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The Ever-Expanding Regulatory State: The People Are the Key to Stopping It

By [Mario Loyola](#)

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The lead editorial in today's *Wall Street Journal* [argues](#) that the battle to rein in the federal regulatory state will be one of the lead political stories of 2011. The editors champion the Reins Act, which would require congressional approval for all new major regulations — those expected to impose a burden of more than \$100 million on the economy. That would be a sound solution, but whatever Congress does, it must do something, and it must do it now.

Today's federal regulatory state is expanding its own scope with breathtaking speed, threatening entire sectors of the American economy with stifling burdens — and threatening to erode further the vanishing constitutional limits on the powers of the federal government.

The argument over costly and counterproductive regulations is an old one in the discourse of our nation, and conservatives have largely won the argument. The Left has moved far to the right in the course of the last half-century, abandoning the welfare state and embracing free markets. But because executive-branch regulations are shielded from the vicissitudes of public opinion and current politics, presidents tend to use them to satisfy their base. The current administration's heavy-handed approach to environmental, health-care, and financial regulations clearly bespeaks a desire to give the Left what the Left couldn't get out of the most left-wing Congress in living memory.

The continued expansion of the federal regulatory state poses a danger to our democracy beyond the familiar economic costs. When Congress delegates legislative authority to an administrative agency, the people's right of self-government is directly diluted. The right to vote on legislation through our representatives in Congress — the essence of negotiating power for what James Madison used to call the “multiplicity of interests” — is reduced to a “notice-and-comment” period during which affected parties lodge complaints and suggestions that federal agencies must respond to but which they are in practice entirely free to ignore. Thus, the expansion of the federal regulatory state not only increases the power of the executive branch at the expense of Congress, it also increases the power of the federal government at the expense of the states — and of the people.

This raises an obvious danger for the whole structure of our federal constitution — a structure enshrined in

the Tenth Amendment, which explicitly reserves to the states and to the people those powers not specifically delegated to the federal government. The federal courts are supposed to be the guardians of the constitutional limits on federal power, but they largely abdicated that role in the 1930s, when the Supreme Court started letting the federal government regulate virtually everything in the name of regulating “commerce among the several states.”

In the 1930s, the Supreme Court caved in to Franklin Roosevelt’s New Deal because both Congress and public opinion were behind the president. The federal courts will not, and perhaps cannot, protect the Constitution at the expense of their own legitimacy, which depends on public opinion. This is how public opinion inevitably shapes the rulings of courts that are supposed to be impartial.

The flip-side of the coin is that the better Americans understand the need to rein in the power of the federal government, the more latitude the federal courts will have to reassert their indispensable role as guardians of the Constitution’s limits on federal power.

The federal government’s response to the Gulf oil spill was an exposition of how regulatory power can be used to shut down whole industries that happen not to enjoy the favor of the president. By some estimates, tens of thousands of jobs have been lost along the Gulf coast as a result of both the deepwater-drilling moratorium and the federal refusal to process permits even for shallow-water drilling. The Environmental Protection Agency’s current rampage against the country’s heavy industries — and against state autonomy in areas of traditional state authority — threatens worse to come, as do the hundreds of rule-makings expected under the new financial and health-care regulations.

The danger to our economy is well understood — but the danger to our constitutional democracy is if anything even greater. The expansion of the regulatory state is pushing America in the direction of a state in which the president rules as proconsul, passing laws by decree on the basis of congressional blank checks. Action by Congress and by the federal courts is woefully long overdue — and will not come until the people demand it.

— *Mario Loyola is director of the Center for Tenth Amendment Studies at the Texas Public Policy Foundation in Austin. Along with former Texas solicitor general Ted Cruz, he is co-author of [Reclaiming the Constitution: Towards an Agenda for State Action](#) (November 2010).*

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