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The Danger of Changing the Regulatory Process in Pennsylvania

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Overview

While most attention to the amendments to the Pennsylvania Constitution in SB 106 have focused on the one concerning the right to an abortion, a second amendment that would radically change the Pennsylvania legislature's role in the regulatory process is also deeply troubling.

Government regulations are a critical means of protecting the public good. Government regulations protect workers from earning low wages and suffering dangerous working conditions; they protect children from dangerous conditions in day cares and K-12 classrooms; they protect the sick and injured from receiving inadequate, and dangerous care by doctors and hospitals; they ensure that businesses do not discriminate in their hiring and encourage them to recruit diverse employees; they ensure that monopolies, like utility companies, do not overcharge their customers; and they protect our air and water from pollution and climate-changing greenhouse gases.

While no regulatory process is perfect, Pennsylvania devises regulations in a careful and effective manner that more often than not protects the public. To begin with, no legislation can be proposed if it is not authorized by a law passed by the General Assembly and signed by the governor. The governor, the executive branch departments, and regulatory agencies then rightly propose regulations. This makes sense. They are the government bodies that have the most expertise in different issue areas and because they are appointed by the governor, the only official elected statewide to represent the interests of all Pennsylvanians, they are likely to consider the interests of all Pennsylvanians. The Independent Regulatory Review Commission (IRRC) holds hearings on proposed regulations and allow all who are likely to be affected by them, as well as legislators, to bring forth their concerns. The IRRC then issues a recommendation about proposed regulations, which are then revised and considered again by the IRRC. And finally, if the IRRC approves them, the General Assembly then reviews them and can overturn them with a concurrent resolution. The governor, however, has the right to veto the concurrent resolution. The General Assembly may overturn the veto by a vote of two-thirds of the House and Senate. The requirement of a two-thirds vote gives the General Assembly the ability to overturn regulations that could be damaging to the

¹ Diana Polson, Maisum Murtaza, Claire Kovach and Stephen Herzenberg provided some of the research that underlies the analysis of regulations in particular policy areas.

public interest as a whole. But the two-thirds requirement prevents the General Assembly from blocking regulations without a strong consensus of its members.

This process has been in place since 1982 and has worked well. However, the proposed regulation amendment would allow the General Assembly to overturn a regulation by majority vote in support of a concurrent resolution that would not be subject to veto by the governor. As we have seen, the Pennsylvania legislature already plays a role in the regulatory process. This is a radical change that would disturb the carefully orchestrated, stakeholder-driven process that already exists and instead subject the regulatory process to the political whims of the moment.

The Regulatory Process in the United States and Pennsylvania

Issuing regulations based on the laws enacted by a legislature has been a central part of American government at the local, state, and federal levels of government since the founding of our country. Contrary to the myth that the *laissez-faire* theory of economics characterized American public policy in the 18th and 19th centuries, local and state governments issued extensive regulations over economic and social life before and after the American Revolution. All aspects of life from the prices of bread to rules protecting people from the spread of illness and death to the chartering of corporations were subject to extensive local and state regulations.

Many of the regulations issued in early America were made by legislators, generally with the approval of executive officials. However, as the rise of national markets and giant corporations in the second half of the 19th century made our economic life more complex and varied, a new practice developed. Legislatures began enacting laws that set general goals and objectives and empowered the executive branch and independent agencies to issue detailed regulations for individuals and businesses to follow in order to meet them. This delegation of the regulatory rulemaking to the executive branch has sometimes been criticized by constitutional scholars as an inappropriate transfer of legislative power. But the more common view—and the one that has dominated constitutional law in the United States—is that the delegation of regulation to the executive branch is necessary for two main reasons I consider here and one that I consider in the final section of the paper.

First, because the president and governors in the United States are elected by everyone in the country or a state, they are the political officials most likely to be concerned about the good of all. Legislators are elected in districts and, rightly, are very concerned with protecting and advancing the interests of their constituents, including the businesses and other organized interests in their districts. Those interests often have the organizational and financial resources to get the attention of legislators in ways that everyday citizens cannot. Presidents and governors are, of course, also subject to these interests. But because they are elected by all the people of their state and of the US—they and their appointees are generally thought to be more likely to consider the good of all.

Second, and even more importantly, executive officials and those who lead regulatory agencies such as the Public Utilities Commission can draw on much more technical expertise in the relevant subject areas than members of the Legislature. The wide range of activity the State of Pennsylvania regulates includes many kinds of health care; water, gas, electric, and other utilities; agriculture; relations between employers and employees; child care; banking and securities; transportation; and environmental protection. This activity encompasses many complicated human activities and services, which each draw on one or more bodies of specialized knowledge.

Public officials in the departments and regulatory agencies spend years in school and an even longer time rising up through the ranks of both the private sector and the state developing the technical

expertise needed to carry out their duties wisely. And among those critical duties is the need to recognize that any new regulation or scheme of regulations must not only be effective in itself but must be consistent with regulations already in place in any one policy area or across a number of policy areas. Members of the General Assembly and most of their staff members have a great deal of knowledge about public policy. But they don't specialize the way administrative officials do.

Unlike other states, since 1982 Pennsylvania has an important check on the departments and agencies that issue regulations: the Independent Regulatory Review Commission. The Commission must vote to approve a regulation twice—once when it is proposed and once when it is finalized. A regulation cannot take effect without both of these approvals. Before both actions, the Independent Regulatory Review Commission holds hearings on all proposed regulations, allowing legislators and all who are likely to be affected by the regulations to voice their concerns. The IRRC then issues a recommendation about the proposed regulations focusing on: the extent to which the regulations are authorized by the legislation under which they were created; their economic or fiscal impact; the protection of the health, safety and welfare of the public; their feasibility, clarity, and reasonableness; and the impact of the regulation on small business.² After the IRRC's first action, regulations are often revised and a second round of hearings and recommendations based on the final regulations take place. Then the IRRC must approve the regulations again.

Pointing to the importance of expertise in both the administrative branch and the IIRC is not to say that the General Assembly should have no role in the regulatory process. It absolutely must have such a role—and it already does. For one thing, regulations are issued only under the color of legislation enacted by the General Assembly. With the consent of the governor, the General Assembly can revise those laws when it chooses to do so. The Senate approves the heads of the executive branch and members of regulatory bodies. Also, the members of the General Assembly frequently communicate with officials in the executive branch and regulatory agencies. They can testify before the IRRC. And four of the five voting members of the IRRC are from the General Assembly, two from the House and two from the Senate, with representation split between Democrats and Republicans. The General Assembly also controls state agencies' budgets. Their "power of the purse" gives them a great deal of influence over every regulatory process in the state, whether carried out by the governor or his appointees or by regulatory agencies. Finally, in cases where the General Assembly feels that a regulatory scheme put forward by the executive branch or regulatory agencies is especially egregious, members can overturn those regulations subject to the veto of the governor. But the General Assembly can overturn that veto by a two-thirds vote.

Note that the Pennsylvania General Assembly has far more power over the state's regulatory process than legislatures in many other states and more than the US Congress has in the federal government. Many states' constitutions, and the US constitution since the *INS v. Chadha* case of 1983, do not allow their legislatures to play any role in rejecting regulations issued by the governor or executive branch.

No political process leads to results that everyone supports, and it is to be expected that there will be regulations that are opposed by many interest groups and the legislators that support them. But one or a few cases should not lead to overturning a regulatory process that has served the Commonwealth well for decades. There needs to be consideration of how the new process could go wrong by empowering special interest groups and ideologues on both sides or how it could undermine the

² [Pennsylvania's Independent Regulatory Review Commission](http://www.irrc.state.pa.us/resources/docs/IRRC%20Brochure.pdf) brochure, [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.irrc.state.pa.us/resources/docs/IRRC%20Brochure.pdf](http://www.irrc.state.pa.us/resources/docs/IRRC%20Brochure.pdf).

ability of executive branch officials and regulatory agencies to bring their technical expertise to bear on the complex and difficult questions that come before them, thereby hampering them from serving the common good.

Some Examples

State regulations are so vast and cover so many areas that it would be impossible to discuss more than a very small subset of them in a long book, let alone a short paper. What we try to do in the next few pages is examine a few regulations in a limited number of policy areas that illustrate the potential problems that could rise from the regulation constitutional amendment we have discussed above.

We look at some recent issues with regard to regulations and some potential ones that could arise in a number of policy areas. We have identified cases in which strengthening the General Assembly's role in the regulatory process could undermine the important role that executive branch officials play in serving the common good. We have also looked for cases that clearly show that the General Assembly already plays a strong role in the regulatory process in many of the ways described above. Again, these examples are meant to be illustrative of our concerns, not a comprehensive review of the current state of regulations in Pennsylvania.

Labor Law

Regulations that come out of the Department of Labor and Industry now, and in the future, play a critical role in protecting workers.

Recent regulations

The Department of Labor has issued regulations to implement the Pennsylvania Prevailing Wage Act. These regulations determine how the prevailing wage should be set, requires the posting of wages, creates procedures for employees to seek a hearing before the Department of Labor to determine if they are being paid the prevailing wage, and provides remedies and penalties for violation of these regulations. Prevailing wage regulations are essential to ensuring that workers in the building trades are paid fairly. Prevailing wage regulations also ensure that well trained and qualified people are hired to do this work, thus protecting communities from the consequences of shoddy construction work in both the public and private sector.

In 2013, the PA Department of Labor issued regulations to implement the Prohibition of Excessive Overtime in Health Care Act, which aimed to limit the hours worked by interns and residents in hospitals. This law was passed in the wake of cases in which doctors who had worked excessive hours made poor medical decisions, which in some cases resulted in the death of patients. The regulations established procedures for complaints to be submitted and investigated and determined the administrative penalties that could be assessed for violating the new rules. These rules not only protect patients but protect doctors in training as well.

In August 2022, new regulations were promulgated that (1) require more transparency regarding the distinction between tips paid to workers and service charges paid to management and (2) clarify how the "regular rate" of pay should be determined when employers are calculating overtime pay. Had the proposed constitutional amendment been in effect, these regulations could have been blocked in the General Assembly. This is a case where executive officials have to balance the common good and competing interests and in which one could imagine one or another side securing a majority in the General Assembly to shift the balance too far in one direction or another.

In June 2021, the Pennsylvania General Assembly passed a law abrogating new regulations that had been proposed and accepted by the IRRC to raise the wage threshold under which employers must pay overtime. Inflation had made the threshold so low that half a million supervisory workers in fast food restaurants, department stores, and offices were not getting paid overtime.

The Wolf administration had spent two years moving these regulations forward, which would have essentially re-established the 40-hour work week and raised the wages for several hundreds of thousands of employees. The story at the time was that the administration agreed to sign the law abrogating the new salary threshold, below which salaried workers would automatically receive overtime pay, in return for an increase in education spending it badly wanted. This episode shows that if the General Assembly had been able to overturn the overtime regulation by a simple majority vote, it would likely have done so, harming working people and failing to secure any other benefits for anyone. While those who opposed the new overtime regulations may view this as a victory, those who support them were sadly, and we believe rightly, disappointed. The case also shows, however, that under the current regulatory process, the General Assembly already has the ability to overturn some regulations with which it disagrees.

Possible Future Regulatory Action

Labor law in Pennsylvania is based on very broad principles established in statute that have been interpreted not by regulations but by judicial decisions. It is these court decisions not regulations that determine how to calculate overtime pay (as in the first case above), which employees are required to be paid overtime, and which employees are subject to the tipped minimum wage. While it is better to have these judicial created rules than not, the process of creating them is somewhat haphazard. For a few reasons it would be far better for the Department of Labor to issue a set of comprehensive regulations that address the full panoply of concerns that employers and employees have about the appropriate way to calculate legal wages and hours. Judge made regulations are necessarily incomplete as they address only the immediate issues before the courts and many issues with regard to labor law have not come before the courts. A full scheme of labor regulations would leave far less open to question, thus giving employers and employees greater certainty in advance about their rights and responsibilities. Because judicial decisions only consider particular cases they can also lead to inconsistent results. And finally, while experienced labor lawyers are the advocates in these cases, judges typically do not have the expertise that is, or should be found, in the Department of Labor.

For all these reasons, advocates for labor, including some of the lawyers who work in this field, have been talking to the PA Department of Labor and Industry about replacing the somewhat inconsistent and incomplete judicial rulings that govern employer-employee relationships with a new, comprehensive set of regulations. This is a long-term project that can benefit both employers and employees and encourage economic growth by limiting unnecessary controversies and the too frequent resort to the courts. But it's conceivable that proposed regulations would be blocked by a majority of legislators on one side of the issue or another.

Health Care

Recent regulations

In 2019, the Pennsylvania Department of Human Services promulgated [new regulations for the provision of Applied Behavior Analysis \(ABA\) services](#). Defenders of these new regulations claimed that they would improve the provision of such services by requiring more stringent behavior analytic qualifications and training for the staff who provide services for those with autism spectrum disorder

(ASD). At the same time, they would make it easier for providers to find staff to provide these services by reducing unnecessary training requirements. A number of physicians, however, claimed that the new requirements would make it harder to find trained providers of ABA services. Reading their comments before the IIRC suggests that different groups of medical providers and organizations had some parochial interests in opposing the new regulations. A few legislators took their side. But possibly because it was too difficult to build a 2/3rds majority against them in both house of the General Assembly, they were adopted without any movement to challenge them.

Hospitals and Nursing Homes

Recent regulations

After a multiyear process, the IIRC recently approved a comprehensive overhaul of nursing home regulations put forward by the Wolf administration. These regulations protect patients in nursing homes by mandating certain staffing ratios for licensed practical nurses (LPNs) and licensed, certified nursing assistants (CNAs) as well as setting patient care hour standards. The regulations also give the PA Department of Health additional authority to enforce these standards and set new rules to prevent irresponsible operators from buying nursing homes. Most of the industry eventually supported the new staffing regulations—in part because the Wolf administration promised new funding for nursing homes. But for a time the nursing home industry was far more opposed to these new rules even though it is clear that they were meant to ensure that seniors in Pennsylvania are cared for in a decent and dignified manner. It is conceivable that if it were easier for the General Assembly to block new regulations, the nursing home industry would have sought to block them, which we believe would have hurt nursing home residents' health and safety.

This case also shows how the power of the purse gives General Assembly influence over the regulatory process. The General Assembly has to approve the additional funding for nursing homes that smoothed the way forward for these new regulations to be approved. Without that funding, the industry-labor agreement might well have fallen apart.

Possible future regulatory action

The regulations that govern hospitals under the Health Facilities Act have not been updated in 30 years. The PA Department of Health expects to soon begin a process of updating them. This is important because these regulations provide critical standards of care for patients and their families and because, of course, medical care has changed drastically in the past three decades. We cannot ensure that hospital patients receive appropriate levels of care without updating the regulations.

These regulations also ensure that hospitals are prepared for emergencies and pandemics and establish their responsibility for providing public health services. Recent experience shows us how important these things can be.

Hospital regulations also govern the opening and closing of hospitals. But the PA Department of Health has very little authority to prevent hospital closures. At a time when urban and rural hospitals—including at least 14 rural hospitals in every corner of the state—are threatened by closure, and a few big hospital chains that don't always have local interests at heart continue to expand, new regulations are needed to protect Pennsylvanians' access to good health care.

Many members of the General Assembly share the concerns that are motivating advocacy groups and the Department itself to begin developing new hospital regulations. They understand that these regulations are vital to protecting the well-being of patients, to preparing for emergencies and

pandemics, and to ensuring that rural and urban low-income communities are protected from the loss of vital hospital services. The rapidly consolidating hospital industry is highly motivated to protect their interests. Making it easier for the General Assembly to veto regulations would empower them to block a badly needed policy.

Reproductive Health

Recent regulations

State regulations ensure that abortions provided in Pennsylvania are safe and that those who seek abortions can access health care facilities without hindrance. The state, however, also restricts access to abortion by requiring a 24-hour waiting period and the provision of “counseling material” that seeks to dissuade people from having an abortion. How these requirements, which are based in state law, are applied in particular cases is determined by Department of Health and Human Service guidance on the basis of regulations it has proposed.

Possible Future Regulatory Action

Efforts are underway to expand telemedicine access to people seeking reproductive health care, including abortion. In addition, regulatory changes may be proposed to better ensure that people seeking an abortion can secure a medical abortion or can seek care at an abortion provider without undue hindrance by protestors. Given how controversial abortion has been in the General Assembly, we fear that new, more expansive regulations on the subject could be blocked under the revision to the regulatory process in the proposed constitutional amendment. And giving opponents of abortion in the General Assembly more ability to block necessary regulations, they could also demand regulations that make access to abortion more difficult.

Health Insurance

Recent regulations

When the Trump administration ended federal support for cost-sharing reductions in the cost of health insurance plans available on the health insurance exchanges for families making 250% of the federal poverty line or less, the Department of Insurance in Pennsylvania and a number of other states issued guidance to insurers that ultimately increased the federal subsidy for health insurance plans, making them more affordable for Pennsylvania families. Even though federal payments to insurance companies for cost-sharing were ended, the ACA still required that health insurers provide them for silver plans in the exchanges. Acting under previously established regulations, the Pennsylvania Department of Insurance allowed the cost of silver plans to rise in order to compensate insurers for the additional costs. They did so knowing that federal subsidies to families with an income below 400% of the Federal Poverty Line is tied to the cost of silver plans. By allowing the price of silver plans to rise substantially, the Department of Insurance policy ensured that the federal subsidy for bronze and gold plans would go up substantially, making them far more affordable to Pennsylvania families. Some bronze plans in Pennsylvania were free while many gold plans, which typically require lower deductibles and out-of-pocket payments, cost less than the silver plans.

As the health insurance industry consolidates and forms closer relationships with hospital networks, the state health insurance provider networks are broad enough. Health care advocates fear that narrow networks will restrict access to doctors, including specialists, who are experts in the health care issues of patients and / or with whom they have a relationship. From time to time, the Department of Insurance issues guidance to health insurance companies to ensure that their provider

networks adequately guarantee their insured population have sufficient options for seeking quality health care in all specialty fields. This guidance is provided under the authority of Department of Insurance regulations that are, in turn, authorized by Act 68 of 1998. Changes in the health insurance industry require that these rules be updated. New regulations can take advantage of new means of evaluating access to health care providers, such as GPS mapping, that allows for finer grained rules ensuring that ensure that Pennsylvanians who live far from major medical centers, have access to a broad spectrum of health care providers.

Possible future regulatory action

It is possible that the Department of Insurance will, at some point, propose revised regulations to enhance its ability to ensure that Pennsylvanians have sufficient access to high-quality doctors and hospitals in health insurance provider networks.

In Pennsylvania and other states, health insurers often try to skirt the ACA requirements on health insurance plans by offering short-term, limited-duration health insurance policies. These policies are not subject to the ACA rules on health insurance policies sold to individuals. Thus, insurers are allowed to charge more from people with existing medical conditions or exclude coverage of these conditions. They can include annual or lifetime limits on health care payments. And they are not required to cover all essential health care. The exceptions from ACA requirements mean these short-term, limited-duration health insurance policies provide little benefit at substantial cost. Pennsylvania has not yet enacted a law to ban or limit these policies. The Department of Insurance, however, has required health insurers that provide such policies to register in the state and report on these policies in order to track bad behavior. Health care advocates are working to enact a law that would give the Department of Insurance to propose regulations of this often predatory insurance practice.

Medical Marijuana

Recent regulations

The list of medical conditions that can legitimately be treated by medical marijuana are not defined in state law but rather in regulations issued by the Department of Health. The final version of these regulations was approved by the IRRC and House and Senate Committees at the end of last year. Medical expertise is, of course, critical in determining which medical conditions can effectively and safely be treated by medical marijuana. And it is likely that new and updated regulations will be issued in the future as medical knowledge advances. It is also possible that these regulations could become the subject of controversy in the Legislature. The General Assembly has the ability to block regulations that are deeply problematic in one way or another. But it should not be able to do so unless there is the kind of broad consensus that is now required under the current regulatory process.

The final regulation addressed other issue as well. One goal of the new regulations was to create a scoring rubric for issuing permits that encouraged these organizations to create plans for community engagement, such as a commitment to charitable giving, community events, job training, and community partnerships or to create a neutrality and card check agreement with a labor organization. Another was to revise testing rules for marijuana products to protect consumers. While the industry supported some of the regulations, it opposed some of the community engagement requirements. It also opposed the requirement that medical marijuana producers use two separate labs to test their products at the harvest and processing phases. Industry spokespeople expressed concerned that they would lose volume discounts on testing their products if they were forced to use two separate labs.

A number of legislators supported the new regulations, but as many opposed them. It is conceivable that these important new regulations would have been overturned by the General Assembly if they could have done so by majority vote. But this is also a case where the technical expertise brought to bear on the issue by the PA Department of Health gave it some authority to find a path that balanced competing interests.

On the whole, these new regulations serve the public good. They require what the proponents of partial marijuana legalization have long promised, ensuring that members of communities that have suffered from unfair enforcement of marijuana laws benefit from the partial legalization of marijuana. And they take important steps to ensure the safety of medical marijuana.

Possible future regulatory action

As medical knowledge about the usefulness of medical marijuana increases, it is likely that the Department of Health will issue revised regulations about which medical conditions justify access to medical marijuana. Future regulations may also revise the procedures under which those who seek medical marijuana secure approval of medical professionals. It is important that those rules not be too burdensome or require additional fees to either the state or medical professionals.

Child Care

Recent regulations

There are three sets of regulations regarding certification and licensing for child care centers, group child care homes, and family child care centers. They are promulgated by the Pennsylvania Office of Child Development and Early Learning (OCDEL), a collaborative effort between the Pennsylvania Department of Education and the Pennsylvania Department of Human Services. These regulations protect children by requiring a safe staff/child ratio; setting the base education level providers need to have; and establishing rules for cleanliness, for bathroom breaks, for communication with parents, etc. Because of these regulations, child care centers were some of the cleanest and safest places for children during the pandemic. There has always been opposition to these regulations from some providers and also from religious groups and municipal groups that seek exemptions from education, hygiene, and minimum age regulations for their summer programs. But despite the burdens of these regulations on those groups, it seems that any parent would want the more stringent rules to apply to all institutions that care for children. The requirement that legislators must secure a 2/3rds vote in each house of the General Assembly to overturn regulations clearly protects our children.

The state has also promulgated regulations for eligibility for subsidized child care. Subsidized child care not only provide enormous help to This effort took months to complete and are now more family-friendly than the minimum federal rules.

Possible future regulatory action

While we currently have a comprehensive approach, the state is in the process of revising the certification regulations to meet new federal requirements and raise quality standards. There is likely to be some opposition in the General Assembly, particularly because of staffing shortages. A number of legislators think that the solution is to reduce staffing ratios instead of adding resources so that pay can be increased. There is strong, research-based evidence that lower staff ratios lead to increased health problems and, sometimes, children's deaths while in child care. This is the kind of

research to which experts in OCDEL pay close attention and which, we believe, should play a strong role in any decision.

Public Education

Recent and long-standing regulations

Many aspects of K-12 public education in the state are subject to regulations. The curriculum offered in individual school districts must meet state requirements. Teachers and principals must meet a code of professional practice established by state education. State regulations determine the level of vocational education and special education that must be provided in each school district. Even school lunch programs are subject to state regulations. There are regulations that determine how state funding of the schools can be used and how its use must be accounted for.

Possible future regulatory action

Charter and cyber-charter schools are currently under state regulation. However, there has been an effort by advocates for children to revise those regulations to ensure that charter schools are more accountable for the public dollars they spend, that their reimbursements are reasonably related to the cost of the education they provide, and on other subjects. These regulations, like charter schools as a whole, have been controversial. This is one more case where the General Assembly already has played a substantial role in the regulatory process in many ways we have described above. And it is one more case where making it possible for the General Assembly to overturn regulation by a simple majority vote is likely to encourage additional controversy that could undermine quality and cost-effective education.

Agriculture

Recent and long-standing regulations

Agriculture is the largest industry in Pennsylvania and it may be the most regulated one. Title 7 of the Pennsylvania Code is one of the longest, with 407 chapters (although some of them are held in reserve for future regulations). Agricultural regulations serve many purposes. Some of them are designed to protect the producers of agricultural goods. For example, the Milk Marketing Board, an independent state agency, issues regulations that provide for a comprehensive milk pricing program that enhances farm milk prices, provides security for dairy farmers and milk dealers and provide a fair and competitive price for consumers. Regulations under the Clean and Green program reduces property taxes for farmers by basing taxes on use values rather than fair market values. Regulations under for the Agricultural Area Security Law govern grants provided by the state to counties to help landowners, land trusts, and other entities protect, restore, and enhance wetlands or protect working farms and ranches through conservation easements.

Many regulations on agriculture protect consumers, and in doing so, ensure that they have confidence in the food produced in Pennsylvania. Regulation about meat hygiene ensure that meat products are produced in ways that minimize adulteration or disease, that they are labeled appropriately, and that they are tested for safety. Milk sanitation regulations, which were updated in 2018, establish minimum requirements for “the production, transportation, processing, handling, sampling, examination, labeling and sale of milk, raw milk, milk products and manufactured dairy products;” “the inspection of dairy farms, milk plants, receiving stations, transfer stations, milk tank truck cleaning facilities, milk tank trucks and bulk milk haulers/samplers;” and the “issuing, suspension and revocation of permits to milk plants, receiving stations, transfer stations, milk tank truck cleaning

facilities and distributors.” Similar regulations have been issued with regard to solid foods, frozen foods, shellfish, and liquid foods.

In 2021, new Agriculture regulations increased the limits on participation in the State Food Purchase Program (SFPP) from 150% of USDA poverty levels to 185% of those levels. The goal of the increase was to enable the program to benefit more food insecure Pennsylvanians and bring SFPP in line with the eligibility limits set for several other food assistance programs, including the Special Supplemental Nutrition Assistance Program for Women, Infants and Children (WIC), and reduced-price School Breakfasts and Lunches. This program not only benefits food insecure Pennsylvanians but creates a market for the products of Pennsylvania farmers.

That these extensive Agriculture regulations have been adopted, mostly without controversy, under the current process for issuing and approving regulations, suggest that system now in place works well.

Environment and Climate Change

Recent regulations

There are many regulations put forward by the state’s Department of Environmental Protection (DEP), which are absolutely critical to Pennsylvanians’ health and safety.

[Chapter 78a](#) of the DEP’s regulations concerns the regulation of unconventional oil and gas wells. It was promulgated in 2016 to implement Act 13 of 2012. It brought Pennsylvania’s regulation of oil and gas activities into the modern age. Before Act 13, Pennsylvania’s oil and gas law dated mostly from 1984, and was not designed at all to deal with high-volume hydraulic fracturing. It’s one example of a DEP regulation that balances competing interests to provide important protections for human health and the environment.

Another example: when parties seek to get permits to drill wells, they have to post bonds. This ensures that an operator does not damage or create a mess at the drilling site. If they do not clean up the damage, they forfeit the bond amount to cover the cost of doing so. If the General Assembly were empowered to overturn DEP regulations by majority vote, these regulations might not have been put in place.

Some of these regulations protecting our water and air might have been overturned by the General Assembly if the proposed regulatory process in the amendment under consideration had been in effect. Pennsylvanians would have no doubted suffered more health issue and deaths as a result.

The controversy over the Regional Greenhouse Gas Initiative is one more example. There is an important legal question about whether the DEP’s RGGI regulations were unconstitutional under the state Air Pollution Control Act. That is a legitimate question. But it is one over which the courts have the primary responsibility to decide, not the General Assembly. Since the General Assembly enacted the law, it’s not appropriate for it to also evaluate the constitutionality of action under it. If the General Assembly could block regulations by majority vote it would have blocked the RGGI regulation from ever being promulgated in the first place.

Just months ago, some legislators, using the existing regulatory review law, were able to delay emissions standards for oil and gas drilling that were required by the federal government, which nearly subjected Pennsylvania to sanctions of \$750 million in federal highways funds. The emissions standards were finally approved by the Department of Environmental Protection on an emergency

basis just at the sanctions deadline. The proposed amendment would make it easier for the legislature to stop such regulations completely with a simple majority vote.

Possible future regulatory activity

A group of environmental organizations have filed petitions for rulemaking to increase bonding amounts for both unconventional (i.e., shale gas) and conventional oil and gas wells. The current bonding requirements for both are very low. The goals of raising them is to ensure that in the future Pennsylvania is not faced with even more abandoned and orphaned gas wells and all the health, safety, and climate problems that come with them. DEP hasn't decided yet whether to initiate a regulatory rulemaking in response to the petition. If it does, the rulemaking could be overturned by majority vote in the General Assembly.

Utility Regulation

Recent regulations

The Electricity Generation Customer Choice and Competition Act of 1996 (the "Competition Act"), 66 Pa.C.S. §§ 2801-2812, restructured the electricity industry to unbundle rates for electricity generation, transmission, and distribution. It created a market that allows businesses and homes to choose among competing electric generation suppliers. The Public Utility Commission (PUC) was given the authority the law to issue licenses to the electricity suppliers and to create rules that protect consumers. These regulations created a process to ensure that each electricity distribution company chooses low-rate default service providers for homeowners and businesses for those that do not choose their own electricity generator. One of the key elements of PUC policy is to use a reverse auction to choose the lowest-cost electricity generator. The reverse auction ensures that homeowners and businesses that are not aware of or do not take advantage of their ability to choose their provider are not stuck with a high-cost electricity provider, which can then raise prices even higher.

Under Alternative Energy Portfolio Standards (AEPS) Act of 2004, 73 P.S. § 1648.1, electric distribution companies and electric generation suppliers include a specific percentage of electricity from alternative resources in the electricity they sell to Pennsylvania customers. Subsequent legislation, including Act 114 of 2020, further refined the AEPS standards. The level of alternative energy required gradually increases according to a 15-year schedule found in the AEPS Act. The AEPS Act does not mandate exactly which resources must be utilized and in what quantities, but PUC regulations set certain minimum thresholds that must be met for the use of Tier I, Tier II, and solar photovoltaic resources.

Thus, the PUC's regulations and orders under the Competition Act also had to consider the requirements of the AEPS Act. Because the electricity generation market changes rapidly, the final [order](#) of the PUC in May, 2007, which was meant to implement both the Competition Act and the AEPS Act, was a policy statement that allowed for multiple ways for EDCs to meet its goals rather than detailed regulations. Since then, the PUC has issued additional rules that have guided the EDCs with regard to this issue.

Under Act 201 of 2005, the Responsible Utility Customer Protection Act, the PUC has issued regulations that protect low-income consumers from losing electric power. These regulations limit the costs of electricity for low-income families and prohibits electric shutoffs during the winter months and if anyone in the family is seriously ill.

The various regulations, orders, and other guidance issued to the electricity industry by the PUC address highly complicated issues in a quickly changing industry. PUC officials and representatives of the industry and consumers engage in continuous discussion about the state of the industry both in Pennsylvania and around the world. Those discussions draw on expertise of the kind that generalists, such as members of the General Assembly—and frankly, the author of this report—are unlikely to have. And they sometimes lead to contention.

Thus, there are two potential dangers if the General Assembly could easily overturn PUC regulations. One is that new PUC regulations or orders, which are designed to fit into the existing structure of regulations, could be overturned. This could either delay necessary regulatory changes or force the PUC to issue regulations that fit less well with its existing structure of rules. A second is that either consumer or industry advocates could go over the head of the PUC and appeal to the General Assembly, overturning regulations that balance competing interests to protect both consumers and the environment on the one hand, and the electricity industry on the other.

This is not to say that the General Assembly should have no role in the process of regulating the electric industry. It has done, and can continue to do, by enacting new legislation that guides the issue of regulations by the PUC. Members of the General Assembly can also testify before the PUC and they, of course, control the PUC's budget and appoint members to the IRRC. And if the PUC were to take actions that were manifestly one-sided, favor one set of interests over another, the General Assembly could muster the two-thirds vote needed to overturn regulations and force the PUC to issue new ones.

These abilities of the General Assembly to oversee PUC are certainly important. But given the technical complexity, rapid change, and multiple interests that need to be balanced in regulating the electricity industry, substantial delegation of authority to the PUC is a necessary part of the process. Allowing the General Assembly greater power to overturn PUC regulations that have already gone through IIRC process would unwisely undermine that delegation.

The Separation of Powers

We want to briefly address the constitutional issue created by the regulation amendment in SB 106. American constitutional and legal thought has long held that the issue of regulations under the law is a central part of the executive power held by the president, governors, and their appointees, one that should not be interfered with by legislatures. The separation of powers was designed to protect the rule of law, the idea that all laws should be general and apply broadly to everyone. Dividing the lawmaking function, which was given to the legislative branch of government, from the function of applying laws to specific cases, which was given to the executive branch of government, was designed to protect the separation of power. Because of the separation of power, no one branch of government could decide, by itself, that an individual or business should be punished. That separation of powers protects all of us from capricious, and potentially tyrannical government.

The fundamental importance of this division of powers is the reason that in 1983 a conservative US Supreme Court in *INS v. Chadha* ruled that the legislative veto of federal regulations unconstitutional.

We do not go that far in Pennsylvania. In keeping with the idea of checks and balances, our state, as well as some others, give the legislature the right to overturn executive branch regulations by concurrent resolution. To limit the legislature's role to providing a check on a regulation that is especially egregious or violates the separation of powers, such resolutions can usually be vetoed by

the governor, thus requiring the legislature to muster a two-thirds vote in both houses to limit the governor's executive power.

Other states allow their legislatures to influence the regulatory process in the ways our general assembly does in Pennsylvania: by allowing it to approve the heads of departments and regulatory agencies; by allowing its members to lobby regulators; by allowing it to make budgetary decisions that affect the regulatory process; by allowing it to challenge regulations in court; and ultimately, by giving it the major role in enacting the legislation under which regulations are issued.

These are substantial powers that set up the checks and balances that protect us all from unwise governmental decisions.

Thus, giving the Pennsylvania General Assembly even more power than it already has to influence the regulatory process not only has the practical consequences discussed throughout this paper, but could radically alter the balance of power between the governor and the General Assembly.

A long-term view of our constitutional arrangement should focus on thinking through what would be best, not just for both parties but for the people of the state over the long term. And that is especially true as a new governor, who has promised to create a better relationship between his office and the General Assembly, prepares to take office.

Conclusion

This paper points to the practical and constitutional dangers of a radical change in the regulatory process in Pennsylvania. It argues that expanding the power of the General Assembly over the regulatory process by allowing it to veto new regulations by majority vote would be an error for four reasons:

- First, the current process, which involves the legislative and executive branches as well the Independent Regulatory Review Commission, was designed to ensure that regulations serve the common good, first and foremost. We know that almost every regulation designed to protect us—whether we are children, seniors, hospital patients or workers—will have opposition. But creating a high bar for legislators to overturn regulations has in the past preserved regulations that protect the health, safety, and welfare of Pennsylvanians. and will likely do so in the future.
- Second, the proposed amendment would undermine the important role of technical expertise in the regulatory process.
- Third, contrary to some critics of the current process in the legislature, the General Assembly already has multiple avenues for influencing the regulatory process. What it does not have—and should not have in a government of checks and balances, is the ability to unilaterally overturn regulations.
- Fourth, the proposed amendment would threaten the separation of powers.