
OVERSIGHT AND INSIGHT: LEGISLATIVE REVIEW OF AGENCIES AND LESSONS FROM THE STATES

The Vermont Yankees of the Founding generation never would have foreseen a Supreme Court case like *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,¹ precisely because they never would have imagined the way in which the U.S. government would become an administrative state, a government not limited to the three branches laid out in the Constitution, but rather infused with — perhaps dominated by — hundreds of administrative agencies charged with the everyday business of governance.² Indeed, administrative agencies have become a prominent feature of the national government, and their rise has engendered many constitutional battles regarding their legitimacy — and correspondingly, much scholarly ink.

The dominance of agencies is not limited to the federal sphere, however. To take but one of fifty examples, the state of Connecticut boasts a wide range of agencies that includes departments of agriculture, consumer protection, education, environmental protection, and labor.³ As a result, states must grapple with the same types of issues that vex national actors, such as the sort of public notice that agencies must provide before they issue regulations and the appropriate scope of judicial review of agency decisions.

This Note seeks to answer a question implicitly left open by the Supreme Court's opinion in *INS v. Chadha*,⁴ which deemed unconstitutional Congress's use of a legislative veto to overturn agency decisions⁵: how should legislative oversight fit into the modern administrative state?⁶ To answer this question, the Note draws on a generally overlooked source of comparison — practice at the level of individual states. An examination of the interaction of agencies and legislatures

¹ 435 U.S. 519 (1978) (holding that courts cannot impose procedural requirements on agencies beyond those provided by statute).

² See Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 953 (1997) (“The Constitution established a system of lawmaking that was designed for a small eighteenth-century government of circumscribed powers. An essentially three-headed legislature — Senate, House of Representatives, and President — would enact statutes, but not many, because of the transaction costs of tricameralist legislating. A tiny judiciary would make additional law by interpretation and by common law rulemaking, but it would not make much additional law . . .”).

³ For a complete list of Connecticut's agencies, see State of Conn., Connecticut's Executive Branch of Government, <http://www.ct.gov/ctportal/cwp/view.asp?a=843&q=246450> (last visited Nov. 10, 2007).

⁴ 462 U.S. 919 (1983).

⁵ *Id.* at 959.

⁶ Agencies engage in all sorts of actions, but this Note focuses on their promulgation of regulations in the service (or putative service) of particular statutes.

at the state level demonstrates what is missing at the national level: deliberate, systematic review of agency regulations. This gap seems particularly stark in light of the federal executive's centralized and fairly systematic review of agency rulemaking, as well as Congress's fairly comprehensive oversight in an area like the budget. An examination of state practices in this area strongly suggests the need for structural reforms at the national level, reforms which might seem unrealistic at first blush, but which have already been floated by some commentators and members of Congress.

This Note proceeds in three parts. Part I describes legislative oversight of agency rulemaking at the federal level, including the fairly recent innovation of the Congressional Review Act⁷ (CRA), and highlights differences between congressional and executive oversight of agency rulemaking. Part II describes legislative oversight of administrative regulations at the state level, painting in particular detail the interactions between agencies and legislatures in two states — Alaska and Connecticut — and suggesting that it is very much possible for legislatures to provide systematic review of agency rulemaking. Part III evaluates the need for change at the national level and proposes structural reforms.

I. "THE" ADMINISTRATIVE STATE: AGENCIES, CONGRESS, AND COURTS AT THE NATIONAL LEVEL

By sanctioning the proliferation of agencies but imposing a sizable number of procedural constraints on them, the Administrative Procedure Act⁸ (APA), enacted in 1946, marked a compromise between those who feared the rise of administrative agencies and questioned their constitutionality and those who believed that agencies were a necessary component of the modern state.⁹ The APA's provisions, however, did not address many larger, structural concerns raised by the administrative state, including the balance of power among Congress, the federal courts, and the executive branch in controlling these agencies. This Part addresses the important, often constitutional, questions relating to legislative oversight of the administrative state, focusing in particular on the post-*Chadha* relationship between Congress and agencies. It then contrasts legislative mechanisms of overseeing agencies with those employed by the executive branch and those used by Congress in other contexts.

⁷ 5 U.S.C. §§ 801–808 (2000).

⁸ 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004).

⁹ See Posner, *supra* note 2, at 953–54.

A. Congressional Control of Agency Rulemaking

Congress enjoys the ability to delegate significant tasks to agencies but does not have unlimited control over decisions that those agencies subsequently make. The Supreme Court has upheld Congress's ability to assign rulemaking authority to agencies so long as the delegating statute contains an "intelligible principle" to guide the agency.¹⁰ The *Chadha* Court, however, struck down Congress's attempt to maintain control over agency decisions by inserting legislative veto provisions into some of its delegations to agencies.¹¹ In *Chadha*'s wake, commentators suggested a number of ways in which Congress could maintain oversight over agencies, such as by imposing sunset provisions on agency rules.¹² In fact, Congress has not been as aggressive as it could have been in responding to the decision. It was not until the Republican Revolution in the mid-1990s that Congress adopted a statutory scheme providing a post-*Chadha* mechanism for legislative review of agency rules.¹³

The following inventory, setting forth some of the more prominent oversight tools currently used by Congress,¹⁴ demonstrates that congressional oversight proceeds in a spotty fashion, with particularly topical regulations far more likely to receive attention than ones with little or no political salience. The normative implications of this dynamic are discussed below in Part III.

1. *Committee Hearings.* — Numerous congressional committees and subcommittees share the work of overseeing the federal regulatory state. Scholars have differing normative views about the oversight conducted by congressional committees, with some claiming that committees are "opportunistic entrepreneurs of regional and special interest pandering whose preferences are likely to depart wildly from

¹⁰ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix [tariff] rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). The Supreme Court recently reaffirmed the "intelligible principle" standard in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

¹¹ *INS v. Chadha*, 462 U.S. 919, 959 (1983). Generally speaking, a legislative veto allows for one or both houses of the legislature to overturn an agency decision by a resolution, meaning that executive approval is not required. A legislative veto was first adopted at the national level in 1932; when the Court decided *Chadha* in 1983, approximately two hundred legislative vetoes were on the books. See Richard B. Smith & Guy M. Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983).

¹² See, e.g., Smith & Struve, *supra* note 11, at 1261–62.

¹³ See *infra* pp. 616–18.

¹⁴ For a rather exhaustive recent survey of congressional methods of controlling and overseeing agencies, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69–139 (2006).

those of the median legislator” and others claiming that “the data reveal committees acting as faithful agents of the chamber majority.”¹⁵

But even if committee members diligently represent the congressional majority, committee oversight creates something of a patchwork system, with some agencies receiving substantial oversight attention from any number of different committees and other agencies being the subjects of far less congressional interest. For instance, legislators have clamored to exercise oversight authority over the often contentious decisions made by administrators of the Environmental Protection Agency (EPA), which has jurisdiction over areas such as vehicle emission standards, endangered species protection, and hazardous waste disposal. As a result, dozens of House and Senate committees and subcommittees exercise jurisdiction over the EPA, and legislators have often been very vocal about their contempt for EPA decisions.¹⁶

The EPA stands out because congressional interest in its regulatory decisions is something of an exception; indeed, “[e]ven the Defense Department has appeared less often than EPA in some sessions of Congress.”¹⁷ But the EPA example also demonstrates a more general point: the intensity of congressional committee oversight is often tied to partisan considerations. This dynamic was evident after the Democratic Party took over both houses of Congress in the fall of 2006, and Democratic committee members targeted actions that had been undertaken by Republican-administered agencies during the previous, Republican-dominated Congress. Consider, for example, the oversight priorities of the House Committee on Natural Resources.¹⁸ The committee’s post-election oversight agenda was directed at specific regulations promulgated by the Bush Administration that it deemed problematic, such as the Administration’s issuance of a rule cutting back on Clinton-era grazing reforms and its refusal to implement a water recycling program that a 1992 statute had placed under the direction of the Bureau of Reclamation.¹⁹

2. *The Congressional Review Act of 1996.* — The CRA was born in a politically charged atmosphere: the Republican Revolution of the mid-1990s. With the CRA, a reform-minded Republican Congress created what its members believed to be the “ultimate weapon for

¹⁵ PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 210 (10th ed. 2003).

¹⁶ See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of the EPA: Quis Custodiet Ipsos Custodes (Who Will Watch over the Watchers Themselves?)*, *LAW & CONTEMP. PROBS.*, Autumn 1991, at 205, 210–18.

¹⁷ *Id.* at 212.

¹⁸ See Comm. on Natural Res., Oversight Plan, <http://resourcescommittee.house.gov> (follow “About the Committee” hyperlink; then follow “Oversight Plan” hyperlink) (last visited Nov. 10, 2007).

¹⁹ *Id.*

curbing big government,” a means of “wresting back power from the agencies and the executive branch, which had become increasingly involved in regulatory policy and review.”²⁰

The CRA sets up a system that avoids the problems of the legislative veto scheme invalidated in *Chadha* but still allows Congress the opportunity to disapprove of proposed regulations before they take effect. It requires that before a new rule²¹ can go on the books, the issuing agency must submit to each house of Congress and the Comptroller General a report that includes the proposed regulation along with a concise general statement that specifies whether the rule is a “major rule”²² and its proposed date of effect.²³ Upon receiving this report, each house must provide a copy of it to the chair and ranking member of each standing committee that could report a bill amending the law under which the regulation was promulgated.²⁴ For major rules, the Comptroller General is required to provide a report about the proposed rule to the congressional committees with jurisdiction over the rule within fifteen days of Congress’s receiving the agency’s report.²⁵ A major rule cannot go into effect until at least sixty days after the agency has given its report to Congress.²⁶

Additionally, the CRA creates an expedited review process for a joint resolution that would prevent a rule from taking effect if the resolution is introduced within sixty days of the filing of the agency’s report in Congress. The Act provides the boilerplate language for such a resolution and creates special procedures for the Senate’s consideration of such a resolution that bypass some of the time-consuming processes generally in place — for instance, limiting debate on the resolu-

²⁰ Cindy Skrzycki, *Reform’s Knockout Act, Kept Out of the Ring*, WASH. POST, Apr. 18, 2006, at D1.

²¹ The CRA defines “rule” to include everything encompassed in § 551 of the APA, with some explicit exceptions, rather than simply those rules that are subject to notice-and-comment rule-making procedures. 5 U.S.C. § 804(3) (2000). Daniel Cohen and Professor Peter Strauss argue that including interpretive rules, policy statements, technical manuals, and the like within the ambit of the CRA was inconsistent with the nature of these sorts of agency actions: “[W]hile the diction of section 801, the operative section, seems to have ‘legislative’ rules in view, the effect of the definitional provision may be to impose new procedural requirements on other forms of rule-making.” Daniel Cohen & Peter L. Strauss, Recent Development, *Regulatory Reform & the 104th Congress: Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 97 (1997).

²² A rule qualifies as a “major rule” if the Office of Management and Budget determines that it is likely to result in an effect on the economy of \$100 million or more per year; a “major increase” in costs or prices for consumers, industries, government agencies, or geographic regions; or “significant adverse effects” on innovation, investment, productivity, or the international competitiveness of U.S. businesses. 5 U.S.C. § 804(2)(A)–(C).

²³ *Id.* § 801(a)(1)(A).

²⁴ *Id.* § 801(a)(1)(C).

²⁵ *Id.* § 801(a)(2)(A).

²⁶ *Id.* § 801(a)(3)(A).

tion to ten hours.²⁷ If a joint resolution is signed by both houses and approved by the President, the agency is forbidden from subsequently issuing a rule that is “substantially the same” as the one disapproved.²⁸

The CRA has not effected the significant changes that its sponsors envisioned. Between 1996 and 2006, agencies reported to Congress 41,218 non-major rules and 610 major rules, but only 37 joint resolutions of disapproval (relating to 28 different rules) were introduced under the Act, and only one of these resolutions became law.²⁹ Fitting with the CRA’s genesis, these attempts to use the statute have generally involved politically charged contexts.³⁰ Indeed, the one successful CRA joint resolution involved an ergonomics regulation that the Office of Safety and Health Administration (OSHA) had issued in the final days of the Clinton Administration. With President George W. Bush in the White House, congressional Republicans seized the opportunity to use the CRA to attack a regulation that they feared would have an inordinate effect on businesses:

The estimated cost of compliance for [OSHA’s] 600-page plan to regulate every nook and cranny of American workplaces ranged into the hundreds of billions of dollars. No one could even guarantee that OSHA’s proposal would protect workers from injury — but we do know that businesses would have to terminate employees just to be able to afford to implement the plan.³¹

Not surprisingly, some commentators have argued that the CRA, as exemplified by its lone successful use, serves to promote special interests — in this case, businesses concerned about keeping costs low — rather than to increase accountability in the rulemaking process.³²

Other situations in which resolutions were introduced under the CRA were also politically charged, including an unsuccessful effort by Senate Democrats to challenge a Bush Administration rule allowing power plants to use tradable pollution permits for mercury emissions³³ and an attempt to challenge highly visible and widely criticized Federal Communications Commission (FCC) rules that would have made it easier for media conglomerates to obtain new markets.³⁴

²⁷ See *id.* § 802(c)–(d).

²⁸ *Id.* § 801(b)(2).

²⁹ Skrzycki, *supra* note 20.

³⁰ Appropriately enough, one piece describing the CRA’s history is entitled “Lessons in Politics.” Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003).

³¹ 147 CONG. REC. 3317 (2001) (statement of Rep. Oxley).

³² See Parks, *supra* note 30, at 199–200.

³³ The rule pitted health and environmental activists against those who sought a more market-based approach to pollution problems. See Michael Janofsky, *Senate Rejects Call on E.P.A. To Toughen Emission Rule*, N.Y. TIMES, Sept. 14, 2005, at A16.

³⁴ See Enrique Armijo, Recent Development, *Public Airwaves, Private Mergers: Analyzing the FCC’s Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482,

3. *Appropriations Riders.* — One final mechanism of congressional oversight that merits mention is Congress's power of the purse: in particular, its ability to control agency rulemaking by attaching to appropriations bills specific riders that limit agency decisionmaking. For instance, with respect to the heated issue of ergonomics regulations, a Republican Congress resisted President Clinton's expressed desire to promote such regulations by including in an appropriations bill a rider specifying: "None of the funds made available in this Act may be used by the Occupational Safety and Health Administration . . . to promulgate or issue any proposed or final standard or guideline regarding ergonomic protection."³⁵ Similarly, a Democratic Congress frequently used such riders in the 1980s to limit the Reagan Administration's ability to promulgate or even study certain rules. For example, when the FCC was considering eliminating the preference that it gave to women and minorities in issuing broadcast licenses, Congress attached riders to appropriations bills that prevented the FCC from reconsidering or changing these preferences.³⁶ The use of politically driven appropriations riders, like the politically motivated invocations of the CRA and the use of politically charged committee oversight, reinforces the notion that congressional oversight is spotty and often dependent on a rule being particularly salient or controversial.

B. *Executive Oversight of Agency Rulemaking*

In contrast to Congress's rather reactive methods of overseeing agency rulemaking, the President has come to play an increasingly significant role in such oversight. The executive's increasing desire to control administrative agencies' decisions culminated in President Reagan's decision to assign the responsibility of reviewing proposed regulations to the Office of Information and Regulatory Affairs (OIRA), an office within the Office of Management and Budget (OMB).³⁷ Thus, the result of executive attempts to increase oversight

1486–88 (2004). The FCC received over 520,000 negative comments from the public in response to the proposed rule. *Id.* at 1486–87.

Of course, one might contend that Congress has used the CRA so rarely because agencies conform their rulemaking to congressional preferences in order to avoid CRA action. However, the CRA would have to have been used frequently when it was first enacted — before agencies had the opportunity to conform their behavior with congressional preferences — for this dynamic to be a likely explanation. Rather, the fact that the CRA was never vigorously used suggests that agencies have every reason to believe that it never will be.

³⁵ Department of Labor Appropriations Act of 1996, Pub. L. No. 104-134, § 102, 110 Stat. 1321-211, 1321-220.

³⁶ See Beermann, *supra* note 14, at 86.

³⁷ See Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128–30 (1981) (revoked 1993) (requiring major regulations to include a regulatory impact analysis to be reviewed and approved by OIRA); *see also* Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (revoked 1993) (requiring submission by agencies of regulatory plans for OMB approval).

“is that a centralizing and rationalizing body, housed within OMB and devoted to regulation, has emerged as an enduring, major, but insufficiently appreciated part of the national government.”³⁸

A Clinton-era Executive Order relating to OIRA’s oversight role states that OIRA is responsible for “provid[ing] meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive order.”³⁹ In order to accomplish such review, the Executive Order sets forth specific guidelines for agencies and OIRA to follow. All agencies must provide OIRA with a list of proposed regulations, indicating which qualify as “significant.”⁴⁰ Regulations not designated as significant are not subject to OIRA review unless OIRA notifies the agency within ten days that the regulation is in fact significant.⁴¹ For significant regulations, unless OIRA waives review,⁴² the agency must provide OIRA with a “reasonably detailed description” of the necessity for the regulation and an assessment of its costs and benefits, as well as a statement of the statutory authority for the regulation.⁴³ If OIRA returns some or all of a regulation to an agency for reconsideration, OIRA must provide a written explanation for the return; if the agency’s head disagrees with the reasons for return, he must notify OIRA in writing.⁴⁴ Regulations can be published in the Federal Register only after OIRA has waived review, failed to make objections within the required time period, or completed review “without any requests for further consideration.”⁴⁵ The President may be consulted to resolve the conflict if OIRA insists on reconsideration and the agency firmly disagrees.⁴⁶

Recently, OIRA has reviewed between 600 and 700 regulations per year and has frequently required agencies to make changes in order for rules to be considered consistent with executive branch policy. For in-

³⁸ Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 16 (1995).

³⁹ Exec. Order No. 12,866, § 6(b), 3 C.F.R. 638, 646 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

⁴⁰ *Id.* § 6(a)(3)(A), 3 C.F.R. at 645. Whether a regulation is “significant” depends on its potential effects on the economy, its consistency with the actions of other agencies, its impact on the budget, and its potential to raise certain types of novel legal or policy issues. *Id.* § 3(f)(1)–(4), 3 C.F.R. at 641–42.

⁴¹ *Id.* § 6(a)(3)(A), 3 C.F.R. at 645.

⁴² *See id.* (“The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant . . .”).

⁴³ *Id.* § 6(a)(3)(B)(i)–(ii). If the regulation is significant because of its potential effects on the economy, the agency must provide OIRA with additional information, including an assessment of the costs and benefits of feasible alternatives to the regulation. *Id.* § 6(a)(3)(C), 3 C.F.R. at 645–46.

⁴⁴ *Id.* § 6(b)(3), 3 C.F.R. at 647.

⁴⁵ *Id.* § 8, 3 C.F.R. at 648–49.

⁴⁶ *Id.*; *see also id.* § 7, 3 C.F.R. at 648 (setting forth procedures for presidential resolution of disagreements between agencies and OIRA).

stance, in 2006, the agency reviewed exactly 600 rules, with an average review time of 56 days per regulation.⁴⁷ OIRA deemed 159, or 26.5%, of these regulations to be “consistent” without needing alterations and 415, or 69.2%, to be consistent after some changes were made.⁴⁸

The executive review of agency rulemaking that occurs through OIRA suggests that centralized and relatively systematic review of agency decisions is quite possible, and also that an interbranch imbalance exists, potentially leading agencies to be more concerned with executive than legislative reaction to their decisionmaking. The existence of such executive oversight also suggests the potential for coordination — for instance, Congress could adopt the executive’s definition of “significant” regulations and focus on reviewing those regulations so designated, or require agencies to submit to it the same statements and assessments that they provide to OIRA in order to save them the time and expense of producing additional documentation.

C. Other Congressional Oversight

Meanwhile, the existence of the Congressional Budget Office (CBO), as well as centralized budget committees in both houses, suggests that Congress is capable of employing experts and streamlining processes to manage a complex policy area — notably, like regulatory review, one requiring extensive interactions with the executive — and raises the question why it does not also do so in the regulatory context. Indeed, Congress has created a system of relatively systematic oversight to rectify an interbranch imbalance with respect to the budget. Relations between the executive and Congress regarding the budget deteriorated significantly during the late 1960s and early 1970s.⁴⁹ One result of these tensions was the Congressional Budget and Impoundment Control Act of 1974,⁵⁰ which, among other things, established the CBO as an office of experts within Congress to rectify the fact that “Congress had been at a disadvantage because it lacked its own budget analysts and policy experts.”⁵¹ According to Professor William

⁴⁷ All statistics relating to OIRA review of regulations are available to the public at General Services Administration, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Nov. 10, 2007). For each year, the number of reviews reported here can be obtained by setting the start date as “01/01/YEAR” and the end date as “12/31/YEAR.”

⁴⁸ *Id.* OIRA’s public records do not indicate the particular sorts of changes made to each regulation, leading one public watchdog group to complain that “[a] change for clarity, such as the insertion of a comma, is reported in the same manner as a change in substance that affects the very nature of the regulation.” OMB Watch, OMB Changes Difficult To Document (Sept. 4, 2002), <http://www.ombwatch.org/article/articleview/1073/1/132?TopicID=3>.

⁴⁹ See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 425 (3rd ed. 2001).

⁵⁰ Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 and 31 U.S.C.).

⁵¹ ESKRIDGE ET AL., *supra* note 49, at 430.

Eskridge, “[o]ne of the lasting effects of the 1974 Act has been the production and dissemination of a flood of budget information and a substantial improvement in the expertise available to lawmakers.”⁵²

It is also worth noting proposals that have been made to centralize congressional oversight in another area: intelligence. The 9/11 Commission Report, released in 2004, decried the “dysfunctional” nature of current congressional oversight of intelligence and suggested two alternatives, one of which is the creation of a Joint Committee on Intelligence (JCI) that would be modeled after the Joint Committee on Atomic Energy (JCAE).⁵³ The JCAE was created in 1946, the same year that the Atomic Energy Commission was established; it consisted of eighteen members, with an equal number from each house; and it had the “unique” ability to report legislation to the floors of both houses of Congress.⁵⁴ The 9/11 Commission suggested the JCAE as a model for the JCI on account of several of its achievements, including its “largely bipartisan approach,” the “considerable unity among its members,” its “close working relationship with the executive,” and its “ability to streamline the legislative process.”⁵⁵ Although Congress has not yet adopted the JCI proposal, the 9/11 Commission’s recommendation reinforces the idea that centralized congressional oversight is valuable in contexts that involve complex decisions and frequent legislative-executive interactions.

II. THE OTHER ADMINISTRATIVE STATES: AGENCIES, LEGISLATURES, AND COURTS AT THE STATE LEVEL

Legal scholarship generally focuses on national rather than state government and as a result tends to overlook potentially valuable les-

⁵² *Id.* Additionally, the 1974 Act created designated House and Senate budget committees on top of the existing committee structure. *See id.* at 431.

The CBO currently employs about 230 people, and approximately seventy percent of its professional staff have advanced degrees in economics or public policy. CBO, Staffing and Organization, <http://www.cbo.gov/aboutcbo/organization> (last visited Nov. 10, 2007). The CBO sees itself as an office of experts charged with serving members of Congress by providing them with comprehensive, nonpartisan analysis; its reports contain no policy recommendations. *See* CBO, CBO’s Role in the Budget Process, <http://www.cbo.gov/aboutcbo/budgetprocess.shtml> (last visited Nov. 10, 2007).

⁵³ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 420 (2004) [hereinafter 9/11 COMMISSION REPORT].

⁵⁴ CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES 4–5 (2007), available at <http://www.fas.org/sgp/crs/intel/RL32525.pdf>.

⁵⁵ *Id.* at 5. The JCAE was dissolved in 1977 for a number of reasons, including the breakup of the Atomic Energy Commission and the fact that the “expanding nature of atomic energy and nuclear power” increasingly brought those areas under the jurisdiction of other congressional committees. *Id.*

sons that can be gleaned by considering state practices.⁵⁶ This Note attempts to buck that trend and, as a point of comparison with congressional oversight of agency rulemaking, considers legislative oversight of agency rulemaking at the state level, in particular the practices in two states: Alaska and Connecticut.⁵⁷

The 1981 Model State Administrative Procedure Act (Model State APA), drafted by the National Conference of Commissioners on Uniform State Laws, suggests one method of comprehensive legislative oversight of agencies. It calls for the creation in state legislatures of a bipartisan, joint legislative committee called the Administrative Rules Review Committee that consists of three representatives appointed by the speaker of the house and three senators appointed by the president of the senate.⁵⁸ This committee is charged with “selectively review[ing] possible, proposed, or adopted rules.”⁵⁹ It can require a representative of the promulgating agency to attend a committee meeting and answer questions, and also can require the agency to respond to comments in writing.⁶⁰ If the committee thinks that a rule (or part of a rule) should be superseded by statute, it can make that recommendation to the speaker of the house or the president of the senate, who in turn will refer the recommendation to the appropriate standing committees of the legislature.⁶¹ Meanwhile, if the committee thinks that a rule (or part of a rule) is “beyond the procedural or substantive authority delegated to the adopting agency,” it may file its objection with the secretary of state.⁶² Within fourteen days, the agency must respond to the committee in writing, at which point the committee may elect to modify or withdraw its objection.⁶³ If the objection remains, it will be noted next to the rule when the rule is published in the state’s admin-

⁵⁶ For instance, a search of the LEXIS law reviews and journals database for the search term “Model State APA” produces a mere thirty-seven results; a search of the same database for the term “APA” yields more than three thousand hits.

⁵⁷ Alaska and Connecticut are chosen because they employ regulatory review committees that function differently. The two states also differ in the degree of the professionalization of their legislature: according to the National Conference of State Legislatures, Alaska has a “red” legislature, meaning that “legislators are paid enough to make a living without requiring outside income. These legislatures are most like Congress.” Nat’l Conf. of State Legislatures, Full- and Part-Time Legislatures (Jan. 2007), http://www.ncsl.org/programs/press/2004/backgrounder_fullandpart.htm. Meanwhile, Connecticut fits into the category of “white” legislatures, which are “hybrids” that fall between highly professional “red” and less professional “blue” legislatures. *Id.*

⁵⁸ See MODEL STATE ADMIN. PROCEDURE ACT § 3-203 (1981), available at <http://www.nmcpr.state.nm.us/acr/presentations/1981MSAPA.htm>.

⁵⁹ *Id.* § 3-204(a).

⁶⁰ *Id.* § 3-204(b).

⁶¹ *Id.* § 3-204(c). The Act makes clear that the existence of the Administrative Rules Review Committee does not preclude standing committees of the legislature from reviewing agency rules (and recommending statutory changes) on their own prerogative. *See id.*

⁶² *Id.* § 3-204(d)(1).

⁶³ *Id.* § 3-204(d)(4).

istrative code, and in any judicial proceeding the burden will be on the agency to demonstrate that the rule falls within the authority delegated to it.⁶⁴ The committee also can recommend that an agency promulgate a rule and require that an agency publish notice of such a recommendation as a proposed rule.⁶⁵

Although the Model State APA has not been adopted wholesale in every state, some states have heeded its recommendation and created joint regulatory review committees as standing committees in their legislatures. The following case studies highlight two different ways in which such regulatory review committees function.

A. Alaska

Alaska created its Administrative Regulation Review Committee to respond to the “need for prompt legislative review of administrative regulations.”⁶⁶ The committee consists of three members of the state’s house of representatives and three members of the state’s senate, with the requirement that the membership from each house consist of at least one member of each major political party.⁶⁷ The committee’s powers include reviewing “all” administrative regulations — including proposed regulations, amendments, and orders of repeal — “to determine if they properly implement legislative intent” and “to provide comments on them to the governor and state agencies.”⁶⁸ The committee also receives and investigates any other legislative standing committee’s findings that regulations falling within its purview fail to implement legislative intent properly.⁶⁹ In carrying out these responsibilities, the committee has the ability to hold public hearings and require state agencies and officials to provide it with any necessary information.⁷⁰

If the committee decides that a regulation should be repealed or amended, it does not have the ability to void or change the regulation unilaterally. Rather, it must propose a corrective statute and proceed through regular legislative channels.⁷¹ However, if the legislature is not in session, the committee can, by a vote of two-thirds, suspend the

⁶⁴ *Id.* § 3-204(d)(3), (5).

⁶⁵ *Id.* § 3-204(e).

⁶⁶ ALASKA STAT. § 24.20.400 (2006).

⁶⁷ *Id.* § 24.20.410.

⁶⁸ *Id.* § 24.20.460(4).

⁶⁹ *Id.* §§ 24.05.182, 24.20.460(8). Standing committees that receive notice of proposed regulations, amendments, or repeals are required to review the regulation, amendment, or repeal to determine whether it “properly implements legislative intent.” *Id.* § 24.05.182. If the committee determines that the regulation, amendment, or repeal fails to implement legislative intent, it reports its findings to the Administrative Regulation Review Committee. *Id.* § 24.05.182(d).

⁷⁰ *Id.* § 24.20.460(2)–(3).

⁷¹ *See id.* § 24.20.460(8).

effectiveness of a regulation or amendment to a regulation that had been adopted after the conclusion of the previous regular legislative session until thirty days after the legislature reconvenes.⁷²

The committee's activities suggest that it is particularly concerned with securing the input of members of the public regarding how new regulations might affect them. For one thing, the committee compiles and makes available to the public summaries of proposed regulations, including the date of the scheduled public hearing and information regarding how members of the public can submit written comments to the promulgating agency. The committee notes that "[t]hese reports are for the purpose of providing a quick read on newly proposed regulations and newly adopted regulations to spark interested parties to take a closer look."⁷³ Press releases issued by the committee emphasize that its decisions to hold hearings on certain regulations are a response to the comments that the committee has received from concerned members of the public. For instance, in 2002 the committee decided to hold public hearings about new regulations for correspondence schools after receiving "a lot of written comment on the proposed regulations."⁷⁴ In 2005, the committee held a hearing regarding proposed assisted living home regulations after it was contacted by a number of assisted living home operators who feared that the new regulations would drive them out of business.⁷⁵ Public commentary at these hearings can be extensive. For instance, at a 2006 hearing about regulations proposed by the state's Department of Health and Social Services relating to durable medical equipment supplies, over a dozen members of the public — including representatives of assisted living homes and medical supply companies — came to testify before the committee, and the committee needed to hold two nearly two-hour long meetings in order to exhaust the discussion.⁷⁶

⁷² *Id.* § 24.20.445(a).

⁷³ Alaska Legislature, Admin. Regulation Review Comm., Reports, <http://arr.legis.state.ak.us/reports.htm> (last visited Nov. 10, 2007) (emphasis added).

⁷⁴ Press Release, Alaska State Legislature, Admin. Regulation Review Comm., Committee To Take Up School Regulations (Mar. 15, 2002) (quoting Rep. McGuire), available at <http://www.akrepublicans.org/pastlegs/22ndleg/pdf/prmcguire103152002.pdf>.

⁷⁵ Press Release, Alaska State Legislature, Admin. Regulation Review Comm., Committee To Hear Concerns of Assisted Living Home Operators (Mar. 1, 2005), available at http://arr.legis.state.ak.us/newsrelease_3-1-2005.pdf.

⁷⁶ See *Changes to Regulations Adopted by Department of Health and Social Services 1/11/06 Regarding Durable Medical Equipment Supplies: Hearing Before the Admin. Regulation Review Comm.*, 2006 Leg., 24th Sess. (Alaska 2006), available at http://www.legis.state.ak.us/basis/get_minutes_comm.asp?hse=H&session=24&comm=ARR&date=20060222&time=0837; *Changes to Regulations Adopted by DHSS 1/11/06 Re: Durable Medical Equipment Supplies: Hearing Before the Admin. Regulation Review Comm.*, 2006 Leg., 24th Sess. (Alaska 2006), available at http://www.legis.state.ak.us/basis/get_minutes_comm.asp?hse=H&session=24&comm=ARR&date=20060221&time=1526.

The committee's responses to public concerns and testimony have included encouraging agencies to take such concerns into consideration,⁷⁷ as well as using the threat of legislative nullification to pressure agencies to respond. For instance, at the end of its hearing about assisted living homes, the committee's chair informed those present, including representatives of the promulgating agency, that "at this stage these regulations are unacceptable," and if necessary he would "sponsor legislation in the next month to address these regulations."⁷⁸ In some situations, the committee has gone ahead with introducing a disapproval resolution when an agency has refused to address its concerns, as it did in 2002 when the Division of Occupational Licensing promulgated regulations that interpreted statutory testing requirements for mechanical administrators in a way that the committee believed contradicted the statutory language. The committee's chair noted: "Even though the committee expressed clear concerns about this stance at an interim hearing, the division went ahead with its plans, in what I feel is a violation of state law. In the interests of proper separation of powers, this action cannot stand."⁷⁹ And in another situation, the committee undermined the floatplane regulations promulgated by an agency by forming its own ad hoc committee of legislators, airport managers, and representatives of the aviation community. The chair of the Administrative Regulation Review Committee made the pointed comment that "this group will help us get established on the *proper regulatory path*."⁸⁰

In 2004, a new law took effect in Alaska that created an additional mechanism of legislative oversight: the review of proposed regulations — including amendments to or repeals of regulations — by attorneys employed by the Legislative Affairs Agency of the Legislative Council, a joint committee of the state legislature that oversees general legisla-

⁷⁷ See, e.g., *DEC Proposed Changes to the Alaska Food Codes: Hearing Before the Admin. Regulation Review Comm.*, 2005 Leg., 24th Sess. (Alaska 2005), available at http://www.legis.state.ak.us/basis/get_minutes_comm.asp?hse=H&session=24&comm=ARR&date=20050420&time=1311 ("Vice Chair Therriault concluded by expressing his hope that the department would take today's comments into consideration as the regulation package moves forward.")

⁷⁸ *Overview: Assisted Living Home Regulations: Hearing Before the Admin. Regulation Review Comm.*, 2005 Leg., 24th Sess. (Alaska 2005), available at http://www.legis.state.ak.us/basis/get_minutes_comm.asp?hse=H&session=24&comm=ARR&date=20050303&time=1512.

⁷⁹ Press Release, Alaska State Legislature, Admin. Regulation Review Comm., Committee Seeks To Repeal Regulations (Jan. 30, 2002) (quoting Rep. McGuire) (internal quotation marks omitted), available at <http://www.akrepublicans.org/pastlegs/22ndleg/pdf/prmcguire101302002.pdf>.

⁸⁰ Press Release, Alaska State Legislature, Admin. Regulation Review Comm., McGuire Seeks Lake Hood Floatplane Solutions (Aug. 8, 2001) (emphasis added) (quoting Rep. McGuire) (internal quotation mark omitted), available at <http://www.akrepublicans.org/pastlegs/22ndleg/pdf/prmcguire108082001.pdf>.

tive matters.⁸¹ The attorneys give first priority to proposed regulations that would implement newly enacted statutes and then consider proposed regulations for which review has been requested in writing because the regulations implicate a “major policy development.”⁸² The Legislative Affairs Agency conducts its reviews of proposed regulations “[w]ithin available staff resources and priorities set by the legislative council” — meaning that it is up to the legislature how aggressively it wants to conduct such reviews.⁸³ In reviewing proposed regulations, the attorneys take into account the “legality and constitutionality” of the regulation, the existence of statutory authority for the agency to adopt the regulation, and the consistency of the regulation with applicable statutes.⁸⁴ If a reviewing attorney determines that the regulation fails to meet one of these criteria, he provides written notice to a number of parties, including the agency proposing the regulation and the Administrative Regulation Review Committee.⁸⁵ Additionally, he notifies the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives of any provision in the regulation that might be inconsistent with legislative intent and thus “appropriate for additional legislative oversight.”⁸⁶ The determinations of the attorney are not binding on the agency.⁸⁷

This new layer of review comes relatively early in the regulatory process — after the Department of Law has opened a file for the regulation but before the agency has provided public notice with respect to the regulation — and therefore addresses the problem that previously only the attorney general had formally reviewed regulations prior to their enactment, and his review had come relatively late in the process.⁸⁸ Legislators also liked the idea that the same attorneys who “actually draft the legislation that authorizes the regulations” would conduct the review and therefore would presumably be quite familiar with what the statute had intended.⁸⁹ Another goal of the law was to bring about a “more cooperative effort” between agencies and the legislature.⁹⁰ Additionally, the law addresses the problem that “the cost for a

⁸¹ See ALASKA STAT. § 24.20.105(a) (2006).

⁸² *Id.* § 24.20.105(b).

⁸³ *Id.* § 24.20.105(d).

⁸⁴ *Id.*

⁸⁵ *Id.* § 24.20.105(e).

⁸⁶ *Id.* § 24.20.105(f).

⁸⁷ *Id.* § 24.20.105(h).

⁸⁸ See *HB 424 — Regulation Review: Hearing Before H. Judiciary Comm.*, 2004 Leg., 23d Sess. (Alaska 2004) (statement of Barbara Cotting, representing Rep. Jim Holm), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=01376&end_line=01592&time=1320&date=20040227&comm=JUD&house=H.

⁸⁹ *Id.*

⁹⁰ *Id.*

poorly written regulation is millions of dollars” and parties cannot get relief until the administrative process is exhausted.⁹¹

In sum, legislative oversight in Alaska is selective but fairly comprehensive in that review is provided both before and after enactment and by both staff attorneys and committee members. The Administrative Regulation Review Committee is very much focused on public input, and its members see themselves as ombudsmen, protecting the public from regulation gone awry — and in doing so they cover a wide range of subject matter in a fair amount of depth.

B. Connecticut

Connecticut has a standing joint regulatory oversight committee — the Regulation Review Committee — that itself can exercise a veto over agency regulations. As the committee puts it: “[B]ecause administrative regulations have the force of law, a closer scrutiny and control by the legislative branch is clearly in the public interest to ensure that regulations do not contravene legislative intent.”⁹²

The committee consists of eight members of the state house of representatives, with four from each major political party, and six members of the state senate, with three from each major political party.⁹³ The adoption, amendment, or repeal of any regulation cannot go into effect until a copy, including a statement of purpose, has been provided to the committee⁹⁴ and the committee has approved the regulation.⁹⁵ Accordingly, the committee is charged with reviewing “all” proposed regulations and holding public hearings as appropriate.⁹⁶

After reviewing a regulation, the committee may elect to approve, disapprove, or reject it without prejudice.⁹⁷ If the committee disapproves a regulation, it must provide notice and the reasons for its disapproval to the promulgating agency, which then may not implement

⁹¹ *Id.* (statement of David Stancliff, representing Sen. Gene Therriault).

⁹² Conn. Gen. Assembly, Regulation Review Comm., 2007 Committee Rules [hereinafter Committee Rules], available at <http://www.cga.ct.gov/tr/2007RULES.htm>.

⁹³ CONN. GEN. STAT. § 4-170(a) (2007).

⁹⁴ *Id.* § 4-170(b)(1)–(3). The committee also requires that regulations include a “submittal letter summarizing why the regulation is being promulgated and what is included in the regulation and a summary of all public hearings held by the Agency or comments received concerning their proposed regulations.” Committee Rule 10, *supra* note 92. Additionally, for regulations submitted on or after March 7, 2007, the statement of purpose is to be “a detailed, plain language narrative” and include “the purpose of the regulation, including the problems, issues or circumstances that the regulation proposes to address,” a summary of the regulation’s major provisions, and “the legal effects of the regulation, including all the ways that the regulation would change existing regulations or other law.” *Id.*

⁹⁵ CONN. GEN. STAT. § 4-170(b)(1).

⁹⁶ *Id.* § 4-170(c).

⁹⁷ *Id.* If the committee fails to take any action with respect to a regulation within sixty-five days of its submission, the regulation is considered approved. *Id.*

the proposed regulation.⁹⁸ Once each year, the co-chairs of the committee are required to provide a list of all disapproved regulations to the General Assembly.⁹⁹ The speaker of the house and the president of the senate then refer the disapprovals to the standing committees with jurisdiction over the subject matter, and the committees must schedule hearings on the matter.¹⁰⁰ The General Assembly may, by means of a joint resolution, vote to sustain or reverse a vote of disapproval.¹⁰¹ However, the General Assembly need not act on the matter in order to sustain the committee's vote of disapproval: "If the committee disapproves a proposed regulation . . . no agency shall thereafter issue any regulation or directive or take other action to implement such disapproved regulation . . . provided the General Assembly *may reverse* such disapproval."¹⁰² On the other hand, if the committee rejects a regulation without prejudice, it must communicate its reasons to the agency, and if the regulation is required by statute, the agency must revise and resubmit the regulation within a specified time frame.¹⁰³ The agency may also revise and resubmit nonmandatory regulations.¹⁰⁴

To manage its significant responsibilities, the Regulation Review Committee is divided into twenty-seven subcommittees that correspond with various state agencies, such as the Department of Agriculture, the Department of Environmental Protection, the Department of Labor, and the Department of Special Revenue.¹⁰⁵ Records from the committee's meetings suggest that most of its work is done outside of these meetings, which take place once per month. At these seemingly perfunctory meetings, committee members vote on whether to approve (in whole or in part), reject without prejudice, or entirely disapprove regulations submitted to them. According to committee records, over the past five years the committee approved (again, either in whole or with technical corrections) 334 regulations, rejected 119 regulations without prejudice, and disapproved — and sent to the General Assembly — two regulations.¹⁰⁶ In other words, the committee ap-

⁹⁸ *Id.* § 4-170(d).

⁹⁹ *Id.* § 4-171.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* § 4-170(d) (emphasis added).

¹⁰³ *Id.* § 4-170(e).

¹⁰⁴ *Id.*

¹⁰⁵ See Conn. Gen. Assembly, Regulation Review Comm., Legislative Regulation Review Subcommittee Assignments, <http://www.cga.ct.gov/rr/RR.asp> (last visited Nov. 10, 2007).

¹⁰⁶ These calculations are based on a review of the committee's monthly meeting minutes from 2002 through 2006, all of which are available at <http://www.cga.ct.gov/rr>. In 2002, the committee approved 52 regulations, rejected 28 without prejudice, and disapproved 1; in 2003, the committee approved 49 regulations and rejected 25 without prejudice; in 2004, the committee approved 75 regulations and rejected 21 without prejudice; in 2005, the committee approved 93 regulations

proved of regulations 73% of the time, rejected regulations without prejudice 26% of the time, and disapproved regulations 0.4% of the time. Thus, the committee relies far more on the tool of rejecting a regulation without prejudice and requiring the promulgating agency to revise and resubmit it than it does on disapproving a regulation altogether and referring it to the legislature. The picture that emerges, then, is one of an active dialogue between legislators and agencies.¹⁰⁷ For instance, at its September 2006 meeting, the committee voted “[a]fter extensive questions” to return to the Department of Consumer Protection a regulation entitled “Administration of Influenza Vaccine by Pharmacists”;¹⁰⁸ the regulation was revised, resubmitted, and approved by the committee at its meeting two months later.¹⁰⁹ As further support for the notion of cooperation and engagement between the committee and various agencies, it is worth noting that the committee had not previously considered the two regulations that it disapproved, and so it was not the case that the agencies were refusing to accede to the committee’s requests. Rather, the two disapproved regulations were perhaps *sui generis*: one was an emergency regulation¹¹⁰ and the other was sufficiently controversial as to engender very rare “extensive discussion.”¹¹¹

Connecticut’s Regulation Review Committee thus differs from Alaska’s in at least two important respects: it must review all proposed regulations, and it has the ability unilaterally to prevent a proposed regulation from going into effect, as well as to require an agency to revise and resubmit a regulation that it does not deem acceptable. The committee’s records indicate that it does not simply serve as a rubber stamp, but rather that its members actively engage with regulations, frequently either approving them only with technical amendments or sending them back for committee revision.

and rejected 19 without prejudice; and in 2006, the committee approved 65 regulations, rejected 26 without prejudice, and disapproved 1.

¹⁰⁷ This notion is reinforced by the fact that the committee approves regulations with “technical corrections” rather than “as a whole” quite frequently, emphasizing its engagement with the regulations in question.

¹⁰⁸ Conn. Gen. Assembly, Legis. Regulations Review Comm., Meeting Minutes (Sept. 26, 2006) [hereinafter Minutes of Sept. 26, 2006], available at <http://www.cga.ct.gov/2006/RRdata/cm/2006CM-00926-R001100RR-CM.htm>.

¹⁰⁹ See Conn. Gen. Assembly, Legis. Regulations Review Comm., Meeting Minutes (Nov. 28, 2006), available at <http://www.cga.ct.gov/2006/RRdata/cm/2006CM-01128-R001100RR-CM.htm>.

¹¹⁰ See Conn. Gen. Assembly, Legis. Regulations Review Comm., Meeting Minutes (Mar. 26, 2002), available at <http://www.cga.ct.gov/2002/RRdata/cm/2002CM-00326-R001300RR-CM.htm>.

¹¹¹ Minutes of Sept. 26, 2006, *supra* note 108.

III. INSIGHTS INTO OVERSIGHT: APPLYING LESSONS FROM THE STATES

This Part attempts to apply the lessons of state-level practice to congressional oversight of agency decisionmaking. It begins by considering critically the value of increased congressional oversight, proceeds to evaluate various proposals for increasing congressional oversight, and concludes by presenting its own model for reform.

A. *A Need for Greater Congressional Oversight?*

Given that the Supreme Court has established a relaxed nondelegation doctrine — again, only an “intelligible principle” is required, and the Court has not been at all strict in determining what constitutes such a principle¹¹² — some sort of legislative check on federal agencies’ rulemaking is necessary to supplement deferential judicial review¹¹³ and ensure that regulations do not go beyond or improperly implement the statutes that authorized them. There is nothing inherently wrong with members of Congress acting most vigorously with respect to issues that are highly salient to their constituents; that is, after all, their job as representatives. However, the system of oversight as it currently exists makes it difficult for agencies to predict by whom, how, and how thoroughly their regulations will be reviewed, and also allows hundreds upon hundreds of regulations effectively to escape legislative oversight altogether. Thus, the problem is not that political salience plays a role in determining the extent of attention that a regulation receives, but rather that many — if not most — regulations receive no legislative oversight at all.

Moreover, the existence of relatively systematic oversight of agency rulemaking by the executive branch suggests both that more thorough review is possible and that an interbranch imbalance exists, one that very well might lead agencies to weigh the potential or expected reaction of the executive branch more heavily than that of Congress when promulgating regulations. Meanwhile, an examination of legislative oversight at the state level suggests that relatively systematic legislative oversight is possible. Indeed, the ad hoc nature of committee hearings, the CRA, and appropriations riders becomes particularly evident when these devices are contrasted with state-level practices, in

¹¹² See, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474 (2001) (noting that the Court has “found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition,’” and at the same time has found an intelligible principle in statutes containing such vague standards as “in the ‘public interest’”).

¹¹³ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984) (establishing a deferential standard of judicial review for agency regulations).

particular the existence of a dedicated regulatory review committee as suggested by the Model State APA and adopted in states like Alaska and Connecticut.

Of course, there might seem to be good practical reasons for the divergence in legislative oversight at the state and national levels: the federal government has many times more agencies than a state like Connecticut. However, it is also the case that state legislatures are far smaller, less professionalized, and in session less frequently than Congress.¹¹⁴ Alaska's legislature consists of forty representatives and twenty senators and is in session for no more than 120 days per year;¹¹⁵ Connecticut's legislature consists of 151 representatives and thirty-six senators and is in regular session from January to June in odd-numbered years and from February to May in even-numbered years.¹¹⁶ In any event, it would seem to be faulty logic to excuse Congress from overseeing agencies simply because Congress has elected to transfer so much authority to them; if Congress cannot monitor agencies, then perhaps it has no business creating them or assigning them so much power in the first place.

Additionally, a significant concern with increased congressional oversight is that the existence of yet another hurdle for agencies to surmount in promulgating regulations would encourage ossification, as agencies would keep the rules that are currently in place rather than go through the time-consuming and expensive process of creating new ones.¹¹⁷ However, it is not clear that congressional oversight would impose excessive burdens on agencies, especially if the agencies were not required to prepare any additional paperwork beyond that which they already submit to OIRA. It is also possible that ossification could be avoided if, in light of additional congressional oversight, courts chose to relax the standard of judicial review for those regulations that received some specified level of congressional attention.¹¹⁸

Finally, it is true that instituting additional review mechanisms would be costly. But it is also true that much money could be saved if problematic regulations were taken off the books — or never allowed in them in the first place. In other words, the cost-benefit analysis

¹¹⁴ See, e.g., Nat'l Conf. on State Legislatures, *supra* note 57.

¹¹⁵ See Alaska State Leg., Legislative Branch, <http://w3.legis.state.ak.us/misc/legbranch.php> (last visited Nov. 10, 2007).

¹¹⁶ See Conn. Gen. Assembly, Frequently Asked Questions: About the Connecticut General Assembly, <http://www.cga.ct.gov/asp/Content/FAQs.asp> (last visited Nov. 10, 2007).

¹¹⁷ For a discussion of concerns about ossification, see generally Thomas O. McGarrity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

¹¹⁸ Cf. Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking? A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1084-85 (1999) (suggesting that all proposed regulations be approved by Congress and that those that are the subject of floor debate receive judicial review only for "constitutional challenges").

does not necessarily cut in one direction because additional review would both expend and preserve time, money, and effort.

This Note thus takes the position that increased and more centralized congressional oversight of agency rulemaking is desirable, while acknowledging that this question is by no means uncontroversial.¹¹⁹

B. *Proposals for Reform*

The potential value of structural change in promoting congressional oversight of agency rulemaking is reinforced by the fact that such proposals have been made by members of Congress and commentators alike. For instance, the Congressional Office of Regulatory Analysis Creation Act,¹²⁰ introduced in the 105th Congress, would have created a new congressional office charged with “prepar[ing] its own regulatory impact analysis, including an assessment of costs and benefits of major regulations” — in other words, a regulatory counterpart to the CBO.¹²¹ The Regulatory Right-to-Know Act¹²² of the 106th Congress would have required the OMB to “submit an annual report to Congress providing an accounting statement of the costs and benefits of federal regulations,” and to receive input on this statement from the public and the CBO.¹²³ Morton Rosenberg of the Congressional Research Service has a much different proposal that would require that regulations be presented to Congress for approval before taking effect.¹²⁴ In order to make such a process feasible, Rosenberg envisions that an approval resolution would be introduced automatically upon the receipt of a proposed rule, and “[a]fter twenty days the joint resolution would be automatically discharged from committee, and ten days after that the joint resolution would be deemed passed by each house. Thus, the effectiveness of a noncontroversial rule would be delayed a total of thirty days.”¹²⁵

These proposals each have their own flaws. The two bills introduced in Congress seem primarily concerned with substantive outcomes — in particular, achieving deregulation by requiring additional consideration of cost-benefit analysis of proposed regulations.¹²⁶ Meanwhile, Congress’s experience under the CRA suggests that Ro-

¹¹⁹ For an alternative approach, see Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984), which argues that the current mode of congressional oversight — essentially responding to alarms — is preferable to a more centralized, proactive model.

¹²⁰ H.R. 1704, 105th Cong. (1997).

¹²¹ ESKRIDGE ET AL., *supra* note 49, at 493.

¹²² H.R. 1074, 106th Cong. (1999).

¹²³ ESKRIDGE ET AL., *supra* note 49, at 493.

¹²⁴ See Rosenberg, *supra* note 118, at 1084.

¹²⁵ *Id.*

¹²⁶ See ESKRIDGE ET AL., *supra* note 49, at 493.

senberg's proposal would lead to rubber-stamping far more than it would encourage informed deliberation; indeed, it seems to reinforce rather than address the sorts of structural problems this Note highlights, and could very well run into *Chadha* problems.¹²⁷ To avoid such problems, this Note draws on the Alaska and Connecticut experiences as well as another suggestion that Rosenberg made — this one to a House subcommittee reviewing the CRA in 2006 — that an additional House committee be created to review regulations and make recommendations to standing committees for possible CRA-related action.¹²⁸

This Note proposes the creation of a joint congressional committee that would, with the assistance of a sizable, nonpartisan staff of experts¹²⁹ and holding public hearings as necessary, systematically review proposed regulations and engage in dialogues with promulgating agencies with respect to the committee's concerns.¹³⁰ If the committee did not believe that the agency sufficiently addressed its concerns, the matter would be referred to standing committees in both houses with appropriate jurisdiction. If the committees introduced legislation within a specified period of time, expedited review procedures similar to those of the CRA would be in effect. This new joint committee would also be charged with providing oversight after enactment by soliciting public feedback, holding public hearings as appropriate, and referring concerns to the appropriate standing committees as necessary.

This proposal recognizes that oversight should not be entirely immune from politics while drawing on the lesson that benefits inhere in

¹²⁷ Rosenberg argues that his proposed process could survive *Chadha* scrutiny because Congress has the ability to determine its own internal procedures. See Rosenberg, *supra* note 118, at 1087–88. But his argument seems to ignore the fact that the legislative veto at issue in *Chadha* might also have been framed in such a way, as involving merely the creation of internal legislative procedures. More significantly, by allowing Congress to prevent a regulation from having the force of law, his proposal would have exactly the same effect as the disapproved legislative veto. There is no reason to think that the Court would be willing to draw a distinction based on the fact that Rosenberg's proposal would entail more internal congressional procedures than the *Chadha* provision.

¹²⁸ See Tom Gottlieb, *Review Act Faces Potential Overhaul*, ROLL CALL, Apr. 6, 2006, LEXIS, News Library, Rollcl File. Rosenberg asserted that such a proposal had the advantage of “eliminat[ing] the political problem of taking jurisdiction away from the jurisdictional committees.” *Id.* (internal quotation mark omitted).

¹²⁹ Cf. CONG. RESEARCH SERV., *supra* note 54, at 9 n.16 (noting that the 9/11 Commission recommended that the staff of the Joint Committee on Intelligence be “nonpartisan and work for the entire committee and not for individual members” (quoting 9/11 COMMISSION REPORT, *supra* note 53, at 420) (internal quotation mark omitted)).

¹³⁰ This committee, unlike its Connecticut counterpart, would not have the ability to prevent such regulations from taking effect because such a power would run into *Chadha* problems. Thus, the committee would be able to review regulations and voice concerns, but only subsequent congressional legislation, duly passed by both houses and signed into law by the President, could override the regulation.

designating a joint committee, staffed by experts, to conduct relatively systematic review. It also provides for review both at the time of enactment and once regulations are in place. The existence of legislative attention before or shortly after enactment could mean that problematic regulations either will never go into effect or will be wiped from the books before there is excessive reliance by — and costs are imposed upon — regulated parties and the public.¹³¹ Such a scheme also does not require that Congress overcome the inertia that develops once a regulation is in place. Meanwhile, post-enactment review — the kind currently dominant in Congress and also in place in Alaska — has the advantage of allowing those evaluating the regulation to see its actual impact, as opposed to the impact feared by those initially protesting the regulation.

Finally, it is worth noting that this sort of reform is something on which both parties might be able to agree, given Democrats' general concerns about a Republican administration failing to enforce certain statutes adequately and using regulations to implement policies Democrats would deem problematic, and Republicans' general concerns about overregulation.

CONCLUSION

Sixty years after the APA formally established the modern administrative state, much remains unresolved with respect to exactly how this administrative state ought to operate. Drawing on examples from two smaller administrative states, this Note attempts to cast fresh light on old but important debates and, in doing so, suggests that Congress ought to rethink its oversight of agencies.

And by using states as models, this Note takes an approach that even an old Vermont Yankee could appreciate.

¹³¹ See *supra* pp. 627–28.