing firms to avoid adapting to domestic and foreign competition and instead to lobby legislators for market privileges. We want companies to be investing capital in innovative ways to promote competitiveness so that America's manufacturing jobs are suited for the needs of the future, not the past.

Stepping back a bit, there is the even bigger question of the constitutional and legal framework within which the US economy operates. Over the past 50 years, we have learned how America's legal system burdens the workings of economic life through excessive regulation—and are therefore contrary to the motivations of our forefathers. The debates that eventually led to the drafting and ratification of our Constitution were heavily influenced by the desire to

1 U.S. Department of Commerce, Bureau of Industry and Security, "Section 232 National Security Investigation of Steel Imports: Information on the Exclusion Process." Accessed March 15, 2024. https://www.bis.doc.gov/index.php/232-steel.
2 Flaaen, Aaron, and Justin Pierce. "Disentangling the Effects of the 2018-2019 Tariffs on a Globally Connected U.S. Manufacturing Sector." 2019. Finance and Economics Discussion Series 2019-086. Washington: Board of Governors of the Federal Reserve System. February 27, 2022. https://doi.org/10.17016/FEDS.2019.086.

resolve economic problems left unaddressed by the Articles of Confederation. Thankfully, a cornerstone economic achievement of the US Constitution was its establishment of the new republic as a single and united free trade zone. That approach would play a key role in the rise of the United States to the status of a global economic superpower by the end of the 19th century. Similar economic thinking—unshackled by government interference—is needed today.

There are important constitutional issues that must be resolved if we are to revive free markets in America. Prominent among such matters is the vast scope and authority conferred on the administrative state to act in a manner essentially free from legislative control and oversight. This was codified by the Supreme Court's 1984 *Chevron* doctrine.[3] The resulting explosive growth of an unaccountable bureaucracy has had devastating effects on the American economy, particularly the manufacturing sector.

The end result has been the dramatic expansion of the power of federal government agencies to reach into the American economy. Beyond the negative economic consequences of state oversight, it certainly raises questions concerning the accountability of government agencies to the citizens they serve.

Addressing these immediate policy challenges in order to make the US economy more competitive, dynamic, and productive is critical. But an even broader issue must be addressed—that of promoting the basic legitimacy of a market economy in the eyes of Americans. By this, I mean more than simply boosting understanding and encouraging acceptance of the economic case for markets. Though they are important, economic arguments for free markets need to be supplemented by greater conviction among Americans that market economies are good in and of themselves. This applies to the United States in particular, and again, in ways that go beyond greater economic efficiency.

The best free market thinkers have always understood that extra-economic arguments for capitalism can help establish acceptance of free markets among wider audiences. Americans need to be persuaded, for example, that free markets bolster rather than degrade America's national security; that capitalism can help sustain stable families; that free-market policies will reinforce, and not diminish, American industrial strength and competitiveness; that dynamic markets promote important values like creativity, civility, and trust beyond the boundaries of kith and kin; and that free market policies encourage both self-restraint and self-command in how people conduct their lives.

Above all, Americans should understand that while free markets are not unique to the United States, there is something about our freemarket economy that echoes what it means to be an American in ways that alternative economic arrangements like socialism do not.

Even the most cursory of reflections on America's founding make it clear that if today's Americans are to be faithful to the preeminent insights of our Founding Fathers, the United States cannot be allowed to slouch ever more closely toward European social democracy. Of all America's founding texts, President George Washington's Farewell Address of 1796 best expresses the liberty-oriented economic vision of his period. Washington referred to the commercial strength and growth generated by the integration of the markets north, south, east, and west within the United States. According to the Father of our Country,

3 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Harmony, liberal intercourse with all nations, are recommended by policy, humanity, and interest. But even our commercial policy should hold an equal and impartial hand, neither seeking nor granting exclusive favors or preferences; consulting the natural course of things; diffusing and diversifying by gentle means the streams of commerce, but forcing nothing; establishing (with powers so disposed, in order to give trade a stable course, to define the rights of our merchants, and to enable the Government to support them) conventional rules of intercourse . . .[4]

This is a vision of America as a commercial republic, in which its very identity as a nation is defined by limited government constitutionalism and a deep commitment to free commerce and economic liberty. As a country, we need to ask ourselves how loyal today's United States is to this vision. Any return to free market principles and policies must include linking these ideas and programs to an understanding of who Americans are meant to be.

If done well, we will form the necessary foundation for American free enterprise and market competition to flourish. Free market values will see millions of Americans once again pursuing the American dream. Sound policies ultimately reflect sound principles. Therein lies the path to a freer and more prosperous America that is again capable of fulfilling its promises to all its citizens.

I commend to you the market policy ideas outlined in the following chapters.

About the Author

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4 The American Presidency Project, "George Washington: Farewell Address," accessed March 15, 2024, https://www.presidency.ucsb.edu/documents/farewell-address

AFTERWORD

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Tax Reforms to Strengthen America's Industrial Base

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FREEDOM FORWARD

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KEY FINDINGS

- Economic policy has recently shifted away from neutral, broad-based provisions for encouraging capital investment toward targeted tax subsidies and tariff protections for specific industries to achieve governmental policy goals.

- The result of this shift is a conflicting tax code that thwarts investment in general but also provides offsetting subsidies or protections for favored industries and technologies. Understanding the drawbacks of this industrial policy approach, as well as better alternatives to boost domestic investment, will help lawmakers better navigate upcoming policy decisions, such as the expiration of the 2017 Tax Cuts and Jobs Act (TCJA) at the end of 2025.

- While the goal of growing American businesses and jobs is worthy, the bottom line is that industrial policy is an inefficient and even counterproductive means to do so. Industrial policy most often fails to achieve its intended goals, and it distorts the economy by shifting resources toward politically favored sectors at the expense of overall growth and welfare. It is not merely economically costly; it wastes significant taxpayer dollars too.

- In the short term, a more promising path would be for lawmakers to eschew industry-specific tax credits and protections, instead providing full cost recovery to all business investment. In the long term, lawmakers can build on full cost recovery by adopting a distributed profits tax system to improve work and investment incentives significantly and reduce the resources wasted on tax compliance and administration.

- Such reforms would boost economic output by 1.8 percent while growing the size of the aggregated US capital stock, lifting wages, increasing employment, and reducing the complexity of the tax system. Plus, higher economic output would drive improvements in the nation’s fiscal health by reducing the long-term debt-to-GDP ratio.

INTRODUCTION

A disturbing shift is taking place within US economic policymaking: the increasing use of industrial policy, or narrowly targeted government subsidies and protections intended to achieve specific outcomes. One arena in which the industrial policy trend is highly evident is the tax code. Tax breaks for businesses have shifted markedly away from deductions for broad categories of capital investment toward subsidies for specific industries or technologies. Import tariffs to shield domestic businesses from competition have also been on the rise.

This trend raises serious concerns about economic efficiency, competitiveness, and long-term welfare. The record of accomplishment of industrial policy, both in the United States and abroad, should give lawmakers significant pause—subsidies tend to be inefficient and even counterproductive. Meanwhile, tariffs redistribute income from domestic consumers and downstream industries to politically favored businesses and the government, while reducing overall output and welfare. At a time of mounting fiscal deficits, fierce international competition, and rising geopolitical concerns, tax dollars should be put to their most efficient use. By relying on inefficient subsidies and output-reducing tariffs, policymakers are forfeiting the opportunity to revise a tax code that could better promote growth and opportunity.

Lawmakers will soon have a chance to correct course when legislative deadlines set by the TCJA of 2017 arrive in 2025. In contrast to the recent trend of narrowly targeted provisions, the TCJA broadly improved the tax treatment of some types of investment temporarily but worsened the tax treatment of research and development (R&D). The legislative deadlines of the TCJA could function as a forcing mechanism for Congress to enact comprehensive and permanent reforms. If lawmakers heed the principles of sound tax policy—simplicity, neutrality, transparency, and efficiency—they could substantially reduce compliance costs and economic burdens that hinder the US economy.

The following section reviews the tax treatment of business investment and explains how the current tax code's cost recovery schedules are biased against business: they disallow companies from fully deducting the costs of their R&D and capital expenditures. The subsequent section examines examples of industrial policy, including recent green energy and semiconductor manufacturing subsidies. It also reviews import tariffs for steel, aluminum, and a broad category of goods from China. Finally, this paper concludes by outlining a more promising path forward: in the short term, full cost recovery to business investment, and in the long term, comprehensive reform of the tax system so that it no longer serves as a barrier to American economic success.

How the Tax Code Treats Business Investment Costs

The corporate income tax is defined as a tax on business profits; business profits are calculated by subtracting a company's expenses from its revenues for a given period. The corporate tax system comprehends this basic business definition for most business costs, such as utilities and wages, allowing immediate deductions when those expenses are incurred. However, business costs for physical capital (business investment) and R&D are not immediately deducted when the expense is incurred. Instead, each company must follow government-directed cost recovery periods for its various business investment activities.

By delaying deductions for investment, the tax code partially denies deductions for those investments. Inflation and the time value of money combine to eat away at the value of those deductions, reducing them to some value less than the company's real-time expense. Waiting to deduct the cost of an investment, whether it be new equipment, new real property, or salaries paid to scientists engaging in R&D, is a government-inflicted cost. According to Internal Revenue Service (IRS) figures, corporations invested $1.1 trillion in 2020 but deducted only $620 billion from their aggregated 2020 tax returns, leaving $480 billion to deduct in future years.[1] While they wait, the real value of the deductions falls. The result: in 2020, firms could deduct only an estimated 81 cents on the dollar in real terms.

The longer the delay for taking a deduction, plus the higher the inflation rate and the firm's discount rate, the worse the tax penalty on investment. Table 1 illustrates the effect of a $100 investment that must be depreciated over different recovery schedules and under different inflationary environments. In real terms, delayed depreciation deductions overstate a firm's taxable income, resulting in a higher tax burden. The effect is a higher cost of capital, which discourages capital accumulation across the economy and hits capital-intensive sectors like manufacturing particularly hard. In contrast, allowing a full and immediate deduction ("full expensing") recognizes the real costs firms incur and does not result in a bias against investment.

TABLE 1. How Delays Reduce the Value of Deductions for Investment

	5-year asset	15-year asset	20-year asset
Expensing	$100.00	$100.00	$100.00
MACRS at 0% inflation	$92.97	$78.64	$75.50
MACRS at 2% inflation	$88.75	$69.32	$63.87
MACRS at 3% inflation	$86.77	$66.69	$59.07

Source: Author calculations assuming straight line depreciation, half-year convention, and 3 percent real discount rate plus inflation.

1 "SOI Tax Stats—Corporation Income Tax Returns Complete Report (Publication 16)," Table 13, Internal Revenue Service, accessed February 20, 2024, https://www.irs.gov/statistics/soi-tax-stats-corporation-income-tax-returns-complete-report-publication-16.

A tax system that falls short of full and immediate deductions discourages business investment, while a tax system that uses expensing is neutral toward investment. The evidence speaks for itself: a host of empirical work demonstrates the historical success of bonus depreciation (allowing firms to deduct a greater portion of their capital investment expenses immediately) increasing capital investment and employment levels among affected firms.[2] Put simply, the US tax code penalizes capital investment, putting capital-intensive industries such as manufacturing at a competitive disadvantage relative to the service sector and other countries that offer favorable treatment. They would not face these disadvantages under neutral tax treatment.[3]

The Shortcomings of Industrial Policy

Within tax policy, lawmakers have taken varied approaches to encourage additional investment. For instance, the tax code features accelerated depreciation schedules for specific types of assets, tax credits for various industries and technologies, as well as exemptions, exclusions, and deductions. And recently, the United States has seen an uptick in industry-specific tax policies.

A typical justification for the embrace of industrial policy stems from observations that the US manufacturing sector has, over the past several decades, seen a decline in employment and output as a share of the entire US economy. The argument then follows that more government support is needed to stem that decline.

The observation, however, lacks crucial context. Declines in manufacturing employment have occurred across the globe in countries with varying degrees of industrial policy, manufacturing trade balances, and even different baselines of employment size.[4] Rather than reflect a US-specific issue that demands government intervention, the declines reveal secular trends, like significantly higher shares of consumer spending on services.[5] As such, the declines are not indicative of broad problems with overall manufacturing capacity or policy.

Another motivating factor for policies aimed at specific industries is to ensure the United States remains competitive with other countries, particularly China. As China has continued to develop over the past few decades, its government has increasingly pursued large-scale investments through subsidies and state-owned enterprises. China's market interventions have raised concerns from US policymakers that America may be losing ground and has led to calls for increased government intervention of our own.

Policymakers should recognize that while it remains important to address legitimate concerns regarding China's practices, the notion that China will inevitably surpass the United States economically does not reflect the full picture—either now or in the future.[6] For example, economic output per person, adjusted

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2 Eric Zwick and James Mahon, "Tax Policy and Heterogenous Investment Behavior," *American Economic Review* 107 no. 1 (January 2017): 217–48, https://www.aeaweb.org/articles?id=10.1257/aer.20140855; Dan G. Garrett, Eric Ohrn, and Juan Carlos Suárez Serrato, "Tax Policy and Local Labor Market Behavior," *American Economic Review: Insights 2, no. 1* (March 2020): 83–100, https://pubs.aeaweb.org/doi/pdfplus/10.1257/aeri.20190041; E. Mark Curtis, Daniel G. Garrett, Eric C. Ohrn, et al., "Capital Investment and Labor Demand," National Bureau of Economic Research, Working Paper No. 29485, February 2022, https://www.nber.org/system/files/working_papers/w29485/revisions/w29485.rev1.pdf.

3 See estimates of marginal effective tax rates in the United States versus China and the OECD in Erica York, Alex Durante, and Alex Muresianu, "Comparing the Corporate Tax Systems in the United States and China," Tax Foundation, May 3, 2022, https://taxfoundation.org/research/all/federal/us-china-competition-corporate-tax/ and in Kyle Pomerleau, "The Tax Burden on Corporations: A Comparison of Organisation for Economic Co-operation and Development Countries and Proposals to Reform the US Tax System," American Enterprise Institute, October 13, 2021, https://www.aei.org/research-products/report/the-tax-burden-on-corporations-a-comparison-of-organisation-for-economic-co-operation-and-development-countries-and-proposals-to-reform-the-us-tax-system/.

4 Robert Z. Lawrence, "Trade Surplus or Deficit? Neither Matters for Changes in Manufacturing Employment Shares," Peterson Institute for International Economics, Working Paper No. 20-15, September 22, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697393.

5 Scott Lincicome, "Manufactured Crisis: 'Deindustrialization,' Free Markets, and National Security," CATO Institute, January 27, 2021, https://www.cato.org/publications/policy-analysis/manufactured-crisis-deindustrialization-free-markets-national-security#.

6 Scott Lincicome, "The China Threat Meets the China Reality," CATO Institute, June 2, 2021, https://www.cato.org/commentary/china-threat-meets-china-reality.

for purchasing power parity, was three and a half times higher in the United States ($76,329.60) than in China ($21,482.60) in 2022.[7] R&D intensity, measured by taking R&D expenditures as a share of the economy, is more than 40 percent higher in the United States (3.46 percent) than in China (2.43 percent).[8] And comparing labor productivity in both countries (value added per worker) again shows the strength of the US economy and its workers—the metric is more than four times higher in the United States ($114,920) than in China ($27,436).[9]

Accordingly, policymakers should be skeptical of emulating China's interventionist industrial policy. Funneling government money toward industrial activity is not a guarantee of achieving innovative or productive outcomes and, in fact, is likely to undermine growth in the long run. A recent empirical review of China's "Made in 2025" initiative finds "little statistical evidence of productivity improvement or increases in R&D expenditure, patenting, and profitability."[10] The researchers acknowledge they face some data limitations but nevertheless conclude that their results "cast doubt on the view that this controversial Chinese government policy has yet achieved its key objectives." They also note that their conclusions are consistent with other work that has found China's subsidies to *suppress* the country's total factor productivity growth rate.

China's infamous ghost cities paint a stark picture of government policies leading to capital misallocation. The government's push to develop land rapidly and rely on that development for growth fueled a boom of wasteful, debt-financed development that significantly outpaced demand. Sprawling ghost towns appeared; megadevelopments now sit uncompleted or unoccupied. This real estate bubble burst and is now dragging down overall growth.[11] The combination of the real estate downturn and other challenges of unemployment and local government financial stress are creating economic headwinds for the country.[12] The short-term headwinds are compounded by longer-term challenges, including demographic factors, that further cast doubt on China's economic prospects.[13]

The failure of China's industrial policy to produce lasting growth is not the only dangerous example for lawmakers to heed. Japan also provides an instructive example, recently detailed in *The Wall Street Journal:*

> *Both Japan and China's fondness for industrial policy, and Washington's increasing inclination to follow suit, should be another red flag for U.S. stock bulls. . .it is far from clear that subsidies can boost growth over the long run. And it often turns out poorly for investors because, by industrial policy's very nature, it tends to create overcapacity and depress companies' pricing power. At the same time, efforts to build "supply security" usually raise costs.*[14]

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7 "GDP per Capita, PPP (Current International $)—China, United States," The World Bank, accessed February 20, 2024, https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=CN-US.
8 "Gross Domestic Spending on R&D," OECD Data, The Organization for Economic Co-operation and Development, accessed February 6, 2024, https://data.oecd.org/rd/gross-domestic-spending-on-r-d.htm.
9 "Industry (Including Construction), Value Added per Worker (Constant 2015 US$)," The World Bank, accessed February 20, 2024, https://data.worldbank.org/indicator/NV.IND.EMPL.KD. Data is as of 2019 and in constant 2015 US dollars.
10 Lee G. Branstetter and Guangwei Li, "Does 'Made in China 2025' Work for China? Evidence from Chinese Listed Firms," National Bureau of Economic Research, Working Paper No. 30676, November 2022, https://www.nber.org/papers/w30676.
11 Yoko Kubota and Liyan Qi, "Empty Buildings in China's Provincial Cities Testify to Evergrande Debacle," *The Wall Street Journal*, October 4, 2021, https://www.wsj.com/articles/evergrande-china-real-estate-debt-debacle-empty-buildings-cities-beijing-11633374710; Jason Douglas and Stella Yifan Xie, "Evergrande Is Finished. China's Property Woes Aren't," *The Wall Street Journal*, January 30, 2024, https://www.wsj.com/world/china/evergrande-is-finished-chinas-property-woes-ar-ent-ea1be00f.
12 Laura He and Simone McCarthy, "Xi Jinping rings in 2024 with rare admission that China's economy is in trouble Simone McCarthy," January 1, 2024, CNN, https://www.cnn.com/2024/01/01/economy/xi-jinping-new-year-address-economy-intl-hnk/index.html.
13 Michael E. O'Hanlon, "China's shrinking population and constraints on its future power," April 24, 2023, The Brookings Institution, https://www.brookings.edu/articles/chinas-shrinking-population-and-constraints-on-its-future-power/.
14 Jacky Wong and Nathaniel Taplin, "Stocks for the Looong Run: Could Japan's Lost Decades Happen in America?" *The Wall Street Journal*, February 2, 2024, https://www.wsj.com/finance/investing/stocks-for-the-looong-run-could-japans-lost-decades-happen-in-america-71d9e17c.

The United States is susceptible to these same problems. The Congressional Budget Office estimates that productive federal investment exhibits an average rate of return of five percent—half the average rate the agency estimates for productive private investment.[15] The difference in returns between federal and private investment is illustrative of the gains forfeited when government policy diverts capital away from its most productive use toward a less productive use. A major review of US industrial policy from 1970 through 2020, conducted by international tax and trade experts Gary Clyde Hufbauer and Euijin Jung, finds mixed results at best. It also offers warnings against the failures of import protection, the high costs of attempting to save or create jobs in specific industries, and similar perils in firm-specific support.[16]

Despite jarring warnings against the industrial policy approach,[17] lawmakers' concerns over the US manufacturing sector and China's industrial policies reached a crescendo amidst the coronavirus pandemic and resulting supply chain disruptions. This culminated in the enactment of new industrial policy efforts. Enacted in 2022, the Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act provides $52 billion in grants and $24 billion in tax credits for onshore semiconductor production.[18] Similarly, the Inflation Reduction Act (IRA) established and expanded tax credits now expected to cost anywhere from $780 billion[19] to $1.2 trillion.[20] The hundreds of billions of dollars in new subsidies come on top of existing policies, including tariffs against China and other tax preferences, designed to benefit specific industries, geographies, and constituencies. Meanwhile, unfathomably, the underlying biased treatment of business investment within the tax code remains intact.

IRA Electric Vehicle Tax Credits

The main motivation behind the green energy tax credits enacted in the IRA was to accelerate the transition to greener energy sources through IRS-administered tax subsidies, with a secondary motivation to incentivize domestic investment, production, and employment. The IRA aims to accomplish these goals for electric vehicles (EVs) in two ways, by subsidizing the purchase of EVs that meet domestic content and assembly requirements, and by subsidizing a charging infrastructure that meets prevailing wage, apprenticeship, and geographical requirements. Thus far, the results highlight how this attempt at government planning, like most other attempts, is marred by inefficiencies, unintended economic consequences, and incongruence among policy objectives and outcomes.

When it comes to addressing the externalities of carbon emissions, most evidence suggests subsidies are not an effective approach. The inherent inefficiency of the subsidy approach is compounded by the specific design of the IRA credits. Requirements for domestic content and prevailing wages have been shown to slow the speed[21] and raise the costs[22] of other types of investment; these same factors are at play with the green energy credits.

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15 *The Macroeconomic and Budgetary Effects of Federal Investment*, Congressional Budget Office (June 16, 2016), https://www.cbo.gov/publication/51628#:~:text=C-BO%20further%20estimates%20that%20productive,of%20return%20on%20private%20investment.
16 Gary Clyde Hufbauer and Euijin Jung, *Scoring 50 Years of US Industrial Policy, 1970–2020*, Peterson Institute for International Economics (November 2021), https://www.piie.com/sites/default/files/documents/piieb21-5.pdf.
17 Erica York, "Tax Policy Improvements Needed to Help Industries through the Semiconductor Shortage," *Tax Foundation* (blog), March 16, 2021, https://taxfoundation.org/blog/semiconductor-shortage-tax-policy/.
18 *The CHIPS and Science Act: Here's what's in it*, McKinsey and Company (October 4, 2022), https://taxfoundation.org/blog/semiconductor-shortage-tax-policy/.
19 John Bistline, Neil R. Mehrotra, and Catherine Wolfram, *Economic implications of the climate provisions of the Inflation Reduction Act*, Brookings Institution (March 29, 2023), https://www.brookings.edu/articles/economic-implications-of-the-climate-provisions-of-the-inflation-reduction-act/.
20 *Update: Budgetary Cost of Climate and energy provisions in the Inflation Reduction Act*, Penn Wharton Budget Model (April 27, 2023), https://budgetmodel.wharton.upenn.edu/estimates/2023/4/27/update-cost-climate-and-energy-inflation-reduction-act.
21 *Project Selection and Starts Are Influenced by Certain Federal Requirements and Other Factors*, US Government Accountability Office (February 2010), https://www.gao.gov/assets/gao-10-383.pdf.
22 Michael Thom, "What Do We Know about the Impact of Prevailing Wage Laws?," Mackinac Center for Public Policy, June 4, 2021, https://www.gao.gov/products/gao-10-383

For instance, the IRA's clean vehicle credit provides a nonrefundable tax credit of up to $7,500 for vehicles assembled in North America if the vehicles use specific types and amounts of components sourced from the United States or friendly countries. Additionally, taxpayers must meet income and price thresholds to take advantage of the credit.

These sourcing requirements reduce the number of vehicles that qualify for the credit while also creating associated cost pressures. Both of these misallocation outcomes undermine the goal of the credit to increase EV adoption. However, the Department of the Treasury ruled that leased vehicles do not have to meet the content, income, or pricing requirements to qualify for the tax credits. Leasing has since increased dramatically, and the costs of the EV credits have unsurprisingly grown in tandem from $11 billion to $69 billion in the 2023–2031 estimate.[23]

A complementary effort was the IRA's credit to cover 30 percent of the installation costs for EV chargers. However, the credit amount depends on whether businesses meet prevailing wage and apprenticeship requirements, and since 2023, charging property is eligible for the credit only if it is placed in low-income or rural areas. In other words, the legislation forces the installation of charging stations in locations not otherwise profitable to install and operate. Here too, however, the Department of the Treasury quickly stepped in with guidance that broadened subsidy eligibility such that nearly two-thirds of the population would qualify.[24]

The gross misalignment of EV policy objectives—increasing their adoption by subsidizing purchases and increasing domestic production at the cost of pricing pressures—is not the only IRA concern. Another is the relative newness of the technology the credits are intended to subsidize, locking in billions of government investment dollars for products consumers may not be ready to embrace. For example, the Biden administration "backdoored" a public EV mandate in April 2023 with proposed tailpipe emissions standards that "would effectively require that electric vehicles make up two-thirds of car sales in 2032."[25]

Whether via subsidies or mandates, government planning is not an effective means to stimulate innovation. Citing data on the falling momentum of EV sales, the American Enterprise Institute's James Pethokoukis notes that formulating a plan to design the future of the American auto industry through tough rules on tailpipe emissions to force automakers to sell more EVs "isn't the same as successfully executing" such a plan.[26] As is often the case, the government does not have the information necessary to choose the right technology and is not nimble enough to respond to changes in the market.

Indeed, recent data shows auto companies taking heavy losses on EVs and, in turn, reducing production significantly—as much as 50 percent in the case of some models—despite the extensive subsidies.[27] The Biden administration finalized its tailpipe emissions rules in March 2024. Though the requirements are

23 William McBride and Daniel Bunn, "Repealing Inflation Reduction Act's Energy Credits Would Raise $663 Billion, JCT Projects," *Tax Foundation* (blog), June 7, 2023, https://taxfoundation.org/blog/inflation-reduction-act-green-energy-tax-credits-analysis/.
24 The Editorial Board, "An EV Charger for Everyone—Courtesy of Taxpayers," *The Wall Street Journal*, January 28, 2024, https://taxfoundation.org/blog/inflation-reduction-act-green-energy-tax-credits-analysis/#:~:text=Repealing%20Inflation%20Reduction%20Act's%20Energy%20Credits%20Would%20Raise%20%24663%20Billion%2C%20JCT%20Projects,-June%207%2C%202023&text=The%20price%20tag%20of%20the,goods%2C%20services%2C%20and%20bills.
25 The Editorial Board, "Congress Takes On the EV Mandate," *The Wall Street Journal*, December 4, 2023, https://www.wsj.com/articles/congress-electric-vehicle-mandate-biden-administration-house-republicans-31329e8c.
26 James Pethokoukis, "Biden's EV Rules 'Demonstrate to Men How Little They Really Know about What They Imagine They Can Design,'" American Enterprise Institute, February 26, 2024, https://www.aei.org/economics/bidens-ev-rules-demonstrate-to-men-how-little-they-really-know-about-what-they-imagine-they-can-design/.
27 David Shepardson and Nathan Gomes, "Ford Cuts F-150 Lightning Production as EV Demand Softens," Reuters, January 19, 2024, https://www.reuters.com/business/autos-transportation/ford-reduce-f-150-lightning-production-2024-01-19/; "Ford+ Again Attracts New Customers, Drives Growth in Q3; Company Changing How It Works to Improve Quality, Costs," Ford Motor Company, accessed February 20, 2024, https://s201.q4cdn.com/693218008/files/doc_financials/2023/q3/Ford-Again-Attracts-New-Customers-Drives-Growth-in-Q3-Company-Changing-How-it-Works-to-Improve-Quality-Costs.pdf.

somewhat relaxed in the early years, in an apparent admission that they would not be economically feasible, they nevertheless aim for nearly the same ultimate emissions reduction targets that were originally envisioned.[28]

Meanwhile, EV sales growth is cooling amid consumer concerns over reliability and availability of charging stations,[29] as consumers are demonstrating a preference for hybrid models that do not qualify for the Biden administration's subsidies. Yet the subsidies have proven themselves true budget busters, thanks to changes in guidance and regulations; contradictory goals (e.g., increasing costs via sourcing and union requirements vs. encouraging consumer adoption through lower prices); and wasteful spending on EV-related industry lobbying and gamesmanship.[30] The latest estimates from the Congressional Budget Office indicate the totality of the IRA erergy credits will aggregate to $786 billion over the next decade—enough to completely offset any deficit-reducing effect the IRA could muster.[31]

Interfering in consumer and business choices by distorting relative prices, micromanaging supply chain and sourcing decisions, and consuming billions of taxpayer dollars does not add up to an efficient approach to encourage investment in new technologies. That is especially true if consumers are undecided about the viability and convenience of the technology.[32]

CHIPS Semiconductor Investment Tax Credits

The CHIPS Act provided $24 billion in semiconductor tax credits and another $52.7 billion of direct subsidies for the industry.[33] These credits and subsidies were motivated in part by the chip shortage amid the pandemic and concerns about China's own industrial policy toward semiconductors.

Semiconductor manufacturing facilities, or foundries, and their related manufacturing equipment are extremely expensive and cannot be built quickly. When finally up and running, the manufacturing process is time-consuming; semiconductor output does not always scale with volume and can be subject to high waste rates compared to less difficult production efforts. Complex tax credits and subsidies will not work to relieve temporary chip shortages, nor are they the right tools to encourage long-term investment.

Under current law, investment in industrial factories, such as a semiconductor foundry, cannot be deducted immediately but instead must be deducted over a 39-year period. Tax treatment of short-lived assets, such as much of the machinery and equipment required to populate a foundry, also prohibits immediate deduction. R&D expenses, obviously crucial to the semiconductor industry, must be amortized over five years. The tax code seems to go out of its way to fabricate arduous barriers to semiconductor manufacturing investment.

To qualify for the new semiconductor subsidies, as detailed in a 75-page notice, applicants must meet a

28 Matthew Daly and Tom Krisher, "EPA issues new auto rules aimed at cutting carbon emissions, boosting electric vehicles and hybrids," Associated Press, March 20, 2024, https://apnews.com/article/epa-electric-vehicles-emissions-limits-climate-biden-e6d581324af51294048df24269b5d20a.
29 Camila Domonoske, "The Journey toward Electric Vehicles Has Hit a Rough Patch. Sales Are Cooling Off," National Public Radio, January 31, 2024, https://www.npr.org/2024/01/31/1228067622/the-journey-toward-electric-vehicles-has-hit-a-rough-patch-sales-are-cooling-off.
30 Phred Dvorak, "What Does 'Made in America' Mean? In Green Energy, Billions Hinge on the Answer, *The Wall Street Journal*, March 23, 2023, https://www.wsj.com/articles/what-does-made-in-america-mean-in-green-energy-billions-hinge-on-the-answer-6e2471c5.
31 Alex Muresianu and William McBride, "Major Takeaways from CBO's Updated Long-Term Outlook," *Tax Foundation* (blog), February 13, 2024, https://taxfoundation.org/blog/us-deficit-cbo-budget-economic-outlook/.
32 Dan Neil, "You've Formed Your Opinion on EVs. Now Let Me Change It," *The Wall Street Journal*, January 19, 2024, https://www.wsj.com/lifestyle/cars/youve-formed-your-opinion-on-evs-now-let-me-change-it-6c6fd1c1?mod=lifestyle_lead_story.
33 *The CHIPS and Science Act: Here's what's in it*, McKinsey and Company (October 4, 2022), https://www.mckinsey.com/industries/public-sector/our-insights/the-chips-and-science-act-heres-whats-in-it.

host of criteria unrelated to increasing semiconductor investment and output.[34] The requirements include, but are not limited to, a detailed explanation of a firm's expected benefits from the investment tax credit, plans for workforce needs, descriptions of "whether and how they plan to utilize iron, steel, and construction materials produced in the United States as part of their projects," and "an equity strategy, in concert with their partners, to create equitable workforce pathways for economically disadvantaged individuals in their region."[35] Applications are to be judged on a firm's commitment to "refrain from stock buybacks." If applicants are requesting more than $150 million in funding, the Department of Commerce will require plans for workers to access childcare as well as "Upside Sharing" of a portion of "excess profits" with the federal government.[36]

As of April 2024, more than $23 billion in grants have been awarded to semiconductor firms, including three large multibillion dollar awards.[37] Though significant sums of government subsidies are going out the door, other barriers remain in place. For instance, a shortage of skilled workers that is already delaying US semiconductor plant openings, providing an early warning that CHIPS funding may indeed be a waste of taxpayer money.[38] Finally, despite the recent announcements of significant funding, many U.S. Chips manufacturers are delaying and/or scaling back planned investments due to bureaucratic hurdles put in place by the Biden Administration—including Intel, the Taiwan Semiconductor Manufacturing Company (TSMC) and Samsung.[39]

A final foundational concern regarding both the green energy credits and the semiconductor subsidies and credits remains: rather than promote innovation and competitiveness, they risk insulating firms from the competitive forces that drive innovation, thereby fostering endless dependence on government assistance. That is precisely the opposite of what America's industries need to do to create value and employ workers.[40]

Tariffs on Steel, Aluminum and Goods from China

In another ill-advised effort to boost specific industries, the Trump administration increased import taxes on washing machines and solar panels, steel and aluminum, and a wide range of goods from China. These actions totaled $80 billion in new taxes annually, based on 2018 import levels.[41] According to the Trump administration, the tariffs would revive the manufacturing sector and create jobs in the United States.[42] However, a wide range of analyses indicates those misguided promises have not been met.[43]

There is little reason to believe that tariffs can boost domestic output overall. Instead, they redistribute income from consumers and downstream industries to government coffers and to the industries lucky enough (or connected enough) to receive government protection. Indeed, the economic literature indicates this is the case in the trade war the US has been in since early 2018.[44]

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34 National Institute of Standards and Technology, "Notice of Funding Opportunity (NOFO) CHIPS Incentives Program—Commercial Fabrication Facilities," US Department of Commerce, accessed February 20, 2024, https://www.nist.gov/system/files/documents/2024/04/19/Amended%20CHIPS-Commercial%20Fabrication%20Facilities%20NOFO%20Amendment.pdf.
35 National Institute of Standards and Technology.
36 National Institute of Standards and Technology.
37 Semiconductor Industry Association, "Commerce Department Announces First CHIPS Grant Recipients," accessed April 24, 2024, https://www.semiconductors.org/chips-incentives-awards/..
38 Henry Kressel, "The Challenge of Reviving US Chip Industry," *Asia Times*, January 31, 2024, https://asiatimes.com/2024/01/the-challenge-of-reviving-us-chip-industry/.
39 Matt Cole and Chris Nicholson, "DEI Killed the CHIPS Act," The Hill, March 7, 2024, https://thehill.com/opinion/4517470-dei-killed-the-chips-act/#:~:text=The%20law%20contains%2019%20sections,Inclusion%E2%80%9D%20instructs%20the%20Department%20of.
40 Scott Lincicome, "Should the U.S. Government Subsidize Domestic Chip Production?," CATO Institute, February 27, 2022, https://www.cato.org/commentary/should-us-government-subsidize-domestic-chip-production.
41 Erica York, "Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions," *Tax Foundation*, July 7, 2023, https://taxfoundation.org/research/all/federal/tariffs-trump-trade-war/.
42 Ana Swanson, "Trump to Impose Sweeping Steel and Aluminum Tariffs," *New York Times*, March 1, 2018, https://www.nytimes.com/2018/03/01/business/trump-tariffs.html.
43 Erica York, "Trump-Biden Tariffs Hurt Domestic Manufacturing," *Tax Foundation*, December 1, 2021, https://taxfoundation.org/blog/trump-biden-tariffs-manufacturing/.
44 Max Zahn, "Donald Trump wants to escalate a US trade war. Did it work the first time?" ABC News, February 25, 2024, https://abcnews.go.com/US/donald-trump-escalate-us-trade-war-work-time/story?id=107448832.

No reputable study has found that tariffs lead to job creation or higher production overall. For example, a recent study from David Autor and others concludes, "The trade war has not to date provided economic help to the US heartland," import tariffs had "neither a sizable nor significant effect on US employment in regions with newly protected sectors," and foreign retaliation "by contrast had clear negative employment impacts, particularly in agriculture."[45]

In fact, most studies find net losses in employment and output. Accounting for benefits to protected companies and costs to companies that faced higher input prices and retaliatory tariffs, a Federal Reserve study found a decrease in manufacturing employment due to the tariffs.[46] The positive contribution from protected industries was significantly outweighed by the effects of rising input costs and retaliatory tariffs.[47] The Federal Reserve concluded, "We find the impact from the traditional import protection channel is completely offset in the short run by reduced competitiveness from retaliation and higher costs in downstream industries."[48]

Finally, a report from the US International Trade Commission (USITC) regarding tariffs on steel, aluminum, and Chinese goods found a "nearly one-to-one increase in prices of U.S. imports following the tariffs."[49] Echoing the Federal Reserve study, the USITC found that while steel and aluminum tariffs boosted domestic steel production by about 1.9 percent, or $1.5 billion per year on average, and domestic aluminum production by about 3.6 percent, or $1.3 billion per year on average, domestic production in downstream industries decreased decreased 21 percent more than any purported benefit, or $3.4 billion per year on average.[50] Notably, the USITC review was not comprehensive, as it considered only a subset of downstream industries most likely to be negatively affected by the tariffs. The aggregate impact across all affected industries may well have been worse.

The economic studies leave no doubt that tariffs have, overall, a negative impact on the US economy—including manufacturing especially—by reducing output, employment, and incomes.

A Better Solution

Our tax system maintains broad penalties for capital-intensive industries through long depreciation schedules but provides, for certain investments and industries, special subsidies to compensate for those penalties. If the tax code would treat capital investment neutrally, the need for short-term or industry-specific tax breaks could be almost zeroed. The need for a better solution is both clear and simple: rather than actively harming the manufacturing sector with punitive cost recovery rules, policymakers should immediately prioritize improved cost recovery rules.

Machinery, Equipment, and Software Investment

Over the years, Congress has offset some of the bias against manufacturing by temporarily allowing immediate deductions for short-lived assets (such as equipment) through bonus depreciation. The TCJA of 2017 provided 100 percent bonus depreciation through 2022 but scheduled it to phase out at the end

45 David Autor, Anne Beck, David Dorn, et al., "Help for the Heartland? The Employment and Electoral Effects of the Trump Tariffs in the United States," National Bureau of Economic Research, Working Paper No. 32082, January 2024, https://www.nber.org/system/files/working_papers/w32082/w32082.pdf.
46 Aaron Flaaen and Justin Pierce, "Disentangling the Effects of the 2018–2019 Tariffs on a Globally Connected U.S. Manufacturing Sector," Finance and Economics Discussion Series (FEDS), Board of Governors of the Federal Reserve System, May 26, 2020, https://doi.org/10.17016/FEDS.2019.086.
47 Flaaen and Pierce.
48 Flaaen and Pierce.
49 "Economic Impact of Section 232 and 301 Tariffs on U.S. Industries," The US International Trade Commission, Investigation No. 332–591, USITC Publication No. 5405, May 2023, https://www.usitc.gov/publications/332/pub5405.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.
50 U.S. International Trade Commission.

of 2026.[51] To improve investment incentives, Congress should restore 100 percent full expensing for short-lived assets on a permanent basis.

Research and Development Investment

Since the beginning of 2022, a TCJA directive requires companies to deduct their R&D costs over five years for domestic efforts and 15 years for offshore efforts.[52] Prior to this change, companies could deduct the full cost of the expense immediately, a feature of the tax code dating back to at least 1954.[53]

As we have seen, the requirement to amortize raises the cost of R&D investments while increasing the tax burden on those firms looking to invest and grow long term. To improve investment incentives, Congress should restore R&D expensing permanently for all varieties of R&D expenses.

Structures Investment

Structures investment faces some of the longest depreciation schedules: commercial buildings such as factories must be depreciated over 39 years, while residential structures must be depreciated over 27.5 years. Full expensing for structures investments presents unique policy challenges. Investments in structures are large and lumpy; if a business does not have adequate revenue to absorb the full deduction, it generates a net operating loss that must be carried forward, resulting in a tax treatment similar to taking depreciation deductions over time.[54]

The extent of the deductions also presents a challenge for the federal budget. Businesses with legacy investments would continue to take their deductions over time, while new investments would be immediately deducted. This would create a significant up-front increase in deductions and decrease in federal revenue. As legacy deductions fall, the cost of the policy falls too, but the high up-front cost within the budget window would drive a temporary although significant hit to the federal deficit.

A solution exists: a policy of neutral cost recovery, which adjusts depreciation deductions for inflation and the time value of money, provides an economically equivalent alternative to full expensing. Businesses would still wait to take their deductions for structures investment over time, but they would be made whole for the delay by the use of neutral cost-recovery adjustments.

Interest Limitation

Prior to the enactment of the TCJA, businesses were generally allowed to deduct their total amount of interest paid, subject to a few minor limitations. The TCJA established a new limit on the deduction for business interest paid to reduce the tax code's preference for debt over equity.[55] Beginning in 2018, the limit generally disallowed companies from deducting net interest above 30 percent of their "adjusted taxable income," defined as earnings before interest, taxes, depreciation, and amortization (EBITDA).[56] In 2022, the limit was tightened significantly by abandoning EBITDA for earnings before interest and taxes (EBIT).[57]

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51 Erica York, Huaqun Li, Daniel Bunn, Garrett Watson, Cody Kallen, "The Economic, Revenue, and Distributional Effects of Permanent 100 Percent Bonus Depreciation," *Tax Foundation*, August 30, 2022.
52 Kyle Pomerleau, "R&D and the TCJA: The Basics," *American Enterprise Institute*, January 9, 2024, https://www.aei.org/economics/rd-and-the-tcja-the-basics/.
53 "Tax Treatment of Research Expenses: Current Law and Policy Issues," *Congressional Research Service*, December 19, 2022, https://crsreports.congress.gov/product/pdf/IN/IN11887.
54 See discussion in Stephen J. Entin, "Tax Treatment of Structures Under Expensing," *Tax Foundation* (blog), May 24, 2017, https://taxfoundation.org/blog/tax-treatment-structures-expensing/.
55 Kyle Pomerleau, "The Treatment of Business Interest Expense in the TCJA," *American Enterprise Institute*, May 10, 2021, https://www.aei.org/articles/the-treatment-of-business-interest-expense-in-the-tcja/.
56 Pomerleau.
57 Pomerleau.

Basing the limitation on EBIT rather than EBITDA makes the United States an outlier with respect to international norms—no other country in the Organization for Economic Co-operation and Development uses EBIT to limit interest deductions.[58] Rather, the most common international limit is 30 percent of EBITDA, which is what the United States used prior to 2022.[59] This modification has disproportionately harmed capital-intensive industries such as manufacturing.[60] Returning to EBITDA would realign the US tax system with other nations and would modestly improve investment incentives, especially in light of today's higher interest rates.

Economic and Revenue Effects of Four Business Tax Reforms

In Table 2, we see that these four improvements to the tax code—100 percent full expensing, R&D expensing, neutral cost recovery for structures, and an EBITDA-based interest limitation—would increase long-run Gross Domestic Product (GDP) by 1.8 percent, capital stock by 3.4 percent, wages by 1.5 percent, and hours worked by 347,000 full-time equivalent jobs, according to Tax Foundation estimates.

Within the 10-year budget window, revenue would fall by $697 billion on a conventional basis. Factoring in the positive impact on the economy and the additional tax revenues the larger economy would generate, the cost of the reforms would drop by more than 75 percent—reducing revenue by only $170 billion on a dynamic basis.

By year 11, the numbers turn the corner—dynamic revenues start increasing above the baseline. The long-run debt-to-GDP ratio would decrease 6.3 percentage points because of the boost to output. Repealing the IRA (now estimated to cost upward of $786 billion over the decade) and CHIPS tax credits would improve fiscal sustainability further by raising enough revenue to offset the conventional revenue of broad cost recovery improvements.[61]

TABLE 2. Economic and Revenue Effects of Better Cost Recovery Policies

Long-Run GDP	1.80%
Capital Stock	3.40%
Wages	1.50%
Full-Time Equivalent Jobs	347,000
Conventional Revenue, 2024–2033	-$697 billion
Dynamic Revenue, 2024–2033	-$170 billion
Dynamic Change in Long-Run Debt-to-GDP	-6.3 percentage points

Source: Tax Foundation General Equilibrium Model, February 2024.

58 Garrett Watson and William McBride, "U.S. Businesses Face Growing Impact from Tightened Interest Deductions and Higher Interest Rates," *Tax Foundation* (blog), September 12, 2023, https://taxfoundation.org/blog/ebitda-us-business-interest-expense-limitation/.
59 Garrett Watson, "Tighter Limits on U.S. Interest Deductibility Make U.S. an Outlier and Increase Pain of Rising Interest Rates," *Tax Foundation*, December 5, 2022, https://taxfoundation.org/blog/business-interest-deduction-limitation/.
60 NAM News Room, "Manufacturers Push for Tax Deduction Extension," National Association of Manufacturers, December 15, 2020, https://nam.org/manufacturers-push-for-tax-deduction-extension-11365/.
61 Muresianu and McBride, "Major Takeaways from CBO's Updated Long-Term Outlook."

A Comprehensive Tax Reform Plan

Full expensing for all capital investment would markedly improve the US tax system. But in the longer term, lawmakers should consider an even more substantial overhaul of business taxes, perhaps modeled after successful international examples. Forward-looking action like this would provide growth and opportunity for workers and businesses in the United States, significantly reduce business tax compliance costs, and put all types of businesses on a level playing field.

One such approach proposed by the Tax Foundation, based on the Estonian tax system, would transform the current taxation of corporate and noncorporate business income with a flat tax of 20 percent on distributed profits from businesses.

Under this approach to tax reform, the entire business tax system would be replaced with a 20 percent entity-level tax on distributed profits, including dividends and net share repurchases. By taxing profits only when they are distributed, the business tax reform places no tax on retained earnings, creating a powerful incentive for growth and investment, not to mention massively simplifying our US business tax structure.

As seen in Table 3, the Tax Foundation estimates this reform would increase long-term GDP by 1.8 percent, increase capital investment by 3.4 percent, raise wages by 1.4 percent, and add 429,000 full-time equivalent jobs.

TABLE 3. Economic and Revenue Effects of a Distributed Profits Tax Reform

Long-Run GDP	+1.8%
Capital Stock	+3.4%
Wages	+1.4%
Full-Time Equivalent Jobs	+429,000

Source: Tax Foundation General Equilibrium Model, June 2023.

Conclusion

US economic policy has veered toward inefficient subsidies for politically favored industries while burdening unpreferred industries with a tax system that deters investment. It is not too late for lawmakers to correct course and adopt better policies to encourage investment and jobs across all of America's industries. Full and immediate deductions for R&D and machinery, combined with neutral cost-recovery adjustments for structures, is a far more efficient and fiscally responsible alternative to the budget-busting industrial policies Congress recently enacted. Rather than shift resources around through distorting subsidies and tariffs, lawmakers should reduce the cost of capital across the entire economy by means of reasonable and unbiased business tax policies.

In the long term, tax reform for businesses could further improve incentives to work and invest, leading to even more opportunities for American workers and companies. Pro-growth tax policies will unshackle American manufacturing and should be prioritized by policymakers working to strengthen American industrial capacity.

About the Author

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3

Industrial Headwinds: Reducing the Burden of Regulations on US Manufacturers

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Founder and President

THE CLUB FOR GROWTH FOUNDATION

FREEDOM FORWARD

Limiting Government, Empowering Families,
Strengthening American Industry

INTRODUCTION

Washington has saddled manufacturers with restrictions, rules, and regulations ostensibly to mitigate this social ill or facilitate that social goal. Environmental regulations, occupational safety rules, the workers' compensation system, mandated employee health coverage, import compliance, export compliance, and many other federal mandates have been thrust upon US manufacturers over the decades.

In more recent years, concerns about national security, the battle for technological supremacy, the reliability of trade partners, precarious global supply chains, and social dissonance caused by the supposed "hollowing out" of manufacturing have opened the door to a new set of paternalistic proposals to rescue, revitalize, or repurpose the manufacturing sector.

For decades, policymakers have poked and prodded, bound and gagged, and dug their sharp regulatory spurs deep into the sides of America's manufacturing corpus. In 2022, the costs of federal regulations accounted for 12% of US GDP, or 20% more than the value produced by the entire US manufacturing economy. Remarkably, despite this abuse, US manufacturing still measures up well against its own past performance and against the contemporary performance of other countries' industrial sectors. But that is changing. The intensifying global pursuit of resources, especially critical minerals needed to produce semiconductors, electric vehicle batteries, and other technology goods, is stoking competition among countries to attract investment in production capacity and research and development (R&D). Whether a country's regulatory environment helps or hinders those efforts will be a significant determinant of future investment location decisions.

The Biden administration—abetted by the last Congress—has chosen to offer massive subsidies to induce manufacturers to make semiconductors and green products in the United States. Even if that approach to the challenge were wise in theory, the rules around those industrial policies operate at cross-purposes, adding unnecessary complexity, uncertainty, and costs to the existing US regulatory morass.

US manufacturing is especially burdened by a wayward regulatory state that is politicized, opaque, disconnected from sound economic underpinnings, and, all the while, mocking the separation of powers established under the US Constitution. Major legal and structural reform, requiring action from all three branches of the federal government, is needed to mitigate the damage and correct our course.

Yes, Manufacturing Matters

With a global technology revolution in full swing and competition among many of the world's economies heating up, manufacturing innovation and production driven by R&D are essential to US economic and security objectives. Manufacturing matters because it is better than most sectors at attracting capital for R&D, commercializing innovation, and producing to scale. This helps keep the United States at the technological fore. US manufacturers succeed when they can direct resources toward innovation and productivity rather than toward lobbying and influence peddling.

Unfortunately, politicians evoke the strategic importance of manufacturing to push policy interventions that not only fail to strengthen the manufacturing sector but even actively hurt it. Tariffs that raise the cost of production, export restrictions that reduce economies of scale, and subsidies that encourage the use of more expensive or less efficient industrial inputs and processes do nothing to confront the most pressing challenge facing the manufacturing industry: overregulation.

Manufacturing matters. But interventionist prescriptions will only increase the regulatory burdens at a time when reducing accumulated restrictions and limiting new ones are the best ways to strengthen what is still the world's most competitive manufacturing sector.

The Large and Growing Costs of the Regulatory State

Regulations issued by the US government cost the economy an estimated $3.1 trillion in 2022—close to 12% of US GDP.[1] To put that in perspective, the total value added of the US manufacturing sector in 2022 was $2.6 trillion, which is to say the US regulatory state is 20% larger than the entire US manufacturing economy.[2]

The problem is growing. For manufacturing firms, the cost of federal regulations in 2022 was roughly $350 billion, or 13.5% of the sector's GDP—a burden 26% greater than the inflation-adjusted cost of regulatory compliance in 2012.[3] Whereas the average US company pays approximately $13,000 per employee annually to comply with federal regulations, the average US manufacturer pays more than $29,100 per employee—more than double.[4] This cost increases to a staggering $50,100 for manufacturers with fewer than 50 employees.[5] The unconscionable burden on smaller manufacturing firms restricts competition and, therefore, the innovation, dynamism, and productivity it spurs.

The dollar value of compliance costs is one objective measure of the financial burden of regulations. Other metrics can further enhance our understanding of the breadth of the problem confronting manufacturers (and the rest of the private sector). The Competitive Enterprise Institute (CEI) publishes an annual report

1 Nicole V. Crain and W. Mark Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, National Association of Manufacturers (October 2023); figure expressed in 2023 dollars. https://nam.org/wp-content/uploads/2023/11/NAM-3731-Crains-Study-R3-V2-FIN.pdf.
2 US Bureau of Economic Analysis, "Gross Domestic Product: Manufacturing (31–33) in the United States," Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, March 1, 2024, https://fred.stlouisfed.org/series/USMANNQGSP.
3 Crain and Crain, *The Cost of Federal Regulation*.
4 Crain and Crain, *The Cost of Federal Regulation*.
5 Crain and Crain, *The Cost of Federal Regulation*.

FIGURE 1.

***Federal Register* Pages per Decade**

Source: Competitive Enterprise Institute, *Ten Thousand Commandments 2023, Figure 11*

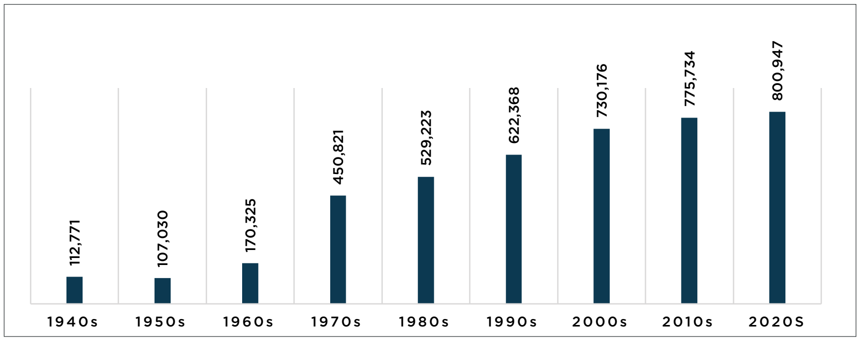
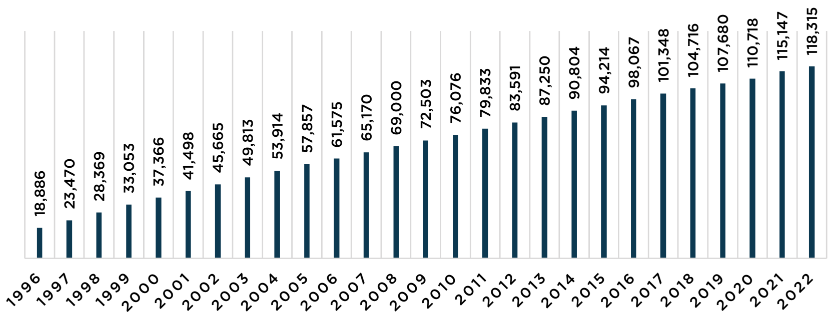


FIGURE 2.

Accumulation of Final Rules Published in the *Federal Register*, 1996–2022

Source: Competitive Enterprise Institute, *Ten Thousand Commandments 2023, Figure 14*



on regulation that includes a variety of measures reflecting the growth of the regulatory state. Metrics, such as the number of published pages in the *Federal Register*, the number of new regulatory rules, the number of new significant rules, and so on, offer a taste of the magnitude of the regulatory state and its growth over time.[6]

Figure 1,[7] published in CEI's latest report, shows the number of pages published in the *Federal Register* over the decades increasing to more than 800,000 thus far in the 2020s alone. Since 1970, the word count in the *Code of Federal Regulations* has more than tripled to more than 100 million. Figure 2,[8] also published in the CEI report, shows the annual accumulation of final rules published in the *Federal Register*. The report notes that "Biden's count of completed economically significant rules is higher than anything seen in the Bush, Obama, and Trump years."[9]

6 Clyde Wayne Crews, "Chapter 5: Page Counts and Numbers of Rules in the *Federal Register*," in *Ten Thousand Commandments 2023: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute (November 29, 2023), https://cei.org/publication/chapter-5-10kc-2023/. The first several paragraphs of this chapter describe the various metrics and their value and shortcomings as metrics of regulatory volume.
7 Crews, *Ten Thousand Commandments 2023.*
8 Crews, *Ten Thousand Commandments 2023.*
9 Economically significant rules are those expected to have an economic impact of at least $100 million. These are rules that trigger the requirement that agencies conduct a cost-benefit analysis. Notably, the Biden administration's new guidance to federal agencies redefines "economically significant" as those rules with a likely impact of at least $200 million (https://cei.org/studies/ten-thousand-commandments-2023/#:~:text=Even%20taking%20the%20dip%20into,Trump%2C%2021%20were%20deemed%20deregulatory).

Scholars at George Mason University's Mercatus Center studied the problem of "regulatory accumulation" and put it this way:

> *Depending on how you count, there are somewhere between 80 and 200 federal regulatory agencies. These agencies were created by Congress over the past century and delegated with the authority to make "administrative laws," which most people know as regulations. Federal regulatory agencies represent the center of lawmaking in the United States—every year, far more law comes out of regulatory agencies than Congress.*
>
> *For most of the 20th and 21st centuries, the overall stock of federal regulation has steadily increased. New restrictions frequently compound on top of old ones, narrowing the range of compliant behavior and sometimes becoming redundant or contradictory.*
>
> *Regulatory accumulation—that is, the buildup of regulations over time—remains a pressing policy issue despite broad recognition of the problems it creates. In part, this is because a collection of many accrued rules has a burden that is greater than the mere sum of the individual rules' burden. The sheer volume and complexity of interlocking requirements and exceptions is itself a challenge to decipher. Individuals and businesses face the task of identifying, reading, and understanding regulations before they can even get to the point of complying with the substance of the restrictions. This complexity creates economic barriers to entry, which produce a business environment that favors established large businesses at the expense of startups and other potential new competitors.*[10]

The manufacturing sector bears the brunt of the US regulatory burden, and some manufacturing industries are saddled with more regulations than others. At the broadest levels of industry aggregation, four industries face the most rules: chemicals, paper, transportation, and petroleum/coal.[11]

Interestingly, semiconductor manufacturers—those coveted producers considered so essential to US economic and national security that the Biden administration showers them with taxpayer subsidies to build capacity in the United States—are the latest high-profile victims of regulation. For example, the subsidy terms of the 2022 Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act include non-germane requirements, such as recipients using organized labor and providing ample childcare services to their workers. Semiconductor manufacturers must also comply with a separate and more onerous set of Clean Air Act requirements;[12] these are so burdensome that the delays in the permitting process often render the sought investments unviable from the outset.[13]

As summed up by one journalist, "This industry-specific regulatory framework makes semiconductors more expensive at the same time that we're subsidizing their American manufacture, via the CHIPS Act. Instead of imposing unnecessary costs on key industries, policymakers should strive to make production as cheap as reasonably possible."[14] Similar

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10 Mercatus Center, "Regulatory Accumulation," QuantGov, George Mason University, 2022, https://www.quantgov.org/regulatory-accumulation.
11 Patrick McLaughlin, Jonathan Nelson, and Oliver Sherouse, "Regulatory Accumulation in the Manufacturing Sector," Mercatus Center, George Mason University, August 31, 2017, https://www.mercatus.org/research/data-visualizations/regulatory-accumulation-manufacturing-sector. See the various charts reflecting regulations at the 3-digit through 6-digit NAICS aggregations of manufacturing descriptions.
12 Stephen Miran, "How to 'Build America Right,'" City Journal, February 12, 2024, https://www.city-journal.org/article/how-to-build-american-right.
13 Thomas Hochman, "It's Not Just NEPA: Reforming Environmental Permitting," *American Affairs VII*, no. 4 (Winter 2023), https://americanaffairsjournal.org/2023/11/its-not-just-nepa-reforming-environmental-permitting/.
14 Stephen Miran, "How to 'Build American' Right," *City Journal*, February 12, 2024, https://www.city-journal.org/article/how-to-build-american-right.

incongruent policies that simultaneously subsidize and tax manufacturing also beset the production of steel, aluminum, solar panels, wind turbines, and other industries.

Jay Timmons, president and CEO of the National Association of Manufacturers (NAM), reminds us that ". . . two out of three manufacturers [report] that the regulatory burden is preventing them from hiring more workers or increasing pay and benefits" and that "Congress and the administration can help correct this trend by restoring sensible regulations [and] enacting further permitting reforms."[15]

But since Timmons's remarks in late 2023, the state of manufacturing regulation has worsened. The Biden administration recently issued new guidance to its agencies concerning how it should estimate the costs and benefits of regulation going forward. This will have the effect of exaggerating estimated future benefits, rendering regulatory proposals more likely to justify their costs.[16]

Writing approvingly in *The New York Times*, Jim Tankersley described the administration as having "overhauled how the federal government assesses the costs and benefits of regulation," which will have "the effect of justifying more aggressive climate regulations by giving more weight to the benefits of reducing economic damage from global warming in the future."[17]

Susan Dudley, director of George Washington University's Regulatory Studies Center and former administrator of the Office of Information and Regulatory Affairs (OIRA) under George W. Bush, identified other first-order conditions arising from Biden's new guidance. She writes, ". . . instead of requiring agencies to require evidence of a need for regulation based on accepted principles of market failure, the draft would *encourage them to regulate as long as they think they know better than individuals do about individuals' own welfare*"[18] (emphasis added).

If the Biden administration's November 2023 publication of new guidance were not enough to cause deep concern across US manufacturing, the Environmental Protection Agency's (EPA) February 2024 announcement that it will hold manufacturers to even more rigorous "particulate matter" standards most certainly has. The EPA's new standard for emissions of soot, particulate matter often called PM2.5, will fall from 12 to 9 micrograms per cubic meter of air.[19]

A subsequent NAM press release noted that air in the United States is "actually cleaner than ever, due in large part to manufacturers' commitment to innovation," and cited the EPA's recent report that PM2.5 concentrations have declined by 42% since 2000.[20] If enacted, the press release continues, the new standard "would make it far more difficult and costly for manufacturers to operate in the United States" and "would put huge swaths of the country in 'nonattainment,' meaning that they would not meet ambient air quality standards." Translation: factories could be unable to operate, causing economic development to grind to a halt. As noted by the officials at NAM, this rule makes it effectively impossible for American manufacturers to compete. "Europe's current

15 "Overregulation and Workforce Challenges Weigh Heavily on Manufacturing Sector," National Association of Manufacturers, September 13, 2023, https://nam.org/overregulation-and-workforce-challenges-weigh-heavily-on-manufacturing-sector-28360/?stream=series-press-releases.
16 "Biden-Harris Administration Releases Final Guidance to Improve Regulatory Analysis," The White House, November 9, 2023, https://www.whitehouse.gov/omb/briefing-room/2023/11/09/biden-harris-administration-releases-final-guidance-to-improve-regulatory-analysis/.
17 Jim Tankersley, "Biden Finalizes Significant Overhaul in Federal Regulations," *The New York Times*, November 9, 2023, https://www.nytimes.com/2023/11/09/business/biden-regulations-cost-benefit-spending.html.
18 Susan E. Dudley, "Circular Reasoning?" *Notice and Comment* (blog), *Yale Journal on Regulation*, May 25, 2023, https://www.yalejreg.com/nc/circular-reasoning-by-susan-e-dudley/.
19 EPA Press Office, "EPA Finalizes Stronger Standards for Harmful Soot Pollution, Significantly Increasing Health and Clean Air Protections for Families, Workers, and Communities," US Environmental Protection Agency, February 7, 2024, https://www.epa.gov/newsreleases/epa-finalizes-stronger-standards-harmful-soot-pollution-significantly-increasing.
20 NAM News Room, "EPA Releases Punishing New Air Standard," Policy and Legal, National Association of Manufacturers, February 8, 2024, https://nam.org/epa-releases-punishing-new-air-standard-2-30088/?stream=policy-legal.

PM standard is 25; China's is 35. If we want the next manufacturing dollar to be spent in America rather than abroad, a standard of 9 is simply not feasible."[21] According to an analysis by Oxford Economics, such a standard "could reduce GDP by nearly $200 billion and cost as many as 1 million jobs through 2031."[22] Not content with the existing assault on manufacturers, the EPA recently announced a radical proposal that would dramatically increase the cost of energy. As noted by Mario Loyola of the Heritage Foundation, "The rule requires all existing coal plants and new natural gas plants that run frequently to eliminate virtually all carbon emissions by using carbon capture technology starting in 2032. The new standards will be virtually impossible for electrical utilities to meet. The Energy Information Administration expects virtually all coal plants—from which Americans get 16% of their electricity—to shut down by 2032 under the rule. And meantime the rule has already frozen investment in the large combined-cycle natural gas plants that are the mainstays of America's power grid." The spike in the cost of energy resulting from this radical proposal will disproportionately harm American manufacturers.[23]

Defiantly, Manufacturing Is Still Performing Well (for Now)

Despite the varied and accumulating impositions thrust upon US manufacturers, the sector continues to perform well overall. In 2022, "real manufacturing GDP" reached a record high of $2.28 billion.[24] Sector value added per worker also reached a record high of nearly $142,000, which was 50% more than South Korea, who landed in second place for that metric.[25]

Still, manufacturing would be appreciably stronger were it not for the myriad of policy headwinds. Regulations and other policies that create uncertainty and raise the costs of production deter investment, effectively seizing equity from the manufacturing economy and often diverting it abroad. Other countries act differently: they are attracting investment to match their abundant raw material and labor resources while simultaneously fostering regulatory environments that promise greater certainty and shorter permitting periods. American manufacturing cannot continue to compete globally under the weight of a metastasizing administrative state.

Mitigating the Burdens of Regulation

Reining in a regulatory state that has grown beyond any reasonable limits is a heavy lift. The checklist is daunting: identifying the problems to address, and in what order; crafting solutions aimed at their root causes instead of their symptoms; and securing buy-in from policymakers across the political and ideological spectra. It is difficult to find grounds for compromise when one major political party mostly prioritizes reducing the burdens of regulation, while the other sees regulation as essential to progress. All three branches of the federal government bear some responsibility for what has become of the regulatory state; all have important roles to play if the effort to fix the problem is to succeed.

Regardless of whether regulation is costly to manufacturing and the broader private sector,

21 NAM News Room, "NAM to House: Overturn Air Standard," Policy and Legal, National Association of Manufacturers, February 16, 2024, https://nam.org/nam-to-house-overturn-air-standard-30185/?stream=policy-legal.
22 NAM News Room, "EPA Releases Punishing New Air Standard."
23 Mario Loyola, "EPA's New Power Plant Rule Will Cause Catastrophic Energy Scarcity," The Heritage Foundation, May 2, 2024, https://www.heritage.org/energy/commentary/epas-new-power-plant-rule-will-cause-catastrophic-energy-scarcity.
24 US Bureau of Economic Analysis, "Real Value Added by Industry: Manufacturing," Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/RVAMA.
25 Colin Grabow, "The Reality of American 'Deindustrialization,'" CATO Institute, October 24, 2023, https://www.cato.org/publications/reality-american-deindustrialization#united-states-remains-manufacturing-powerhouse.

it has become a favorite tool in the shed of the executive branch, which most administrations are loath to surrender. Dan Lips and Satya Thallam of the Foundation for American Innovation note that "since the 1980s, Republican and Democratic administrations have asserted broad discretion to use their executive authority to shape how the federal government manages and implements regulations, with little pushback from the other side of Pennsylvania Avenue."[26]

Perhaps the core of the problem is the deterioration of the sense of obligation among policymakers to respect the Constitution's separation of powers. In the United States, the legislative branch is supposed to make the laws, and the executive branch is supposed to administer them. However, in many areas of public policy, Congress has ceded its responsibilities to the executive branch, which readily receives them.

The Legislature's Imperative: Take Back Control

Clyde Wayne Crews of CEI views congressional abdication of its power as "one of the main enablers of regulatory growth" because federal agencies are less visible, less interested in compromise, and less concerned about being blamed when regulations backfire.[27] Moreover, passing laws that are written unclearly, fail to convey legislative intent, or lack administrative guidance open the door to broad interpretative variation, risking and often birthing interpretations that are far more burdensome and costly than they need to be.

The nondelegation doctrine holds that it is unconstitutional for the legislative branch to abdicate its responsibilities to the executive branch. Although legislation passed by Congress need not prescribe the specifics of how the executive branch implements the ensuing regulations, the nondelegation doctrine requires there be an "intelligible principle" that connects resulting agency regulations to the authorizing legislation.

Adherence to the nondelegation doctrine has waned; it must be reinvigorated. The right place to start that process is the legislature, in which the purposes and intended effects of its bills should be clear before voting occurs. Limited government requires robust debate surrounding potential law, as well as clearly stated purposes and expected outcomes. The objective should be to foreclose avenues for subjective interpretation and implementation by the executive branch.

In June 2023, the House of Representatives passed legislation that would give Congress the opportunity to reassert its authority when the economic stakes are considered especially high. The Regulations from the Executive in Need of Scrutiny (REINS) Act would allow Congress to vote on major rules—those with an annual price tag of $100 million or more (though recently redefined by the Biden administration as $200 million or more)—before agencies could implement them. In early 2024 this legislation was dead in the Senate, but the idea behind the REINS Act (and similar efforts to strengthen the 1996 Congressional Review Act) to once again legitimize and systematize Congress's oversight responsibilities is consistent with reinvigorating the nondelegation doctrine. Reform efforts such as this should continue.

Today, nearly all official analysis of regulation occurs in the executive branch, mostly at OIRA and the individual agencies. About regulations, Congress has little expertise and few resources—problems that exacerbate the power imbalance that has contributed to the regulatory morass. Establishing something akin to

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26 Dan Lips and Satya Thallam, "Congress Needs to Assert Authority over Government Regulations," *The Hill*, December 26, 2023, https://thehill.com/opinion/congress-blog/4377580-congress-needs-to-assert-authority-over-government-regulations/.
27 Crews, "Page Counts and Numbers of Rules in the *Federal Register*."

a Congressional Regulations Office (CRO) to mirror the purpose and operations of the Congressional Budget Office could help restore balance and enable Congress to fulfill its constitutional role.

Kevin Kosar, a scholar of Congress and the administrative state at the American Enterprise Institute, recently published a compelling case for a CRO. He describes the details of what boils down to two core functions of a future CRO: to perform cost-benefit analyses of proposed agency rules and to perform periodic retrospective analyses informed by real data rather than by forward-looking estimates. A CRO would then evolve to fulfill other important roles to help Congress restore equilibrium with the executive branch on regulatory matters.[28] Of course, executive branch concurrence with creating a CRO might be difficult to achieve.

The Executive's Duty: Stop Writing Law and Simplify the Regs

The cost of US regulation is astonishingly high because too much economic activity is subject to it. This is because the guardrails that were designed to prevent burdensome regulation, or to make it more purposed and efficient, have long since been broken. The guardrails are violated because publicly available information on the nature and magnitude of the problems supposedly meriting regulatory solutions is sparse or unavailable. What masquerade as cost-benefit analyses to justify federal agency regulations are usually disconnected from fundamental economic principles and observable reality. These disconnects can be traced to the scarcity of legal obligations to conduct rigorous ex ante or ex post analysis of individual regulations. Ex ante analysis is particularly weak; when performed, results hinge on estimated values for parameters, multipliers, and the dependencies among them. Worse, these variables can be pulled from outdated academic papers that have no real relevance to the immediate analysis.[29]

To rectify this, cost-benefit analyses that comport with widely accepted economic, financial, and accounting principles should be required for all proposed economically significant regulations. Also, the definition and application of "economically significant" should be broadened so that more proposed regulations are subject to this commonsense necessity.

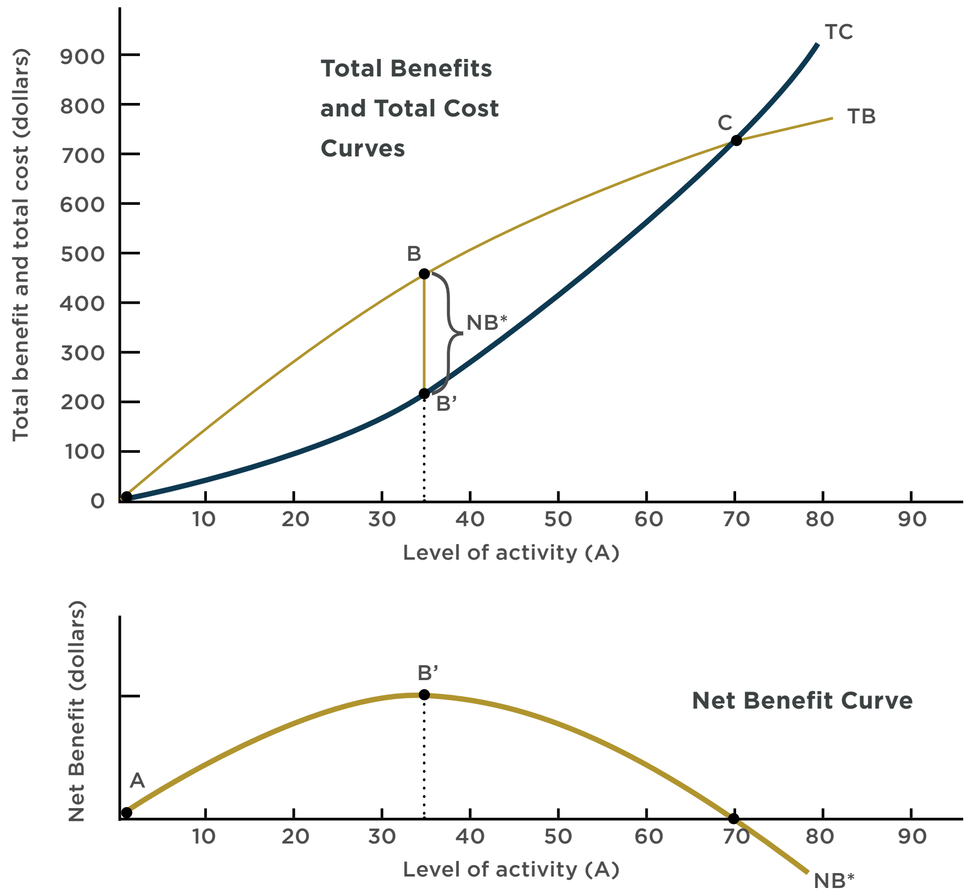
Importantly, agencies should also be required to use "marginal analysis." Marginal analysis is the right way to estimate the amount of regulation, given its increasing costs, that yields the greatest "net benefits."

A fitting example of the utility of marginal analysis is pollution abatement. In 1970, when the EPA began to regulate activities that were presumed to have adverse impacts on environmental quality, the opportunity for air and water quality improvement was vast; there was much low-hanging fruit. Compared to today, the marginal benefit of the first unit of abatement was much greater, and the marginal cost was much lower, because America's air and water quality were poor. But today, after the most obvious and affordable abatement measures have been adopted and the associated benefits reaped, the marginal cost of the next increment of improvement is much greater—and its benefit much smaller. Of course, after working along the continuum of abatement priorities toward the limits of technological feasibility, the marginal costs and benefits of any future increment of abatement continue ever higher, and lower, respectively. This rational and coherent insight must be considered in the analysis of all proposed regulations.

28 Kevin R. Kosar, "The Case for a Congressional Regulation Office," Understanding Congress, January 1, 2024, https://www.understandingcongress.org/2024/01/01/the-case-for-a-congressional-regulation-office/.
29 See Nam D. Pham and Daniel J. Ikenson, *A Critical Review of the Benefits and Costs of EPA Regulations on the U.S. Economy*, NDP Analytics (November 2012), 24–26, https://ndpanalytics.com/wp-content/uploads/ACriticalReviewoftheBenefitsandCostsofEPARegulationsonthe.pdf.

FIGURE 3.

Finding the "Optimal" Level of Regulation



Existing regulatory guidance already mandates that regulating agencies "must, among other things . . . select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits."[30] Net benefits are maximized at the level of regulation where the marginal benefit of an increment of regulation equals its marginal cost. In other words, the "optimal" amount of regulation is the amount that maximizes net benefits, and that happens at the level of regulation where the marginal benefit equals the marginal cost.

Figure 3 helps illustrate these concepts. Net benefits are maximized at 35 units of regulation, where the vertical difference between the total benefits (TB) curve and the total cost (TC) curve is maximized. The net benefit of regulation to society increases with more regulation, up to the point of optimal regulation. (For many regulations, the optimal level may very well be close to zero.) After that, the marginal cost of an additional increment of regulation rises, the marginal benefit declines, and the net benefit to society shrinks.

US regulators tend not to recognize constraints until point C, where total benefits equal total costs. But at every point beyond 35 units and up to 70 units (point C), the net benefit of regulation is declining. And to make matters worse, regulators often overestimate the benefits and underestimate the costs of regulation, putting manufacturers well to the right of point C,

30 "Summary of Executive Order 12866 - Regulatory Planning and Review" Environmental Protection Agency, Accessed March 8, 2024, https://www.epa.gov/laws-regulations/summary-executive-order-12866-regulatory-planning-and-review.

where the net benefit of regulation to society turns negative (TB < TC). This illustrates why NAM has called out the EPA for its latest tightening of particulate matter standards noted previously.

Marginal analysis confirms this instructive conclusion of an Obama-era Council of Economic Advisers report: "A regulation that is expected to eliminate 90 percent of certain harmful emissions at a cost of $100 million per year may well generate higher net benefits than one that eliminates 98 percent of those emissions at a cost of $1 billion per year."[31]

Another approach to address the regulatory problem is available: retrospective analysis. Retrospective analysis can reveal if, how effectively, and how efficiently specific rules have met their objectives. The problem of regulatory spitballing is well-known to policymakers. A former OIRA administrator, Cass Sunstein, said, "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions."[32]

A study published by the Office of Management and Budget compared the projected benefits and costs of regulations with the actual benefits and costs measured after implementation. The results "tend to overestimate both benefits and costs, but they have a significantly greater tendency to overestimate benefits than costs."[33]

The idea of regulatory budgeting to cap the annual cost of regulation effectively has a history of bipartisan support. Add to that the discipline of accounting for the costs of regulatory implementation and compliance, and agencies should become more aware of the impacts of their rules. Hopefully, regulators will start thinking more clearly about trade-offs—not only about costs and benefits but about how varied and additional approaches to their analyses can yield more accurate findings.

Moreover, the resources allocated by the agencies to help the private sector navigate the mire of rules to obtain permits and subsequently comply with their associated imperatives are rarely commensurate with the volume and complexity of the relevant regulations. The rules must be simplified and streamlined, but in the meantime, more resources should be made available.

Another area of potential reform that could fall under the rubrics of regulatory budgeting or improving regulatory transparency is the need to make records available, standardized, and digitized for the benefit of the public. Identifying the worst case is easy: no law has spawned more rules than the Clean Air Act. It regulates almost every factory, building, and piece of equipment in a multitude of industries. Thousands of Clean Air Act federal rules commingle with thousands more at the state level.

As an example, to understand where it is most cost-effective to establish a semiconductor plant, it is necessary to compare regulatory costs across states and even counties. But the information needed to make comprehensive and comprehensible evaluations is sparse. There is no uniformity to public recordkeeping and sharing. This renders the regulatory state opaque, inequitable, and oppressive.

31 Council of Economic Advisers, *Smarter Regulations through Retrospective Review*, Executive Office of the President, (May 10, 2012), 3, https://obamawhitehouse.archives.gov/sites/default/files/lookback_report_rev_final.pdf.
32 Cass R. Sunstein, "Regulation: Looking Backward, Looking Forward," Speech to the American Bar Association, May 10, 2012, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/speeches/regulation-looking-backward-looking-forward-05102012.pdf.
33 Office of Management and Budget, "Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Executive Office of the President, December 16, 2005, 2, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/2005_cb/final_2005_cb_report.pdf.

Thomas Hochman of the Foundation for American Innovation illumines this problem and describes a potential path to regulatory innovation:

> *[M]any of the solutions to the Clean Air Act's problems will not come in the form of deregulation per se, but rather through regulatory innovation—new frameworks and restructurings of existing rules that will improve efficiency without narrowing the law's substantive environmental protections. That is, done right, Clean Air Act reform will better align environmental and economic imperatives, not suppress one in favor of the other.*[34]

Existing misalignments abound. For instance, the rules sometimes perversely incentivize continued operation of less efficient, higher-polluting equipment over replacing them with better pollution-control technology because the latter requires more rigorous regulatory scrutiny than the former. Clean Air Act experts at the Institute for Policy Integrity note that "pairing restrictive standards for new sources with either lax standards or no standards at all for existing sources creates two problematic incentives: Old plants are encouraged to stay in business longer than they otherwise would, and new plants are discouraged from coming online altogether."[35]

The Judiciary's Responsibility: Stop Deferring and Start Judging

These compounding problems of runaway regulations suggest a more effective role for the judicial branch. Recall Chief Justice Marshall's famous statement in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[36] For too long, the courts have neglected to heed Marshall's words—at least with respect to matters concerning the administrative state. In recent decades, as the tether between regulations and the laws that give them life fray and sever, the judicial branch has been reluctant to offer judgment.

In 1984, the Supreme Court ruled in *Chevron USA, Inc. v. Natural Resources Defense Council* that lower courts should defer to an agency's interpretation of an ambiguous statute if the interpretation is reasonable.[37] What has become known as the "*Chevron* Deference" over the past 40 years is now shorthand for the judiciary's hands-off approach to the administrative state. This broad deference to agency interpretation and decision certainly serves as a primary cause of regulatory overkill.

Lately, however, a series of cases before the Supreme Court concerning matters of administrative interpretation of statutes have been decided without reference to *Chevron*. Many court watchers believe the Supreme Court is reconsidering the *Chevron* criteria and may be about to overturn the long-standing deference in a challenge brought before it regarding the National Marine Fisheries Service (NMFS).[38] At issue is whether the NMFS can require commercial fishing vessels to host environmental observers onboard and require the fishers to pay the observers' salaries.

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34 Thomas Hochman, "It's Not Just NEPA: Reforming Environmental Permitting."
35 Richard L. Revesz and Jack Lienke, "The Tragic Flaw of the Clean Air Act," *The Regulatory Review*, May 17, 2016, https://www.theregreview.org/2016/05/17/revesz-lienke-tragic-flaw-clean-air-act/.
36 *Marbury v. Madison,* 5 U.S. 1 Cranch 137. 1803.
37 *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837. 1983.
38 Brief of Petitioners before the Supreme Court of the United States, LOPER BRIGHT ENTERPRISES, et al., Petitioners, v. GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al., Respondents, July 17, 2023, https://www.supremecourt.gov/DocketPDF/22/22-451/272199/20230717152715108_2023-07-17%20Loper%20Bright%20Opening%20Brief%20FINAL.pdf.

Whether *Chevron* is explicitly overturned or superseded with reference to the emerging Major Questions Doctrine (MQD)—which leaves it to the courts, not the agencies, to decide what is reasonable—the case will have far-reaching implications. Whereas *Chevron* requires deference to an agency's reasonable interpretation of an ambiguous statute, the MQD presumes there are issues of major national significance that require agencies' actions to be clearly supported by congressional authorization. As summarized by the Congressional Research Service: "The Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue."[39] Reversing *Chevron* likely would open cases that were decided on its grounds to appeal anew, reopening an extensive amount of litigation but also taking deeper hacks at the regulatory state.

Supreme Court Justice Brett Kavanaugh (and at least two other conservative justices) seem to favor overturning *Chevron*. Kavanaugh appears troubled by the way *Chevron* "ushers in shocks to the system every four or eight years when a new administration comes in" and implements massive changes in securities law, communications law, and environmental law, among others.[40]

Whereas *Chevron* deference applies to agency interpretations of statutes, "*Auer* deference," which takes its name from the Supreme Court's 1997 decision in *Auer v. Robbins* but is rooted in earlier Court decisions, generally instructs courts to defer to an agency's interpretation of its own ambiguous regulatory language "unless it is plainly erroneous or inconsistent with the regulation." The Supreme Court recently has recognized circumstances when *Auer* deference was not appropriate, such as when an agency's interpretation is not a result of its "fair and considered judgment," which would seem to open the door to judicial review of potentially very many regulations.[41]

The Supreme Court has made it clear that Auer is not constitutionally required, and Congress may opt to memorialize, abrogate, or modify applications of the doctrine by statute. In fact, Congress could potentially legislate on whether the *Auer* deference or some other standard of judicial review should be applied to regulatory interpretations in particular statutes rather than be applied generally per the authority of the Administrative Procedure Act.[42]

The courts play a vital role in fixing the onerous errors of the regulatory state. Tightening the aperture against interpretations that are at odds with regulatory or statutory language can help to restore a greater sense of predictability to the regulatory environment.

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39 Kate R. Bowers, "The Major Questions Doctrine," Congressional Research Service, In Focus, November 2, 2022, https://crsreports.congress.gov/product/pdf/IF/IF12077.
40 Amy Howe, "Supreme Court Likely to Discard *Chevron*," *SCOTUSblog*, January 17, 2024, https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/.
41 Daniel J. Sheffner, *Kisor v. Wilkie: Supreme Court Upholds the Auer Doctrine but Clarifies Its Limitations*, Congressional Research Service (July 3, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10322#:~:text=That%20doctrine%2C%20commonly%20called%20the,construction%20of%20ambiguous%20regulatory%20language.
42 Daniel J. Sheffner, *Kisor v. Wilkie: Supreme Court Upholds the Auer Doctrine but Clarifies Its Limitations*.

Conclusion

An out-of-control regulatory state is the greatest threat to US manufacturing. The situation is a consequence of a broader breakdown in the separation of constitutional powers, mostly reflected in an ineffective legislature willingly surrendering its authority to an overeager executive branch.

US regulations and their accumulated residue are inhibiting domestic investment and even chasing it abroad. Investment deterrents can be found in the millions of pages of the *Code of Federal Regulations* and the *Federal Register*. In almost every instance, those deterrents were not intended to discourage US investment. However, without regard to original motivations, capital flows serve as revealing verdicts on the relative strengths and weaknesses of an economy's institutions, policies, and potential. America's capital is flowing offshore.

Fixing or, more realistically, mitigating the problem of regulatory overreach demands changes from all three branches of the federal government.

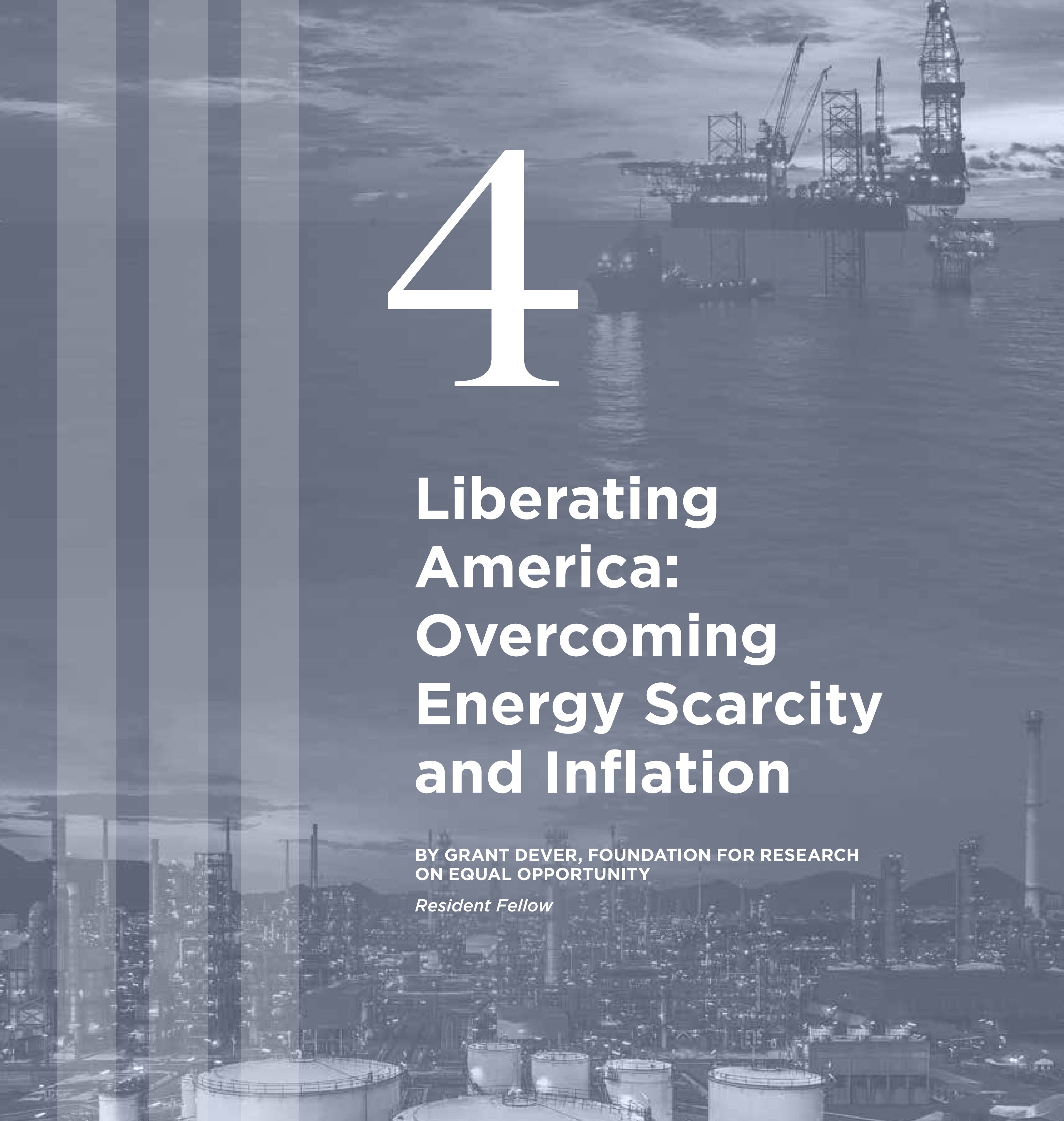
Congress must act to restore its role to provide oversight of an executive branch that is often zealous to regulate anything that moves. Legislating is more than making and passing laws; it involves pride in ownership of those laws, necessarily entailing oversight of how they are executed and judged by the other branches.

The executive branch must remove sand from the gears by sunsetting outdated regulations; streamlining permitting processes; committing to greater transparency; making more information public, easy to access, and easy to analyze; committing to best practices in the realm of cost-benefit analyses, including the use of marginal analysis; and conducting retrospective assessments of regulations.

Finally, the judiciary is essential to reining in regulatory abuse by informing the other branches what the law is and by generating clear and objective jurisprudence that helps all of them reinvigorate the nondelegation doctrine. Overturning the *Chevron* and *Auer* doctrines of deference would prominently contribute to that reinvigoration effort. Along the way, the judiciary should establish new doctrine to restore and reinforce the separation of powers.

About the Author

Daniel Ikenson is founder and president of Ikenomics Consulting, a firm specializing in data analysis, strategic communications, and issue advocacy on behalf of clients seeking to understand and influence public policy outcomes. For more than 20 years, Ikenson was a scholar at the Cato Institute, where he published scores of papers, articles, books and gave testimony before congressional committees and federal agencies on a variety of trade policy subjects, including US-China trade relations, bilateral and multilateral trade agreements, globalization, US manufacturing issues, foreign direct investment, and trade regulations.



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Liberating America: Overcoming Energy Scarcity and Inflation

BY GRANT DEVER, FOUNDATION FOR RESEARCH ON EQUAL OPPORTUNITY

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THE CLUB FOR GROWTH FOUNDATION

FREEDOM FORWARD

Limiting Government, Empowering Families, Strengthening American Industry

INTRODUCTION

America's present and future prosperity requires access to an abundance of affordable and reliable energy. The cost of energy directly impacts the competitiveness of American industry, particularly manufacturing and other sectors that are energy intensive. High electricity prices erode the household budgets of American families and reduce their ability to purchase goods and services, save for retirement, or invest in entrepreneurial ventures.

America is fortunate to have not only an abundance of natural resources but also the human and financial capital necessary to use them efficiently and innovatively. It is critical that the United States pursue an energy agenda that will enable all Americans to benefit from the growth of new industry, from the innovations in energy production and transmission, and from an abundance of reliable and affordable power.

Investors throughout the world are seeking opportunities to invest in sectors that are energy intensive. You cannot open a newspaper without reading about semiconductors, artificial intelligence, Bitcoin, hydrogen, defense industries, aerospace engineering, small modular nuclear reactors, or the opportunity to reshore critical industries to create more secure supply chains. All these industries require access to electricity and heat at a competitive price. While there are many reasons for businesses to be located in the United States, the global competitiveness and success of any of these companies will be greatly influenced by their energy costs. Greater investment in these industries and demand for the goods and services they provide will lead to far greater demand for energy than in prior years.

A recent report by Grid Strategies estimates that demand for power in the United States is set to grow 0.93 percent annually over the next five years, 81 percent faster than was forecasted a year ago.[1] The bulk of this increase is driven by investment in

1 John D. Wilson and Zach Zimmerman, *The Era of Flat Power Demand Is Over*, Grid Strategies (December 2023), https://gridstrategiesllc.com/.

new manufacturing capacity and data centers. If the United States pursues an agenda of energy abundance, demand for electricity could exceed even those lofty predictions as American entrepreneurs build and grow businesses that can outcompete foreign competitors saddled with higher energy costs.

Sadly, that vision is contrary to our nation's recent experience: the United States has endured anemic growth in electricity demand over the past two decades. Thankfully, gains in energy efficiency were sufficient to offset the minimal new demand with only modest investments in new and updated production.

Although electricity demand may have been stagnant, the supply of new regulations for energy infrastructure projects has continued without pause. For the United States not only to meet projected demand but also to capitalize on opportunities at the cutting edge of technological development, significant regulatory reform is essential. Failure to advance reasonable reforms will impair the competitiveness of American industry, leave the United States vulnerable to geopolitical rivals, discourage investment in domestic industry, and lead to higher prices and greater reliability concerns. The decisions made by lawmakers at this pivotal time in history will determine the trajectory of American prosperity for the coming decades.

The Positive Sum Game of Innovation and Competition

Americans can have access to reliable, affordable power while decreasing our emissions and advancing the United States' geopolitical strategy. This is no theoretical claim; it is a reality of the Shale Revolution.

In 2020, the president's Council of Economic Advisers (CEA) found that the gains in productivity since the outset of the Shale Revolution led to lower prices for natural gas, electricity, and oil.[2] These cost-cutting innovations save the average family of four $2,500 annually. These savings have been particularly pronounced for the bottom quartile of households, as an estimated 6.8 percent of their income is spent on energy. The CEA also found that the productivity gains during the Shale Revolution reduced the domestic price of natural gas by 63 percent and led to a 45 percent decrease in wholesale electricity prices.

Competition and innovation in this sector directly translated into savings for American families and businesses. In 2005, the Energy Information Administration (EIA) estimated that natural gas production for the lower 48 states would rise to 19 trillion cubic feet by 2018; however, by 2018, American natural gas production had instead risen to 30 trillion cubic feet. This represents an abundance by any measure, and it has been much cheaper than analysts expected. Similarly, the EIA had also estimated that annual carbon dioxide emissions would rise by 16.5 percent from 2006 to 2018; instead, they declined by 12 percent annually! American innovation in the energy sector has led directly to lower electricity costs, lower emissions, and greater economic growth.

While there were initial federal investments in the research and development of shale, this investment played a limited role in the recent wild successes of the natural gas industry. A fair regulatory environment that enabled entrepreneurs and engineers to experiment resulted in increased competition and allowed companies to profit from their success. These are the conditions necessary to spur innovation and fuel American prosperity.

Nonetheless, the United States is now pursuing a top-down energy policy through the use of mandates and heavy-handed subsidies—like those in the 2022 Inflation Reduction Act (IRA).

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2 *Economic Report of the President: Together with the Annual Report of the Council of Economic Advisers*, The White House (February 2020), https://www.whitehouse.gov/wp-content/uploads/2021/07/2020-ERP.pdf.

The success of every power source in history has been rooted in its clear advantages over the power source it replaced. Coal outcompeted wood because of its greater energy density, availability, and superior industrial applications. Similarly, natural gas has begun to outcompete coal due to the flexibility of the generators, lower fuel extraction costs, and greater efficiency of its power plants. The IRA's combination of mandates and subsidies has instead distorted investment in the energy sector by trying to pick winners and losers at the obvious expense of reliability and affordability for consumers.

The United States can meet its 21st-century energy demands by pursuing federal regulatory reform that encourages greater innovation and competition. The price of electricity can go much lower, and the nation's electrical grids can again become the envy of the world. America's overall electrical grid can be a bulwark for the present and an inheritance for our descendants to meet the challenges of their time. Correspondingly, the Shale Revolution can be only the beginning of a grander story of energy abundance and opportunity if lawmakers allow the freedom of entrepreneurs and engineers to compete to discover the best solutions to meet our energy needs. American citizens will have access to new high-paying jobs in the energy and manufacturing sectors. Effective federal regulatory reform will lower energy costs, reduce the cost of living for Americans throughout the country, and increase the competitiveness of American industry.

The Lower Energy Costs Act

At the start of the 2023 congressional session, Republicans put forward H.R. 1, the Lower Energy Costs Act (LECA). A few minor reforms from this bill were included in the 2023 Fiscal Responsibility Act. However, Congress has refused to advance broader permitting and energy regulatory reform, despite bipartisan agreement that our current energy infrastructure and regulations are unsatisfactory. The provisions in the LECA would improve the competitiveness of American industry by streamlining permitting reform, opening access to critical minerals and resources, and removing red tape that prevents the development of critical infrastructure projects.[3] All these changes would make it easier to build new energy projects and increase private sector investment in manufacturing capacity without resorting to market-distorting subsidies that fuel debt, bureaucracy, and wasted resources.

The regulatory reforms in H.R. 1 would profoundly impact Americans by lowering their energy costs, creating new jobs, and raising their incomes.[4] Analysis from The Heritage Foundation indicates the LECA would reduce the energy costs of the average American household by $795 annually. This would provide significant relief for American consumers and businesses, particularly after the burdensome inflation they experienced in 2022. The Heritage Foundation also estimates that the average household income would increase by $2,850 per year, or nearly four percent. The legislation would fuel new capital investment and industrial growth and create more than 667,000 jobs while raising the median worker's wages by $564. In aggregate, these regulatory changes would increase GDP by $379 billion per year and reduce the deficit by $369 billion over 10 years. This last advantage is particularly important, as US debt has risen to more than $34 trillion. Interest payments alone are estimated to total $870 billion in 2024 due to continued deficit spending and higher interest rates.[5]

3 George P. Bush, David Winter, Grant Dever, "An Analysis of the Lower Energy Costs Act," The Foundation for Research on Equal Opportunity, March 29, 2023, https://freopp.org/an-analysis-of-the-lower-energy-costs-act-69cf466b8dcf.
4 Parker Sheppard, Richard Stern, and Kevin Dayaratna, "Policies in the Lower Energy Costs Act Will Lower Energy Costs and Increase GDP," the Heritage Foundation, March 20, 2023, https://www.heritage.org/energy-economics/report/policies-the-lower-energy-costs-act-will-lower-energy-costs-and-increase.
5 "What Is the National Debt Costing Us?," The Peter G. Peterson Foundation, February 9, 2024, https://www.pgpf.org/blog/2024/02/what-is-the-national-debt-costing-us.

Oil and Gas Leasing

The United States has an abundance of natural resources, including natural gas and oil. Oil and natural gas are critical to the prosperity of America and the broader world. In 2022, 39.9 percent of all electricity in the United States was generated using natural gas, and another 20.5 percent came from coal and other fossil fuels.[6] In certain localities, natural gas constitutes a much larger share of total power generation. For example, 95 percent of all electricity generated in downstate New York, which includes New York City, comes from natural gas. Fossil fuels are necessary to power most cars, and they are vital to trucks, trains, planes, and ships transporting American goods domestically and globally. The price of these commodities is so critical to the well-being of Americans that the Biden administration has temporarily reduced sanctions on Venezuela[7] and released oil from the Strategic Petroleum Reserve to expand its available supply.[8] Until superior products replace our demand for fossil fuels, federal regulations and operations that unnecessarily prevent the development of new leases for gasoline and oil simply encourage investment abroad—ironically, away from reasonable regulations that minimize harm to workers and the environment.

H.R. 1 would allow for greater opportunities to lease oil and gas on federal lands but would also provide increased congressional visibility into auctions and granted permits. The LECA would reduce the timeline for leasing permits and stop excessive litigation that delays permit approvals. The Department of the Interior (DOI) would be compelled to resume lease sales on federal onshore lands and hold at least four lease sales per year in states with eligible lands. The DOI would also be required to hold a minimum of two oil and gas lease sales per year in the Gulf of Mexico and in the Alaskan region of the Outer Continental Shelf. These reforms to federal land leasing would increase oil and gas production, encourage investment in critical energy infrastructure, and lower energy costs for American consumers and businesses—which, in turn, would fuel greater capital investment and industrial growth.

National Environmental Protection Act Reform

The National Environmental Protection Act (NEPA) requires federal agencies to analyze the potential environmental impacts of a project before issuing a permit. This most often requires the creation of an Environmental Impact Statement (EIS) and an Environmental Assessment (EA). These reports are used to assess the ecological impacts of a proposed project. In practice, NEPA has become a bureaucratic barrier to desirable and necessary infrastructure and energy projects: NEPA has significantly raised the costs of innumerable projects and discouraged many firms from even pursuing permits. In 2016, an average NEPA process consumed more than five years. Timelines like these deter investment in large projects with significant upfront capital expenditures; extraordinary delays, particularly as interest rates rise, can destroy a project's budget. Moreover, when projects are completed, they are more expensive than they need to be, forcing consumers and businesses to pay more for goods and services.

NEPA does more harm than good, killing industry innovation to pursue ambitious projects that spur economic growth. NEPA even reduces investment in, and hinders the development of, projects that would decrease pollution, reduce aggregate land

6 "U.S. Energy Information Administration, 'Electricity in the United States,'" June 30, 2023, http://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php.
7 Ben Lefebvre, "Biden Eases Sanctions on Venezuelan Oil and Republicans Howl," Politico, October 18, 2023, https://www.politico.com/news/2023/10/18/biden-venezuela-oil-sanctions-nicolas-maduro-00121779.
8 Housley Carr, "Empty Spaces—The Strategic Petroleum Reserve Is Slowly Being Refilled. How Much Is Enough?," RBN Energy LLC, December 21, 2023, https://rbnenergy.com/empty-spaces-the-strategic-petroleum-reserve-is-slowly-being-refilled-how-much-is-enough.

use, or promote other clear environmental benefits. Simply stated, NEPA is a barrier to the development of renewables, new nuclear power, geothermal power, high voltage transmission projects, and other energy infrastructure opportunities that would promote capital investment and industrial growth through lower energy costs.

Since H.R. 1 was put forward, some of its provisions were enacted into law under the 2023 Fiscal Responsibility Act (FRA).[9] One win is that EIS and EA lengths are capped. In 2018, the median length of a final EIS was 447 pages. Today, the reports in most circumstances are capped at 150 pages, but in exceptional cases, they cannot exceed 300 pages. The FRA also requires a head agency to be designated if multiple federal agencies participate in the NEPA process for a given project, sets a deadline for them to respond, and mandates reporting to Congress to improve transparency of the process. While these changes were a small step forward, they highlight the potential for greater regulatory reform that can ensure Americans have access to the robust and safe energy infrastructure they need to prosper.

The remaining NEPA-centric provisions in the LECA would help to further streamline these processes. Under the LECA, certain low-impact activities, and activities in previously studied areas on public lands, would not be considered "major federal actions" and therefore no longer require NEPA review. This would make it much easier for businesses to conduct maintenance of existing projects and to seek new opportunities on lands that have already been assessed, reducing unnecessary paperwork and bureaucracy. The LECA would also impose a 120-day deadline for agencies to initiate litigation under NEPA authority. Additionally, it sets a one-year limit for NEPA review of EAs and a two-year limit to review EISs. These improvements would significantly reduce project risk by creating a measure of project certainty within NEPA processes. Clear deadlines will allow project managers to plan better and allocate scarce resources.

NEPA is difficult to understand. Its processes are bureaucratic and fixated on project minutiae. Process complexity has increased dramatically over time in ways that materially harm Americans: deterred and deferred investment in critical energy infrastructure raises costs for everyone. These simple reforms to NEPA have the potential to unlock new opportunities for nuclear power, geothermal energy, oil and gas renewables, and hydropower.

Without NEPA reform, an abundance of reliable electricity at affordable prices cannot happen.

A Resilient, Critical Mineral Supply Chain

The United States needs reliable access to critical minerals that are essential to the development and maintenance of America's power systems. Critical minerals are vital for the manufacturing of everyday goods like cellphones, computers, and automobiles. These materials are also necessary for the production and maintenance of military technologies. The COVID-19 pandemic, the Ukraine war, and the present disruptions to international trade in the Middle East have combined to expose noteworthy vulnerabilities in our nation's supply chains. The possibility that the United States could be cut off from access to critical minerals, and thus associated processing and refining capacities, is a threat to public health, the economy, and national security.

9 Grant Dever, "The Debt Limit Deal Shows Promise of Bipartisan Energy Reforms," *OPPBlog*, July 20, 2023, https://blog.freopp.org/the-debt-limit-deal-shows-promise-of-bipartisan-energy-policies/.

As of 2022, China is responsible for 63 percent of total rare earth mineral mining, 85 percent of processing, and 92 percent of rare earth magnet production.[10] China also controls most of the market for processing and refining cobalt, lithium, rare earths, and other critical minerals.[11] A bipartisan bill introduced in the Senate included the following:

> *. . . in 2022, the United States was 100 percent import reliant for 12 out of 50 critical minerals and more than 50 percent import reliant for an additional 31 critical mineral commodities classified as "critical" by the United States Geological Survey, and the People's Republic of China was the top producing nation for 30 of those 50 critical minerals . . .*[12]

The United States has the natural resources and the talent to onshore the mining, processing, and refining of these minerals.

The LECA would help to support domestic mining by streamlining the mining permitting process for critical minerals on federal lands. It would amend the 2015 Fixing America's Surface Transportation Act to include mining as a covered activity. This would create a single point of contact in the federal bureaucracy for a project undergoing a NEPA review, establish clear timelines to reduce project uncertainty, and require concurrent review for projects in which various agencies participate in the process. It would also reduce legal uncertainty by limiting the NEPA-related litigation to specific circumstances in which a project poses an "imminent and substantial environmental harm."[13] Last, the LECA would designate uranium as a critical mineral, creating new opportunities in the American nuclear industry.

These regulatory changes will encourage investment not only in mining but also in processing and refining. To decrease our critical mineral dependence, the United States needs to develop certain refining and processing capacities to match Chinese capabilities, particularly the refinement of rare earth elements, lithium, cobalt, and graphite. Taken together, these changes would create new opportunities for American companies to explore, mine, refine, and process critical minerals. In turn, improved access and unencumbered development opportunities will promote significant industrial investment in manufacturing chips, cellphones, computers, and automobiles. All Americans would benefit.

The American Nuclear Renaissance

The electrical grid in the United States has struggled under the weight of onerous, top-down policy. Texas, New York, and California, states that disproportionately rely on intermittent energy sources, have experienced rolling blackouts and disastrous grid failures. In 2021, Winter Storm Uri led to hundreds of deaths and the near total failure of the Texas grid. In 2022, Winter Storm Elliott caused a nearly catastrophic failure of New York City's local natural gas distribution network.[14] In the heat of 2023, California averted severe rolling blackouts because an abundant snowfall the prior winter enabled above-average output from the state's hydroelectric power plants. What is the root cause of these parallel problems? These three states do not have adequate reliable baseload power, so they routinely risk operating with thin or negative margins during extreme weather events.

10 Xianbin Yao, "China Is Moving Rapidly Up the Rare Earth Value Chain," Marsh McLennan, August 7, 2022, https://www.brinknews.com/china-is-moving-rapidly-up-the-rare-earth-value-chain/#:~:text=Although%20it%20has%20only%20about,rare%20earth%20permanent%20magnets%20manufactured.
11 "Fact Sheet: Securing a Made in America Supply Chain for Critical Minerals," The White House, February 22, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/22/fact-sheet-securing-a-made-in-america-supply-chain-for-critical-minerals/.
12 Intergovernmental Critical Minerals Task Force Act, https://www.congress.gov/bill/118th-congress/senate-bill/1871/text.
13 H.R. 1 - 118th Congress (2023-2024): Lower Energy Costs Act, H.R. 1, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/1/text.
14 "Bone-Chilling," *Robert Bryce* (blog), November 25, 2023, https://robertbryce.substack.com/p/bone-chilling.

American nuclear power can help to solve the growing reliability crisis. The fundamental physics behind nuclear power should enable power plants to compete alongside natural gas and coal. While the most recent builds in the United States have been expensive, building a nuclear power plant does not have to be. The first nuclear plants built in the United States were built with overnight capital costs of $1,000 per kilowatt capacity and generated electricity for less than three cents per kilowatt hour, in 2020 dollars.[15] Recently, the South Korean energy company, KEPCO, built a new nuclear power plant for $2,000 per kilowatt of capacity, which is cheaper than a combined cycle natural gas plant with carbon capture and storage.[16] The problem is not with the technology but with a regulatory environment that has led to industry stagnation. Since the creation of the Nuclear Regulatory Commission (NRC) in 1974, only two new nuclear reactors have gone from the start of the permitting process to successful operation. That is a half century of failure to deliver a regulatory framework that enables the American nuclear industry to provide an abundance of safe, affordable, and reliable power for the American people. The costs of this failure are obscured yet all around us in the form of grid unreliability, higher energy costs, and lower economic growth.

Today, numerous advanced nuclear reactor companies are developing designs and seeking approval from the NRC. However, other American-led companies have instead sought opportunities abroad in order to avoid the United States' hostile regulatory environment. The United States should be leading in the development of these cutting-edge technologies. American-led companies choosing to start operation abroad rather than at home is a clear signal that serious reform is necessary. The House Subcommittee on Energy, Climate, and Grid Security has considered several bills that would help to address the self-limiting regulatory burdens within the American nuclear power industry. Many of these bills, including each of the bills described in the following paragraphs, were included in the Atomic Energy Advancement Act, which passed the House of Representatives on February 28 of this year.

The NRC must collect fees from applicants applying for new designs to help offset the cost of the agency. In practice, this has significantly reduced the number of applicants seeking approval, as the agency charges $300 per hour to review applications. NuScale, the only company to receive approval for their small modular reactor design, spent $500 million to prepare its application.[17] Despite approval receipt, NuScale remains years away from an operational, revenue-generating power plant. There are two pieces of legislation under consideration within the House to help reduce these types of burdens.

The first, the Advanced Reactor Fee Reduction Act, would reduce the fees that a company pursuing an advanced nuclear reactor license must pay—and the fees the NRC must collect. It would encourage companies to engage in pre-application activities to save both company and agency resources while expediting the overall process. The second, the Advanced Nuclear Reactor Prize Act, would likewise support companies in pursuing new designs by covering the fees of the companies that are first to be licensed to begin operations in one or more of several different types of advanced reactors. These prizes will encourage more companies to apply and work to be the first in a category, rather than waiting for others to pave the way in the hope that the process becomes more efficient over time. Awarded prizes would, of course, help companies raise further capital and achieve profitability faster.

15 Jack Devanney, "Nuclear Is Too Expensive," Gordian Knot News, December 11, 2022, https://jackdevanney.substack.com/p/nuclear-is-too-expensive.
16 Statista Research Development, "Planned Base Overnight Costs of New Electricity Generating Stations in the United States in 2023, by Major Technology," Statista, October 26, 2023, https://www.statista.com/statistics/519118/power-plant-base-overnight-costs-in-the-us-by-technology/.
17 World Nuclear News, "NuScale SMR recieves US design certification approval," September 1, 2020, https://world-nuclear-news.org/Articles/NuScale-SMR-recieves-US-design-certification-appro.

The House has also proposed two acts aimed at making approvals more efficient and giving the NRC the resources that it needs to achieve its mission. First, the Nuclear Licensing Efficiency Act would require the NRC to provide efficient, timely, and predictable reviews and proceedings for licensing and, at facilities where there is already an existing nuclear reactor, rely on information from the prior application, where appropriate, to streamline the approval of a second reactor at the same site. This change would particularly facilitate the growth of small modular reactors, as they are intended to be geographically aggregated to ease future scaling simply by adding more reactors. Second, the Modernize Nuclear Reactor Environmental Reviews Act would direct the NRC to submit a report and conduct rulemaking changes to facilitate efficient and timely environmental reviews for nuclear power plants. Under NEPA, this should help to accelerate the deployment of new reactors once they receive all the necessary permits and approvals from the NRC. However, as noted earlier, NEPA processes have proven prohibitive in the past. Reports and rulemaking that will expedite these processes could reduce uncertainty for investors and entrepreneurs.

One of the obstacles the NRC faces, even if it streamlines and refines its processes, is the small pool of talent it has to draw from. The stagnation of the nuclear industry has led to fewer young people joining the nuclear workforce. Further, many talented nuclear engineers are now of retirement age; at the NRC, around 24 percent of the workforce is 61 or older. The agency is currently growing, but it has historically struggled to attract and retain the quantity and quality of talent it will need to support a true American nuclear renaissance.[18] A fifth House bill, the Strengthening the NRC Workforce Act of 2023, would authorize an exception to the Office of Personnel Management's competitive hiring process for the NRC. It would allow the agency to recruit individuals more efficiently when there is a severe shortage of candidates to fill a critical NRC position, and it would allow the NRC to pay its people more, hire outside experts and consultants, and authorize bonuses. The NRC must have the tools to hire the experts it needs to conduct rigorous analyses of proposed designs and approve successful applications in a timely and predictable manner.

Many coal plants were shut down due to subsidies and regulations that distorted the energy market in favor of their competition. The shuttering of a power plant has devastating impacts on the local community, as people lose their jobs, the tax base shrinks, and electricity can become more expensive and less reliable. Nuclear energy development can revitalize areas where coal plants have been shuttered. Toward that end, the Nuclear for Brownfields Site Preparation Act would require the NRC to expedite necessary licensing and regulatory procedures to simplify the development of nuclear facilities at retired fossil fuel sites. These sites can be an ideal location for small modular reactors that can benefit from the existing infrastructure. Finally, the Advanced Nuclear Deployment Act would require the NRC to facilitate regulatory approval procedures for microreactors, which are anticipated to be used to provide reliable energy and promote economic growth in rural areas.[19]

The Path Forward

The demand for new technologies and cost-competitive heat and electricity will continue to rise, regardless of our nation's policies. America's existing energy infrastructure and critical mineral processing and refining capacities are insufficient to meet our present and future needs. To meet those demands, lawmakers must pursue relaxed permitting and other

18 American Nuclear Sociey, "A One-on-One with NRC Chair Christopher Hanson," YouTube, September 29, 2023, https://www.youtube.com/watch?v=Th-PlfFqeKRQ&t=20.
19 Office of Nuclear Energy, "The Big Potential for Nuclear Microreactors," US Department of Energy, August 7, 2019, https://www.energy.gov/ne/articles/big-potential-nuclear-microreactors.

regulatory reform. The Lower Energy Costs Act and the House's several nuclear energy bills serve as examples of effective reforms that will increase private sector investment, fuel economic growth, and reduce the deficit. Policy makers should embrace free-market principles to liberate the American energy sector.

However, the supreme barrier to the growth of America's energy industry is excessive regulation. The United States has the natural resources, financial capital, and human talent to create a future of affordable, dependable, and abundant energy. Entrepreneurs and engineers have repeatedly proven themselves capable to solve the tough technical and business problems necessary to drive down the cost of energy, increase the competitiveness of American manufacturing, and significantly improve the quality of life for all Americans. The federal government needs to get out of the way.

Why would America's leaders wish to crush American industry, leave American families vulnerable to energy inflation and severe weather events, and further our country's dependence on our international geopolitical rivals—and even enemies? Now is the time for decisive action by our lawmakers to rein in the federal bureaucracy and create a regulatory framework that will allow businesses to compete and innovate to liberate Americans from the suffering of energy scarcity. The United States must pursue energy policies that will lower energy costs, spur economic growth, and preserve our national security.

About the Author

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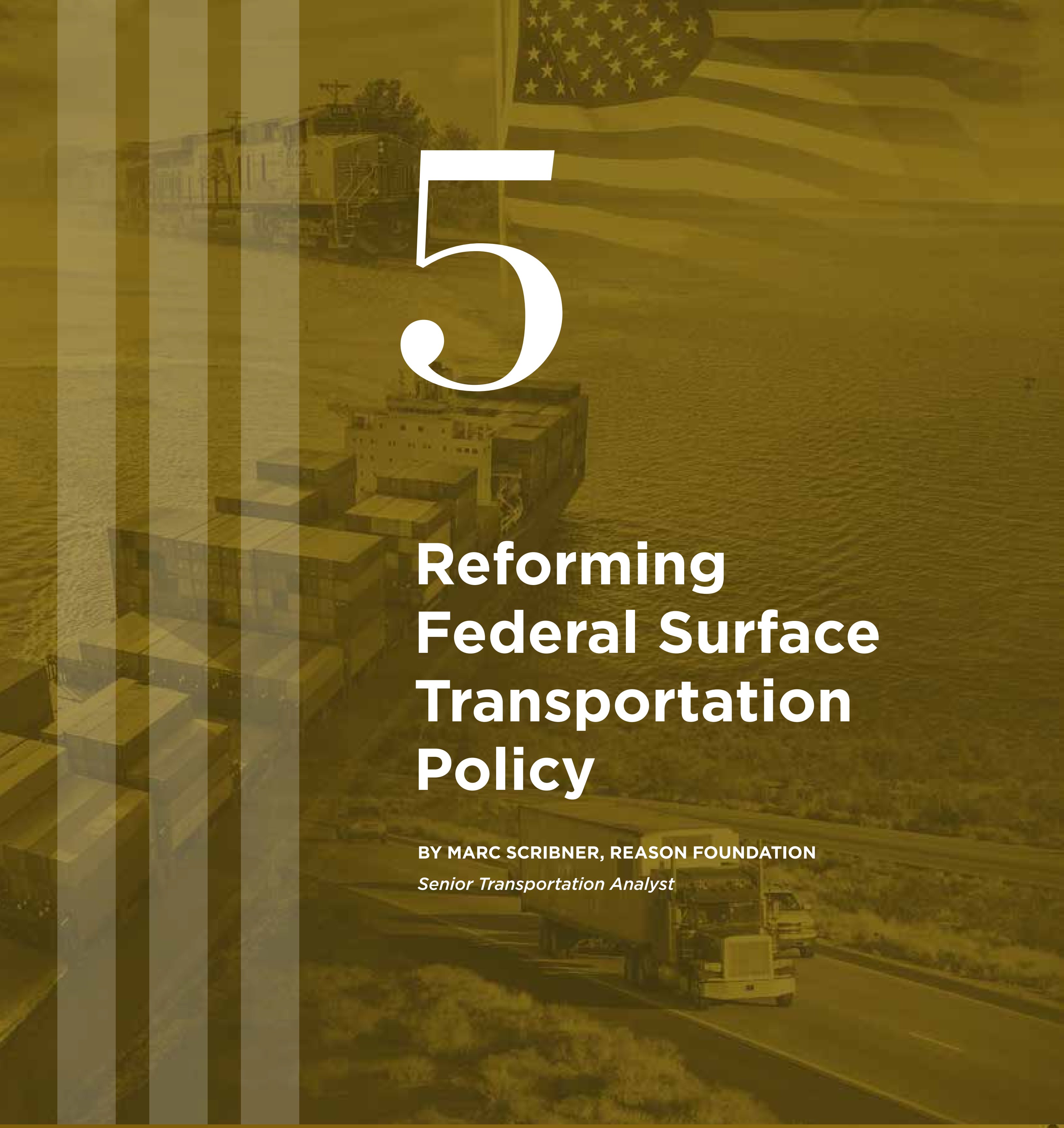

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Reforming Federal Surface Transportation Policy

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THE CLUB FOR GROWTH FOUNDATION

FREEDOM FORWARD

Limiting Government, Empowering Families, Strengthening American Industry

INTRODUCTION

Federal surface transportation policy is facing numerous challenges. Despite an unprecedented increase in federal funding in recent years, major infrastructure needs remain unmet. Much of this can be explained by mission creep within federal legacy programs. This has led to increased funding of dubious projects with little plausible connection to the national interest. Congress is due to reauthorize surface transportation programs by the end of September 2026, which will serve as an opportunity to refocus federal attention on promoting economic growth in the 21st century.

The surface transportation networks of the United States support robust economic growth and high standards of living by connecting people with places and by carrying goods to markets. Each year, the 4.2 million miles of US roadways carry more than 3 trillion vehicle-miles of travel,[1] which equates to roughly 5.5 trillion passenger miles annually.[2] On the freight side, trucks move about 2.5 trillion ton-miles of cargo worth more than $10 trillion annually.[3]

The creation of the Interstate Highway System in 1956 formed the basis of the modern Federal-Aid Highway Program. The interstates account for just under 49,000 of those 4.2 million miles of road (about 1%) but carry 26% of US vehicle-miles traveled.[4] Economists recently estimated that eliminating the interstates would reduce US gross domestic product between 2.6% and 3.6%—or between $718 billion and

1 Federal Highway Administration, "Traffic Volume Trends," Office of Highway Policy Information, US Department of Transportation, accessed February 7, 2024, https://www.fhwa.dot.gov/policyinformation/travel_monitoring/tvt.cfm.
2 Bureau of Transportation Statistics, "U.S. Passenger-Miles," US Department of Transportation, accessed February 7, 2024, https://www.bts.gov/content/us-passenger-miles.
3 Bureau of Transportation Statistics, "U.S. Ton-Miles of Freight," US Department of Transportation, accessed February 7, 2024, https://www.bts.gov/content/us-ton-miles-freight; Bureau of Transportation Statistics, "Freight Activity in the United States: 1993, 1997, 2002, 2007, 2012 and 2017," US Department of Transportation, accessed February 7, 2024, https://www.bts.gov/content/freight-activity-united-states-1993-1997-2002-and-2007.
4 Bureau of Transportation Statistics, "Roadway Vehicle-Miles Traveled (VMT) and VMT per Lane-Mile by Functional Class," US Department of Transportation, accessed February 7, 2024, https://www.bts.gov/content/roadway-vehicle-miles-traveled-vmt-and-vmt-lane-mile-functional-class.

$994 billion per year in 2023 dollars.[5] This estimate only accounts for the benefits to freight transportation and does not include the value of the interstates to passenger transportation.

While the interstates are owned and operated by the states, federal leadership in route selection and construction funding was justified by Congress due to the national significance of these superhighways. The Highway Trust Fund was created to support the development of the Interstate Highway System on a pay-as-you-go basis, largely via per-gallon excise taxes on motor fuel.

These policies were narrowly focused on achieving a discrete goal—constructing a nationwide network of freeways—and were quite successful at facilitating interstate commerce and international trade. They also increased access to employment and social opportunities within metropolitan areas.

But the Interstate Highway System has been functionally complete for a generation; consequently, for 25 years or so, our federal surface transportation policy has lacked a clear mission. As we would expect, this lack of direction threatens the program's continuing performance. This is especially troubling because much of the system has reached the end of its service life; reconstruction and modernization will be required over the next two decades. In 2019, this price tag was estimated to be between $900 billion and $1.4 trillion.[6]

The strict pay-as-you-go funding model based on user taxes has deteriorated since the 1970s, with federal funding increasingly being directed toward projects without national significance and of little benefit to the highway users paying the taxes to support those projects. Since 2008, Congress has relied on general fund transfers to the Highway Trust Fund to support expenditures that exceed dedicated user tax revenue. The Infrastructure Investment and Jobs Act of 2021 was heralded for its record-setting expenditure levels, but it was also characterized by record Highway Trust Fund bailouts, even more focus on projects lacking national significance, and a failure to address the trillion-dollar interstate reconstruction question.

As a result of these policy failures, taxpayer dollars have been wasted. Resources that could have improved system performance and allowed manufacturers to increase production by moving more goods to market have been diverted to political priorities that do nothing to increase economic growth.

Federal taxpayers and the users of the transportation system deserve better. Policymakers should consider three complementary recommendations to maximize taxpayer return on investment and promote economic growth,especially in the industrial sector:

1. Restore the "user-pays/user-benefits" principle and refocus on projects of national significance.
2. Leverage road pricing and the private sector to build, finance, operate, and maintain infrastructure facilities.
3. Reduce regulatory barriers that limit competition and increase costs.

Let us explore these ideas.

5 Taylor Jaworski, Carl Kitchens, and Sergey Nigai, "Highways and Globalization," *International Economic Review* 64, no. 4 (November 2023): 1615–1648, https://doi.org/10.1111/iere.12640. For the 2023 annualized GDP estimate, see "Gross Domestic Product (Third Estimate), Corporate Profits (Revised Estimate), and GDP by Industry, Third Quarter 2023," Bureau of Economic Analysis, December 21, 2023, https://www.bea.gov/news/2023/gross-domestic-product-third-estimate-corporate-profits-revised-estimate-and-gdp.
6 Transportation Research Board, *Renewing the National Commitment to the Interstate Highway System: A Foundation for the Future*, National Academies of Science, Engineering, and Medicine (National Academy of Sciences, 2019), https://doi.org/10.17226/25334.

Restore the user-pays/user-benefits principle and refocus on projects of national significance.

After two decades of study and debate at the federal level, Congress and President Dwight D. Eisenhower established the Interstate Highway System with the Federal-Aid Highway Act of 1956. This law was coupled with the Highway Revenue Act of 1956, which established a dedicated Highway Trust Fund account at the US Treasury. As with previous federal-aid highway programs, states would own and manage the interstates within their respective jurisdictions.[7]

To fund the new network of nationwide freeways, several highway user taxes were increased or created—most notably per-gallon excise taxes on gasoline and diesel fuel collected at the wholesale distribution "rack"—and receipts from these taxes were deposited into the Highway Trust Fund. Revenue credited to the trust fund was then made available to cover 90% of states' interstate project construction costs on a pay-as-you-go basis.[8]

These mechanisms formed the basis of what is known as the user-pays/user-benefits principle in highway funding. When compared to general fund appropriations, the user-pays principle offers several advantages:

- **Fairness:** Users who pay to support the system benefit from infrastructure improvements funded by their payments.
- **Proportionality:** Those who drive more pay more, those who drive less pay less, and those who do not drive at all do not pay.
- **Self-limiting:** With user payments as the sole source of revenue, the funding limit is set by the amount of revenue received from users.
- **Predictability:** Highway use and highway user revenue collections do not fluctuate wildly from year to year.
- **Signaling investment:** Users' willingness to pay can be used to direct future infrastructure improvements.[9]

The user-pays principle for the Federal-Aid Highway Program began to collapse at the end of the first phase of construction. In 1973, Congress first granted states broad authority to "flex" federal highway funds to mass transit projects.[10] The diversion of highway user tax revenue to mass transit was made automatic in 1983, when Congress established the Mass Transit Account within the Highway Trust Fund.[11]

To fund this new trust fund account, as well as increase federal-aid highway funding to the states, gasoline and diesel fuel tax rates were raised by 5¢, with 1¢ dedicated to mass transit. Mass Transit Account expenditures accounted for 16.6% of Highway Trust Fund outlays in fiscal year (FY) 2023.[12] A significant incongruity emerged: despite steadily increasing subsidies, mass transit's national passenger travel market share has fallen from 2.5% of personal trips in 1983 to 1.5% in 2022.[13]

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7 Federal-Aid Highway Act of 1956, Pub. L. 84–627, 70 Stat. 374 (June 29, 1956), § 209.
8 Federal-Aid Highway Act of 1956, Pub. L. 84–627, 70 Stat. 374 (June 29, 1956), §§ 108, 202–207, 209.
9 Robert W. Poole Jr. and Adrian T. Moore, "Restoring Trust in the Highway Trust Fund," Reason Foundation, August 2010, https://reason.org/wp-content/uploads/files/restoring_highway_trust_fund.pdf.
10 Federal-Aid Highway Act of 1973, Pub. L. 93–87, 87 Stat. 250 (Aug. 13, 1973), § 121.
11 Surface Transportation Assistance Act of 1982, Pub. L. 97–424, 96 Stat. 2097 (Jan. 6, 1983), § 531.
12 Federal Highway Administration, "Status of the Highway Trust Fund," US Department of Transportation, accessed February 7, 2024, https://www.fhwa.dot.gov/highwaytrustfund/.
13 Federal Highway Administration, *Personal Travel in the United States*: 1983–1984, vol. 1, US Department of Transportation (August 1986), https://www.fhwa.dot.gov/ohim/1983/vol1pt2.pdf; Federal Highway Administration, "Popular Person Trips (PT) Statistics," US Department of Transportation, accessed February 7, 2024, https://nhts.ornl.gov/person-trips.

In addition to diversions to mass transit, the Highway Trust Fund's Highway Account has seen its focus shift away from core highway construction and rehabilitation programs. Congress's 1991 surface transportation reauthorization created new "flexible" programs under the Highway Account, most notably the Surface Transportation Block Grant program (STBG) and the Congestion Mitigation and Air Quality Improvement program (CMAQ).[14]

STBG boasts expansive eligibility criteria and has allowed highway funding to be repurposed to support local sidewalk, bike path, and transit projects, in addition to purely aesthetic "transportation enhancements" such as landscaping and scenic beautification. CMAQ follows suit: any transportation projects that could plausibly be connected to reducing air pollution, are eligible including nonhighway projects aimed at reducing vehicle-miles traveled.

With the Infrastructure Investment and Jobs Act of 2021, Congress created two additional "flexible" formula programs under the Highway Trust Fund's Highway Account: the Carbon Reduction program and the Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) Formula program. The Carbon Reduction program can fund an array of highway and nonhighway projects that "support the reduction of transportation emissions."[15] Likewise, the PROTECT Formula program can fund myriad highway and nonhighway projects with a plausible connection to reducing vulnerability to natural hazards.[16]

Table 1 displays FY 2024 apportionments from the Highway Trust Fund's Highway Account.

Table 1.
FY 2024 Federal-Aid Highway Program Apportionments

Highway Account Program	Apportionments	Share
National Highway Performance Program	$29,588,395,810-	54.20%
Surface Transportation Block Grant Program	$14,394,354,721	26.40%
Highway Safety Improvement Program	$3,110,182,769	5.70%
Railway-Highway Crossings Program	$245,000,000	0.50%
Congestion Mitigation & Air Quality Improvement	$2,638,965,032	4.80%
Metropolitan Planning	$455,821,233	0.80%
National Highway Freight Program	$1,429,439,392	2.60%
Carbon Reduction Program	$1,283,496,627	2.40%
PROTECT Formula Program	$1,459,427,633	2.80%
Total	$54,605,083,217	100.2%

Note: Apportionment figures are before post-apportionment set-asides, penalties, and sequestration. Program shares total more than 100% because of rounding.

Source: Federal Highway Administration, "Apportionment of Federal-Aid Highway Program Funds for Fiscal Year (FY) 2024," Notice 4510.880, US Department of Transportation, October 2, 2023, https://www.fhwa.dot.gov/legsregs/directives/notices/n4510880.cfm

14 Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102–240, 105 Stat. 1914 (Dec. 18, 1991), §§ 1007, 1008.
15 Federal-Aid Highways, 23 U.S.C. § 175(c)(1).
16 Federal-Aid Highways, 23 U.S.C. § 176.

Highway user tax revenue was able to sustain several decades of Highway Trust Fund mission creep. This changed in 2008, when the structural deficit between Highway Trust Fund revenue and outlays led Congress to begin a series of general fund bailouts that has continued ever since. The Eno Center for Transportation's Jeff Davis has identified three primary causes of this persistent revenue-outlay imbalance:

1. **Growth in vehicle-miles traveled has slowed.** During the initial construction phase of the Interstate Highway System, from the 1950s through the 1970s, vehicle-miles traveled growth averaged 4.5% per year. For the last two decades, however, it has averaged just 0.8% per year. A slower increase in travel means a slower increase in fuel consumed. And with approximately 85% of Highway Trust Fund revenue coming from per-gallon taxes on gasoline and diesel, this means a slower increase in revenue.

2. **Vehicle fuel efficiency has greatly improved.** The energy crisis in the 1970s led to a variety of public and private actions aimed at increasing vehicle fuel efficiency. Since then, average fuel economy has nearly doubled in the light-duty fleet, with passenger cars burning 4 gallons of gas per 100 miles today compared to 7.6 gallons in 1976. Pickup trucks and SUVs, which make up a growing percentage of the vehicle fleet, burn 5.6 gallons per hundred miles today compared to 9.3 gallons in 1976.

3. **Congress has failed to respond to these trends.** Despite the changing relationship between road use and revenue, Congress has not cut spending, raised fuel tax rates, nor employed some combination of these tools to account for these changes. Gasoline (18.4¢ per gallon) and diesel fuel (24.4¢ per gallon) tax rates were last raised in 1993.[17]

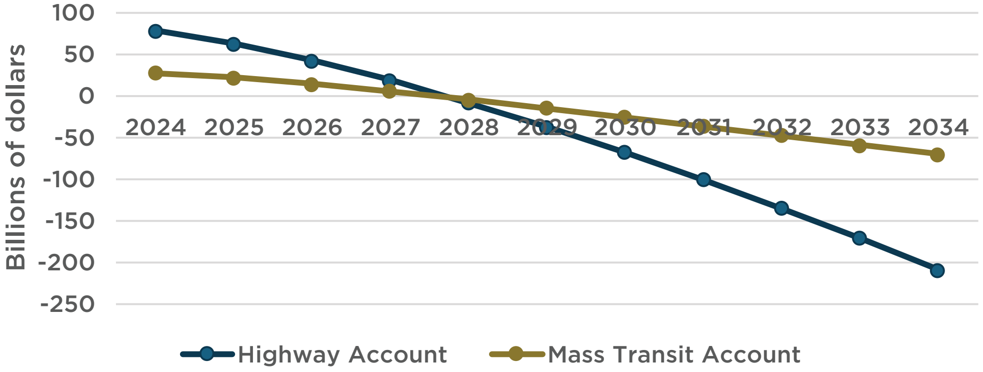
According to the Congressional Budget Office (CBO), Congress has authorized $275 billion in Highway Trust Fund bailouts since 2008.[18] Of that cumulative total, $118 billion was authorized by 2021's IIJA.[19] The IIJA provided $383 billion in Highway Trust Fund contract authority over five years, meaning nearly one-third of Highway Trust Fund spending under the current law is supported by general fund transfers.[20]

While these transfers temporarily replenished the trust fund, they failed to address the underlying structural deficit. The shortfall for FY 2023 totaled $17.6 billion, with highway user tax receipts covering 73% of Highway Account spending and 59% of Mass Transit Account spending.[21] And even if the Mass Transit Account were eliminated and all revenue dedicated to highways, highway user tax receipts would cover only 95.5% of highway outlays—a $2.2 billion deficit.[22]

17 Statement of Jeff Davis, Senior Fellow, Eno Center for Transportation, before the Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, US House of Representatives, "Running on Empty: The Highway Trust Fund," Eno Center for Transportation, October 18, 2023, https://docs.house.gov/meetings/PW/PW12/20231018/116425/HHRG-118-PW12-Wstate-DavisJ-20231018.pdf.
18 Chad Shirley, Principal Analyst, Microeconomic Studies Division, before the Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, US House of Representatives, "The Status of the Highway Trust Fund: 2023 Update," Congressional Budget Office, October 18, 2023, https://docs.house.gov/meetings/PW/PW12/20231018/116425/HHRG-118-PW12-Wstate-ShirleyC-20231018.pdf.
19 Shirley, "The Status of the Highway Trust Fund." The IIJA authorized a $90 billion transfer to the Highway Trust Fund's Highway Account and a $28 billion transfer to the Mass Transit Account.
20 Shirley, "The Status of the Highway Trust Fund."
21 Jeff Davis, "The Highway Trust Fund Ran a $17.8 Billion Structural Deficit in FY 2023," Eno Center for Transportation, October 27, 2023, https://enotrans.org/article/the-highway-trust-fund-ran-a-17-8-billion-structural-deficit-in-fy-2023/.
22 Federal Highway Administration, "Status of the Highway Trust Fund, " Table FE-1, February 2024, https://www.fhwa.dot.gov/highwaytrustfund/docs/fe-1_feb2024.pdf.

FIGURE 1.

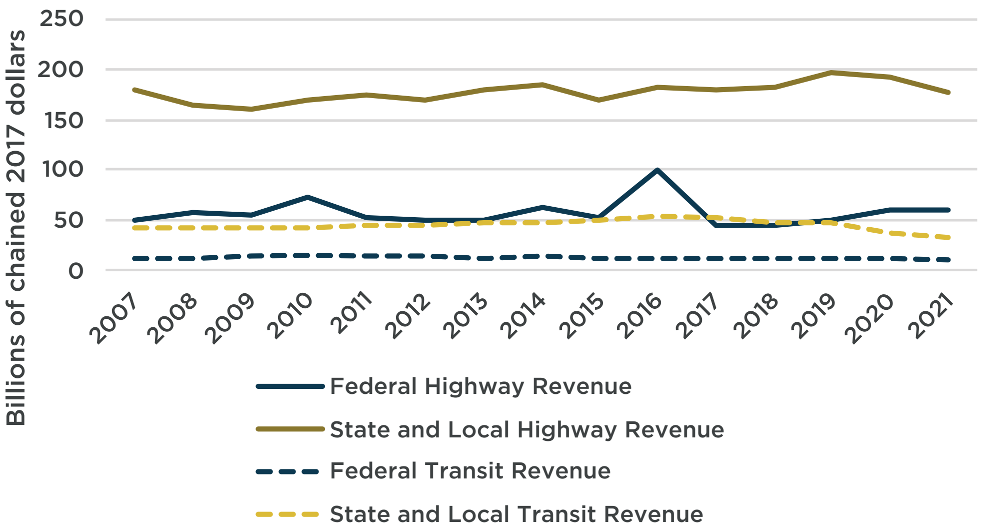
CBO Forecast of Highway Trust Fund End-of-Year Balance/ Shortfall, By Account



Source: Congressional Budget Office, "Baseline Projections: Highway Trust Fund Accounts," May 2023.

FIGURE 2.

Figure 2: Real Transportation Revenue by Level of Government, 2007—2021



Source: Bureau of Transportation Statistics, Government Transportation Financial Statistics (GFTS), Table 2-B, https://www.bts.gov/browse-statistical-products-and-data/gtfs/transportation-revenue-level-government-type.

The Highway Trust Fund's structural deficit is expected to worsen over the next decade, with forecasted end-of-year balances and shortfalls presented in Figure 1. At the end of the CBO's baseline budget window in 2034, the cumulative deficit is forecasted to reach $279.33 billion, with highway user tax receipts and interest covering just 49% of Highway Account outlays and a paltry 24% of Mass Transit Account outlays.[23]

This dismal outlook calls for rethinking federal surface transportation policy. A fiscally responsible Congress would begin by recognizing that federal revenue supports a relatively small share of total surface transportation funding.

As Figure 2 shows, state and local governments tend to allocate three to four times more revenue to highways and transit than does the federal government.

23 Congressional Budget Office, "Highway Trust Fund Accounts," February 2024, https://www.cbo.gov/system/files/2024-02/51300-2024-02-highwaytrustfund.pdf.

With the vast majority of federal revenue being spent on grants to state and local infrastructure owner-operators, economists have long been concerned that federal transportation grants may crowd out state and local spending, leading to little or no net increase in transportation infrastructure investment that can fuel economic growth.[24]

This crowding-out risk can be minimized by refocusing the federal role on nationally significant projects rather than projects that solely benefit particular states or localities. A rightsized surface transportation program designed to promote the national interest would focus primarily on maintaining and modernizing the Interstate Highway System, which accounts for just 2.6% of US roadway lane-miles but carries 25.9% of US vehicle-miles traveled.[25]

If the Highway Trust Fund ceased funding non-interstate highways, mass transit, highway safety, and similar programs, expected cash flow is likely to be sufficient to cover Interstate Highway System rehabilitation and reconstruction needs over the next two decades.

In FY 2023, federal highway user taxes generated $42.1 billion in revenue that was credited to the Highway Trust Fund's Highway Account ($37.4 billion) and the Mass Transit Account ($4.7 billion) before interest income ($5.7 billion), or approximately $48 billion in total income.[26]

Assuming a 0.75% annual increase in vehicle-miles traveled that approximates recent trends, the National Academies' 2019 interstate futures study estimated that $33 billion (in 2016 dollars) in annual federal and state spending over the next 20 years was needed to resurface and construct highway segments ($27 billion), rehabilitate and replace bridges ($4 billion), and support highway operations on the Interstate system.[27] Maintaining the 90% federal share for interstates results in $29.7 billion in federal obligations. Finally, adjusting 2016 dollars to 2023 dollars yields an annual interstate federal funding estimate of $34.6 billion.[28]

While this approach would likely sustain the interstate system as it currently exists at current federal highway user tax rates, it does not include capacity expansions to maintain and improve system performance (for example, by minimizing congestion delay). Including these additions would require $51.4 billion per year in 2023 dollars, according to the estimate from the National Academies study, which exceeds anticipated Highway Trust Fund revenue.[29] However, this estimate is sensitive to assumptions about vehicle-miles traveled growth and vehicle fuel economy, so it is subject to significant uncertainty.

With current highway user taxes likely unable to fully fund future Interstate Highway System needs—let alone support broader National Highway System federal aid funding, safety programs, and transportation research activities that many desire and can be justified under the user-pays principle—alternative procurement methods are needed to bridge the gap. To do so, Congress should eliminate restrictions on direct road pricing by infrastructure owner-operators. This would reduce Highway Trust Fund fiscal obligations while simultaneously strengthening the user-pays principle.

24 Brian Knight, "Endogenous Federal Grants and Crowd-Out of State Government Spending: Theory and Evidence from the Federal Highway Aid Program," *American Economic Review* 92, no. 1 (March 2002): 71–92, https://doi.org/10.1257/000282802760015612.
25 Bureau of Transportation Statistics, "Estimated U.S. Roadway Lane-Miles by Functional System," US Department of Transportation, accessed February 7, 2024, https://www.bts.gov/content/table-1-6-estimated-us-roadway-lane-miles-functional-systema; Bureau of Transportation Statistics, "Roadway Vehicle-Miles Traveled."
26 Federal Highway Administration, "Status of the Highway Trust Fund."
27 Transportation Research Board, *Renewing the National Commitment to the Interstate Highway System,* p. 158.
28 Adjusted to 2023 dollars using the GDP deflator derived from the Bureau of Economic Analysis, "Table 8.1.4: Price Indexes for Gross Domestic Product, Not Seasonally Adjusted," National Income and Product Accounts, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwy-LDNdLCJkYXRhIjpbWyJjYXRlZ29yaWVzIiwiU3VydmV5Il0sWyJOSVBBX1RhYmxlX0xpc3QiLCI0MDMiXV19.
29 Congressional Budget Office, "Highway Trust Fund Accounts," February 2024.4

Table 2. Current Federal Highway Tolling Programs Tolling Program

Tolling Program	Description
Section 129 General Toll Program	Permits tolling of new highways, new lanes to existing highways (provided the number of toll-free lanes remains the same), reconstruction of non-Interstate highways, and reconstruction/replacement of bridges and tunnels.
Section 129 Congestion Relief Program	Permits tolling of interstates in up to 10 urbanized areas with populations greater than 1 million residents.
Section 166 HOV/HOT Lanes	Permits high-occupancy vehicle lanes to be used by toll-paying vehicles that do not meet minimum occupancy requirements.
Interstate System Reconstruction and Rehabilitation Pilot Program	Permits the conversion of toll-free Interstate highways to toll facilities for reconstruction purposes. Limited to three route slots, which must be used by different states (one per state).
Value Pricing Pilot Program	Permits variable tolling to manage the demand for congestion mitigation purposes. Limited to 15 slots, although agencies that have been allocated a slot can implement congestion pricing on multiple facilities.

Source: Office of Innovative Program Delivery, "Tolling and Pricing," Federal Highway Administration, US Department of Transportation, 2018, https://www.fhwa.dot.gov/ipd/pdfs/fact_sheets/techtools_federal_highway_tolling.pdf. Pub. L. 117–58, § 11404(a).

Leverage road pricing and the private sector to build, finance, operate, and manage infrastructure facilities.

To encourage investment in pro-growth highway capacity enhancements and reduce risk to taxpayers, policymakers should remove barriers to road pricing and private sector infrastructure development. Despite its strong embodiment of the user-pays/user-benefits principle, tolling of federal-aid highways was traditionally forbidden under federal law. This prohibition has been relaxed in recent decades, but it still applies to the reconstruction of interstate highways. The legalization of tolling is a prerequisite to most forms of public-private partnerships (P3s). Tolling and P3s present opportunities to deliver better infrastructure more quickly and at reduced costs to taxpayers.

Congress has restricted funding to toll roads since the Federal Aid Road Act of 1916, the first federal road construction assistance program, which mandated that "all roads constructed under the provisions of this Act shall be free from tolls of all kinds."[30] This general prohibition was first relaxed in 1927 with an exemption for funding toll bridges.[31] In establishing the Interstate Highway System, Congress incorporated a number of existing toll roads, bridges, and tunnels into interstate routes but prohibited federal funding from supporting those grandfathered toll facilities.[32]

In 1991, Congress exempted from the general tolling prohibition the new construction or reconstruction of existing toll-free bridges and tunnels, as well as federal-aid highways not part of the interstate system.[33] This reoriented federal tolling policy from general opposition to qualified support when tolls are imposed to improve highways or enhance capacity. Since then, Congress has allowed tolling of high-occupancy vehicle lanes, established a pilot program for toll-financed reconstruction of existing interstate segments, created a congestion pricing pilot program, and permitted tolling of new interstate lanes.[34] However, tolling existing interstate highway capacity is still generally prohibited. Table 2 summarizes the five current federal tolling programs.

30 Federal Aid Road Act of 1916, Pub. L. 64–156, 39 Stat. 355 (July 11, 1916), § 1.
31 Robert S. Kirk, "Tolling U.S. Highways and Bridges," Congressional Research Service, updated August 4, 2017, https://crsreports.congress.gov/product/pdf/R/R44910/5.
32 Kirk, "Tolling U.S. Highways and Bridges."
33 Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102–240, 105 Stat. 1914 (Dec. 18, 1991), § 1012.
34 Kirk, "Tolling U.S. Highways and Bridges."

While it is possible to toll federal-aid highways, just 0.6% of federal-aid highway mileage is tolled.[35] Approximately 60% of this mileage is on the Interstate Highway System, with 7.5% of interstate route miles being tolled.[36] Modifying federal toll policy could encourage more states to examine tolling as an alternative revenue mechanism.

In a 2013 study, the Reason Foundation's Robert Poole proposed financing the reconstruction and expansion of the Interstate Highway System with toll revenue. After estimating the per-mile toll rates necessary to undertake interstate modernization in each of the 50 states plus the District of Columbia, he found that only six high-cost, low-traffic rural states would require toll rates that "are probably far from being acceptable."[37]

For those six, he concluded,

> *These states might be expected to argue for federal aid, analogous to what they received in the original Interstate construction program, to cover part of the costs, leaving a smaller amount to be financed by tolls. Or they could decide to use one or more sources of state funds (e.g., in Alaska, a portion of the revenues from the Alaska Permanent Fund) to supplement the amount raised via tolling. Such funding would be a departure from the users-pay/users-benefit principle advocated in this study.*[38]

As noted, the primary impediment to financing interstate modernization with tolls is that it is generally prohibited; the partial exception is the three-slot Interstate System Reconstruction and Rehabilitation Pilot Program. Poole recommends "mainstreaming" this pilot program by expanding its authority to allow each state to reconstruct any or all its interstate segments with tolls.[39]

Allowing tolling where it is feasible would reduce the demand for limited taxpayer funds and would better align with the user-pays system. This user-based revenue stream also creates opportunities to leverage private sector investment and management, which can shift financing, construction, and operating risks away from taxpayers. This would help ensure that scarce resources are directed to their most beneficial use and maximize the potential economic growth from infrastructure expenditures.

Conventionally procured megaprojects are notorious for being "over budget, over time, under benefits, over and over again."[40] Long-term toll concessions are a form of public-private partnership widely used abroad and increasingly used in the United States to deliver highway megaprojects.[41] In a toll-concession P3, private companies compete to design, build, finance, operate, and maintain highway facilities for multiple decades. As "revenue-risk" projects, these concessionaires assume the risks of cost overruns, delayed construction, and traffic and revenue shortfalls, in exchange for the toll revenue with which they hope to earn an adequate return on investment.

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35 Office of Highway Policy Information, "Public Road Length by Functional System and Federal-Aid Highways National Summary," Federal Highway Administration, US Department of Transportation, October 26, 2021, https://www.fhwa.dot.gov/policyinformation/statistics/2020/hm18.cfm; Office of Highway Policy Information, "Toll Facilities in the United States," Federal Highway Administration, US Department of Transportation, May 12, 2022, https://www.fhwa.dot.gov/policyinformation/tollpage/page04.cfm.
36 Office of Highway Policy Information, "Toll Facilities in the United States."
37 Robert W. Poole Jr., "Interstate 2.0: Modernizing the Interstate Highway System via Toll Finance," Reason Foundation, September, 2013, p. 32, https://reason.org/wp-content/uploads/files/modernizing_interstates_toll_finance.pdf.
38 Poole, "Interstate 2.0," 32.
39 Poole, "Interstate 2.0," 29.
40 Bent Flyvbjerg, "Introduction: The Iron Law of Megaproject Management," introduction to *The Oxford Handbook of Megaproject Management*, ed. Bent Flyvbjerg (Oxford: Oxford University Press, 2017), 1–18.
41 Baruch Feigenbaum and Mae Baltz, *2023 Annual Privatization Report: Surface Transportation*, Reason Foundation, May 25, 2023, https://reason.org/wp-content/uploads/annual-privatization-report-2023-surface-transportation.pdf.

The most significant barriers to developing major highway projects as toll-concession P3s are federal restrictions on tolling and the states' failure to provide adequate enabling legislation. However, federal law is also biased against public-purpose infrastructure financing by the private sector. Most significantly, interest income on government bonds is untaxed, while interest income on commercial bonds is generally taxed.[42]

To encourage private sector investment in public-purpose infrastructure like highways, Congress has attempted to level the financing playing field by authorizing qualified private activity bonds (PABs), for which interest income is untaxed. Qualified PABs for highway projects are subject to a $30 billion lifetime national volume cap.[43] In addition to qualified PABs, the US Department of Transportation can provide credit assistance under the Transportation Infrastructure Finance and Innovation Act (TIFIA). TIFIA is funded by Congress and thus faces budget constraints but has, to date, maintained unobligated budget authority throughout its program life.[44]

At the end of 2022, 27 surface transportation P3 projects that cost a total of $41.5 billion were financed by outstanding qualified PABs and/or TIFIA loans.[45] TIFIA financing totaled $11 billion and qualified PAB financing totaled $7.5 billion. If these projects had been conventionally funded by federal grants at the typical 50%–90% federal share of project costs, they would have required nearly $28 billion in additional federal funding.[46] That number represents a 150% increase in taxpayer funding that would have been required.

If toll-concession P3s are to play a much larger role in procuring US highway megaprojects, Congress must eliminate or greatly increase the lifetime volume cap on qualified PABs and increase TIFIA program authorizations. While these changes would not be costless, the cost to the US Treasury would be a fraction of the funding required to execute the same projects with conventional taxpayer grants. The overall result would be less waste, better protection for taxpayers and investments targeted to projects that lead to sustained economic growth.

Reduce regulatory barriers that limit competition and increase costs.

Improving the efficiency of surface transportation infrastructure funding and financing should be the primary focus of reform-minded policymakers. But regulatory mandates that limit competition, increase costs, and ultimately reduce productive infrastructure investment should also be scrutinized. The impacts of Buy America and the Davis-Bacon Act deserve special attention.

First, the federal government has imposed "Buy America" domestic content requirements on surface transportation infrastructure since 1978.[47] These policies aim to encourage domestic employment by requiring recipients of federal aid funding to use steel, iron, and manufactured products produced in the United States. This includes state departments of transportation, transit agencies, and Amtrak.

With respect to highways, one study estimated that Buy America's requirements on steel alone raised construction costs by $652 million per year between 2009 and 2011.[48] Domestic content requirements

42 Marc Scribner, "Private Activity Bonds Can Spur Infrastructure Investment," Reason Foundation, May 26, 2021, https://reason.org/commentary/private-activity-bonds-can-spur-infrastructure-investment/.
43 26 U.S.C. § 142(m).
44 William J. Mallett, *The Transportation Infrastructure Finance and Innovation Act (TIFIA) Program*, Congressional Research Service, last modified February 15, 2019, 7, https://crsreports.congress.gov/product/pdf/R/R45516.
45 Feigenbaum and Baltz, *2023 Annual Privatization Report,* p. 29.
46 Feigenbaum and Baltz, *2023 Annual Privatization Report,* p. 29.
47 Surface Transportation Assistance Act of 1978, Pub. L. 95–599, 92. Stat. 2689 (Nov. 6, 1978), § 401.
48 Michaela D. Platzer and William J. Mallett, *Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing*, Congressional Research Service, last modified July 2, 2019, 17, https://crsreports.congress.gov/product/pdf/R/R44266/9.

also substantially increase procurement costs and limit competition in the passenger railcar and transit bus markets.[49]

A general waiver on manufactured products for highways that has applied since the original 1978 enactment is facing elimination, which will, undoubtedly, further increase highway construction costs.[50] The law will continue to allow for waivers if Buy America requirements do not meet the "public interest," if needed materials or products are insufficiently available, or if meeting domestic content restrictions would increase costs by more than 25%.[51]

This explicit tolerance for higher costs not only negatively impacts the productivity of federally funded surface transportation investments, but it also fails to produce the intended employment effects. Economists have estimated that US domestic content preference laws cost the economy more than six jobs for each job protected from import competition.[52] Put another way, for every job "created or saved" through Buy America requirements, six jobs are lost or never created in the rest of the economy through higher costs for domestic producers. Unsurprisingly, the benefits of Buy America are concentrated in industries that supply the government, with export-oriented manufacturers of finished goods being particularly harmed.[53]

Second, since the enactment of the Davis-Bacon Act of 1931, federal law has required contractors of any federally funded public works project of more than $2,000 to pay at least "prevailing wages" for a given occupation.[54] These minimum wage rates are determined by the Department of Labor based on past wages and benefits paid for similar work in the same state.[55] Current implementing regulations derive prevailing wages based on average wages paid to at least 30% of local workers in a given occupation.[56] This 30% threshold was reduced from a 50% threshold set in 1983.[57]

In practice, use of a "prevailing wage" mandates union pay scales for public works projects, increasing the cost of construction labor. Economists have been investigating the cost of Davis-Bacon for decades. A 1983 study found that Davis-Bacon increased federal project construction costs by as much as $600 million each year.[58] A more recent estimate found that Davis-Bacon increased construction costs by 9.9% and that repeal would have saved taxpayers $10.9 billion in 2010.[59]

Regardless of the precise costs, the goal of increasing wage rates on public works projects is fundamentally misguided, as are Buy America's domestic content requirements. The economic value of infrastructure is measured not in inputs, such as construction labor or materials, but in outputs. To maximize the productivity of infrastructure and potential economic growth, input costs should be minimized. Inflated input costs translate to less infrastructure than could otherwise be procured, which reduces the benefits to US citizens—the users of the infrastructure—as well as the overall economy.[60]

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49 Platzer and Mallett, *Effects of Buy America on Transportation Infrastructure*, 18.
50 Marc Scribner, "Department of Transportation's 'Buy America' Regulatory Agenda Increases Highway Construction Costs," Reason Foundation, December 21, 2023, https://reason.org/commentary/department-transportation-buy-america-regulatory-agenda-increases-highway-costs/.
51 2 C.F.R. § 184.7(a) https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-184/section-184.7.
52 Peter B. Dixon, Maureen T. Rimmer, and Robert G. Waschik, "Evaluating the Effects of Local Content Measures in a CGE Model: Eliminating the US Buy America(n) Programs," *Economic Modelling* 68 (January 2018): 155–166, https://doi.org/10.1016/j.econmod.2017.07.004.
53 Dixon, Rimmer, and Waschik, "Evaluating the Effects of Local Content Measures."
54 Davis-Bacon Act of 1931, Pub. L. 71–798, 46 Stat. 1494 (March 3, 1931).
55 40 U.S.C. § 3142(b). https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title40-section3142&num=0&edition=prelim.
56 29 C.F.R. § 1.2. https://www.ecfr.gov/current/title-29/subtitle-A/part-1/section-1.2.
57 Shirley A. Jones, *Updating the Davis-Bacon and Related Acts Regulations*, US Government Accountability Office, Department of Labor, 88 Fed. Reg. 57526, September 5, 2023, https://www.gao.gov/assets/830/828700.pdf.
58 Steven G. Allen, "Much Ado about Davis-Bacon: A Critical Review and New Evidence," *Journal of Law and Economics* 26, no. 3 (October 1983): 707–736.
59 James Sherk, "Repealing the Davis-Bacon Act Would Save Taxpayers $10.9 Billion," The Heritage Foundation, February 14, 2011, https://www.heritage.org/jobs-and-labor/report/repealing-the-davis-bacon-act-would-save-taxpayers-109-billion.
60 Clifford Winston, "On the Performance of the U.S. Transportation System: Caution Ahead," *Journal of Economic Literature* 51, no. 3 (September 2013): 773–824, http://dx.doi.org/10.1257/jel.51.3.773.

Conclusion

The US surface transportation system is at a crossroads. The federal government's ambitious goals of the mid-20th century have largely been accomplished, leaving today's policymakers without a coherent vision of what comes next. This failure to set clear goals has caused the performance of legacy programs to suffer.

At the federal level, the efficiency lodestar should be paired with a clear connection to the national interest. As we have seen, that coupling is not difficult—it means placing a strong emphasis on transportation policy that facilitates interstate commerce and international trade, areas of federal oversight that are recognized and endorsed by the US Constitution. This corrected focus should acknowledge—and reinforce—the small relative role of the federal government in surface transportation networks while aiming to complement the more efficient roles of the states and private sector.

A new approach is needed—one that will reignite America's industrial capacity and investment. Policymakers must begin by recognizing that transportation is a means to an end. The value of transportation is instrumental rather than intrinsic; it comes from connecting people and products with places. Policy that directs resources to their most productive use, rather than the current practice of wasteful spending on projects that promote political interests, will allow American firms to increase production and move more goods to market — which in turn will promote American industrial growth. To maximize the benefits of transportation, infrastructure policy must be focused on providing the best service at the lowest cost. That is, policy must enable efficiency.

Rationalizing federal surface transportation policy for the 21st century entails rethinking current funding mechanisms, encouraging state and private infrastructure investment, and removing regulatory barriers that unnecessarily increase costs. If federal policymakers value a strong American economy with robust growth in the manufacturing and industrial sectors, a free market and limited government approach can enable efficient transportation networks to get us there.

It is time for America to put Americans first. It is time to set ourselves free from onerous and needless surface transportation headwinds.

About the Author

Marc Scribner is a senior transportation policy analyst at Reason Foundation. Scribner has testified numerous times before Congress at the invitation of both Democrats and Republicans on issues including highway revenue collection, traffic congestion management, freight rail regulation, airport financing, and air traffic control modernization. He is a member of the Transportation Research Board of the National Academies' Standing Committee on Emerging Technology Law.

"A new approach is needed—one that will reignite America's industrial capacity and investment. Policymakers must begin by recognizing that transportation is a means to an end. The value of transportation is instrumental rather than intrinsic; it comes from connecting people and products with places."

Marc Scribner

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Strengthening American Industry through Education and Workforce Deregulation

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THE CLUB FOR GROWTH FOUNDATION

FREEDOM FORWARD
Limiting Government, Empowering Families, Strengthening American Industry

INTRODUCTION

K–12 education suffers from many ailments. It is beholden to powerful special interest groups like the teachers' unions, relies on a pipeline of teachers educated in ineffective colleges, and is crippled with regulations that prevent school leaders from controlling critical functions like personnel decisions, school safety, and finances. It is also a victim of its most notable defect: it is a near monopoly, largely insulated from the competitive pressures of the free market.

Nearly 200 years after Horace Mann's push for "common schools," America's K–12 public schools, while still largely decentralized, are driven by an increasingly top-down structure that limits innovation at the individual school level. Federal mandates that have accumulated in the 60 years following Lyndon Johnson's push for the "Great Society" in 1965 have tied the hands of school leaders while failing to improve student learning outcomes. Since then, trillions of dollars spent at the federal level on K–12 education have been expended in vain.

Just as regulations have accrued at the federal level, state-level K–12 education governance has likewise become more centralized. State education agencies are tasked with responding to federal mandates that too often direct their attention away from meeting the needs of students and their parents. At the local level—due to myriad factors over the past century—massive school district consolidation has meant district leaders must be responsive to larger geographic regions such that parents have a difficult time getting answers from the "central office." Why? The number of school districts has shrunk dramatically from more than 117,000 in 1940 to just over 13,500 today.[1]

1 Amber M. Northern, "How School District Consolidation Affects Student Outcomes and Economic Efficiency," Thomas B. Fordham Institute, May 13, 2021, https://fordhaminstitute.org/national/commentary/how-school-district-consolidation-affects-student-outcomes-and-economic.

Higher education suffers from many of the same problems and—as with K–12 education these problems can be traced in large part back to Lyndon Johnson's War on Poverty. A powerful cartel of higher education administrators controls the shape and structure of accreditation. This federally sanctioned regime is also the gatekeeper to federal student loans and grants, which—rightly or wrongly—most universities see as their lifeblood.

Meanwhile, college students spend little time engaging in academic work or attending class, with the average full-time student spending just 2.76 hours per day on education activities.[2] At the same time, they are racking up student loan debt for degrees of questionable value. A 2023 survey of employers found that 67 percent strongly disagreed with the idea that colleges prepare students with "relevant skills that today's business community needs."[3] And ongoing efforts by the Biden administration to cancel student loans—a regressive policy that forces working Americans to bear the burden of someone else's debt—are a tacit admission that the value of a college degree is low if borrowers cannot repay their loans.

Consider those findings in the context of significant labor shortages in manufacturing. The Manufacturing Institute estimates that there could be as many as 2.1 million unfilled manufacturing jobs by 2030 absent efforts to prepare Americans to fill them.[4] A study conducted by the Institute, produced in conjunction with Ernst & Young Global Limited, included in-depth interviews with manufacturing industry leaders, 65 percent of whom said "the skills needed for changing manufacturing jobs are outpacing the current workforce."[5] At the same time that the remunerative manufacturing sector is hungry for workers, college graduates increasingly find that their academic credentials are leaving them underemployed. Although college graduates who find employment in a job that requires a degree earn on average $28,000 more than someone with only a high school diploma, college graduates who end up working in fields that do not require a college degree outpace their high school counterparts' earnings by only $8,000 annually.[6] As higher education scholar Preston Cooper notes, "If you're a college grad[uate] in a non-college job, you're much less likely to earn back the costs of your education."[7]

Taken together, it is clear that the current structure of top-down federal control over K–12 and higher education is yielding inadequate outcomes and leading to significant labor shortages in manufacturing. Reducing government intervention, while empowering individuals, businesses, and state and local governments, is needed to improve results and fill the labor gaps. With less government intervention, manufacturing output will increase, and America's industrial strength will return.

The Current State of K–12 Education

Centralization—rather than education freedom through expansive school choice—has failed to produce academic improvement. From the National Assessment of Educational Progress,
Figures 1 and 2 indicate just 33 percent of fourth-

2 Lindsey M. Burke, Mary Clare Amselem, Jamie Hall, *Big Debt, Little Study: What Taxpayers Should Know about College Students' Time Use*, The Heritage Foundation, July 19, 2016, https://www.heritage.org/education/report/big-debt-little-study-what-taxpayers-should-know-about-college-students-time-use.
3 Suzanne Blake, "Most Companies Say College Isn't Worth It for Their Employees," *Newsweek*, November 24, 2023, https://www.newsweek.com/college-not-worth-it-companies-say-study-1846780.
4 "How Adaptive Skills Can Play a Pivotal Role in Building the Manufacturing Sector of the Future," The Manufacturing Institute and Ernst & Young Global Limited, accessed March 1, 2024, https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/advanced-manufacturing/ey-how-adaptive-skills-can-play-a-pivotal-role-in-building-the-manufacturing-sector-of-the-future-v2.pdf.
5 "How Adaptive Skills Can Play a Pivotal Role in Building the Manufacturing Sector of the Future."
6 *Talent Disrupted: College Graduates, Underemployment, and the Way Forward*, Burning Glass Institute and Strada Institute for the Future of Work, February 2024, https://stradaeducation.org/wp-content/uploads/2024/02/Talent-Disrupted-1.pdf
7 Preston Cooper (@Preston Cooper93), "Digging into the great @Burning_Glass @stradaeducation report on college grads' underemployment," Twitter, February 27, 2024, 8:44 a.m., https://twitter.com/PrestonCooper93/status/1762473887315505478.

FIGURE 1. Trend in fourth-grade NAEP reading achievement-level results

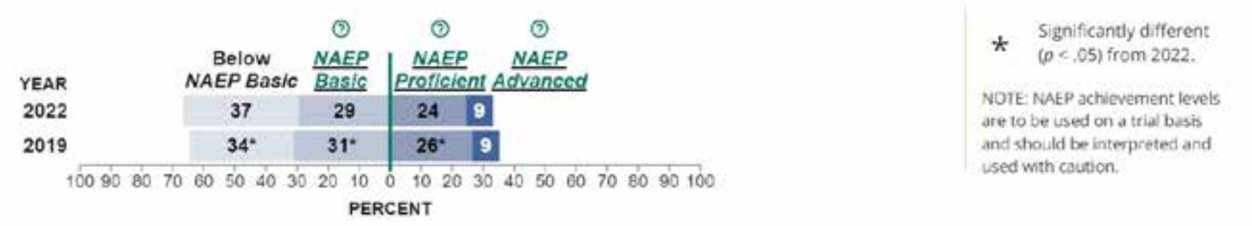


FIGURE 2. Trend in eighth-grade NAEP reading achievement-level results

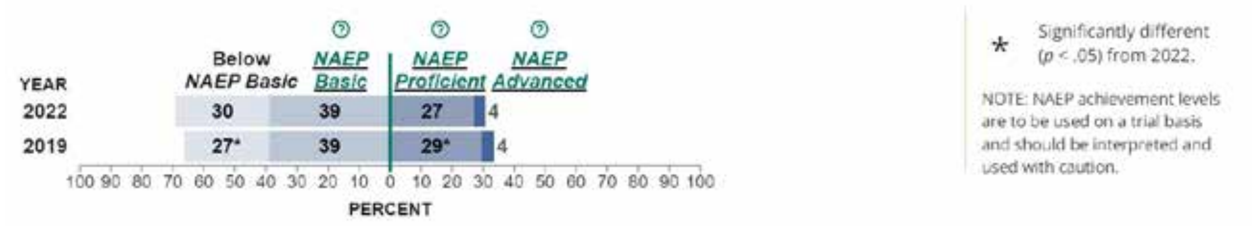


FIGURE 3. Trend in fourth-grade NAEP mathematics achievement-level results

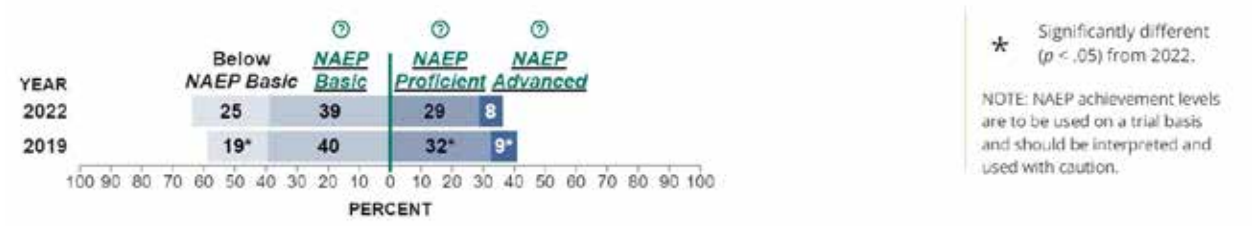
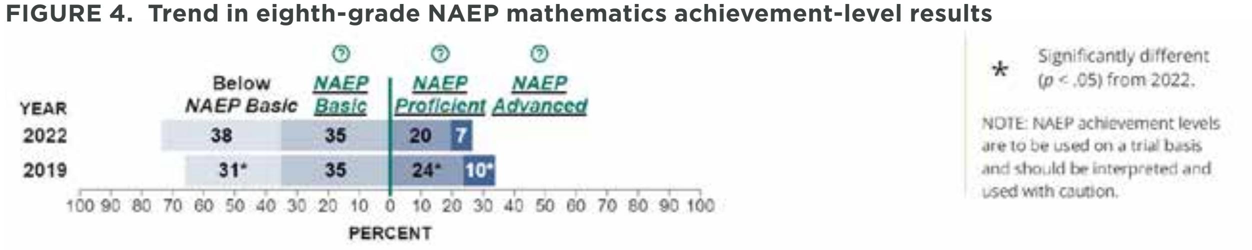


FIGURE 4. Trend in eighth-grade NAEP mathematics achievement-level results



Source: National Assessment of Educational Progress, "Scores Decline in NAEP Reading at Grades 4 and 8 Compared to 2019," The Nation's Report Card, NAEP Report Card: 2022 NAEP Reading Assessment, 2022, https://www.nationsreportcard.gov/highlights/reading/2022/.

graders performed at or above "proficient" in reading in 2022, a number that declines to 31 percent for eighth-graders.[8] In Figures 3 and 4, we see that only 37 percent of fourth-graders and a mere 27 percent of eighth-graders performed at or above "proficient" in math.[9]

Academic attainment also languishes. Although the national high school graduation rate stands at 87 percent, that figure declines to 81 percent for black students. Comparing states, some also have significantly lower high school graduation rates,

8 National Assessment of Educational Progress, "Scores Decline in NAEP Reading at Grades 4 and 8 Compared to 2019," The Nation's Report Card, NAEP Report Card: 2022 NAEP Reading Assessment, 2022, https://www.nationsreportcard.gov/highlights/reading/2022/.
9 National Assessment of Educational Progress, "Largest Score Declines in NAEP Mathematics at Grades 4 and 8 since Initial Assessments in 1990," The Nation's Report Card, NAEP Report Card: 2022 NAEP Mathematics Assessment, 2022, https://www.nationsreportcard.gov/highlights/mathematics/2022/.

including Alaska (79 percent), New Mexico (77 percent), and Arizona (77 percent). The District of Columbia rate is 74 percent.[10]

Subpar academic achievement and attainment outcomes are felt most acutely, however, in urban areas. Merely 23 percent of eighth-graders in Washington, DC, were proficient in reading in 2022. Eighth-graders in five cities fared worse: Albuquerque, New Mexico (21%); Philadelphia, Pennsylvania (17%); Baltimore, Maryland (15%); Cleveland, Ohio (10%); and Detroit, Michigan (5%).[11]

Graduation rates in the urban areas follow a similar pattern. In Washington, DC, the graduation rate stands at 74.9 percent.[12] The same five cities saw comparable results: Albuquerque (69%),[13] Philadelphia (75%),[14] Baltimore (68%),[15] Cleveland (74%),[16] and Detroit (71%).[17]

The structure of K–12 education is failing to meet the needs of students in large part because educational opportunity is linked to a family's zip code. Even though more students than ever have access to education options like vouchers, tax credit scholarships, education savings accounts, open enrollment, and homeschooling, 64 percent of children are still enrolled in an assigned district public school. Fourteen percent attend a chosen public school, 6 percent a charter school, and 5 percent a magnet school, meaning roughly 89 percent of students attend some form of public school.[18]

As of 2023, approximately 1 percent of the nation's 55 million school-aged children were enrolled in a private school program, allowing their families to leverage education savings accounts, vouchers, and tax credit scholarships. Another 7 percent paid out of pocket to attend private school, and an estimated 3 percent were homeschooled.[19] Thus, the vast majority of students still attend public school, and the majority of those attend their assigned public school based on where their parents can afford to live—as indicated by their zip code.

Breaking the link between housing and schooling is crucial to reforming education. Indeed, the empirical evidence points to resoundingly improved academic and attainment outcomes for students who have access to education choice. To date, researchers have conducted 17 random assignment studies on the impact of education choice on student academic achievement. Of those 17, 11 studies found statistically significant positive effects. Just 2 found negative effects, but these were unique to a heavily regulated program in Louisiana that discouraged high-performing private schools from participating. Four studies found neutral effects.[20]

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10 "Public High School Graduation Rates," in Chapter 2 of *The Condition of Education 2023, National Center for Education Statistics* (2023), https://nces.ed.gov/programs/coe/pdf/2023/coi_508.pdf.
11 National Assessment of Educational Progress, "District Achievement-Level Results," The Nation's Report Card, NAEP Report Card: Reading, 2022, https://www.nationsreportcard.gov/reading/districts/achievement/?grade=8.
12 Office of the State Superintendent of Education, "OSSE Announces 2022 Graduation Rates," DC.gov, December 20, 2022, https://osse.dc.gov/release/osse-announces-2022-graduation-rates.
13 Spencer Schacht, "Metro School Districts Show Drop in 2022 Graduation Rates," KOB4, October 31, 2023, https://www.kob.com/new-mexico/metro-school-districts-show-drop-in-2022-graduation-rates/.
14 Office of Research and Evaluation, "2021–22 Four-Year High School Graduation Rates in Philadelphia," The School District of Philadelphia, March 22, 2023, https://www.philasd.org/research/2023/03/22/2021-22-four-year-high-school-graduation-rates-in-philadelphia/.
15 WMAR Staff, "Study: Baltimore Ranks Near Last in High School Graduation Rate, Top Five in Crime," WMAR Baltimore, June 22, 2023, https://www.wmar2news.com/local/study-baltimore-ranks-near-last-in-high-school-graduation-rate-top-five-in-crime#.
16 Rachel Abbey McCafferty, "Cleveland Sees Graduation Rates Drop on State Report Cards, but Progress in Other Areas," Crain's Cleveland Business, September 15, 2022, https://www.crainscleveland.com/education/cleveland-sees-graduation-rates-drop-state-report-cards-progress-other-areas.
17 "Detroit Public Schools Community District Demonstrates Strong Graduation Rate Improvement," Detroit Public Schools Community District, accessed March 1, 2024, https://www.detroitk12.org/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=4585&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=78427&PageID=1#:~:text=Adult%20Education-,Detroit%20Public%20Schools%20Community%20District%20Demonstrates%20Strong%20Graduation%20Rate%20Improvement,from%2064.5%25%20to%2071.1%25.
18 *The ABCs of School Choice: The Comprehensive Guide to Every Private School Choice Program in America*, EdChoice (2023), https://www.edchoice.org/wp-content/uploads/2023/01/2023-ABCs-WEB.pdf.
19 *The ABCs of School Choice*.
20 *The 123s of School Choice*: *What the Research Says about Private School Choice Programs in America*, EdChoice (2023), https://www.edchoice.org/school-choice-bibliography/.

Further, researchers have conducted 7 random assignment studies on the effect of school choice on academic attainment, with academic attainment being defined as high school completion and college enrollment. Five of those studies found increases in high school graduation rates and college enrollment, while 2 found no difference.[21] Twenty-six of the 29 empirical studies conducted to date on the competitive effects of private school choice found positive effects on academic achievement for public school students in surrounding schools.[22] Of the 28 studies that considered whether school choice programs save money for taxpayers, all but 3 found that to be the case.[23]

K–12 education is largely a state and local issue, with states enjoying constitutional authority to manage their education systems as they see fit. Accordingly, states and localities shoulder the bulk (90 percent) of the financing for public education, with the federal government picking up the last 10 percent. Although education is a state and local matter, there is a role for Congress to play: restoring control of dollars and decision-making to the states. Two opportunities follow.

Needed K–12 Reforms

A-PLUS.

The Academic Partnerships Lead Us to Success (A-PLUS) Act would allow states to opt out of programs that fall under the Elementary and Secondary Education Act—currently reauthorized as the Every Student Succeeds Act (ESSA)—and instead direct their share of funding toward any lawful education purpose under state law.[24] Rather than funneling federal taxpayer dollars through an ineffective, labyrinthian maze of federal formulas and competitive grant programs, states could instead put their share of the nearly $30 billion in ESSA funding toward initiatives that work for their communities.[25] States could, for example, put that funding toward career and technical education programs, Science of Reading initiatives, school safety efforts, or innovative education options for families. This flexibility would improve academic outcomes and prepare students for the millions of projected unfilled job openings in the manufacturing sector over the next decade—thereby strengthening American industrial capacity and output.

Education Choice.

Although school choice is primarily a state prerogative, there is room for the federal government to assist. For example, Congress should establish education savings accounts (ESAs)—preferably using existing funding—for children from active-duty military families. This would enable them to attend a school or education option of choice, rather than being assigned to the district school closest to their parent's assigned duty station.[26] The federal government has an obligation to provide for the national defense; ensuring the children of service members have access to safe and effective learning options. Congress should also provide ESAs to Native American children on tribal lands, enabling them to attend a school of choice

21 *The 123s of School Choice*.
22 *The 123s of School Choice*.
23 Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, 4th ed., Ed Choice (May 2016), https://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf.
24 Lindsey Burke, *Advancing School Choice and Restoring State and Local Control of Education through A-PLUS*, The Heritage Foundation, April 5, 2017, https://www.heritage.org/education/report/advancing-school-choice-and-restoring-state-and-local-control-education-through.
25 "Federal Education-Related Discretionary Programs: Final Appropriations, FY 2023," National Education Association, accessed March 1, 2024, https://www.nea.org/sites/default/files/2023-01/final-fy23-appropriations-for-education-related-discretionary-programs-with-state-tables.pdf.
26 Lindsey Burke and Anne Ryland, *A GI Bill for Children of Military Families: Transforming Impact Aid into Education Savings Accounts,* The Heritage Foundation, June 2, 2017, https://www.heritage.org/education/report/gi-bill-children-military-families-transforming-impact-aid-education-savings.

rather than relegating them to some of the worst-performing schools in the country—those managed by the Bureau of Indian Education. Congress has a historical and prescribed obligation[27] to provide school choice options for this community.

Finally, for Washington, DC, which is under the jurisdiction of Congress, George W. Bush signed the DC School Choice Incentive Act into law in 2004, establishing the DC Opportunity Scholarship Program—the only federally funded school choice program. Congress should expand eligibility for the DC voucher program to all children living in the nation's capital. Transitioning the program from a voucher model to a more flexible ESA option would also be wise. Similar to the A-PLUS Act, these school choice policies will improve academic outcomes and help fill the millions of job openings anticipated in the manufacturing sector over the next decade.

The Current State of Higher Education

American higher education faces significant challenges of its own. Nationally, tuition and fees for in-state students attending four-year universities have nearly tripled in real terms since 1990.[28] Since 1970, inflation-adjusted tuition rates have quintupled at both public and private colleges.[29] At the same time, spending on student loans, propped up by massive federal subsidies, has risen 328 percent over the last 30 years, from $20.4 billion during the 1989–90 school year to $87.5 billion during the 2019–20 school year.[30] Inflation-adjusted state appropriations for public colleges and universities have increased $1,700 per pupil since 1980.[31] Ohio University economist Richard Vedder sums up the current situation:

> *[I]t takes more resources today to educate a postsecondary student than a generation ago. . . . Relative to other sectors of the economy, universities are becoming less efficient, less productive, and, consequently, more costly.*[32]

From 2001 to 2011, the number of nonteaching employees and administrators in higher education increased 50 percent faster than teaching faculty, according to the *Wall Street Journal's* Douglas Belkin and Scott Thurm.[33] Noninstructional staff now typically accounts for more than half of university payroll costs.[34] As higher education scholar Preston Cooper has detailed, only 40 percent of full-time employees at nondoctoral colleges are instructional staff; that number is just 28 percent at doctoral-granting universities.[35] Indeed, "Since 2003, only one-third of the increase in colleges' and universities' core expenditures has gone to spending on instruction. Almost all the rest has fed the growth of the vast administrative apparatus of these institutions," Cooper reports.[36]

This surge in nonteaching staff and general administrative costs is one contributing factor toward the swelling cost of college. Ever-increasing federal aid, particularly subsidized student loans, are the primary

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27 *Indian Elementary-Secondary Education: Programs, Background, and Issues,* Congressional Research Service, August 18, 2015, https://www.everycrsreport.com/files/20150818_RL34205_80439e306cdda749c89221a0c5c1cdb779587ddb.pdf.
28 *Trends in College Pricing and Student Aid 2020*, Trends in Higher Education Series, The College Board (October 2020), https://research.collegeboard.org/media/pdf/trends-college-pricing-student-aid-2020.pdf.
29 Preston Cooper, "Why College Is Too Expensive—and How Competition Can Fix It," Foundation for Research on Equal Opportunity, Medium, March 5, 2021, https://freopp.org/why-college-is-too-expensive-and-how-competition-can-fix-it-cb2eb901521b.
30 Cooper, "Why College Is Too Expensive."
31 Cooper, "Why College Is Too Expensive."
32 Richard K. Vedder, *Restoring the Promise: Higher Education in America*, Oakland, CA: Independent Institute, 2019, 29.
33 Douglas Belkin and Scott Thurm, "Deans List: Hiring Spree Fattens College Bureaucracy—and Tuition," *The Wall Street Journal*, December 28, 2012, https://www.wsj.com/articles/SB10001424127887323316804578161490716042814.
34 *Critical Care: Policy Recommendations to Restore American Higher Education after the 2020 Coronavirus Shutdown*, National Association of Scholars, April 18, 2020, https://www.nas.org/reports/critical-care/full-report.
35 Cooper, "Why College Is Too Expensive."
36 Cooper, "Why College Is Too Expensive."

contributing factor, with colleges raising tuition 60 cents for every dollar received in bankrolled student loans.[37] This crisis will compound significantly in coming years, thanks to the Biden administration's ongoing efforts to cancel student loan debt held by borrowers. This unfair and regressive cancellation, will also spawn an additional inflationary effect on the price of college, as new cohorts of students borrow even more out of the reasonable expectation that their loans will be forgiven in the future. The result: colleges evermore raise tuition, confident that Uncle Sam will ultimately pick up the tab.

As college costs continue to rise, its value proposition continues to fall. The six-year completion rate for students pursuing a bachelor's degree stood at just 60 percent in 2020—meaning just 6 in 10 students complete a four-year bachelor's degree in six years.[38] One-third of college graduates are underemployed, working in jobs that do not require a bachelor's degree,[39] and most of them likely took on student loan debt in the process. As analysts with the Federal Reserve Bank of New York discovered, while 75 percent of engineering students land jobs that require a college degree, just 40 percent of communications majors do.[40] Moreover, scholars at the Brookings Institution explain that the proportional increase in earnings gained from advancing from a high school diploma to a bachelor's degree is much less for students from poor families than for those who did not grow up poor.[41] And, as previously noted, employers are increasingly skeptical that a bachelor's degree prepares students with the skills they need to be successful in the workplace.

Needed Higher Education Reforms

Accreditation Reform.

The Higher Education Reform and Opportunity Act (HERO) would reform the ossified higher education system by decoupling accreditation from federal financing. Rather than conditioning access to student

37 David O. Lucca, Taylor Nadauld, and Karen Shen, *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, Federal Reserve Bank of New York, Staff Report No. 733, February 2017, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf.
38 Madeline St. Amour, "Completion Rates Flat over All," Inside Higher Ed, December 7, 2020, https://www.insidehighered.com/quicktakes/2020/12/08/completion-rates-flat-over-all.
39 Jaison R. Abel, Richard Deitz, and Yaqin Su, "Are Recent College Graduates Finding Good Jobs?" *Current Issues in Economics and Finance* 20, no. 1 (2014), https://www.newyorkfed.org/medialibrary/media/research/%20current_issues/ci20-1.pdf.
40 Abel, Deitz, and Su, "Are Recent College Graduates Finding Good Jobs?"
41 Brad Hershbein, "A College Degree Is Worth Less If You Are Raised Poor," The Brookings Institution, February 19, 2016, http://www.brookings.edu/blogs/social-mobility-memos/posts/2016/02/19-college-degree-worth-less-raised-poor-hershbein.

loans and grants on colleges being accredited by a de facto federal system that has failed to provide quality assurance, HERO would allow states to determine accreditation options, permitting them to allow any entity to accredit and credential colleges and individual courses. This would provide students with significant flexibility in pursuing their postsecondary goals. Senator Mike Lee (R-UT), the bill's sponsor, explained,

> *Accreditation could also be available to specialized programs, individual courses, apprenticeships, professional credentialing, and even competency-based tests. States could accredit online courses, or hybrid models with elements on- and off-campus.*
>
> *These systems would open up opportunities for non-traditional students—like single parents working double shifts—whose life responsibilities might make it impossible to take more than one class at a time. They would also enable traditional students to tailor a degree that better reflects the knowledge and skills valued by employers. Innovations in vocational education and training would open new opportunities in growing fields that are hiring right now.*
>
> *Qualified unions, businesses, and trade groups could start to accredit courses and programs tailored to their evolving needs. Churches and charities could enlist qualified volunteers to offer accredited classes and training for next to nothing. States could use innovative systems to attract new opportunities and businesses, investing in their own future by investing in the human capital of their citizens.*[42]

Allowing states to establish alternative accreditation systems will improve quality assurance while also creating more opportunities for students to earn credentials that can fill the workforce gap, especially in sectors facing significant labor shortages, such as manufacturing. To reinforce the benefits of alternative accreditation approaches, Congress should allow Pell Grants—federal grants to income-eligible students that do not have to be repaid—to be used for short-term programs that result in industry-valued credentials.

Ending PLUS.

One of the primary drivers of increases in college costs is the federal PLUS Loan program. PLUS (not to be confused with A-PLUS) includes two components: 1) the Parent PLUS Loan program created in 1980 that enables parents to borrow on behalf of the undergraduate child and 2) the Grad PLUS Loan program, created in 2006, which enables graduate students to borrow up to the cost of attendance to enroll in graduate school. The Parent PLUS program encourages entire families to take on debt to finance an undergraduate degree; the Grad PLUS program enables students to take on six figures of debt to finance graduate school. Both components have fueled college tuition increases, and abolishing both for that reason has gained support in Congress. Eliminating PLUS would encourage a restoration of the private lending market, create more discipline in borrowing, and put downward pressure on the price of college.

In the wake of PLUS, colleges should explore adopting income share agreement (ISA) models, in which colleges pay the cost of college up front for a student in exchange for a portion of their income after graduation and upon employment. The current model diverts scarce resources to less-appreciated

42 Senator Mike Lee, "What's Next for Conservatives" (speech), The Heritage Foundation, October 29, 2013, https://www.lee.senate.gov/2013/10/what-s-next-for-conservatives.

degrees by allowing students and parents to borrow as much as they want to study any subject at any institution, regardless of value—leading to increased costs, depressed academic outcomes, and degrees of questionable worth. But an ISA model would create needed incentives for students to choose fields of study that produce higher ROIs. Results would include more innovation, increased productivity, higher output in sectors such as manufacturing, and increased industrial capacity.

The Promise of Apprenticeships and Workforce Deregulation

Today, too many students graduate college and begin careers that do not require a college degree. Their student loan debt, amassed for a degree they are not leveraging, demands to be serviced. Although college is the right path for many, too often young Americans are introduced to a disheartening amount of debt after having been sold the myth that college is the only way to climb the ladder of upward economic mobility.

In response, K–12 schools should educate students on the many opportunities provided by apprenticeship programs, whether they are begun while in high school or after graduation. Schools across the country should expand career and technical education offerings, following in the decades-old footsteps of vocational training options in the culinary arts, automobile mechanics, HVAC, and other trades. As Table 1 indicates, many vocations supported by career and technical education offer the promise of sizeable salaries but without the burden of student loan debt. Plus, apprenticeships enable individuals to begin paid work immediately, while learning on the job.

Table 1. Median Salary by Vocation Type[43]

	Median Salary, $	Salary Range, $	Median Apprentice Salary, $
Electricians	60,240	37,440–102,300	56,000
Mechanics	46,970	29,270–75,360	43,080
Elevator Techs	99,000	47,850–135,130	50,000
Plumbers	60,090	37,250–101,190	43,680
Carpenters	51,390	36,160–89,950	45,784

Source: Data retrieved from US Bureau of Labor Statistics, Salary.com, and ZipRecruiter.

43 Electrician data derived from US Bureau of Labor Statistics, "Occupational Employment and Wage Statistics," 47-2111 Electricians," US Department of Labor, May 2023, https://www.bls.gov/oes/current/oes472111.htm and "Electrician—Apprentice Salary in the United States," Salary.com, January 26, 2024, https://www.salary.com/research/salary/alternate/electrician-apprentice-salary; Mechanic data derived from US Bureau of Labor Statistics, "Occupational Employment and Wage Statistics:" 49-3023 Automotive Service Technicians and Mechanics" US Department of Labor, May 2022, https://www.bls.gov/oes/current/oes493023.htm and "Auto Apprentice Mechanic Salary," ZipRecruiter, accessed March 1, 2024, https://www.ziprecruiter.com/Salaries/Auto-Apprentice-Mechanic-Salary; Elevator tech data derived from US Bureau of Labor Statistics, "Elevator and Escalator Installers and Repairers," Occupational Outlook Handbook, US Department of Labor, September 6, 2023, https://www.bls.gov/ooh/construction-and-extraction/elevator-installers-and-repairers.htm; Plumber data derived from US Bureau of Labor Statistics, "Occupational Employment and Wage Statistics, "47-2152: Plumbers, Pipefitters, and Steamfitters" US Department of Labor, April 25, 2023, https://www.bls.gov/oes/current/oes472152.htm and "Hourly Wage for Plumber, Apprentice Salary in the United States," Salary.com, February 26, 2024, https://www.salary.com/research/salary/alternate/plumber-apprentice-hourly-wages; Carpenter data derived from US Bureau of Labor Statistics, "Carpenters," Occupational Outlook Handbook, US Department of Labor, October 3, 2023, https://www.bls.gov/ooh/construction-and-extraction/carpenters.htm and "Carpenter Apprentice Salary in the United States," Salary.com, February 26, 2024, https://www.salary.com/research/salary/benchmark/carpenter-apprentice-salary.

IRAPs.

Reviving Industry-Recognized Apprenticeship Programs (IRAPs) would expand total apprenticeships while providing companies and industries the needed flexibility to tailor this valuable tool to the needs of their businesses. IRAPs, established during the Trump administration via executive order (EO),[44] directed the Department of Labor to propose regulations to support third-party apprenticeship programs. These IRAPs include paid work in a given industry, along with education that results in an industry-recognized credential.[45] As Paul Winfree and Rachel Greszler note, "This quickly led to more than 130 new apprenticeship programs predominantly in high-demand fields with worker shortages."[46] As promising and needed as the IRAP model is, the Biden administration canceled the effort. Reviving IRAPs will be critical to filling the manufacturing labor gap, which, as discussed previously, is estimated to reach 2.1 million unfilled manufacturing jobs by 2030.

Right to Work.

Another important labor policy for lawmakers interested in spurring manufacturing growth is legislation that would implement right-to-work (RTW). RTW laws ensure that individuals working in the private sector are not forced to join a union or pay union dues against their will. Outside of the economic benefits, RTW laws empower workers since businesses have a strong incentive to provide competitive pay and benefits to avoid any clashes with unions, who often have political agendas that supersede the interests of the workers or the business.

Importantly, RTW laws provide needed certainty for firms that make long term investments — particularly manufacturers. This can be seen in numerous studies finding that states with RTW laws experience faster growth in manufacturing production and employment. A 2021 study from economists at Harvard University found that "RTW laws are associated with a 3.2

44 Exec. Order No. 13,801: *82 Fed. Reg. 28229,* (June 15, 2017), https://www.federalregister.gov/documents/2017/06/20/2017-13012/expanding-apprenticeships-in-america.
45 Office of Apprenticeship, "Industry-Recognized Apprenticeship Program Frequently Asked Questions," US Department of Labor, accessed March 1, 2024, https://www.apprenticeship.gov/sites/default/files/IRAP_FAQ.pdf.
46 Paul Winfree and Rachel Greszler, "Apprenticeships, Not College, Can Help Reduce Unemployment," The Heritage Foundation, June 21, 2022, https://www.heritage.org/jobs-and-labor/commentary/apprenticeships-not-college-can-help-reduce-unemployment.

percentage point increase in the manufacturing share of employment."[47] A 2022 study published by the Mackinac Center for Public Policy found that.

Manufacturing employment as a percentage of total employment increased as a result of right-to-work laws. Border counties in right-to-work states had 12.1% higher employment share in pre-2000 right-to-work states and 20.7% higher in post-2000 right-to-work states.[48]

Finally, a 2023 study from the Manhattan Institute found that RTW laws sharply raise a state's manufacturing share of employment by approximately 28%, or 3.23 percentage points. This increase in manufacturing is not from crowding out other industries; rather, it results in stronger local labor markets in general."[49] The next administration should use the bully pulpit to call on states to adopt RTW laws that have been shown empirically to boost manufacturing.

Education and Workforce Freedom—from K–12 through Higher Education—Is the Key to Supporting Vibrant American Industry

A looming manufacturing shortage, coupled with growing dissatisfaction with higher education, adds urgency to both K–12 and higher education reform. States and the federal government should strive to meet the needs of the rapidly changing manufacturing industry nimbly. At the K–12 level, Congress should allow

47 Benjamin Austin and Matthew Lilley, "The Long-Run Effects of Right to Work Laws," Harvard University, November 16, 2021, https://scholar.harvard.edu/files/matthew-lilley/files/long-run-effects-right-to-work.pdf.
48 Michael D. Lafaive and Todd Nesbit, "The Impact of Right-to-Work Laws: A Spatial Analysis of Border Counties," Mackinac Center for Public Policy, April 12, 2022, https://www.mackinac.org/archives/2022/s2022-03.pdf.
49 Matthew Lilley, "Workers, Wages, and Economic Mobility: The Long-Run Effects of Right-to-Work Laws," Manhattan Institute, September 2023, https://media4.manhattan-institute.org/wp-content/uploads/long-run-effects-of-right-to-work-laws.pdf.

states to opt out of the myriad of ineffective federal education programs, instead putting their share of funding toward alternatives, such as apprenticeships, which add value through increased employment and service to local communities. For their part, states should enact universal school choice, enabling more students to have access to learning options that meet their needs, including schools that have strong career and technical education programs. In higher education, Congress must reduce federal subsidies and tackle accreditation reform to allow innovation to flourish. The next administration should also reinstate the 2017 IRAP EO so that market-based apprenticeships can return to contribute to industry employment. Finally, the next administration should call on states to guarantee that no American—regardless of where they live—is forced to join a labor union or have part of their paycheck forcefully used to fund a labor union.

Taken in total, these policy changes would go a long way toward promoting American industrial capacity and filling the millions of projected unfilled manufacturing jobs through 2035.

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"A looming manufacturing shortage, coupled with growing dissatisfaction with higher education, adds urgency to both K–12 and higher education reform."

Lindsey M. Burke

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Originalism Promotes the Common Good

BY ILYA SHAPIRO, MANHATTAN INSTITUTE

HON. WILLIAM PRYOR, FEDERALIST SOCIETY

JOEL ALICEA, CATHOLIC UNIVERSITY, COLUMBUS SCHOOL OF LAW

THE CLUB FOR GROWTH FOUNDATION

FREEDOM FORWARD

Limiting Government, Empowering Families, Strengthening American Industry

INTRODUCTION

By Ilya Shapiro, Manhattan Institute

Originalism is good for the common good because the Constitution is good for the common good. This aphorism is all you need to know to understand why the so-called debate between originalism and "common good constitutionalism" is phony. If your goal is to create an institutional framework that maximizes human flourishing, to facilitate structures that lead to a healthy society, and to enable the development of virtue under a system of ordered liberty, I have good news: we have already done so.

Now, it is certainly true that constitutional interpretation has been woefully deficient, allowing progressive theories to go unchallenged for decades until the advent, in fits and starts, of originalism (and textualism for statutory interpretation). And originalism itself has, until very recently, lacked a critical judicial mass. So of course we hear calls to abandon "value-neutral" process rules and join the Left in placing result-oriented thumbs on scales. But such siren songs fall flat, particularly as the conservative legal movement reaches its pinnacle and continues to place its vanguard in the highest offices and achieve landmark rulings in areas of law ranging from abortion and affirmative action to the scope of administrative power.

Beyond such practical considerations, originalism is the best philosophical game in town because it precludes judges from imposing their own views on the Constitution. "Common good originalism," on the other hand, would invite judges to do just that, and it would approve theories of social justice, "active liberty," and the like. This legal equivalent to "common good conservatism" thus suffers from the same flaw: without neutral interpretive rules, the progressive devil turns around on you.

As you consider the following arguments, remember that originalism is apt for specific kinds of the common good: economic growth, manufacturing, and industrial development.

Many constitutional clauses have an explicit or implicit relationship to economic growth and development, and an originalist interpretation of these clauses is beneficial for the overall economy—especially industrial production and manufacturing. This is especially true for the Commerce Clause, which describes Congress's power to regulate interstate commerce, and thus to prevent internal barriers to trade of the sort that led to the breakdown of the Articles of Confederation. Most importantly, though, originalism helps the pocketbook at the individual and family levels as much as for large corporations and the nation as a whole, by generating stability and predictability in financial structures. Originalism is synonymous with the rule of law, which is essential to economic development and industrial strength.

The rule of law exists when all persons and institutions—including the government itself—are accountable to laws rather than personal authority. These laws must be publicly enacted by a representative body; enforced equally by authorities who themselves follow the laws; and reviewed, interpreted, and applied by an independent judiciary. Government officials undermine the rule of law when they go beyond their constitutional powers, whether by creating unauthorized rules (e.g., OSHA's vaccine mandate or the EPA's Clean Power Plan) or by twisting the Constitution to allow actions it was plainly meant to prevent (e.g., the New Deal, Obamacare's individual mandate).

People and firms alike need the rules of the game to be clear and free from arbitrary enforcement if they are to plan their affairs, make long-term investments, and accept the risks of delayed gratification. The formula is simple: originalist jurisprudence promotes economic growth and industrial strength by reducing the arbitrary power of the regulatory state. When judges apply the law as written rather than bending over backward to approve the excesses of the political branches and unaccountable bureaucracy, they promote investment-backed expectations. Changes in the law then require sustained democratic majorities following the meta law through transparent processes. But when judges interpret the law liberally, ad hoc regulatory inflation leads to rule-of-law devaluation, which introduces economic uncertainty and harm.

But enough on my view of this "debate." What follows is one the most effective takedowns of common good constitutionalism, and by a distinguished jurist at that, Chief Judge William J. Pryor of the U.S. Court of Appeals for the Eleventh Circuit. Take it from him that "living common goodism," as he coined it, is no good.

Chief Judge Pryor appropriately quotes Princeton professor Robert P. George in decrying judicial usurpation of legislative authority, "whether for good or bad causes." Pryor first laid out his critique of common good constitutionalism in his Joseph Story Lecture at the Heritage Foundation in October 2021. I was honored to attend that lecture, and we are all fortunate to have the exegesis that follows.

About the Author

Ilya Shapiro is the director of constitutional studies at the Manhattan Institute. He is the author of *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court* and the forthcoming *Lawless: The Miseducation of America's Elites*. He also writes the *Shapiro's Gavel* newsletter on Substack.

“Early Justices too practiced originalism. Chief Justice Marshall clearly embraced originalism in Ogden v. Saunders. *There, Marshall identified the ‘principles of construction which ought to be applied to the constitution of the United States.’”*

William H. Pryor

Against Living Common Goodism

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BY HON. WILLIAM PRYOR, FEDERALIST SOCIETY | MAY 2024

Today I want to discuss a new version of an old debate. In 1985, then-Attorney General Ed Meese delivered a famous address to the American Bar Association in which he advocated "a jurisprudence of original intention."[1] Meese argued that, in contrast with many modern decisions by the Supreme Court, the Founders expected that "[t]he text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution."[2] He explained that judges should not "depart[] from the literal import of the words"[3] in the Constitution and argued, as Justice Story had two centuries earlier, that "[w]here the words admit of two senses, . . . that sense is to be adopted, which . . . best harmonizes with the nature and objects, the scope and design of the instrument."[4]

The backlash against Meese's speech was swift and fierce. At a law school symposium a few months later, Justice William Brennan lambasted originalism as "little more than arrogance cloaked as humility."[5] Justice Brennan instead promoted an approach whose results aligned with his personal moral vision. He argued that what mattered was what "the words of the text mean in our time."[6] And he maintained that the Constitution required judges to "striv[e] toward th[e] goal" of "human dignity."[7] Of course, it was not the Founders' conception of human dignity that Justice Brennan sought to advance. Justice Brennan made clear that it was a particular vision of human dignity that the Constitution should guarantee. For example, he argued that capital punishment was a violation of human dignity—and so unconstitutional—even though he acknowledged that most of his colleagues and most Americans disagreed.[8] I will let you decide, as between Justice Brennan's methodology and the methodology he condemned, which of the two is better described as "arrogance cloaked as humility."[9]

After the debate between Attorney General Meese and Justice Brennan, the proponents of originalism multiplied in politics, the bar, the academy, and the bench, thanks in no small part to the Federalist Society. Justice Antonin Scalia became the leading evangelist for originalism, and Justice Clarence Thomas became its leading practitioner. Four decades later, originalism has been restored as the primary interpretive philosophy of the judiciary. Today, most of the Justices of the Supreme Court are originalists—they maintain that the text of the Constitution has a fixed meaning, that the Constitution means now what it originally meant, and that the original meaning is binding on them as judges. And as the Justices have become less inclined toward living constitutionalism, so too has the Court's jurisprudence.

1 Edwin Meese III, Speech Before the American Bar Association, in *Originalism: A Quarter-Century of Debate* 47, 52 (Steven G. Calabresi ed., 2007).
2 Id. At 48.
3 Id. At 53.
4 Id. at 53-54.
5 William J. Brennan, Jr., Speech to the Text and Teaching Symposium, in *Originalism: A Quarter-Century of Debate* 55, 58 (Steven G. Calabresi ed., 2007).
6 Id. At 61 (emphasis added).
7 Id. At 67.
8 Id. At 68-69.
9 Id. At 58.

Consider the recent decision in *Bucklew v. Precythe,*[10] in which the Court stated that the Constitution "allows capital punishment" because of its original meaning.[11] As the Court explained, that fact "mean[s] that the judiciary bears no license to end a debate reserved for the people and their representatives."[12] And contrary to Justice Brennan's view, this Court acknowledges that a judge is powerless under our Constitution to abolish capital punishment even if he or she sincerely believes that capital punishment is against human dignity, the natural law, or the common good. Tellingly, the Bucklew Court ignored the formulation of the Warren Court that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[13]

Despite that achievement, a few individuals on the right side of the political spectrum have recently condemned the current practice of originalism.[14] Some advocate for a new kind of originalism—so-called "common-good originalism"—that they say is "rooted in the teleology and ratio legis of" the Constitution[15] and that would allegedly secure conservative ends. Last year, in the Joseph Story Lecture at the Heritage Foundation, I explained the problems with this view,[16] and I will not rehearse them again here.

I want instead to address a kind of results-oriented jurisprudence that is indistinguishable in everything but name from Justice Brennan's living constitutionalism: Harvard Law Professor Adrian Vermeule's so-called common-good constitutionalism—a variant of what I call living common goodism. Vermeule's approach, in his words, "take[s] as its starting point substantive moral principles that conduce to the common good, principles that [judges] . . . should read into the majestic generalities and ambiguities of the written Constitution."[17] Replace "common good" with "human dignity" and Vermeule's living common goodism sounds a lot like Brennan's living constitutionalism. Indeed, the difference between Brennan's living constitutionalism and Vermeule's living common goodism consists mainly in their differing substantive moral beliefs; in practice, the methodologies are the same.

Although I disagree with Vermeule's view, it would be a mistake to dismiss it out of hand. To be sure, there is little evidence that many judges or lawyers have been persuaded by Vermeule but his view is being taken seriously by at least some law students. And because the history of the Federalist Society proves that minority views can become prevailing ones, we should take seriously even mistaken views like living common goodism. So I want to explain why Vermeule's view is mistaken.

The Constitution does not give judges the power to "read into" the text of the Constitution "substantive moral principles that conduce to the common good."[18] And fashioning that kind of jurisprudence would conflict with natural law. As Professor Robert George has explained, when courts exceed their jurisdiction and usurp "legislative authority," whether for good or bad causes, "they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government."[19]

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10 139 S. Ct. 1112 (2019).
11 See id. at 1122–23.
12 Id. at 1123.
13 *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).
14 E.g., Hadley Arkes et al., "A Better Originalism," *The American Mind* (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.
15 Josh Hammer, "Common Good Originalism: Our Tradition and Our Path Forward," 44 Harv. J.L. & Pub. Pol'y 917, 942 (2021).
16 See William Pryor Jr., "Politics and the Rule of Law," Heritage Foundation (Oct. 20, 2021), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law.
17 Adrian Vermeule, "Beyond Originalism," *The Atlantic* (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (emphasis added).
18 Id.
19 Robert P. George, "Natural Law, the Constitution, and the Theory and Practice of Judicial Review," 69 Fordham L. Rev. 2269, 2282 (2001).

Within the bounds of the constraints it imposes, the natural law is neutral about the kind of constitution that a people can establish to promote the common good. Like the ancient moral philosophers, the Founders understood that power corrupts. They gave the judiciary and other branches limited powers within separate domains for protecting the common good. They recognized, as Professor George put it, that "natural law itself does not settle the question . . . whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights."[20] And as Professor Vermeule acknowledges, "the common good does not, by itself, entail any particular scheme of . . . judicial review of constitutional questions, or even any such scheme at all."[21]

The only question for judges is the scope of their power under our Constitution. As Professor Joel Alicea recently explained in his excellent article refuting living common goodism, an enacted text is morally binding according to the natural-law tradition "only insofar as it is both . . . substantively consistent with the natural law and . . . promulgated by a legitimate authority."[22] Judges committed to that tradition have already determined for themselves that the Constitution accords with natural law and has been promulgated by a legitimate authority, or else they would not have taken an oath to support it.[23] As far as I can tell, Vermeule is not advocating for a revolution of our constitutional order. So we must ask whether our Constitution gives judges the power to "insure that the positive law conforms to the natural law"[24] by departing from original meaning; if it does not, then a judge who purports to exercise that power has transgressed the natural law by going "beyond the power committed to him."[25]

The nature of our written Constitution conflicts with living common goodism because, as Professor Chris Green points out, our Constitution refers to itself as a written text situated at a fixed time in history.[26] Consider just a few examples. The Preamble identifies our Constitution with the text: the People "ordain[ed] and establish[ed] this Constitution for the United States of America."[27] Article II declares that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President."[28] Article III extends the "judicial Power . . . to all Cases, in Law and Equity, arising under this Constitution,"[29] as distinguished from those arising under distinct bodies of law—federal statutory law and treaties. Article VI likewise distinguishes "[t]his Constitution" from the rest of the law that composes "the supreme Law of the Land."[30] And it requires that "judicial Officers" be "bound by Oath" to "support this Constitution."[31] So unlike Britain's unwritten constitution, our Constitution is a written text that expressed its meaning "at the time of [its] Adoption."[32]

Vermeule's failure to appreciate the nature of our Constitution causes him to misunderstand what originalism claims about it. Originalism does not, as Vermeule asserts, "simply equate[] law with positive enacted texts";[33] after all, the Constitution itself refers both to the "Law of Nations"[34] and to the common

20 Id. at 2279.
21 Adrian Vermeule, "Common Good Constitutionalism" 10 (2022).
22 J. Joel Alicea, "The Moral Authority of Original Meaning," 98 Notre Dame L. Rev. (forthcoming 2022) (manuscript at 6), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049069&msclkid=356649d7ab8011ec93d2e720134bf1ed.
23 See U.S. Const. art. VI.
24 George, supra note 19, at 2279.
25 Alicea, supra note 22, at 14.
26 Christopher R. Green, "This Constitution: Constitutional Indexicals As a Basis for Textualist Semi-Originalism," 84 Notre Dame L. Rev. 1607, 1674 (2009) ("[T]he Constitution presents itself as a historically situated text—that is, a text whose meaning was attached to it at the time of the Founding.").
27 U.S. Const. pmbl.
28 Id. art. II, § 1, c.5 (emphasis added).
29 Id. art. III, § 2, cl. 1.
30 Id. art. VI.
31 Id.
32 Id. art. II, § 1, c.5.
33 Vermeule, supra note 21, at 8.
34 U.S. Const. art. I, § 8, cl. 10.

law.[35] Originalism instead acknowledges that our particular Constitution—novel when it was adopted—is the text with which it identifies itself. So Vermeule's view that "departing from the text is not the same as departing from the law"[36] may be true of other constitutions, but it is untrue of our Constitution, from which judges have no legal authority to depart.

The judicial oath obliges judges, as a moral duty, to support the written text that is our Constitution.[37] To be sure, an oath could be immoral. Professor Alicea imagines "a hypothetical constitution that, in express terms, mandated genocide."[38] It would be wrong to support that constitution even if one were—wrongly—to take an oath to support it. But as I have explained, judges have already determined for themselves that our Constitution, as amended, is morally legitimate. If we are right, then our oath morally binds us. The oath bridges the gap between descriptive facts about the meaning of the text that is our Constitution and the normative fact that judges are obliged to faithfully interpret what the text means.[39] So the oath squarely presents the question whether originalists have the correct account of interpretation; if so, judges are morally bound to original meaning.

On the mistaken living-common-goodist account, legal texts must always be read in the light of the natural law[40]—or, more accurately, what a judge believes is the natural law. That is, judges may "read into" the text the moral principles that, they believe, "conduce to the common good."[41] But the problem with that account is that there is no necessary connection between the meaning of a text and any particular conception of the common good.[42] One must know a text's meaning before one can know whether faithful application of its meaning would "conduce to the common good."[43] That fact is why we can know that a legal text serves an immoral end. For example, if we were to discover an ancient Roman edict, we would have to understand what the edict originally meant before we could form a belief about whether enforcing it—instead of something distinct to which we have superadded our own moral principles—would have been consistent with the natural law. So whether the text bears a particular meaning is an independent, antecedent question for judges to answer, and going beyond that meaning would be going "beyond the power committed to [them]."[44]

A major theme of Vermeule's recent popular-level[45] polemic defending living common goodism is that it supposedly prevailed at the Founding.[46] He contends that living common goodism "is the original understanding" of the Constitution.[47] In his revisionist historical account, "the classical legal tradition structured and suffused our law" "[r]ight from the beginning, long before the Constitution of 1789."[48] And living common goodism "has since been displaced . . . by originalism,"[49] which he labels as a creature of the late 20th century. Rubbish!

To begin with, it is odd that Vermeule places so much emphasis on the alleged historical basis for his view. He emphatically states that he "do[es] not advocate a revival of the classical law because it is

35 Id. amend. VII.
36 Vermeule, supra note 21, at 75.
37 Cf. Catechism of the Catholic Church ¶ 2150 (1994).
38 Alicea, supra note 22, at 11.
39 See C'zar Bernstein, "Originalism and the 'Oath Theory,'" Nat'l Rev. Online (May 20, 2020), https://www.nationalreview.com/2020/05/constitution-originalism-what-critics-of-venerable-legal-philosophy-get-wrong/.
40 See Vermeule, supra note 21, at 3.
41 Vermeule, supra note 17.
42 See Bernstein, supra note 39.
43 Vermeule, supra note 17.
44 Alicea, supra note 22, at 14.
45 See Vermeule, supra note 21, at 25.
46 Id. at 58 ("The largest and simplest point may also be the most important: the classical view was central to our legal world (not exclusive, but central) during the founding era and through the nineteenth century.").
47 Id. at 2.
48 Id. at 53.
49 Id.

the original understanding,"[50] but then spends many pages attempting to convince readers of the historical pedigree of his view.[51] Vermeule does not make clear what role, if any, he believes his historical account plays in his overall argument, but surely it must play a key role. In the so-called classical tradition, law is "an ordinance of reason for the common good, promulgated by a [legitimate] public authority."[52] If living common goodism were not the prevailing view of the legitimate "public authority" at the Founding, then it would be implausible to suppose that its "ordinance of reason for the common good"[53]—that is, our Constitution—empowered judges to do what Vermeule would now have them do. So Vermeule's account of the Founding turns out to be critical to his case.

Vermeule's argument for that historical revisionism does not withstand scrutiny. He argues that three opinions—the first Justice Harlan's dissent in *Lochner v. New York*,[54] the decision of the Supreme Court in *United States v. Curtiss-Wright*,[55] and the decision of a New York court in *Riggs v. Palmer*[56]—"illustrate how deeply the classical legal tradition has always infused our law."[57] Setting aside whether these decisions support Vermeule's methodology, it strains credulity to suppose that a dissenting opinion from 1905, a Supreme Court decision from 1936, and a state-court decision from 1889 could establish that living common goodism is deeply rooted in the American tradition: that it "structured and suffused our law" "[r]ight from the beginning, long before the Constitution of 1789 was written."[58] Vermeule's argument is about as persuasive as using *Roe v. Wade*[59] as evidence that living constitutionalism is deeply rooted in our legal tradition.

But even if we ignore the recency of the opinions he chose, Vermeule's argument still fails. Consider first *Riggs v. Palmer*, an 1889 decision of the Court of Appeals of New York. In that case, a grandson murdered his grandfather to inherit under the grandfather's will.[60] The grandson "claim[ed] the property, and the sole question for [the Court's] determination [was whether he] c[ould] . . . have it[.]"[61] The relevant statute stated that "'[n]o will in writing, . . . nor any part thereof, shall be revoked or altered otherwise'" except in circumstances not at issue in Riggs.[62] The Riggs court read into the governing statute an exception for murderous heirs and held that the grandson could not inherit.[63]

The *Riggs* court started with what Vermeule asserts is "a crucial proposition of"[64] living common goodism: "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."[65] The *Riggs* court appealed to Aristotle's authority to reason that "equitable construction[s]" can "restrain[] the letter of a statute"[66]—you can see why Vermeule likes this decision. And the court determined that it was not "much troubled by the general language contained in the laws" because it was "inconceivable" that the "legislative intention" was to allow the property to pass to the grandson.[67] So I agree that *Riggs* is an example of living common goodism.

50 Id. at 2.
51 See id. at 52–90.
52 Id. at 3.
53 Id.
54 198 U.S. 45 (1905).
55 299 U.S. 304 (1936).
56 115 N.Y. 506 (1889).
57 Vermeule, supra note 21, at 53 (emphasis added).
58 Id.
59 410 U.S. 113 (1973).
60 *Riggs*, 115 N.Y. at 508–09.
61 Id. at 509.
62 Id. at 517 (Gray, J., dissenting).
63 Id. at 514–15.
64 Vermeule, supra note 21, at 80.
65 *Riggs*, 115 N.Y. at 509.
66 Id. at 510.
67 Id. at 511.

The problem for Vermeule's argument is that most American courts of that era rejected *Riggs* in favor of the textualist approach he says was invented after the Second World War.[68] For example, in *Wall v. Pfanschmidt*,[69] the Supreme Court of Illinois in 1914 rejected the living common goodism of *Riggs*. It quoted Chief Justice Marshall's 1820 opinion in *United States v. Wiltberger*: "Where there is no ambiguity in the words [of a statute], there is no room for construction."[70] And it explained that, "[u]nder the rules for the interpretation of statutes the courts cannot read into a statute exceptions or limitations which depart from its plain meaning."[71] In 1892, the Supreme Court of Ohio affirmed a decision that expressly rejected *Riggs*'s approach as "legislation in disguise."[72] In that case, *Deem v. Millikin*, the court endorsed textualism: "when the legislature . . . speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent."[73] And it derided the decision in *Riggs* as "the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy."[74]

The dominant textualist approach that rejected *Riggs* was nothing new. After all, Chief Justice Marshall had in 1819 endorsed a strong textualism with a narrow absurdity canon: "if, in any case, the plain meaning of a provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[75] In *Reading Law*, Justice Scalia and Bryan Garner explain that "all states [now] have statutes that explicitly deal with" the problem of murderous heirs because most American courts rejected *Riggs* and applied even "unwise law[s] as written"[76]—the kind of textualism that prevails today.

Consider next Justice Harlan's dissent in *Lochner*. Although the outlier decision in *Riggs* was consistent with living common goodism, Harlan's dissent in *Lochner* was not. The *Lochner* Court held that a state law prohibiting bakers from "working . . . more than sixty hours in one week" violated the supposed liberty of contract protected by the Fourteenth Amendment.[77] Both the majority and Harlan agreed that the Fourteenth Amendment protects a right of contract "subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society,"[78] but they disagreed about whether the maximum-hours law for bakers was a reasonable exercise of the state's police power.[79] Harlan argued that the state law "cannot be held to be in conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its original purpose."[80] And other famous Harlan dissents confirm that he was an

68 See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 8, at 99–100 & nn.29–31 (2012) (collecting decisions and reporting that "[m]ost cases agreed with the . . . murderer-can-inherit holding, which we believe is textually correct").
69 106 N.E. 785 (Ill. 1914).
70 Id. at 788 (quoting *United States v. Wiltberger*, 18 U.S. 76, 95–96 (1820)).
71 Id. at 789.
72 *Deem v. Millikin*, 1892 WL 971, at *2 (Ohio Cir. Ct. May 1, 1892), aff'd *Deem v. Millikin*, 44 N.E. 1134 (Ohio 1895).
73 Id.
74 Id.
75 *Sturges v. Crowninshield*, 17 U.S. 122, 202-03 (1819) (emphasis added). Vermeule places a lot of emphasis on Justice Scalia's endorsement of the absurdity canon and asserts that *Riggs* faithfully applied it, see Vermeule, supra note 21, at 77, but as Chief Justice Marshall's statement of the canon makes clear, it was traditionally far narrower than Vermeule's description of it, accord Scalia & Garner, supra note 68, at § 37, at 237–38; 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 315 (Bos., Little, Brown, & Co. 1873) ("But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."). As I have explained, most courts rejected its application in the context of murderous heirs. See Scalia & Garner, supra note 68, at § 8, at 99–100. And the outcome in *Riggs* was not so absurd and unjust "that all mankind would, without hesitation, unite in rejecting the application," *Sturges*, 17 U.S. at 203, because, as the dissent in *Riggs* illustrates, one could rationally suppose that a murderous heir should not suffer the "imposition of an additional punishment or penalty" that was not "provided by law for the punishment of [the] crime" of which he was convicted, see *Riggs*, 115 N.Y. at 519–20 (Gray, J., dissenting) (internal quotation marks omitted). The absurdity canon, properly understood, is part of textualism.
76 Scalia & Garner, supra note 68, § 8, at 100.
77 *Lochner*, 198 U.S. at 52–53.
78 Id. at 68 (Harlan, J., dissenting).
79 See *Adair v. United States*, 208 U.S. 161, 174 (1908) ("Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation.").
80 *Lochner*, 198 U.S. at 73 (Harlan, J., dissenting).

originalist. In *the Civil Rights Cases*, he explained that courts must follow "the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."[81] In *Hurtado v. California*, Harlan argued that the meaning of the words "due process of law" in the Fifth and Fourteenth Amendments "must receive the same interpretation they had at the common law from which they were derived."[82] And in *Plessy v. Ferguson*, he argued that the Thirteenth and Fourteenth Amendments should be "enforced according to their true intent and meaning."[83]

Finally, consider *Curtiss-Wright*. Contrary to Vermeule's account, *Curtiss-Wright* does not "illustrate how deeply the classical legal tradition has always infused our law."[84] In that decision, the Supreme Court held that a joint resolution of Congress permitting the President to prohibit the sale of arms in a foreign conflict was not an unconstitutional "delegation of the lawmaking power."[85] The Court reasoned that "[t]he Union existed before the Constitution," which, according to the constitutional text itself, was "ordained and established . . . to form 'a more perfect Union.'"[86] The Court explained that because sovereignty "immediately passed to the Union" from Britain,[87] the federal government possessed "powers of external sovereignty"—such as the power to declare war, to conclude peace, and to make treaties—that "did not depend upon the affirmative grants of the Constitution."[88] And the Court acknowledged that those powers "remained [in the Union] without change save in so far as the Constitution in express terms qualified [their] exercise."[89]

Vermeule asserts that *Curtiss-Wright* "stands as a direct and . . . flagrant affront to originalism, and to the positivism of which the currently reigning version of originalism is a species" because it endorsed "[t]he shockingly anti-originalist idea that '[t]he Union existed before the Constitution.'"[90] But Vermeule again attacks a straw man. Originalism does not assert that the Constitution created the Union or that there is no law outside the written text. Originalism asserts that our Constitution is a written text that was adopted as the supreme law[91] at a fixed point in time. And the Court in *Curtiss-Wright* agreed. The Court described the "establish[ment]" of the written Constitution by the Union as an "event" in time,[92] and it declared that the federal government retained the powers of sovereignty that pre-existed that event only "in so far as the Constitution in express terms [did not] qualif[y] [their] exercise."[93] The Court explained that presidential power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[94] Because the Constitution is supreme, the Court considered whether the resolution was consistent with the Constitution. It based its ruling on "the unbroken legislative practice which has prevailed almost from the inception of the national government" by examining Acts of Congress from as early as 1794.[95] And it engaged in originalist reasoning by giving "unusual weight" to the "impressive array of legislation . . . enacted by nearly every Congress from the beginning of our national existence."[96] *Curtiss-Wright* is not an example of living common goodism.

81 Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (emphasis added).
82 *Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) (emphasis added).
83 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).
84 Vermeule, supra note 21, at 53 (emphasis added).
85 *Curtiss-Wright*, 299 U.S. at 315–317.
86 Id. at 317 (emphasis added).
87 Id.
88 Id. at 318.
89 Id. at 317.
90 Vermeule, supra note 21, at 85–86, 87 (quoting *Curtiss-Wright*, 299 U.S. at 317).
91 See U.S. Const. art. VI.
92 *Curtiss-Wright*, 299 U.S. at 317.
93 Id.
94 Id. at 320.
95 Id. at 322–28.
96 Id. at 327.

A major theme of Vermeule's revisionism is that originalism was "initially developed in the 1970s and '80s,"[97] but that canard flouts a mountain of historical evidence. For example, James Madison could not have been clearer: "In the exposition of . . . Constitutions, . . . many important errors [would] be produced . . . if not controulable by a recurrence to the original and authentic meaning attached to" their words and phrases.[98] Scalia and Garner explain in *Reading Law* that, "[i]n the English-speaking nations, the earliest statute directed to statutory interpretation," enacted by the Scottish Parliament in 1427, "made it a punishable offense for counsel to argue anything other than original understanding."[99]

Instead of interacting directly with the many historical examples that contradict his conspiracy theory that originalism was invented by the conservative legal movement in the "1970s and '80s,"[100] Vermeule broadly dismisses them. "Of course," he concedes, "it is true that more than zero instances of originalist-like utterances can be detected across the vast landscape of our legal history."[101] And he asserts that these examples "tend to speak of the framers' intentions rather than the original meaning as understood by the ratifiers," "embody[ing] a version of originalism that few currently defend."[102] But, strangely, Vermeule repeatedly relies on Professor Jeff Powell's 1985 article[103] refuting an original-intentions methodology for the proposition that originalism is "counter-originalist"[104]—apparently unaware that Powell's article established that the Founders were originalists in the modern sense.

Powell's article refutes Vermeule's invented history. Although Founding-era Americans did use the term "intent" in the context of constitutional interpretation, that usage, as Powell explained, tracked a long tradition of discerning intent "solely on the basis of the words of the law, and not by investigating any other source of information about the lawgiver's purposes."[105] "At common law," Powell explained, "the 'intent' of the maker of a legal document and the 'intent' of the document itself were one and the same; 'intent' did not depend upon the subjective purposes of the author."[106] And consistent with that tradition, Powell explained that the "Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language."[107]

Powell drew on a host of primary sources, but his discussion of the early debate about the "passage by the first Congress of a bill to establish a national bank"[108] well illustrates the practice of originalism at the Founding. That bill "provoked an elaborate debate over constitutional interpretation within the executive branch" about the scope of Congress's power in which both sides relied on originalist interpretive methods.[109] Taking the expansive view, Hamilton argued that, "whatever may have been the intention of the framers of the constitution, or of a law, that intention is to be sought for in the instrument itself."[110] Hamilton "derived his knowledge of 'the intent of the convention' from the 'obvious [and] popular sense' of the constitutional expression under consideration."[111] Far from establishing, as Vermeule

97 Vermeule, supra note 17.
98 Letter from James Madison to Converse Sherman (Mar. 10, 1826), in 3 Letters and Other Writings of James Madison 519 (J.B. Lippincott 1865).
99 Scalia & Garner, supra note 68, § 7, at 79.
100 Vermeule, supra note 17.
101 Vermeule, supra note 21, at 210-11 n.241 (emphasis added).
102 Id. at 211 n.241.
103 H. Jefferson Powell, "The Original Understanding of Original Intent," 98 Harv. L. Rev. 885 (1985).
104 See Vermeule, supra note 21, at 2, 186 n.4; Conor Casey & Adrian Vermeule, "Myths of Common Good Constitutionalism," 45 Harv. J. L. & Pub. Pol'y 103, 130 n.83 (2022).
105 Powell, supra note 103, at 895.
106 Id. at 895.
107 Id. at 903.
108 Id. at 914.
109 Id. ("Both Hamilton and Jefferson purported to rely on 'the usual & established rules of construction.'").
110 Id. at 915 & n.153.
111 Id. at 915.

asserts, that the Founders were not originalists, their debate about the national bank proves that they "did not in any way . . . reject[] the traditional common law understanding of 'intent' as the apparent 'meaning of the text.'"[112]

Early Justices too practiced originalism. Chief Justice Marshall clearly embraced originalism in *Ogden v. Saunders*.[113] There, Marshall identified the "principles of construction which ought to be applied to the constitution of the United States."[114] First, "that the intention of the instrument must prevail"; second, "that this intention must be collected from its words"; third, "that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended"; and finally, "that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."[115] Vermeule cannot seriously dismiss Marshall's opinion as an "originalist-like utterance[]."[116]

We can go earlier still for rejections of living common goodism. Justice James Iredell wrote in *Calder v. Bull*[117] in 1798 that if Congress or any state legislature "shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[118] As he explained, "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."[119] And he concluded that, "[A]ll that the Court could properly say, in such an event, would be, that the Legislature[,] []possessed of an equal right of opinion[,] had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."[120] Vermeule asserts that this interpretation of Iredell's opinion is a "wild overreading";[121] I leave it to the literate reader of English to determine whether Justice Iredell's opinion fits more comfortably with living common goodism than with originalism.

Justice Iredell's observation that "the ablest and the purest men have differed upon" "principles of natural justice"[122] is why living common goodism in practice would be indistinguishable from living constitutionalism. Throughout Vermeule's work, the phrase "common good" evades concrete application except where the outcomes happen to align with his own worldview. Compare Vermeule's view of the Second Amendment with the view taken by Josh Hammer, who touts common-good originalism.[123] Vermeule complains that *District of Columbia v. Heller*[124] was "revolutionary" and "a startling break with the Court's long-standing precedents,"[125] but Hammer rightly praises it as "a sober analysis of the historical meaning of the" Second Amendment.[126] A Justice Vermeule—who says the common good requires reviewing for arbitrariness burdens on rights secured by the Bill of Rights[127]—would have evidently dissented in *Heller*. And if one were to put living common goodism in the mind of a Justice who disagrees with Vermeule about whether same-sex marriage is required by the common good, one would still get *Obergefell v. Hodges*.[128]

112 Id.
113 25 U.S. 213 (1827).
114 Id. at 332.
115 Id. (emphasis added).
116 Vermeule, supra note 21, at 210-11 n.241.
117 3 U.S. 386 (1798).
118 Id. at 399 (opinion of Iredell, J.).
119 Id.
120 Id.
121 Vermeule, supra note 21, at 59.
122 *Calder*, 3 U.S. at 399 (opinion of Iredell, J.).
123 See Hammer, supra note 15, at 921.
124 554 U.S. 570 (2008).
125 Vermeule, supra note 21, at 93.
126 Hammer, supra note 15, at 943 & n.100.
127 See Vermeule, supra note 21, at 126-28, 168.
128 576 U.S. 644 (2015).

Vermeule asserts that "[i]t is irrelevant that there was, is[,] and will be disagreement between classical lawyers over the content of the common good,"[129] but he conveniently applies a different standard to disagreements between originalists. When responding to Justice Brett Kavanaugh's point in dissent that the majority in *Bostock v. Clayton County*[130] misapplied originalism, Vermeule insists that "[i]f originalism is so difficult that one of its leading champions cannot apply it correctly, one might conclude instead that originalism is simply a dangerously unreliable technology, one that induces fatal rates of human error."[131] But Vermeule cannot have it both ways: he cannot forgive disagreement about the common good among classical lawyers while condemning originalism based on disagreements among its proponents.

I will close by quoting from Justice Benjamin Curtis's dissent in *Dred Scott v. Sandford*.[132] I do so because Vermeule repeatedly invokes the living-constitutionalist myth that *Dred Scott* is "the most clearly proto-originalist decision."[133] Justice Curtis, like the courts that later rejected *Riggs*, repudiated the approach that would allow judges to read unmentioned exceptions into unambiguous texts. When addressing whether the Supreme Court had the authority "to insert into . . . the Constitution an exception of the exclusion or allowance of slavery" to Congress's express "power to make all needful rules and regulations respecting" territories,[134] Curtis rejected Chief Justice Taney's majority opinion as anti-textualist:

To engraft on [the Constitution] a substantive exception not found in it, . . . upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of judicial interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[135]

Justice Curtis's textualist dissent in *Dred Scott* rejected living common goodism. So should you!

129 Casey & Vermeule, supra note 104, at 143.
130 140 S. Ct. 1731 (2020).
131 Vermeule, supra note 21, at 106.
132 60 U.S. (19 How.) 393 (1857).
133 Vermeule, supra note 21, at 210-11 n.241; see also Casey & Vermeule, supra note 104, at 131.
134 See *Scott*, 60 U.S. at 620–21 (Curtis, J., dissenting); see also U.S. Const. art. IV, § 3, cl.2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").
135 *Scott*, 60 U.S. at 620-21 (Curtis, J., dissenting).

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Why Originalism Is Consistent with Natural Law: A Reply to Critics

BY JOEL ALICEA, CATHOLIC UNIVERSITY - COLUMBUS SCHOOL OF LAW | MAY 2024

Constitutional theorists on the right are engaged in a debate about the moral foundations of originalism, the theory that government officials, including judges, are bound by the original meaning of the Constitution. I recently offered a defense of originalism's moral authority grounded in the natural-law tradition. Harvard law professor Adrian Vermeule and his sometime co-author, University of Liverpool law professor Conor Casey, recently responded to my draft article, as did another supporter of Vermeule's theory, lawyer and blogger Pat Smith. In the interest of furthering this important discussion about the moral foundations of originalism, I respectfully offer this reply.

The background of this controversy can be briefly stated. Originalism has been the reigning constitutional theory of legal conservatives since the election of Ronald Reagan, but in a March 2020 essay in the *Atlantic*, Vermeule called on legal conservatives to "abandon[] the defensive crouch of originalism" and embrace "a substantive moral constitutionalism that [is] not enslaved to the original meaning of the Constitution." This alternative theory, which Vermeule called "common good constitutionalism," would "read into the majestic generalities and ambiguities of the written Constitution" "substantive moral principles that conduce to the common good." Vermeule elaborated on his theory in his new book, *Common Good Constitutionalism*, in which he attempted to ground his theory in the natural-law tradition.

Shortly after Vermeule published his book, I posted online a draft article (forthcoming in the *Notre Dame Law Review*) that provides a natural-law justification for originalism and argues that Vermeule's theory misunderstands the implications of the natural-law tradition for American constitutionalism. I argue that, under well-established natural-law principles, political authority — that is, the power to make and enforce laws and resolve legal disputes — is essential to secure those conditions that allow for human beings to flourish, conditions that we might call "the common good." In the natural-law tradition, ultimate political authority is vested in the people of a society, and part of that authority is the power to constitute a government. Within the broad parameters of the natural law, the people have discretion in allocating authority within a regime to secure the common good, which the American people did by ratifying the Constitution.

Because each of us has a moral obligation to pursue our own (and our community's) flourishing, each of us has a moral obligation to seek the common good, which means each of us has a moral obligation to preserve the people's legitimate political authority that is essential to securing the common good. Assuming that the Constitution is, at least as a general matter (though perhaps not in all its applications), consistent with the substance of the natural law, our obligation to preserve the people's legitimate authority means respecting the decisions the people have made in allocating power and constituting their government. In the American context, the only way to preserve the people's legitimate authority is to understand the Constitution *as they understood it* when they ratified it. To allow present-day officials to depart from the original meaning of the Constitution is to allow them to undermine the decisions made by the people in the exercise of their legitimate authority, and undermining the people's legitimate authority harms the common good. Thus, when Vermeule argues that judges ought to depart from the original meaning of the Constitution in the name of the common good, he commits a serious error, since judicial departure from the original meaning of the Constitution *necessarily harms the common good*. There is, therefore, a moral obligation to obey the original meaning of the Constitution.

As noted above, Vermeule and Casey responded in a blog post. The first and most significant thing to notice about their response is that they do not dispute *anything* I said in my article. Rather, they argue that "Alicea has said nothing that is even *prima facie* in tension with our interpretive arguments." Vermeule and Casey's response, then, is not that I am wrong; it is that the conclusions I reach are unimportant (in Vermeule and Casey's words, my conclusions "are banalities, truisms"). In their view, my arguments are fully reconcilable with common-good constitutionalism. As Vermeule and Casey elaborated in a subsequent article responding to Judge William Pryor's criticism of common-good constitutionalism: "Common good constitutionalism does not alter the semantic meaning of concepts and principles," and it does not "take the semantic meaning to be entirely open to any and all changing applications and moral novelties that current generations may dream up."[1] Common-good constitutionalism, according to Vermeule and Casey, does not oppose what they call "'thin' originalism," "the bare commitment to the claim that the meaning of a fixed text remains constant over time."[2]

This is genuine progress in the debate. In his *Atlantic* essay two years ago, Vermeule stated that the "common core" of originalist theories "is the view that constitutional meaning was fixed at the time of the Constitution's enactment," and it was *that* "core" of *all* originalist theories that Vermeule said "has now outlived its utility" and should be discarded. Today, Vermeule agrees that "the meaning of a fixed text" — including the Constitution — "remains constant over time," and he has clarified that he rejects only *certain kinds* of originalism. That is consistent with his earlier retreat from a broad condemnation of *all* originalist theories in his *Atlantic* essay to a recognition that "no global condemnation of 'textualism' is adequate." Vermeule concedes that some forms of textualism/originalism are based on the natural-law tradition, and his "disagreement with" *those* forms of originalism is, he has said, "ultimately one of contingent judgement rather than of principle." These clarifications represent a welcome narrowing of the scope of Vermeule's critique of originalism,[3] since they make his claims more precise and, therefore, allow for a more fruitful exchange.

More fundamentally, both sides now agree that the moral imperative to secure the common good means preserving the people's legitimate authority, and both sides now agree that preserving the people's legitimate authority means understanding the Constitution as the people understood it when they ratified it. Our continuing disagreement, then, is about the *implications* of those premises. Vermeule thinks those premises pose no difficulties for his theory; I think they do.

The principal (though not exclusive) focus of Vermeule's theory is on how judges should decide cases, and our shared premises have significant implications for the judicial role. If the moral imperative to secure the common good means understanding the Constitution as the people understood it when they ratified it, then the scope of judicial authority under the Constitution becomes a distinctively legal form of *historical* inquiry, since it is through such an inquiry

1 Conor Casey and Adrian Vermeule, "Argument By Slogan" 17 (Apr. 27, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081264.
2 Id. at 3.
3 I focus on Vermeule rather than Casey in this response because my article specifically takes on Vermeule's articulation of common-good constitutionalism and because Casey has yet to produce an extended treatment of the theory like Vermeule's book. In doing so, I do not mean to diminish Casey's significant contributions to this ongoing debate.

that we can recover how the people authoritatively allocated the power to resolve legal disputes within the American constitutional system. Yet if there is one thing that Vermeule has been crystal-clear about, it is that "officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution" "substantive moral principles"[4] *regardless* of whether judges were historically understood to have the authority to do so under Article III of the Constitution. In Vermeule's words: "I certainly do not advocate a revival of the classical law because it is the original understanding."[5] He disclaims as "an ersatz form of respect for the natural law" the argument that judges may resort to the natural law in adjudicating cases "only insofar as it happens to be picked up by an originalist command (a form of soft positivism), not because it has binding force as natural law in its own right."[6] Thus, Vermeule simultaneously endorses two propositions: (1) the common good requires that we understand the scope of judicial power as the people understood it when the Constitution was ratified, and (2) the scope of judicial power includes the power to apply substantive moral principles in deciding cases *regardless* of whether the people understood the judicial power that way when the Constitution was ratified.

This means that one of two things is true about Vermeule's position. Either he has fallen into a flat contradiction, or he believes that the natural law *requires* that judges *must* have the authority to resort to substantive moral principles in adjudicating constitutional disputes, regardless of whether the people may have decided otherwise. If the latter position were true, historical inquiry would indeed be irrelevant; it would not matter what the people had decided about the scope of judicial power, since the people could not legitimately decide something contrary to the natural law. The problem with this latter view is that Vermeule *never offers an argument in its favor*. It is simply assumed throughout his book, blog posts, and other writings on this subject, even though many natural-law theorists, such as Professor Robert P. George, have argued against it.[7] It is also undermined by his repeated acknowledgement in his book that "the precise allocation of law-interpreting power between courts and other public bodies is itself a question for determination,"[8] where "determination" is a process in which decisions are, by definition, *not* dictated by the natural law. I point all of this out in my *Notre Dame Law Review* article,[9] and it demonstrates that Vermeule's theory is either self-contradictory or rests on an undefended premise that he himself gives us reason to reject. Yet Vermeule does not respond to these arguments.

Instead, Vermeule argues in his response that the real debate is "about the limited determinacy of the positive law," that is, "what to do in hard cases, where the putatively fixed meaning is vague, ambiguous, or conflicts with other equally legitimate sources of law, such that interpreters are necessarily left with interpretive discretion at the point of application." In Vermeule's view, it is "impossible to avoid interpretation that rests on controversial normative judgments at the point of application, especially in hard cases."[10] About this issue, his response asserts that I "say[] almost nothing."

I do, in fact, expressly address in my article Vermeule's argument that moral principles must be brought to bear in cases of under-determined text, and what I say is based on the foregoing analysis: resolving under-determinacy is primarily a historical inquiry.[11] The key point, again, is that we are trying to recover

4 As I argue in my article, the limits on judicial authority under our Constitution are based on the natural law, so in that sense, adherence to originalism is the result of applying substantive moral principles to our constitutional system. But Vermeule would go further by, for example, interpreting the scope of Congress's power under the commerce clause based on the natural-law principle of subsidiarity, regardless of whether subsidiarity was originally understood to have been incorporated into any source of positive law. See Adrian Vermeule, *Common Good Constitutionalism* 162–64 (2022). This is the kind of application of moral principles that is in dispute.
5 Id. at 2.
6 Id. at 214 n.290
7 Robert P. George, In *Defense of Natural Law* 110–11 (1999).
8 Vermeule, supra, at 12; see also id. at 10, 43–47.
9 See Section III.B.
10 Vermeule, supra, at 16; see also id. at 22, 83.
11 See pages 53–55 and notes 395–96 of the current draft of my article.

the people's original understanding of the Constitution. If, at the time of ratification, the people would not have understood the Constitution in light of the kinds of substantive moral principles Vermeule would have judges employ, then he would not be trying to understand the Constitution as *they* did; he would be substituting *his* understanding for theirs. And because that undermines the people's legitimate authority, it imperils the common good. Thus, my argument shows that, with respect to under-determined texts, Vermeule's resort to substantive moral principles *irrespective* of their historical grounding is mistaken.

Perhaps the people did understand the Constitution against a backdrop of the kinds of substantive moral principles to which Vermeule appeals. Vermeule points to an ostensible history of the Founders relying on natural-law arguments in interpreting the Constitution (even while Vermeule disclaims the necessity of that history to his theory).[12] But the point is that whether those moral principles are part of the people's original understanding is a *historical* question, not one dictated by the natural law.

There are, after all, *other* ways to resolve under-determinacy without directly applying substantive moral principles. There are numerous principles of interpretation that were well-established at the Founding and that help resolve ambiguity or vagueness when it arises, such as many of those that Justice Scalia and Bryan Garner surveyed in their book *Reading Law: The Interpretation of Legal Texts*. Those principles, along with historical analysis, will resolve a great deal of *apparent* under-determinacy. It is erroneous to simply *assume* that a text that looks under-determined is, in fact, incapable of clarification through further historical analysis and application of traditional interpretive principles. Vermeule, for instance, cites in his response "the equal protection of the laws" as an example of under-determined texts, but this ignores the impressive scholarship of Professors John Harrison and Christopher Green arguing that the "protection of the laws" was actually a fairly well-understood phrase in 1868, not some amorphous, abstract guarantee of equality that always calls for moral analysis at the point of application to a particular case.[13] As Professors John McGinnis and Michael Rappaport have argued, skipping straight from seemingly abstract language to the conclusion that the language is under-determined is to commit the "abstract meaning fallacy." Certainly, nothing in the natural-law tradition requires committing that fallacy, and Vermeule offers no argument otherwise.

The abstract-meaning error is related to another fallacy: the fallacy of the excluded middle. In his book, Vermeule, relying on the work of the important non-originalist theorist, Ronald Dworkin, sets up a choice between two different ostensibly originalist approaches. Under the first approach, the original meaning refers only to "the principles embodied in semantic content," such that those living today (such as judges) would apply "the abstract principle" of cruelty embodied in the Cruel & Unusual Punishment Clause based on their best understanding of what that principle objectively requires.[14] Under the second approach, "[original] meaning is based on expected applications," such that the clause refers *not* to some abstract principle but to "a particular set of punishments" that those who ratified the Eighth Amendment would have regarded as "cruel."[15] Vermeule, following Dworkin, thinks that there is no principled way for originalists to decide between these two alternatives, which exacerbates the under-determinacy problem.[16]

But as Professor Lawrence Solum has argued at length, Dworkin's (and, therefore, Vermeule's) argument presents a false choice that excludes an intermediate

12 Vermeule, supra, at 52–90.
13 Whether Harrison and Greene are correct in their interpretation of the equal protection clause and whether, in light of more than a century of judicial precedent, courts ought to return to the original meaning of that clause are separate questions that I do not address here.
14 Id. at 95–96.
15 Id. at 95.
16 Id. at 96–97.

position that is, in fact, the position held by the majority of originalists — and that follows from the natural-law argument for originalism. The choice is not between applying *our* understanding of an abstract principle or *denying* that the text embodies an abstract principle at all. Rather, if we ought faithfully to obey the commands of those who ratified the text (and Vermeule appears to agree with me that we should), then the correct approach is to determine, based on historical analysis, *whether* the people understood the text to embody an abstract principle and, if so, what version of that principle *the people themselves* understood the text to embody. Perhaps the Cruel & Unusual Punishment Clause was a term of art that was not understood to embody an abstract principle, or perhaps it was understood to embody an abstract principle, but the people understood it to embody *a specific conception* of that abstract principle that may differ from our own, an interpretation supported by Professor John Stinneford's exhaustive historical scholarship. As Solum argues, only historical analysis can tell us for sure. McGinnis and Rappaport have made a similar argument in responding to the work of Professor Jack Balkin, on which Vermeule also relies for his argument.[17] Remarkably, even though Vermeule relies on Dworkin and Balkin for these points, his book never cites — let alone addresses — the responses to Dworkin and Balkin offered by Solum, McGinnis, and Rappaport, which predate Vermeule's book by several years.

In any event, where historical analysis and the traditional principles of interpretation are unable to clarify under-determinacy sufficiently to permit resolution of a specific constitutional dispute, it is simply not true that the only remaining possibility — at least in the judicial context — is applying substantive moral principles. For example, McGinnis — consistent with arguments made by Professors Gary Lawson and Michael Stokes Paulsen — has made a compelling argument that, at the Founding, there was a "judicial obligation of clarity" that was "a constituent of judicial duty — and thus judicial power — " and that "defined the standard by which judges displaced applicable law with law of higher obligation."[18] "Those who framed the Constitution and rendered justice in the early Republic did understand judicial duty as requiring a clear incompatibility between the Constitution and a statute before displacing the latter by the former."[19] If that is true, then the proper judicial response in the face of under-determinacy that cannot be resolved through further historical analysis and ordinary principles of interpretation would be to sustain the constitutionality of the statute, not to go beyond the scope of the judicial power as originally understood by applying substantive moral principles.

McGinnis's argument might or might not be sound; that is a historical question. But, again, the key point is that, if one accepts my argument that the natural-law tradition requires us to adhere to the people's understanding of the scope of judicial power at the Founding, then we resolve under-determinacy in the judicial context primarily through historical inquiry.

One final point. In the article, I draw out the implications of my argument for Vermeule's theory in the context of asking what a judge should do when the original meaning contradicts what the natural law might require in a given instance. In his response, Vermeule asserts that this is "a sideshow" to the real issue of under-determinacy. This is a strange response from Vermeule, given that he has explicitly, and at length, argued that "the critical question" in assessing the relationship between originalism and the natural law is: "What happens if and when the original understanding and the common good diverge?" I offer a response to that "critical question" that differs from his.

17 Id. at 97–99. It is also worth noting, as discussed below, that I devote an entire section of my article to showing why Balkin's theory is incompatible with the natural-law tradition as applied to American constitutionalism, yet Vermeule—without responding to my arguments—states in his response that Balkin's theory "may fully satisfy Alicea's axioms."

18 John O. McGinnis, "The Duty of Clarity," 84 Geo. Wash. L. Rev. 843, 862 (2016).

19 Id. at 918.

Lawyer and blogger Pat Smith, who is supportive of Vermeule's theory, has also responded to my article, and it is worth replying to his critique because, whereas Vermeule and Casey find the arguments in my article uncontroversial, Smith finds the arguments suffer from "serious problems." The core of Smith's objection is that "there is no room in [Alicea's] analysis for the people to express their reserved sovereignty through custom." He points out that Aquinas held, in line with other theorists, that "that the people have a reserved power to make, abolish, and interpret law through custom," and he asserts that "subsequent amendments, abolitions, and interpretations via custom are the end of originalism." Customary lawmaking, according to Smith, would allow for something like Balkin's theory, in which "the Constitution must be interpreted according to the people's changing understanding of the Constitution," since these changing understandings could be seen as a manifestation of the people's lawmaking power through custom. Smith asserts that I "fail[] to engage with" the issue of customary law.

I find this critique odd. As Smith acknowledges, I cite Aquinas's discussion of customary law in my article, and precisely because the role of customary law could be thought to support a version of originalism like Balkin's, I — in Smith's words — am "at pains to rebut Professor Jack Balkin." So it is strange to say that the article "fails to engage" with the question of customary law: that is why the section on Balkin is there, as Smith himself seems to understand.

Smith's real objection is that he does not *agree* with how I address the potential implications of the people's ability to make law through custom. In the natural-law tradition, the people are vested with at least two kinds of political authority: the authority to constitute their government and the authority to govern day-to-day affairs. They transmit at least some of their day-to-day governing power to a government when they exercise their constitution-making power, but they do not and cannot fully divest themselves of the authority to constitute the regime, since (as I elaborate in the article, relying on Aquinas) they have ultimate responsibility for securing the common good.

As relevant here, the issue of customary lawmaking comes in when we think about how the people manifest their exercise of constitution-making authority. In Balkin's theory, the people engage in an ongoing exercise of their constitution-making authority through ordinary politics (e.g., elections), so the people can (in his view) also legitimately change how the Constitution is understood through ordinary politics. A natural-law theorist could argue (as I understand Smith to do) that Balkin is right to suppose that the people can manifest their constitution-making power through ordinary politics, which is a reflection of their customary lawmaking authority.

In the article, I argue that the problem with Balkin's theory is that it effectively collapses the distinction between ordinary politics (things like elections) and constitutional politics (the formal process of ratifying or amending the Constitution). That matters because, in the context of the American constitutional system, the people made the authoritative decision to *separate* ordinary from constitutional politics by including the Article V amendment process in the Constitution. That separation was no accident. Rather, it was designed to better secure the common good by (1) preventing sudden, unwise, and impassioned changes in the allocation of constitutional authority through ordinary politics, which could undermine the common good, and (2) by allowing for genuine, enforceable limits on governmental power by taking out of the hands of government officials the ability to interpret ordinary elections as granting themselves additional power.

To accept Balkin's (and Smith's) argument, one would have to say that, post-1788, the people have overridden Article V through instances of customary lawmaking manifested in ordinary politics. But that would mean interpreting the people to have *sub silentio* worked a fundamental change in our regime, since (as just explained) the separation of ordinary from higher politics is at the foundation of our Constitution. Indeed, as *Marbury v. Madison* makes clear, it is the justification for judicial review: If the people may change the Constitution through ordinary politics (such as the enactment of a statute), the judiciary would have no basis for setting aside a statute that conflicts with the Constitution. Balkin's argument conflicts with core aspects of our constitutional system, which makes it an implausible interpretation of our regime. The better view — the view that accords with those core aspects of our constitutional system — is that the people have authoritatively said that they will *not* manifest their constitution-making power through custom; they will only do so through the Article V amendment process.

Of course, since the people retain ultimate constitution-making power, they could always abolish the Article V amendment process and adopt a new constitution that permits them to exercise constitution-making authority through custom. As I explicitly acknowledge in the article, nothing in the natural law forbids the people from adopting such an arrangement. But it is not the arrangement that *we* have adopted in the United States. Aquinas only addresses the abstract question of the people's authority to make customary law; he does not purport to analyze how that authority should be understood in the context of a specific constitutional order. Nothing that I say, therefore, contradicts Aquinas on this point.

Smith's error is that he analyzes the issue of customary lawmaking in the abstract, without reference to the specifics of our regime. This is the same type of error Vermeule commits when he asserts that judges have the power to apply substantive moral principles to resolve constitutional cases without taking into account the limits on judicial power that *our* regime imposes. Thus, like Vermeule, Smith's argument must be that the natural law *requires* that the people retain the ability to manifest their constitution-making power through custom and *forbids* them to disclaim that ability in the context of a specific society. But as I point out in the article, there is simply *nothing* in the natural-law tradition that requires that result, which would, in effect, be an argument that Article V (and the separation of ordinary and constitutional politics on which our entire constitutional system is based) is contrary to the natural law.

Perhaps Vermeule and Smith are of the view that the natural law does, in fact, forbid the constitutional arrangements adopted by the people through the Constitution. Vermeule has said before, in passing, that "a Constitution as morally compromised as our own" does not "always or even usually" "track the natural law," so perhaps he thinks the limitations on judicial power under Article III are one example of such moral compromises. Perhaps Smith thinks the same of Article V. But neither has made an argument in that regard, and if Article III and Article V are consistent with the natural law and are the result of the people's exercise of legitimate political authority, then the approach to constitutional adjudication that Vermeule advocates is contrary to the natural-law tradition and would do great harm to the common good.

About the Author

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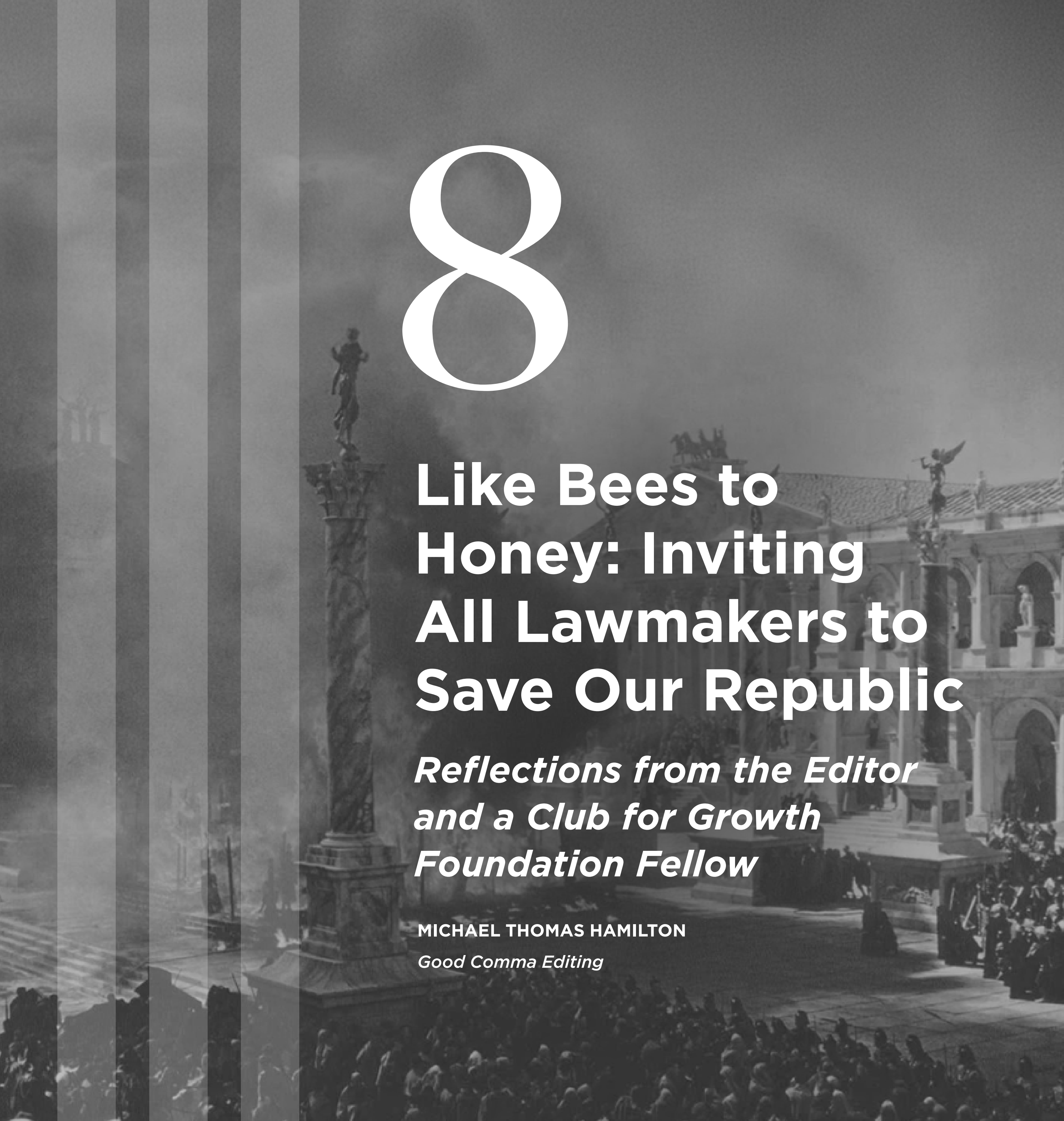
“Because each of us has a moral obligation to pursue our own (and our community’s) flourishing, each of us has a moral obligation to seek the common good, which means each of us has a moral obligation to preserve the people’s legitimate political authority that is essential to securing the common good.”

Joel Alicea



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Like Bees to Honey: Inviting All Lawmakers to Save Our Republic

Reflections from the Editor and a Club for Growth Foundation Fellow

MICHAEL THOMAS HAMILTON

Good Comma Editing

THE CLUB FOR GROWTH FOUNDATION

FREEDOM FORWARD

Limiting Government, Empowering Families, Strengthening American Industry

AFTERWORD

One pillar that upheld Rome as a republic for hundreds of years was the relative restraint of her tax system for her many provinces that sprawled east and west of the "eternal city." This restraint had at least two effects noteworthy for Americans in our time. First, it enabled provincial inhabitants to continue conducting affairs and prospering largely as they had prior to their local rulers' submission to Rome. Second and equally important, the amount of money available to spend on ill-conceived public policy decisions and crony business dealings was capped. For a time, Rome's finite reserves did what no other government or army on earth could: check Rome's power.

Then, one day in 123 BC—about 100 years before the republic collapsed at the feet of Rome's first emperor—Rome changed her tax policy. The impetus was an unexpected revenue windfall instantly addictive to Rome's leaders: the king of a subdued province in present-day Turkey had died—but, rather than leaving his state's vast treasury to his heirs, he had bequeathed it to Rome, as if conceding her authority to be inescapable and final.

For 10 years, the Senate debated whether to redistribute the gold to Roman citizens, fund agricultural land reform, subsidize grain markets, invest militarily—or leave the surplus to the pitiless provincials whose king had overtaxed them. Eventually, traditional Roman suspicion of gold as a gateway drug to moral corruption yielded to the bullish optimism that free money always fuels in the name of the "common good." Naturally, the most bullish were those positioned to influence the flow of such money. At last, dreaming bigger than one king's treasury, Rome began mercilessly taxing her eastern satellite states, while accelerating the ravaging of her western lands through silver mining. As popular historian Tom Holland put it, "The lid of the honeypot was now well and truly off."[1]

America's Honeypot

In the United States, the lid of the honeypot has been off for about 100 years as well, and today the consequences of our fiscal and monetary policy are laid bare. During the Roaring Twenties of a century ago, speculation made with loose, cheap credit abounded. As investment fueled by artificial wealth boomed, unemployment dropped toward historic lows. The catastrophic bust mired the US in the Great Depression and sunk the global economy with it. As if spending could cure overlending, FDR implemented an unprecedented series of taxpayer-funded public works programs. But the "honey" of "the New Deal did not end the Depression. Unemployment was as high before World War II as it was in 1932, and incomes and productivity had actually declined."[2]

Nevertheless, Keynesian advocacy of greater spending—and the expansion of government's sphere of action, and then control—continued to prevail through the war. Contrary to claims at the time that interventionist policies (price and wage controls and rationing) and buying war bonds would supply Allied victory, "almost all the funding for the war came from taxes and the Fed's inflating of the currency," teeing up a 17% annualized inflation rate immediately after the war.[3] Even today, decades after orthodox Keynesianism fell out of favor with economists across the political spectrum, it is Keynesian terminology that politicians, officials, and economists use to describe the government's taxation, spending, and manipulation of supply and demand for goods, labor, and money. Words give form to ideas, defining and directing the trains of thought of those who use them. Fulfilling this Orwellian prophecy, Nixon famously echoed non-Keynesian Milton Friedman's lament, "We're all Keynesians now."[4]

Since the late 1940s and 50s, the honey has ceaselessly flowed from the US Treasury and the Federal Reserve to programs and industries deemed by those in power to be of national interest. Spilling far beyond the military-industrial complex that Eisenhower foresaw, taxpayer funding next fueled Lyndon Johnson's Great Society welfare programs. These would evolve into an albatross around the neck of every federal and state legislator, every president and governor. Predictably, "Social Security, Medicare, Medicaid, and kindred welfare state programs moved to the center of our political life, dominating the domestic agenda and eventually usurping the majority of federal spending, now delicately termed 'uncontrollable.'"[5] Despite early gains against racial injustice in the 60s and provision of

1 For a fuller retelling of what I have recounted, see Tom Holland, *Rubicon: The Triumph and Tragedy of the Roman Republic* (London: Abacus, 2004), 28–47.
2 Ron Paul, *End the Fed*, the Foundation for Rational Economics and Education, Inc. (Grand Central Publishing: New York, 2009), 69.
3 Ron Paul, *End the Fed*, 34–36.
4 Jeffrey Snider, "We're All Keynesians Now Because We Have No Choice," RealClearMarkets, July 8, 2016, https://www.realclearmarkets.com/articles/2016/07/08/were_all_keynesians_now_because_we_have_no_choice_102254.html.
5 Charles Kessler, "The New New Deal," *Imprimis* vol. 39, is. 5/6, Hillsdale College, May 2010, https://imprimis.hillsdale.edu/the-new-new-deal/.

longer-term relief for aging Americans, half a century later, many such programs have proven a snare to poorer citizens' individual prosperity and achievement, rather than a safety net.

Contrary to the restless swarm buzzing around America's bottomless honeypot, cooler heads emerged from the shade in the 1970s after decades of "stand[ing] athwart history, yelling 'Stop,' at a time when no one [was] inclined to do so."[6] But the free-market recommendations first championed by Austrian economists Ludwig von Misis and Frederick Hayek would continue to swim upstream. Tying the value of the US Dollar to nothing more than America's fiat, or assertion, that it has value, Nixon essentially guaranteed his successors' perennial escalation of government manipulation of consumer behavior through profligate fiscal and monetary policies.[7]

History may not truly repeat, but it does reincarnate. The burst of the dot-com bubble in the stock market in 2000 was prelude to a far worse correction. Once again fueled by extremely cheap credit—much of it extended to a critical mass of citizens unable to make their mortgage payments—the 2008 crash evaporated $7.4 trillion in stock wealth, equal to $66,200 per US household.[8] The mantra that certain companies and industries were "too big to fail" (meaning to *let* fail) ushered in a new era of corporate welfare. In this era, richer people who make risky investments extract honey from poorer people who make safer investments or who cannot afford to invest at all. Again choosing to spend America's way out of an overlending and overspending crisis, empowered officials dumped more "free" money into the economy through "quantitative easing"—for a decade. Concurrently, Barack Obama and Congress made taxpayers liable for the health insurance fees of millions of Americans (even of those who earn more than many of the taxpayers funding their insurance plans!). Subsequently, both red and blue presidents and Congresses—Trump and Biden—made multiple direct payments to the American people. Biden has further promised that workers who paid off their own college loans shall also pay off the loans of people who have not.

America's immense spending and rapid government expansion over our relatively brief history uniquely position 21st-century Americans—but whether we teeter on the cutting edge of a new frontier or on the slippery slope of an abyss remains to be seen. As of this writing, the Fed's balance sheet reads $8 trillion, having reduced it from $8.7 trillion in an effort to check and prevent the return of recent runaway inflation that the Fed itself caused.[9] The current national deficit hovers at $1.9 trillion, while our overall national debt has ballooned to $34.7 trillion: a lidless honeypot.[10] Today, thanks to the popularity of the Broadway musical *Hamilton*, it is again cool to invoke the blessing of the first treasury secretary of the United States on our national debt. But this abuses Alexander Hamilton, who wrote,

> *"[I] ardently wish to see it incorporated as a fundamental maxim in the system of public credit of the United States that the creation of debt should always be coupled with the means of extinguishing it."*[11]

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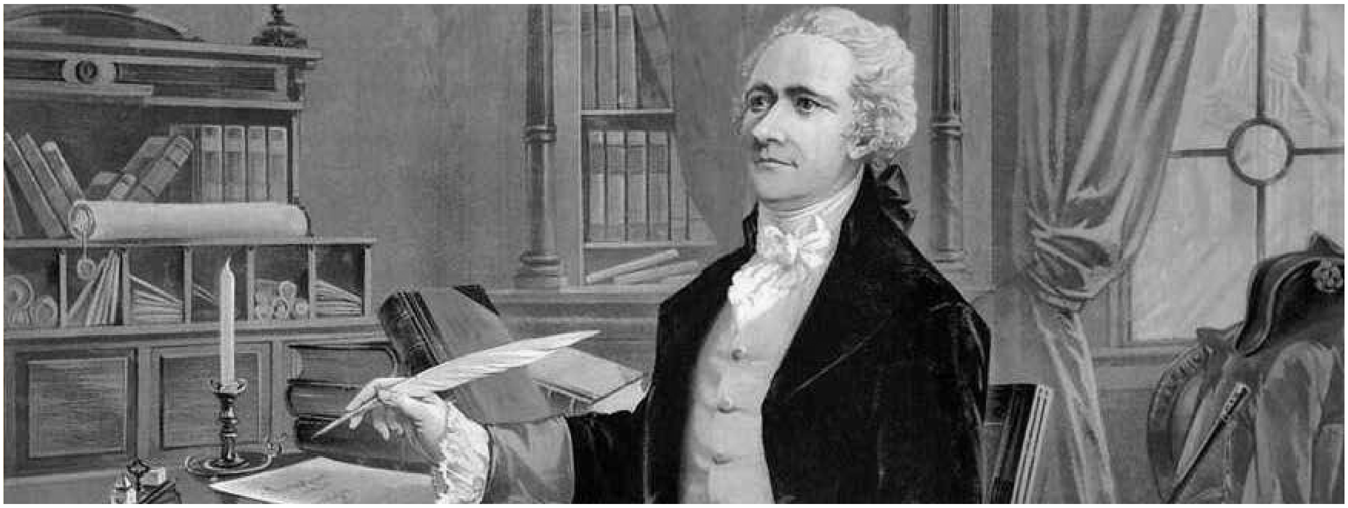
6 William F. Buckley, "Our Mission Statement," *National Review*, November 19, 1955, https://www.nationalreview.com/1955/11/our-mission-statement-william-f-buckley-jr/.
7 Jeffrey Snider recounted for RealClearMarkets, "The quote attributed to Nixon was actually given by Milton Friedman—twice. The first was in a *Time Magazine* article from December 1965 all about Dr. Keynes. Friedman was purportedly very upset about his inclusion in the work, judging it to be a case of words taken far out of context. In 1968, he attempted to set the record straight, declaring instead that, 'We all use the Keynesian language and apparatus; none of us any longer accepts the initial Keynesian conclusions.' As Nixon would prove in just three years, all that matters is the former. See Jeffrey Snider, "We're All Keynesians Now Because We Have No Choice."
8 The Pew Charitable Trusts, "The Impact of the September 2008 Economic Collapse," April 28, 2010, https://www.pewtrusts.org/en/research-and-analysis/reports/2010/04/28/the-impact-of-the-september-2008-economic-collapse.
9 Board of Governors of the Federal Reserve System, "Federal Reserve Balance Sheet Developments," November 2023 (latest available), https://www.federalreserve.gov/publications/files/balance_sheet_developments_report_202311.pdf.
10 usdebtclock.org.
11 Quoted in Ron Chernow, *Alexander Hamilton*, ch VIII 20:10–21:28, narrated by Grover Gardner (New York: Penguin Audio, 2004), Audible audio ed., 11 hr., 51 min.



Frustrated that even bigger spenders than himself had distorted his statement that "a well-funded debt would be a national blessing that would protect American prosperity," Hamilton was still clarifying five years later:

Progressive accumulation of debt is perhaps the natural disease of all governments. . . . It is not easy to conceive anything more likely than this: to lead to great and convulsive revolutions of empire.[12]

Alexander Hamilton would have regarded our lidless honeypot with weeping and gnashing of teeth—first because of how much we spend, but second because, due to today's regulatory environment, our elected leaders spend in the wrong ways and on the wrong things to achieve their stated outcomes.

Fix or Fall

Yet judging by today's polarized, volatile, highly combustible political and social culture, limitless government spending has not restored the American happiness or relative unity of earlier times. Whatever endorphins that spending sprees are supposed to release, Americans aren't feeling them (at least not in the public square). Rumblings of another American civil war appear to be more common now than at any time since 1860, with half of one 8,600-respondent panel claiming they "expect a civil war in the US in the next few years."[13] As Election 2024 approaches, two presidents currently vie for victory; one faces waves of allegations, the other an undeniable pattern of senility. Both major parties share concerns that the true winner will not hold that office—if not due to election fraud, then due to a planned resignation, or even an invocation of the 25th Amendment, that passes power to the vice president. Now—seemingly closer than ever to "the end of days"—America's march down a divided highway toward the selection and empowerment of our next Great Man feels eerily Roman.

12 Quoted in Ron Chernow.
13 Rodrigo Pérez Ortega, "Half of Americans anticipate a U.S. civil war soon, survey finds," Science, July 19, 2022, https://www.science.org/content/article/half-of-americans-anticipate-a-us-civil-war-soon-survey-finds.

The prospect of bridging that divide at our nation's critical moment is precisely why the policies recommended throughout this Club for Growth Foundation handbook are promising for lawmakers and their constituents. Rather than conceiving stillborn legislative agendas to be pronounced dead on arrival in either chamber, the authors have produced (or have highlighted current lawmakers' production of) public policy solutions that ought to appeal to broad swaths of legislators across the political spectrum. Bombastic howls for the red meat of "mere" deregulation—as a cynic might expect from a cadre of free-market-minded scholars, experts, and purists tasked with such a project—receive no quarter in this book. With admirable ingenuity and restraint, the authors have descended from the lofty idealism of Mount Olympus to offer practical solutions to pragmatic lawmakers running political races. They invite lawmakers on all sides of the valley to share common (and usually commonsense) ground.

Instead of mere deregulation—a proposition big-government proponents might kill in the cradle—these policy recommendations consistently call for *regulatory innovation* that would make today's regulatory environment more efficient and relevant. Such efficiency and relevance have (or should have) universal appeal to progressives, conservatives, and libertarians alike. Efficiency would *enhance* regulators' decision-making abilities, not remove them. Relevance would enable regulators to redirect and refocus their attention on the most critical intersections of American interests in tax, manufacturing, energy, infrastructure, education, and legal policy. Efficiency and relevance would not defund the departments or agencies that oversee these areas that, for better or worse, are forever in the federal government's purview. Instead, efficiency and relevance would allow regulators to redeploy funds and manpower to address areas that bipartisan coalitions have identified as inflection points for American prosperity.

A convenient byproduct of making regulation itself more efficient and relevant is its multiplication of efficiencies for everything lawmakers regulate. Grant Dever, author of this handbook's "Liberating America: Overcoming Energy Scarcity and Inflation," writes that H.R. 1, the proposed Lower Energy Costs Act (LECA), "would make it much easier for businesses to conduct maintenance of existing projects and to seek new opportunities on lands that have already been assessed, reducing unnecessary paperwork and bureaucracy." LECA would achieve this not by letting businesses run unregulated but by merely reducing redundancy where regulators have already spoken. The same bill would limit officials' review of permit application materials to one or two years, depending on the materials—hardly unreasonable, considering this is barely fast enough to keep pace with the technology that applicants are likely to use for the projects, if they ever receive permits for them.

Simplifying regulatory processes would enable *actual* regulation to occur, instead of the Chinese water torture of waiting endlessly for regulators to review, or consider reviewing, while opportunities expire. Simplification should entice both those who want more regulation and those who want less. For example, LECA would help businesses mine for critical minerals (and reduce US dependence on other countries) by designating a single agency as the point of contact when multiple agencies are involved, requiring concurrent (as opposed to consecutive) review of projects, and establishing clear timelines to reduce uncertainty. This proposes nothing that members of Congress with a shred of organizational leadership experience would not desire from and (one hopes) require of their own staff.

There is room for both sides, both parties, both agendas, to find satisfaction in the regulatory innovation recommended in the pages of this handbook. "Would you rather have cheap fuel or reduce carbon dioxide emissions?" is no longer an accurate question in all contexts. Innovation has lowered energy costs—the Shale Revolution's increase of the supply of natural gas saves many households $2,500 annually—*and* has lowered carbon dioxide emissions precipitously, contrary to forecasting during the George W. Bush presidency.[14] Similarly, the proposed Advanced Reactor Fee Reduction Act would waive the application fee for the first companies awarded licenses to operate various categories of advanced reactors. Considering that one company recently spent $500 million to prepare its application, this carrot would entice more companies to innovate, "rather than waiting for others to pave the way in the hope that the process becomes more efficient over time."[15] Naturally, attracting more applicants would also increase the flow of fees to the collecting agency and bolster regulatory activity—a win for all sides.

The handful of bipartisan energy solutions I have highlighted here are representative of the golden mean that every other policy paper in this book emphasizes by offering lawmakers of all stripes a roadmap to regulatory innovation in tax, manufacturing, infrastructure, education, and legal policy. In an era when the legislative branch's chief ability seems to be that of ceding and bleeding away its power to the leviathan executive branch, these recommendations propose to break congressional gridlock with a bipartisan blitz up the middle way. Surely that is a more mouthwatering, and hopeful, prospect than the lidless honeypot of our past and present.

14 Grant Dever, "Liberating America: Overcoming Energy Scarcity and Inflation," in this handbook.
15 Grant Dever, "Liberating America: Overcoming Energy Scarcity and Inflation."

About the Author

Michael Thomas Hamilton is a Club for Growth Foundation Fellow (2021). As the founder and CEO of Good Comma Editing, he and his team of liberty-minded writers and editors help leaders in business, ministry, and the public square to state the most important things clearly. He is a graduate of Hillsdale College.

"Manufacturing matters. But industrial policy has failed and will continue to fail. It allows bureaucrats to favor specific industries, misallocating resources and forcing companies to invest in lobbying and political influence rather than jobs and productivity. It puts taxpayers on the hook for bad investments that cannot sustain themselves without continued bailouts or investments that would have happened anyway — often at cross purposes to other government policies or else for explicitly political purposes. Free-market reforms to taxes, regulation, energy, infrastructure, and education will reduce the size and scope of government and can supercharge American manufacturing, allowing business and industry to grow, return, and invest in the U.S."

David McIntosh

President, Club for Growth Foundation

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