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**FROM THE PAST TO THE FUTURE:
IDEAS AND ACTIONS FOR A FREE SOCIETY**

CHAPTER TWENTY-FOUR

KEY MILESTONES IN REGULATION

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Key Milestones in Regulation

- Susan E. Dudley

In the 130 years since Congress created the first regulatory agency, the number of agencies and the scope and reach of the regulations they issue have [increased dramatically](#). In 2019, [more 70 federal regulatory agencies](#) employed almost 300,000 people to write and implement regulation. Every year, they issue thousands of new regulations, which now occupy more than [180,000 pages](#) of regulatory code. This essay summarizes efforts to constrain that growth, identifying five key milestones that have shaped regulatory practices in the United States from the middle of the last century to today. It is based on an article published in the [Penn Regulatory Review](#).

Milestone 1: The Administrative Procedure Act

Congress created the Interstate Commerce Commission (ICC) in 1887 to regulate railroad rates. In the following decades a [variety of agencies](#) were established to regulate interstate trade, water and power, communications, commodity exchanges, etc. In the 1930s, President Franklin D. Roosevelt's New Deal expanded the jurisdiction of these agencies and added [new ones](#), but their sweeping authorities began to raise concerns that the apparent delegation of Congress's Article I powers might be unconstitutional. Years of debate on this question led to the passage in 1946 of what was arguably the first regulatory reform bill—the Administrative Procedure Act (APA). The APA reflected a “[fierce compromise](#),” balancing the competing goals of bureaucratic expertise and legislative accountability. Its requirements—that regulations be grounded in statutory law and an administrative record that includes public notice-and-comment—continue to guide rulemaking today.

Milestone 2: Economic Deregulation

The 1970s and 1980s brought a wave of [deregulation](#). The “economic regulation” prevalent at that time relied on economic controls such as price ceilings or floors, quantity restrictions, and service parameters. Although one justification for agencies such as the ICC, the Civil Aeronautics Board (CAB), and the Federal Communications Commission was protection of consumers from the exercise of producers' market power, observers noted that they seemed to get “captured” by the industries they regulated. By the early 1970s, legal and economic [scholarship](#) generally recognized that economic regulation of prices, entry, and exit tended to keep prices higher than necessary, benefiting regulated industries at the expense of consumers. This awareness motivated [bipartisan deregulatory efforts](#) across all three branches of government that eventually led to the abolition of some agencies, including the ICC and CAB, and removal of unnecessary regulation in several industries. The deregulation of transportation and telecommunications that occurred in the 1970s and 1980s succeeded in increasing competition,

which lowered consumer prices and increased choices, and provided tens of [billions of dollars per year](#) in consumer benefits.

Milestone 3: Benefit-Cost Analysis

While economic forms of regulation were declining in the 1970s, a new type of “social regulation” began to emerge, aimed at protecting health, safety, and the environment. Concerns over the reporting and compliance burdens these rules created led to the next wave of regulatory reform, focused not on deregulation but on ensuring that regulatory benefits outweighed costs. In 1978, President Carter issued Executive Order (E.O.) 12044, which established [procedures for analyzing](#) the impact of new regulations and minimizing their burdens. In 1980, Congress passed and Carter signed the [Paperwork Reduction Act](#), which created the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget to review and approve all new reporting requirements. Benefit-cost balancing has since become standard practice in most regulatory agencies, and increasingly is [expected by reviewing courts](#).

Milestone 4: White House Review

Soon after he took office in 1981, President Reagan issued [E.O. 12291](#), giving the newly created OIRA a gatekeeper role in reviewing draft regulations (as well as paperwork) to ensure that their benefits exceeded their costs. While this order was [initially controversial](#), [each subsequent president](#) has continued and expanded OIRA’s central regulatory oversight role, as well as the economic principles embodied in Reagan and Carter’s orders.

In 1993, President Clinton replaced E.O. 12291 with [E.O. 12866](#), which remains in effect today, despite the very different regulatory rhetoric of Presidents Bush, Obama, and Trump. E.O. 12866 retained OIRA’s review of significant new regulations; it reinforced the philosophy that regulations should be based on an analysis of the benefits and costs of all available alternatives, and directed agencies to select regulatory approaches that maximize net benefits to society unless otherwise constrained by law.

Milestone 5? Regulatory Budgeting

Are we witnessing the next wave of regulatory reform? President Trump has made deregulation a high priority. Although he retained E.O. 12866, he overlaid its requirements to maximize net regulatory benefits with an incremental regulatory budget. His [E.O. 13771](#) requires agencies to remove two regulations for every new one issued, and to offset the costs of new regulations by removing or modifying existing rules. This emphasis on [reducing regulatory costs](#) reflects a dramatic departure from the focus on net benefits that has prevailed for social regulations.

To date, E.O. 13771 has led to a [sharp reduction](#) in the issuance of new regulations, as well as to the modification and removal of some existing regulations. Nevertheless, Trump's initiatives have not come close to achieving his [promise of cutting regulations by 75%](#), and that is due to the regulatory process that previous reforms have instituted. To remove or revise an existing regulation, agencies must follow the notice-and-comment procedures of the APA to build a regulatory record they can defend in court. They must also demonstrate that the benefits of proposed deregulatory actions outweigh the costs.

Whether Trump's policies become a permanent fixture of the U.S. regulatory landscape remains to be seen. The next president could rescind his executive orders with the stroke of a pen. Like earlier milestones in regulatory reform, the nascent regulatory budget has been initially controversial, and it is too soon to tell whether it will achieve comparable durability. Looking back, however, it is striking to see the degree of bipartisan consensus on the need to develop practical tools for managing the administrative state. As President [Carter's Economic Report of the President](#) concluded in 1980:

The Nation must recognize that regulation to meet social goals competes for scarce resources with other national objectives. Priorities must be set to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits. Admittedly, this is an ideal that can never be perfectly realized, but tools like the regulatory budget may have to be developed if it is to be approached.



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