For over three decades, “regulatory reform” has been an aspiration chiefly for opponents of regulation. Everyone agrees that regulation could be improved. But too many proposals for change are designed to undercut protection of the environment, public health, and civil rights.

What would regulatory reform look like if you actually want to improve regulation rather than destroy it? Lisa Heinzerling, Peter Shane, and I tackle that question in an issue brief for the American Constitution Society. We focused on administrative rulemaking, the primary target of contemporary conservative efforts.

Are there changes that could make regulation more evidence-based, more transparent, more inclusive, more accountable, and more efficient? We think the answer is yes.

Here is a sample of our proposals:

- **Repurpose White House regulatory review.** Significant rulemakings go to the White House for review. Currently, the review process is intended to force agencies to pursue cost-benefit analysis rather than heed their statutory missions. White House review should focus instead on ensuring that agencies are effectively pursuing the goals that Congress assigned them. Generally speaking, Congress intended a thumb on the scales in favor of environmental protection, recognizing the difficulty of assessing all possible environmental harms.
- **Expand judicial review of agency inaction.** One way of sabotaging an agency’s mission is to stop implementing congressional mandates. We think courts should be more willing to intervene. Agencies must have some leeway in setting priorities, given budget limitations, but this is no excuse for deliberately shirking statutory mandates.
- **Abolish the Congressional Review Act**. This law, which allows Congress to kill carefully considered regulations without serious deliberation, has served only to empower special interests and knee-jerk ideologues. Some conservatives want to give Congress an even stronger rule, but it hasn’t been able to responsibly implement the more limited powers it has under this statute.
- **Reaffirm the *Chevron doctrine*.** The *Chevron* doctrine gives agencies more ability to adapt statutes to changing circumstances. Ideally, Congress should codify *Chevron* into statute, while omitting the mischievous “major questions” exceptions that let’s courts second-guess agencies at will. If Congress has entrusted implementation of nearly all environmental statutes to agencies, not courts. Courts should exercise deference in reviewing the actions of these agencies. this doesn’t mean a blank check, but it does mean agencies should get the benefit of the doubt.
- **Improve transparency, accountability, and public participation.** At the same

> time they ask for public comment, agencies implementing should be required to post all underlying studies on-line along with other relevant background materials. They should also be required to log all contacts with other officials in the Executive Branch regarding a proposed rule. The current consultation process provides a backdoor for special interest and partisan politics. The least the public is entitled to is transparency.

We don’t view these proposals as in any way definitive. We would be delighted if we succeed in starting a discussion about how to improve regulation – but this time, among those who believe in the administrative state, not those who want to turn the clock back to Herbert Hoover’s world.