Administrative Law and Regulation

Constitutional Restoration by Executive Order

*By John O. McGinnis**

Introduction

I offer here a fresh normative defense of the president's exercise of regulatory review authority and his role in enforcing federalism— responsibilities embodied in executive orders issued by President Ronald Reagan and continued in large measure by President William Jefferson Clinton.[1] These executive orders move in some measure toward the restoration of two central principles of the original Constitution—tricameralism (i.e., the combination of bicameralism and the presidential veto) and federalism. While the previous orders advance this constitutional restoration, further revisions would make the orders even more effective instruments of reviving the original constitution.

The federalism executive order[2] and the regulatory review executive order[3] revive the key constitutional principles of federalism and tricameralism and strengthen their objectives for the modern era. Through the federalism order, the president, within the discretion provided by regulatory statutes, can use his authority to revive sensible limitations on the national government by reserving to the states the authority to address regulatory problems within their jurisdictions and the authority to provide distinctive public goods appropriate to their citizens' preferences. Perhaps most importantly, the order may help revive the decentralized structure that the Framers believed essential to quicken the spirit of self-government within citizens of a continental republic.

For similar reasons, the president has incentives to revive the restraints on lawmaking that the original Constitution imposed through bicameralism and the presidential veto (tricameralism) and that have been eroded by the modern administrative state. Regulatory review by the Office of Information and Regulatory Affairs (OIRA), under presidential direction, compensates in some measure for the decline of tricameralism in the last sixty years. By allowing the president to monitor regulation by the executive branch, the regulatory review order also compensates for the loss of the veto power over government regulation that has resulted from broad delegation. Finally, the substance of the cost-benefit analysis mandated by the regulatory review order[4] helps screen public interest regulations from those sought by special interests—a core object of the constitutionalism.

Given this view of the federalism order and the regulatory review order as means toward constitutional restoration, this Essay presents suggestions for strengthening both these orders to better reflect their potential to restore the original constitutional structure. For instance, the federalism order should be revised to make more explicit the virtues of regulatory competition and to direct that, within the discretion provided by law the federal government should regulate only when state regulation would be inadequate to address the problem.

Turning to the regulatory review order, I suggest that just as bicameralism and the presidential veto apply to all bills, the regulatory review order should apply to all regulations to screen more comprehensively special interest regulations from public interest regulations. The regulatory review order should be extended to independent agencies. Furthermore, the regulatory review order should not impose restrictions on the delays that OIRA could impose in the course of its review unless the regulatory law at issue can be fairly read to require the implementation of a regulation by a specific date.

On the substance of cost-benefit analysis, this Essay recommends that the order be revised to take account of the dynamic costs of regulations. Just as the effects of tax revisions should take account of the resulting changes in taxpayer's behavior, so should the costs of regulations take account of changes in interest groups' behavior. If regulations make rent seeking more attractive, as they frequently do, such increased rent seeking decreases the productivity of society and must be reflected in any cost-benefit analysis.

I. The Background of the Current Executive Orders

Elected on a platform of restoring the authority of the states, President Ronald Reagan promulgated a federalism executive order, Executive Order 12,612.[5]

The order reasserts the doctrine of enumerated powers[6] and mandates that executive branch agencies recognize the distinction between what is best regulated nationally and what is best regulated locally.[7] In addition, the federalism order permits federal agencies to preempt state law only when a statute contains language clearly showing that Congress intended to preempt state law.[8]

President Clinton's final federalism order, Executive Order 13,132,[9] does not differ substantially from President Reagan's. It too reiterates the importance of federalism and although not setting forth a test as to what constitutes a national or local problem, Clinton's federalism order directs agencies to "consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means."[10] It also requires clear evidence of Congress's intention to preempt before permitting preemption, although the standard is slightly less emphatic than that in President Reagan's order.[11] Clinton's federalism order added the additional requirement that agencies provide, to the extent permitted by law, a waiver process to allow states that are accomplishing the same objectives with their own laws to be exempted from those aspects of a federal regulatory regime. [12]

President Reagan issued the regulatory review order, Executive Order 12,291,[13] shortly after he took office. The order required the agencies whose heads served at his pleasure to submit their major regulatory proposals to the Office of Information and Regulatory Affairs (OIRA), a unit of the Office of Management and Budget (OMB), together with a "regulatory impact analysis."[14] Only after OIRA signed off on their orders were the agencies permitted to issue the regulations; there were no time limits to the period OIRA could demand for completion of its review.[15] The order also established cost-benefit analysis as the overarching principle that would govern regulation, insofar as that principle was consistent with the agency's statutory framework.[16]

These orders continued in force during the presidency of George Bush, President Reagan's successor. In 1994 President Clinton issued Executive Order 12,866,[17] which maintained the principal objectives and structures of the Reagan executive orders while making some important changes. First, President Clinton modified the cost-benefit provisions, making it clear that government would take into account soft as well as hard costs and consider the "equity" and "distributive" consequences of regulation.[18] In response to critics of the secrecy of the regulatory review process, the new regulatory review order also required very substantial disclosure. In response to criticisms of the undue delays that OIRA imposed, Clinton's order imposed strict limits on the time OIRA could spend evaluating an agency's regulations.[19]

II. Constitutional Restoration Through Presidential Review

A. Reviving Constitutional Federalism

The president is the political actor most likely to revive the virtues of the Framers' federalism. To be sure, federal legislators are closer to their individual states than the president. But they are interested in the welfare of people in their individual states, not the welfare of the nation as a whole. Indeed, unlike the contribution that federalism makes to economic growth through jurisdictional competition, the geographic nature of representation at the federal level detracts from economic growth. For instance, each legislator has an incentive to bring back pork barrel legislation for his state despite the economic losses this causes the nation. In the case of spending, the representational nature of federalism can cause a geographic tragedy of the commons in which each representative has an incentive to overgraze the federal budget at the expense of the nation's economic prosperity. Exactly the same incentives work to the disadvantage of the nation at the regulatory level: each individual representative wants to obtain a regulatory framework that benefits his state even if it hurts the nation as a whole.

In contrast to their interest in bringing back pork, federal legislators do not have as strong an interest in strengthening state autonomy. Protecting autonomy has benefits that are much less visible to voters and thus do not advance the career prospects of politicians. Additionally, more powerful states mean more powerful state officials, and these officials represent an important source of competition for federal legislators for reelection (or, in the case of members of the House of Representatives, for both reelection and promotion to the Senate). Moreover, even if individual members of the legislature want to strengthen state autonomy, they cannot achieve this goal as easily as they can succeed in bringing back pork. Pork barrel legislation creates no free-rider problems among legislators: all legislators are rewarded with pork for their own districts if they support similar legislation for others. State autonomy brings no such individualized payoffs because the autonomy of all states is increased by the action of an individual senator protecting state autonomy. Given this free-rider problem, it

will be difficult to mobilize the critical mass of legislative support needed to achieve a restoration of state authority through federal legislation.

The pathologies that flow from this system have become so palpable that they set the stage for new ways of reconstituting a federalism that preserves liberty and generates wealth. Here the president is the leading actor on the set. First, the electoral fortunes of the president and his successor are more dependent on economic growth than those of national legislators. Moreover, unlike national legislators, the president has no free-rider problems in enforcing a system of competitive federalism. The president also should be less reluctant than national legislators to cede power to state officials because even more substantially empowered state officials are not going to overshadow the president. Finally, the federalist structure of the electoral college also gives the president an interest in appeasing state officials, particularly state governors, because governors and state party committees play an important role in presidential elections.

Of course, the president is not going to be a perfect enforcer of federalism. He also has factions that he wants to satisfy at the expense of long-term growth. But he is likely to prove better at preserving federalism because he has a strong countervailing interest in continuing economic growth for the foreseeable future. Moreover, the federalism executive order (and the regulatory review order as well) can act as a precommitment device. It thus enables the president to make it more difficult for himself to heed the pleas of these factions at the expense of this overriding interest. More to the point, perhaps, the federalism executive order may redirect these factions to other sources of rents or status that are unlikely to interfere with competitive federalism.

Although President Reagan issued the federalism executive order, President Clinton continued the order, thus showing that the movement toward presidential enforcement of federalism may be beyond partisan politics. It is true that President Clinton's first version of the executive order was criticized particularly by state officials as cutting back on the strong federalism of the Reagan executive order. That order was suspended and the final version was very similar to Reagan's executive order. Although neither order is explicit about restoring constitutional federalism per se, both resurrect key concepts in distinguishing between what is best regulated locally and what is best regulated nationally and directing agencies to focus only on national problems.[20]

Ideally, the federalism executive order should allow the president and his advisers the flexibility to make economically sound judgments about what is best regulated locally and what is best regulated nationally, taking into account both the advantages of jurisdictional competition and the advantages of national harmonization. In short, the president is not limited by formalism and could help implement a more effective system of competitive federalism.

Much of government regulation concerns matters that, although important, do not stir great political passions. As to these matters, the presidential order can be an effective counterweight to federal bureaucracies' natural tendency to impose federal solutions. Thus, even if the federalism executive order does not restore federalism to its former glory, it may be the most substantial revival possible in the current polity.

B. Reviving Tricameralism

The process of regulatory review can best be understood as an attempt to compensate for the decline of bicameralism and the presidential veto occasioned by delegation. As discussed in connection with the federalism executive order, the president is now the logical candidate for reviving normative structures that restrain special interests or factions. The OIRA review process envisioned in the regulatory review order facilitates this restoration.

1. Restoring Bicameralism Through OIRA. The requirement that a regulation receive the approval of OIRA as well as agency approval introduces, like the addition of another legislative chamber to a previously unicameral legislature, an additional barrier to restricting citizens' freedom. Furthermore, like an additional legislative chamber elected from different jurisdictions, OIRA impedes interest group legislation to some extent. Even assuming that the same interest groups were as capable of influencing OIRA as administrative agencies, the additional layer of review makes it harder for these interest groups to gain rents through regulation just as bicameralism makes it harder for interest groups to gain rent through legislation.

2. Restoring the Presidential Veto Through OIRA. Another effect of the regulatory review process is to compensate for the loss of the president's veto power. The review process reduces his transaction costs in monitoring agencies and thus helps him keep agency heads within the margin of autonomy that their independent authority (even in the important but limited sense that they often must be fired to stop their exer-

cise of authority contrary to the president's will) permits. It thus strengthens the president's autonomy and makes his regulatory review power similar to his power to veto bills.

3. Advancing the Objectives of Tricameralism Through Cost-Benefit Analysis. The final aspect of the regulatory review order that attempts constitutional restoration is the substantive requirement of cost-benefit analysis. The original constitutional filters of bicameralism and presentment offered the promise of distinguishing public goods from special interest legislation overall. The cost-benefit analysis accomplishes much the same objective, at least if the baseline for regulation is the absence of government intervention, because cost-benefit analysis should authorize government intervention only if its net benefits are greater than those provided by the market or nonmarket forms of spontaneous order like the family. Such intervention produces public goods—services that the market or the family either cannot provide or cannot provide as efficiently.

Even if no single aspect of the president's executive order on regulatory review compensates for the loss of tricameralism occasioned by delegation, both the procedural and substantive aspects of the regulatory review order move us back toward the Framers' system designed to filter public good provisions from special interest impositions.

III. Recommended Revisions of the Federalism and Regulatory Review Executive Orders

A. Revising the Federalism Executive Order

The analysis sketched above leads to the following recommendations for revising the federalism executive order:

1. Strengthening Competitive Federalism. The original Constitution recognized that there were costs to centralized regulation and circumscribed the government's regulatory powers. The federalism order should be amended to strengthen competitive federalism. It should specifically allude to the original design and suggest that federal regulation is warranted, unless otherwise required by law, only when the presence of interstate externalities or spillovers suggests that federal regulation is necessary. Even when there needs to be some federal involvement, the order should direct OIRA to consider whether there remains a role for state regulatory competition within an overall federal framework.

2. Applying Federalism Principles to Agency Recommendations About Legislation. One important limitation on the degree of constitutional restoration that the federalism order affords is that its application is limited to the executive branch. Congress can pass statutes that do not comply with the federalism principles that limit the role of the federal government to solving social problems with substantial externalities. One partial response to this difficulty is to direct agencies to follow the principles of the federalism order in their recommendations as to whether the president should sign such legislation.

3. Revising the Preemption Section of the Federalism Order. Executive Order 13,132 imposes a Clear Statement Rule on Agencies in Preemption Matters. Section 4 of the order essentially directs the agency to interpret a statute as requiring preemption only when Congress expressly or clearly intends to preempt state laws and to interpret it as permitting preemption only when that delegation is clearly expressed or intended.[21] The breadth of the clear statement rule should be slightly narrowed to those areas in which preemption would undercut jurisdictional competition, because such a scope would better comport with a view of the federalism order as constitutional restoration and because it would be easier to defend as a matter of law.

Recall that this Essay contends that the federalism order is necessary to restore the jurisdictional competition that has been eroded by Congress's use of plenary powers. Accordingly, at least when Congress is not addressing some interjurisdictional spillover or strengthening the conditions for interjurisdictional competition (such as permitting free movement of people and capital), there are policy reasons for the executive to employ its administrative discretion against interpreting a statute to require preemption or to delegate authority for preemption to the agency. It would follow from this rationale that in those few instances when Congress is addressing spillovers or protecting the free flow of capital among the states, the presumption against preemption should not apply because the model of jurisdictional competition assigns these responsibilities to the federal government. As with other issues in federalism, the executive has an advantage over the judiciary in creating a pragmatic doctrine of preemption that actually advances the general values of efficient constitutional design.

4. Judicial Review of Executive Orders. An issue common to both the regulatory review and federalism executive orders is whether judicial review should be

available to litigate compliance with the orders. Currently both orders flatly bar judicial review.[22] But if the orders are seen as a means of constitutional restoration, it is not clear that judicial review should be barred, at least for procedural matters. Permitting judicial review will make it more likely that agencies will scrupulously comply with the procedures set out in these orders.

Strong countervailing considerations, however, suggest that the substantive provisions of the orders, such as cost-benefit analysis and the review of whether sufficient spillovers exist to justify national regulation, should not be subject to judicial review. These provisions involve policy determinations and the weighing of economic costs and benefits—areas in which the executive has a comparative advantage over the judiciary.

B. Revising the Regulatory Review Order

From this normative analysis emerge some recommendations to strengthen the regulatory review executive order as well:

1. Expanding the Scope. A revised regulatory review order should reject the decision to restrict the full application of the order to only major rules.[23] Just as bicameralism and presentment apply to all proposed laws, so should the OIRA process apply to all regulations. The filtering process afforded by the regulatory review order should improve regulations overall, not only the set of regulations with very substantial regulatory costs. Moreover, without careful review, it is difficult to know whether even a minor regulation will create a dynamic that generates further regulation in the future.

2. Including Independent Agencies in the Regulatory Review Order. The regulatory review order does not include independent agencies—agencies whose heads do not serve at the pleasure of the president—within its full review process.[24] Independent agencies' exercise of quasi-legislative authority undermines tricameralism to an even greater extent than the exercise of such discretion by nonindependent agencies because such independence diminishes the president's formal authority to direct agency heads in the exercise of their discretion and makes that authority even less comparable to his veto power. If presidential review is seen as constitutional restoration, the case for including independent agencies under all aspects of the presidential regulatory review order is even stronger than including nonindependent agencies. The Clinton regulatory review order already has moved in this direction by applying the regulatory planning process of OMB to independent agencies in a way that allowed the vice president and other participants in the interagency process to request further consideration of rules that conflicted with the president's program. [25]

3. Deleting Time Limits. The decision in President Clinton's regulatory review order to put limits on the time OIRA can review a prospective regulation is a mistake.[26] The regulatory review process should not be terminated on an arbitrary date, because the advantages of filtering will be decreased by the agencies' ability to wait out the regulatory review process. To be sure, Congress can set a deadline for regulation that the administration must respect. In that event, however, Congress has managed to get a specific timing directive approved through bicameralism and presentment and the deadline will have survived the tricameral procedure established by the Constitution. Consequently, there is less need for a regulatory process to substitute for the absence of tricameralism.

4. Revising Cost-Benefit Analysis. The regulatory review process should be more explicit about cost-benefit analysis. Compared to President Reagan's order, President Clinton's regulatory review order is not quite as clear that the cost-benefit analysis should be its sole focus.[27] To be effectively balanced even soft costs should be given as accurate an approximation as possible. An agency must make choices and must tote up benefits and costs as best it can, and a single scale would facilitate this process.

A revised order also should make clear that regulation should consider the costs that regulations themselves bring about. Cost-benefit analysis should employ a dynamic scoring of costs that takes account of the more substantial opportunities for rent seeking that result from centralized regulation. These public choice problems should be highlighted by the new regulatory review order because they represent some of the costs that the high hurdles of tricameralism in the original Constitution avoided.

5. Revising Disclosure Requirements. The revised order should retain the requirements (initiated in President Clinton's regulatory review order) that OIRA disclose contacts from parties outside the administration about the regulation.[28] This disclosure rule helps restrain special interests, thus making the order a more effective substitute for other constitutional structures that have been dissolved.

In contrast, the requirements for internal executive branch disclosure introduced by the Clinton order should be deleted.[29] These requirements do not constrain special interests by bringing their activity to the light of day. In attempting to avoid this danger, OIRA may pull its punches and reduce the searching nature of its analysis of agency regulations.

Conclusion

I do not claim that even revised executive orders can wholly compensate for the decline of the original Constitution. These executive orders address only the regulatory side of the modern administrative state and do not seek to dissolve the welfare state that also has transformed the polity that the Framers bequeathed to us. The federalism and regulatory review executive orders, even revised according to these suggestions, will not and should not end the debate about the proper scope of government regulation.

Unlike some other commentators, I do not see the presidential review process simply as a technocratic one designed to create better coordination within the executive branch[30] or to advance the undoubted virtue of government accountability.[31] Instead, the federalism and regulatory review orders replace New Deal norms concerning the appropriate government structure with norms that are closer to those of the Framers and that more effectively restrain the special interests that seek to live off the modern administrative state.

There are broader lessons from this analysis of the regulatory review and federalism executive orders. If these orders essentially compensate for the decline of certain aspects of the original Constitution, it shows that our constitutional norms can reassert themselves other than through the judicial or amendment process. Moreover, the analysis offered here also suggests that there are routes to the restoration of legal norms that do not simply revive the original Constitution. If we are to restore the Framers' principles of government in a world that they could not have imagined and in which their governmental framework has been distorted substantially, it may not be possible or effective to revive the exact replica of the Framers' design. New ways must be sought to reconstitute a limited interlocking structure of state and federal government that efficiently produces necessary public goods. The federalism and regulatory review executive orders can be an important part of this process of reconstituting the polity and reclaiming the system of government from the special interests that have been empowered by constitutional decline in the twentieth century.

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Footnotes

[1] President Reagan's executive order on regulatory review, Exec. Order No. 12,291, 3 C.F.R. 127 (1981), was revoked by President Clinton's regulatory review order, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000). President Reagan's executive order on federalism, Exec. Order No. 12,612, 3 C.F.R. 252 (1987), was revoked by President Clinton's federalism order, Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000).

[2] Throughout this Essay, the "federalism executive order" and the "federalism order" refer to President Clinton's federalism order, Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000), which replaced President Reagan's federalism order, Exec. Order No. 12,612, 3 C.F.R. 252 (1987).

[3] Likewise, throughout this Essay the "regulatory review executive order" and the "regulatory review order" refer to President Clinton's regulatory review order, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000), which replaced President Reagan's regulatory review order, Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

[4] Exec. Order No. 12,291 § 2, 3 C.F.R. 127, 128; Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 638.

[5] Exec. Order No. 12,612, 3 C.F.R. 252 (1987), revoked by Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000).

[6] Id., 3 C.F.R. at 252-53.

[7] Id. § 3(b)(1), 3 C.F.R. at 254.

[8] Id. § 4(a)-(b), 3 C.F.R. at 255.

[9] Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000).

[10] Id.

[11] Id. § 4(a)-(b), 3 C.F.R. at 208.

[12] Id. § 7(a)-(d), 3 C.F.R. at 210.

[13] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000).

[14] Id. § 3, 3 C.F.R. at 128-30.

[15] Exec. Order No. 12,291 § 3, 3 C.F.R. at 128-30.

[16] Id. § 3(d), 3 C.F.R. at 129.

[17] Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C.

§ 601 (2000).

[18] Id. § 1(a), 3 C.F.R. at 638-39.

[19] Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. at 646-47 (requiring OIRA to review proposed regulations within ninety days and providing for one thirty-day extension).

[20] Exec. Order No. 12,612 § 3(b)(1), 3 C.F.R. 252, 254 (1987), revoked by Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000). The order states:

[21] Exec. Order No. 13,132 § 4(a)-(b), 3 C.F.R. 206, 208 (1999), reprinted in 5 U.S.C. § 601 (2000).

[22] Exec. Order No. 12,612 § 8, 3 C.F.R. 252, 256 (1987), revoked by Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000); Exec. Order No. 13,132 § 11, 3 C.F.R. 206, 211 (1999), reprinted in 5 U.S.C. § 601 (2000).

[23] Exec. Order No. 12,866 § 3(f), 3 C.F.R. 638, 641-42 (1994), reprinted in 5 U.S.C. § 601 (2000).

[24] Exec. Order No. 12,866 § 4(c), 3 C.F.R. 638, 642 (1994), reprinted in 5 U.S.C. § 601 (2000).

[25] *See* Exec. Order No. 12,866 § 2(b)-(c), 3 C.F.R. at 640 (stipulating the review roles of the OMB and the vice president in the regulatory planning process).

[26] *See* Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. at 647 (setting a strict time limit of ninety days for OIRA review and prescribing one possible extension of thirty days).

[27] Exec. Order No. 12,866 § 1(a), 3 C.F.R. at 639.

[28] Exec. Order No. 12,866 § 6(b)(4), 3 C.F.R. at 644-48.

[29] Exec. Order No. 12,866 § 6(b)(5), 3 C.F.R. at 648.

[30] See Comm'n on Law and the Econ., Federal Regulation: Roads to Reform 72-73 (Am. Bar Ass'n ed., 1979) (justifying coordination within the executive branch).

[31] See Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 460 (1987) (discussing the advantages of the executive order in promoting political accountability).