

## CHAPTER 8



# The Honest Deal Act

America! America!  
God mend thine every flaw,  
Confirm thy soul in self-control,  
Thy liberty in law!

—KATHARINE LEE BATES (“AMERICA THE BEAUTIFUL”)<sup>1</sup>

**B**y empowering legislators to be responsible to voters for both benefits and burdens, the Constitution sought to bring self-control. Yet, by allowing legislators to dodge responsibility for unpopular consequences, the Five Tricks produce a government that is dangerously out of control, as seen in chapters 5 and 6. In this book, I propose that Congress pass a statute that will stop these tricks. The present chapter explains the statute, which I call the “Honest Deal Act.” Appendix A concisely outlines its terms.

### The Money Trick

Were I a candidate for Congress, I would feel honor-bound to disclose how I would keep the government solvent. As a constituent rather than a candidate, I demand that the government disclose how much it will cost us in the long run to maintain solvency and how the current Congress and president have increased or decreased that cost. This requires of the government the same thing that it does of private lenders under the Truth in Lending Act: to provide a crystal-clear statement of the costs people will have to bear in the future. Instead the government provides us with false information shrouded in fine print. “A false balance is abomination

to the Lord,” states Proverbs 11:1. A false balance sheet from the government is abomination to the people.

The Honest Deal Act would require the government to disclose how much we would have to pay in tax increases or spending cuts to make ends meet in the long run but not that Congress has to increase taxes or cut spending now. How to respond to this disclosure would be up to members of Congress, who could no longer keep us in the dark.

It is possible to provide reasonable estimates of the costs we will ultimately have to bear despite uncertainty about the future:

- We don't know how large the national debt can grow without imperiling the government's credit but we do know that the debt cannot grow infinitely large. For this reason, the government's spending (including interest on the debt) cannot exceed its revenue in the long run, as discussed in chapter 4.
- To determine the size of change in current policy needed to bring spending in line with revenues in the long run, we can use a budget model that estimates how much Congress would need to permanently cut annual spending or increase annual revenue if it acted now. Such estimates are surprisingly not too sensitive to changes in assumptions about the rate at which the economy grows.<sup>2</sup>
- We don't know whether Congress will cut spending or increase taxes to close the gap or how it will do so. What we do know is that in the end the impacts will be felt primarily by individuals, whether as taxpayers, beneficiaries of entitlements, employees, consumers, shareholders, local taxpayers, or the like, and we can calculate the average annual impact on a family of four.
- We don't know on which families the impacts of increased taxes or spending cuts will fall most heavily. What is clear is that if the tricks remain unstopped, lower- and middle-income families will likely suffer an even-greater cost than the average family because the trickery tends to especially benefit the rich and connected, as seen in chapter 5. As a point of comparison we can estimate the average cost per family.

A calculation of the average cost per family would be better than an estimate but, realistically, the choice is between an estimate and flying blind.<sup>3</sup> For a similar reason, responsible people produce estimates as to

whether they can afford a long-term expense such as a mortgage. The irresponsible rely on wishful thinking.

The key thing is that the estimate should be apolitical. The Congressional Budget Office could do the job. When it began operation in 1975, the office's first director, Dr. Alice Rivlin, set out to make it independent and nonpartisan. It has stayed that way.<sup>4</sup> What the office needs to do the job of estimating the average cost per family is a mandate from Congress, a completely free hand in how to do it, and the means to get its analysis sent to every voter. This will give the CBO support from many in the electorate and so help insulate it from tampering.

As it has done before, the CBO would provide information rather than recommend policy, let alone tie the hands of Congress. The CBO's work would not impose so-called fiscal cliffs or sequesters. Elected officials would get to decide how to react, but would be responsible for the consequences.

Under the Honest Deal Act, at the conclusion of each Congress and before each general election, the Congressional Budget Office would send citizens an easily understood letter explaining the size of the changes needed for the government to make ends meet. The letter might look something like this:

“The Honest Deal Act requires the Congressional Budget Office to provide citizens with forthright information on the state of the government's finances over the long run.

The Congressional Budget Office calculates that the government will not be able to pay its bills in the long run if it continues its current practices of taxing and spending.

If Congress and the president act now to close the gap between spending and taxation by increasing income taxes on individuals and corporations, revenues from such taxes will have to be increased permanently by \_\_\_\_%. If they instead act to close the gap by cutting government expenditures (including Social Security, Medicaid, Medicare, military, and all the other programs), total expenditures will have to be cut permanently by \_\_\_\_%.

Congresses and the presidents now and in the future will have to choose the extent to which they increase taxes or cut spending, and how to do so, but in the end the impacts will be felt largely by individuals. Assuming that the cost is spread equally among the population, the

average tax increase or spending cut to a family of four in the current year will be \$\_\_\_\_\_, with similar amounts cut each subsequent year.

During the most recent Congress, which began in \_\_\_\_\_ and ended in \_\_\_\_\_ [(or in the case of a letter sent before a general election) the current Congress, which began in \_\_\_\_\_ and will end in \_\_\_\_\_], legislators have taken actions that increased [or decreased as the case may be] this amount \$\_\_\_\_\_ per family.<sup>[5]</sup>

The size of the tax increases or spending cuts required to make ends meet will grow larger the longer Congress and the president delay action. If they delay ten years, the size of the required tax increase or spending cut will grow \_\_\_\_\_% larger.

Current spending and taxing policies will not only leave the federal government with insufficient funds to make ends meet but will take funds from future generations to benefit current voters. For more information on the actual impact that the current actions will have on an average person born in a particular year (such as someone born the same year as you, your children, or your grandchildren), see the Congressional Budget Office's Web site at \_\_\_\_\_."

The CBO shall, to the greatest extent possible, have a copy of this letter delivered to each individual of voting age. The Honest Deal Act should also require the Social Security Administration, any other agencies that provide information on benefits, and the Internal Revenue Service to enclose the CBO's letters along with their own mass communications they send to the public.

To fill in the blanks in the letter, the CBO would adopt its own budget model that projects future spending and revenues under current policies. The model would be based upon actual current policy rather than the tax increases or spending cuts that current statutes suggest will happen in the future but for which elected officials have not taken responsibility.

Because the public needs information on how the votes of their own senators and representatives have affected the cost per family, the CBO should be required to make its budget model public. Analysts of every stripe could then use the model on their own to assess the fiscal impact of these politicians' positions on various legislative proposals. Such analysts could also critique the budget model.

Overall, the letter and model would provide us with a common language to discuss the government's fiscal future. Because we now lack

such a language, politicians can get away with talking past one another and confusing us. Depending on what is politically convenient to them, they now choose to talk about either the national debt or the deficit for the current year, the next ten years, or the next seventy-five years. Current politicians can also speak about how much their proposals would cut any of these amounts from many different baselines, each of which they choose on the basis of political convenience. In contrast to this babel, the information produced by the Congressional Budget Office would prompt our politicians to tell us what they propose to do, if anything, to make ends meet. The CBO's information would also help Standard & Poor's, Moody's, and other companies that rate the creditworthiness of government bonds to be more precise. Bond buyers would in turn pay attention, and that would reverberate back into politics.

Given the salience of such information, isn't it likely that Congress would want to amend the Honest Deal Act to suppress it? Yes, but changed conditions will provide no cover to amend the statute, even though changed conditions did provide cover for gutting the balanced budget statutes of the 1990s. Back then, the statutes controlled the budget, so that changed circumstances provided an argument for changing that control. Under the Honest Deal Act, the CBO would control nothing; its only job would be to provide information.<sup>6</sup> Changed circumstances would provide a reason for Congress to react differently to the information rather than to amend the Honest Deal Act. If Congress can be made to order the CBO to put such information into the hands of voters, it will have to live with that order.

As it is, the Money Trick hides not only the long-term cost of the Congress's current policies but also the fact that current policies enrich current voters at the expense of their children and grandchildren.<sup>7</sup> And the longer Congress waits to close the fiscal gap, the worse the deal will be for future generations. As people who want to be fair to those who come after us, we should know the burdens that we are imposing on them. For that reason, the CBO should also compute how much programs with intergenerational consequences will enrich or impoverish a person born in any particular year.

We cannot excuse leaving a larger bill to succeeding generations on the basis that they will benefit from investments that their forebears made. Yes, we who came before them have built roads and other government-owned infrastructure and fought wars to defend the country. But the great

bulk of the growing shortfall comes from money going to older people. Moreover, if members of the older generations such as me get credited for having invested in government-owned infrastructure, we should also get debited for failing to maintain that infrastructure adequately and selling off government-owned oil, gas, and other nonrenewable resources. Congress has, in Christopher DeMuth's words, erased "the distinction between investing in the future and borrowing from the future." Nor can Congress excuse its current policies by claiming that they are necessary to take care of the poor. As the mildly conservative John Micklethwait and his coauthor Adrian Wooldridge put it: "For all the worries about 'benefit scroungers' and 'welfare queens,' most [government] spending is sucked up by the middle classes, many of them conservatives."<sup>8</sup>

That is why the proposed letter from the Congressional Budget Office should include language of the following sort:

"Current spending and taxing policies will not only leave the federal government with insufficient funds to make ends meet but will take funds from future generations to benefit current voters. For more information on the actual impact that the current actions will have on an average person born in a particular year (such as someone born the same year as you, your children, or your grandchildren), see the Congressional Budget Office's Web site at \_\_\_\_\_."

### ***Better Rather Than Best***

To provide a strong basis for concluding that the proposals in the Honest Deal Act would make the government better, I have limited them to methods that can clearly work. By limiting myself to such methods, I aim to propose an Honest Deal Act that delivers the better but not necessarily the best.

We can accept the better rather than the best when we understand that improvements can come incrementally. Once we have experience with the implementation of the reforms in the Honest Deal Act, we will have information that is useful in considering further reforms. In so suggesting, I am following the advice of the famous political science professor Charles Lindblom, who pointed out that we seldom have the information and consensus needed to agree on objectives and identify the very best policies to achieve them in designing reforms.<sup>9</sup> Instead, we

usually make policy by considering whether an obvious change in current practice would make things better.

Frustration with Congress's inability to control the deficit has generated some support for amending the Constitution to restrict its spending, but I do not propose such an amendment requiring Congress to produce a balanced budget. Whether such an amendment is good economics, it is unlikely to succeed. An amendment of this type has never gotten the two-thirds approval in both houses of Congress needed to submit it to the states for ratification. Even if it did get this approval, it would not be likely to then be ratified by three-quarters of the states as is necessary to amend the Constitution. Besides, as happened in the last years of the twentieth century, Congress can produce a seemingly balanced budget for the current year while also having current policies that will produce a huge gap between spending and revenues in future decades. And if a balanced budget requirement were to be proposed, Congress would likely find ways to skirt it, just as some state legislatures have found ways to skirt the balanced budget requirements in state constitutions.<sup>10</sup>

What the perpetually unsuccessful balanced budget amendment does accomplish is to let some elected officials strike a pose in favor of fiscal responsibility without actually having to take the blame for raising taxes or cutting spending. Stopping the Money Trick, on the other hand, would make legislators pay a political price for leaving a big fiscal gap and make us, the voters, be honest with ourselves.

### **The Debt Guarantee Trick**

Many financial analysts and market participants think that no matter what Congress says, the government will not let the debts of the financial giants go unpaid in a crisis. Otherwise, as the government sees it, the crisis would grow even bigger.<sup>11</sup> It also cannot hand off guaranteeing the debts of financial giants to private firms because these firms lack sufficient capital to back up these massive debts. So, as long as the government guarantees the debts of these firms, it should charge them market-based fees for what they get.

The market should determine these fees because otherwise the government will set them too low. Government officials tend to overlook politically inconvenient risks. Consider this statement by the director of

the agency regulating Fannie and Freddie only six months before they collapsed: “Let me be clear—both [Fannie and Freddie] have prudent cushions above [my agency’s] capital requirements.” Two months before the collapse, Senate Banking Committee Chairman Chris Dodd stated, “What’s important are facts—and the facts are that Fannie and Freddie are in sound situation.”<sup>12</sup>

To set a market-based fee, the government should require each financial giant to buy a guarantee from private guarantors for a portion of its debt that is small enough to ensure that the guarantors will be good for it. The guarantors would charge higher fees to the riskier financial giants. The government would then guarantee the balance of the debt, basing its fee on that charged by private guarantors. For example, if private guarantors guaranteed 10 percent of a financial giant’s debt at a certain fee, the government would provide the remaining 90 percent at a fee nine times higher than that charged by the private guarantors.<sup>13</sup>

The market-based fee would end the welfare for Wall Street that comes from free or cheap debt guarantees. The fee would also give the financial giants a profit-based incentive to limit the risk that their debts inflict upon the economy and thus on our livelihoods. Moreover, the private guarantors would lobby regulators to limit the riskiness of the firms whose debts they guaranteed, thus helping to offset the influence over regulators of too-big-to-fail firms.

How to go about charging market-based fees for debt guarantees is, however, complicated. One reason is that such fees for financial giants may need to be phased in. As these firms are now structured, they would have to pay very high fees because their debts are large and far from risk-free. To reduce the risk, they will need to raise capital and that will take time. A phase-in period may be necessary to avoid a tightening of credit.<sup>14</sup>

Another reason that charging market-based fees would be complicated is that the government now guarantees many sorts of private debts. Examples include commercial loans to alternative-energy manufacturers such as Solyndra (which famously went bankrupt) and the pensions owed by private corporations. In many cases, the government charges no fee for the guarantees or a fee not fully reflective of the risk that it assumes in backing up the debt. For example, Congress sets the fees that the Pension Benefit Guaranty Corporation (PBGC) charges corporations too low for it to cover the risks, as chapter 1 discussed.

To help decide how to initiate market-based fees, I propose that



Congress should create a “Debt Guarantee Honesty Commission.” At the end of year one, the commission would produce an exhaustive list of existing debt guarantees, explicit and implicit. The commission would then divide the debt guarantees into three groups to be the subject of proposals at the end of years two, three, and four. At the close of these years, the commission would recommend whether each kind of debt guarantee could and should be eliminated and, if not, how to set a market-based fee for it.<sup>15</sup> The commission would also recommend whether there should be a phase-in period for the elimination. Congress would vote on each year’s recommendations as a package on a fast-track basis that permits no amendments or filibusters.

I modeled this process on one that Congress established to eliminate redundant military bases. Congress tasked the Defense Base Closure and Realignment Commission to propose which bases to eliminate and set up a process in which the legislators voted on the commission’s proposals on a fast-track basis.<sup>16</sup> The reason for the commission was that Congress alone could not come to grips with getting rid of redundant bases despite their huge cost to the public. The legislators fiercely defended the bases in their own districts, redundant or not. Similarly, members of Congress would likely defend debt guarantees that benefit their campaign contributors. These beneficiaries are smart enough to give heavily to both parties. The base closure commission is widely viewed as a great success.

Charging a market-based fee would, of course, end the subsidies that Congress covertly grants through free or underpriced guarantees. If Congress wishes to subsidize an activity, it should have to do so openly by appropriating the money through the discretionary budget on which it votes annually. This would effectively prevent beneficiaries of the guarantees from growing the subsidy, as Fannie, Freddie, and the too-big-to-fail firms did, without the legislators having to take responsibility.

While the Debt Guarantee Honesty Commission would provide a short-term process to deal with the backlog of free or underpriced debt guarantees that currently exist, another process would be needed to deal with any free or underpriced debt guarantees that may creep into existence in the future. This could happen through a firm growing to the point where it becomes too big to fail. It could also happen if Congress were to enact a new statute providing a free or underpriced debt guarantee. Either occurrence is likely to be infrequent, so it makes sense that the

Debt Guarantee Honesty Commission would end after four years and the job of dealing with the occasional new problems be assigned to another entity. I suggest the Federal Reserve Board.

### ***Better Rather Than Best***

Federal officials have long understood the popular appeal of making firms whose debts are guaranteed pay a market-based price for the guarantees—private businesses have long used this method to deal with debt guarantees—and have sometimes tried to make it seem as if they have applied it.

Some observers contend that the very best way to deal with the systemic risk from the collapse of financial giants is to break them up or to radically change their internal structure.<sup>17</sup> They may be correct, but I stick with advocating a market-based fee because it is simpler to understand and therefore has a better chance of bringing home to voters the injustice of financial giants continuing to get a hidden subsidy from taxpayers. Until voters understand this injustice, no change is possible. Ending the subsidy for being big would both reduce these firms' incentive to swell their size and reduce their resistance to solutions that may be even "better."

### **The Federal Mandate Trick**

Ideally, members of Congress should cast a roll call vote on all of the statutory provisions that would harm constituents if states or localities fail to do the federal bidding. This ideal would be, however, impossible to implement because statutes include large numbers of such provisions, often on issues as noncontroversial as denying federal highway grants to states unless they build the highways with concrete that meets federal specifications. Voting on each and every such provision would take too much time.

To prompt votes on the most controversial provisions without requiring votes on all of them, the Honest Deal Act would adopt a method similar to that used to challenge the most controversial rulings by National Football League officials. The act would amend the standing rules of the House and Senate to allow legislators to challenge provisions in a bill that threaten to do harm to states or localities if they fail to do the federal bidding. The challenges would be made when the bill comes up

for passage on the floor of the House or Senate. Each legislator would be entitled to make one such challenge during each Congress, which lasts two years. The challenge would take the form of a point of order and state how to amend the bill to avoid the harm. The House or the Senate would resolve the challenge by roll call vote. There would be no debate. Each successful challenge would result in the bill being amended and the legislator being yielded a chance to make another challenge.<sup>18</sup> So smart legislators could make many challenges. In response, smart bill sponsors would strip their bills of mandates for which legislators would not take responsibility. While nothing would require legislators to actually issue challenges, their ability to do so would tend to make them responsible for controversial mandates.

Limiting each legislator to only one unsuccessful challenge and blocking debate on any of them would prevent these challenges from becoming a routine way to kill bills. In contrast, the Unfunded Mandates Reform Act, discussed in chapter 4, imposes no limit on the number of challenges, and as a result it has given the leadership of the House and Senate an excuse to use legislative maneuvers to prevent challenges against mandates. To make sure that they don't do so, we should ask candidates for Congress to sign my proposed "Honest Deal Pledge" (see appendix B), which includes a promise to oppose any maneuver to prevent challenges to mandates under the Honest Deal Act.

### ***Better Rather Than Best***

The Honest Deal Act's proposal to stop the Federal Mandate Trick employs the method that Congress actually adopted in the Unfunded Mandates Reform Act but failed to design in a practical form.

My proposal to stop the Federal Mandate Trick would not apply to mandates arising under statutes that antedate the Honest Deal Act. However, my proposal to stop the Regulation Trick, which I outline later in this chapter, would require Congress to vote on major new regulations, including those that impose new mandates under both new and old statutes.

It is ideal for Congress to take responsibility for old mandates because those that were once popular can become unpopular in time. For example, state and local officials have supported some mandates because Congress promised states money to implement them, only for Congress to then fail to produce the money. Implementation of the Honest Deal

Act will suggest some process by which elected officials can reconsider old mandates.

Retired senator and judge James Buckley argued that Congress should replace all federal grants to states and localities (and the mandates that they impose) with federal grants that these states and localities can spend as they wish.<sup>19</sup> Because my focus is on making Congress accountable for its decisions rather than dictating what decisions it should make, I take no position on his proposal. If, however, the Money Trick and the Mandate Trick were stopped, members of Congress could consider this proposal without a blatant conflict between their own interests and those of their constituents.

### **The Regulation Trick**

We can't stop the Regulation Trick by insisting that Congress make all the rules of conduct without the help of agencies. To produce rules on complex subjects, Congress needs their expertise. We can, however, marry the expertise of agencies with accountability for Congress. James Landis, the New Deal's sage of administrative law, showed how. In 1938, as the dean of Harvard Law School, he wrote that for administrative officials, "it is an act of political wisdom to put back upon the shoulders of Congress" responsibility for "controversial choices." Congress, he urged, should vote on agencies' important decisions. The votes could be on whether (1) to ratify or (2) to veto the choices. In this way, the agency would be, in Landis's words, "the technical agent in the initiation of rules of conduct, yet at the same time . . . [the elected lawmakers would] share in the responsibility for their adoption."<sup>20</sup>

Congress built Landis's second alternative into dozens of statutes by providing that the House and the Senate (or in some statutes, either of them acting alone) could veto an agency action regardless of whether the president agreed. In 1983, however, the Supreme Court held that Landis's legislative veto violates the Constitution because it cuts the president out of the legislative process. The Constitution, the Court reasoned, provides that legislation receive the support of majorities of both the House and the Senate and then be presented to the president to sign or veto. The Court so held despite legislators of both parties arguing that the legislative veto is good public policy.<sup>21</sup>

Responding to the Supreme Court's decision in a law review article, then-judge Stephen Breyer argued that Congress could achieve the effect of a legislative veto by, in essence, adopting Landis's first alternative. In other words, Congress could, consistent with the Constitution, provide that agency actions would not go into effect until Congress approved them by roll call vote and presented the bill to the president, thus going through the Constitution's full legislative process. Breyer went further, suggesting a fast-track legislative process that would force legislators to take responsibility by a deadline without the possibility of amendment or filibuster.<sup>22</sup> His design is similar to the process for closing redundant defense bases I previously discussed in my proposal to stop the Debt Guarantee Trick.

In 1995, some members of Congress asked for my help in designing a bill to stop Congress from passing the buck on regulation. I suggested a bill based upon Landis's first alternative and Breyer's fast-track design. The bill, titled the Congressional Responsibility Act, would have barred agency regulations unless approved through the Constitution's legislative process, which includes presenting the bill to the president.<sup>23</sup> After the bill began to gain traction, Congress pulled a switcheroo. It passed a sound-alike called the Congressional Review Act. Signed by President Clinton, it gave legislators the option of voting on agency regulations. The Congressional Responsibility Act, in contrast, would have required them to do so. Not that it's any surprise but, as it turns out, legislators hardly ever opt to take responsibility under the Congressional Review Act.<sup>24</sup>

Starting in 2009, after the failure of the Congressional Review Act had become apparent, members of the House have regularly introduced bills modeled on my original Congressional Responsibility Act. Yet the sponsors of the new versions of the original bill have done a grave disservice to it by casting their bill as antiregulatory instead of proaccountability. This is apparent from the newest bill's title, Regulations from the Executive in Need of Scrutiny Act, or REINS. Not only did these legislators stake out the low rather than the high ground in titling the bill, they have put into it poison pills that make it unlikely that it will ever become law. For example, the version passed by the House of Representatives in 2015 requires that any and all Affordable Care Act regulations, no matter how trivial, get congressional approval.<sup>25</sup> This provision will make the Affordable Care Act unworkable and therefore prevent REINS from

getting enacted unless Republicans already have the votes to repeal the Affordable Care Act.

Such poison pills allow supporters of REINS to strike a proaccountability pose while shielding themselves from accountability. That's convenient because voting against regulations with broad public support can cost votes in the next election. In the mid-1990s, as Howard Dean related, "Voters started to blanch when Republicans went after the Endangered Species Act and a host of other basic environmental, health and safety measures."<sup>26</sup> Fear of accountability helps us to understand why some legislators turned the Congressional Responsibility Act into the toothless Congressional Review Act in 1996 and today put poison pills into REINS to prevent it becoming law. That way, they can continue to surreptitiously pressure agencies to go easy on campaign contributors but avoid having to cast roll call votes that could cost them votes at the next election.

Legislative responsibility for agencies' decisions is even more imperative now than when Landis wrote in 1938. Since then, as Professor Bruce Ackerman has shown, presidents have come to exert tight political control of the once supposedly expert and apolitical agencies.<sup>27</sup> We need a new version of REINS suitable for lawmakers who are actually willing to be responsible for the laws that benefit and burden the people. The new version would omit the poison pills and instead require Congress to vote on regulatory actions to make regulation both *less* and *more* protective.

Also unlike REINS, the new version would provide that a petition signed by a majority in either house would add an extra thirty days to the deadline for a final roll call vote in order to allow time for a hearing on the promulgated rule. The extra time would not usually be necessary, however, because the Honest Deal Act would come with the expectation that both houses hold hearings when an agency *proposes* a rule that would trigger votes in Congress. Proposed regulations usually come months if not years before the agency finalizes them. At these hearings, the time should be devoted to committee counsel carefully questioning witnesses, especially agency officials, rather than to members of the committee putting on a show for constituents and campaign contributors. The hearings on the proposed rule would launch a conversation between swing legislators and the agency.

The Honest Deal Act's provision on regulation would apply only to regulations that are "major," as defined by the White House's Office of Management and Budget.<sup>28</sup> This limit accords with Dean Landis's

proposal, which calls for Congress to vote on only the important decisions, and would ensure that Congress has sufficient time to do the job. Voting on a major regulation would not take much time in Congress because the agencies would have already drafted the regulation, solicited comments from the public, revised the proposal in light of those comments, and estimated the impacts. Debate would be strictly limited in order to prevent filibusters and conserve time. During the two years of the 111th Congress, agencies promulgated 126 major regulations. Congress could make the time to vote on major regulations. During the same Congress, it voted on 112 symbolic public laws, such as those naming post offices.<sup>29</sup> The bills assigning names are one of the numerous ways in which legislators devote time to striking poses rather than taking responsibility for the actual consequences that will be felt by their constituents. Voting on major regulations would require legislators to shoulder much-more responsibility than they do with laws that name post offices, but shouldering responsibility is their job.

To further ensure that Congress does not kill major regulations by failing to vote by the Honest Deal Act's deadline, such failure should automatically cut off appropriations (including those for their salaries, travel expenses, staffs, and office expenses) for members of whichever house fails to vote until such time as that house ends the failure.

This response to the Regulation Trick would carry risks for both the Left and the Right. Regardless of which side the president is on, agencies would often have to appeal to swing legislators to get their major regulations through Congress. The Left and the Right are both sure that they can produce the kind of regulation that is correct and reflects the people's values. But they both can't be correct. They are, in fact, both incorrect for two reasons. First, they will not always have the kind of president that they want. Second, to repeat the words of Professor Ackerman in chapter 1, "It makes good sense to require the president to gain the support of Congress even when [the president's] vision is morally compelling."<sup>30</sup>

I am not predicting that Congress would always approve the regulatory decisions that I favor. Yet, courts do not always approve regulations, and agencies' fear of losing in court often results in them delaying needed regulations for years. Congressional approval of an agency's regulation would markedly improve its chances of passing judicial review and therefore allow the agency to promulgate it more quickly.

Besides, small-*d* democrats worthy of the name cannot limit democracy to instances in which it produces decisions that accord with their individual preferences. We must resist what Professor Jeremy Waldron called the “dangerous temptation to treat an opposing view as something which is ‘beneath notice,’ . . . by assuming that it is necessarily ignorant or prejudiced or self-interested or based on insufficient contemplation of moral reality.”<sup>31</sup>

### What about Climate Change?

“How,” people concerned about climate change, as I am, might ask, “can you have scruples about democracy when greenhouse gases alter the climate of the planet?” Here’s how.

During the administration of President Obama, the EPA had eight years to promulgate regulations limiting greenhouse gas emissions, yet its regulations were inadequate. They directly addressed mainly auto makers and power plant operators. Deeper cuts could be achieved through reducing the combustion of fossil fuels and other greenhouse-gas-producing activities by businesses of all sizes and sorts, farmers, governments, universities, and ordinary citizens. For example, we citizens might be made to change how we insulate, heat, and cool our houses; where we live relative to where we work; and how we commute to work. The EPA knows deeper cuts in emissions require society-wide changes in behavior, and so it issues regulations that coerce power plant operators to encourage customers to use less electricity. This roundabout way of cutting electricity consumption is messy and will do nothing to promote less use of fossil fuels for purposes other than generating electricity or to change other activities that produce greenhouse gases. The EPA takes this backhanded, halfhearted approach because the Clean Air Act does not provide an efficient way to achieve society-wide changes and in order to fool voters into thinking that the burdens that it imposes fall on giant corporations rather than ordinary people.

To get deeper cuts, we need a far-more-honest, comprehensive, and efficient approach than the current Clean Air Act allows. We need new legislation of the sort that Richard Stewart, Katrina Wyman, and I proposed in *Breaking the Logjam*. The legislation would establish market-based incentives that influence the conduct of everyone. Were



this done by taxing greenhouse gas emissions and using the proceeds to reduce other taxes, we could cut greenhouse gas emissions without significant loss in our standard of living. That is the finding from the deeply respected nonpartisan think tank Resources for the Future. It is a plausible conclusion when one considers that a tax on income discourages the work and investment that brings prosperity, while a tax on emissions discourages the emission of greenhouse gases. We should tax what we don't want and reduce the tax on what we do want. Many conservatives, as well as liberals, are open to such an approach. We can implement it without making taxes less progressive.<sup>32</sup> The EPA, however, lacks the power under the current Clean Air Act to opt for this win-win solution, and the tricks make Congress much less likely to make the necessary legislative changes.

With the Honest Deal Act in place, I don't know what choices Congress would ultimately make, but the representatives would have to account to constituents no longer misled by the tricks. That is how government in a democracy should work. Meanwhile, without the Honest Deal Act, the EPA under the new presidential administration could, without the approval of Congress, weaken the existing regulations limiting greenhouse gas emissions.

Nonetheless, some on the left may oppose requiring Congress to take responsibility for major regulations because they fear that legislators on the right would reflexively block popular regulations. I disagree because they would pay a price for that at the polls. Yet, if such fear on its own would block the Honest Deal Act, a fallback position is available—make Congress vote on only those major regulations promulgated under newly enacted or amended statutory authority. That way, the sponsors of new legislation would have the option of including agency-drafted rules in the bill rather than having the agency promulgate the rules in regulations after the statute is enacted. Either way, Congress would have to take responsibility for the major regulations promulgated under the new statutory authority.

I strongly prefer, however, that Congress commit itself to voting on major regulations promulgated under both its new and old statutory

authority. Because legislators escape responsibility for the consequences of old regulatory statutes, we continue to live under obsolete statutes such as the Clean Air Act that fail to deliver the protection we need and impose wasteful burdens on us. Or, as Philip Howard argued, we continue to live under regulations made by dead people.<sup>33</sup> The fallback position would, however, be better than nothing, in that Congress would recognize the principle that its members should take responsibility for the major regulations, although not fully vindicating that principle. Should experience with the fallback ease fears, Congress could extend the requirement to major regulations promulgated under old statutes.

### ***Better Rather Than Best***

The Honest Deal Act's proposal to stop the Regulation Trick employs the method that James Landis proposed in 1938 and a variant of which was used by Congress from then until 1983. Gaining experience with the Honest Deal Act could then help induce Congress to adopt ways to accept responsibility for major regulations that antedate the act.<sup>34</sup>

### **The War Trick**

The Constitution states that the "President shall be Commander in Chief" of the military. That means Congress cannot interfere with *how* the president conducts combat. But *whether* the president can commit the United States to combat without congressional approval is quite another question. President Dwight Eisenhower's answer was that the Constitution requires the president to get approval from Congress. Professor John Hart Ely argued that the Constitution requires congressional approval whether the war is "big or small, 'declared' in so many words or not." Others answer that presidents can wage undeclared wars without congressional authorization.<sup>35</sup>

Yet even those who claim that presidents can start undeclared wars without congressional approval concede that Congress can stop a war by cutting off funding. After all, the Constitution allows the government to spend only the money that Congress has appropriated.<sup>36</sup>

Congress can use its power over the federal budget to require congressional approval for war. In his book *War and Responsibility*, John Hart Ely proposed a statute that would do so.<sup>37</sup> Relying heavily on Ely's proposal, the Honest Deal Act would work as follows:

1. In the absence of a declaration of war, a president shall submit a report before or, in the case of an emergency, simultaneously with the introduction of the military into an area of ongoing or impending hostilities. The report must detail the reasons for the mission and its estimated scope.
2. In the event that the president does not submit a report, any member of the armed forces ordered into the area may bring a lawsuit. The court shall declare if the president should have submitted a report but issue no order to the president. The court's decision can be directly appealed to the Supreme Court. This is the kind of case, Ely contended, that courts should and would decide.<sup>38</sup>
3. Within twenty days of when a president submits a report or a final court decision declares that the president should have submitted such a report, whichever is earlier, no funds otherwise appropriated may be used for the military action except for the purpose of withdrawing the military unless Congress has declared or otherwise explicitly authorized the war.<sup>39</sup>

If the Honest Deal Act had been in place, President Obama would have, for example, been required to submit a report triggering a vote in Congress on the bombing of Libya in 2011, and members of Congress would have had to take responsibility rather than just kibitz.

Even if Ely was wrong that courts would decide cases against the president for failing to file the report, as described in the second point, his statute could still work. The president could file a report without being sued, which would cut off funding in twenty days unless Congress authorized the war. The president would file such a report if enough voters wanted candidates for president to commit to doing so. In other words, voters would need to demand that officials act in a way that makes the government accountable. Enacting the new statute would help by eliminating provisions in the War Powers Act that are arguably unconstitutional and so give presidents political cover for not filing reports that trigger votes in Congress. A new statute would also embody a political commitment to accountability and, in particular, a demand that presidential candidates take the Honest Deal Pledge to obey the Honest Deal Act on war and everything else.<sup>40</sup>

There are those who believe that presidents need the power to enter wars without the approval of Congress. For example, John Yoo, an assistant

attorney general under President George W. Bush, argued that the current War Powers Act, if obeyed, would constrict the president's flexibility too much. Professor Yoo warned that requiring congressional authorization "can have a steep cost—congressional delay can keep the United States out of wars that are in the national interest."<sup>41</sup> Delay is a real concern, but Ely's statute does not require delay. Under the statute, the president can in an emergency launch a military campaign without prior approval so long as Congress is notified simultaneously. Congress then has twenty days to decide whether to authorize the campaign. Meanwhile, it can continue.

Professor Yoo also warned that requiring congressional approval would keep us out of needed wars: "If Congress had held the upper constitutional hand in war and had refused to send troops to Korea and Vietnam, the Cold War may have ended very differently." Although he acknowledged that we don't really know what the outcome would have been, he went too far in suggesting that requiring congressional approval would give Congress "the upper . . . hand." The president can use the office's unique ability to speak to the public and frame the issue. In addition, the president as commander in chief and diplomat in chief can shape events to make congressional approval more likely. Meanwhile, even now, presidents must reckon with how Congress will react. As strategic studies expert Eliot Cohen explained, "The powers of investigation, legislation, and authorization to spend money give Congress the ability to oversee and influence a war for good or ill."<sup>42</sup> My conclusion: Ely's proposal would not shift the upper hand from the president to Congress but rather work a marginal adjustment in the balance of power between them.

The major change would be in accountability rather than power. A marginal shift in the balance of power and a major shift in accountability is the right mix. There is no exact allocation of power that could ensure that the nation always makes wise decisions about whether to go to war. Indeed, it is hard to say in the abstract what is the best allocation. Professor Yoo and Jide Nzelibe argued that congressional approval of military campaigns does not always mean that Congress deliberates carefully. That is so, but recent experience suggests that confining authority to the president and those under the president's thumb often leads to narrow-minded groupthink in decisions about war.<sup>43</sup> In the absence of a clearly optimal allocation of power, we should opt for making both the president and Congress accountable.

Professor Yoo's argument that the president should have the power to

wage war without congressional approval parallels the argument of some on the left that the president and the president's appointees should have the power to impose major regulations without congressional approval. They, like Yoo, argue for cutting Congress out of the process since the president is more apt to make the right decision. I respond to Yoo, as I do to those on the left, by invoking Professor Ackerman's admonition that "it makes good sense to require the president to gain the support of Congress even when [the president's] vision is morally compelling."<sup>44</sup> This principle should be applied with special force to decisions to go to war because we risk so much in war. Moreover, with presidents often justifying wars as fought to protect democracy abroad, democratically accountable legislators at home should feel a heightened duty to shoulder responsibility.

### ***Better Rather Than Best***

The Honest Deal Act's proposal to stop the War Trick employs the rule generally used from the beginnings of the republic until 1950—no combat without a declaration of war or specific authorization by statute.

Leslie H. Gelb and Professor Anne-Marie Slaughter argued that authorization of combat by statute is not good enough; the president should have to get Congress to declare war:

A more public vetting of the decision to go to war, culminating in a solemn declaration of war by Congress, would most likely ensure stronger public support for the war, by involving the people in the decision and assuring voters that the war had not been launched hastily or under false pretenses. Setbacks and sacrifices might be less surprising and more easily accepted. Because the declaration process would address problems beforehand, it would help us win wars once they started.<sup>45</sup>

The Afghanistan War and the Second Iraq War provide support for Gelb and Slaughter's claim. In both cases, Congress authorized war by statute. The statutes' titles, such as "Authorization for Use of Military Force," were euphemisms for wars that proved far more bloody, prolonged, and expensive than most people had expected. The authors may well be correct in saying that calling war by its name might have prodded elected officials into a more candid public discussion beforehand. The Honest Deal Act would use no such euphemism. Congress and the president would have to authorize "war."

I disagree, however, with Gelb and Slaughter's conclusion that war should always be authorized by declaration rather than by statute. As author and decorated marine veteran Karl Marlentes wrote, "We will find ourselves increasingly embroiled in wars where the primary goal is to restore, or even establish for the first time, civil order and a workable system of justice, not to defeat a clearly defined enemy who is trying to harm us."<sup>46</sup> What is required is candor rather than a declaration of war. If the president fails to disclose the risks, if legislators fail to get the president to disclose the risks, or if legislators fail to disclose their own concerns about the risks, we will blame them for their failures, as President George W. Bush and some legislators discovered to their misery.



To sum up, we can't look to the Constitution to stop the tricks. Most of the tricks do not violate the Constitution, and the Supreme Court has shown little inclination to use it to stop the rest, as I found by trying.<sup>47</sup> The tricks do, however, cleverly frustrate a core purpose of the Constitution: to make members of Congress accountable at the polls for the key decisions of government. This purpose is fundamental to making sure that they serve us and that we are honest with ourselves.

We don't need to amend the Constitution to stop the tricks. The nation avoided the tricks through its first century and a half because we had practices in place that blocked them, not because politicians back then were too upright or too stupid to be tricky. Those practices came in the form of an unwritten constitution that supplemented the written one, much as the United Kingdom today is said to have an "unwritten" constitution. Actually, much of the British constitution is written, but it is done in statutes and other documents rather than in a document called a "constitution." The United States can improve its lowercase-*c* constitution by enacting the Honest Deal Act.<sup>48</sup>

The Honest Deal Act is not the complete solution to the problems that come from a Congress that uses tricks to promise something for nothing and an electorate that demands it, but it is an essential first step. Yet, no second step is possible until our representatives face up to the chasm between the benefits they promise and the burdens they acknowledge and We the People, in turn, face up to the chasm between the benefits we want and the burdens we are willing to bear.