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# Regulatory Moratoria

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# REGULATORY MORATORIA

KATHRYN A. WATTS†

## ABSTRACT

*Despite significant scholarly attention given to tools that the political branches use to exert control over the administrative state, one emerging tool has gone largely unnoticed: regulatory moratoria. Regulatory moratoria, which stem from legislative or executive action, aim to freeze rulemaking activity for a period of time. As this Article demonstrates, regulatory moratoria have worked their way into the political toolbox at both the federal and state levels. For example, at least fifteen federal bills proposing generalized regulatory moratoria were introduced in the first session of the 112th Congress, and from 2008 to 2011 alone, no fewer than nine states implemented some kind of executive-driven regulatory moratorium. In addition, beginning with President Reagan, all U.S. presidents other than George H.W. Bush have issued short-term regulatory moratoria immediately upon coming into office to facilitate review of midnight regulations passed by their predecessors. President Bush, who followed a member of his own party into the White House, instead implemented a one-year moratorium during his last year in office.*

*This Article aims to situate regulatory moratoria within the existing literature on political control of the administrative state. The goal of this Article is largely descriptive: to provide the first overarching description of the emergence of and proposals for regulatory moratoria at both the federal and state levels and the different contexts in which regulatory moratoria have arisen. The Article also seeks to identify and analyze the major arguments for and against regulatory moratoria from both a legal and a policy perspective. In weighing the pros and cons of regulatory moratoria, this Article warns against the use of “hard” moratoria—defined as long-term moratoria often*

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† Associate Dean for Research and Faculty Development and Associate Professor of Law, University of Washington School of Law. Many thanks to my research assistant Sarah Cox, as well as to Cheryl Nyberg and others in the Gallagher Law Library for their excellent research support. Also, thanks to Bill Andersen, Jack Beermann, Ron Levin, Rafael Pardo, Hugh Spitzer, and Lea Vaughn for helpful comments on prior drafts and to participants in a faculty colloquium held at the University of Washington School of Law and participants in the *Duke Law Journal*'s Forty-Second Annual Administrative Law Symposium, where drafts of this paper were presented.

*spanning a year or more. It also suggests, however, that “soft” moratoria—meaning short-term moratoria keyed to a brief period of political transition—might appropriately further notions of democratic accountability when used carefully by the executive branch following a change in administration to ensure that the regulatory machinery is aligned with the policies of those newly elected to power.*

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#### INTRODUCTION

Scholars have spent a great deal of time studying various mechanisms that the political branches use to exert control over the administrative state.<sup>1</sup> One emerging tool for political control,

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1. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (examining congressional involvement in the administration of the laws); James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851–52 (2001) (examining centralized presidential

however, has slipped by largely unnoticed: regulatory moratoria. Regulatory moratoria, which are also referred to as regulatory “suspensions” or “freezes,” stem from legislative or executive action, and they aim to halt or suspend rulemaking activity for a specified period of time.<sup>2</sup>

This Article demonstrates that, far from being an isolated or novel concept, regulatory moratoria have worked their way into the political toolbox. Regulatory moratoria now provide a means through which executive and legislative actors at both the federal and state levels are either exerting or attempting to exert control over the administrative state.<sup>3</sup>

At the federal level, short-term regulatory moratoria have become an entrenched feature of the period immediately after a president takes office. Beginning with President Reagan, upon coming into office, all presidents excluding George H.W. Bush have

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control of regulatory activities and arguing in favor of it); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (examining the “recent and dramatic transformation in the relationship between the President . . . and the administrative state”); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that scholars have underestimated congressional involvement in oversight of administrative agencies).

2. Some regulatory moratoria are subject-specific—meaning that they apply only to regulations involving specific topics like greenhouse gases or healthcare. *See, e.g.*, H.J. Res. 22, 27th Leg., 1st Sess. (Alaska 2011) (resolving that “the Alaska State Legislature calls on the United States Congress to pass legislation prohibiting the United States Environmental Protection Agency from regulating greenhouse gas emissions”); S. 23, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (proposing to impose a moratorium on rulemaking with respect to the implementation and enforcement of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code)); Exec. Order No. 2011-03 para. 1 (Idaho Apr. 20, 2011), *available at* <http://gov.idaho.gov/pdf/Executive%20Order%202011-03.pdf> (directing that executive agencies within the state shall not promulgate “any rule to implement any provisions” of the ACA). Some moratoria also involve limits on appropriations in the form of targeted riders that prohibit specific regulatory activity. *See generally* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS (2008) (describing regulatory restrictions in appropriations bills). This Article focuses only on generalized regulatory moratoria rather than subject-specific moratoria.

3. Although this Article studies only regulatory moratoria in the United States, at least one other country—Mexico—has imposed a generalized one-year moratorium to boost its economy. *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV., MEXICO: PROGRESS IN IMPLEMENTING REGULATORY REFORM 45 (2004) (noting that President Vicente Fox published a presidential decree in 2004 restricting new regulation until April 2005 and forcing federal agencies to conduct a review of existing regulations). In addition, in 2011, the United Kingdom announced a narrower moratorium on new domestic regulation for microbusinesses and start-ups. DEP’T FOR BUS. INNOVATION & SKILLS, HM TREASURY, THE PLAN FOR GROWTH 56 (2011), *available at* [http://cdn.hm-treasury.gov.uk/2011budget\\_growth.pdf](http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf).

issued orders to agency heads to freeze new rulemaking.<sup>4</sup> In addition, in 1992, a federal moratorium was implemented outside the context of a change in administration when President George H.W. Bush ordered what turned into a one-year moratorium in the last year of his presidency.<sup>5</sup> Furthermore, bills proposed in the 104th Congress—one of which passed in the House—would have imposed a moratorium on federal rulemaking from November 1994 to December 1995.<sup>6</sup> Later, in the first session of the 112th Congress alone, at least fifteen bills proposing some kind of a regulatory moratorium, such as the Stop the Regulation Invasion Please Act of 2011,<sup>7</sup> were proposed.<sup>8</sup>

Regulatory moratoria have emerged as a tool for political control at the state level as well. For example, in 1995, right around the time that Congress was considering imposing a federal regulatory moratorium via legislative action, New York's Republican governor George Pataki ordered a ninety-day moratorium on new state regulations upon his coming into office,<sup>9</sup> following up on a campaign promise to "be business friendly."<sup>10</sup> Subsequently, between 2008 and 2011, in the wake of state budget crises and increased economic uncertainty, state-level regulatory moratoria were implemented in at least nine states<sup>11</sup>: Arizona, Florida, Maine, Nevada, New Mexico, New Jersey, North Carolina, Tennessee, and Washington.<sup>12</sup>

Given the frequency with which regulatory moratoria are cropping up at both the federal and state levels, one might expect that scholars would have studied this emerging tool. Yet—with the exception of literature discussing moratoria imposed at the federal

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4. *See infra* Part I.A.1.

5. *See infra* notes 41–66 and accompanying text.

6. Regulatory Transition Act of 1995, H.R. 450, 104th Cong. §§ 3(a), 6(2) (1995); Regulatory Transition Act of 1995, S. 219, 104th Cong. § 103 (1995); *see also* 141 CONG. REC. 5880–81 (1995) (noting that 276 representatives voted in favor of the House bill).

7. Stop the Regulation Invasion Please Act of 2011, H.R. 3181, 112th Cong. (2011).

8. *See infra* notes 99–102 and accompanying text.

9. Exec. Order No. 2, N.Y. COMP. CODES R. & REGS. tit. 9 § 5.2 (1995).

10. Tom Precious, *Pataki Tightens Reins on Regulation*, TIMES UNION (Albany, N.Y.), Jan. 6, 1995, at A1.

11. The phrase "at least" is used very purposefully because the number might be higher. Although the goal in conducting the research for this Article was to be as exhaustive as possible, some instances of moratoria or proposals for moratoria may have been missed. This possibility is heightened at the state level given the difficulty of conducting research involving all fifty states and the lack of easily searchable, comprehensive electronic databases for some state-level materials, such as executive orders. *See infra* notes 379–84 and accompanying text.

12. *See infra* Part I.B.

level by presidents upon a change in political administration to enable review of so-called midnight regulations, which are regulations issued by an outgoing administration at the eleventh hour<sup>13</sup>—scholars generally have failed to study regulatory moratoria in any depth.<sup>14</sup> This lack of scholarly attention may be because the use of regulatory moratoria is still relatively nascent. Furthermore, because regulatory moratoria involve a significant element of political maneuvering, some legal scholars may have been quick to dismiss specific proposals for moratoria as individualized proposals that represent “more symbol than substance”<sup>15</sup> and hence may have missed the bigger picture. In addition, administrative-law scholars often tend to approach issues through a federal lens, a tendency that likely has the effect of obscuring trends, such as regulatory moratoria, that become more apparent when viewed across federal and state lines.<sup>16</sup>

Regardless of the reason for the dearth of scholarly attention, the lack of scrutiny needs to be remedied given the prevalence with which executive and legislative actors at both the federal and state levels are

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13. For examples of scholarly discussion of presidential reliance on rulemaking suspensions, withdrawals, or freezes after a change in administration, see Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 983–84 (2003); Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645, 646 (1987); Thomas O. McGarity, *Jogging in Place: The Bush Administration's Freshman Year Environmental Record*, 32 ENVTL. L. REP. 10,709, 10,715 (2002); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 471–72, 473 n.8 (2011); William M. Jack, Comment, *Taking Care That Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1483–84 (2002); B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782, 782 (2003).

14. The only article that treats regulatory moratoria in any detail—outside of the context of moratoria imposed at the beginning of new presidential administrations—is a piece that focuses on the impact of a 1992 regulatory moratorium ordered by President George H.W. Bush during the last year of his presidency. See Scott R. Furlong, *The 1992 Regulatory Moratorium: Did It Make a Difference?*, 55 PUB. ADMIN. REV. 254 (1995) (concluding that President Bush's moratorium had little impact).

15. Jonathan H. Adler, *Misguided Case for Regulatory Moratorium*, THE VOLOKH CONSPIRACY (Sept. 26, 2011, 10:46 PM), <http://volokh.com/2011/09/26/misguided-case-for-regulatory-moratorium>.

16. Cf. Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 553 (2001) (“[C]asebooks, treatises, and scholarship harbor a heavy bias towards federal administrative law, relegating state administrative procedure little, if any, serious attention.”); Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis 3* (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper No. 98-3, 1998), available at <http://ssrn.com/abstract=159578> (noting in a report studying state and federal regulatory reform that “identification of state regulatory reform provisions [had been] difficult because no comprehensive source of data exists”).

attempting to impose moratoria. This Article aims to supply the remedy by situating regulatory moratoria within the existing literature on political control of the administrative state and by providing the first comprehensive discussion of the emergence and use of regulatory moratoria.

The main goal of this Article is descriptive: to trace the rise of regulatory moratoria and proposals for moratoria at both the federal and state levels and to describe the different contexts in which regulatory moratoria have arisen. Part I demonstrates that when one looks at both the federal and the state levels, moratoria are cropping up with increasing frequency and are becoming part of the political toolbox. As Part I shows, however, these moratoria do not all look alike. Whereas some moratoria have been driven by the executive branch, others have been driven by legislatures. In addition, some moratoria—referred to here as “hard” moratoria—are long-term moratoria spanning a year or more, whereas other moratoria—referred to here as “soft” moratoria—are short-term moratoria that generally last only a few months and are keyed to a period of political transition.

Part II seeks to identify and weigh the major arguments in favor of and against hard and soft regulatory moratoria from both a legal and a policy perspective, and in doing so, Part II offers some normative assessments regarding the proper use of regulatory moratoria moving forward. Ultimately, Part II warns against the use of hard moratoria because they threaten to create protracted regulatory confusion and evince an antiregulatory bias. In addition, as a 2011 decision handed down by the Florida Supreme Court demonstrates, executive-driven hard moratoria raise numerous legal questions and separation-of-powers concerns relating to whether the executive branch possesses the power to freeze agency rulemaking.<sup>17</sup> At the same time, however, Part II suggests that soft moratoria—if crafted to avoid major legal pitfalls—might play a more appropriate role, helping to further notions of democratic accountability when used for a brief period of time by the executive branch following a change in administration. Finally, Part III concludes by identifying some questions surrounding the use of moratoria that are in need of future study, including empirical questions about the actual impact of moratoria.

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17. *See* *Whiley v. Scott*, No. SC11–592, 2011 WL 3568804, at \*5 (Fla. Aug. 16, 2011) (per curiam) (finding an executive-ordered rulemaking suspension in Florida to be improper).

## I. THE EMERGENCE OF REGULATORY MORATORIA

Since the rise of the modern administrative state and the broad delegation of policymaking powers to agencies,<sup>18</sup> the political branches have used formal and informal tools for controlling the regulatory state and reining in agency discretion, including jawboning, the appointment process, centralized presidential oversight, congressional control of appropriations, and congressional hearings.<sup>19</sup> Scholars have spent much time studying these and other tools of political control, with a particular emphasis on presidential control of the administrative state.<sup>20</sup> For example, prominent administrative-law scholars, including then-Professor Elena Kagan, have studied the origins of strong presidential oversight of federal agency rulemaking, tracing it back to President Reagan.<sup>21</sup> According to then-Professor Kagan, President Reagan brought about a “sea change” in terms of increased presidential oversight of the regulatory state by “self-consciously and openly adopt[ing] strategies to exert” his influence over the regulatory state.<sup>22</sup>

Despite extensive scholarly attention given to political control of the administrative state, the extant literature has largely failed to identify regulatory moratoria as an emerging tool for political control. This Part describes the emergence of regulatory moratoria as a tool for control at both the federal and state levels, taking care to differentiate between moratoria issued by the legislative and executive branches and between two very different kinds of moratoria: what will be called “soft” and “hard” moratoria. Soft moratoria are defined here as short-term moratoria limited to brief

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18. See Kagan, *supra* note 1, at 2253 (“[A]s the administrative state grew and then the New Deal emerged, Congress routinely resorted to broad delegations . . .”).

19. See *supra* note 1.

20. See Beermann, *supra* note 1, at 64–65 (noting that the phenomenon of presidential control of the administrative state “has received significant attention in legal academia,” especially in comparison to congressional control); see also Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994) (arguing against the proposition that the Founders did not intend to have a strong unitary executive); Peter L. Strauss, *Foreword: Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759–60 (2007) (arguing that in the context of the “ordinary world of domestic administration” the president’s role is to oversee, rather than decide, regulatory matters); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944 (1980) (analyzing judicially imposed restrictions on ex parte contacts in formal rulemaking and evaluating whether such restrictions should extend to informal rulemaking).

21. See Kagan, *supra* note 1, at 2277–78.

22. *Id.* at 2277.



periods of political transition. By contrast, hard moratoria are defined here as long-term moratoria that span a year or more and that are not limited to brief periods of political transition.

A. *Moratoria at the Federal Level*

The concept of imposing a generalized regulatory moratorium seems to have originated with President Reagan. At the beginning of his presidency, Reagan imposed a temporary regulatory moratorium to enable review of the midnight regulations issued by the outgoing Carter administration.<sup>23</sup> Since then, several different regulatory moratoria have been implemented at the federal level. So far, all of these federal rulemaking moratoria have stemmed from presidential rather than legislative command, and all but one have been soft moratoria coming at the beginning of new administrations.<sup>24</sup> Nonetheless, Congress has considered legislative proposals for hard moratoria on numerous occasions, and—even though none of these legislative proposals has become law—one such proposal did pass the House in 1995.<sup>25</sup> All of this federal activity is described here, beginning with the history of soft and hard executive-driven moratoria at the federal level and then turning to various legislative calls for hard moratoria.

1. *Executive-Driven Moratoria.* Executive-driven moratoria at the federal level have arisen in two very different contexts to date: (1) numerous soft moratoria implemented at the beginning of new presidential administrations, as occurred when Presidents Reagan, Clinton, George W. Bush, and Obama entered the White House; and (2) one hard moratorium issued by President George H.W. Bush in the fourth year of his presidency in 1992.

a. *Presidentially Driven Soft Moratoria.* On January 29, 1981, President Reagan—immediately upon coming into office—issued a memorandum to designated heads of executive agencies titled “Memorandum Postponing Pending Federal Regulations.”<sup>26</sup> In the

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23. See *infra* Part I.A.1.

24. See *infra* Part I.A.1.

25. See *infra* Part I.A.2.

26. President Ronald Reagan, Memorandum Postponing Pending Federal Regulations, PUB. PAPERS 63 (Jan. 29, 1981). Before issuing the memo, President Reagan did obtain the opinion of the Office of Legal Counsel as to the legality of the order. See Presidential Memorandum Delaying Proposed and Pending Regulations, 5 Op. O.L.C. 55, 56 (1981)

memorandum, President Reagan directed agency heads—to the extent permitted by law and subject to certain specified exceptions—to “postpone for 60 days” the “effective date of all regulations” that had been “promulgated in final form and that [were] scheduled to become effective during such 60-day period.”<sup>27</sup> In addition, he directed agencies “[to] refrain, for 60 days following the date of this memorandum, from promulgating any final rule.”<sup>28</sup>

President Reagan justified the order by stressing that one of his priorities was to “establish[] a new regulatory oversight process that [would] lead to less burdensome and more rational federal regulation,” and he explained that the postponement of pending regulations would enable him to review the “prior Administration’s last-minute decisions that would increase rather than relieve the current burden of restrictive regulation.”<sup>29</sup> He also noted that this review of pending regulations was “especially necessary in the economic climate we have inherited.”<sup>30</sup>

Subsequently, on February 17, 1981, President Reagan issued Executive Order 12,291,<sup>31</sup> which created a formal regulatory review process using the Office of Management and Budget (OMB) and which called for cost-benefit analysis in agency decisionmaking.<sup>32</sup> To permit reconsideration of pending rules in accordance with the terms of Executive Order 12,291, the order called for the postponement or suspension of “the effective dates of all major rules” that had been promulgated in final form as of the date of the order but that had not yet become effective.<sup>33</sup>

Through the combination of Executive Order 12,291 and his prior January memorandum, President Reagan seems to have pioneered the idea of a soft, executive-driven regulatory moratorium keyed to a brief period of political change. Indeed, “[s]ince Reagan, every president taking over from a president of the opposing political party,” namely Presidents Clinton, George W. Bush, and Obama, has

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(concluding that the president has the “authority to direct executive agencies to postpone proposed and pending regulations for a 60-day period”).

27. Reagan, *supra* note 26, at 63.

28. *Id.*

29. *Id.*

30. *Id.*

31. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

32. *Id.* §§ 3(d), 6–7, 3 C.F.R. at 129, 131–33.

33. *Id.* § 7(a), 3 C.F.R. at 131–32.

“ordered a similar regulatory moratorium.”<sup>34</sup> These short-term moratoria generally have been viewed and justified as tools for presidents to control the phenomenon of midnight rulemaking by the prior administration—a term that refers to the spike in new regulations that takes place at the end of a presidential term.<sup>35</sup>

For example, President Clinton’s order noted that it was “important that President Clinton’s appointees have an opportunity to review and approve new regulations.”<sup>36</sup> Likewise, President Obama’s memorandum noted that it was “important that President Obama’s appointees and designees have the opportunity to review and approve any new or pending regulations.”<sup>37</sup> And President Bush’s memorandum explained that the president had requested the moratorium “[i]n order to ensure that the President’s appointees ha[d] the opportunity to review any new or pending regulations”—although President Bush, unlike the others, also hinted at a deregulatory purpose by noting at the very end of the memorandum that independent agencies were welcome to voluntarily participate “in the interest of sound regulatory practice and the avoidance of costly, burdensome, or unnecessary regulation.”<sup>38</sup>

Specifically, all of the moratoria issued by Presidents Clinton, George W. Bush, and Obama involved a freeze on new rules until the new rules had been approved by an appointee of the new president, as well as the withdrawal of final rules that had been sent to the

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34. Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 189 (2009); see also CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32356, FEDERAL REGULATORY REFORM: AN OVERVIEW 22 (2004) (describing moratoria as “a technique that has been used to assert control over the rulemaking process, particularly for an incoming presidential Administration,” beginning with the Reagan administration).

35. On the existence, causes, and problems of midnight rulemaking, see generally CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34747, MIDNIGHT RULEMAKING: CONSIDERATIONS FOR CONGRESS AND A NEW ADMINISTRATION (2008); Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf>; Beermann, *supra* note 13; Brito & Rugy, *supra* note 34; Christopher Carlberg, *Early to Bed for Federal Regulations: A New Attempt To Avoid “Midnight Regulations” and Its Effect on Political Accountability*, 77 GEO. WASH. L. REV. 992 (2009); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005); Sanford, *supra* note 13.

36. Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291, 58 Fed. Reg. 6074, 6074 (Jan. 25, 1993).

37. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435 (Jan. 26, 2009).

38. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001).

*Federal Register* but that had not yet been published.<sup>39</sup> In addition, President Bush ordered—and President Obama suggested but did not mandate—the temporary postponement of the effective date of regulations that had been published in the *Federal Register* but that had not yet taken effect.<sup>40</sup> Hence, since President Reagan, every president taking over the White House from an opposing political party has frozen the regulatory machinery when transitioning into office by using a short-term rulemaking freeze combined with the withdrawal of unpublished regulations or the postponement of the effective dates of final regulations.

*b. President Bush's Hard Moratorium in 1992.* President George H.W. Bush seized on the concept of a regulatory moratorium in a very different and much broader context than had President Reagan. Specifically, when the economy was floundering in 1992, President Bush ordered what began as a ninety-day moratorium while he was running for reelection during what turned out to be the last year of his presidency.<sup>41</sup> The moratorium, which was set forth in a memorandum titled “Reducing the Burden of Government Regulation,” requested that agency heads—to the maximum extent “permitted by law” and subject to certain exceptions—spend ninety days evaluating existing regulations and eliminating unnecessary and burdensome regulations rather than promulgating new regulations.<sup>42</sup> Unlike the soft moratorium that President Reagan had issued in 1981 upon coming into office, which served primarily “to undo midnight regulations issued by the Carter administration, to wrest control of the bureaucracy, and to set the tone for the new administration’s view of the regulatory process,” President Bush’s moratorium more overtly

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39. See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. at 4435 (ordering a freeze on new rules and the withdrawal of regulations that had not been published); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. at 7702 (same); Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291, 58 Fed. Reg. at 6074 (same).

40. Compare Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. at 7702 (suspending for sixty days the effective dates of final regulations that had already been published), with Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. at 4435 (urging agencies to “consider” extending the effective dates of final regulations for sixty days).

41. See President George Bush, Memorandum on Reducing the Burden of Government Regulation, 1 PUB. PAPERS 166 (Jan. 28, 1992); see also *President's Regulatory Moratorium*, ADMIN. L. NEWS, Spring 1992, at 4 (describing President Bush’s moratorium).

42. Bush, *supra* note 41, at 167 (directing agencies to “refrain from issuing any proposed or final rule” during a ninety-day period).

claimed to address the country's economic woes through reduced regulation.<sup>43</sup>

Another aspect of President Bush's moratorium differentiated it from the regulatory moratoria issued by other presidents at the beginning of their administrations: whereas the moratoria issued by Presidents Reagan, Clinton, George W. Bush, and Obama had all been issued relatively quietly in a behind-the-scenes fashion, President George H.W. Bush repeatedly highlighted his moratorium to the public. For example, the first President Bush announced the moratorium publicly and associated it with his plans for economic recovery during a State of the Union Address before Congress in January 1992, stating, "We must have a short-term plan to address our immediate needs and heat up the economy. And then we need a longer term plan to keep combustion going and to guarantee our place in the world economy."<sup>44</sup>

President Bush succeeded in getting his moratorium noticed by the public, but initial reaction to the moratorium included significant opposition by those who were "cynical," with some suggesting that the program was "simply an election-year ploy"<sup>45</sup> and a political "gimmick."<sup>46</sup> For example, the *New York Times* reported that although President Bush had been "anything but hawk-eyed against Government rules" in the first three years of his presidency, the moratorium represented a sharp reversal of course "at the outset of [the] election year, with the economy flagging, the business community demanding relief and the right wing of the Republican Party challenging [the president's] ways."<sup>47</sup>

Not all reactions to the moratorium, however, were negative.<sup>48</sup> Numerous members of the House of Representatives called on

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43. *President's Regulatory Moratorium*, *supra* note 41, at 4.

44. President George Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 156, 159 (Jan. 28, 1992).

45. *President's Regulatory Moratorium*, *supra* note 41, at 8.

46. David E. Rosenbaum & Keith Schneider, *Bush Is Extending Regulation Freeze as a Great Success*, N.Y. TIMES, Apr. 29, 1992, at A1; *see also* Douglas Jehl, *Bush Extends His Suspension of New Government Regulation*, L.A. TIMES, Apr. 30, 1992, at A32 ("[A]s Bush spoke of taking a 'wrecking ball' to rigid government rule-making, senior officials inside the White House hinted at another motivation when they referred to new polls showing public distaste for such regulation." (quoting President Bush)).

47. Rosenbaum & Schneider, *supra* note 46.

48. *See id.* ("Michael J. Boskin, chairman of the Council of Economic Advisers and a coordinator of the review process, said, 'In this 90-day period alone, dozens of regulatory

President Bush to extend the moratorium for one year.<sup>49</sup> They asserted that “increasing Federal regulations require[d] private enterprises to expend a growing level of resources to meet regulatory mandates, rather than investing in new capital [or] expanding operations, therefore inhibiting the creation of new jobs.”<sup>50</sup>

Ultimately, President Bush chose to extend the moratorium, announcing before cameras during an April 1992 address from the Rose Garden that he was “ordering a 120-day extension of the moratorium on new regulations,”<sup>51</sup> thereby turning the moratorium from a three- to a seven-month freeze on rulemaking.<sup>52</sup> In justifying the extension, President Bush—flanked by White House officials, including Vice President Dan Quayle and White House Counsel Boyden Gray—proclaimed the ninety-day moratorium to be a resounding success, and he argued that “[t]o ensure that recovery continues and is strengthened, to ensure that we can create new jobs, we must continue our course of regulatory reform.”<sup>53</sup> Specifically, he claimed, “We estimate that the reforms we’ve set in motion just since January 28 will save consumers about \$15 billion to \$20 billion a year. That’s a savings of \$225 to \$300 per year for the average American family.”<sup>54</sup>

These claims of victory did not go unchallenged. Indeed, during the very Rose Garden ceremony in which President Bush was declaring success,<sup>55</sup> the Bush administration’s celebration was derailed when “Fred Krupp, the executive director of the Environmental Defense Fund, unexpectedly stepped to the microphone and denounced the extension of the regulatory moratorium as a sell out to

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reforms and initiatives were taken that removed unnecessary obstacles to business expansion and job creation.” (quoting Boskin).

49. H.R. Con. Res. 307, 102d Cong. (1992).

50. *Id.*

51. President George H.W. Bush, Remarks on Regulatory Reform, 1 PUB. PAPERS 663, 664 (Apr. 29, 1992); see also Andrew Rosenthal, *Outsider Steals Bush’s Rose Garden Scene*, N.Y. TIMES, Apr. 30, 1992, at A18 (“In its drive to convey the image of a President offering an agenda for the future, the White House sent President Bush into the Rose Garden today for a much-advertised announcement on what he called ‘one of my top priorities’—Government deregulation.” (quoting President Bush)).

52. A video of President Bush announcing the extension can be found on C-SPAN’s website. See *Regulatory Moratorium Announcement*, C-SPAN (Apr. 29, 1992), <http://www.c-spanvideo.org/program/25791-1>.

53. Bush, *supra* note 51, at 664.

54. *Id.*

55. *Id.* at 665.

big business.”<sup>56</sup> Specifically, Krupp, who had “helped the Bush Administration draft its position on acid rain during negotiations on the 1990 Clean Air Act,” asserted that the freeze was a “‘wholesale handout to the American business community’ at the expense of clean air and water.”<sup>57</sup> Krupp’s statement reportedly left two of the president’s top aides “fuming.”<sup>58</sup>

Outside the context of the Rose Garden ceremony, much of the controversy surrounding President Bush’s moratorium centered on how much impact, if any, the moratorium was actually having—with many attacking the veracity of the president’s claims of billions in cost savings per year. Some policy analysts argued that the moratorium had “had little visible effect in reversing the sharp growth of regulation during the first three years of [Bush’s] Presidency.”<sup>59</sup> In addition, Public Citizen, a national nonprofit consumer group founded by Ralph Nader, decried President Bush’s claim of cost savings as “pure voodoo accounting,”<sup>60</sup> arguing that the moratorium was “costing the nation dearly in human life and a damaged environment” rather than saving money.<sup>61</sup> Specifically, Public Citizen and OMB Watch asserted that “[n]o claim of savings from the moratorium should be counted until the administration shows how it got its numbers, and until the costs to public health and safety and to the environment of *not* regulating are also factored in.”<sup>62</sup>

Despite all of the controversy, President Bush stood behind his regulatory moratorium. In fact, he continued calling public attention to it as he faced reelection, stating, for example, during his acceptance speech at the Republican National Convention in August 1992 that he would further extend the moratorium for one year through August

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56. Robert V. Percival, *Separation of Powers, the Presidency and the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 25, 40 (2001).

57. Rosenthal, *supra* note 51 (quoting Krupp).

58. *Id.*

59. Robert D. Hershey Jr., *Regulations March On, Despite a Moratorium*, N.Y. TIMES, Sept. 21, 1992, at D1.

60. NANCY WATZMAN, PUB. CITIZEN’S CONG. WATCH & CHRISTINE TRIANO, OMB WATCH, VOODOO ACCOUNTING: THE TOLL OF PRESIDENT BUSH’S REGULATORY MORATORIUM, JANUARY–AUGUST 1992, at v (1992).

61. *Id.* at i.

62. NANCY WATZMAN, PUB. CITIZEN’S CONG. WATCH & CHRISTINE TRIANO, OMB WATCH, THE HIDDEN STORY: WHAT BUSH AND QUAYLE DON’T SAY ABOUT THE REGULATORY MORATORIUM 4 (1992).

1993.<sup>63</sup> After the convention, a White House spokeswoman clarified that the “announcement at the convention had functionally extend[ed] the moratorium,”<sup>64</sup> and Vice President Quayle subsequently followed up more formally by issuing a memorandum to all department heads stating that agencies “should continue to follow the procedures and substantive standards established” in the president’s original memorandum.<sup>65</sup> Hence, President Bush’s experiment with an executive-driven moratorium ultimately lasted one year in all, and it would have continued until at least August 1993 had President Clinton not been inaugurated in January 1993.<sup>66</sup>

2. *Legislative Calls for Hard Regulatory Moratoria.* After the use of executive-driven regulatory moratoria in 1981 and 1992, it was perhaps just a matter of time before Congress too would start thinking about regulatory moratoria. And this is indeed exactly what happened. Beginning in the 1990s, various legislative proposals for hard regulatory moratoria surfaced in Congress. As this Section describes, though none of these legislative proposals has been enacted into law, their mere introduction suggests that Congress has taken

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63. See President George H.W. Bush, Remarks Accepting the Presidential Nomination at the Republican National Convention in Houston, 2 PUB. PAPERS, 1380, 1384 (Aug. 20, 1992) (“I believe that small business needs relief from taxation, regulation, and litigation. And thus, I will extend for one year the freeze on paperwork and unnecessary Federal regulation that I imposed last winter.”).

64. *Regulatory Moratorium Remains in Effect Despite Lack of Official Bush Memorandum*, DAILY REP. FOR EXECs., Sept. 1, 1992, at 170, available at LEXIS, Doc. No. 1992 DER 170 d20.

65. *Quayle Sends Memo Reminding Agencies To Comply with Regulatory Moratorium*, DAILY REP. FOR EXECs., Dec. 4, 1992, at 234, available at LEXIS, Doc. No. 1992 DER 234 d33 (quoting Quayle).

66. Even though it appears that President Bush is the only president to date to have ordered a long-term regulatory moratorium outside the context of a political transition, President Obama reportedly gave the strategy some consideration. Specifically, according to the *New York Times*, in the fall of 2011, President Obama—when faced with an ailing economy and a bid for reelection—considered proposing a regulatory moratorium on some regulations that especially affected the economy. Jeff Zeleny, *A Campaign Challenge: Defining Obama*, N.Y. TIMES, Sept. 7, 2011, at A24. The president’s aides, however, promptly denied the *New York Times* report. Sam Stein, *White House Denies Reports It’s Considering Regulation Moratorium*, HUFFINGTON POST (Sept. 7, 2011, 12:39 PM ET), [http://www.huffingtonpost.com/2011/09/07/obama-jobs-speech-regulation-moratorium\\_n\\_952168.html](http://www.huffingtonpost.com/2011/09/07/obama-jobs-speech-regulation-moratorium_n_952168.html). In addition, at least one candidate for the Republican presidential nomination in 2012, Governor Rick Perry of Texas, campaigned “calling for a six-month moratorium on federal business regulations that he said were holding back job growth nationally.” *Rick Perry Touts Jobs Record Ahead of 2012*, HUFFINGTON POST (Aug. 15, 2011, 2:05 PM ET), [http://www.huffingtonpost.com/2011/08/15/rick-perry-jobs-record\\_n\\_927271.html](http://www.huffingtonpost.com/2011/08/15/rick-perry-jobs-record_n_927271.html).



note of the executive's use of regulatory moratoria as a potential tool for political control of the administrative state.

*a. Legislative Proposals in the 1990s.* On April 8, 1992, a concurrent resolution was proposed in the House that would have expressed Congress's view that the president should extend for one year the provisions of his ninety-day moratorium on unnecessary new federal regulations.<sup>67</sup> This resolution ended up being unnecessary because President Bush extended his moratorium for another 120 days without the passage of any formal legislative prodding.<sup>68</sup>

Subsequently, after Republicans swept the 1994 midterm elections and gained control of both houses of Congress, the new Republican leaders wrote a letter to President Clinton in December 1994, urging him to issue an executive order that would impose a moratorium on new rules for the first one hundred days of the 104th Congress.<sup>69</sup> President Clinton responded to the Republican leaders' demands via a letter from Sally Katzen, the administrator of the Office of Information and Regulatory Affairs (OIRA).<sup>70</sup> In that letter, Katzen noted President Clinton's opposition to imposing a hard regulatory moratorium, asserting that "a moratorium is a blunderbuss that could work in unintended ways."<sup>71</sup>

Undeterred by President Clinton's response, House Majority Whip Tom DeLay, along with numerous other Republicans, decided to take matters into his own hands by introducing a bill on January 9, 1995—House Bill 450, the Regulatory Transition Act of 1995<sup>72</sup>—calling for a legislatively imposed regulatory moratorium.<sup>73</sup> Reportedly, the bill had initially been drafted by Gordon Gooch, a lobbyist for the petrochemical industry who was part of Project

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67. H.R. Con. Res. 307, 102d Cong. (1992).

68. See *supra* notes 51–52 and accompanying text.

69. Melissa Healy, *GOP Seeks Moratorium on New Federal Regulations*, L.A. TIMES, Dec. 13, 1994, at A32; see also Peter Grier, *GOP Hopes To Unspool Government Red Tape*, CHRISTIAN SCI. MONITOR, Dec. 20, 1994, at 1 ("The GOP, in fact, is pushing the White House to freeze all new rules for 100 days . . .").

70. Letter from Sally Katzen, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, to Rep. Newt Gingrich (Dec. 14, 1994), available at <http://archives.clintonpresidentialcenter.org/?u=121594-letter-from-katzen-on-regulatory-moratorium.htm>.

71. *Id.*

72. Regulatory Transition Act of 1995, H.R. 450, 104th Cong. (1995).

73. *Id.* § 2.

Relief, a corporate lobbying movement that aimed to roll back government regulation.<sup>74</sup>

As introduced in the House, section 2 of the bill set forth congressional findings, concluding, for example, “that effective steps for improving the efficiency and proper management of Government operations . . . will be promoted if a moratorium on new rulemaking actions is imposed and an inventory of such action is conducted.”<sup>75</sup> Then section 3 went on to set forth the specific terms of the proposed moratorium, declaring that federal agencies could “not take any regulatory rulemaking action” until June 30, 1995, unless the rulemaking was exempted from the act through a specific exception.<sup>76</sup> Section 5 provided specific exemptions, making clear that the moratorium would not apply to rulemaking actions “necessary because of an imminent threat to health or safety or other emergency” or “necessary for the enforcement of criminal laws.”<sup>77</sup>

In the debate over the bill, the executive-driven moratoria of Presidents Reagan and George H.W. Bush were cited as precedent. A representative from Illinois, for example, noted that “[r]egulatory moratoria are not new” and that “Presidents Reagan and Bush each had a moratorium on regulations”—although the proposed bill would have gone even further than the prior executive-driven moratoria had.<sup>78</sup> In addition, testifying before a House committee considering the bill in January 1995, former White House Counsel Boyden Gray—who had stood by President Bush’s side in the Rose Garden when the president extended his 1992 moratorium—pointed out that

[i]n 1981 and again in 1992, [a moratorium had] permitted the White House to tell agencies, look, take a look at all the existing rules that you haven’t revisited in a decade or two or three and redirect some

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74. Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 743 (1996); see also Martin Walker, *Licence To Pollute the Free World*, GUARDIAN (London), Sept. 6, 1995, at 4 (“Gordon Gooch, who lobbies for the petrochemical industry, drafted the first effort—a moratorium on any new federal regulations of any kind.”). Representative DeLay apparently acknowledged that “lobbyists offered suggestions for the regulatory reform bill, but [took] issue with assertions that they ‘drafted’ the legislation in his office.” *Argument Turns to Shove*, TULSA WORLD, Apr. 10, 1997, at A7.

75. H.R. 450 § 2.

76. *Id.* § 3(a).

77. *Id.* § 5(a)(2).

78. 141 CONG. REC. 5645 (1995) (statement of Rep. Cardiss Collins).

of your attention, at least for a little time, on reevaluating existing rules.<sup>79</sup>

Ultimately, the bill passed the House by a vote of 276 to 146 approximately a month and a half after being introduced.<sup>80</sup> But the Senate counterpart to House Bill 450—Senate Bill 219<sup>81</sup>—did not fare so well. Senate Bill 219, which was originally introduced on January 12, 1995, called for a moratorium on regulations, subject to specified exemptions, that would last until the summer of 1995—a proposal similar to that of House Bill 450.<sup>82</sup> A hearing on the bill was held in February 1995 before the Senate's Committee on Governmental Affairs,<sup>83</sup> and one common theme that emerged among detractors during the hearing was the concern that a moratorium might be too blunt. For example, Senator Joseph Lieberman opened the hearing by stressing the broad bipartisan consensus that the regulatory process needed reform, but he argued that “to just say, ‘stop’ endangers a lot of values and undercuts one of the fundamental roles of government, which is protection of the public from threats that they cannot protect themselves from.”<sup>84</sup> Similarly, Sally Katzen of OIRA argued that a moratorium would be a “distraction” and a “detour” from the real goal of improving the regulatory system because it would spawn numerous questions, such as questions about the meaning of the exceptions to the moratorium.<sup>85</sup>

In contrast, supporters argued that a moratorium made good sense because it would force agencies to review and do away with unnecessary regulations that burdened the economy and industry. For example, a representative from the trucking industry supported the moratorium, asserting that “Federal regulators are strangling

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79. *The Regulatory Transition Act of 1995: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the H. Comm. on Gov't Reform & Oversight*, 104th Cong. 160 (1995) (statement of C. Boyden Gray, Partner, Wilmer, Cutler & Pickering).

80. 141 CONG. REC. 5880 (1995); see also John H. Cushman Jr., *House Votes To Freeze Regulations as Democrats Fail To Gain Health and Safety Exemptions*, N.Y. TIMES, Feb. 25, 1995, at 7 (“The House of Representatives voted today to freeze most new Federal regulations for the rest of the year, with Republicans and Democrats arguing to the debate’s bitter end over whether the proposal would endanger the public.”).

81. Regulatory Transition Act of 1995, S. 219, 104th Cong. (1995).

82. *Id.*

83. *S. 219—Regulatory Transition Act of 1995: Hearing Before the S. Comm. on Governmental Affairs*, 104th Cong. (1995).

84. *Id.* at 3 (statement of Sen. Lieberman).

85. *Id.* at 8 (statement of Sally Katzen, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

transportation in this country” and that “[t]he Federal rulemaking process has spun out of control and it is costing American jobs, strangling small businesses, and raising prices for every one of us.”<sup>86</sup>

In March 1995, the Senate committee reported favorably on the bill and recommended some amendments.<sup>87</sup> A minority of the committee, however, argued against the moratorium, concluding that although “[w]e should fix the regulatory process, we should not freeze it and the benefits that flow from it.”<sup>88</sup> In the end, the general sentiment expressed in the minority report—that regulatory reform was needed but that a moratorium was not the right way to achieve it—won out when a major amendment was proposed to the bill providing for a forty-five-day congressional review of certain federal regulations instead of a generalized moratorium.<sup>89</sup> This amended version of the bill, which passed the Senate by a vote of 100 to 0,<sup>90</sup> did not call for a hard moratorium, as did the House bill, but rather proposed that certain significant regulations—defined essentially in terms of economic effect<sup>91</sup>—would require a forty-five-day congressional-review period before taking effect.<sup>92</sup> Although the Senate’s version of the bill could be seen as calling for a moratorium because it proposed to suspend the effective date of certain significant regulations pending a congressional-review period, it was not a true moratorium in any sense of the word.<sup>93</sup> Hence, the House’s desire to

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86. *Id.* at 39 (statement of Thomas J. Donohue, President and Chief Executive Officer, American Trucking Association, Inc.).

87. S. REP. NO. 104-15, at 1–3 (1995).

88. *Id.* at 32.

89. 141 CONG. REC. 9312–14 (1995).

90. 141 CONG. REC. 9580 (1995).

91. *See* Regulatory Transition Act of 1995, S. 219, 104th Cong. § 106(2) (1995) (defining “significant rule[s]”).

92. *Compare* Regulatory Transition Act of 1995, H.R. 450, 104th Cong. § 3(a) (1995) (“Until the end of the moratorium period, a Federal agency may not take any regulatory rulemaking action, unless an exception is provided under section 5 [of this bill].”), *with* S. 219 § 103 (noting that “significant” rules may only take effect after a forty-five-day review period).

93. *See* 141 CONG. REC. 13,265 (1995) (statement of Rep. William F. Clinger, Jr.) (arguing that the Senate version of the moratorium was, “frankly, hard to characterize as a regulatory moratorium”); *id.* at 13,266 (statement of Rep. Colin Peterson) (noting that the Senate bill provides “for a different approach, which is not all bad, which asks for a congressional review period for new regulations”); President William J. Clinton, Statement on Senate Action To Reject a Regulatory Moratorium, 1 PUB. PAPERS 416, 416 (Mar. 29, 1995) (asserting that a forty-five-day congressional review period—“not the blunt instrument of a moratorium”—was “the right way to reform regulation”). Consistent with this sense, federal and state bills and statutes calling for the extension or suspension of the effective dates of regulations to enable legislative review of regulations are *not* treated as regulatory moratoria for purposes of this

impose a long-term regulatory moratorium on federal regulations failed. Still, the Senate's desire to institute a congressional-review period to enable Congress to consider whether to affirmatively disapprove significant rules—via a joint resolution passed by both houses and presented to the president—was eventually codified in the Congressional Review Act.<sup>94</sup>

*b. Legislative Proposals in the First Session of the 112th Congress.*

After the spurt of legislative activity in the mid-1990s focusing on regulatory moratoria,<sup>95</sup> congressional attention given to the topic tapered off, with very few legislative proposals involving regulatory moratoria surfacing between 1996 and 2010.<sup>96</sup> But after the economy again took a turn for the worse and many voters began voicing

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Article. In contrast, short-term, executive suspensions of the effective dates of regulations to enable executive review *are* treated as regulatory moratoria for purposes of this Article. The reason for this different treatment of legislative suspension of the effective date of a regulation and executive suspension is as follows: When the legislative branch, via a statute like the Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868 (codified at 5 U.S.C. §§ 801–808 (2006)), extends the point at which certain regulations can become effective in order to enable review of a regulation, *see id.* sec. 251, § 801(a)(3), 110 Stat. at 869 (codified at 5 U.S.C. § 801(a)(3)) (mandating a waiting period before a “major rule” can take effect), it does not impose a moratorium on regulatory activity in general but rather merely statutorily defines the effective date of the covered regulations. For example, no one would argue that Congress has implemented a moratorium by providing that substantive rules shall not be effective until at least thirty days after the required publication of the rule has occurred. *See* Administrative Procedure Act § 4(c), 5 U.S.C. § 553(d) (2006) (“The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . .”).

94. Congressional Review Act, 110 Stat. 868. The issue of congressional review of regulations came to the forefront again in the 112th Congress when Republicans proposed legislation that would halt all new major regulations until the regulations had been affirmatively approved by Congress—rather than simply giving Congress the chance to disapprove significant regulations, as the Congressional Review Act does. *See* Regulations from the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. § 801(b)(1) (2011) (“A major rule shall not take effect unless the Congress enacts a joint resolution of approval . . .”). This bill passed the House in December 2011 and was sent to the Senate. *See* 157 CONG. REC. H8237 (daily ed. Dec. 7, 2011) (noting that 241 representatives voted in favor of the bill).

95. *See, e.g.*, S. 219 (requiring a review period before a “significant rule” can take effect); H.R. 450 (proposing a moratorium on federal rulemaking); Stop Regulating Our Small Businesses Act of 1995, H.R. 839, 104th Cong. (1995) (proposing a moratorium on regulations related to small businesses).

96. *See, e.g.*, H.R. Res. 1649, 111th Cong. (2010) (proposing an amendment to House rules to establish a House Committee on Regulatory Review and American Jobs that would (1) review all final and proposed federal regulations to determine whether such regulations would result in the loss of U.S. jobs, and (2) impose a moratorium on such regulations); Midnight Rule Act, H.R. 34, 111th Cong. (2009) (proposing that midnight rules—defined as agency rules adopted within the final ninety days of the final term a president serves—“shall not take effect until 90 days after [a new] agency head [has been] appointed by the new President”).

concerns about overregulation,<sup>97</sup> this quiet period came to an end in the 112th Congress, when moratoria burst back onto the legislative agenda. Specifically, in the first session of the 112th Congress alone, at least fifteen bills introduced by Republicans called for the imposition of a generalized regulatory moratorium.<sup>98</sup>

In January 2011, Representative Don Young, a Republican from Alaska, introduced House Bill 213, the Regulation Audit Revive Economy Act of 2011 (RARE).<sup>99</sup> The ten-page bill proposed to impose a regulatory moratorium for at least two years after the date of enactment with some specified exceptions.<sup>100</sup> Its language borrowed heavily from House Bill 450 and Senate Bill 219 from the 104th Congress.<sup>101</sup>

At least fourteen additional legislative proposals calling for regulatory moratoria followed over the course of the next nine months in the Senate and the House.<sup>102</sup> These bills, with titles such as the Stop the Regulation Invasion Please Act of 2011<sup>103</sup> and the Regulation Moratorium and Jobs Preservation Act of 2011,<sup>104</sup> were similar in the sense that they all proposed generalized moratoria. Yet four distinct issues seemed to divide the various bills into different camps.

First, the bills differed regarding the length of their proposed moratoria. Many of the bills specified a set period of time for a

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97. For a description of polls demonstrating rising concerns about overregulation and the economy, see *infra* notes 229–31 and accompanying text.

98. This number counts bills introduced in the House or in the Senate as unique bills—meaning that a bill introduced in the House and the same counterpart bill introduced in the Senate are counted as two different bills.

99. Regulation Audit Revive Economy Act of 2011, H.R. 213, 112th Cong. (2011).

100. *Id.*

101. Compare Regulatory Transition Act of 1995, S. 219, 104th Cong. (1995), with Regulatory Transition Act of 1995, H.R. 450, 104th Cong. (1995).

102. H.R. 3518, 112th Cong. (2011); Jobs Through Growth Act, H.R. 3400, 112th Cong. (2011); Long-Term Surface Transportation Extension Act of 2011, S. 1786, 112th Cong. tit. VI (2011); Regulatory Time-Out Act of 2011, H.R. 3257, 112th Cong. (2011); Jobs Through Growth Act, S. 1720, 112th Cong. (2011); Job Creation and Regulatory Freeze Act of 2011, H.R. 3194, 112th Cong. (2011); Stop the Regulation Invasion Please Act of 2011, H.R. 3181, 112th Cong. (2011); H.R. Res. 402, 112th Cong. (2011); Regulatory Time-Out Act of 2011, S. 1538, 112th Cong. (2011); Regulation Moratorium and Jobs Preservation Act of 2011, H.R. 2898, 112th Cong. (2011); Two-Year Regulatory Freeze Act of 2011, S. 1531, 112th Cong. (2011); Regulation Moratorium and Jobs Preservation Act of 2011, S. 1438, 112th Cong. (2011); Restoring Economic Certainty Act of 2011, H.R. 1281, 112th Cong. (2011); Regulation Moratorium Act of 2011, H.R. 1235, 112th Cong. (2011).

103. H.R. 3181.

104. H.R. 2898.

proposed moratorium, such as a one- or two-year period.<sup>105</sup> In contrast, a few bills called for a moratorium keyed to the country's unemployment rate.<sup>106</sup> For example, the Regulation Moratorium and Jobs Preservation Act of 2011<sup>107</sup> called for a moratorium on any significant new federal regulations until the national unemployment rate had fallen to 7.7 percent or below.<sup>108</sup>

Second, the bills differed as to whether only major or significant rules should be covered, or whether all rules—regardless of their significance—should be targeted. Many bills targeted only significant regulations, including regulations that would have an annual effect on the economy of \$100 million or more or that would “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”<sup>109</sup> In contrast, other bills declined to impose any kind of a significance threshold. For example, one bill covered *all* regulations “that would affect employment levels,”<sup>110</sup> and another bill banned agencies from putting into force “*any* rule,” with narrow, specified exceptions.<sup>111</sup>

Third, the bills differed as to which otherwise-covered regulations should be exempted from the reach of a moratorium. Most of the bills recognized the need to provide some exemptions or waivers,<sup>112</sup> but the bills differed in terms of the types and scope of

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105. See, e.g., H.R. 3518 § 1 (proposing a two-year moratorium); S. 1786 § 603 (proposing a one-year moratorium); H.R. 3257 § 3(2) (proposing a moratorium to last until January 21, 2013); H.R. 3194 § 4(3) (proposing a moratorium with an end date of January 20, 2013); H.R. 3181 § 6(3) (providing for a minimum of a two-year moratorium); S. 1538 § 3 (proposing a one-year “time-out” period for regulations); S. 1531 § 2 (proposing a two-year freeze on new rules or regulations); H.R. 1281 § 6(2) (proposing a moratorium that would last until the end of the “two-year period beginning on the date occurring 30 days after the date of the enactment of this Act”); H.R. 1235 § 2 (proposing a moratorium through January 31, 2013).

106. See, e.g., H.R. 3400 § 202(a) (“No agency may take any significant regulatory action, until the Bureau of Labor Statistics average of monthly unemployment rates for any quarter beginning after the date of enactment of this Act is equal to or less than 7.7 percent.”); S. 1720 § 3503(a) (same); H.R. 2898 § 3(a) (same); S. 1438 § 3(a) (same).

107. S. 1438.

108. *Id.* § 3(a).

109. S. 1538; accord H.R. 3400 § 201(3); S. 1720 § 3502(3); H.R. 3194 § 4(2); H.R. 2898 § 2(3)(A); S. 1438 § 2(3).

110. H.R. 3518 § 1.

111. Regulation Moratorium Act of 2011, H.R. 1235, 112th Cong. § 2 (2011) (emphasis added).

112. H.R. 3518 is an example of a bill that fails to provide exemptions. It proposes a moratorium that apparently would cover *all* rules “that would affect employment levels”—without any specified exceptions. H.R. 3518 § 1.

specified exemptions. Many of the bills exempted regulations that would be necessary “due to an imminent threat due to human health or safety, or any other emergency”<sup>113</sup> or regulations that would be “necessary for the enforcement of a criminal law.”<sup>114</sup> Some of the bills exempted regulations that would foster job creation or economic growth;<sup>115</sup> others exempted rules pertaining to agency organization, management, or personnel matters;<sup>116</sup> and a few contained exemptions for regulations involving civil rights.<sup>117</sup> In addition, some of the bills included exemptions for regulations pertaining to military or foreign-affairs functions,<sup>118</sup> as well as regulations limited to interpreting, implementing, or administering the Internal Revenue Code.<sup>119</sup>

Finally, the bills differed as to whether they would create private rights of action. Many of the bills said nothing about this question.<sup>120</sup>

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113. H.R. 2898 § 4(a)(1)(A)–(B); *accord* H.R. 3194 § 3 (providing for exemptions in cases of “an imminent threat to human health or safety, or any other emergency”); Stop the Regulation Invasion Please Act of 2011, H.R. 3181, 112th Cong. § 3(a)(2)(A) (2011) (providing for exemptions in emergencies as certified by the administrator of OIRA); Regulation Audit Revive Economy Act of 2011, H.R. 213, 112th Cong. § 4(a) (2011) (establishing an “emergency exception”); *see also* H.R. Res. 402, 112th Cong. (2011) (exempting rules that “provide for emergency services or the defense of the Nation”); H.R. 3400 § 203 (“The President may waive the application of [the moratorium] to any significant regulatory action, if the President . . . determines that the waiver is necessary on the basis of national security or a national emergency . . .”); H.R. 2898 § 4 (same); S. 1438 § 4 (same).

114. H.R. 3194 § 3(a)(1)(B); H.R. 2898 § 4(a)(1)(A)–(B); H.R. 213 § 4(a); *accord* H.R. 3181 § 3(a)(2)(B).

115. *See* H.R. 3194 § 3(a)(1)(C) (exempting regulations that have as their principal effect “fostering private sector job creation and the enhancement of the competitiveness of workers in the United States” or “encouraging economic growth”); *cf.* H.R. 2898 § 2(3)(A) (defining “significant regulatory action[s]” to which the moratorium applies as, *inter alia*, those actions that “adversely affect in a material way the economy, a sector of the economy, productivity, competition, [or] jobs”).

116. *E.g.*, Restoring Economic Certainty Act of 2011, H.R. 1281, 112th Cong. § 6(3)(B)(ii) (2011) (exempting regulations “that are limited to agency organization, management, or personnel matters”).

117. *See, e.g.*, H.R. 3181 § 3(c) (noting that the regulatory moratorium would not apply to rulemaking or rules that “establish or enforce any statutory rights against discrimination on the basis of age, race, religion, gender, national origin, or handicapped or disability status except such rulemaking actions or rules that establish, lead to, or otherwise rely on the use of a quota or preference based on [those characteristics]”); H.R. 213 § 4(c) (same).

118. *See* H.R. 3194 § 3(a)(1)(D) (exempting regulations that pertain “to a military or foreign affairs function”); H.R. 1281 § 6(3)(B)(i) (same).

119. H.R. 3194 § 3(a)(1)(E); Regulatory Time-Out Act of 2011, S. 1538, 112th Cong. § 4(a)(1)(E) (2011).

120. *See, e.g.*, H.R. 3518, 112th Cong. (2011); Long-Term Surface Transportation Extension Act of 2011, S. 1786, 112th Cong. tit. VI (2011); Regulatory Time-Out Act of 2011, H.R. 3257, 112th Cong. (2011); H.R. 3194; H.R. 3181; Two-Year Regulatory Freeze Act of 2011, S. 1531, 112th Cong. (2011); Regulatory Moratorium Act of 2011, H.R. 1235, 112th Cong. (2011).



Of those that did, some allowed private rights of action, stating that “[a]ny person that is adversely affected or aggrieved by any significant regulatory action in violation of this Act is entitled to judicial review.”<sup>121</sup> In contrast, other bills expressly disallowed such actions, stating that “[n]o private right of action may be brought against any Federal agency for a violation of this Act.”<sup>122</sup>

Neither the Senate nor the House has come together behind any of these bills. Nor have the bills managed to gather bipartisan momentum. Nonetheless, they demonstrate that legislative proposals for regulatory moratoria have worked their way into the legislative consciousness, with Republicans in Congress introducing the bills.

### *B. Moratoria at the State Level*

State executives and legislatures have also started looking to and relying upon both hard and soft regulatory moratoria as means of exerting control over state regulatory activity.

1. *Executive-Driven Moratoria in the States.* Similar to the moratoria at the federal level, most state-level moratoria have followed from executive orders rather than legislative command. As this Section describes, most of these executive moratoria have been soft rather than hard moratoria. Some state moratoria that started out as soft moratoria, however, have been transformed into hard moratoria. In addition, a few governors, including Washington Governor Christine Gregoire and Nevada Governor Brian Sandoval, have chosen to call outright for hard moratoria spanning a year or more.

*a. Soft Gubernatorial Moratoria.* In the mid-1990s—on the heels of President Bush’s one-year moratorium on federal regulation in 1992<sup>123</sup> and around the time that the 104th Congress was considering legislation to impose a moratorium on federal regulatory activity<sup>124</sup>—some governors experimented with imposing short-term moratoria upon coming into office. One prominent example of this phenomenon occurred in New York, where on January 5, 1995, the newly elected

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121. Jobs Through Growth Act, H.R. 3400, 112th Cong. § 204(b) (2011); Jobs Through Growth Act, S. 1720, 112th Cong. § 3505(b) (2011); Regulation Moratorium and Jobs Preservation Act of 2011, S. 1438, 112th Cong. § 5 (2011).

122. H.R. 1281 § 7; H.R. 213 § 7.

123. See *supra* notes 41–66 and accompanying text.

124. See *supra* notes 73–95 and accompanying text.

governor, George Pataki, implemented a ninety-day moratorium, banning the “adoption of any rule or regulation” by any agency over which he had control with certain specified exceptions.<sup>125</sup> Although Governor Pataki, a Republican, issued the order after taking the governor’s office out of Democratic hands, he did not justify the moratorium in terms of a general need to review regulations issued by the prior administration. Rather, he justified it in economic terms. Specifically, he noted that “excessive rules and regulations have unduly burdened the State’s economy and imposed needless costs on the businesses and citizens of this State,” and he stressed the need to “review all proposed rules and regulations to ensure that no rule or regulation is more demanding than required to meet legislative goals.”<sup>126</sup> Governor Pataki had campaigned on a promise to “be business friendly,” and according to news reports, the moratorium was a means of following up on his campaign promise.<sup>127</sup> Indeed, business leaders reportedly hailed the move “as the first step to a better business climate.”<sup>128</sup>

Governor Pataki subsequently determined that his administration could not complete a review of all regulations within the ninety-day period, and he extended the initial freeze through September 1995 via subsequent orders.<sup>129</sup> This meant that his initial

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125. Exec. Order No. 2, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.2 (1995); *see also* GEORGE E. PATAKI, MESSAGE TO THE LEGISLATURE 14 (1995) (announcing to the legislature that he would sign an “Executive Order declaring a moratorium on all new regulations—except regulations needed to protect the public health and safety or rules that promote new jobs and economic activity”); Patricia E. Salkin, *News from the States*, ADMIN. & REG. L. NEWS, Spring 1995, at 8, 8 (noting that Governor Pataki ordered a moratorium on proposed rules and regulations via his second executive order).

126. Exec. Order No. 2, tit. 9, § 5.2.

127. *See* Precious, *supra* note 10 (“Living up to his campaign promise to be business friendly . . . Gov. George Pataki on Thursday placed a 90-day moratorium on new regulations being issued by state agencies.”); *see also* Patricia Salkin, *Regulatory Reform Continues To Dominate Political Agenda in New York*, ADMIN. & REG. L. NEWS, Spring 1996, at 10, 10 (“When Governor George Pataki campaigned for office, he promised regulatory relief and reform to the businesses and local governments in the State.”).

128. Jessica Ancker, *Business Leaders Hail Pataki Order*, BUFF. NEWS, Jan. 6, 1995, at A12.

129. *See* Exec. Order No. 7, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.7 (1995) (extending “Executive Order No. 2 in full force and effect up to and including June 30, 1995”); Exec. Order No. 14, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.14 (1995) (extending “Executive Order No. 2 in full force and effect up to and including Sept. 30, 1995”); *see also* Pataki Aims To Cut into Some Red Tape, TIMES UNION (Albany, N.Y.), Dec. 2, 1995, at B2 (noting in December 1995 that even though the Pataki administration’s “moratorium on issuing new regulations” was over, agencies would face a “rigorous set of guidelines designed to discourage the creation of too much governmental red tape”); Michael Slackman, *Pataki’s Regulatory Revolution*, NEWSDAY,

soft moratorium ultimately morphed into a longer-term freeze that was coupled with numerous other initiatives designed to achieve regulatory reform, such as a focus on cost-benefit analysis.<sup>130</sup>

On January 25, 1995—around the same time that Governor Pataki issued his initial moratorium in New York—Rhode Island’s newly elected Republican governor, Lincoln Almond, issued an order just days after taking the governorship out of Democratic hands.<sup>131</sup> In the order, Governor Almond declared “a moratorium on the issuance of any new regulations” so that “each department can assess the need for all current regulations and eliminate or modify those which are not warranted.”<sup>132</sup> Like Governor Pataki, Governor Almond justified the order largely in terms of improving the economy and combating overregulation, asserting that “a strong and growing economy is essential to job formation and the well-being of Rhode Island” and that “government over-regulation poses a threat to the health of Rhode Island businesses.”<sup>133</sup>

Since 2002, many more governors have imposed short-term regulatory moratoria in their states immediately upon coming into office. And they too have all either expressly or implicitly pointed to concerns about the economy, unnecessary burdens, or overregulation when freezing rules at the beginning of their new administrations.

Governor Arnold Schwarzenegger in California was one such governor. Immediately upon coming into office in November 2003, Governor Schwarzenegger issued a regulatory moratorium via executive order that imposed a 180-day freeze on rulemaking, requesting among other things that agencies cease processing

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Aug. 6, 1995, at A21 (noting that Governor Pataki’s moratorium would “continue[] at least until the end of September”).

130. See Slackman, *supra* note 129 (“Gov. George Pataki is leading a quiet revolution by moving aggressively to rearrange the state’s regulatory landscape.”); Roy Yancey, *State Shapes Rules To Weigh the Price of New Regulations*, TIMES UNION (Albany, N.Y.), Aug. 14, 1995, at B2 (“Taking a page from the federal book, the Pataki administration is preparing how-to handbooks on cost-benefit analysis and risk assessments to be distributed next month to various state agencies.”).

131. Exec. Order No. 95-3 (R.I. Jan. 25, 1995), available at [http://www.uri.edu/library/special\\_collections/almond/execord/95-03.html](http://www.uri.edu/library/special_collections/almond/execord/95-03.html); see also *Rhode Island Governor Inauguration*, C-SPAN (Jan. 3, 1995), <http://www.c-spanvideo.org/program/62525-1> (relaying Governor Almond’s inaugural address on January 3, 1995); *Governor Bruce Sundlun Papers 1990-1995: Biographical Note*, UNIV. OF R.I., [http://www.uri.edu/library/special\\_collections/political\\_papers/sundlun/historical.html](http://www.uri.edu/library/special_collections/political_papers/sundlun/historical.html) (noting that Governor Sundlun succeeded the Democrat Bruce Sundlun).

132. Exec. Order No. 95-3.

133. *Id.*

proposed rules and suspend or postpone the effective date of published regulations that had not yet become effective.<sup>134</sup> Governor Schwarzenegger, a Republican who had replaced a Democrat,<sup>135</sup> justified the moratorium by asserting that “the increased costs associated with California’s regulatory environment ha[d] diminished competition in the national and global marketplaces for the State’s goods and services.”<sup>136</sup> He also noted that “with the onerous impact of over-regulation on the daily lives of Californians, it is time to reassess the system of State Government that is perceived to work against businesses and inhibit growth and economic prosperity.”<sup>137</sup>

Several years later, in January 2009, Arizona’s newly elected Republican governor, Janice Brewer, announced a moratorium just one day after taking the office out of Democratic hands.<sup>138</sup> Her memorandum asked agencies, among other things, to refrain through April 30, 2009, from sending proposed or final rules for publication and to withdraw proposed rules that had been sent but had not yet been published.<sup>139</sup> She justified the order by highlighting the necessity of “ensur[ing] that [her] appointees ha[d] the opportunity to review any new or pending rules.”<sup>140</sup> At the end of her order, however, she also noted that independent agencies were welcome to comply voluntarily in the interest “of sound regulatory practice and the avoidance of costly, burdensome, or unnecessary rules.”<sup>141</sup> Hence, her motives seemed to hint at a desire to act against overregulation. Through a combination of legislative acts and additional executive orders, the moratorium in Arizona was extended through June 2012—meaning that it turned from a short-term, executive-driven moratorium keyed to a political transition into a long-term

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134. Exec. Order No. S-2-03 (Cal. Nov. 17, 2003), *available at* <http://www.gov38.ca.gov/executive-order/3381>.

135. *History of California’s Constitutional Officers*, CAL. SEC’Y OF STATE DEBRA BOWEN, [http://www.sos.ca.gov/admin/ca-roster/2010/pdf/01c-his\\_off.pdf](http://www.sos.ca.gov/admin/ca-roster/2010/pdf/01c-his_off.pdf) (last visited Apr. 11, 2012).

136. Exec. Order No. S-2-03.

137. *Id.*

138. *See Governor Janice K. Brewer’s Accomplishments*, OFFICE OF ARIZ. GOVERNOR JANICE K. BREWER, [http://www.azgovernor.gov/About/Gov\\_Accomplishments.asp](http://www.azgovernor.gov/About/Gov_Accomplishments.asp) (last visited Apr. 11, 2012) (stating that Governor Brewer took office on January 21, 2009, and announced a regulatory moratorium the next day); *Janet Napolitano*, WASH. POST, [http://www.washingtonpost.com/politics/janet-napolitano/gIQAynPe9O\\_topic.html#path-to-power](http://www.washingtonpost.com/politics/janet-napolitano/gIQAynPe9O_topic.html#path-to-power) (last visited Apr. 11, 2012) (noting that Governor Brewer would succeed Democrat Janet Napolitano).

139. Memorandum from Janice K. Brewer, Governor, to State Agency Dirs. & Acting Dirs., 15 Ariz. Admin. Reg. 342, 342 (Jan. 30, 2009).

140. *Id.*

141. *Id.*

moratorium that was expressly tied to the economy and deregulation.<sup>142</sup>

One year after Governor Brewer first announced the initial moratorium in Arizona, New Jersey's newly elected governor, Chris Christie, another Republican who had replaced a Democrat,<sup>143</sup> declared that "[a]ll proposed regulations and rules" specified in an appendix accompanying the order were to be suspended for ninety days.<sup>144</sup> He also directed that rules that had not yet been published in the state register should be withdrawn.<sup>145</sup> Like other governors, he justified the freeze by claiming that it was necessary "to address the current economic and fiscal situation" and "to ensure that the regulatory processes of State Government do not have the effect of preventing this State from attracting new business enterprises, constraining the growth and expansion" of businesses, or "hindering the creation of jobs."<sup>146</sup>

Over the course of the following year, as the economy continued to suffer, several other newly elected governors followed New Jersey's lead,<sup>147</sup> implementing rule freezes in their own states in the name of boosting the economy and avoiding overregulation. For example, New Mexico's governor, Susana Martinez, a Republican who had replaced a Democrat,<sup>148</sup> signed an order on her first day in office on January 1, 2011, that suspended "[a]ll proposed and pending rules and regulations, excluding those not under the authority of the Governor," for a period of ninety days, with limited, specified exceptions.<sup>149</sup> Just days later in Maine, on January 10, 2011, right after

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142. See *infra* notes 176–85 and accompanying text.

143. David M. Halbfinger & Ian Urbina, *G.O.P. Wins Two Key Governors' Races; Bloomberg Prevails in a Close Contest*, N.Y. TIMES, Nov. 4, 2009, <http://www.nytimes.com/2009/11/04/nyregion/04elect.html>.

144. Exec. Order No. 1 (N.J. Jan. 20, 2010), available at <http://www.nj.gov/infobank/circular/eoccl.pdf>.

145. *Id.*

146. *Id.*

147. See *New Jersey: Common Sense Drives Regulatory Reform—A Positive Influence Outside Our Own State*, METROPOLITAN CORP. COUNS., Apr. 2011, at 17 (suggesting that "newly elected governors in Florida, Nevada, New Mexico and North Carolina have instituted rule freezes" inspired by New Jersey's own freeze (quoting Kim Gaudagno, Lieutenant Governor of New Jersey)).

148. Marc Lacey, *New Mexico Governor Rushes To Undo the Agenda of Her Predecessor*, N.Y. TIMES, Aug. 30, 2011, at A11.

149. Exec. Order No. 2011-001 para. 1 (N.M. Jan. 1, 2011), available at <http://www.governor.state.nm.us/uploads/FileLinks/1e77a5621a1544e28318ba93fcd47d49/EO-2011-001.pdf>.

taking the governorship out of Democratic hands,<sup>150</sup> the newly elected Republican governor, Paul LePage, issued an order, that put a six-month halt on rulemaking in the state to enable his office to review proposed and pending rules, allowing rules to go forward during this period only if given the green light by his governor's office.<sup>151</sup> Also in January 2011, Tennessee's governor, Bill Haslam, a Republican who had replaced a Democratic governor,<sup>152</sup> issued a statement at the very beginning of his administration announcing "a 45-day freeze on any new regulations and rules as part of the top-to-bottom review of state government."<sup>153</sup>

One other state that saw a newly elected governor impose a brief rule freeze in 2011 was Florida. Specifically, in January 2011, immediately upon coming into office,<sup>154</sup> Florida's Republican governor, Rick Scott, stressed the need to avoid "duplicative, obsolete and unnecessarily burdensome requirements" on citizens

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150. See Kevin Miller, *Gov.-Elect LePage Takes Oath Today*, BANGOR DAILY NEWS (Me.), Jan. 5, 2011, at 1 (noting that the Republican Governor LePage would succeed Democrat John Baldacci on January 5, 2011).

151. Exec. Order No. 09 (Me. Jan. 10, 2011), available at [http://www.maine.gov/tools/whatsnew/index.php?topic=Gov\\_Executive\\_Orders&id=182022&v=article2011](http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=182022&v=article2011). Notably, Governor LePage's moratorium was immediately supplemented by an order issued by Maine's secretary of state, who chose to implement "an immediate moratorium on rulemaking within the bureaus overseen by his office" and a review of existing and pending rules. *Secretary of State Summers Implements Rulemaking Moratorium, Will Scrutinize Pending Rules*, STATES NEWS SERVICE, Jan. 11, 2011, available at Academic OneFile, Doc. No. GALE|A246202209. Maine's secretary of state is elected by the state's legislature as a constitutional officer and is governed by the "Maine Constitution rather than by the Governor and Executive Department." *Id.* Hence, the secretary of state felt that his supplemental order was necessary because the office of the secretary of state "is authorized under Maine's Constitution and therefore theoretically outside of those impacted by the Governor's Executive Order." *Id.* (quoting Summers).

152. *Gov. Bill Haslam (R)*, NAT'L J., <http://www.nationaljournal.com/almanac/person/bill-haslam-us> (last updated July 1, 2011).

153. Press Release, Governor Bill Haslam, Haslam Announces Freeze of New Rules and Regulations (Jan. 19, 2011), available at <http://news.tennesseeanytime.org/node/6611>. One high-profile rule reportedly frozen by Governor Haslam's order was a Tennessee Department of Revenue rule change that allegedly would have impacted online retailer Amazon.com. See Brian Reisinger, *Retailers Call Play for Amazon 'Unfair,'* NASHVILLE BUS. J., Apr. 1, 2011, <http://www.bizjournals.com/nashville/print-edition/2011/04/01/retailers-call-play-for-amazon-unfair.html> ("The Department of Revenue canceled [a] hearing on the rule change, citing Haslam's regulatory freeze as he came into office.").

154. Ryan Mills, *On the Job: Rick Scott Sworn In as Florida's 45th Governor, Issues First Orders*, NAPLES DAILY NEWS (Jan. 4, 2011, 12:25 PM), <http://www.naplesnews.com/news/2011/jan/04/rick-scott-sworn-in-florida-governor-inauguration>.

and businesses by suspending rulemaking in the state.<sup>155</sup> His order did not include a defined time period for the rulemaking suspension; nevertheless, a subsequent order issued by Governor Scott suggested that he had intended the suspension to last only temporarily while his administration worked to get a new Office of Fiscal Accountability and Regulatory Reform (OFARR) set up. Moving forward, OFARR would have to approve rulemaking by agencies under the governor's direction before rules could move forward.<sup>156</sup>

In short, as all of this executive activity demonstrates, numerous state governors have experimented with freezing regulatory activity for brief periods immediately upon coming into office, generally in the name of helping the economy and avoiding overregulation. This phenomenon suggests that at least some governors see soft moratoria as a means of aligning the regulatory machinery with their own policy goals.

*b. Hard Gubernatorial Moratoria.* Reliance upon executive-driven moratoria in the states has not been limited to brief periods of political transition. To the contrary, some governors have ordered hard moratoria spanning one or more years—similar to President George H.W. Bush's one-year moratorium on federal regulatory activity in 1992.<sup>157</sup> Although North Carolina,<sup>158</sup> Arizona,<sup>159</sup> and perhaps Michigan<sup>160</sup> all fall into this category, Nevada and Washington provide the clearest examples and are discussed here.

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155. Exec. Order No. 11-01 (Fla. Jan. 4, 2011), available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-01-rulemaking.pdf>, superseded by Exec. Order No. 11-72 (Fla. Apr. 8, 2011), available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-72-fiscal.pdf>.

156. See Exec. Order No. 11-72 § 1 (requiring state agencies “to submit all proposed notices, along with the complete text of the proposed rule or amendment, to OFARR” and prohibiting agencies from publishing “any required notice without prior OFARR’s approval”). The Florida Supreme Court, however, later refused to read Executive Order No. 11-72 as overriding the suspension of rulemaking in the state. See *Whiley v. Scott*, No. SC11-592, 2011 WL 3568804, at \*10 (Fla. Aug. 16, 2011) (per curiam) (“We trust that any provision in Executive Order 11-72 suspending agency compliance with the [Administrative Procedure Act, FLA. STAT. ANN. ch. 120 (West 2008)], i.e., rulemaking, will not be enforced against an agency at this time . . .”).

157. See *supra* notes 41–66 and accompanying text.

158. See *infra* notes 187–96 and accompanying text.

159. See *infra* notes 176–85 and accompanying text.

160. See Exec. Order No. 1995-6 § 4 (Mich. Mar. 31, 1995), available at <http://www.state.mi.us/migov/gov/ExecutiveOrders/1995/1995-6.html> (ordering that agencies “shall process rules only when the rules are required by law, are necessary to interpret or enforce the law, are necessary to rescind or amend obsolete or superseded rules, or are necessary due to compelling public need”).

*i. Washington.* In November 2010, Washington’s governor, Christine Gregoire, a Democrat who had assumed the governorship in 2005,<sup>161</sup> ordered the suspension of all “non-critical rule development” by state agencies through January 1, 2012.<sup>162</sup> In issuing the suspension, Governor Gregoire cited the need for a “stable and predictable regulatory and policy environment” in a time of “severe budget constraints” and the difficulty small businesses and governments face when “monitor[ing] and respond[ing] to proposed changes in rules and policies.”<sup>163</sup> To try to help clear up ambiguity around which rules would be deemed critical and hence exempted from the suspension, Governor Gregoire’s office promptly issued a clarifying memorandum, stating that the “Governor is directing agencies to suspend rule making that is not *immediately* necessary.”<sup>164</sup> The memo also set forth certain categories of rules that would be deemed critical, such as rules required by federal or state law and rules “necessary to protect public health, safety, and welfare or necessary to avoid an immediate threat to the state’s natural resources.”<sup>165</sup>

Then, in the fall of 2011, Governor Gregoire issued another order, extending the initial moratorium through December 31, 2012<sup>166</sup>—meaning that the moratorium was now scheduled to last more than two years. In extending the moratorium, Governor Gregoire explained that “[i]t’s clear from the state of our economy that the timing isn’t right to end the moratorium,” and that “[g]iving small businesses and local governments more time to devote their full attention to creating jobs and helping communities will help support the economy.”<sup>167</sup> Hence, Washington’s moratorium is notable not only because it—unlike many other state-level moratoria—was issued by a

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161. Chris McGann, *Gregoire Sworn In amid Legal Challenge*, SEATTLE POST-INTELLIGENCER, Jan. 12, 2005, at A1.

162. Exec. Order No. 10-06 § 1 (Wash. Nov. 17, 2010), available at [http://www.governor.wa.gov/execorders/eo\\_10-06.pdf](http://www.governor.wa.gov/execorders/eo_10-06.pdf).

163. *Id.*

164. Memorandum from Kari Burrell, Exec. Policy Dir., to Agency Dirs. (Nov. 16, 2010), available at [http://www.governor.wa.gov/news/20101116\\_memo\\_eo\\_10-06.pdf](http://www.governor.wa.gov/news/20101116_memo_eo_10-06.pdf) (emphasis added).

165. *Id.*

166. Exec. Order No. 11-03, at 1 (Wash. Oct. 11, 2011), available at [http://www.governor.wa.gov/execorders/eo\\_11-03.pdf](http://www.governor.wa.gov/execorders/eo_11-03.pdf).

167. Press Release, Governor Chris Gregoire, Gov. Gregoire Extends Rule Moratorium (Oct. 13, 2011), available at <http://www.governor.wa.gov/news/news-view.asp?pressRelease=1784&newsType=1>.



Democratic governor, but also because it was slated to last more than two years.

*ii. Nevada.* Turning to Nevada, Governor Brian Sandoval, a Republican who had taken over the governorship from a fellow Republican,<sup>168</sup> issued a one-year freeze on proposed regulations, with specified exceptions, immediately upon coming into office in January 2011.<sup>169</sup> Although his order spoke of the need to review regulations to ensure that they were consistent with his regulatory policy,<sup>170</sup> the one-year freeze went well beyond a brief period of political change. The freeze was, for example, twice as long as the one ordered by Governor Schwarzenegger in California in 2003<sup>171</sup> and four times as long as the freeze ordered by New Mexico's governor in 2011.<sup>172</sup> Hence, Governor Sandoval's freeze seems to be most properly classified not as a soft moratorium tied to a brief period of political transition but rather as a hard moratorium tied to relieving businesses of regulatory burdens, much like the moratorium President George H.W. Bush issued in 1992.<sup>173</sup> Indeed, statements made by Governor Sandoval and his aides seemed to confirm that the moratorium was not simply about the political transition but rather was about the economy.<sup>174</sup>

*2. Calls for Hard Moratoria by State Legislatures.* In addition to the various moratoria imposed by state governors, state-level moratoria also have come about as a result of legislative action in at least two states: Arizona and North Carolina.<sup>175</sup> Additionally, state

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168. Ed Vogel, *Sandoval Set To Take Office*, LAS VEGAS REV.-J., Jan. 1, 2011, at 2B.

169. Exec. Order No. 2011-01 para. 1 (Nev. Jan. 3, 2011), available at [http://ndep.nv.gov/docs\\_10/exec-order-2011-01.pdf](http://ndep.nv.gov/docs_10/exec-order-2011-01.pdf).

170. See *id.* para. 2 (“The review shall include an assessment of how each regulation or set of regulations is consistent with my regulatory priorities—that is, to protect the health and welfare of the people of the state of Nevada without discouraging economic growth.”).

171. See Exec. Order No. S-2-03 (Cal. Nov. 17, 2003), available at <http://www.gov38.ca.gov/executive-order/3381> (ordering a 180-day regulatory freeze).

172. See Exec. Order No. 2011-001 para. 1 (N.M. Jan. 1, 2011), available at <http://www.governor.state.nm.us/uploads/FileLinks/1e77a5621a1544e28318ba93fcd47d49/EO-2011-001.pdf> (ordering a ninety-day regulatory freeze).

173. See *supra* notes 41–66 and accompanying text.

174. See Ed Vogel, *New Rules Don't Violate Sandoval Order*, LAS VEGAS REV.-J., Dec. 12, 2011, at 3B (“Sandoval made it clear the regulation freeze was meant strictly for regulations affecting business and that he wanted to help, not hurt, businesses.”).

175. Idaho stands in a different but somewhat related category. The Idaho Administrative Procedure Act, IDAHO CODE ANN. §§ 67-5201 to -5292 (2006), requires legislative review of all

legislators in other states have proposed bills and nonbinding resolutions calling for moratoria. This Section describes this legislative activity.

*a. State Laws Imposing Moratoria.* The legislatures in both Arizona and North Carolina have experimented with imposing different kinds of regulatory moratoria. These legislatures, however, have not acted alone. Rather, they have acted in concert with the governors in those states.

*i. Arizona.* In Arizona, the state's moratorium began when Governor Brewer came into office and ordered a regulatory moratorium on January 22, 2009, that initially was to last only through April 2009.<sup>176</sup> She subsequently extended the moratorium, first through June 29, 2009,<sup>177</sup> and then later through November 24, 2009.<sup>178</sup> In the midst of her actions, however, the legislature got involved, ultimately passing a law that extended the moratorium, first through June 2010,<sup>179</sup> and then later through June 2011.<sup>180</sup> In reporting

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proposed rules by a joint subcommittee, *id.* § 67-5223; *see also* OFFICE OF THE ADMIN. RULES COORDINATOR, THE IDAHO RULE WRITER'S MANUAL 13 (2010), *available at* [http://admin.rules.idaho.gov/rulemaking\\_templates/rule\\_draftmanual.pdf](http://admin.rules.idaho.gov/rulemaking_templates/rule_draftmanual.pdf). Analysts at the state's Legislative Services Office, "who review and prepare an analysis of the proposed rules for the germane joint subcommittees, stop reviewing proposed rules and begin drafting legislation for the upcoming session" before the beginning of the legislative session. *Id.* Hence, "[p]rior to the beginning of the legislative session a m[or]atorium is imposed on state agencies that restricts them from promulgating proposed rules." *Id.*

176. *See supra* note 139 and accompanying text.

177. Memorandum from Janice K. Brewer, Governor, to State Agency Dirs. & Acting Dirs. (Apr. 30, 2009), *available at* [http://azgovernor.gov/dms/upload/NR\\_043009\\_RegReviewDirective.pdf](http://azgovernor.gov/dms/upload/NR_043009_RegReviewDirective.pdf); *see also* Jeremy Duda, *Gov. Brewer Extends Suspension of Agency Rulemaking*, ARIZ. CAP. TIMES, May 1, 2009, <http://azcapitoltimes.com/news/2009/05/01/brewer-extends-suspension-of-agency-rulemaking> ("[Brewer] ordered a two-month extension of the ban on April 30. The new order keeps the suspension in effect until June 30. . . .").

178. *See* Memorandum from Janice K. Brewer, Governor, to State Agency Dirs. & Acting Dirs. (June 29, 2009), *available at* [http://www.azsos.gov/public\\_services/Register/SDOC4287Continuation02.pdf](http://www.azsos.gov/public_services/Register/SDOC4287Continuation02.pdf) (extending the moratorium through October 16, 2009); Memorandum from Janice K. Brewer, Governor, to State Agency Dirs. & Acting Dirs. (Oct. 16, 2009), *available at* [http://www.id.state.az.us/publications/Gov\\_Regulatory\\_Review\\_Plan\\_Oct\\_16\\_2009.pdf](http://www.id.state.az.us/publications/Gov_Regulatory_Review_Plan_Oct_16_2009.pdf) (extending the moratorium through November 24, 2009).

179. *See* Act of Sept. 4, 2009, ch. 7, § 28(A), 2009 Ariz. Sess. Laws 1874, 1905 (imposing a regulatory moratorium through the 2009–2010 fiscal year); ARIZONA OPENBOOKS, <http://openbooks.az.gov/app/transparency/index.html> (last visited Apr. 11, 2012) ("The State of Arizona government operates on a fiscal year that begins on July 1 and ends on the following June 30.").

180. Act of May 10, 2010, ch. 287, sec. 18, § 28(A), 2010 Ariz. Sess. Laws 1804, 1829–30. A gap in coverage existed between the two bills, with the original legislative moratorium set to expire at the end of June 2010, and the second legislative moratorium not set to kick in until

on the legislature's embrace of the moratorium, one newspaper in Arizona somewhat wryly noted, "Legislatures have enacted state holidays. They've done tax holidays. Now, Arizona's Legislature wants a regulatory holiday—an extended holiday."<sup>181</sup>

Although the legislatively imposed moratorium was set to expire at the end of June 2011,<sup>182</sup> Governor Brewer stepped back in on June 30, 2011, with yet another order to executive state agencies—this time calling for the moratorium to continue through June 30, 2012.<sup>183</sup> In extending the moratorium once again, Governor Brewer noted that "the economic climate in Arizona continues to challenge both those seeking employment and our employers," that "a predictable regulatory climate in this State will promote job creation and retention," and that "the expiration of the current regulatory review and moratorium could result in a regulatory explosion detrimental to job creation and retention in this State."<sup>184</sup> Notably, she also pointed to the actions of other states as support for the moratorium, reporting that from the time she had called for the moratorium in 2009, "other states ha[d] since implemented regulatory reviews and moratoriums."<sup>185</sup>

*ii. North Carolina.* North Carolina has also experienced an interesting mix of legislative and executive action regarding regulatory moratoria. In October 2010, North Carolina's governor, Beverly Perdue, a Democrat who had taken office in 2009,<sup>186</sup> issued an executive order commanding her cabinet secretaries to refrain from creating any new rules until the order was rescinded unless the rules were "deemed necessary to serve the public interest" or were required by law.<sup>187</sup> Although the command might have been read to

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July 29, 2010. Exec. Order No. 2010-13 (Ariz. June 30, 2010), available at [http://azgovernor.gov/dms/upload/EO\\_2010-13.pdf](http://azgovernor.gov/dms/upload/EO_2010-13.pdf). Hence, Governor Brewer filled the gap, issuing an executive order that extended the moratorium from July 1, 2010, through July 29, 2010. *Id.*

181. Mary Jo Pitzl, *Freeze on New Laws, Rules Sought*, ARIZ. REPUBLIC, Feb. 6, 2009, at 1.

182. Act of May 10, 2010, sec. 18, § 28(A), 2010 Ariz. Sess. Laws at 1829–30.

183. Exec. Order No. 2011-05 (Ariz. June 30, 2011), available at [http://www.azdhs.gov/diro/admin\\_rules/documents/Governor-Executive-Order\\_2011-05.pdf](http://www.azdhs.gov/diro/admin_rules/documents/Governor-Executive-Order_2011-05.pdf).

184. *Id.*

185. *Id.*

186. Press Release, Office of Governor Bev Perdue, Perdue Inaugurated as 73rd Governor, Pledges Strong, Hands-on Leadership in Tough Times (Jan. 10, 2009), available at <http://www.governor.state.nc.us/newsItems/PressReleaseDetail.aspx?newsItemID=13>.

187. Exec. Order No. 2011-001 § 2(1)(a) (N.C. Oct. 21, 2010), available at <http://www.governor.state.nc.us/NewsItems/UploadedFiles/88069e35-fa4c-4d03-b785-6455d7dc8880.pdf>.

lack teeth, given that the word “necessary” could be read liberally to allow most if not all otherwise-authorized rules to proceed,<sup>188</sup> Governor Perdue simultaneously issued a press release that demonstrated that she meant the word “necessary” to be read stringently.<sup>189</sup> The press release began by noting, “Governor Perdue today issued a directive to her cabinet secretaries and a request of Council of State members: do not create any new rules unless they are *absolutely* necessary.”<sup>190</sup>

After Governor Perdue had issued her ban on noncritical rules, the state legislature became involved, passing a law in March 2011 that barred agencies from adopting rules that would result in “substantial estimated additional costs”—defined as an aggregate financial impact on all persons subject to the rule of at least \$500,000 in a twelve-month period—unless adoption of the rule fell within a specified exception, such as being necessary to respond to “a serious and unforeseen threat to the public health, safety, or welfare,” or to a law or court order.<sup>191</sup> The law was reportedly designed to “prohibit new regulations that would hit North Carolinians in the pocketbook,”<sup>192</sup> or as one newspaper put it, to freeze “new rules if

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188. For example, at the federal level, Executive Order 12,866, 3 C.F.R. 638 (1994), *reprinted as amended* in 5 U.S.C. § 601 app. at 745 (2006), and 5 U.S.C. § 601 app. at 108 (Supp. IV 2010), which was initially adopted by President Clinton, seems to ban regulations that are not necessary, providing,

Federal agencies should promulgate only such regulations as are required by law, are *necessary* to interpret the law, or are made *necessary* by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.

*Id.* § 1(a), 3 C.F.R. at 638–39, *reprinted as amended* in 5 U.S.C. § 601 app. at 745 (emphasis added). This text, however, appears in a section of the executive order titled “Statement of Regulatory Philosophy and Principles,” *id.*, and it could be read to set more of an aspirational regulatory philosophy for agencies than a stringent requirement. Indeed, President Clinton surely did not view this language as imposing the equivalent of a moratorium, given that he openly opposed the concept of a regulatory moratorium. See Clinton, *supra* note 93, at 416 (asserting in 1995 that “the blunt instrument of a moratorium” was not “the right way to reform regulation”).

189. Press Release, Office of Governor Bev Perdue, Governor Stops New Rulemaking Unless Absolutely Necessary (Oct. 21, 2010), *available at* <http://www.governor.nc.gov/NewsItems/PressReleaseDetail.aspx?newsItemID=1524>.

190. *Id.* (emphasis added).

191. Act of Mar. 25, 2011, Sess. L. No. 2011-13, 2011 N.C. ALS 13 (LEXIS).

192. David N. Bass, *GOP Clashes with Perdue over Regulatory Reform Agenda*, CAROLINA J. ONLINE (Feb. 8, 2011), [http://www.carolinajournal.com/exclusives/display\\_exclusive.html?id=7378](http://www.carolinajournal.com/exclusives/display_exclusive.html?id=7378).

they [would] cost the regulated target money.”<sup>193</sup> The lifespan of this rulemaking freeze on significant rules proved fleeting, however, because in July 2011, the legislature enacted—over Governor Perdue’s veto—a new law that repealed the prior law.<sup>194</sup> The new law included a host of wide-ranging provisions relating to regulatory reform, including a provision that barred state agencies from adopting rules unless they were “necessary to serve the public interest.”<sup>195</sup> This new requirement did not go into effect until October 2011,<sup>196</sup> so it is still too soon to know whether the term “necessary” will be read loosely or stringently in North Carolina.

*b. State Bills and Resolutions Proposing Moratoria.* In 2011 alone,<sup>197</sup> bills or resolutions involving proposed moratoria were introduced in states such as Connecticut,<sup>198</sup> Michigan,<sup>199</sup> Oregon,<sup>200</sup> Washington,<sup>201</sup> and West Virginia.<sup>202</sup> Some of these unenacted bills proposed a freeze on regulatory activity within the state, whereas others were merely nonbinding resolutions encouraging the federal government to impose a moratorium on federal rulemaking.

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193. Lynn Bonner & Rob Christensen, *Senators Call for Freeze of Rule Making*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 9, 2011, at B3.

194. Act of July 25, 2011, Sess. Law No. 2011-398, § 61.2, 2011 N.C. ALS 398 (LEXIS).

195. *Id.* § 2.

196. *Id.*

197. Although 2011 seems to have been a particularly busy year for moratoria proposals, state legislatures have considered such proposals in prior years as well. For example, in 1993, New York’s senate passed a bill called the Regulatory Relief Act of 1993, S. 3659, 190th Leg., 216th Reg. Sess. (N.Y. 1993), which would have established a 120-day moratorium on the issuance of proposed or final rules with specified exceptions, *id.*; see also JAMES W. WRIGHT, 1993 REPORT OF THE SENATE CHAIRMAN OF THE ADMINISTRATIVE REGULATIONS REVIEW COMMISSION 23–24 (1993) (noting that S. 3659, the Regulatory Relief Act of 1993, passed the senate in New York).

198. See S. 390, Gen. Assemb., Jan. Sess. (Conn. 2011) (proposing “[t]o establish a two-year moratorium on new state regulations”).

199. See S. Res. 27, 96th Leg., Reg. Sess. (Mich. 2011) (urging the president “to impose a moratorium on any new regulations”).

200. See S.B. 812, 76th Legis. Assemb., Reg. Sess. (Ore. 2011) (proposing a rule moratorium); S.B. 712, 76th Legis. Assemb., Reg. Sess. (Ore. 2011) (same).

201. See H.R. 1156, 62d Leg., Reg. Sess. § 2 (Wash. 2011) (proposing to suspend agency rulemaking until the “later of July 1, 2014, or such time as the economic and revenue forecast council reports for three consecutive quarters that state revenue collections have increased above the official forecast”).

202. Quality Control Procedure for Agency Rules Act, S.B. 517, 80th Leg., 1st Reg. Sess. (W. Va. 2011) (proposing a “five-year moratorium on the adoption of new agency rules and modification of existing rules” but excepting “new emergency rules or modifications or new rules or modifications required by federal or state law”).

For example, in Michigan, the state senate passed a resolution in March 2011 that, among other things, urged “the President of the United States to impose a moratorium on any new [federal] regulations.”<sup>203</sup> The resolution specifically found that “[n]onproductive and burdensome regulations take a major toll on the job-creating capacity of companies of all sizes and types” and that “[t]he total cost of complying with all federal regulations has been estimated to be as high as more than \$1 trillion, which amounts to \$10,500 each year for every person employed by a small business.”<sup>204</sup>

In contrast, Republican senators in Oregon introduced bills that were aimed at freezing state regulatory activity, claiming that a regulatory suspension was needed to “spur job creation across the state” and to reduce burdens facing businesses.<sup>205</sup> The Oregon leaders pointed to Arizona and Washington, noting, “In December, Washington Governor Chris Gregoire (D) issued an executive order suspending the development of all new agency rules,” and “Arizona Governor Jan Brewer (R) enacted a similar order in 2009.”<sup>206</sup> Evidently, news of state-level regulatory moratoria travels among various governmental actors,<sup>207</sup> likely helping to fuel regulatory moratoria’s emergence at the state level.

## II. ASSESSING THE PROPRIETY AND LEGALITY OF MORATORIA

Both hard and soft moratoria have worked their way into the political toolbox at the federal and state levels thanks to legislative and executive action. The emergence of regulatory moratoria, however, invites the question whether moratoria are sound from both a legal and policy perspective.

This Part seeks to identify and assess the major legal and policy arguments in favor of and against soft and hard regulatory moratoria.

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203. S. Res. 27, 96th Leg., Reg. Sess. (Mich. 2011).

204. *Id.*

205. Press Release, Senate Republican Office, Republicans Call for Moratorium on Agency Rulemaking (Jan. 20, 2011), *available at* [http://www.leg.state.or.us/press\\_releases/sro\\_012011.pdf](http://www.leg.state.or.us/press_releases/sro_012011.pdf); *see also* Michelle Cole, *GOP Seeks Two-Year Halt to New State Agency Rules*, OREGONIAN, Jan. 21, 2011, *available at* NewsBank, Doc No. MERLIN\_16457724 (describing Oregon Republicans’ demand for a regulatory moratorium).

206. Press Release, Senate Republican Office, *supra* note 205.

207. *See* Johanna Maurice, *The Future Belongs to the Nimble*, CHARLESTON GAZETTE (W. Va.), July 9, 2011, at 5A (noting “[w]eird things” happening in other states, such as how “[i]n Florida, Nevada, New Mexico and Tennessee, new Republican governors [had] issued executive orders putting freezes on new state regulations”).

This Part concludes that hard moratoria carry minimal benefits and significant costs. As a result, it warns against the use of hard moratoria—such as those implemented by President George H.W. Bush in 1992 and those implemented at the state level in Arizona, Nevada, and Washington. Nevertheless, this Part also concludes that soft moratoria—such as those used by Presidents Reagan, Clinton, George W. Bush, and Obama upon coming into office—might well play an appropriate role when used carefully by the executive branch following a change in administration so as to further democratic accountability.

*A. Hard Moratoria: An Improper and Ill-Advised Tool*

Hard moratoria are often justified on the grounds that they will reduce costs and regulatory burdens, increase regulatory predictability, and address Americans' concerns about overregulation. At the same time, however, hard moratoria raise numerous risks, including a lack of transparency, protracted regulatory confusion, legal challenges, harm to the public interest, and blunt antiregulatory bias. Hence, balancing the costs and benefits of regulatory moratoria reveals that the willingness of states such as Arizona, Nevada, and Washington to impose hard moratoria should not be replicated elsewhere.

1. *The Asserted Benefits of Hard Regulatory Moratoria.* Proponents of hard moratoria either implicitly or explicitly articulate three major arguments in favor of hard moratoria: (1) the avoidance of costly, burdensome, or unnecessary regulations to achieve cost savings; (2) the creation of a stable and consistent regulatory environment; and (3) political symbolism.

*a. Achieving Cost Savings.* The most pervasive argument made in favor of hard moratoria—whether imposed by the executive or by the legislative branch—has to do with the desire to achieve cost savings during tough economic times by avoiding costly, burdensome, or unnecessary regulations. For example, in announcing Washington's moratorium in 2010, Governor Gregoire noted the need to “conserve resources” in the face of a weak economy.<sup>208</sup>

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208. See Exec. Order No. 10-06, at 1 (Wash. Nov. 17, 2010), available at [http://www.governor.wa.gov/execorders/eo\\_10-06.pdf](http://www.governor.wa.gov/execorders/eo_10-06.pdf) (“[W]e are called upon in these unprecedented economic times to both conserve resources and continue to meet our responsibilities . . .”).

The implication of these sorts of statements seems to be that by freezing rules, moratoria will reduce costs, conserve resources, and avoid unnecessary and burdensome regulation. Nevertheless, the reality is that—due in no small part to the general lack of scholarly attention paid to regulatory moratoria—very little is known about whether these assertions about cost savings are true. In 1992, for example, President George H.W. Bush claimed that the reforms that he had set into motion during the first three months of his administration would “save consumers about \$15 billion to \$20 billion a year”—a savings of “\$225 to \$300 per year for the average American family.”<sup>209</sup> Yet his administration refused—despite public-records requests—to provide data to back up these claims,<sup>210</sup> and one scholar—Professor Scott Furlong—has concluded that the Bush “moratorium had a minimal impact on regulatory output,”<sup>211</sup> thus undermining President Bush’s claims.

Moreover, even if one could prove—contrary to Professor Furlong’s findings—that moratoria do lead to lower regulatory output, this showing would say “nothing about the actual impact of not promulgating certain regulations.”<sup>212</sup> For example, Governor Gregoire claimed that agencies in Washington had “put 436 rules—about half of what was proposed—on hold” in the first year of the state’s moratorium.<sup>213</sup> But merely considering the number of rules put on hold in Washington does not give a full picture of the impact of not promulgating the regulations. This is because regulations are developed to try to bring benefits to society, including “cleaner air and water, safer products, a sounder banking system.”<sup>214</sup> Therefore, when regulations are not promulgated, any benefit to those who seek to avoid regulation may well be offset by harm to society at large, such as harm to the environment or to public health. The benefits that flow from rules may be quite significant and hence should form part of the calculus when one considers the cost savings of moratoria. Indeed, especially at the federal level, that the benefits of most rules outweigh the costs seems quite likely, given the centralized review

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209. Bush, *supra* note 51, at 664.

210. See WATZMAN & TRIANO, *supra* note 60, at ii–iii (“The administration refused [public records requests] on grounds of ‘executive privilege.’”).

211. Furlong, *supra* note 14, at 260–61.

212. *Id.* at 257.

213. Press Release, Governor Chris Gregoire, *supra* note 167.

214. WATZMAN & TRIANO, *supra* note 60, at 23.



process run by OIRA and the fairly robust opportunities for judicial review of rules.

Although one's initial instinct might be to think that fewer rules mean lower enactment and enforcement costs to the government, as well as lower compliance costs to those regulated, the evidence about potential costs savings is not well developed. Until more evidence is collected, unproven claims that moratoria will yield cost savings and conserve resources seem an insufficient basis for imposing something as blunt as a freeze on rulemaking—especially when numerous other tools already exist to ensure sound and responsible rulemaking, such as cost-benefit analysis, public participation in the rulemaking process, legislative control of statutory delegations to agencies, and judicial review.<sup>215</sup>

*b. Creating a Stable Regulatory Environment.* Another major argument commonly made in favor of hard moratoria is the desirability of creating regulatory stability. For example, in ordering Nevada's moratorium, Governor Sandoval asserted that "stable, consistent and predictable common sense regulation is vital to maintaining a regulatory environment that both secures the people and businesses of the state of Nevada and fosters economic growth."<sup>216</sup> Similarly, in arguing in favor of a federal moratorium, Senator Susan Collins of Maine analogized to sports time-outs, noting that time-outs are taken to "give athletes a chance to catch their breaths and make better decisions about the next play."<sup>217</sup> According to Senator Collins, "American workers and businesses are the athletes in a global competition," and "[t]hey need a time-out from excessive regulation so that America can get back to work."<sup>218</sup>

These sorts of repeated claims that regulatory moratoria will lead to greater regulatory certainty and will give businesses a "time-out," however, seem oversimplified. For one thing, as Professor Jonathan Adler points out in responding to Senator Collins's claims, "Kicking the regulatory can down the road does not reduce uncertainty, nor does it improve the investment climate."<sup>219</sup> Rather, pushing regulation

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215. *Cf. supra* note 1.

216. Exec. Order No. 2011-01, at 1 (Nev. Jan. 3, 2011), available at [http://ndep.nv.gov/docs\\_10/exec-order-2011-01.pdf](http://ndep.nv.gov/docs_10/exec-order-2011-01.pdf).

217. Susan Collins, Opinion, *The Economy Needs a Regulation Time-Out*, WALL ST. J., Sept. 26, 2011, at A15.

218. *Id.*

219. Adler, *supra* note 15.

down the line is likely to create more uncertainty about the future and to place a strain on industry planning cycles.<sup>220</sup>

Furthermore, a long-term moratorium freezing agencies out of notice-and-comment rulemaking might prod agencies to try to clear up regulatory uncertainty via other less desirable means. For example, agencies might promulgate policy via case-by-case adjudication if the agency has adjudicatory authority.<sup>221</sup> Or if the moratorium could be read to apply only to notice-and-comment rules,<sup>222</sup> then the agency might turn toward issuing more informal guidance documents, general policy statements, and interpretive rules,<sup>223</sup> which are generally exempt from notice-and-comment requirements.<sup>224</sup> These alternative methods of promulgating policy generally lack the same opportunities for political review, transparency, and public participation as those that are built into the normal notice-and-comment rulemaking process,<sup>225</sup> and this

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220. See WATZMAN & TRIANO, *supra* note 60, at ii (arguing that a “rule freeze, in fact, can harm the economy since businesses face uncertainty about what standards they must comply with” and since “delaying implementation of regulations” can “place[] a strain on the capital planning cycles of industry”); cf. DEP’T OF ECOLOGY, STATE OF WASH., RULEMAKING SUSPENSION UPDATE 1, 3 (2010), available at [http://www.ecy.wa.gov/laws-rules/docs/decision\\_list.pdf](http://www.ecy.wa.gov/laws-rules/docs/decision_list.pdf) (noting that a rulemaking involving outdoor burning could be delayed until 2012 under Washington’s rulemaking suspension but acknowledging that waiting until 2012 would “delay improvements in rule clarity and streamlining that benefit those businesses and residents who may be subject to the regulations”).

221. Cf. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”).

222. See, e.g., Two-Year Regulatory Freeze Act of 2011, S. 1531, 112th Cong. (2011) (proposing a two-year regulatory freeze but exempting from the freeze all regulations that are exempted from the notice requirements of section 4(a) of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b) (2006)).

223. See, e.g., DEP’T OF ECOLOGY, *supra* note 220, at 1, 2 (noting that the Department of Ecology would delay a rulemaking related to reclaimed water pursuant to Governor Gregoire’s rulemaking suspension and that “Ecology can use the delay to *focus on developing guidance* about reclaimed water that answers concerns raised by stakeholders” (emphasis added)).

224. See, e.g., APA § 4(a), 5 U.S.C. § 553(b) (exempting “interpretative rules, general statements of policy, or rules of agency organization, procedure or practice” from notice-and-comment requirements under the federal APA).

225. See Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 338 (2007) (noting that “guidance documents, case-by-case administrative adjudication, or other informal mechanisms . . . lack the transparency or democratic legitimacy of the rulemaking process”); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546 (2002) (describing how “[m]aking policy through adjudication can lead to inconsistent outcomes and frustrates expectations when policy changes

circumvention of notice-and-comment rulemaking would hence undermine good governance.

*c. Furthering Political Symbolism.* Finally, from the perspective of politicians who support regulatory moratoria, a third benefit of hard moratoria might have to do with popular discourse and political symbolism. By supporting regulatory moratoria, politicians are able to issue press releases, appear on television, and author editorials in the name of standing up against overregulation and listening to constituents' concerns. Although supporters of regulatory moratoria generally do not forthrightly state that they are proposing moratoria to be responsive to constituents' concerns, many of their actions and comments suggest that those concerns are indeed at play.

Americans' concerns in 1992 about the ailing economy and overregulation, for example, seem to have motivated President George H.W. Bush to issue his one-year moratorium in the midst of his presidential campaign.<sup>226</sup> President Bush chose to announce during his acceptance speech before the Republican National Convention in the summer of 1992 that he would be extending his moratorium, leading to the perception among some that the moratorium was nothing more than an "election-year gambit."<sup>227</sup> Indeed, even his aides referred to "new polls showing public distaste" for regulation when explaining President Bush's motivations in imposing the freeze.<sup>228</sup>

In addition, the spurt of bills proposed in Congress in 2011 calling for a regulatory moratorium seem linked to polls showing a distaste for overregulation. Most notably, a poll released by Gallup in October 2011 showed that "[s]mall business owners in the United States are most likely to say complying with government regulations (22%) is the most important problem facing them today, followed by consumer confidence in the economy (15%) and lack of consumer

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retroactively"); *cf.* APA § 4(a), 5 U.S.C. § 553(b)(3)(A) (exempting these alternative policy instruments from the requirements of notice-and-comment rulemaking).

226. *See* Furlong, *supra* note 14, at 261 ("Symbolically, the moratorium showed a president responding to an economic crisis as well as catering to conservative voters.").

227. WATZMAN & TRIANO, *supra* note 60, at i.

228. Jehl, *supra* note 46; *see also* *Corporate Executives Surveyed Say Government Regulations Top Concern*, 24 SEC. REG. & L. REP. 207, 208 (1992) (reporting that in a survey of 653 corporate executives during the second half of 1991, government regulation was identified as the top concern for more than 50 percent of all chief executive officers).

demand (12%).”<sup>229</sup> In addition, whereas Gallup polls indicated that only 36 percent of Americans in 2006 and 38 percent in 2007 and 2008 had said that there was “too much” government regulation of business and industry, the percentage spiked to 50 percent of Americans by September 2011—a result that was “by one percentage point the highest in Gallup’s [then-nineteen-year] history” of asking the question.<sup>230</sup> Notably, 84 percent of Republicans—compared to only 22 percent of Democrats—polled in September 2011 answered this question by saying that there was “too much government regulation of business and industry” whereas just 56 percent of Republicans—compared with 23 percent of Democrats—polled in 2008 had answered the question by saying that there was “too much” government regulation.<sup>231</sup>

Various Republican members of Congress appear to have paid careful attention to these polls. For instance, in introducing the Regulatory Time-Out Act of 2011,<sup>232</sup> one Republican member of the House justified the need for a regulatory moratorium by noting that “[s]mall businesses tell us that their top challenge is complying with government regulations.”<sup>233</sup> Similarly, when Senator Susan Collins introduced the same act in the Senate,<sup>234</sup> she signaled that she was paying close attention to public opinion. Specifically, in a televised interview with CNBC, she explained that she had come up with the idea for proposing a regulatory “time-out” after “talking to employers in [her] state [who] kept telling [her] they were dreading what was coming out of Washington next by way of regulation.”<sup>235</sup> She also tried to speak directly to American workers and businesses when

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229. Dennis Jacobe, *Gov’t Regulations at Top of Small-Business Owners’ Problem List*, GALLUP (Oct. 24, 2011), <http://www.gallup.com/poll/150287/gov-regulations-top-small-business-owners-problem-list.aspx>.

230. Frank Newport, *Despite Negativity, Americans Mixed on Ideal Role of Gov’t*, GALLUP (Sept. 28, 2011), <http://www.gallup.com/poll/149741/despite-negativity-americans-mixed-ideal-role-gov.aspx>.

231. *See id.* (noting that “Republicans have consistently been more likely than Democrats to say there is too much government regulation of business” but that “in recent years, the gap between Republican and Democratic views on this issue has widened”).

232. Regulatory Time-Out Act of 2011, H.R. 3257, 112th Cong. (2011).

233. Press Release, U.S. Rep. Richard Hanna, Hanna Introduces Legislation To Put a Time-Out on Regulations (Nov. 3, 2011), *available at* [http://hanna.house.gov/index.php?option=com\\_content&view=article&id=3157:hanna-introduces-legislation-to-put-a-time-out-on-regulations&catid=49:press&Itemid=300066](http://hanna.house.gov/index.php?option=com_content&view=article&id=3157:hanna-introduces-legislation-to-put-a-time-out-on-regulations&catid=49:press&Itemid=300066).

234. Regulatory Time-Out Act of 2011, S. 1538, 112th Cong. (2011).

235. *The Kudlow Report* (CNBC television program Sept. 26, 2011), *available at* <http://video.cnbc.com/gallery/?video=3000047845>.

she published an op-ed in the *Wall Street Journal* arguing in favor of a moratorium in which she asserted, “I have asked employers in my state what it would take to help them add jobs. No matter their business or the size of their work force, they tell me that Washington must stop imposing crushing new regulations.”<sup>236</sup>

In addition, when Republicans in the Oregon State Senate called for a two-year suspension of rulemaking in 2011 to spur job creation across the state, they pointed out that “[s]mall businesses routinely point to the bureaucratic morass of state government rules and regulations as a key barrier to job creation.”<sup>237</sup> Likewise, in Washington, the Department of Ecology’s deputy director noted that Governor Gregoire’s decision to suspend noncritical rulemaking “is responsive to what she is hearing from the broader regulated community,” which is “telling her they are struggling in this difficult economic climate to meet current regulations—not only environmental regulations, but others as well—and that a time-out on new rules is something government can do to help.”<sup>238</sup>

Hence, from the perspective of politicians, a major advantage of a regulatory moratorium does seem to be its political symbolism, enabling politicians to show Americans that their concerns about overregulation have been registered and heard. Indeed, the number of unenacted regulatory-moratoria bills proposed in the 112th Congress<sup>239</sup> suggests that politicians believe that they may well gain this political benefit simply by touting that they have *proposed* a moratorium—regardless of whether the moratorium is ever actually implemented.

Political representation and political responsiveness is, of course, a central component of American democracy and is generally to be applauded. If, for example, residents who live downwind from a plant ask for increased regulation of pollutants from the plant, the governor’s touting such complaints as a justification for more regulation of the plant would be perfectly appropriate. On the one hand, the fact that politicians’ proposals for regulatory moratoria seek to respond to constituents’ concerns about overregulation could be

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236. Collins, *supra* note 217.

237. Press Release, Senate Republican Office, *supra* note 205.

238. Letter from Polly Zehm, Deputy Dir., Dep’t of Ecology, State of Wash., to Ecology Stakeholders (Nov. 17, 2010), *available at* [http://www.ecy.wa.gov/laws-rules/docs/zehmletter\\_111710.html](http://www.ecy.wa.gov/laws-rules/docs/zehmletter_111710.html).

239. *See supra* notes 99–102 and accompanying text.

viewed positively as a sign of political responsiveness in a democratic system. On the other hand, concerns about overregulation may suffer from a bit of a chicken-and-egg problem. Specifically, whether politicians' own statements about the pitfalls of regulation have created an antiregulatory fever, and hence whether the politicians are actually the ones who have created the public opinion leaning against regulatory action, is hard to know. In other words, politicians' own public statements condemning regulation may have helped to create and feed the public climate.

2. *The Costs of Hard Regulatory Moratoria.* Even if hard moratoria can be said to appropriately help ensure political responsiveness to legitimate public opinion, this political benefit must be weighed against the costs of moratoria. Hard moratoria carry with them many significant potential costs. First, as demonstrated by a 2011 Florida Supreme Court opinion,<sup>240</sup> executive-driven regulatory moratoria raise thorny legal questions, including separation-of-powers concerns about whether the executive possesses the legal authority to suspend rulemaking. In addition, both legislative- and executive-driven moratoria threaten to undermine transparency, create protracted regulatory confusion, and evince a blunt antiregulatory bias that simply assumes that the status quo is better than what the current administration would produce for the future. These aspects of hard moratoria suggest that the costs of hard moratoria significantly outweigh any political or symbolic benefits, leading to the conclusion that hard moratoria are an ill-advised tool for political control and should be avoided.

a. *Imposing the Costs of Legal Challenges.* One of the most significant risks of executive-driven moratoria is their likelihood to invite legal battles. In the wake of President George H.W. Bush's 1992 moratoria, for example, a number of cases were filed challenging agencies' delays of rules.<sup>241</sup> These cases raised a variety of questions pertaining to specific rules, such as whether certain rules were

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240. See *Whiley v. Scott*, No. SC11-592, 2011 WL 3568804, at \*1 (Fla. Aug. 16, 2011) (per curiam) (addressing the legality of the Florida governor's decision to suspend rulemaking in the state).

241. See WATZMAN & TRIANO, *supra* note 60, at 18–22 (describing litigation challenging agency delays).

required by statutory deadlines or statutory requirements.<sup>242</sup> If they were, President Bush lacked the authority to suspend them.

Even more threatening than the potential for as-applied claims asserting that specific rules must be exempt from a hard moratorium, however, is the possibility that broader constitutional issues—most notably, separation-of-powers issues—could be raised challenging the facial validity of the chief executive’s order. At the federal level, “[m]ost regulatory statutes specify that agency heads, rather than the president, shall make regulatory decisions.”<sup>243</sup> In the states, many, if not most, regulatory statutes delegate rulemaking authority to agency heads, not to state governors.<sup>244</sup> Those desiring to challenge executive-driven hard moratoria might well question whether the chief executive has the power—consistent with notions of the separation of powers and existing statutory schemes—to suspend discretionary rulemaking activities that the legislature chose to delegate to agency heads, not to the chief executive.<sup>245</sup> The answer to this question is not straightforward, and it likely varies at the federal and state levels due to the differing separation-of-powers principles and different constitutional and statutory provisions at play in different jurisdictions.<sup>246</sup>

At least at the federal level, a robust body of literature erupted after President Reagan issued Executive Order 12,291, which called for OMB review of all major rules.<sup>247</sup> Specifically, scholars questioned whether the president had the legal authority to direct centralized executive review of regulatory activity in light of Congress’s general

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242. *Id.*

243. Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2487 (2011); *see also* Kevin M. Stack, *The Statutory President*, 90 *IOWA L. REV.* 539, 550–52 (2005) (discussing presidential directive authority).

244. *See, e.g.,* *Whiley*, 2011 WL 3568804, at \*5 (noting that in Florida, the “Legislature has delegated specific responsibility to agency heads, such as the authority to determine whether to go forward with proposing, amending, repealing or adopting rules”); *see also* *New Energy Econ., Inc. v. Martinez*, 247 P.3d 286, 291 (N.M. 2011) (concluding that the state legislature had delegated duties to state agencies independent of the governor).

245. A legislatively imposed hard moratorium, of course, would not raise similar separation-of-powers concerns because the legislature itself would be suspending rulemaking activity that it had created in the first instance.

246. *Cf.* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 *ADMIN. L. REV.* 77, 80 (2004) (noting that the states differ as to how they approach separation-of-powers issues and “as to what extent they seek equipoise among the branches”).

247. *See* Exec. Order No. 12,291 §§ 6–7, 3 C.F.R. 127, 131–33 (1982) (granting broad review powers to a task force within OMB).

decision to delegate rulemaking power via statute to particular agencies, not to the president.<sup>248</sup> At least three principal approaches to the question of presidential directive authority have emerged as this general debate over presidential authority to direct regulatory decisions has continued. The first approach—the unitary-executive approach—“holds that presidential directive authority is constitutionally required.”<sup>249</sup> The unitary-executive theory flows from Article II, Section 1 of the U.S. Constitution, which vests the executive power in “a President of the United States.”<sup>250</sup> Pursuant to the unitary-executive theory, “executive officers can act only in the President’s stead, since it is the President and the President alone who can delegate to them the constitutional power that they must have if they are to execute laws.”<sup>251</sup> In other words, notwithstanding any statutory language that might vest a particular power, such as discretionary rulemaking authority, in a particular agency, “it is the President, under our Constitution, who must always be the ultimate empowered and responsible actor.”<sup>252</sup>

The second approach—the “‘directive authority’ as an ‘interpretive principle’” approach—takes the position that “statutes entrusting regulatory decisions to [executive] agency heads should be interpreted to grant the President directive authority unless they expressly restrict it.”<sup>253</sup> This approach, which has been articulated by then-Professor Kagan, rejects unitary-executive advocates’ claims

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248. See, e.g., Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483 (1988) (discussing “the constitutional controversies surrounding Executive Order 12,291 and the promise of similar disputes over Executive Order 12,498” but concluding that “[w]hatever one’s opinion of the policy prescriptions contained in President Reagan’s executive orders, the actions taken therein fall squarely within the president’s constitutional authority”); Colin S. Diver, Commentary, *Presidential Powers*, 36 AM. U. L. REV. 519, 526–27 (1987) (“[N]umerous critics have charged that, as actually implemented, the executive orders constitute a distortion of the President’s supervisory role.”); Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199 (1981) (“[T]he question . . . is whether the President in promulgating Executive order 12,291 has engaged in an exercise of Executive lawmaking without either constitutional or statutory authority and thereby violated the separation of powers doctrine.”); Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981) (exploring “the [fundamental] threshold question of the order’s facial legality”).

249. Percival, *supra* note 243, at 2488 (summarizing the unitary-executive theory).

250. U.S. CONST. art. II, § 1.

251. Calabresi & Prakash, *supra* note 20, at 595.

252. *Id.* at 595–96.

253. Percival, *supra* note 243, at 2488.



“for plenary [executive] control as a matter of constitutional mandate.”<sup>254</sup> Instead, then-Professor Kagan views the question as one of congressional intent, arguing that “if Congress, as it usually does, simply has assigned discretionary authority to an agency official without in any way commenting on the President’s role in the delegation,” then a way to read such a statute—at least when executive as opposed to independent agencies are involved—would be to “assume that the delegation runs to the agency official specified, rather than to any other agency official, but still subject to the ultimate control of the President.”<sup>255</sup>

Under the third approach, “the President does not have directive authority unless a statute expressly gives it to him.”<sup>256</sup> According to this approach, “as a matter of statutory construction the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name.”<sup>257</sup>

Although the extensive scholarly debate has yielded little consensus as to which of these approaches to presidential powers is correct, the reality is that centralized executive review and oversight of the regulatory process of the type initiated by President Reagan in Executive Order 12,291<sup>258</sup> has become an “entrenched” and established element of the administrative process.<sup>259</sup> Yet an across-the-board, long-term freeze on rulemaking ordered by a president differs significantly from what is now viewed as entrenched centralized presidential oversight, and hence—depending on which approach to presidential power were to be applied—such a blanket freeze could be seen as pushing the envelope too far and as violating separation-of-powers principles.

On the one hand, for those who adhere to the unitary-executive theory, the executive would possess ample authority to freeze discretionary rulemaking because the president alone has the power to execute federal law.<sup>260</sup> In contrast, those who argue that the president can oversee regulatory activity but cannot generally dictate

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254. Kagan, *supra* note 1, at 2326.

255. *Id.* at 2326–27.

256. Percival, *supra* note 243, at 2488.

257. Kevin M. Stack, *The President’s Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

258. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

259. Beermann, *supra* note 1, at 65 n.20.

260. *Cf. supra* notes 249–52.

or decide substantive questions delegated to agencies by Congress might argue that a long-term rulemaking ban ordered by the president impermissibly decides the substance of regulatory questions delegated to agencies by favoring the status quo.<sup>261</sup>

A case decided by the Florida Supreme Court in 2011 suggests that the risk of an executive-driven hard moratorium's triggering such constitutional questions in certain jurisdictions is very real. The case, *Whiley v. Scott*,<sup>262</sup> involved a challenge to two executive orders issued by Florida's newly elected governor, Rick Scott, in 2011,<sup>263</sup> and hence the case turned on specific aspects of Florida law. The first order challenged was Executive Order No. 11-01,<sup>264</sup> which had suspended agency rulemaking in the state and also had established OFARR within the governor's office.<sup>265</sup> The second order challenged was Executive Order No. 11-72,<sup>266</sup> which had superseded Executive Order No. 11-01 and had allowed agencies to move forward with rulemaking in the state only after seeking the approval of OFARR.<sup>267</sup> The woman challenging the orders, Rosalie Whiley, was a blind woman who claimed standing as a Florida citizen and taxpayer and initially asserted that Executive Order 11-01 negatively impacted her as a blind food-stamp recipient by delaying a rule that would have made completing an online application for benefits easier.<sup>268</sup>

In bringing suit, Whiley sought a writ of quo warranto from the court, arguing that the governor had exceeded his authority and violated separation-of-powers principles.<sup>269</sup> In agreeing to exercise its discretion to hear the case, the Florida Supreme Court noted that a decision from it could "provide important guiding principles to other

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261. Cf. Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) ("[A]lthough the president's ability to remove agency heads gives him enormous power to influence their decisions, it does not give him the authority to dictate substantive decisions entrusted to them by law."); Strauss, *supra* note 20, at 704–05 (arguing that the president can act as "overseer" but not "decider").

262. *Whiley v. Scott*, No. SC11-592, 2011 WL 3568804 (Fla. Aug. 16, 2011) (per curiam).

263. *Id.* at \*1.

264. Exec. Order No. 11-01 (Fla. Jan. 4, 2011), <http://www.flgov.com/wp-content/uploads/orders/2011/11-01-rulemaking.pdf>, superseded by Exec. Order No. 11-72 (Fla. Apr. 8, 2011), available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-72-fiscal.pdf>.

265. *Id.* §§ 1, 3.

266. Exec. Order No. 11-72 (Fla. Apr. 8, 2011), available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-72-fiscal.pdf>.

267. *Id.* § 1.

268. *Whiley*, 2011 WL 3568804, at \*2 n.4.

269. *Id.* at \*2.

state courts.”<sup>270</sup> Then, turning to the merits, the court, over the dissent of two justices, sided with *Whiley*, concluding, “[T]he Governor’s executive orders at issue here, to the extent each suspends and terminates rulemaking . . . absent prior approval from OFARR—contrary to the [Florida] Administrative Procedure Act—infringe upon the very process of rulemaking and encroach upon the Legislature’s delegation of its rulemaking power.”<sup>271</sup>

The court noted that in Florida, rulemaking is seen as a legislative function and that the “Legislature retains the sole right to delegate rulemaking authority to agencies.”<sup>272</sup> The Florida Supreme Court, accordingly, found that the governor’s orders “that operate[d] to suspend rulemaking . . . constitute[d] an encroachment upon a legislative function.”<sup>273</sup>

Because the *Whiley* case turned on specific aspects of the Florida constitution and Florida statutory provisions, its direct application is limited to Florida. Indeed, the Florida Supreme Court’s separation-of-powers analysis, which rested on the conclusion that rulemaking is itself a legislative function in Florida,<sup>274</sup> would be relatively foreign to federal separation-of-powers jurisprudence, which continues to embrace the notion—albeit perhaps a fiction—that rulemaking performed by agencies is executive rather than legislative in nature.<sup>275</sup> Nonetheless, *Whiley* does illustrate the very real threat of legal challenges to executive-driven suspensions of rulemaking. In doing so, it suggests the need for caution surrounding executive-driven hard moratoria and for more study surrounding whether U.S. presidents or state governors possess the legal authority to direct agencies to suspend rulemaking pursuant to applicable federal or state law.

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270. *Id.* at \*3.

271. *Id.* at \*8 (emphasis omitted).

272. *Id.* at \*10.

273. *Id.*

274. *See id.* at \*5 (“[R]ulemaking is a legislative function.”); *id.* at \*10 (“The Legislature retains the sole right to delegate rulemaking authority to agencies, and all provisions in both Executive Order 11-01 or 11-72 that operate to suspend rulemaking contrary to the APA constitute an encroachment upon a legislative function.”).

275. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (noting that the Constitution permits no delegation of Congress’s legislative powers). *But see id.* at 489 (Stevens, J., concurring in part and concurring in the judgment) (noting that the text of Article I’s Vesting Clause, U.S. CONST. art. I, § 1, “do[es] not purport to limit the authority of [Congress] to delegate authority to others”).

*b. Undermining Transparency.* Another cost of hard moratoria—regardless of whether the moratoria are ordered by the executive branch or by the legislature—is that they may undermine transparency because they are implemented largely behind closed doors. For example, even though President George H.W. Bush’s 1992 moratorium directed agencies to “submit a written report” to the president indicating the “regulatory changes recommended or made,”<sup>276</sup> these reports were not easily accessible to the public. Indeed, the Bush White House—reportedly claiming “executive privilege”—refused a Freedom of Information Act (FOIA)<sup>277</sup> request made by OMB Watch and Public Citizen seeking data to support President Bush’s claim of billions in cost savings stemming from the moratorium.<sup>278</sup> Public Citizen and OMB Watch then followed up with additional FOIA requests to twenty-four different agencies, asking for background data on President Bush’s claim of savings as well as copies of the reports that agencies were required to file with the president after the first ninety days of the moratorium.<sup>279</sup> According to OMB Watch and Public Citizen, most agencies responded, but their reports did not describe affected regulations with much detail<sup>280</sup>: “None of the agencies provided information about ‘cost savings’ in a form even remotely understandable. Often agencies decided such documents constituted ‘predecisional’ material [exempted under FOIA] and blocked out large portions of it; in other cases, sheets of paper with hand-scrawled calculations were provided.”<sup>281</sup>

Although these concerns about a lack of transparency are troubling, they—unlike other costs accompanying hard moratoria—could be overcome fairly easily. In particular, Washington state’s implementation of its rulemaking suspension provides a model of sorts. There, the Office of Financial Management directed agencies to report “the number of rules eliminated or suspended in response to [Governor Gregoire’s] order as well as the number of and justification for rules that proceeded through development and/or

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276. Bush, *supra* note 41, at 168.

277. Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. IV 2010).

278. WATZMAN & TRIANO, *supra* note 60, at ii–iii.

279. *Id.* at 23.

280. *Id.*

281. *Id.* (footnote omitted).

adoption,<sup>282</sup> and various state agencies responded by making their reports easily accessible to the public online.<sup>283</sup>

*c. Creating Protracted Regulatory Confusion.* A much more troubling risk of both legislative- and executive-driven hard moratoria is that such moratoria may lead to protracted confusion about their scope. For example, how should North Carolina's legislative ban on rules that are not "necessary to serve the public interest" be read?<sup>284</sup> Or how should people read Washington state's decision to exempt rules that are "necessary to protect public health, safety, and welfare or necessary to avoid an immediate threat to the state's natural resources" from its rulemaking suspension?<sup>285</sup> As one court has recognized in another context, "'necessary' is a chameleon-like word whose meaning . . . may be influenced by its context."<sup>286</sup> If the term "necessary" is interpreted leniently, then few—if any—new rules might be barred, given that all authorized rules might in some way or another be viewed as necessary to the public interest. Alternatively, if "necessary" is interpreted stringently, then it might be read to forbid all rules that lack a sense of immediate emergency and hence could operate as a very broad ban. Because of this ambiguity, state agencies in Washington reportedly had "difficulty . . . identifying which rules would be put on hold" immediately after Governor Gregoire ordered the moratorium in Washington in 2010.<sup>287</sup>

These sorts of interpretive questions are a major reason why Sally Katzen—testifying on behalf of the Clinton administration in 1995—opposed Congress's attempt to impose a federal regulatory

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282. Memorandum from Kari Burrell, Exec. Policy Dir., to Agency Dirs., *supra* note 164, at 2.

283. See, e.g., DEP'T OF ECOLOGY, *supra* note 220 (listing the rulemakings that have been delayed and those that will continue); *Department of Health and State Board of Health Rule Making Activities*, WASH. STATE DEP'T OF HEALTH, [http://www.doh.wa.gov/Rules/pdf/EO1103\\_Moratorium\\_rulemaking\\_masterlist.pdf](http://www.doh.wa.gov/Rules/pdf/EO1103_Moratorium_rulemaking_masterlist.pdf) (last updated Oct. 14, 2011) (same); *Temporary Rule-Making Suspension*, DEP'T OF REVENUE, WASH. STATE (Jan. 5, 2011), <http://dor.wa.gov/Content/FindALawOrRule/RuleMaking/tempSuspension.aspx> (same).

284. See *supra* notes 195–96 and accompanying text.

285. See *supra* notes 164–65 and accompanying text.

286. *Cellco P'ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004).

287. Jim Camden, *Order Puts Moratorium on Nonessential Rules: Stability for Businesses Expected To Help State*, SPOKESMAN-REV. (Spokane, Wash.), Nov. 18, 2010, at 7A (expressing the business community's concern that "[t]he potential exemptions are so broad that no one can be sure" and that "[i]t's practically impossible to figure out what the executive order will apply to and what it won't apply to" (quoting Eric de Place of Sightline Institute, a sustainable-energy organization)).

moratorium. Specifically, Katzen explained the Clinton administration's fears about protracted confusion as follows: "The people who will be caught up in these debates are the same officials who would otherwise spend their time working on substantive solutions to the real problems with the regulatory system."<sup>288</sup> In other words, if weeding out inefficient regulations and reforming the regulatory system are truly top priorities, then spending time fighting "about what is in or out of a moratorium" rather than focusing on identifying ill-advised regulations may prove unproductive.<sup>289</sup>

*d. Evincing a Blunt Antiregulatory Bias.* Yet another major downside of hard moratoria is that they operate in a very blunt manner, often demonstrating an antiregulatory bias that seems to suggest that all regulations are inherently bad.<sup>290</sup> Yet "not all regulations are bad, nor are they all good."<sup>291</sup> Rather, regulations seeking to ensure safe products, clean air and water, a healthy economy, and equal opportunities in education, employment, and housing "have the potential to be either" good or bad depending on how they are crafted and chosen.<sup>292</sup>

Given that regulations have the potential to be good or bad depending on how they are crafted, halting the regulatory machinery through a one-size-fits-all approach via a moratorium that would stop "good regulations, bad regulations, [and] in between regulations" makes little sense.<sup>293</sup> In other words, simply assuming that less regulation or the status quo—preserved through a moratorium—is better than what the administration might produce in the future is overly simplistic. If the goal is to avoid unnecessary and overly burdensome regulations, then closely scrutinizing rules based on their merits to make sure that the government regulates only when appropriate and in a cost-effective manner makes much more sense. This is the view that President Clinton took in 1995 when—in speaking out against Republican leaders' efforts to push through a

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288. *S. 219—Regulatory Transition Act of 1995*, *supra* note 83, at 11 (statement of Sally Katzen, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

289. *Id.* at 8.

290. *See id.* at 11 ("[A] moratorium is a blunderbuss approach that delays rules based on necessarily arbitrary categories . . .").

291. *Id.* at 6.

292. *Id.* at 8.

293. *Id.* at 6.

federal moratorium—he said that those pushing for a moratorium “don’t want reform, they really want rigor mortis.”<sup>294</sup>

In short, although “nameless ‘regulations’ may be a convenient whipping boy” for those who want to avoid regulatory burdens,<sup>295</sup> hard regulatory moratoria are an ill-advised method of weeding out unnecessary or overly burdensome regulations. Many other methods of oversight and political control, including redrafting statutory delegations to agencies, executive oversight via appointment and removal powers, legislative hearings, and public participation through notice-and-comment procedures, already exist and can be used to help avoid improper regulations.<sup>296</sup> These methods of political control—not the blunt, one-size-fits-all approach of a regulatory moratorium, which assumes that the status quo is better than any regulations the administration might produce in the future—should be used to weed out bad regulations moving forward.

*B. Soft Moratoria: A Potentially Useful Tool for Political Control by the Executive Branch During Brief Periods of Political Transition*

Unlike hard moratoria, which have little to commend them, soft moratoria might well serve a very different and useful purpose: enabling those newly in power to align the regulatory machinery with their policy preferences—regardless of whether those policy preferences are regulatory or deregulatory in nature—upon a change in administration, thereby furthering principles of democratic accountability.

1. *The Main Benefit of Soft Moratoria: Aligning the Regulatory Machinery with the New Administration’s Policies.* As for the benefits of regulatory moratoria, some of the same arguments considered in Section A with respect to hard moratoria are relevant. For example, political symbolism might well be at work in the context of soft

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294. John M. Broder & Kelly Owen, *Clinton Assails GOP Regulatory Proposal*, L.A. TIMES, Feb. 22, 1995, at A16 (quoting President Clinton) (internal quotation mark omitted). Cass Sunstein also has noted the “blunderbuss” nature of the moratorium proposed in 1995. See Cass R. Sunstein, *Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 273 (1996) (“[A] general moratorium on federal regulation is reactionary in the worst way—a crude, lazy, and pandering response to current problems. Its blunderbuss quality ensures that it will stop measures that are otherwise required by law, or that would do a lot of good, as well as measures that warrant reconsideration (which a moratorium by itself fails to provide).”).

295. S. REP. NO. 104-15, at 26 (1995).

296. Cf. *supra* note 1.

moratoria as it is in the context of hard moratoria.<sup>297</sup> In addition, proponents of soft moratoria—just like proponents of hard moratoria—often justify moratoria as a means of achieving cost savings, creating jobs, and giving the economy a boost,<sup>298</sup> even though these asserted cost savings and economic benefits generally have yet to be proven via careful study.

Yet one additional reason that is lacking in the context of hard moratoria does exist to support the imposition of soft moratoria: soft moratoria, which are imposed at the beginning of a period of political transition, give the new administration a brief transitional period within which to ensure that midnight rules promulgated by the prior administration are consistent with the policies of the new administration, thereby furthering notions of democratic accountability and political responsiveness.

Midnight rulemaking, which often occurs postelection at the eleventh hour, is widely thought to represent “an illegitimate vehicle for projecting an outgoing administration’s policy agenda beyond the end of its term.”<sup>299</sup> For one thing, as Professor Jack Beermann puts it, a general discomfort seems to exist with the notion that a lame-duck, outgoing administration might wait “until late in the term to take politically controversial action or load[] up on late-term actions to project its policy preferences in the future.”<sup>300</sup> In addition, cynical questions often arise about “why, if the regulation was deemed so important, the administration failed to act during the previous three or seven and three-quarters years.”<sup>301</sup>

Yet even if this cynicism surrounding the motives behind midnight rules is set to one side and even if one ascribes completely honorable motives to the outgoing administration, midnight rulemaking is still problematic for another even more important

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297. See, e.g., Precious, *supra* note 10 (noting that Governor Pataki froze rulemaking in New York, “[l]iving up to his campaign promise to be business friendly”).

298. See, e.g., Exec. Order No. 2011-001, at 1 (N.M. Jan. 1, 2011), available at <http://www.governor.state.nm.us/uploads/FileLinks/1e77a5621a1544e28318ba93fcd47d49/EO-2011-001.pdf> (“[S]uch an effort is timely given current unemployment levels and state budget difficulties, in order to create economic opportunity for each and every New Mexican, while protecting and preserving the health, safety and welfare of our community.”); Memorandum from Janice K. Brewer, Governor, to State Agency Dirs. & Acting Dirs., *supra* note 139, at 342 (encouraging agencies to act “in the interest of sound regulatory practice and the avoidance of costly, burdensome, or unnecessary rules”).

299. Beermann, *supra* note 35, at 369.

300. *Id.* at 353.

301. *Id.*



reason: it is difficult to square with scholars' embrace of the "political control" model of the administrative state, which legitimizes federal agency action by stressing that agencies are subject to political control.<sup>302</sup> The political-control model "acknowledges that many policymaking decisions made by agencies cannot be resolved through a myopic technocratic lens but rather are highly political decisions that should be made by politically accountable institutions."<sup>303</sup> As Professor Nina Mendelson explains, in embracing the political-control model, scholars have relied "heavily upon the President as a major source of democratic responsiveness and accountability," and even those scholars "who do not see presidential control as central see it as a significant feature of a legitimate administrative state."<sup>304</sup>

When regulation occurs postelection, after voters have lost "an important tool for holding agencies accountable,"<sup>305</sup> the political-control model breaks down.<sup>306</sup> Enabling the incoming administration to freeze the regulatory machinery via a soft moratorium upon coming into office is one way to deal with this breakdown in political accountability and responsiveness. Such soft moratoria empower new chief executives to change course quickly from their predecessors and to align the regulatory machinery with their policy preferences—regardless of whether those policy preferences are deregulatory or regulatory in nature.<sup>307</sup>

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302. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35 (2009) (describing the rise in the political-control model); see also Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 580 (2003) ("[T]he dominant version of the principal-agent approach to the democratic legitimacy of administrative agencies is now the presidential control model.").

303. Watts, *supra* note 302, at 35.

304. Mendelson, *supra* note 302, at 567–68; cf. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .").

305. Mendelson, *supra* note 302, at 566–67.

306. See *id.* (noting that postelection regulation raises concerns about democratic responsiveness and legitimacy).

307. See Jack, *supra* note 13, at 1517 (noting that "[t]he continued use of rule withdrawals and rule suspensions by incoming presidential administrations over the last twenty years suggests these presidential directives are here to stay" and that "[t]hey will likely be used in regulatory review plans by Republicans as well as Democrats, by administrations with a deregulatory bias, as well as those administrations that have a favorable view of federal regulations").

Given these important benefits relating to political accountability and responsiveness that flow from soft moratoria,<sup>308</sup> one can see why soft moratoria have become so well entrenched at the federal level during presidential transitions and why they have been used by Democratic and Republican presidents alike.<sup>309</sup> It also suggests that, at the state level, incoming governors, regardless of party affiliation, should consider soft moratoria as a potentially useful political tool rather than leaving the tool primarily in the hands of Republican governors who seek to push a deregulatory agenda, as has been the trend in the states.

2. *The Major Risks of Soft Moratoria.* Despite the significant value of enabling political control and furthering democratic accountability at the beginning of a new administration, soft moratoria raise a variety of risks, including legal questions about whether the executive branch possesses the authority to order even a temporary suspension of rulemaking at the start of a new administration. In addition, soft moratoria also raise (1) transparency concerns, (2) the potential for regulatory confusion, and (3) the risk that soft moratoria will morph into hard moratoria. Some of these downsides of soft moratoria, including the legal issues, concerns about transparency, and the potential for regulatory confusion, are similar to the risks facing hard moratoria, yet—as this Section discusses—soft moratoria can overcome these potential risks more easily than hard moratoria can.

a. *Inviting Legal Costs.* One major concern surrounding soft moratoria—as is the case with hard moratoria—has to do with the

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308. This is not to suggest that soft moratoria are the *only* way that an incoming administration could be empowered to deal with midnight rulemaking, but rather that soft moratoria are a viable and well-entrenched tool for empowering a new chief executive. Other tools that might empower the incoming administration should be explored as well. *See, e.g.,* Beermann, *supra* note 35, at 354–59 (discussing the Midnight Rule Act, H.R. 34, 111th Cong. (2009), a bill proposed in Congress that would have given the incoming administration the power to disapprove of regulations adopted during the last ninety days of the outgoing administration); Nina A. Mendelson, *Quick off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464, 468–72 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/19/LRColl2009n19Mendelson.pdf> (exploring the possibility of statutory amendments that would increase a president-elect's power).

309. *See* Ari Cuenin, Note, *Mooting the Night Away: Postinauguration Midnight-Rule Changes and Vacatur for Mootness*, 60 DUKE L.J. 453, 478 (2010) (“[T]hese suspension and withdrawal memoranda are frequently suggested to new presidents as one of the most effective means for handling midnight regulations.”).

various legal challenges that could arise, especially over separation-of-powers concerns. Depending on the specific terms of a soft moratorium, a variety of legal issues might arise, including whether the new chief executive can order (1) a freeze on new rules, (2) the withdrawal of final rules after they have been sent for publication but before actual publication, or (3) the postponement of the effective dates of final rules that already have been published. Although these potential legal issues all deserve consideration, none seems to doom the legality of soft moratoria, especially if careful drafting is used.

*i. Separation-of-Powers Questions Stemming from a Freeze on New Rules.* An executive-driven soft moratorium calling for a general freeze on all new rules during a political transition could potentially trigger constitutional separation-of-powers questions under applicable federal or state law similar to the separation-of-powers questions raised by hard executive moratoria.<sup>310</sup> At least at the federal level,<sup>311</sup> however, soft moratoria ordered by newly elected presidents likely would pass constitutional muster, for at least two reasons.

First, and most importantly, soft moratoria, unlike hard moratoria, are limited in duration to brief periods of political transition. They are designed not to halt rulemaking for extended periods of time but rather simply to enable the newly elected president—exercising his constitutionally granted powers to appoint officers—to get his appointees in place before the regulatory machinery moves forward.<sup>312</sup> In this sense, one can hardly say that soft moratoria enable the president to decide the substance of regulatory decisions delegated by Congress to agency actors by locking into place the status quo. Rather, soft moratoria merely enable the president to effectuate his appointment powers by staffing the executive branch with his appointees prior to allowing new rulemakings to continue. Hence, even if—contrary to the unitary-executive theory—the president merely has the power to oversee

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310. See *supra* notes 241–75 and accompanying text.

311. At the state level, the answer could be different depending on each state's own constitutional and statutory requirements.

312. The president's appointment powers are spelled out in the Constitution in the Appointments Clause. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .”).

administrative action but not to decide the substance of decisions delegated to agency officials by law, a temporary freeze of discretionary rulemaking would not seem to cross the line from overseeing to deciding the substance of regulatory actions.<sup>313</sup>

Second, a soft moratorium could be viewed as a mere request, rather than a command that new rules be put on hold during the political transition.<sup>314</sup> Even though agency heads likely feel significant pressure to comply with the president's wishes, particularly at the beginning of a new administration, if *the agency* ultimately complies with the president's wishes and puts the new rules on hold, then the president will not have violated the law by somehow usurping the agency's power or by deciding for himself the substance of regulatory decisions delegated to the agency by Congress.

Finally, another reason—albeit a much more controversial and less persuasive reason—for concluding that soft moratoria are constitutional at the federal level would be to say that the practice has gained constitutional legitimacy through the entrenched practice of presidents' coming into office and freezing new rules.<sup>315</sup> After all, Presidents Reagan, Clinton, George W. Bush, and Obama *all* imposed a temporary freeze on new rules upon coming into the White House. For those who are willing to apply the logic of this kind of “constitutional adverse possession,”<sup>316</sup> the fact that four of five consecutive presidents have temporarily suspended rulemaking while getting their appointees into place would likely help to legitimate soft moratoria at the federal level. Needless to say, however, this acquiescence argument is not a slam dunk. Take, for example, the one- and two-house vetoes, which the Supreme Court found unconstitutional in *INS v. Chadha*<sup>317</sup> despite the fact that they had

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313. Cf. *supra* note 261 and accompanying text.

314. See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435 (Jan. 26, 2009) (“requesting” that agencies take the steps outlined in the memorandum).

315. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

316. See William A. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193, 203–09 (2008) (discussing the notion of “constitutional adverse possession” and its pitfalls).

317. *INS v. Chadha*, 462 U.S. 919 (1983).

been employed by Congress for decades prior to the Supreme Court's striking them down.<sup>318</sup>

*ii. The Legality of Ordering the Withdrawal of Final Regulations After They Have Been Sent for Publication but Before Actual Publication.* Another legal question that could crop up with respect to soft moratoria is whether the new chief executive may permissibly order the withdrawal of final regulations prior to publication. Presidents Clinton,<sup>319</sup> George W. Bush,<sup>320</sup> and Obama,<sup>321</sup> as well as governors in Arizona<sup>322</sup> and New Jersey,<sup>323</sup> have all ordered agencies to initiate these sorts of rule withdrawals prior to publication of the final rules.<sup>324</sup>

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318. See *id.* at 955–60 (discussing narrow situations in which Congress can act unilaterally and holding the one-house veto unconstitutional).

319. See Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291, 58 Fed. Reg. 6074, 6074 (Jan. 25, 1993) (“[Agency heads] are requested to withdraw from the Federal Register for approval [by an agency head appointed by President Clinton] . . . all regulations that have not yet been published in the Federal Register . . .”).

320. See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) (“With respect to regulations that have been sent to the [Office of the Federal Register (OFR)] but not published in the Federal Register, withdraw them from OFR for review and approval [by an agency head appointed by President Bush] . . .”).

321. See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435 (Jan. 26, 2009) (“Withdraw from the OFR all proposed or final regulations that have not been published in the Federal Register so that they can be reviewed and approved by a department or agency head [appointed by President Obama] . . .”).

322. See Memorandum from Janice K. Brewer, Governor, to State Agency Dirs. & Acting Dirs., *supra* note 139 (“With respect to proposed rules that have been sent to the Secretary of State but not published in the Arizona Administrative Register, withdraw them from the Secretary of State.”).

323. See Exec. Order. No. 1 para. 2 (N.J. Jan. 20, 2010), available at <http://www.nj.gov/info/bank/circular/eoccl.pdf> (“With respect to any proposed administrative regulation or rule that may have been transmitted to the Office of Administrative Law, but has not been published in the New Jersey Register, the head of the State agency proposing the regulation or rule shall withdraw the proposed regulation or rule in a manner consistent with the Rules for Agency Rulemaking and procedures of the Office of Administrative Law.”).

324. The withdrawal involved an unpublished proposed rule—as opposed to a final rule—that seemed to be legally permissible. See *A Rush To Regulate—The Congressional Review Act and Recent Federal Regulations: Hearing Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs of the H. Comm. on Gov't Reform*, 107th Cong. 121–22 (2001) (prepared statement of Thomas O. McGarity, W. James Kronzer Chair, University of Texas School of Law) (noting that the withdrawal of unpublished proposed rules at the beginning of the Bush administration was likely legal because most rulemakings are not commenced until notice is actually published in accordance with section 4 of the APA, 5 U.S.C. § 553 (2000)).

Although the question is complicated, this kind of a command to agencies might withstand legal scrutiny at the federal level. In particular, support for agencies' power to withdraw unpublished rules can be found in a D.C. Circuit opinion, which held that an agency has the power to withdraw its rule from the *Federal Register* before the rule has been made public and during the three-day confidential processing period.<sup>325</sup> Although the D.C. Circuit opinion left open the question of whether an agency may withdraw an unpublished rule after the confidential processing period but before publication, the Office of the Federal Register (OFR) has taken the view that agencies have the right to withdraw documents that have been filed for public inspection but that have not yet been published by the OFR.<sup>326</sup> Hence, one commentator—relying heavily upon the OFR's own views and the fact that the OFR's views might receive deference from the courts—concludes that the withdrawal of unpublished final and proposed rules, even after the OFR has made them available for public inspection, “appears to be valid.”<sup>327</sup> In addition, in a statement before Congress after the Bush transition in 2001, Professor Thomas McGarity expressed his view that “it is legally permissible for the agency that sent the rule to the [OFR] to withdraw the submission” so long as the signed rule had not yet been published in the *Federal Register*.<sup>328</sup>

Nonetheless, reason for caution still exists at the federal level. In particular, in one case, a federal district court concluded that a rule conferring a substantive benefit became final once it had been signed by the agency and sent to the *Federal Register*.<sup>329</sup> Although the Second Circuit reversed, it did so on the ground that the signed final rule stated that it was to be effective upon publication in the *Federal*

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325. *Kennecott Utah Copper Corp. v. Dep't of the Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996).

326. 1 C.F.R. § 18.13 (2011) (“A document that has been filed for public inspection with the Office of the Federal Register but not yet published, may be withdrawn from publication or corrected by the submitting agency.”).

327. Jack, *supra* note 13, at 1494–95.

328. *A Rush To Regulate—The Congressional Review Act and Recent Federal Regulations*, *supra* note 324, at 123 (prepared statement of Thomas McGarity, W. James Kronzer Chair, University of Texas School of Law).

329. *See Xin-Chang v. Slattery*, 859 F. Supp. 708, 712 (S.D.N.Y. 1994) (“[W]here a rule confers a substantive benefit to a person, an agency must comply with it, even if the rule is not published.”), *rev'd sub nom. Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995).

*Register* and that the required publication had not yet occurred.<sup>330</sup> Hence, this holding left open the possibility that a rule designed to confer a benefit could be treated as effective and enforced *against* the government if the rule's effective date precedes publication.

In addition, at the state level, a decision by the Supreme Court of New Mexico in 2011, *New Energy Economy, Inc. v. Martinez*,<sup>331</sup> provides reason for caution. The case involved a regulation promulgated by the Environmental Improvement Board after a two-year rulemaking process and regulations promulgated by the Water Quality Control Commission after a one-year rulemaking process.<sup>332</sup> Both rules had been transmitted to the State Records Center and Archives (Records Center) for filing and publication, and both had been slated for publication in the January 14, 2011, edition of the *New Mexico Register*.<sup>333</sup> On January 1, 2011, however, newly elected Governor Martinez suspended rulemaking in the state for ninety days.<sup>334</sup> After correspondence between the Records Center and the governor's office, the acting cabinet secretary of the New Mexico Environment Department gave the Records Center written notification that it was not to publish the regulations.<sup>335</sup> Proponents of the rules then filed suit, arguing that a writ of mandamus was appropriate to order publication of the regulations.<sup>336</sup> The Supreme Court of New Mexico agreed, finding that the state records administrator had a clear, indisputable, and nondiscretionary duty under state law to publish the regulations notwithstanding the regulatory freeze imposed by the governor.<sup>337</sup> Hence, the case suggests that drafters of soft moratoria in the states should carefully consult state law when deciding whether to call upon agencies to suspend the publication of unpublished rules after they have been sent to the state register. If the law is unclear, the safest route when crafting a soft

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330. *See* Zhang v. Slattery, 55 F.3d 732, 749 (2d Cir. 1995) (noting that the effective date of the rule was timed to publication), *superseded on other grounds by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1101 (a)(42) (2006)).

331. *New Energy Econ., Inc. v. Martinez*, 247 P.3d 286 (N.M. 2011).

332. *Id.* at 288.

333. *Id.*

334. *Id.*

335. *Id.* at 288-89.

336. *Id.* at 289.

337. *Id.* at 293.

moratorium would be to leave untouched unpublished regulations after they have been sent for publication.

*iii. The Legality of Suspending the Effective Date of a Final, Published Regulation.* Yet another legal question that has plagued the use of some soft moratoria at the federal level is whether it is legal to order the suspension of final, published agency regulations prior to their effective dates,<sup>338</sup> as Presidents Reagan and George W. Bush did when coming into office.<sup>339</sup> The basic issue boils down to this: Can an agency delay a notice-and-comment rule prior to its effective date without going through notice-and-comment procedures? Or is the delay itself a rule that is subject to notice-and-comment requirements? Some cases involving interpretations of the federal Administrative Procedure Act (APA)<sup>340</sup> touch on these questions at the federal level. These cases demonstrate that the delay of a final, published rule constitutes a “rule” within the meaning of the APA and hence requires that notice and comment be allowed before delaying the effective date of the rule,<sup>341</sup> unless one of the APA’s exemptions from notice-and-comment rulemaking applies, such as the procedural-rule exemption or the “good cause” exemption.<sup>342</sup>

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338. There seems to be no question that agencies can legally withdraw published *proposed* rules. See *A Rush To Regulate—The Congressional Review Act and Recent Federal Regulations*, *supra* note 324, at 122 (prepared statement of Thomas McGarity, W. James Kronzer Chair, University of Texas School of Law) (noting that there is “probably no legal impediment to withdrawing a published notice of proposed rulemaking”).

339. See Reagan, *supra* note 26, at 63 (“To the extent permitted by law, your agency shall, by notice in the *Federal Register*, postpone for 60 days from the date of this memorandum the effective date of all regulations that your agency has promulgated in final form and that are scheduled to become effective during such 60-day period.”); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) (asking agency heads, “[w]ith respect to regulations that have been published in the OFR but have not taken effect, temporarily [to] postpone the effective date of the regulations for 60 days”).

340. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2006).

341. See, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982) (“We conclude that, under the facts of this case, EPA’s action in indefinitely postponing the effective date of the amendments fit the definition of ‘rule’ in the APA, and, as such, was subject to the APA’s rulemaking requirements.”); *Council of S. Mountains v. Donovan*, 653 F.2d 573, 580–82 (D.C. Cir. 1981) (discussing how deferring the implementation of regulations generally requires notice-and-comment procedures); see also JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 119–20 (4th ed. 2006) (“[R]egardless of the duration of a postponement, a delay of a rule’s effective date is normally considered a ‘rule’ within the meaning of the APA so as to require notice-and-comment rulemaking.”).

342. See APA § 4(a), 5 U.S.C. § 553(b)(3) (exempting procedural rules and rules for which there is “good cause,” such as impracticability).



One commentator concludes that the federal APA's procedural-rule exemption might exempt certain, but not all, brief rule delays from notice-and-comment requirements because the brief delay of some rules might not affect the rights and interests of private parties.<sup>343</sup> In addition, another commentator asserts that a brief delay in a rule's effective date might be permissible even without notice-and-comment procedures by relying upon the APA's good-cause exception, as requiring an agency to hold notice and comment on a decision about whether to delay a rule before running up against its effective date might be impractical in some circumstances.<sup>344</sup> In his statement to Congress in 2001, however, Professor McGarity concluded that neither exemption could be used to avoid notice-and-comment procedures when delaying the effective date of a final, published rule.<sup>345</sup>

Hence, in light of these unresolved and complicated legal questions, cautious drafters of soft moratoria might choose not to order the suspension of the effective date of final, published rules to avoid the threat of legal challenges.<sup>346</sup> This strategy is what President Clinton pursued. When he came into office, he ordered a freeze on new rules and the withdrawal of rules that had not yet been published, but—unlike Presidents Reagan and George W. Bush<sup>347</sup>—he did not order the suspension of already-published, final rules.<sup>348</sup>

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343. See Jack, *supra* note 13, at 1505–08 (concluding that some but not all rule suspensions made by the Bush administration pursuant to the Card Memorandum, Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001), may have fallen within the APA's procedural-rule exemption because the temporary delay might not have substantially affected private parties' interest in the final rule).

344. See Beermann, *supra* note 13, at 983 & n.120 (noting that the good-cause exemption should support sixty-day delays). *But see* Jack, *supra* note 13, at 1515–17 (concluding that agencies should give notice and an opportunity to comment on rule delays and that a generic invocation of "good cause" should not suffice to avoid notice and comment).

345. *A Rush To Regulate—The Congressional Review Act and Recent Federal Regulations*, *supra* note 324, at 125 (prepared statement of Thomas McGarity, W. James Kronzer Chair, University of Texas School of Law); *see also* Sanford, *supra* note 13, at 801–07 (arguing that in the wake of the Card Memorandum issued under the Bush administration, agencies could not legally delay the effective dates of regulations that had already been published because the delays had substantive impact and triggered an obligation for agencies to give adequate reasons for the delays under arbitrary-and-capricious review).

346. Because states have their own administrative-procedure acts, the analysis at the state level could differ depending on the state and its requirements.

347. See *supra* note 339 and accompanying text.

348. See Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291, 58 Fed. Reg. 6074, 6074 (Jan. 25, 1993).

Alternatively, if the drafter of a soft moratorium wishes to call for the suspension of the effective date of final rules after publication, then limiting the potential delay to a brief sixty-day period, as the text of both President Reagan's and President Bush's memoranda did, would be wise.<sup>349</sup> In addition, to further reduce the likelihood of legal challenges, drafters of soft moratoria might consider following in the footsteps of President Obama. His regulatory-review memorandum made the suspension of final rules permissive by directing agencies merely to “[c]onsider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect . . . for the purpose of reviewing questions of law and policy raised by those regulations.”<sup>350</sup> In addition, it expressly directed that if an agency were to choose to extend the effective dates of regulations, then the agency should “immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules.”<sup>351</sup> Furthermore, Peter Orszag, the director of OMB under President Obama, issued a clarifying memorandum to agency heads at the outset of the Obama administration, noting, “If you determine that you want to extend the effective date for purposes of enabling further review, you should promptly provide a 30-day notice-and-comment period, *seeking public comment about both your contemplated extension of the effective date and the rule in question.*”<sup>352</sup> If the rule at issue would “take effect before there [had been] sufficient time to solicit and review comments on the extension of the effective date,” then Orszag directed agencies to “consult immediately with [the Office of Legal Counsel] and OIRA about the appropriate course of action.”<sup>353</sup>

*b. Undermining Transparency.* Another concern surrounding soft moratoria—as with hard moratoria—is that they suffer from a

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349. See Reagan, *supra* note 26, at 63 (postponing effectiveness of published rules for sixty days); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) (same).

350. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435–36 (Jan. 26, 2009).

351. *Id.*

352. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads & Acting Heads of Exec. Dep'ts & Agencies (Jan. 21, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation\\_memoranda\\_2009\\_pdf/m09-08.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation_memoranda_2009_pdf/m09-08.pdf) (emphasis added).

353. *Id.*

lack of transparency and openness,<sup>354</sup> not only from the public's perspective but also perhaps from the new administration's perspective. For example, as Professor Beermann notes, after President George W. Bush implemented a soft moratorium at the beginning of his administration pursuant to what is called the Card Memorandum,<sup>355</sup> it was "unclear how many such rules there were, and because they had not yet been published, no sign of them appear[ed] in the Federal Register itself."<sup>356</sup> Nor were there "any documents in the Federal Register that reflect[ed] the withdrawal of a submitted but unpublished rule or proposal, or a decision not to publish a rule so as to comply with" the Card Memorandum.<sup>357</sup> Indeed, OMB admitted in February 2001 that "it did not know how many rules were delayed, or how many rules were exempted from the Card Memorandum because of judicial or statutory deadlines, or emergency situations relating to health and safety."<sup>358</sup> The "only information available on the identity, number, and character of delayed rules came from" a General Accounting Office report published in February 2002 as a result of congressional oversight.<sup>359</sup>

In the context of soft moratoria, this lack of openness and transparency is troubling for two reasons. First, if a new administration lacks an organized system for tracking rules affected by and exempted from a soft moratorium, it will find it difficult to "oversee and monitor the implementation of [its] regulatory review"<sup>360</sup> effectively, thereby undercutting the usefulness of soft moratoria as a tool for political control. Second, from the public's perspective, the lack of transparency could undermine perceptions about the validity of the regulatory process.

As with hard moratoria, however, these transparency-related concerns could be remedied through disclosure requirements that

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354. See *supra* notes 276–81 and accompanying text; see also Jack, *supra* note 13, at 1512–14 (describing the lack of transparency characterizing President George W. Bush's regulatory review at the beginning of his administration).

355. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

356. Beermann, *supra* note 13, at 991.

357. *Id.*

358. Jack, *supra* note 13, at 1513.

359. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-370R, REGULATORY REVIEW: DELAY OF EFFECTIVE DATES OF FINAL RULES SUBJECT TO THE ADMINISTRATION'S JANUARY 20, 2001, MEMORANDUM (2002), available at <http://www.gao.gov/new.items/d02370r.pdf>).

360. *Id.* at 1514.

would force disclosure and enable greater oversight. For example, federal agencies that are subject to soft moratoria could be required to publish in the *Federal Register* “a list of the regulations that either are not sent to or are withdrawn from OFR following a presidential transition,”<sup>361</sup> as well as a list of any rules whose effective dates are delayed. Likewise, state agencies could be required to publish a list of affected regulations in their state’s administrative register.

*c. Creating a Risk of Some Regulatory Confusion.* Yet another problem facing soft moratoria—one also relevant to hard moratoria—is that confusion is likely to surface surrounding the meaning and scope of any moratorium.<sup>362</sup> After Governor Schwarzenegger initiated a temporary rulemaking freeze in California upon coming into office, for example, confusion erupted over whether the regulatory moratorium would “delay or alter a law requiring greater water efficiency for California clothes washers, which could keep the state from saving billions of gallons in water use.”<sup>363</sup> Although these concerns about regulatory confusion are very real, they seem much less acute in the context of soft moratoria than in that of hard moratoria. This is because soft moratoria, by their terms, are keyed to brief periods of political transition, such as sixty- or ninety-day periods<sup>364</sup> or until an agency head appointed by the newly elected chief executive has authorized the new rules to move forward.<sup>365</sup> Hence, unlike hard moratoria, soft moratoria should not pose a significant risk of protracted, lengthy confusion.

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361. Gale Lea Rubrecht, *President Obama Halts Midnight Regulations*, 24 NAT. RESOURCES & ENV'T 47, 49 (2009).

362. See *supra* notes 284–89 and accompanying text.

363. Anna Oberthur, *Order May Delay Water-Saving Clothes Washer Law*, ASSOCIATED PRESS, Dec. 14, 2003, available at <http://www.sdcwa.org/clips/2003/dec/121403/121403ordermaydelay.html>.

364. See, e.g., Reagan, *supra* note 26, at 63 (directing agencies to refrain for sixty days from promulgating any new rules).

365. See, e.g., Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435 (Jan. 26, 2009) (ordering agencies to refrain from sending any proposed or final regulations to the *Federal Register* unless they have been approved by an appointee of President Obama); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) (ordering agencies to send no proposed or final regulations to the *Federal Register* unless they have been approved by an appointee of President Bush); Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291, 58 Fed. Reg. 6074, 6074 (Jan. 25, 1993) (directing that no proposed or final regulations should be sent to the *Federal Register* for publication unless they have been approved by an appointee of President Clinton).

*d. The Blurring of Soft and Hard Moratoria.* Still another concern surrounding soft moratoria is that either their duration will be longer than necessary to effectuate a smooth change in political administration or they will easily morph from soft moratoria into hard moratoria. An example of the former problem occurred in California, where Governor Schwarzenegger put a six-month freeze on rulemaking in the state upon coming into office.<sup>366</sup> Examples of the latter problem can be found in New York, where Governor Pataki initially announced a ninety-day rulemaking freeze keyed to his entrance into office but then later repeatedly extended the moratorium,<sup>367</sup> as well as in Arizona, where a combination of legislative and executive action turned what began as a limited three-month rulemaking freeze into a multiyear moratorium.<sup>368</sup>

Furthermore, some soft moratoria have poorly defined end dates, ordering agencies to avoid promulgating any new rules until the rules have been approved by an agency head appointed by the incoming administration.<sup>369</sup> As one commentator notes in the context of President George W. Bush's moratorium, this approach leaves the duration of any freeze somewhat open-ended because the freeze may be, for example, contingent on "how fast agency appointees can be vetted, approved with the advice and consent of the Senate, and caught up to speed on pending proposed or final rules within their agencies."<sup>370</sup>

The easiest way to minimize these sorts of problems would be to ensure that soft moratoria are defined in terms of a specific number of days. Given that the goal of a soft moratorium is simply to enable the incoming administration to align the regulatory machinery with its policy preferences, a sixty- or ninety-day freeze on new rules generally should prove sufficient. Indeed, a sixty-day period would be in line with some of the provisions found in federal moratoria ordered by incoming presidents, such as Reagan, who put a freeze on new rules for a sixty-day period upon coming into the White House,<sup>371</sup> and George W. Bush, who ordered agencies to suspend for sixty days the effective dates of regulations that had been published in the *Federal*

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366. See *supra* note 134 and accompanying text.

367. See *supra* note 129 and accompanying text.

368. See *supra* notes 139–40, 176–81 and accompanying text.

369. See *supra* note 365 and accompanying text.

370. Jack, *supra* note 13, at 1514–15 (footnote omitted).

371. Reagan, *supra* note 26, at 63.

*Register* but that were not yet final.<sup>372</sup> Alternatively, a ninety-day period would be consistent with—or longer than—soft moratoria implemented in some states.<sup>373</sup>

In an effort to resolve these sorts of issues in a uniform manner, one solution that warrants future consideration would be the enactment of permanent congressional legislation establishing a soft moratorium at the beginning of new presidential terms to enable the incoming administration to review any midnight rules and compare them with the policies of the incoming administration.<sup>374</sup> Such legislation could clearly specify the period of time available for review of midnight rules by the new administration—for example, sixty or ninety days—thereby eliminating concerns that soft moratoria might drag out too long or morph into hard moratoria. In addition, such legislation could incorporate transparency requirements, ensuring that soft moratoria are implemented in an open manner. Such legislation also would help to settle any constitutional separation-of-powers questions that might hover over executive-driven moratoria. This is because the legislature itself, not the executive, would be the body electing to turn soft moratoria into a normal, expected part of the transitional process.<sup>375</sup>

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372. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001).

373. See Exec. Order No. 1 para. 1 (N.J. Jan. 20, 2010), available at <http://www.nj.gov/info/bank/circular/eoccl.pdf> (ordering a ninety-day freeze); Exec. Order No. 95-3 para. 1 (R.I. Jan. 25, 1995), available at [http://www.uri.edu/library/special\\_collections/almond/execord/95-03.html](http://www.uri.edu/library/special_collections/almond/execord/95-03.html) (same); Exec. Order No. 2011-001, at 1 (N.M. Jan. 1, 2011), available at <http://www.governor.state.nm.us/uploads/FileLinks/1e77a5621a1544e28318ba93fcd47d49/EO-2011-001.pdf> (determining that “ninety days is a reasonable time to review such proposed and pending rules and regulations, to examine them from various perspectives as to their workability, reasonableness, and determine whether they are proper and necessary”); Press Release, Governor Bill Haslam, *supra* note 153 (ordering a forty-five-day freeze). But see Exec. Order No. S-2-03 para. 1(b) (Cal. Nov. 17, 2003), available at <http://www.gov38.ca.gov/executive-order/3381> (ordering a 180-day freeze).

374. If the legislation were to work at the federal level, the idea could be copied at the state level, perhaps with the assistance of a model state act.

375. At least one bill has been proposed in Congress seeking the establishment of soft moratoria at the beginning of new presidential terms. See *Midnight Rule Act*, H.R. 34, 111th Cong. (2009) (proposing that “a midnight rule shall not take effect until 90 days after the agency head is appointed by the new President”). But that bill was written in fairly sweeping terms and, if enacted, would have raised many problems. See Beermann, *supra* note 35, at 354–59 (detailing defects in H.R. 34, such as the fact that the proposed bill contemplated a blanket delay on midnight rules and did not provide “exceptions for instances in which the incoming administration would rather have the midnight rules go into effect”).

## III. ISSUES FOR FUTURE STUDY

Hopefully, the cautionary tale that has just been told about regulatory moratoria will start prompting greater dialogue about the legality and wisdom of imposing regulatory moratoria and about the different contexts in which moratoria have been and should be used. Yet it is just a start. Many questions remain unresolved and call out for future study. Two such questions are highlighted here.

First, one significant question in need of future study involves looking at what, if any, impact regulatory moratoria—particularly hard moratoria lasting at least one year—have had on regulatory activity. As noted in Part II, even though politicians repeatedly point to the cost savings yielded by regulatory moratoria, scholars know very little about the actual impact of regulatory moratoria.<sup>376</sup> For example, when President Bush implemented the one-year federal regulatory moratorium in 1992, did the number of rules produced actually go down? When President Bush claimed in 1992 that the efforts put into motion by his regulatory moratorium would save billions per year,<sup>377</sup> was he correct?<sup>378</sup> Or were public-interest groups correct that his claims were based on “voodoo accounting” and that the moratorium was actually costing the country dearly in terms of harm to the environment and human health?<sup>379</sup> And with regard to hard moratoria in states such as Arizona and Washington, has regulatory activity decreased? Have cost savings occurred?

Given the lack of attention that has been paid to regulatory moratoria in general, the fact that few researchers have looked at these sorts of questions is unsurprising. And the scholars who have considered these questions have barely scratched the surface. For example, Professor Scott Furlong’s 1995 article, which studies the impact of President Bush’s 1992 moratorium from the perspective of the number of rules produced, “says nothing about the actual impact

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376. See *supra* notes 209–14 and accompanying text.

377. Bush, *supra* note 51, at 664.

378. See generally Rosenbaum & Schneider, *supra* note 46 (quoting a senior Senate staff assistant, who said that explaining what the moratorium had done would be “impossible” because “[t]he Federal river is awfully wide” and a person “just can’t be sure” when “saying that such-and-such happened or didn’t happen because of the moratorium” (internal quotation marks omitted)).

379. WATZMAN & TRIANO, *supra* note 60, at i, v (calling President Bush’s cost-saving claims “voodoo accounting” and arguing that “the regulatory moratorium is costing the nation dearly in human life and a damaged environment”).

of not promulgating certain regulations.”<sup>380</sup> Hence, Professor Furlong’s inquiry is limited to looking at rulemaking output, not other potential measures of impact. In addition, a 2010 report briefly notes Arizona’s experiment with a moratorium and concludes, based on surveys completed by agency administrators within the state, that even though “some agencies [in Arizona] have utilized the public health and safety exception to pass a few rules,”<sup>381</sup> other agencies feel that “[t]he moratorium has stunted [their] ability . . . to conduct rulemakings” in the state.<sup>382</sup> Yet the report is limited in that it discusses only Arizona’s moratorium and relies only on survey results rather than on any kind of empirical analysis to assess the impact of Arizona’s moratorium.

Given that numerous states have experimented with regulatory moratoria, researchers should look to the states as laboratories and try to analyze the impact of regulatory moratoria. States that have implemented hard moratoria, such as Washington, Nevada, and Arizona, present researchers with a unique opportunity to study these questions through a set of natural experiments. If these regulatory moratoria are studied and the results ultimately show that the hard moratoria have had little impact on regulatory activity, then hard regulatory moratoria could more easily be dismissed as nothing more than mere symbolic tools used to curry political favor and to signal that a politician is tough on government regulation.

Another issue crying out for more scholarly attention is the issue of state-level regulatory review and reform. In contrast to their understanding of regulatory-reform efforts occurring at the federal level, scholars know very little about what is going on in the states in terms of regulatory review and reform or what themes might be emerging in the states.<sup>383</sup> Granted, attention is sometimes given to

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380. Furlong, *supra* note 14, at 257.

381. JASON A. SCHWARTZ, INST. FOR POLICY INTEGRITY, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKINGS 159 (2010), available at [http://policyintegrity.org/files/publications/52\\_Experiments\\_with\\_Regulatory\\_Review.pdf](http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf).

382. *Id.* (second alteration in original) (quoting Casey Cullings, Arizona Department of Agriculture).

383. *Cf. id.* at v (“[T]he central theme of this report is that state regulatory review structures are powerful, poorly understood, and deserve much more attention than they have received to date.”); Rossi, *supra* note 16, at 553 (“[C]asebooks, treatises, and scholarship harbor a heavy bias towards federal administrative law, relegating state administrative procedure little, if any, serious attention.”). *But see* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 473–75 (3d ed. 2009) (discussing state executive-review programs).



regulatory oversight and reform efforts occurring in one isolated state or another.<sup>384</sup> But what has generally been missing is serious scholarly effort to study systematically state-level regulatory-review efforts. Much room remains for future scholars to look for emerging trends across all the states and to analyze how those patterns do or do not fit within themes identified at the federal level.<sup>385</sup>

Of course, one major hurdle that stands in the way of remedying this lack of attention paid to state-level regulatory reform is the relative difficulty of gathering state-level information.<sup>386</sup> In writing this Article, for example, it became clear that no easily searchable electronic database of all state executive orders or directives exists.<sup>387</sup>

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384. See, e.g., Barbara L. Borden, *Legislative Review of Agency Rules in Arizona: A Constitutional Analysis*, 1985 ARIZ. ST. L.J. 493 (“This comment analyzes Arizona’s existing legislative review procedure and a recent proposal for legislative oversight.”); Jonathan Rose, *Executive Oversight of Rulemaking in Arizona: The Governor’s Regulatory Review Council—The First Three Years*, 1985 ARIZ. ST. L.J. 425 (“Th[is] article will describe the establishment, operation, and effect of the [Governor’s Regulatory Review Council] during its first three years . . .”).

385. A few notable exceptions do exist. See SCHWARTZ, *supra* note 381 (studying regulatory review in the fifty states, plus the District of Columbia and Puerto Rico, in a report spanning more than four hundred pages); Brian J. Gerber, Cherie Maestas & Nelson C. Dometrius, *State Legislative Influence over Agency Rulemaking: The Utility of Ex Ante Review*, 5 ST. POL. & POL’Y Q. 24 (2005) (studying legislative review of agency rule proposals “[u]sing data from a 1994 survey of top agency administrators in the 50 states”); Hahn, *supra* note 16 (studying state and federal regulatory reform from a comparative perspective); Patty D. Renfrow & David J. Houston, *A Comparative Analysis of Rulemaking Provisions in State Administrative Procedure Acts*, 6 POL’Y STUD. REV. 657 (1987) (comparing provisions of state administrative-procedure acts). Nevertheless, these projects studying state-level regulatory review and reform are the exception, not the norm. In addition, many of these studies are now dated or rely on old data. Even the 2010 report published by Jason Schwartz, *supra* note 381—which appears to be the most comprehensive and the most current study of state-level regulatory review—is already dated, *see id.* at 77 (“[T]his report can only claim reasonable accuracy and comprehensiveness through January 2010.”). It does not cover, for example, the numerous regulatory moratoria that occurred in the states after early 2010. Indeed, Arizona is the only state with a generalized regulatory moratorium discussed in the report. *See id.* at 159 (“On January 22, 2009, in her first official act as governor, Governor Jan Brewer issued a moratorium on all rulemaking activities.”).

386. See Hahn, *supra* note 16, at 3 (noting in a report studying state and federal regulatory reform that “identification of state regulatory reform provisions was difficult because no comprehensive source of data exists” and that compiling state information made it “necessary to interview state officials in all states, acquire and analyze available state information, search state web pages, and use survey data”); *see also* SCHWARTZ, *supra* note 381, at ii (noting that in order to compile a report on regulatory review in the states, “dozens of researchers at New York University School of Law” had to study “the laws and regulations governing agency decisionmaking in all 50 states, plus Washington D.C. and Puerto Rico” and also administer and collect surveys in the states).

387. Westlaw does offer a state executive-order database. It is labeled “Netscan Executive Orders” on Westlaw and can be found using “NS-EO” as the database identifier. According to

Moving forward, states will need to adopt clearer, more uniform rules for dealing with the publication and archiving of state executive orders and other materials involving regulatory review. If this shift occurs, and if more and more states make such information readily available electronically, state-level research should become easier, enabling more scholars to conduct comparative state-federal research in the regulatory arena in the future.

#### CONCLUSION

The goal of this Article is to demonstrate that when one looks at both the federal and the state landscape, one realizes that—far from being an isolated or novel concept—regulatory moratoria have worked their way into the political toolbox. This Article, however, suggests the need for caution toward regulatory moratoria and warns that not all moratoria are created equal. Soft moratoria—like those used by Presidents Reagan, Clinton, George W. Bush, and Obama when they entered office and by governors in New Jersey, New Mexico, Tennessee, and other states—might appropriately further notions of democratic accountability when carefully crafted and used for limited periods following a change in administration.

Hard moratoria, however, which are designed to freeze rulemaking for extended periods of time—such as President George H.W. Bush's one-year moratorium in 1992, Washington state's two-year suspension of noncritical rulemaking, and Arizona's multiyear rulemaking freeze—are highly problematic. Apart from raising questions about whether hard moratoria actually yield cost savings and economic benefits, such long-term moratoria also evince an antiregulatory bias that bluntly targets all regulation as inherently bad. Furthermore, far from leading to a predictable regulatory climate, hard moratoria are likely to lead to protracted regulatory confusion. In addition, as the Florida Supreme Court's decision in *Whiley v. Scott* demonstrates, executive-driven hard moratoria threaten to raise separation-of-powers concerns and other legal questions surrounding the executive's authority to suspend rulemaking. Hard moratoria, accordingly, have little to commend them other than mere political symbolism.

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Westlaw, the database, which is produced from electronic data transmissions provided by NETSCAN, does not begin coverage until 2008, and the database proved difficult to use effectively.