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Punishing the Innocent

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Punishing the Innocent

Richard W. Parker



Congress should not sabotage regulatory authorizations with sunset provisions.

In their essay opening this series, [Jonathan Adler](#) and [Christopher Walker](#) offer

their opinion that in recent years “Congress has increasingly shelved its legislative powers, leaving a lawmaking void to be filled by the executive branch and the administrative state.” They argue that this congressional abdication of authority is not merely a policy problem: it raises constitutional (non-delegation) concerns.

To remedy this supposed defect, Adler and Walker [propose](#) that Congress should return to the practice of “regular reauthorization of statutes that govern federal regulatory action.” They [urge](#) Congress to give itself an incentive to do so by adopting the practice of adding sunset defaults to authorizing statutes that would terminate agencies’ authority to issue new regulations or (possibly) even enforce existing regulations after a specified time has elapsed following passage of the statute. And they [encourage](#) Congress to terminate appropriations for agencies to make or enforce rules after the sunset date of statutes that have not been re-authorized.

Such self-imposed disciplines, Adler and Walker [argue](#), will “force Congress to revisit and reauthorize the agency or program” in question, thereby solving the temporal non-delegation problem.

Although few would disagree with the general proposition that Congress should do its job, and that its job includes authorizing and re-authorizing agency action, I cannot endorse either their diagnosis of the problem or their sunset remedy. To understand why not, it may be helpful to first examine their evidence of the problem and then consider a few examples of how their sunset remedy would operate in practice.

Adler and Walker [offer](#) two pieces of evidence in support of their claim that Congress has been “shelving” its legislative powers.

First, they [cite](#) statistics showing that federal agencies issued many more rules in 2015 and 2016 than Congress issued statutes, and that rules passed in those years occupy many more pages than the statutes passed in those years.

Second, they [offer](#) the Supreme Court’s 5–4 decision in *Massachusetts v. EPA*, which “forced” the [Environmental Protection Agency](#) (EPA) to retrofit a 17-year-old statutory regime to a set of gases that Adler and Walker believe the agency is ill-adapted to address.

Are these data points evidence of a constitutional dilemma? Few readers of this article will be shocked to hear that it takes more rules, and more pages of the [Code of Federal Regulations](#) (CFR) and *Federal Register*, for agencies to *implement* congressional regulatory commands than it takes for Congress to *issue* them.

For example, Section 112 of the [Clean Air Act](#) directs EPA to devise cost-effective regulations to control emissions of 186 toxic chemicals from dozens of categories of industrial sources—a truly herculean task. [Section 112](#) occupies 44 pages of text. EPA’s regulations [implementing](#) that directive consume 320 pages of the CFR. Those pages [codify](#) over 40 separate rules and rule revisions issued over a forty year period beginning in 1976—with notices, proposals, and final rules occupying uncounted thousands of *Federal Register* pages. So what?

CFR and *Federal Register* page counts are favorite tropes of conservative critics of regulation, but they do not constitute evidence that Congress has “[shelved](#) its legislative powers.” If anything, they prove the opposite: that Congress knows how to leverage its legislative power by using a few pages of statutory text to call forth and guide an immense and sustained agency regulatory effort, one that has kept our factories operating and our air still safe to breathe when it would not be so otherwise.

Equally unconvincing is Adler and Walker’s claim that the Supreme Court’s decision in *Massachusetts v. EPA* somehow [proves](#) that Congress should re-authorize statutes every “x” number of years or else sunset them. That case [involved](#) a complex and controversial question of statutory interpretation. Statutory ambiguities can arise with *any* statute, old or new. Indeed, they are more likely to be found in new statutes, precisely because they are new and therefore unexplored. Arbitrarily requiring new enabling acts every “x” number of years would seem more likely to *proliferate* statutory ambiguities than to reduce them.

After conjuring an unproven and probably illusory problem, Adler and Walker [offer](#) a legislative solution that, if enacted, will do real harm. To see why, it may be helpful to consider a few examples of how their sunset provisions would operate in practice.

The [Public Health Service Act](#), first passed in 1944, provides that “regulations prescribed under this section may provide for the apprehension and examination of

any individual reasonably believed to be infected with a communicable disease.” No one had heard of Ebola or the coronavirus when this law was passed in 1944. Suppose Congress in 1944 had included a sunset clause barring the executive from addressing unforeseen new threats after five to ten years without returning to Congress for new authorization. Should people be allowed to die from Ebola, or dengue fever, or coronavirus, while waiting for Congress to act to fill Walker and Adler’s imagined “democracy deficit”?

The [National Highway Traffic Safety Administration](#) (NHTSA) [sets](#) auto safety standards under a broad delegation which states: “The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.” Over 30,000 Americans [die](#) in car crashes each year. Many of those lives might be [saved](#) by new artificial intelligence technologies that prevent crashes. Yet none of these technologies were [contemplated](#) by the original drafters of NHTSA’s enabling statute. Under Adler and Walker’s sunset [proposal](#), NHTSA would be paralyzed and unable to issue new life-saving regulations to require such life-saving technologies once the agency’s pre-existing legislative authority had lapsed.

The [Clean Air Act Amendments of 1990](#) authorize EPA to protect the public from lethal exposure to hazardous air pollutants by requiring emitters of such pollutants to limit their emissions to the level achievable by the “maximum achievable control technology.” This [includes](#) the authority to impose additional restrictions on emissions if EPA determines the residual public health risks are too high. Under the Adler and Walker proposal, in the absence of congressional re-authorization, EPA’s authority to keep us safe from hazardous air pollution would [lapse](#) after five or ten years, leaving everyone exposed to newly-emerging toxins and possibly to long-known hazards depending on how the sunset clause was worded.

The list could go on and on, but these examples should suffice to illustrate the fundamental flaw in the Adler and Walker proposal: it effectively would punish all Americans for the failure of Congress to do its job.

Adler and Walker may not wish for such results. But they avoid them only by [assuming](#) that Congress—faced with the looming loss of important health, safety, environmental, and economic protections from sunset statutes—will act in a timely

way to avoid such harms by updating and re-authorizing agency enabling acts.

Unfortunately, Adler and Walker offer no empirical evidence to support this blithe assumption. In fact, the available evidence supports precisely the *opposite* prediction. Congress is [paralyzed](#). Congress often cannot [pass](#) a budget, or even regular [appropriations](#), much less reauthorization legislation. As the *Washington Post* [chronicled](#) in a heart-wrenching series of investigative articles, the opioid crisis swept the country while Congress [dithered](#), in part because of massive campaign [contributions](#) from opioid manufacturers. [Legislation](#) to address the fentanyl [scourge](#), perhaps the greatest threat facing small towns and inner cities across America, is [opposed](#) by the powerful pharmaceutical lobby and still awaits meaningful congressional action.

Nor is congressional near-paralysis a new phenomenon. History teaches that it often takes a crisis or tragedy to get Congress to surmount the opposition of special interests and regulate in the public interest. It took the [spectacle](#) of Lake Cuyahoga catching on fire and an enormous oil spill off the coast of Santa Barbara to get Congress to create EPA. It took toxic sludge [oozing](#) into the basements of hundreds of homeowners to get CERCLA enacted. Hundreds of miners [died](#) before Congress finally enacted a meaningful [Mine Safety Act](#). It took the Great Recession to get the Dodd-Frank financial sector regulatory [reforms](#) enacted, and that act is under relentless [attack](#).

[Richard Pierce](#), in a [response](#) to Adler and Walker's paper, has analyzed some of the deficiencies in our electoral system and in the rules of the U.S. Senate and House of Representatives that might account for this inertia and paralysis, and he has [offered](#) thoughtful suggestions for reform. None of his reforms, alas, has any immediate prospect of passage.

What Adler and Walker fail to appreciate, most fundamentally, is that people do not vote for Congress. They vote for their *member* of Congress, or for that member's opponent, and there is no mechanism in place for holding individual members of Congress accountable for the failure of Congress as a whole to act.

Polls [reveal](#) that Congress is widely [mistrusted](#) and scorned, yet we know that virtually every member of that reviled body has received more than 50 percent of

the vote in their home state or district. Given this mismatch of incentives, it obviously does not matter much to the electoral prospects of individual members that their institution is mistrusted. This being so, there is simply no reason, empirical or *a priori*, to assume that Congress will act forthrightly to enact thoughtful re-authorizing legislation when existing enabling statutes expire.

These circumstances reveal the true impact of Adler and Walker's proposal. It is not a cure for a true "democracy deficit." It is simply a back-door device for paralyzing or, depending on how the sunset is phrased, de-constructing the administrative state along with vital protections it offers all Americans.

To such a proposal, however well-meant, there is only one appropriate response: no thanks.

Common sense dictates that Congress should amend legislative authorizations when change is needed and leave them alone when change is not needed. The best way to ensure this optimal result is not to sunset needed laws, thus punishing America for the dysfunction of its Congress. Instead, the answer is to change the incentives of individual members of Congress to better align with the public interest. Free members of Congress from paralyzing subservience to special interests and the most extreme members of their own party by enacting some of the reforms that Pierce proposes. Reform the flawed system of campaign finance that forces so many members to [spend](#) more than half their time "dialing for dollars" rather than legislating. And, as the [Center for American Progress](#) has [proposed](#), bar congressional committee members who write authorizing legislation from seeking or receiving campaign contributions from the very entities the public interest requires them to regulate.

In short, what America needs most of at the moment is not the sunset of laws that protect our health, safety, economy and environment. What it needs is a sunset of the enervating combination of ideological gridlock and special interest capture that now nearly paralyzes Congress.

This essay is part of a seven-part series, entitled [Reinvigorating Congressional](#)