

Reg Review: Articles on Labor &
workplace Regs.

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TO: John F. Morrall, III

FROM: Richard P. Theroux
 Office of Mgmt and Budget, OIRA

SUBJECT: GOP COMMITTEE CHAIRMAN GOODLING PROMISES RE-EVALUATION OF

GOP COMMITTEE CHAIRMAN GOODLING PROMISES RE-EVALUATION OF
LABOR LAW

Rep. William F. Goodling (R-Pa), the new chairman of the House Economic and Educational Opportunities Committee, Jan. 10 called for a comprehensive re-examination of the entire body of U.S. workplace law and regulation in keeping with a GOP promise to dramatically reduce the burden of federal regulation on employers.

Appearing at a news conference with Edward E. Potter, president of the Employment Policy Foundation, a nonprofit research organization funded by major U.S. employers, Goodling stressed the importance of helping U.S. companies to become more competitive in the global economy.

'While the governments of other industrialized countries are exploring deregulation of their industries, our government is busy saddling U.S. business with layer upon layer of legislation, taxation, and regulation in an attempt to shift more and more of the cost and responsibility of solving our societal problems to the employer community. This is especially true in the area of employment and workplace policy,' he said.

Goodling said the challenge for the Republican-led 104th Congress is to make government 'more user-friendly, less confrontational, and less costly. With that said, I believe we must re-examine the entire spectrum of our nation's employment and workplace laws to measure their necessity and effectiveness, as well as to begin the process of downsizing and reorienting the entire federal bureaucracy.'

Electromotion Seen As Barrier

Goodling said the aim of government regulation of the workplace should be 'to create more jobs at higher wages' by redirecting efforts into areas that will emphasize 'creativity, innovation and flexibility.' In this vein, he said, the ability of employers and employees to work together has been 'limited significantly' by the National Labor Relations Board's Electromotion decision, which he said 'raises substantial doubts about the legality of many cooperative efforts--except those of traditional labor unions.'

'Evidence demonstrates that employee involvement programs work effectively in both union and nonunion contexts and add substantially to employee productivity. However, with less than 12 percent of the American workforce unionized, the Electromotion decision jeopardizes many legitimate

employer-employee cooperative efforts," he said.

Goodling said he is considering legislation that would remove the potential legal impediments to legitimate employee involvement programs without diminishing the right of employees to form or join a union, or to engage in collective bargaining.

The new chairman also called for reform of the Fair Labor Standards Act, saying that American companies are burdened by having to cope with a federally mandated compensation and scheduling scheme that is "seriously outdated and inflexible."

"The present rigid structure of the FLSA," Goodling said, "hampers the ability of employers and employees to adapt to the changing workplace and marketplace, focusing solely on meeting legal, but not human or economic, needs."

He called for changes in the law to expand private sector use of compensatory time, eliminate barriers to flexible compensation packages such as bonuses based on productivity, and offer alternatives to the traditional 40-hour week.

Reserves Judgment On Minimum Wage Hike

The Pennsylvania Republican said he had not come to any conclusion about whether the current \$4.25 an hour minimum wage should be increased, and that he first would want to examine the employment impact of any recommendation from the Clinton administration. The administration reportedly is considering a minimum wage hike of \$1 an hour. Goodling supported the last minimum wage increase that went into effect in 1991.

Informed that House Majority Leader Richard Armey (R-Texas) last week suggested abolishing the minimum wage, Goodling remarked: "He's not on the committee any longer."

Goodling also called for restructuring the federal job training system and greater reliance on arbitration to resolve employer-employee disputes as an alternative to costly litigation. The committee, he said, may examine ways to ensure that there is greater use of alternative dispute resolution, "while also maintaining the present judicially imposed mandates of fairness and protection of employee rights."

Employees, he said, need a "strong, swift and equitable enforcement of a balanced set of employment protections and rights. Enforcement of these protections and rights, however, should be accomplished in a way that does not negatively impact on the cooperative needs of the workplace and America's competitiveness."

Potter remarked that nearly 95 federal employment laws have been enacted over the past 35 years, creating what he described as "a tangled thicket of employment policy that increasingly does not meet the needs of employees or employers."

"Businesses have re-engineered and redesigned their workplaces to meet the realities of the global marketplace to make them work better for both employees and employers. It is time we re-engineered and refocused our federal employment policies. The standard of living of America depends on it," he said.

The committee is scheduled to conduct its first hearing in the new Congress Jan. 11 on the federal role in workplace policy. Scheduled witnesses include Labor Secretary Robert B. Reich, former Labor Secretary Lynn Martin, and Potter.

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GOP Congress Could Profoundly Change the American Workplace

By David Everett, Detroit Free Press
Knight-Ridder/Tribune Business News

WASHINGTON--Jan. 11--Did you know that one result of America's shifting political tides could be a serious proposal to loosen the 40-hour work week?

Or let workers get more time off instead of overtime pay? Or change how companies can be sued for job discrimination? Some of this century's most fundamental workplace traditions are being examined by the new GOP-controlled Congress. And while Democrats might block wholesale changes in the way of working, Americans seem certain to face a critical political choice in this historic showdown on government's role in the workplace.

"We cannot utilize a scorched-earth policy in our examination," said Rep. Bill Goodling, the Pennsylvania Republican who will lead the GOP effort. "I do, however, consider everything - and I mean everything - to be on the table."

To Goodling, everything means federal laws promoting higher construction wages, leave for pregnancy or illness, and overtime pay after 40 hours of work a week. The new chairman of the House Economic and Education Opportunities Committee also worries that federal law restricts employee-company cooperation, wastes job training money and promotes too many work-related lawsuits.

Many of the labor law revisions likely would affect non-union workers, who make up most of the U.S. workforce, before they reach union members. That's because non-union employers aren't bound by union contracts that specify hours, overtime and other work rules.

Goodling is not pledging that every U.S. workplace law will be changed; he doesn't want to ban overtime or create a 60-hour work week, he said. But in a speech Tuesday, he said he expects Congress to update and perhaps overhaul some key laws. Companies, for example, may need greater authority to use compensatory time instead of overtime, he said.

Fighting the proposed changes will be organized labor and many Democrats, who view the workplace as critical to show how they differ from Republicans.

The best example of these differing views is the Clinton administration's current consideration of raising the minimum wage. Any such proposal would be dead on arrival in the GOP Congress, but Clinton may still make the move, for political reasons. Unions and, generally, urban minorities support higher minimum wages, while business does not.

Unions hope the threat of Senate filibusters or White House vetoes will delay, if not prevent, any pro-business revolution in labor laws.

"But clearly a major debate is going to take place, and the '96 election will be the final outcome," said David Silberman, director of the AFL-CIO task force on labor law. "To me, the critical issue the country is facing is what's happening to the living standards of working families. The government's role in establishing labor standards is vital to that."

Surprisingly, similar words come from Edward Potter, an employment lawyer and coauthor of "Keeping America Competitive," a recent book that has become a GOP blueprint. Yet Potter argues that the way to help families is with fewer labor

standards.

"Our current employment policies are antiquated," he said. "They are out of sync with today's workplaces. They sometimes conflict with one another, and in some instances they are dysfunctional."

Amid such fundamental disagreement, Goodling and Senate Labor Committee Chairwoman Nancy Kassebaum, R-Kan., are separately or jointly examining the these labor issues for updating or repeal:

- The Davis-Bacon Act. This 63-year-old law requires contractors to pay prevailing local wages - usually union pay - on federally funded construction. A similar law applies to service contracts. Republicans say that raises costs and forces companies to hire fewer workers; labor believes the law promotes higher wages.

- The Fair Labor Standards Act. Passed in 1938, it requires the 40-hour week and the general requirement that overtime be paid above those hours. Potter and Goodling believe workers are clamoring for more flexibility, such as the ability to work 45 hours one week, then 35 the next. But Silberman worries that letting companies use flexible scheduling and more comp time would mean less pay and flexibility for workers.

- Worker involvement committees. While involving workers in a company's operation seems critical in today's demanding workplace, the GOP believes federal law and court rulings make it hard for companies to form groups based on labor-management cooperation. Opponents say the laws and rulings are needed to prevent companies from using sham worker programs to block unions.

- Workplace disputes. Alternatives to lawsuits are the third item on Goodling's list, but critics worry that some GOP proposals to encourage arbitration and mediation might weaken a worker's right to seek justice in the courts.

- Job training. Studies have questioned both the hodgepodge and effectiveness of federal training programs. Democrats have worried that consolidating the programs might cut their impact, but Goodling wants to eliminate ineffective programs and give states more authority. END!A7?DE-WORKPLACE11

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Everyone Criticizes Government's New Blueprint for Better Future

By Stephen Franklin, Chicago Tribune
Knight-Ridder/Tribune Business News

CHICAGO--Jan. 10--Labor and business leaders, handed a government task force's blueprint for a more peaceful and productive future, Monday did what they often do: heaped complaints on each other.

But the loudest complaints over the long-awaited report delivered by the 10-member Commission on the Future of Worker-Management Relations, headed by former U.S. Labor Secretary John Dunlop, came from some business groups.

"We thought that maybe the report would reflect a little more of the reality of the global market of the 1990s rather than the pro-union days of the 1950s and '60s," said Peter Eide, a labor and public-policy expert for the U.S. Chamber of Commerce in Washington.

Twenty of 23 recommendations offered by the commission, Eide said, are "totally or wholly" unacceptable to his group.

It is a real question as to how any proposal labeled pro-union by business leaders might become law in a Republican-led Congress that has vowed to make life easier and less burdensome for corporate America.

"Legislatively, it is dead," said Chicago attorney John Raudabaugh, a member of the National Labor Relations Board during the Bush administration.

The 70-page report will wind up "on the bookshelf," he said. Commission member Douglas Fraser, a former president of the United Auto Workers, conceded that some of the report's proposals will face a difficult time in Congress, controlled by Republicans for the first time in 40 years.

Referring to the GOP's overwhelming victory in the recent congressional election, Fraser added, "I don't think anyone could classify Nov. 8th as a victory from my point of view."

Labor Secretary Robert Reich, organized labor's closest ally in the Clinton administration, was more upbeat, noting that he would refer the commission's report to the president.

Improving labor-management relations so workers can overcome the decline in their real, or inflation-adjusted, wages is not a "partisan goal," said Reich.

Among its recommendations, the commission said: -- Federal labor law ought to permit companies to create employee-participation efforts in which job and pay issues can be brought up. Such discussions have been legally taboo for companies, since unions say it would infringe on their rights to negotiate contract issues.

-- Elections to recognize a union as the workers' bargaining agent should be held within two weeks after workers have voted to belong to a union. Too often, the commission said, long delays follow these votes. Businesses say this will hurt them because they will not have enough time to present their case against the union to their workers.

-- There should be a new definition of contract work. Too often companies list part-time and contingent workers as contract help to evade their obligations to workers, the commission said. Some contract workers have also avoided

paying various employment-related taxes, the commission added.

To business groups, such a proposal would lead the way for unions to organize their part-time and contingent work forces. These workers prefer to work without union contracts or stiffer labor-law protections, they say.

In a preliminary fact-finding report issued in June, the commission decried conditions that have increased the gaps in wages and placed greater burdens on American workers.

That report was generally praised by business and labor leaders, who said it seemed to acknowledge both sides' needs evenly.

This time, however, the response was much less unanimous. The AFL-CIO hailed the commission for citing such problems as stagnating wages but criticized it for not recommending "strong enough protections" for workers who want to join unions.

The labor organization was especially critical of proposals that would allow businesses to pick employees for committees that could deal with a number of issues ranging from workplace safety to internal company disputes.

"The economic crisis will be solved by giving workers more of a voice in the workplace, not by taking away our democratic rights," said Teamsters union President Ron Carey.

On the other hand, business groups such as the Labor Policy Association, which represents human-resource officials at the nation's major corporations,

complained that it appeared the report intended to make labor organizing easier.

American businesses today need support for labor-law reforms that allow them to more easily set up "team-based work arrangements in non-union settings," said the Washington-based business organization.

The National Association of Manufacturers offered a more mixed appraisal of the commission's report than some business groups. While it said the commission had shot "itself in the foot" with its labor-law suggestions, it praised the panel for recognizing the "importance of employee involvement."

At the same time, it faulted the commission's proposal calling for outside assistance for companies and unions bargaining for their first contract. The commission said one-third of the first attempts at bargaining do not lead to contracts and often result in strikes.

But the manufacturers group said such a proposal "would be the death knell of democratic collective bargaining." END!B&6?TB-LABOR

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A White House Strategy for Deregulation

by
Jeffrey A. Eisenach*

The Reagan Administration's battle against excessive government regulation proved to be even more difficult than expected. Certainly the early Reagan deregulators recognized that they faced tough substantive and political challenges, but they could not have imagined some of the obstacles that would be thrown into their path by Congress and the courts. And they certainly hoped for a more impressive showing than they got from some key regulatory appointees.

While there have been notable successes in deregulation, the overall costs of government regulation have not diminished substantially from the late 1970s. As in so many areas, the Administration must be content with a legacy of stopping or slowing government growth, rather than reducing the government's role.

There would appear to be little prospect for the next President to accomplish substantial overall reductions in government regulation. Nevertheless, continued incremental improvements in regulatory policy can be accomplished. More importantly, in the long run, steps can be taken to rebuild the public consensus for more sensible regulation and to focus attention on the increasingly counterproductive role of congressional and court intervention in the regulatory process.

Specifically, the next President must assert leadership in three areas of regulatory policy. First, he must indicate clearly his objectives for regulatory policy. The most important indicator will be in the form of regulatory appointments, which provide the most tangible indication

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of the President's views. Also important, however, is a clear statement of regulatory priorities, which recent Administrations have chosen to issue in the form of presidential executive orders.

Second, he must indicate to Congress and the courts that he takes seriously the constitutional duties of the office of the President and is willing to incur costs, if necessary, to defend the integrity of his office. Recent incursions into the President's authority to study policy changes, appoint his own people within the Executive Office of the President (EOP), and exercise control over regulatory decisions, must be attacked before they become so deeply embedded in precedent and process as to be beyond challenge. In addition, it is time to challenge the independence of the so-called "independent regulatory agencies."

Third, the President should initiate a review of the total costs of government regulation and establish a ceiling on the overall (gross) burden imposed on the economy. The review should be designed to provide a baseline for measuring the overall impact of regulation on the economy, and thus begin the process of educating the public about the effects of government regulatory burdens. The ceiling, which might be permitted to increase over time, should take the form of a "regulatory budget"—i.e., an overall ceiling on the amount of new burdens imposed by each regulatory agency.

THE REAGAN RECORD

President Reagan campaigned aggressively against government overregulation. As a long-time opponent of the excesses of government waste, he carried with him a long list of anecdotes about OSHA-designed toilet seats and polluting trees. If there was any doubt about the Republican Party's intentions, it should have been put to rest by the 1980 platform, which stated that "The Republican Party declares war on government overregulation."

The Administration indicated from the outset that it placed high priority on deregulation, so much so that "regulatory relief" was one of the four components of the President's February 1981 "Program for Economic Recovery." (The others were cutting taxes, reducing government spending, and stabilizing monetary policy.)

The early results of the Reagan effort were impressive. Within a matter of weeks, Reagan issued a moratorium on new regulations, decontrolled oil prices, eliminated the Council on Wage and Price Stability, and identified a set of existing regulations to be changed. On

February 17, 1981, just three and a half weeks into his term, the President issued Executive Order 12291. E.O. 12291 stated the Administration's regulatory principles, implemented a program of centralized review through the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), and required regulatory agencies to perform benefit-cost analyses of new regulations. In April 1981, OMB announced a list of 34 specific deregulatory actions designed to help the U.S. auto industry.

However, these administrative steps were not matched by a clear strategy on either the personnel or the legislative fronts. Indeed, the Administration appeared to make a conscious decision to concentrate solely on actions that could be accomplished without changes in legislation. Thus, the Administration's early victories in cutting taxes and federal spending were not matched by legislative victories—or even initiatives—in the area of government regulation.

On the personnel front, key positions remained vacant for months. At the Environmental Protection Agency, for example, several unsuccessful candidates were "run up the flagpole" before the appointment was finally given to Anne Gorsuch (later, of course, Anne Gorsuch Burford) after a delay of more than six months.

Ms. Gorsuch's late arrival and unfamiliarity with the agency, combined with the White House decision to forego legislative initiatives, resulted in one of the greatest missed opportunities of the Administration: the chance to take the offensive on the Clean Air Act, one of the biggest regulatory statutes ever created, which was at that time up before Congress for reauthorization. Most observers believed there was a real chance for changes in the law in favor of benefit-cost analysis and incentive-based reforms, and expected the Administration to take the lead in pushing the legislative agenda. When no action was forthcoming, the consensus quickly dissipated. As a result, no action was taken during the past eight years.

In retrospect, it can also be argued that the Administration was mistaken in its emphasis on regulatory *relief* rather than regulatory *reform*. The former term implied a presumption in favor of "big business," thereby opening the Administration to charges of favoritism.

Long before the end of the first term, the Administration's opportunity to achieve long-lasting structural reforms had dissipated. By the end of 1982, embroiled in controversies at EPA and the Department of the Interior, the Administration found itself on the political defensive—a posture which, due to the nation's deteriorating economy, prevailed across the board.

Looking back on the Reagan Administration's accomplishments, it is clear that there were individual success stories. The Occupational Safety and Health Administration began selecting for enforcement those companies with the worst safety records. The Environmental Protection Agency made some progress in implementing the "bubble" concept. The Federal Trade Commission backed away from the use of "unfairness" as a criteria for pursuing counterproductive advertising regulation. Economic analysis became standard in antitrust law. These are meaningful accomplishments, not to be minimized or dismissed. When one looks at the overall impact of regulation on the economy, however, there is little evidence of a general decline in regulatory costs.

Measuring the impact of regulation is a difficult task, and some measures of regulatory activity have been justly criticized as focusing too much on the quantity of activity and not enough on content. For example, noting that regulatory agency spending has risen in real terms since 1980, or that the number of pages in the *Federal Register* has fallen (both true), provides relatively little information about the impact of regulation. However, some indices of regulatory activity do appear to provide some qualitative insight. In particular, OIRA now keeps track of the number of new regulations that impose new burdens, as distinguished from those that remove burdens. As shown in Table 6-1, in 1982 (the first year this statistic was compiled) the Reagan

Table 6-1 Selected Measures of Regulatory Activity

	1981	1982	1983	1984	1985	1986	1987
Rules Imposing							
New Requirements	N/A	294	248	260	358	366	451
Rules Eliminating							
Requirements	N/A	299	217	162	177	142	85
Major Regulations	38	51	39	25	38	47	30
Hours of Paperwork							
Burden	1.50	1.27	2.02*	1.98	1.89	1.74	1.88

Source: Office of Management and Budget.

*A change in accounting procedures precludes comparison with pre-1983 figures.

Administration issued five more regulations eliminating requirements than regulations imposing new requirements. By 1985, however, the number of new burdens was double the number of burden reductions, and in 1987 the Administration issued more than five times as many new regulatory requirements as it eliminated.

A second qualitative measure of regulatory activity is the number of new major regulations, defined by Executive Order 12291 as those with "an annual [burden] on the economy of \$100 million or more." While this measure shows a decline in the number of new rules in 1987, the overall trend was virtually flat.

A third measure of regulatory burdens is the number of hours of federal paperwork requirements, compiled by OIRA pursuant to the Paperwork Reduction Act of 1980. While a change in accounting procedures precludes comparison of pre-1983 with later figures, the paperwork burden declined by roughly 7 percent between 1983 and 1987, despite a slight increase between 1986 and 1987.

In sum, the available measures of regulatory activity and burden clearly refute any claims that regulation has been severely cut back or reduced. Indeed, the overall trend in the second Reagan term has been toward a resumption of regulatory growth.

To a large extent, the Administration's failure to achieve more in the way of a general rollback in regulation can be attributed to roadblocks erected by Congress and the courts. For example, in 1983 Congress was successful in forcing the Administration to issue requirements for workplace labelling of hazardous chemicals. In 1987, a federal appellate court demanded that the standard be extended to all employers, rather than just to manufacturers. Now, in 1988, Congress is actively considering new legislation to require *ex-post* notification of all employees who might have worked in the vicinity of hazardous chemicals.

A number of court decisions worked against the Administration's efforts, including the 1981 "cotton dust" decision limiting use of benefit-cost analysis. Perhaps most egregious, however, was the D.C. Circuit's decision overruling the National Highway Traffic Safety Administration's decision to revoke airbag requirements for automobiles. While admitting that there was no evidence the rule could pass a benefit-cost test, the court found that the agency had not produced sufficient evidence to overturn its earlier finding that air bags should be required and, indeed, that a higher burden of proof was required to overturn a rule than to issue it in the first place.

At times, there seems to have been no limits on congressional and court interference in regulatory matters. Congress has even prohibited

the executive branch from *analyzing* some regulatory policy alternatives. Appropriations riders, for example, have prohibited both OMB and the Federal Trade Commission from studying proposals to eliminate agricultural marketing orders.

REGULATORY REFORM: THE NEED FOR A CLEAR STATEMENT OF OBJECTIVES

Executive Order 12291 (February 17, 1981), which has formed the basis for the Reagan Administration's regulatory efforts, is best known for the regulatory review process it establishes through the Office of Management and Budget. The review process requires, among other things, that regulations be approved by OMB prior to being published in the *Federal Register* and that "Regulatory Impact Analyses" be performed on regulations with an annual economic impact of \$100 million or more. Supplemented by procedures for review of paperwork and record keeping requirements under the Paperwork Reduction Act, and by the "Regulatory Planning Process" procedures established by Executive Order 12498 (January 4, 1985), the E.O. 12291 regulatory review process establishes a mechanism for presidential control of agency rule-making.

Procedures, however, are of little value unless *substantive* objectives are clearly understood. E.O. 12291, in addition to setting out procedural requirements, offers a set of substantive standards to be applied in evaluating regulations, stating that "regulatory action shall not be taken unless the potential benefits to society for the regulation outweigh the potential costs" (the "benefit-cost test"), that "regulatory objectives shall be chosen to maximize the net benefits to society" (the "social welfare test"), and that "among alternative approaches to any given regulatory objective, the alternative involving the least cost to society shall be chosen" (the "cost-effectiveness test").

These requirements seem innocuous enough, but liberals have been quick to look for a hidden agenda. Their arguments have taken two main forms. First, they have argued that the standards described above cannot practically be met due to the unavailability of data. Thus, requiring regulations to pass a benefit-cost test is equivalent to prohibiting regulation altogether. Second, liberals have suggested that the substantive standards are simply empty words, designed as a shield for a politically motivated effort to control regulation from the White House.

The first criticism—that a benefit-cost analysis requirement would vastly reduce regulatory activity—seems to have been disproved by events: as discussed above, regulatory activity has hardly ground to a halt since imposition of the benefit-cost test in 1981.

As for the "politicization" argument, the Reagan Administration has responded by falling back on the "technical" and procedural aspects of its policy, arguing that the E.O. 12291 process simply formalizes the historical practice of effective White House control and, by doing so, actually makes it more difficult to exercise political influence. Indeed, they point out, the E.O. 12291 process has for the first time imposed strict rules for *ex parte* communications during White House review of regulations, thus insuring that regulatory decisions are made solely on the basis of information contained in the public record.

While narrowly correct, the Administration's defensive response to the politicization argument has taken it off the moral high ground and, arguably, actually made it more difficult to control regulatory agencies. Those familiar with benefit-cost analysis generally, and especially those with hands-on experience in analyzing government regulations, understand that evaluation of regulatory activity is invariably a subjective exercise. What value is society to place on preserving a rare species—the "snail darter" for example? For some individuals, the value is very high, for others nonexistent. Benefit-cost analysis can illuminate the choice by providing an estimate of the direct and indirect costs of the activity involved, but the final choice, whether to build the dam or save the snail darter, is subjective—and therefore inevitably a political choice.

In 1981, of course, with Ronald Reagan's antigovernment campaign rhetoric still fresh in mind, there could be little doubt that the objective of the regulatory review process was to reduce regulatory burdens. The choice, it was understood, should be to build the dam. In 1988, however, policy objectives became less clear, and E.O. 12291 offers very little explicit guidance for the exercise of subjective judgment. Indeed, the order only briefly mentions the goal of "reduc[ing] the burdens of existing and future regulations," and then only in the context of a long list of other goals such as "minimiz[ing] duplication."

This "technocratic" approach to regulatory issues has not contributed to a clear sense of policy priorities and direction among the public nor, importantly, among the 100,000 or so regulatory agency employees who write regulations. Today it is not possible, as it was in the early days of the Administration, for OMB regulatory reviewers to assert a clearly-defined "Reagan agenda" as justification for deregula-

tory positions taken in interagency disputes. Instead, the 75 employees of the Office of Information and Regulatory Affairs—outnumbered more than 1,000-to-one—must fight every battle mainly on “technical” grounds.

To restore effective, centralized control over the regulatory process, the President should work to establish a shared understanding among his appointees of his goals for regulatory policy. Since regulatory policy will not play a significant role in the campaign, it will be necessary to establish that understanding after the election. Presidents Ford, Carter, and Reagan have all used Executive Orders as a vehicle for implementing regulatory policy. The next President should rely on this well-understood method not only to implement policy but also to state his regulatory goals and objectives.

In issuing a new executive order, the President should keep in mind the natural bureaucratic and political tendencies that produced the regulatory explosion of the 1970s and presently hinder the effectiveness of efforts to cut regulation in the 1980s. No recent President has found a need to encourage regulatory agencies to be more active, or to propose stricter regulations than they are inclined to do on their own. Thus, at a minimum, the President should restate and endorse the three “technical” principles embodied in E.O. 12291, and give increased emphasis to a discussion of the need to limit and eventually reduce the burden of government regulation.

Congressional Regulation of the Private Sector

It is also important to keep in mind the pressure for increased regulation created by the budget deficit, especially the incentive for Congress to achieve political objectives by mandating the use of private sector resources.

Congressionally mandated requirements are especially important in the liberal agenda for social welfare policy. Health care benefits, parental leave, more extensive pension options, higher minimum wages and plant-closing notification are among the huge new regulatory burdens that make up this agenda.

Because these new requirements are imposed directly by Congress, they may appear to fall outside E.O. 12291’s definition of “regulation” as “an agency statement of general applicability and future effect designed to implement, interpret or prescribe law or policy. . . .” At a minimum, this ambiguity creates the potential for misplaced emphasis on minor regulatory issues and/or inadequate attention to “congressional rulemaking.” To avoid this problem, the President should state

clearly that he will apply the same analytical framework to all government-imposed burdens on the private sector, regardless of whether it is carried out by regulation or imposed directly by statute.

REGULATORY APPOINTMENTS

In addition to issuing a clear statement of his regulatory objectives, the President should make his views clear through his appointments to the regulatory agencies. The Reagan experience has shown clearly how important appointments are to implementing the President’s objectives.

The Federal Trade Commission is a good case in point: Under deregulator James C. Miller III, the commission made significant progress towards loosening its grip on commercial speech and reversing its counterproductive merger policy. Recent appointments, however, have created a proregulatory majority at the commission, forcing Chairman Dan Oliver—also a committed deregulator—to vote in the minority in unsuccessful efforts to prevent reregulation.

One appointment, the administrator of the Office of Information and Regulatory Affairs at OMB, will say more about the next President’s regulatory philosophy than anything else. Under recently passed legislation, this position is now subject to confirmation by the Senate, and the new administrator’s confirmation hearings will be taken as a significant indicator of the President’s views. Early appointment of a well-known advocate of the free market is therefore crucial.

RETAKING CONTROL FROM CONGRESS

Increasing congressional encroachment on presidential authority is a phenomenon that affects virtually every area of federal policy, from foreign policy to the budget process. Nowhere, however, has Congress been more effective or insidious in usurping executive branch authority than it has with respect to regulatory policy.

Some forms of legislative control over regulatory policy are entirely appropriate under the Constitution. Whether or not one agrees with particular policy outcomes, for example, it clearly is within the authority of Congress to pass regulatory statutes that impose costs on the private sector. Furthermore, there is no presumption against specific

requirements that limit executive discretion in carrying out statutes. These matters of statutory content are part of the intended interplay between the congressional and executive branches of government, and the President is well armed—with the veto among other tools—to play his part in that interplay.

However, in recent years, Congress has found a number of ways *in addition to passing laws* to impose its will on the regulatory process. These tools, including appropriations riders, abuse of investigatory authority, delegation of rulemaking authority directly to agency heads rather than the President, increased reliance on “independent” regulatory bodies, and requirements for Senate confirmation of key regulatory staff, all have the effect of limiting the President’s ability to control regulation and to carry out his constitutional duty to “faithfully execute the laws.”

A second effect of these developments is to strengthen the ability of individual congressmen, congressional committees, and congressional staff to influence regulatory policy outside the legislative process. From a “public choice” point of view, of course, Congress desires such changes because they permit congressmen to provide constituent favors (in the form of intervention in the regulatory process) without incurring the responsibility attendant to voting on legislation. From a regulatory policy perspective, these developments transform regulation into a tool for directly rewarding special interests, and make it practically impossible for the kinds of rational policy standards laid out in E.O. 12291 to be implemented.

On a broader level, continued presidential acquiescence to congressional and court usurpations of executive power pose a grave threat to our constitutional system of government. In an era in which congressional staff outnumber executive policy-making staff in a number of key policy areas—including regulatory policy and the budget—the prospect for “government by men” as opposed to “government by laws” is frighteningly real.

Retaking control from Congress will require a multifaceted strategy of administrative, legislative, and court actions. Some of the steps that should be taken include:

1) Make presidential control over executive branch regulators explicit in a revised Executive Order. E.O. 12291 currently skirts the issue of presidential control over agency regulatory decisions. While it gives the OMB director authority to review regulations essentially *ad infinitum*, it does not specifically assert presidential regulatory authority. Thus, it preserves and recognizes the principle that Congress may

delegate regulatory authority to agency heads, bypassing the President.

In reissuing E.O. 12291, the President should squarely assert his authority—and the authority of his immediate staff when acting on his behalf—to exercise ultimate control, within the scope permitted by the authorizing statutes, over the content of all government regulations. Naturally, this change will provoke litigation, and should only be undertaken in conjunction with the development of a strategy to maximize the likelihood of a favorable outcome.

2) Extend presidential control to the “independent” regulatory agencies. The Supreme Court’s recent decision in *Morrison v. Olson*, upholding the constitutionality of the independent counsel statute, appears to give support to the concept of “independent” regulatory agencies. Specifically, *Morrison* appears to support the Court’s 1935 decision in *Humphrey’s Executor*, which permits Congress, in some circumstances, to limit the President’s authority to remove officials from office.

While *Morrison* appears to comment favorably on *Humphrey’s Executor*, it also arguably leaves room for distinguishing between the regulatory agency statutes and the independent counsel statute the court upheld. Because of the importance of this issue to the President’s ability to “faithfully execute the laws,” the President should seek a set of favorable conditions to test *Humphrey’s Executor* by dismissing a commissioner of an independent agency purely on policy grounds.

In addition, the President should assert his authority with respect to independent agency decisions in precisely the same manner as with executive branch agencies, bringing their regulatory decisions directly under the provisions of a revised and strengthened E.O. 12291.

Again, these actions will certainly provoke court challenges. However, by seeking out challenges, the President should be able to choose the battleground most favorable to his cause.

3) Eliminate the “independent” agencies. As an alternative, or in addition to the steps taken above, the President might pursue a strategy of eliminating the independent agencies. This could be accomplished through consolidation, by bringing the Federal Trade Commission into the Justice Department, the Securities and Exchange Commission into the Treasury Department, and so forth. Alternatively, the agencies could be eliminated simply by failing to appoint new members and allowing the terms of existing members to run out. (Indeed, this situation is very near to occurring presently at the Federal Energy

Regulatory Commission, where an impasse between the White House and some members of Congress has prevented the confirmation of new members and threatened to leave the agency without a quorum.)

4) Develop a comprehensive litigation strategy for reasserting presidential control. A high-level litigation task force, consisting of the general counsel of OMB, the assistant attorney general for legal counsel (or the Solicitor General), the general counsels of the key regulatory agencies, and chaired by the administrator of OIRA should be formed to manage regulatory litigation throughout the next Administration. The task force should concentrate on devising and executing a comprehensive strategy for a) defending the President's assertion of control over regulatory decisions, b) challenging precedents that prevent rational decision-making or weaken presidential authority, and c) assuring that all significant filings by or on behalf of regulatory agencies are consistent in asserting the President's authority and defending his objectives.

5) Streamline the regulatory review process. The "regulatory planning process" embodied in E.O. 12498, combined with the various other processes run through OIRA, appears to be a case of procedural overkill. OIRA staff spend so much time "running the process" that they have difficulty concentrating on key policy issues. Even at the policy level, process sometimes dominates substance, with too much focus on the number of rules reviewed, the average review time, etc.

One side-effect of this overemphasis on process is to exacerbate the natural tendency for agencies to see OMB as an adversary, in much the same way as business sees government regulators as adversaries. To the agencies, OMB seems out of touch and inflexible, wedded to a set of rules that must be followed whether or not they make sense in a particular case. Rather than an ally in the executive branch battle against congressional micromanagement, agencies may actually see OMB as just another enemy to be overcome. Indeed, Congress may sometimes seem the more attractive ally in a battle where the real enemy is OMB.

While the dynamics of this relationship can never be completely suppressed, the issuance of a new executive order provides an opportunity to review the current process and make adjustments. Buttressed by the President's clear assertion of ultimate rule-making authority, it should be possible to replace the current emphasis on process with greater emphasis on policy. Resources now devoted to relatively minor paperwork or regulatory reviews should be redirected to more inten-

sive involvement in significant policy issues. OIRA staff should organize task forces on key issues, make White House resources (e.g., presidential statements and other press support, congressional relations assistance) available to agencies, and encourage agency heads and key agency staff to see OMB as an ally in their fight against congressional meddling. (See also the discussion of development of a regulatory budget, below.)

6) Undertake a high-profile review of agricultural marketing orders within OMB. As indicated above, congressional appropriations riders currently prohibit OMB from even studying agricultural marketing orders, a type of restriction which potentially could further eviscerate the President's ability to manage the executive branch. While the Reagan Administration's authority to challenge these provisions is hindered by the fact that President Reagan signed the bills containing the riders, the next President will not be so disadvantaged. He should directly challenge this dangerous precedent by ordering OMB to violate the appropriations rider and study agricultural marketing orders. In formulating his request, the President would do well to refer directly to his constitutional authority to "require the opinion, in writing," of his Cabinet officers.

IMPLEMENTING A REGULATORY BUDGET

One key reform not pursued aggressively by the Reagan Administration is the regulatory budget. While there are good reasons for the Administration's decision, including the technical difficulties of implementing a regulatory budget, this reform could do more than any other to limit excessive regulatory growth.

The regulatory budget concept is a simple one. Each year, agencies would be given a single figure, in dollars, representing the net addition in annual regulatory costs they could impose on the private sector during the coming year. Once an agency used up its quota, it would have to balance new regulatory burdens with deregulatory actions of equal effect or, if not, to wait until it received new "budget authority" next year.

In operation, of course, a regulatory budget would be very complex, involving most of the difficulties attendant to the current fiscal budget process and many others unique to regulatory policy. On the other hand, most observers would agree that for all its problems, the fiscal

budget process imposes irreplaceable discipline on federal spending and is well worth the effort. Similarly, the inability to develop a perfect regulatory budget process should not stop us from attempting to develop some such process.

Ideally, development of a regulatory budget would follow the model of the existing Paperwork Budget. It would begin with a baseline estimate of the total costs of all regulation, which would serve as the basis for agency budgets. Each year, agencies would be allocated an amount of increased gross regulatory costs to be imposed on the economy during the coming year, with the total (government-wide) cost permitted to grow at some acceptable level (e.g., 1 percent below the rate of growth of real GNP).

While development of a baseline is not necessary (budgets could be allocated purely in terms of incremental costs, with current costs taken as given), it would have the very desirable effect of providing an estimate of the overall impact of government on the economy. Such an estimate would give the public a means of gauging the cumulative impact of individual regulatory actions—each of which may appear desirable in isolation—on individual freedom. Thus, a regulatory budget could help raise public concern and restore the public consensus against overregulation.

A regulatory budget would also be desirable in identifying the sources of regulatory growth. Because it would include estimates of both administrative and statutorily imposed regulatory costs, it would provide a monitor of congressional regulatory activity, thereby increasing government accountability.

While the expertise to develop a regulatory budget exists, the resources (staff, etc.) do not. One key to freeing up the requisite resources is to reduce the number of process-oriented "exercises" run every year by the OIRA staff. Currently, OIRA is responsible for producing one "Regulatory Program," two "Regulatory Agendas," and one "Paperwork Budget" every year. By combining all of these exercises into a single "regulatory budget," it should be possible to achieve significant efficiencies. (To do so, however, might require a legislative change, since the "Regulatory Agenda" is required by statute to be published twice each year.)

A second way to secure the needed resources to develop a regulatory budget is to involve all of the major regulatory agencies in the development process. Because this project is clearly relevant to the missions of the individual agencies, and because the development process is by nature temporary, it would be appropriate to detail the necessary

resources from the agencies to some regulatory budget task group. Indeed, the "Regulatory Council" created by President Carter would be an appropriate organizational model for such a task force.

CONCLUSION

Regulatory policy will present difficult challenges for the next President. Interest groups continue to clamor for an increasing government role; regulatory agencies remain biased in favor of activist policies; and recent congressional and court actions have weakened presidential authority over the agencies. Public sensitivity to excessive government is perhaps at the lowest level in more than a decade.

However, regulatory policy also presents opportunities. By clearly stating his priorities and exerting his authority, the President can win back control of the regulatory process from Congress and the courts. By moving to develop a regulatory budget, he can begin the process of reminding the public of the aggregate costs of regulation and, for the first time, impose an overall limit on the growth of regulatory control of the economy.



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variety of service delivery strategies in America's diverse and complex cities. Finally he announced, with great finality: "You cannot have each station master making up the railroad schedule! It's got to be centralized; somebody's got to control it."

In reality, of course, cities are not much like railroads. They don't have master schedules. They don't operate on one set of rails. They don't have one task. Cities are much more like markets: vast, complex aggregations of people and institutions, each constantly making decisions and each adjusting to the other's behavior based on the incentives and information available to them.

In a city, or state, or nation, managers cannot make up "the schedule" or "control" the decisions. They can manage administrative programs, which control specific activities. They could even manage a railroad. But to manage the entire polity, they must learn how to *steer*—as we stressed in chapter 1. And perhaps the most powerful method of steering is structuring the marketplace: creating incentives that move people in the direction the community wants to go, while letting them make most of the decisions themselves.

Think of the challenges facing our governments today: a health care system in crisis; an environment threatened as never before; a global economy in which American workers need dramatically better education and training throughout their careers; a changing family structure that makes quality child care virtually a necessity. Ask yourself if your governments have the capacity to solve these problems by raising taxes and spending more money. In today's fiscal and political climate, the answer is clear. Just as FDR's New Deal could not afford to build all the moderate-income housing Americans needed, our governments today cannot afford to supply all the health care, environmental protection, job training, and child care we need. The very thought is inconceivable.

If this is true, it means that government has no choice but to find a noncentralist approach. Our governments must consciously use their immense *leverage* to structure the market, so that millions of businesses and individuals have incentives to meet our health care, child care, job training, and environmen-

tal needs. Not surprisingly, this is precisely where they are heading:

- In health care, the debate about universal health care is really a debate about how to restructure the marketplace. No one recommends a British-style public health system, in which government administers the entire system and doctors and nurses are public employees.
- In environmental protection, the Clean Air Act of 1990 used a market mechanism known as emissions trading—a form of tax on pollution—to control acid rain. Environmental organizations have begun to advocate market-based regulatory strategies, such as "green taxes," and state governments have begun to pass them.
- In job training, several states are exploring variations of the Michigan Human Investment System. Rather than trying to fund more publicly administered job training programs, they are working to create functioning markets for job training, in which workers have the purchasing power and information they need.
- And in child care, when Congress passed its first major child-care bill, in 1990, the debate was between those who wanted Washington to fund day-care centers directly and those who wanted to use market mechanisms, like tax credits and vouchers, to give low-income families the power to make their own decisions. Needless to say, the latter view prevailed.

These trends have been spurred on by the collapse of communism in Eastern Europe, a development that has dramatized in living color the superiority of market systems over administrative systems. Since the fall of the Berlin Wall, market-oriented government seems almost to have been in the air. The trend has nothing to do with conservative calls to "leave it to the market," however. Structuring the market to achieve a public purpose is in fact the opposite of leaving matters to the "free market"—it is a form of *intervention* in the market.

(In reality, there is no such thing as a free market, if by that we mean a market free of government intervention. All legal markets are structured by rules, set down by governments. The only markets free of government regulation are black markets—and precisely because they operate outside government's authority, black markets are controlled through force and wracked by violence. Next time you hear someone condemn government and glorify the free market, ask him if he really means to hold the drug trade up as a model.)

Structuring the market is also the opposite of creating publicly administered bureaucracies to deliver services. It is a third way, an alternative to both the liberal call for administrative programs and the conservative call for government to stay out of the marketplace. It is a way of using public *leverage* to shape private decisions to achieve collective goals. It is a classic method of entrepreneurial governance: active government without bureaucratic government.

We are not saying that market mechanisms always work. Many collective goods provided by government, from parks to public safety, are not traded in markets. And many markets are deeply flawed. Government is often called on to act because a market has created severe social or economic problems. In the 1930s, government was called on because the market economy collapsed. Today government is called on because the market is moving us toward environmental catastrophe, while simultaneously leaving many of the poor and uneducated without jobs, homes, or hope. But as Franklin Roosevelt demonstrated 50 years ago, the most effective way to solve a problem generated by the market is often to *restructure* that market.

Market mechanisms have many advantages over administrative mechanisms. We have discussed some of them in previous chapters: markets are decentralized; they are (normally) competitive; they empower customers to make choices; and they link resources directly to results. Markets also respond quickly to rapid change. And as emphasized above, market restructuring allows government to achieve the *scale* necessary to solve serious problems. If a government can create incentives that affect millions of decisions made in the marketplace—rather

than affecting only those activities for which the government pays—it can multiply its impact a thousandfold.

The trend toward market-oriented government, like the collapse of communism in Eastern Europe, is a direct product of the information age. With information expanding at a geometric rate and change breathing down our necks, we need systems that process information quickly, that build in feedback loops, and that move information out to millions of individuals—in the form of price signals—so they can adjust as reality changes. A group of mandarins sitting atop a hierarchical empire can no longer make effective decisions for all of us; they simply cannot cope with the volume of information or decisions they must handle. But a market can.

Markets are to social and economic activity what computers are to information: using prices as their primary mechanism, they send and receive signals almost instantaneously, processing millions of inputs efficiently and allowing millions of people to make decisions for themselves. Consider our higher education system: millions of students (and their parents) sift through volumes of information, compare prices, and finally choose their preferred schools. The colleges and universities do the same with student records, references, and applications. And a match occurs. Would some kind of administrative mechanism—such as the assignment of students to the college nearest their home—work better?

THE TROUBLE WITH GOVERNMENT BY PROGRAM

"When we think of 'government,' the word that automatically comes to mind is 'program.'" Philip Power and Jan Urban-Lurain wrote in Michigan's *Creating a Human Investment System*. "Ham and eggs; government and programs. We literally denominate government's workings in units of programs."

The word program of course covers much ground. Many "programs" are actually market mechanisms. But the vast majority are administrative mechanisms: monopolistic organizations.

normally of public employees, that spend appropriated money to deliver a service. When we speak of programs here, this is what we mean.

Unfortunately, administrative programs have a series of flaws, when compared to markets:

Programs are driven by constituencies, not customers. As Power and Urban-Lurain explain:

Programs tend to be created in response to a constituency group-defined claim on resources, not in response to demand from individuals or labor markets. But mere membership in a constituency group does not entail one person's demand for something. As a result of this confusion, things—cash, goods, services—are regularly offered by programs to individuals who may not want or who are not prepared to use them effectively. The distribution of things provided by government responds to their supply, not to the demand for them by individuals.

This is one reason why so many government programs, created with the best of intentions, fail so miserably to meet the real needs of those they are intended to help.

Programs are driven by politics, not policy. To create a program, political leaders must put together a coalition broad enough to pass a bill and fund an appropriation. Hence there is a constant pressure to make the program all things to all people. By the time a bill works its way through the legislative process, its original goals have often been watered down so far as to be meaningless, and it has often picked up a dozen other goals. Some may even be contradictory. One state development program had a goal of "new job creation" right alongside "the adoption of high technology means of production"—which often eliminates jobs.

Programs create "turf," which public agencies then defend at all costs. "We have all heard the cry of the bureaucratic jungle," says Philip Power: "My program; my money; my clients." Power and Urban-Lurain again hit the nail on the head:

Agencies come to assume that if they are not sole service providers for a client population, they will lose program funding; if they lose their money, they lose staff positions; if they lose staff, they lose status; if they lose status, they lose future funding. Therefore, bureaucracies naturally tend to spend their time and attention building and defending turf, not in managing well.

Programs tend to create fragmented service delivery systems.

As we explained in chapter 6, when legislatures add new programs year after year, each with its own perfectly logical rationale, the result is an unintended hodgepodge of old and new. People have to visit a dozen different offices and apply to a dozen different programs to get the services for which they qualify. Each one has its own rules, its own forms, its own hoops through which people must jump. The system is neither transparent, nor holistic, nor user friendly.

Programs are not self-correcting. When government programs fail, their managers are often the last people to know, because they don't measure results. Typically, they use numbers to promote their program, not to manage it. But markets are self-correcting. Institutions that sell goods or services in competitive markets know when they are failing, and their very survival depends on their ability to correct those failures. Since markets involve millions of independent decisions—and every participant is constantly reevaluating their decisions—markets tend to correct errors fairly rapidly.

Programs rarely die. Except in dire fiscal crisis, most programs keep chugging along, year after year. Many politicians and administrators have broken their picks trying to eliminate an obsolete program that still has a constituency. While the general public remains oblivious, the program's beneficiaries fight tooth and nail to protect it. The politicians win no friends but wind up with a determined group of enemies, who retaliate on election day.

Programs rarely achieve the scale necessary to make a significant impact. To get a program enacted, politicians often accept

appropriations they know are too low to do the job. Particularly if a program is successful, demand quickly outstrips funding. Head Start, long acclaimed as a success, still serves only a third of those eligible.

In a market, demand creates its own supply. Businesses selling in markets expand to meet whatever demand exists; government programs that receive appropriations through the political process do not. Few public organizations can grow by making money, so they ignore the search for new market niches, new services, and new customers. Even when they do get aggressive about meeting customer demand, they are often hamstrung by the legislative process. "If you've got a good new idea and the market for it is really large, you can't get to the market, because the political process controls your funding," says Peter Plastrik, former president of the Michigan Strategic Fund.

Plastrik and his colleagues in Michigan described administrative programs as "retailing," while they called market structuring "wholesaling." The Michigan Strategic Fund was designed to wholesale, by changing bank lending patterns and catalyzing the formation of new financial institutions. "Understanding that our \$100 million is peanuts if you look at just the \$16 billion of bank assets in the state alone," Plastrik said, "you quickly realize you can't buy success—you just can't do it. You don't have enough money." By wholesaling, the Strategic Fund leveraged success.

Finally, programs normally use commands, not incentives. Commands are sometimes necessary. But in today's world of knowledge workers and ever-expanding information, incentives are often more effective. This is particularly true when commands cannot be enforced, as is so often the case in public policy. Bureaucracies long ago refined the art of feigning compliance while ignoring commands they find disagreeable. Antony Jay and Jonathon Lynn captured this art brilliantly in their television satire for the British Broadcasting Company, "Yes, Minister." In one scene, a departmental minister tells his chief civil servant what he wants done, and the civil servant delivers an ambiguous answer. The minister presses, asking just what the civil servant meant:

Civil servant: What I mean is that I am fully seized of your aims and, of course will do my utmost to see that they're put into practice. To that end, I recommend that we set up an interdepartmental committee with fairly broad terms of reference so that at the end of the day we'll be in a position to think through the various implications and arrive at a decision based on long-term considerations rather than rush prematurely into precipitate and possibly ill-conceived action which might well have unforeseen repercussions.

Departmental minister: You mean no?

Civil servant: Yes.

Harry Truman once made the same point while contemplating Dwight Eisenhower's ascension to the White House. Eisenhower had been commander of the Allied forces during World War II. He was accustomed to giving orders and having them obeyed. But now he would command a civilian bureaucracy. "He'll sit behind that big desk and say, 'Do this' and 'do that,'" Truman remarked. "And do you know what will happen? Nothing."

In 1961, President Kennedy ordered U.S. missiles out of Turkey. More than a year later, during the Cuban missile crisis, he was stunned by Khrushchev's offer to remove Soviet missiles from Cuba if we took our missiles out of Turkey. As it turned out, the State Department had undertaken leisurely consultations with our allies about the withdrawal, then finally put together a five-year plan for dismantling the missiles. In the military, this is known as the "slow roll."

The same thing happens constantly in education. When many states ordered their top-down reforms in the 1980s, most school districts quickly reported compliance. But reformers who went out in the field found a far different picture. Newly required courses were simply old courses relabeled; required "remedial" services were minimal; required tests were administered, but some teachers were virtually teaching the test before it was given. (Ralph Tyler, a professor of education at Stanford and a leader in his field for 50 years, says this happens all the time, all over the world.) To make matters worse, the commands

required teachers and principals to spend enormous amounts of time doing paperwork to document their supposed compliance. They created fierce resentment. As we saw in East Harlem and Minnesota, incentives work far better.

Even when commands can be enforced, they often create perverse side effects. When the courts ordered busing to desegregate the schools, for example, white families fled the urban public schools. Today school districts are increasingly using incentives, such as magnet schools and choice systems, to integrate their schools—with far greater success.

HOW GOVERNMENTS ARE RESTRUCTURING THE MARKETPLACE

It may seem strange to argue that there are market-oriented alternatives to most administrative programs. But there are almost an infinite number of ways government can structure the market to achieve its ends. They are used all the time: many, like tax credits and user fees, are so common we barely notice them.

The six elements outlined in the box on the following page suggest six basic strategies to change the market. We have seen dozens of examples of virtually every one, already in use. Consider just a few of the highlights (for a discussion of market mechanisms not covered here, including procurement policy, public-private partnerships, loans, loan guarantees, and equity investments, see appendix A):

Setting the Rules of the Marketplace. Governments have done this since the day government was invented. Zoning laws set the rules for real estate development. Securities laws set the rules for the stock markets. Even something as simple as the market for taxicabs is regulated by public laws.

Governments constantly change the rules of the marketplace to solve problems. Consider just one example: automobile insurance. As rates have pushed steadily upward, states have tried a variety of market reforms to hold them in check. Some, like Massachusetts, have used command-and-control mechanisms,

WHAT IT TAKES TO MAKE A MARKET WORK

To critique programs is not to argue that markets are always better. Some markets are deeply flawed. When a small number of firms dominate a market, true competition often disappears. When customers do not have adequate information, they are often victimized. Profiteers have preyed upon the poor and uneducated throughout our history—from the days when snake oil salesmen sold bogus medicines to more recent scandals in which shady mortgage companies have taken advantage of poor homeowners.

To work effectively and fairly, markets require a number of elements, outlined below. When a government is considering a market mechanism to solve a problem, it should see if these six elements exist. When they do not, it is usually possible to restructure the market to provide the missing elements. If not, it may be better to stay with an administrative mechanism.

Supply. There must be an adequate supply of the service—whether it is child care, home care for the elderly, low-income housing, or group homes for the mentally retarded. There should be enough suppliers to ensure competition.

Demand. Customers must have enough purchasing power to buy the product or service, and they must have a desire to exercise that purchasing power. In the job training market, for instance, many individual customers cannot afford to buy training. Many corporations are not motivated to buy training, because they often lose their trained workers to competitors.

Accessibility. Sellers must be easily accessible to buyers. Often this requires brokers, to carry out transactions. For example, buyers of stock do not meet sellers of stock; instead they use stockbrokers to make transactions. In services such as job training, brokers are rare. When they do exist, in the form of public programs, they are seldom visible or easily accessible to the public.

Information. When consumers do not have adequate information about the price, quality, and risks of a product or service, their decisions will be flawed. They will end up paying too much

for an inferior product—or worse, losing their home to an unscrupulous mortgage company.

Rules. These are normally established through government.

Policing. As in any activity, those who would prey on the uninformed need to know they may be caught and punished.

regulating insurance companies and setting their rates. (Done in the name of the consumer, this ends up costing the consumer dearly, because it eliminates competition.) Other states, including New York and Florida, have driven premiums down by limiting the consumer's ability to sue. (This is known as tort reform.) Three states have driven rates down by adopting no-fault systems, in which those injured are automatically reimbursed by their own insurance companies—thus eliminating lawsuits to establish guilt. Eighteen others have opted for watered-down no-fault laws, which have backfired. This process of constant market restructuring will no doubt continue as long as people drive cars.

Providing Information to Consumers. If consumers are able to choose between competitive providers, government can force fundamental changes simply by publishing information about the quality of each provider. When the federal government began publishing the on-time records of airlines, it had a dramatic impact—far greater than any regulatory command could have achieved. When Arizona began to publish auto insurance, home insurance, and hospital rates, it forced providers to compete based on price. When California required companies to disclose all toxic substances until the state ruled them safe, it not only discouraged the use of toxics, but punished corporations for delaying the regulatory process.

Visalia used information to encourage energy efficiency. For a fee, people selling their homes can now get an energy inspection and a rating from the Board of Realtors. Sellers pay the fee to add value to their homes by proving they are energy efficient. Nearly a dozen states now operate similar systems. In San Fran-

cisco, such inspections are mandatory, and sellers are required to bring their homes or offices up to certain standards. The city's Public Utilities Commission estimates the measure saved \$5 million in energy costs in its first five years, even before it was extended to commercial real estate.

Creating or Augmenting Demand. Governments create or change markets all the time by stimulating demand: giving people resources with which to buy services; requiring people to buy certain services; or simply encouraging their use. State vouchers (and their equivalent) have helped stimulate the emergence of functioning markets for child care. The GI bill created great demand for higher education, after World War II. San Francisco's energy law created demand for energy inspections.

Catalyzing Private Sector Suppliers. Governments constantly make deals with private corporations to augment the supply of some product or service. In 1988, the St. Paul Department of Planning and Economic Development convinced the First Bank to commit \$94 million over five years to housing and economic development loans in poor communities. In 1990, the Federal Reserve Board pressured Massachusetts banks into promising \$1 billion in loans to poor communities.

Some cities have even incorporated such deal making into their zoning processes. To prevent the deterioration of its downtown, Scottsdale created a series of incentives for businesses to supply infrastructure amenities—like parking garages and street improvements. Those that do so can get permission to increase their buildings' density, height, and other factors. Seattle, San Diego, and Tampa have all developed their own versions of this approach, called incentive zoning.

Creating Market Institutions to Fill Gaps in the Market. Often private investors leave portions of the market untouched because profits are too small, investors are ignorant of the profits to be earned, or prejudice clouds their vision. Typical market gaps include loans to small businesses, minority-owned businesses, and businesses owned by women. Today many state and local governments catalyze the formation of private or quasi-public corporations to fill these gaps. This is hardly unprecedented: early in American history, state governments helped

organize and launch many private corporations. Many of Japan's largest businesses also began as government enterprises.

Catalyzing the Formation of New Market Sectors. Sometimes governments help create not just one corporation to expand the supply of a service, but an entire market sector. Consider health maintenance organizations (HMOs). The first group practice prepayment plan—the precursor of the modern HMO—was created by the Los Angeles Department of Water and Power in 1929. Four decades later, HMOs were still rare. Enamored of their advantages, Congress in 1973 passed the Health Maintenance Organization Act, to stimulate their creation. It volunteered federal funding to help establish private HMOs and mandated that employers who paid for health insurance give their employees the option of joining an HMO, if one existed in their area. States have also worked to stimulate the growth of HMOs. Today, thanks in part to governmental efforts, HMOs serve a significant share of the market.

In the 1980s, several state governments pursued similar strategies in economic development. Pennsylvania catalyzed the formation of a seed capital industry, which provides early stage venture capital. Michigan catalyzed both a seed capital industry and a new financial sector made up of business and industrial development corporations (BIDCOs), which specialize in providing long-term loans to smaller manufacturing firms.

Sharing the Risk of Expanding Supply with the Private Sector. Remember the story of Tampa's Community Redevelopment Agency, in chapter 1? It was a classic example of risk sharing. By guaranteeing bank loans for five years and subsidizing the labor of loan processing, Tampa convinced banks to make loans they would otherwise avoid. "We put the market together and presented it to the private lenders," says Community Redevelopment Director Fernando Noriega.

Risk-sharing is quite common. In the 1930s, the federal government shored up the banking system by providing insurance to depositors. The Small Business Administration has long guaranteed small-business and minority-business loans. The federal government virtually created a market for student loans by guaranteeing bank loans to college students.

And many cities have shared the risk of real estate deals with private developers.

Changing Public Investment Policy. Most governments invest significant amounts of capital: their pension funds, cash balances, and reserve funds. By choosing where to invest, they can have a significant impact on the supply of capital in different markets. In 1982, when the Michigan Treasury Department was allowed to invest up to 5 percent of its then \$6 billion public pension fund in venture capital, it transformed Michigan from a state with virtually no venture capital to a state awash in venture capital. Other states quickly followed suit.

Dozens of state and local governments have also developed policies to put their cash balances in banks that pursue specific lending strategies. These are known as linked deposit programs, and they have been used for almost every purpose under the sun. Illinois used one to encourage minority-business loans, beginning in the late 1960s. Santa Monica, California, used one to encourage energy conservation loans a decade later. Ohio used one to encourage small-business loans during the difficult years of the early 1980s. And Boston announced one to encourage loans in minority communities in 1991.

Public money can be disinvested as well as invested. As South Africa discovered, divestiture can be a powerful tool. Public pension funds have created the Council of Institutional Investors, which discourages corporate activities such as "greenmail" and inflated management salaries by threatening divestiture.

Acting as a Broker for Buyers and Sellers. As we noted above, markets in which buyers cannot easily find sellers require brokers. Sometimes the public sector can play this role. Michigan's Opportunity Card and Opportunity Stores were designed to act as accessible, user-friendly brokers between buyers and sellers of adult education and training. Massachusetts' Bay State Skills Corporation (now copied by at least a dozen states) acts as a broker between businesses that need trained workers and sellers of training. It uses the lure of start-up capital—typically 100 percent the first year, 50 percent the second, and a small portion the third—to get corporations and educational institutions to create new training programs. Because its primary role is to

bring together buyers and sellers, it funds training programs that buyers want—programs that respond to genuine market needs. As a result, those programs have extremely high job placement rates.

Pricing Activities through the Tax Code. The tax incentive is no doubt America's favorite method of leveraging change through the market. We use tax incentives to encourage people to buy houses and donate to charities, to encourage businesses to hire the poor and invest in research and development, and to encourage institutions to adopt not-for-profit status or employee stock ownership plans. Occasionally we even use taxes to discourage behavior that we are not ready to outlaw, such as smoking cigarettes and drinking alcohol. We could of course use the latter method far more widely. Think of all the things Americans would like to discourage but cannot bring themselves to ban: pornography, billboards, junk food, violence on television. A stiff tax might do the trick.

Pricing Activities through Impact Fees. An impact fee is a form of tax designed to impose the social cost generated by an activity, such as driving or building new subdivisions, directly on those who engage in the activity. The idea is simple: turn public costs into private costs, so people and institutions cannot shift the cost of their activities onto others. According to the Rand Corporation, cigarette taxes in America are now almost high enough to do this, but alcohol taxes are not.

Consider driving, which not only creates air pollution but requires expensive roads. Roads are a public as well as a private good—benefiting all Americans, whether they drive or not—so governments do not require motorists to pay their entire costs. Unfortunately, however, they barely require motorists to pay *any* of the costs. "One economist did a study that showed that for every new mile of freeway that's constructed in Los Angeles, the actual cost of construction if allocated only to those vehicles using that new freeway would be 13 cents per mile for the life of that freeway," said Norm King, manager of Moreno Valley, California, in a 1988 speech. "The amount being generated by the gas tax right now is about one cent per mile."

If a community built a new highway to ease commuter traffic, King pointed out, general taxpayers would subsidize more than 90 percent of the cost. "Now I wouldn't go out and ask any of you to pay for the gasoline I need to get to my work; but for some reason we have no qualms at all about asking our neighbors to pay for the cost of the freeway for us to get to work."

Impact fees have become common in high-growth areas like California, Florida, and the suburban counties around Washington, D.C. They are used to force developers to pay for the cost of roads, transit systems, sewers, water systems, and schools they make necessary when they build new developments. After Florida's 1985 Growth Management Act required that local governments have the money for all necessary infrastructure and services before approving new development, half of Florida's 67 counties adopted impact fees. By 1988, 58 percent of the communities that responded to a nationwide survey by the National Home Builders Association were using some form of impact fee—a number that had doubled in the previous five years.

Managing Demand through User Fees. A third variation on the pricing theme is the user fee, which can be used to manage demand for services. Traditional governments, which focus entirely on supplying services, have discovered that they can never outrun demand. They build new highways to fight congestion, and within years those highways are choked. They build new landfills, and within years they are filled.

"Our gut instinct is to provide more," says Norm King. "Our background has emphasized the supply side: how to build more freeways, how to build a bigger sewage treatment plant, how to build a new landfill." But with governments at every level stretched to their fiscal limits, this approach leads straight to bankruptcy. We have to "look at what we can do to manipulate the demand for that product downward so that we don't have to invest those funds in the first place."

To slow the use of landfills, governments now raise the price of garbage collection. To manage demand for highways, they raise tolls, develop special lanes for car pools, and give employers incentives to reduce rush-hour traffic by adopting flextime, car

pools, and van pools for employees. They are even beginning to use peak load pricing, in which they charge more during peak travel hours. (Our telephone companies have long used peak load pricing for long-distance calls, and the airlines do the same with airfares.) The Washington, D.C., subway system charges more during rush hour, and the California Department of Transportation has negotiated franchise agreements with four private companies to build toll highways that will use peak load pricing. Singapore, Norway, and the Netherlands all use peak load pricing already. According to economist Steven A. Morrison, several studies have estimated its potential benefits at roughly \$8 billion in the United States.

The principal objection raised against demand management is that user fees discriminate against the poor. But as we noted in chapter 7, that depends how the revenue generated by user fees is spent. If it were devoted to mass transit, it would benefit the poor. Another objection is the inefficiency and inconvenience of tollbooths. But the technology to charge drivers automatically, without tollbooths, is already in use in several places around the country. A laser system reads an electronic card installed in the cars of regular commuters and bills them according to the time of day.

Building Community. Changing the marketplace means more than restructuring the private, for-profit economy. It can also mean strengthening communities. For example, a handful of states award grants to community development corporations, which strengthen low-income communities by developing housing, creating jobs, enhancing public safety, and the like. Washington, D.C., has a condominium conversion law that gives tenants the right to buy their buildings when their landlords convert them to condominiums. Ft. Collins, Colorado, has created a zoning process in which developers must meet with and gain approval from community representatives before they get city approval for new developments. And of course the U.S. government funnels billions of dollars to churches and other community organizations every year, with its tax deduction for contributions to charitable organizations.

APPLYING MARKET-ORIENTED THINKING TO GOVERNMENT'S OTHER JOB: REGULATION

Most of our argument to this point has focused on the superiority of market mechanisms over administrative mechanisms. But administrative mechanisms are used primarily for service delivery. Regulation is another matter entirely. In the regulatory arena, traditional governments use command-and-control mechanisms: they lay down rules and order people to comply.

Environmental protection offers a perfect example. Ever since it created the Environmental Protection Agency (EPA), the federal government has relied primarily on a command-and-control strategy. Washington has tried a few market mechanisms: tax credits for energy conservation; several emissions trading experiments; a small tax on gas guzzlers. But the EPA has primarily set standards and dragged businesses or local governments to court for violating them. Often it has gone so far as to dictate the technology the business or government must use to comply with its standards.

This strategy has yielded some positive results. Air quality in most metropolitan areas has improved. The Great Lakes are much cleaner than they were in 1970, and many rivers have been cleaned up. Bans on toxic substances like DDT and PCBs have limited our exposure sharply.

But the command-and-control strategy has hardly been an unqualified success. Cities such as New York, Los Angeles, Boston, and Houston routinely exceed EPA standards for air quality—Los Angeles by 140 days a year. Half of all Americans still live in counties whose air is rated unhealthy by the American Lung Association. The EPA has regulated less than 20 toxic air or water pollutants, out of hundreds. And the entire effort has been extremely expensive. According to the EPA itself, by 1990 American corporations, governments, and individuals spent \$115 billion a year to comply with federal environmental regulations. Studies suggest that other methods could have achieved the same results at 25 percent of the cost.

The command-and-control strategy has a number of drawbacks.

First, it does not change the underlying economic incentives driving firms or individuals. Because the EPA's commands run directly counter to economic incentives, businesses and firms often do their best to find some way around them, legal or illegal. A great deal of time and money goes into fighting and circumventing regulations, and illegal dumping increases.

Second, the command-and-control strategy relies on the threat of penalties—but in a political environment, many of those penalties can never be assessed. The original Clean Air Act, passed in 1970, ordered that air quality in cities meet EPA standards by 1987. By 1989, 96 cities still failed to comply. But what could the EPA do? Whenever it tried to impose penalties with real consequences, congressional representatives from the afflicted cities raised a storm.

Third, command-and-control regulation is a very slow process. It requires the EPA to establish unsafe levels of exposure to thousands of substances, with enough accuracy to stand up in court. EPA regulation tends to be an all-or-nothing matter. Since the consequences are so severe—requiring industry to scale back or eliminate its use of the substance in question—the stakes are very high. Hence industry drags virtually every decision through the courts, while often fighting in Congress as well. Not only does this take forever, it makes regulators extremely cautious about reaching their decisions, because they know they will be fiercely contested.

Fourth, regulations that specify the exact technology industry must use to control pollution discourage technological innovation. Most federal regulations require that industry adopt the "best available technology" when they install new plants and equipment. The EPA defines that technology, and businesses must use it. If they develop a better technology, they have to convince the EPA bureaucracy to redefine its standards—a costly, uncertain process at best. So, unlike competitive markets, EPA regulations discourage businesses from pursuing new technologies to solve their problems. They also discourage businesses from closing down their old, dirty plants and opening cleaner ones,

because the best available technology is required primarily in new facilities and industries. Even the EPA's own Advisory Committee on Technology Innovation and Economics recently concluded that the regulatory system discourages the development of innovative pollution-control technology.

Fifth, because the command-and-control approach slaps the same requirements on industries all over the country, it is extremely expensive. No matter what the cost, it requires everyone to use the same technology and meet the same standards. This one-size-fits-all approach is tremendously wasteful, because it requires clean businesses to make the same investments as dirty businesses, rural businesses to make the same investments as urban businesses.

Sixth, the command-and-control approach forces EPA to focus primarily on large institutions, whether businesses or governments. After 20 years of effort in that arena, some environmentalists believe greater returns may now be found by concentrating on individuals and small businesses. But that is very difficult to do with the command-and-control approach. It is politically dangerous to order individuals and small businesses around, and enforcement is a nightmare.

Finally, command-and-control regulation has a tendency to focus on symptoms rather than causes. Regulations require specific technologies on cars, but ignore how much people drive. The EPA requires scrubbers in the smokestacks of coal-fired plants, but ignores what kind of coal the plants burn.

MARKET-BASED REGULATORY POLICY: INCENTIVES RATHER THAN COMMANDS

For 20 years, economists have been telling us there is a simple way around these problems. "When the EPA was created," James Q. Wilson writes, "economists who had studied the matter argued almost unanimously that the most efficient way to reduce pollution was to assess an effluent charge on polluters. The EPA ignored this advice and instead sued polluters in court."

As with other impact fees, the idea is to make sure that all of us, producers and consumers alike, face up to the full costs and consequences of our decisions—*when* we are making those decisions. This is done by building the cost imposed on society by the polluter into the cost of the product—whether gasoline, pesticides, electricity generated by burning coal, or products containing chlorofluorocarbons. When this is done, people have an incentive not to pollute. And businesses that don't spend money or time to reduce their pollution put themselves at a competitive disadvantage.

Economists refer to these social costs as "externalities." Peter Drucker points out that we have built externalities into the price of business before. "During the last century every developed country has converted industrial accidents from an externality into a direct cost of doing business," he says. "Every developed country has adopted workmen's compensation under which the employer pays an insurance premium based on its own accident experience, which makes the damage done by unsafe operations a direct cost of doing business."

Some substances are so harmful that they should simply be banned, Drucker adds. But this is not practical for every harmful activity. (Can you imagine a ban on driving, flying, dry cleaning, or barbecuing?) In such cases, impact fees, effluent fees, and other market incentives have many advantages. They create powerful economic incentives for everyone—businesses and individuals—to change their behavior, because they drive up the cost of activities that pollute. Consumers need no sophistication about which product is more environmentally damaging than another: they simply have to look at the price. If driving a heavily polluting car creates significant air pollution, it becomes expensive. If electricity from coal-fired plants creates acid rain, it becomes expensive. If disposing of plastic diapers fills up landfills, they become expensive.

Not only does this approach give everyone clear price signals about the cost of pollution, it lets them decide how best to respond. If they want to keep driving the dirty, gas-guzzling car, they can. But if they want to drive an energy-efficient, clean car, they will save money. If they want to stick with expensive elec-

tricity, they can. But if they want to put solar panels on their roof, they will save money.

If pollution became a significant expense, industries would do what they could to avoid it—developing cleaner technologies, changing the fuels they burned, recycling materials, and conserving energy. The profit motive is a powerful incentive to innovate. A system of "green taxes," as they are becoming known, would turn loose the creativity of corporate America to find cleaner ways to live, work, and produce.

Green taxes also encourage people to address the root cause of the problem, rather than dealing with its symptoms. In the past we forced coal-fired plants to install scrubbers. The price incentive would drive them to find the cleanest and least expensive way to produce—perhaps by switching to a cleaner fuel. In the past we forced auto manufacturers to install catalytic converters. Emission charges or green taxes on gasoline would drive everyone to find the cleanest form of transportation that was practical.

Green taxes might also avoid some of the drawn-out legal battles that come with all-or-nothing regulation, because the stakes would be lower. They would give governments more flexibility: by raising or lowering the fee, they could vary the pressure. They would be far cheaper, because they would achieve their goals more efficiently. And they would generate public revenue, which could be used both to clean up pollution and to invest in activities that prevent it, such as mass transit.

Market incentives appear to be the wave of the future. During the late 1980s, they finally began to attract significant attention. Watching Western Europe debate green taxes, several environmental organizations endorsed the idea. (European nations have always had very high gasoline taxes, which have helped limit their air pollution significantly. Now they are beginning to apply the same idea to other products.)

States and cities also began to experiment. Iowa, Minnesota, and Oregon taxed agricultural pesticides and fertilizers, then devoted some of the revenues to groundwater protection. Florida passed a tax on nonrecycled paper and a law requiring disposal fees on certain containers if 50 percent of them were not

recycled by October 1992. Oregon and New Jersey created investment tax credits for the purchase of recycling equipment. California's South Coast Air Quality Management District persuaded the EPA to exempt it from "best-available-technology" language so it could use new technologies as they developed. And Seattle got an enormous amount of attention by creating a voluntary recycling program that used price as its lever—charging \$14 for every garbage can not separated for recycling. By 1990, Seattle was recycling 37 percent of its trash, more than any other city in the nation.

In Washington, the Clean Air Act of 1990 stimulated interest in market-based strategies, because it included an emissions trading program to control acid rain. Emissions trading is a market mechanism that acts like a green tax: polluters can pay to pollute or innovate to save money. The EPA first tried it during the 1970s. It gave credits to firms that reduced air pollution below the level set by law, and allowed them to trade the credits between different sources of pollution within the firm or sell them to firms in the same general location. The idea was to encourage businesses to meet EPA's goals, but to let them figure out the most innovative and economical way to do so. If they could reduce one source of pollution economically, they could use the credits generated to offset others that were more expensive. This stimulated only a limited market in emissions trading, but is still estimated to have saved business between \$5 billion and \$12 billion.

In 1982, the EPA extended the idea to lead in gasoline. If refiners produced gasoline with lead content below EPA requirements, they earned credits, which they could sell to other refiners that were still above required levels. This produced a lively market in credits, partly because buyers and sellers had far greater access to one another in the relatively homogeneous refining industry. The EPA estimated that the trading program saved 20 percent of the cost of reducing lead in gasoline.

In 1990, acid rain was the most contentious environmental issue facing Congress. The Bush administration recommended and Congress passed an emissions trading system, in which coal-burning electric power plants essentially receive credits for

the amount of sulfur dioxide emissions they are allowed. They can use any means to reduce their emissions, and if they emit less than they are allowed, they can sell their credits to other plants. Paul Portney of Resources for the Future, a research organization that helped pioneer the concept of market incentives, estimates that this will reduce the cost of compliance from \$8 billion a year to \$4 billion.

By 1991, proponents of market-based environmental regulation found themselves suddenly in the mainstream. The press began writing about green taxes and other market incentives, members of Congress began introducing bills, and the environmental community swung cautiously behind the idea. In 1988, Harvard's Robert Stavins published a study, with Senators Timothy Wirth and John Heinz, which outlined 36 market-based approaches to environmental problems. In January 1991, he told *Fortune* magazine: "Two years ago, we were complaining that no one listened to us. Now it's almost as if night had turned to day."

THE EMERGENCE OF SMARTER MARKETS

Market-based strategies like those just described are possible only because the information age has radically increased our ability to measure pollution and quantify its impact. Only in the past decade, for example, have we developed continuous emissions monitors that are capable of measuring the sulfur emissions from a power plant, or electronic systems that can record which car is passing and at what time, without a toll-booth. Businesses are even developing systems that can measure the exhaust pollution from cars as they pass. Technology like this makes it possible to use market mechanisms in ways we could barely dream of just a decade ago.

The Institute for Alternative Futures, led by futurist Clement Bezold, labels this trend the emergence of "smarter markets"—markets in which buyers and sellers have access to vastly more information than they previously did. One result, Bezold points

out, is that consumers are beginning to "consciously vote their values with their dollars." "Socially responsible" investment firms now invest their clients' money only in corporations that meet certain criteria. The Council on Economic Priorities has published a book that rates corporations and their products according to nine values. Environmentalist Denis Hayes, the originator of Earth Day, has launched an organization to certify products that are environmentally sound. It will sell an official Green Seal to companies, to display on those products. "Our objective is to help American consumers vote with their pocket-books on environmental issues," says Hayes. "We expect the Green Seal to become a catalyst for sweeping change in consumer purchasing habits."

Some products already come with stickers that indicate their energy efficiency: cars, hot water heaters, furnaces, refrigerators, and air conditioners. Nearly a dozen states have established voluntary energy rating systems for houses, as Visalia did. In the Washington, D.C., area, a sophisticated consumer organization rates the region's health plans according to customer satisfaction, price, and other factors, for public comparison in *The Washington Consumer Checkbook*. And health care researchers are beginning to develop further yardsticks with which to measure the quality of various health care providers.

With computer technology, it has become possible not only to develop such information, but to make it readily available to large numbers of people. Think of the Michigan Human Investment System and Opportunity Card: they were attempts to create a smarter market in job training, using "smart" credit cards, electronic information kiosks, and a computer system with data on the performance of every job training or adult education provider in the state. By facilitating the emergence of smarter markets such as this, governments can empower citizens to shape the marketplace according to their own needs and values.

RESTRUCTURING MARKETS *WITHIN* THE PUBLIC SECTOR

Markets exist not only in the private sector; they also exist within the public sector. When they do, we normally call them

systems: the education system, the job training system, the mental health system. But they are markets, just as surely as the financial system, the banking system, and the health care system are markets. If we applied market-oriented thinking to our public systems, we could accomplish a great deal.

Unfortunately, few people think about government this way. Even business people drop their market mind-set when they work with government. Norm King tells a story about the Palm Springs City Council, whose business members could not understand the idea of lowering demand for water by raising its price:

The irony is that our often conservative, local business people, whose very livelihood is dependent upon understanding the laws of supply and demand, do not understand how supply and demand concepts work in a government situation or could work in a government situation. So you have five people, all of them local business people, all of them depending upon supply and demand in their own occupations, resisting the idea that consumption would go down if the user was charged the full cost of water consumed. What we have is a very interesting dichotomy. As capitalists, we believe that the laws of supply and demand work well in the private sector but we disbelieve their validity in the public sector. This in spite of the fact that properly implemented pricing systems will promote the conservation of many government resources.

Ted Kolderie describes a similar phenomenon in the education reform movement. He points out that institutions work when they create the right incentives. Yet business leaders rarely focus on the incentives built into the education system. Instead they create "partnerships" and sponsor projects. "Business's involvement today is roughly the equivalent of doing your daughter's homework," Kolderie says. "It is a kindness, but a misdirected kindness." It consists of:

Donating computers. Giving science teachers summer training. Recognizing outstanding teachers. Motivating students to graduate by promising them a college education. Helping

pass a law extending the school year or toughening teachers' tests. It is hard to criticize such efforts. . . . [But] the test is always whether these efforts change the system. . . .

Business should be tougher. When approached for support, executives should ask the central question: "If these things are so important, why aren't they important enough for the system to do itself? Why are they done only when we finance them?"

If business were thinking strategically, it would be helping to see that the schools get opportunities and incentives to innovate on their own.

We have argued throughout this book that the key to reinventing government is changing the incentives that drive public institutions. This is simply another way of saying that the key is *changing the markets that operate within the public sector*. In education, this might mean moving to a competitive market in which customers have choices and key stakeholders (parents and teachers) have genuine control. In job training, it might mean injecting information about the quality of all training providers into the system, putting resources directly into customers' hands, providing them with accessible brokers, and empowering them to choose between competing providers. In unemployment insurance, it might mean creating a financial incentive for corporations to retrain employees rather than lay them off, or creating an incentive for those collecting unemployment to seek retraining—something that is still discouraged in many states.

The idea is to apply the same analysis one would to a private market: to ask, What's wrong with this market? What is missing? Demand? Information? Competition? What elements of the market need to be improved to make it work effectively? What other public systems have to change to make this possible? Budget systems? Personnel systems? Accounting systems? This is precisely the kind of thinking Philip Power and his colleagues in Michigan applied to job training, and Ted Kolderie and his colleagues in Minnesota applied to education.

Some would call this a systems approach. A few governments use such an approach. Those that embrace Total Quality Man-

agement, for instance, learn that 85 percent of the problems in a typical operation stem from the systems, only 15 percent from the people. But most public sector TQM projects focus on very minor systems, the ones that are easiest to change: the schedule for garbage truck drivers; the way the city's fleet is purchased. Changing these is important, but the real challenge is whether TQM can address the big systems: budget, personnel, and accounting, or education, job training, and unemployment insurance. Tom Mosgaller, Madison's TQM coordinator, believes TQM will run its course if it deals only with the micro systems. "It's valuable that you improve queuing [of garbage trucks] and back injuries," he says, "but it doesn't transform the culture. If you don't move it up into those fundamental infrastructures, after a while the unions and the employees will say, 'Come on guys, cut the crap.'"

BALANCING MARKETS AND COMMUNITY

Much of what we have discussed in this book could be summed up under the rubric of market-oriented government: not only systems change, but competition, customer choice, accountability for results, and of course public enterprise. But market mechanisms are only half the equation. Markets are impersonal. Markets are unforgiving. Even the most carefully structured markets tend to create inequitable outcomes. That is why we have also stressed the other half of the equation: the empowerment of communities. To complement the efficiency and effectiveness of market mechanisms, we need the warmth and caring of families and neighborhoods and communities. As entrepreneurial governments move away from administrative bureaucracies, they need to embrace both markets *and* community.

In Washington, this would be called moving right and left at the same time. The political media are quick to label "conservative" those who embrace markets and "liberal" those who empower communities. But these ideas have little to do with traditional notions of liberalism or conservatism. They do not

address the goals of government; they address its methods. They can be used to implement any agenda. They can help a community or nation wage war on poverty, if that is its priority, or lower taxes and cut spending, if that is its priority. *Reinventing Government* addresses *how* governments work, not *what* governments do. And regardless of what we want them to do, don't we deserve governments that *work* again?

-11-

Putting It All Together

{From 1875 through the 1930s social} innovation took the form of creating new public-service institutions. . . . The next twenty or thirty years will be very different. The need for social innovation may be even greater, but it will very largely have to be social innovation within the existing public-service institution. To build entrepreneurial management into the existing public-service institution may thus be the foremost political task of this generation.

—Peter Drucker, *Innovation and Entrepreneurship*

Our map is complete. It is now yours to use. We hope that you find it a helpful guide in the process of changing *your* governments. Used almost as a checklist, the ten principles offer a powerful conceptual tool. One can run any public organization or system—or any of society's problems—through the list, and the process will suggest a radically different approach from that which government would traditionally take. This is the checklist's ultimate value: the power to unleash new ways of thinking—and acting.

To illustrate, let us offer a simple exercise. What would happen if we took three of the most intractable problems American society faces and ran them through the list? What would our health care, education, and criminal justice systems look like, organized according to the ten principles of entrepreneurial governance? We provide this exercise not to propose definitive solutions to these problems, for we are not experts in education, health care, or criminal justice. We simply intend to demonstrate the power of the ten principles when used as an analytic tool.

Market-Oriented Government: Leveraging Change Through the Market

Instead of operating as mass suppliers of particular goods or services, . . . public agencies are functioning more as facilitators and brokers and seed capitalists in existing or incipient marketplaces. As the past decade has taught many of the leading private corporations, this more entrepreneurial role cannot be performed well by traditional command-style bureaucracies.

—The Corporation for Enterprise Development

If you had set out to buy a home in 1930, you would have saved up 50 percent of the purchase price for a down payment and applied at your local bank for a five-year mortgage. That was how people bought houses in 1930, because that was how banks did business. During the New Deal, Franklin Roosevelt's Federal Housing Administration (FHA) pioneered a new form of mortgage, which required only 20 percent down and let the borrower repay over 30 years. Other government corporations created a secondary market so banks could resell these new loans. And the banking industry converted. Today we take our 30-year, 20 percent down payment mortgages for granted, because the federal government changed the marketplace. Ask yourself: would we be better off if FDR had created half a dozen low- and moderate-income housing programs?

In pioneering a new form of mortgage, the FHA was practicing a form of decentralization. But it was different from the decentralization we discussed in chapter 9; in fact, it might be more accurate to call it *uncentralization*. The FHA strategy let millions of individuals and banks make their own decisions, without commands from above or funding from government. Yet it accomplished a goal set by government.

What the FHA did, in essence, was structure the marketplace to fulfill a public purpose. This is a powerful and economical way for governments to accomplish their goals. By finding the incentives that can leverage millions of decisions, government can often accomplish far more than it can by funding administrative programs.

Think of the way some states have handled litter from bottles and cans. Rather than creating elaborate and expensive recycling programs, they have simply required buyers to pay a five-cent deposit on each bottle or can—to be returned when the bottle or can is returned. Anyone who lives in a state with a "bottle bill" can see the dramatic difference it makes: less broken glass in the parks, less litter on the streets, less garbage in the landfills. Those who don't live in bottle-bill states can read the studies documenting the effects: half a million fewer beverage containers on the streets of New York City every day; a 4 percent drop in landfill tonnage throughout New York State; broken glass prevalent in only 16 percent of Boston's parks.

American governments have always used market mechanisms to achieve their goals to one degree or another. We have long used tax incentives to influence individual and corporate spending. We have long used zoning to shape the growth of our communities. We have always set the rules of the marketplace—and often changed them when we wanted different outcomes.

But when confronted with a problem, most people in government instinctively reach for an administrative program. They believe their job is to "run things"—not to structure a marketplace. They share an unspoken assumption with a deputy mayor of Moscow described to us by E. S. Savas. An old guard Communist, he listened skeptically as Savas discussed the need for a



Selected News Clips and Editorials on the 25th Anniversary of the Federal Mine Safety and Health Act of 1969 and Yearend Stories About Mine Safety

Note: Copies of Assistant Secretary McAteer's December 30th interview with National Public Radio are available from MSHA's Public Affairs Office, 703-235-1452.

President praises mine safety act

WASHINGTON (AP) — The federal Coal Mine Health and Safety Act is a perfect example of how government and industry can cooperate to make the workplace safer, President Clinton said Thursday.

Hechler's role in mine law, 3A
Editorial, 4A

"The law has been an overwhelming success, saving thousands of lives and reminding us of the great achievements possible when the public and private sectors work together for the common good," Clinton said in an address marking the act's 25th anniversary.

"Miners who go to work today stand a much better chance of arriving home safely after a day's work than did their predecessors of 25 years ago,"

Secretary of Labor Robert B. Reich said.

The law was enacted Dec. 30, 1969, setting health and safety standards for underground mines and giving federal inspectors power to shut down unsafe mines and to conduct more checks.

J. Davitt McAteer, assistant labor secretary for the U.S. Mine Safety and Health Administration, said the law has proven to be the most effective workplace safety measure in the country's history.

The year before the act was passed, 311 coal miners died in work-related accidents, according to the administration. As of Thursday, the number of fatalities this year in the nation's coal mines was 43.

If that number sticks through year's end, it would be the lowest mine death toll on record. Coal

mining deaths have declined steadily since 1989, when 68 miners were killed.

Kentucky has posted 12 mining deaths so far this year, leading the nation for the second straight year, according to the administration. West Virginia has had nine.

McAteer noted that great strides have been made in curbing certain types of accidents that were responsible for large numbers of fatalities.

For instance, 901 miners were killed in explosions in the 24 years prior to the law. In the quarter century since the law's enactment, McAteer said explosions have claimed only 133 miners.

United Mine Workers President Richard Trumka said miners can literally see the differences the safety act brought.

"Prior to the '69 act, when you went into a coal mine, you actually couldn't see your feet because of the dust in the section," said Trumka, who was working in a Pennsylvania coal mine at the

time to help pay his tuition. "People were killed and maimed wholesale."

"This is progress that the entire mining industry can be proud of," said McAteer, who as a law student helped write a paper on the Farmington disaster and testified in congressional hearings on the act.

"And this collective effort must be employed in the future to even further reduce the debilitating injuries, illnesses and fatal accidents which still occur in mines," he said.

McAteer has scheduled a conference in March in Beckley, W.Va., to allow industry, government and labor to review past achievements and point out ways things can be further improved.

"If you remember, this mining industry entered this century as the most hazardous occupation in this country," he said. "We would like to see us leave this decade as the safest and healthiest occupation in this country."

KENTUCKY

B

Clinton hails success of mine-safety act

Associated Press

WASHINGTON — The federal Coal Mine Health and Safety Act is a perfect example of a successful joint effort by government and industry to make the workplace safer, President Clinton said yesterday.

"The law has been an overwhelming success, saving thousands of lives and reminding us of the great achievements possible when the public and private sectors work together for the common good," Clinton said in an address marking the act's 25th anniversary.

"Miners who go to work today stand a much better chance of arriving home safely after a day's work than did their predecessors of 25 years ago," Secretary of Labor Robert B. Reich said.

The act, signed into law Dec. 30, 1969, set health and safety standards for underground mines and gave

Law has cut deaths drastically

federal inspectors power to shut down unsafe mines and to conduct more checks. J. David McAteer, the assistant labor secretary for the U.S. Mine Safety and Health Administration, said it has proven to be the most effective workplace safety measure in the country's history.

The year before the act was passed, 311 coal miners died in work-related accidents, according to MSHA. As of yesterday, the number of fatalities in the nation's coal mines was 43 for the year.

If that number sticks through year's end, it would be the lowest mine-death toll on record. Coal mining deaths have been declining steadily since 1989, when 68 miners were killed.

Kentucky has had 12 mining deaths so far this year, leading the nation for the second straight year, according to MSHA. The state Department of Mines and Minerals, which uses different criteria for determining whether a death is mining-related, lists only 10 fatalities for 1994 so far.

Clinton said the national record is remarkable considering that coal production has nearly doubled during the period, from 553 million tons in 1968 to nearly 1 billion tons last year. Coal generates more than half of the nation's electricity.

"America's modern mining industry is a beacon of productivity and technological advancement for the entire world," Clinton said.

McAteer noted that great strides have been made in curbing certain types of accidents that were responsible for large numbers of fatalities.

For instance, 901 miners were killed in explosions in the 24 years before the law was enacted — including 78 in West Virginia's Farmington mine blast in 1968. In the quarter century since the law's enactment, explosions have killed 133 miners, McAteer said.

The number of miners killed in roof falls also has declined, he said. From 1947 to 1970, 5,035 miners were killed by collapsing mine roofs; from 1971 to the present, the number was 777.

McAteer also said the incidence of black lung disease from breathing coal dust underground has decreased by about two-thirds since the law took effect.

Richard Trumka, president of the United Mine Workers union, said

STATES WITH THE MOST DEATHS	
Number of coal-mining deaths for 1994 as of yesterday, as compiled by the U.S. Mine Safety and Health Administration. Each state's 1993 mine-death toll appears in parentheses.	
1. Kentucky — 12 (19)	
2. West Virginia — 9 (13)	
3. Pennsylvania — 7 (5), includes both bituminous and anthracite	
4. Virginia — 3 (1)	
5. Illinois — 2 (1); Utah — 2 (0)	
Indiana reported one mining fatality; it had no mining deaths in 1993.	

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"Prior to the '69 act, when you went into a coal mine you actually couldn't see your feet because of the dust in the section," said Trumka, who was working in a Pennsylvania coal mine at the time to help pay his tuition. "People were killed and maimed wholesale."

"This is progress that the entire mining industry can be proud of," said McAteer, who as a law student helped write a paper on the Farmington disaster and testified in congressional hearings on the act. "And this collective effort must be employed in the future to even further reduce the debilitating injuries, illnesses and fatal accidents..."

Flood protection in the western

Clinton hails federal coal safety act

By The Associated Press

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Please see SAFETY, Page 18A

SAFETY

From Page 1A

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Virginia has had three mining deaths in 1994, one in 1993.

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"America's modern mining industry is a beacon of productivity and technological advancement for the entire world," Clinton said. "The contributions of the dedicated men and women who work in our nation's mines help to power our homes and cities, build and maintain our roads and bridges, bolster scientific innovation and strengthen our economy."

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For instance, 901 miners were killed in explosions in the 24 years prior to the law — including 78 in West Virginia's Farmington mine blast in 1968. In the quarter century since the law's enactment, McAteer said explosions have claimed only 133 miners.

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Friday, December 30, 1994

Nation

Clinton praises coal safety act

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EDITORIALS

A task for Washington

1969 mine law is a government success story

The pictures from West Virginia over Thanksgiving weekend of 1968 were enough to spoil the appetite of a nation.

An explosion at the Consolidation Coal Co.'s Number 9 Mine in Farmington, W.Va., had exploded, trapping 78 of the 99 men who worked in the massive underground operation. As American families prepared turkey and dressing dinners, they watched West Virginia families wait to hear whether their brothers, sons and husbands were still alive.

They weren't. All 78 died at Farmington. The underground fires and explosions were so intense that their bodies were never recovered. The mine was sealed. Their place of work had also become their tomb.

Those who died at Farmington are remembered in West Virginia. Their memorial, however, was erected a year later in Washington D.C. A nation enraged at watching the slow death of a community called on Congress to make coal mining a safer occupation. Miners, a more insistent force, staged a series of wildcat strikes in West Virginia throughout 1969 to dem-

onstrate the need for a national mine safety law. Congress responded, and within the year passed the federal Coal Mine Health and Safety Act of 1969. The act was signed into law 25 years ago today.

It's fashionable these days to say that government is incapable of any good. The 1969 mine safety act puts the lie to that belief. The 78 men killed at Farmington were only a fraction of the carnage in

coal. In the same year as the Farmington Disaster, nearly 500 miners were killed on the job. And that number was just a portion of those who were killed over the decades digging the coal that would power this nation.

There was once a saying that every time you turn on a light switch, you get blood on your hands. During the years when miners would die by the hundreds — 361 at Monongah in West Virginia, 111 blown up at Centralia in Illinois, 128 killed at Littleton in Alabama — that saying bore the truth.

That changed after 1969. Since the safety act was passed, the rate of mining fatalities has dropped by two-thirds. This year 43 miners were killed. Moreover, fewer miners suffer from black lung (the killing pulmonary disease caused by breathing coal dust) because of the 1969 act.

America's coal mines are today safer and more productive than ever before. Kentucky coal miners go to work today knowing they will be protected. Companies, working with state and federal governments, have created not only safer workplaces, but mines that are as efficient as any in the world.

The 1969 act worked — for everyone. And the question for those who would dismantle all government programs is this: Would you return coal miners to the days before 1969, when hundreds of men died every year? Was it better when every time we flicked a light switch, our hands were covered in blood?

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25-year-old mine act has lowered death toll

43 deaths this year fewest on record

BY JOSEPH S. STROUD
HERALD-LEADER BUSINESS WRITER

Twenty-five years to the day after President Richard Nixon signed the Coal Mine Health and Safety Act into law, the nation stands on the verge of recording the lowest number of coal-mining fatalities on record.

As of yesterday afternoon, 43 people had been killed in U.S. coal mines this year. That compares with the previous record low of 47 set last year.

Kentucky has posted 12 mining deaths so far this year, leading the

nation for the second straight year, according to the U.S. Mine Safety and Health Administration. The state Department of Mines and Minerals, which uses different criteria for determining if a death is mining-related, lists 10 fatalities for 1994 so far.

President Clinton marked today's anniversary of the law's passage by proclaiming it "an overwhelming success, saving thousands of lives and reminding us of the great achievements possible when the public and private sectors work together for the common good."

Tony Oppegard, executive director of the Mine Safety Project in Lexington, said the law had indeed

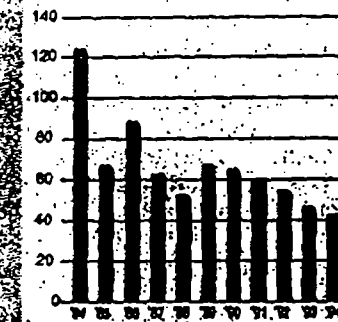
SEE MINE, A8

FATALITIES DECREASE AS PRODUCTION INCREASES

Coal mine deaths have been declining steadily since 1989. This year's death toll could be the lowest on record.

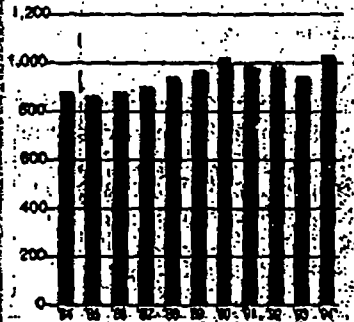
Deaths

Deaths in hundreds



Production

In millions of tons



SOURCE: U.S. MINE SAFETY AND HEALTH ADMINISTRATION

MELISSA NAY/HERALD-LEADER

MINE: Safety law has cut deaths to record low

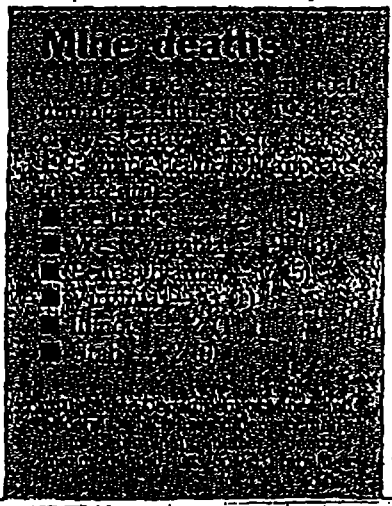
FROM PAGE ONE

led to "remarkable progress." But he also said there are areas "where the promise hasn't been fulfilled."

"Far too many miners in non-union mines are still working in unsafe conditions," Oppegard said, "and far too many miners are still contracting black lung due to excessive dust levels and inadequate ventilation."

Health, safety emphasized

The act, signed into law Dec. 30, 1969, set health and safety standards for underground mines, gave federal inspectors power to shut down unsafe mines and to conduct more checks and also included new rights for miners — including the right to refuse unsafe work.



Government officials, coal operators, and mine safety advocates disagree about some aspects of the law, with industry officials arguing that there is sometimes a problem with over-regulation. But there appears to be almost universal agreement that health and safety in the nation's coal mines have improved.

"One fatality is too many, but there's clearly a trend toward safer mines," said Bill Caylor, vice president of the Kentucky Coal Associa-

Secretary of Labor Robert B. Reich said the law's success can be seen in the numbers.

"Miners who go to work today stand a much better chance of arriving home safely after a day's work than did their predecessors of 25 years ago," he said.

J. Davitt McAteer, assistant secretary of labor for MSHA, said the law has proven to be the most effective workplace safety measure in U.S. history.

In each of the three years before the act was passed, an average of more than 250 miners a year were killed in the nation's coal mines. In the last three years, an average of fewer than 50 miners a year have died.

Black lung disagreement

Exposure to coal dust in mines, which causes pneumoconiosis, or black lung disease, has been reduced during the last 25 years by an average of 75 percent, according to MSHA. The incidence of black lung disease among miners has declined by more than two-thirds, the agency said.

Oppegard disputed those figures, saying that although fewer miners are receiving black lung benefits, the disease and the problem of coal dust in mines are far from eradicated. He called MSHA's dust sampling program "an abject failure."

Oppegard said that was all the more frustrating because black lung "is a disease that can be eliminated."

Under MSHA's system, mine operators take their own samples of coal dust in underground mines. Since 1991, dozens of companies and more than 100 individuals have pleaded guilty or been convicted of violating federal coal-

mine dust standards, accumulating more than \$2 million in fines.

Oppegard said that because many coal operators cannot be trusted to take their own samples, the program should not be left in operators' hands.

"The system has long needed an extensive overhaul, starting with the elimination of mine operators from the program," he said. "It should be run exclusively by MSHA."

Richard Trumka, president of the United Mine Workers union, said enough has changed so that miners can literally see the differences the safety act brought about.

"Prior to the '69 act, when you went into a coal mine you actually couldn't see your feet because of the dust in the section," said Trumka, who was working in a Pennsylvania coal mine at the time. "People were killed and maimed wholesale."

Caylor, of the Kentucky Coal Association, said better mining techniques and new equipment had a lot to do with improved health and safety. As an example, he cited the use of continuous mining machines, which allow a single miner to remove coal from the mine face rather than having several miners in the area.

"A lot of the equipments that are in use today are inherently safer than those used in the past," Caylor said.

Mine safety

Law has saved lives

DAVITT McAteer, head of the federal Mine Safety and Health Administration, is celebrating the 25th anniversary today of the law that created his agency and saved hundreds of coal miners' lives.

Meanwhile, congressional Republicans are drooling over the possibility of dismantling the safety regulations this law has spawned.

Before the Coal Mine Health and Safety Act was passed on Dec. 30, 1969, miners were killed and disabled at an alarming rate. In the 25 years before the act took effect, more than 5,000 miners were crushed by roof falls. Since the act was passed, 777 miners have been killed by roof falls.

Nearly 1,000 miners were killed in explosions in the 24 years before the act was passed. Since it was passed, explosions have killed 133.

While part of the decline in accidents and deaths can be attributed to the nationwide drop in mine employment, the accident rate per worker hour has dropped by more than half.

The incidence of black lung disease is also down, thanks to federal regulations that have lowered coal dust levels in mines.

Obviously, the Coal Mine Health and Safety Act has been a success. It took the outrage of the nation's coal miners, fueled by the death of 78 miners at Consolidation Coal Co.'s Farmington No. 9 mine in 1968, to pass this law over the objections of both the coal industry and union leadership.

Now, 25 years later, United Mine Workers President Richard Trumka fears a new assault on the legislation. The Republican Congress has already asked President Clinton to stop issuing any new regulations, and the coal industry sees its emancipation from the

The voters may have been asking for less government on Nov. 8, but we're certain that they were not asking for workers to be sacrificed.

bonds of safety enforcement.

"The message is that less government is better government," said Andrea Innes, vice president for political affairs of the National Coal Association.

The voters may have been asking for less government on Nov. 8, but we're quite certain that they were not asking for workers to be sacrificed on the altar of profits.

It's clear what less government did for miners prior to 1969. Before the Coal Mine Health and Safety Act passed, mine safety regulations were purely voluntary — and mostly ignored.

Dangerous levels of coal dust were common, causing hundreds of fatal explosions and respiratory problems for hundreds of thousands of miners. Roof falls were also distressingly common.

The act changed all that, by creating MSHA and giving it the teeth to enforce and propose regulations to protect the lives and health of the nation's miners.

Even so, some companies have tried to get around the regulations. Nearly 100 mine operators have been convicted for tampering with coal dust samples, for example.

The industry has clearly proven that it will put profit ahead of safety if given a chance. Republicans like to pretend that regulations have no value other than providing employment for bureaucrats. Thousands of miners who are alive today thanks to mine safety regulations would argue differently.

EDITORIALS

Ripping regulation

THE cost and complexity of federal regulation are easy targets for politicians of all political persuasions. Nothing brings a crowd of business folks to its feet faster than a promise to stomp on meddling bureaucrats.

For all the alarmist rhetoric on both sides of the debate, Washington and to a lesser degree state and local governments remain the first line of defense against threats to public health and safety, environmental degradation and predatory business practices.

President Reagan talked a good game, but his attempts at deregulation mostly backfired, bringing him more embarrassment than public gratitude. Dan Quayle and his "competitiveness council" pecked around the edges.

Crowd-pleasing oratory is soon to be replaced by ideological zealotry, however, and citizens should understand what's at stake.

Judging from a bill that will turn up in Congress early next year, the bumptious Republicans brought to power in November have no interest in attacking the regulatory establishment along its margins. They want to squash the whole system.

Under the new approach, proposed rules would be subject to all manner of "expert" cost and techni-

cal analysis, followed by inevitable court challenges, even before the public knows they're in the works. Not many are likely to survive, which is of course the purpose.

But that's child's play compared to the other part of the proposal — a regulatory "budget" that would attempt to put an upper limit on the cost of complying with all federal regulation.

The goal is not just to contain the cost, but to push the ceiling steadily down until, well, there's not much left.

Anyone tempted to cheer the prospect of "relief" should re-

...some
Republicans want
to throw out the
good with the bad
— and the public
safety be damned."

member this:

Among the regulations at risk are those that limit air pollution, even in the heat of an Ohio Valley summer; prevent needless deaths in coal mine accidents; make highway travel ever safer; protect consumers from countless ripoffs.

These and other regulatory goals are not built into our free market system, whatever its other virtues. If government doesn't insist on them, they'll fall by the wayside.

Yes, regulation often needs to be streamlined and made more cost effective. But some Republicans want to throw out the good with the bad — and the public safety be damned. Clearly it's more important for Congress to thwart Speaker Gingrich and his gang than a few overreaching civil servants.

Southern Illinoisan

MINE safety too important to compromise

Our Opinion

One of the primary reasons for improved safety in the mines has been the Federal Coal Mine Health and Safety Act of 1969.

The death of coal miner Randall Bowling is a tragic reminder of the dangers that persist in his line of work, despite efforts made over the years to improve safety conditions for miners.

Bowling, 37, died after a section of mine roof fell on him at the Arch of Illinois Conant mine near Percy. As a result of Bowling's death, the Illinois Department of Mines and Minerals is requiring the installation of two rows of permanent support roof bolts "rib-to-rib" on either side of the entries to intersections inside the mine.

Bowling's death was the second in Illinois' mines this year. The nature of coal mining makes a certain amount of danger an unavoidable part of the job. Still, great progress has been made in reducing the risks. One of the primary reasons for improved safety in the mines has been the Federal Coal Mine Health and Safety Act of 1969.

The ponderous-sounding title of the law makes it sound like another one of those federal initiatives that conservatives like to claim serves no purpose other than to torment always-heroic businessmen and kill off the jobs they would otherwise create if left to their own devices.

The law isn't perfect, but sharp decreases in the number of mining injuries and deaths since its inception indicate it has prevented many tragedies.

The number of coal miners killed on the job has dropped from 260 in 1970 to 43 in 1994. In the 24 years before the Coal Act, coal mine explosions killed 901 miners, compared to 133 since the law's enactment.

The most dramatic decrease has been in the number of miners crushed by falling rock. From 1947 to 1970, 5,035 miners were killed by accidents like the one in which Bowling died. From 1971 to 1994, 777 miners died in roof fall accidents. The prevalence of coal workers pneumoconiosis, otherwise known as black lung disease, declined by more than two-thirds among miners.

Not all of the safety improvements can be attributed to federal legislation. Joe Angleton, president of UMW Illinois District 12, points out that there are many fewer miners today than 25 years ago. He notes that 40 percent of America's coal is now extracted by 8 percent of all miners in the Western states where the deposits can be removed much more safely than in Eastern mines.

Corruption has tainted federal mine inspections in recent years with a number of inspectors indicted for taking bribes. Still, Angleton and other union leaders are optimistic that J. Davitt McAteer, Assistant Secretary for Mine Safety and Health in the Department of Labor, is serious about cleaning up the agency's mine inspections.

There will be much talk in Congress in the coming months about getting the federal government out of everyone's life. A variety of federal regulations are likely to be come under close scrutiny. Bowling's death and the conditions in many mines before the Coal Act of 1969 show that mine safety is one area that should not be compromised. One person's liberation from government can be another one's indifference and neglect.

Origins of mine safety act recalled

THE ASSOCIATED PRESS

Secretary of State Ken Hechler played a key role in the federal Coal Mine Health and Safety Act, which was signed into law 25 years ago today.

The law, signed Dec. 30, 1969, set health and safety standards for underground mines and gave federal inspectors power to shut down unsafe mines and to conduct more checks.

Hechler, then a member of the U.S. House of Representatives, was responsible for 10 amendments that strengthened the bill, including a ceiling on the amount of coal dust allowed in mines and compensation for miners with pneumoconiosis, or black lung.

The United Mine Workers opposed the black lung measures because union leaders thought they would kill the bill, Hechler said.

"I said now is the time to strike while the iron is hot," Hechler said Thursday.

No one else in West Virginia's congressional delegation backed Hechler's amendments.

To lobby for the amendments, Hechler brought to Washington, at his own expense, coal miners suffering from black lung and widows of some of the 78 miners killed in a mine explosion in 1968 in Farmington, Marion County.

"They made a tremendous impact testifying before House and Senate committees on the need to strengthen the safety provisions," Hechler said.

"No congressman could afford not to speak to one of those widows."

After the House passed the bill, Gerald Ford, then House Republican leader, made a motion to put the bill back in committee to remove the black lung provisions, but his motion was defeated.

Ford then urged President Nixon to veto the bill, Hechler said.

As Christmas approached,

Hechler began working furiously to avoid a veto.

He sent out press releases and gave speeches saying that deleting the black lung provisions "would be like putting razor blades in every side of every coal miner in this nation."

"I implied there would have been a national coal strike," Hechler said.

Hechler called eight Farmington widows back to Washington and urged Nixon to let them watch him sign the bill. Nixon apparently considered Hechler's suggestion because when they toured the White House, they saw eight pens lined up on Nixon's desk in the Oval Office, Hechler said.

They never met Nixon, however. He left for San Clemente, Calif., and signed the bill on the plane, Hechler said.

"It was a tremendous victory. It never would have happened without miners and widows going to Washington," Hechler said.

Sunday Section

Gazette-Mail

December 25, 1994

State mine fatalities at 5-year low

By Ken Ward Jr.

SUNDAY GAZETTE-MAIL

As the 25th anniversary of the federal Coal Mine Health and Safety Act nears, West Virginia is approaching a five-year low in the number of mining fatalities.

Through Friday, nine West Virginia coal miners had been killed on the job in 1994.

That is down from 13 in 1993 and half the 18 miners who died in the mines in 1992. Twenty-two West Virginia miners died in 1991, the most in any year since 1982, when 22 also died.

Thirteen miners died in the state in 1990 and eight in 1989, according to records from the U.S. Mine Safety and Health Administration.

MSHA Chief Davitt McAteer said Friday that when he was sworn in last March, he pledged to work toward the day when no miners are killed.

McAteer has focused on figuring out what causes most accidents, and educating and regulating the industry to eliminate those causes.

Most recently, MSHA has worked to find the causes and possible solutions to strip mine truck accidents — in which huge dump trucks crush miners or smaller pickup trucks — that have caused 20 percent of the nation's recent fatalities.

"I think we're making baby steps," McAteer said from his home in Shepherdstown.

"But that's little solace, especially at this time of year, to people who have lost loved ones in mining accidents," McAteer said. "We've really come a long way, but we need to go farther."

Nationally, the number of miners killed is also dropping, according to recent MSHA statistics.

Through Friday, 43 coal miners had died on the job in 1994. That is down from 47 the previous year, 55 in 1992 and 61 in 1991, according to MSHA records.

MSHA officials last week were preparing for the 25th anniversary of Dec. 30, 1969, when the federal mine safety act was signed into law.

The act was approved by Congress only after miners protested following the death of 78 miners at Consolidation Coal Co.'s Farmington No. 9 mine in Marion County in November 1968.

Under the law, strip mines were to be inspected at least two times a year and underground mines at least four times annually.

MINE

• Continued From Page 1C

Mine inspectors were authorized to shut down operations posing life-threatening risks to miners and require prompt correction of safety and health violations.

Since the law took effect, the working conditions of miners have improved dramatically at the same time that the industry has set new production records annually.

In 1968 alone, 92 miners died in methane explosions and fires and another 99 in roof falls. In 1970, 260 miners were killed on the job, compared to the 43 to date this year.

At the same time, coal production climbed from 610 million tons in 1970 to a projected 1 billion tons in 1994.

In the 24 years before the safety act was approved, 901 miners died in coal mine explosions. In the 24 years since, 133 miners were killed by such blasts.

From 1947 to 1970, more than 5,000 miners were crushed by roof collapses. From 1971 to 1994, 777 miners lost their lives in roof fall accidents.

"This stands out as a dramatic success story not only of effective federal regulation, but also of a constructive alliance of industry, labor and government working toward a shared goal," McAteer said last week in a letter to coal-field newspaper editors.

Charleston, WV

See MINE Page 2C•

Coal-Mine Deaths Fall to New Low

But 2 Utahns Are Among Nation's 1994 Casualties

By Mike Gorrell
THE SALT LAKE TRIBUNE

American coal-mining accidents have claimed fewer lives in 1994 than in any previous year, but that provides little solace to the families of Robert Scott and Boyd Jolley. These two Utahns were among 43 people killed in coal mines nationwide this year, four less than the previous low set in 1993.

Kentucky had the most fatal accidents, 12, while West Virginia had 9. Among Western states, Wyoming, Arizona and New Mexico each had one coal-mining fatality while Colorado had none.

Federal-government officials, including President Bill Clinton, credited the passage 25 years ago today of the Coal Mine Health and Safety Act as being a major impetus for lowering the death toll from 1968's total of 311.

"The law has been an overwhelming success, saving thousands of lives and reminding us of the great achievements possible when the public and private sectors work

together for the common good," the president said.

Added Secretary of Labor Robert Reich: "Miners who go to work today stand a much better chance of arriving home safely after a day's work than did their predecessors 25 years ago."

Mike Dalpiaz, president of the United Mine Workers of America district that includes Utah, agrees to a certain extent.

"They brag about the number being the lowest ever, but the number of coal miners is the lowest ever because of all of the new high-technology mining equipment," he said. "I wouldn't personally be waving flags with 43 deaths. I would hope they would strive for better."

Dalpiaz also is concerned the Republican takeover of Congress could reverse the trend. "Congress is talking about more cuts in MSHA [the federal Mine Safety and Health Administration]. We'll have our hands full holding onto what we've got."

MSHA Director J. Davitt McAteer noted that more than 250 miners were killed annually in the three years before the 1969 Act was passed. The past three years, by contrast, the annual average has been under 50.

But he has expressed concern this year about the number of accidents involving roof-bolting machines that shore

up tunnel roofs in underground coal mines.

Scott died in one of those accidents. On Feb. 15, he inserted a steel bolt into a tunnel wall at Cyprus Plac Mining Corp.'s Star Point No. 2 mine in Carbon County when he was crushed between parts of the machine MSHA probe determined.

"Roof falls," the industry term for coal that breaks from tunnel roofs or walls, continues to be the main cause of underground mining fatalities. Twenty of this year's deaths resulted from roof falls, including Jolley's.

On April 20, Jolley was loading a large reel of cable on a trailer in the Southern Utah Fuel Co.'s mine in Sevier County. A large chunk of coal pinned him against a piece of diesel equipment, MSHA investigators said.

McAteer said MSHA's goal is to eliminate all fatalities in the industry, whose production has risen from 610 million tons annually in 1969 to nearly 1 billion tons this year.

The agency also is continuing its efforts to reduce miners' exposure to breathable coal dust, the cause of black lung disease. Exposure levels have been reduced by 75 percent since the law was enacted "and the prevalence of black lung among miners has declined by more than two-thirds," he added.

The 1969 law increased the frequency of mine inspections and gave federal inspectors greater authority, including the right to shut down mines where they found conditions that threatened miners' lives. Workplace protections were extended to noncoal miners when the act was amended in 1977.

EDITORIAL

Safety progress gradual in mines

We lukewarmly receive news that mining deaths dropped in West Virginia in 1994.

Don't misunderstand — it's great that the state had more coal miners working safely than in any year since 1989.

But nine miners died.

That's nine fewer place settings around holiday tables. Nine people who won't see 1994 turn into 1995.

It's like the Red Cross' saying: There's no such thing as a small disaster. Each tragedy has a profound impact on human lives.

That applies here. There's no such thing as a small loss of life.

For the record, 13 state miners died in 1993, 18 in 1992, 22 in 1991, 13 again in 1990 and only eight in 1989.

That's remarkable improvement compared to the days before the federal Coal Mine Health and Safety act went on the books in 1969, days when deaths from roof falls and explosions routinely climbed into the hundreds every year, when Black Lung deaths were three times more frequent than they are now.

There's no such thing as a small disaster. Each tragedy has a profound impact on human lives.

The law's 25th anniversary is Dec. 30, and the U.S. Department of Labor is hailing its record.

Truly, it's an example of something good rising from the rubble of death and despair in our area — the mine explosion at Farmington No. 9 on Nov. 20, 1968.

Ninety-nine men were trapped underground. Twenty-one of them lived. The impact of those deaths shook the nation. Congress, a year later, finished its Coal Act.

It strengthened safety standards. It also required underground mine inspections four times a year and strip mine inspections at least twice a year.

In fact, miners were given the right to request a federal inspection. If there was a risky situation at a mine, inspectors were authorized to shut it down.

These weren't easy rules for the industry. Some companies resented interference. But it's hard for them to argue.

The Department of Labor says that in the 24 years before the Coal Act, 5,936 miners died in explosions and roof falls. In the 24 years since, 900 have died.

Strangely enough, one of the biggest hazards in the industry is smoking. The health risk isn't from cancer or emphysema, but from the actual process of lighting up — sparks can ignite explosions, especially in winter when the coal dust is dry and barometric pressure rises.

That phenomenon killed eight miners in a Virginia coal mine in 1992.

In addition, Mine Safety and Health Assistant Secretary J. Davitt McAteer, a Fairmont native, says there's room for improvement regarding mine certification standards. For example, he says he's been certified for years to perform methane detector tests, but he can't remember how.

A proposed rule would force miners like McAteer to be re-certified and re-educated. That, along with anti-smoking sweeps, is a starting point to make mines safer in 1995.

AP - Morgantown, WVA Dominion Post 12-26-94

State mine fatalities lowest since '89

Associated Press

CHARLESTON — With the New Year approaching, West Virginia is reporting a five-year low in mining fatalities.

Nine state coal miners have died on the job this year, down from 13 in 1993 and 18 in 1992, according to the U.S. Mine Safety and Health Administration.

Twenty-two state miners died in 1991, 13 in 1990 and eight in 1989, the administration said.

"We've really come a long way, but we need to go farther," MSHA

chief Davitt McAteer said.

McAteer has set a goal of reaching the point when no miners are killed on the job. He has focused on investigating the causes of accidents and teaching the industry to address those causes.

MSHA has studied recently the causes of strip mine truck accidents that have caused 20 percent of the country's recent fatalities.

"I think we're making baby steps," he said. "But that's little solace, especially at this time of year, to people who have lost loved ones in mining accidents."

Nationwide, 43 coal miners had died on the job as of Friday. That compares to 47 in 1993, 55 in 1992 and 61 in 1991, according to the administration.

MSHA marks the 25th anniversary of the federal Coal Mine Health and Safety Act this week. The law requires strip mines to be inspected at least twice a year and underground mines at least four times a year.

It also authorizes mine inspectors to shut down dangerous operations and requires prompt correction of safety violations.

Federal records show in the 24 years before the act, 901 miners died in coal mine explosions. In the 24 years since, 133 miners died in such blasts.

Roof collapses killed more than 5,000 miners from 1947-70. From 1971-94, 777 miners were killed by roof collapses, MSHA said.

"This stands out as a dramatic success story not only of effective federal regulation, but also of a constructive alliance of industry, labor and government working toward a shared goal," McAteer wrote recently.

12/26/94
Don. Post

Morgantown Post-Post 12-27-94

MW president fears incoming Congress may slight safety

YEARENDER '94

HUNTINGTON (AP) — United Mine Workers President Richard Trumka is worried the new Republican Congress will set back workers' safety a quarter-century. The coal industry, however, is optimistic Republicans will better control the industry's overseers.

"Prior to 1969, all health and safety regulations were essentially voluntary," Trumka said. "As a result, people were killed, injured and crippled on a wholesale basis.

"Voluntary regulations have never worked and will never work. It won't work in any indus-

try, let alone the mining industry," he said in a recent interview.

Since the turn of the century, more than 100,000 U.S. coal miners have died on the job, about 500,000 have been totally and permanently disabled on the job, and about 500,000 have suffered from black lung disease, Trumka said.

But it wasn't until miners got angry that the federal Coal Mine Health and Safety Act was adopt-

ed on Dec. 30, 1969, after a year of unprecedented turmoil in the coal industry.

The rumblings began after an explosion killed 78 miners at Consolidation Coal Co.'s Farmington No. 9 mine in West Virginia on Nov. 20, 1968. The industry, union leaders and government officials treated it as just the latest in a long string of unavoidable tragedies.

But the miners disagreed.

"These men knew that this did not have to be," Trumka said.

Throughout 1969, rank-and-file

miners demanding safer workplaces defied both the government and their union, staging mass demonstrations and wildcat strikes. At one point, nearly the entire industry was shut down for three weeks.

The law created the first occupational safety act with mandatory standards and inspectors to enforce them.

The federal Mine Safety and Health Administration had "a profound effect," Trumka said. "The safety record began to improve dramatically."

Now Trumka is concerned about the first Republican Congress in 40 years. House Speaker-elect Newt Gingrich, R-Ga., and incoming Senate Majority Leader Robert Dole, R-Kan., asked President Clinton to impose a moratorium on new regulations at least through the first 100 days of new Congress.

Gingrich and Dole contend federal regulations are strangling businesses.

Under Clinton, Trumka s-

SEE SAFETY

SAFETY

FROM PAGE 6-A

the Mine Safety and Health Administration has made progress toward solving some longtime problems.

"We hope they don't slow down the speed with which (the agency) can correct some of the problems that still haven't been solved," Trumka said.

But, in the coal industry, the new Congress has inspired optimism.

"It's probably safe to bet that the chances of striker replacement legislation seeing the light of day rank somewhere around those of a snowball in purgatory," said Andrea Innes, the National Coal Association's vice president for political affairs.

"The message is that less government is better government," Innes said in a weekly industry news letter.

But the details of the Republican agenda likely will remain obscure until the Republicans finish Congressional committee assignments, including the appointment of subcommittee chairmen, said National Coal Association spokesman John Grasser.

"Until then, we're not going to have a good handle on where Congress is going to be going," he said.

Meanwhile, lots of trial balloons are being floated, like one proposed by Rep. Tom DeLay, R-Texas, who has suggested repealing the Clean Air Act. That law regulates emissions from coal-fired utilities, among other sources of pollution, and has been a frequent target of criticism from the coal industry.

"Is this realistic? Is this just idle talk, or will it really occur?" Grasser asked. "We have to find out just how serious they will be on these issues.

"Two years is a relatively short time," Grasser said. "It will

go by very quickly, and they already have a whole host of issues on their plate."

Davitt McAteer, a Clinton appointee who heads the Mine Safety and Health Administration, said he hopes to convince the new Congress that "not all government is bad."

"Some industries need regulation," McAteer said. "We have a law now and over a period of time it has begun to work. We hope that Congress will see that this is an agency where something actually gets done.

"Even industry leaders say this law has had a positive impact," McAteer said.

Evidence that voluntary controls don't work can be found in mining other than coal, McAteer said.

Although the 1969 law gave government enforcement powers in the coal industry, safety standards remained voluntary for other mines, such as silver, gold, uranium, salt, bauxite, and other metals and ores.

Deaths in the coal mines were slowly declining. But on May 2, 1972, the Sunshine silver mine in Kellogg, Idaho, exploded and killed 91 miners. Later, so-called "metal and non-metal" mines were brought under the act.

"Until then, the standards were voluntary and there was no enforcement," McAteer said.

"Voluntary systems, both in this country and abroad, have turned out to be not terribly effective, especially in industries where conditions are harsh and great risks are present," McAteer said. "That's why we've gone to these systems."

McAteer plans to mark the 25th anniversary of the safety law, which took effect March 29, 1970, with a conference of the entire mining industry at the National Mine Health and Safety Academy in Beckley.

"We want to review what progress we've made and what still needs to be pursued," he said.

News

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PRESIDENT CLINTON NOTES MINE SAFETY ACHIEVEMENTS UNDER 1969 ACT

President Bill Clinton today issued a message to Americans noting that December 30, 1994, marks the 25th anniversary of the date that the federal Coal Mine Health and Safety Act of 1969 was signed into law. The landmark legislation provided American miners with the most comprehensive and effective workplace protection in U.S. history, according to the Labor Department's Mine Safety and Health Administration (MSHA).

"Twenty-five years ago this week, the federal Coal Mine Health and Safety Act was signed into law, bringing together the mining industry and the government in a joint effort to reduce miner injury, illness, and death," the President said. "The law has been an overwhelming success, saving thousands of lives and reminding us of the great achievements possible when the public and private sectors work together for the common good."

Secretary of Labor Robert B. Reich added, "The mining industry has made dramatic improvements in safety and health protection for all miners since the Act was signed into law. Miners who go to work today stand a much better chance of arriving home safely after a day's work than did their predecessors of 25 years ago."

Since 1968, the year before the Act was passed, there has been a considerable decline in the number of mining deaths reported each year. In 1968, 311 coal miners died in mining accidents at the workplace, including the 78 West Virginia coal miners who died in the Farmington mine explosion. By contrast, 43 coal miners have died in 1994, a total that would be the lowest annual number of coal mining deaths ever recorded.

"Much of the credit for the success of this law goes to American miners and their families who have paid the ultimate price for improved mine safety and health in this country," said J. Davitt McAteer, assistant secretary of labor for mine safety and health.

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"Today's miners have evolved from the pick and shovel users of the early 20th century into highly skilled operators of sophisticated machinery producing record amounts of coal. Yet, safety has always been, and remains today, a high priority."

Statistics show the impact that the 1969 law has had on the mining industry. More than 250 workers on average died annually in coal mining accidents during the three-year period prior to passage of the 1969 legislation. In the last three years, the average number of annual coal mining deaths has totalled fewer than 50.

In the 24 years prior to enacting the 1969 law, 901 miners were killed in coal mine explosions. By comparison, in the 24 years since the legislation was passed, 133 miners died in mine blasts. From 1947 to 1970, 5,035 miners were killed in roof fall accidents in underground coal mines. From 1971 to 1994, 777 miners lost their lives in roof fall accidents. (See attached charts.)

During the same period, coal production rose from 610 million tons 24 years ago to a projected one billion tons in 1994. One of our nation's most important natural resources, coal currently supplies more than half of the country's electric power, according to U.S. Department of Energy statistics.

Exposure to respirable dust in coal mines, the cause of black lung disease, has also been reduced during the last 25 years by an average of 75 percent and the prevalence of black lung disease among miners has declined by more than two-thirds.

"This is progress that the entire mining industry can be proud of," added McAteer. "It would never have been possible, however, without protection afforded by the 1969 Act and the technological innovations that resulted from the requirements of the law."

The Coal Mine Health and Safety Act of 1969 increased the frequency of mine inspections and gave federal mine inspectors more authority. The law required that surface coal mines were to be inspected at least two times annually, and underground mines a minimum of four times every year. The law gave federal mine inspectors the authority to shut down mines in which conditions posed life-threatening hazards for workers, and required prompt correction of cited safety and health hazards.

The 1969 law also strengthened safety standards for all coal mines and established new health standards for the first time. New safety standards were set to prevent the fall or collapse of mine roof and explosions of methane gas and coal dust. Miners' exposure to coal mine dust was strictly curtailed. The law also gave miners the right to request a federal inspection.

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The federal Mine Safety and Health Act of 1977 amended the 1969 Act to extend workplace protections to non-coal miners and transferred federal mine inspection authority from the U.S. Department of the Interior to the Department of Labor.

"America's modern mining industry is a beacon of productivity and technological advancement for the entire world," continued President Clinton. "The contributions of the dedicated men and women who work in our nation's mines help to power our homes and cities, build and maintain our roads and bridges, bolster scientific innovation and strengthen our economy. These hard-working Americans have earned our respect and gratitude, and we must continue to ensure that their dangerous jobs are made as safe as possible."

"Mine operators, miner unions, and the federal government have played essential roles in mine safety and health achievements under the Mine Act," said McAteer. "And this collective effort must be employed in the future to even further reduce the debilitating injuries, illnesses, and fatal accidents which still occur in the mines."

A copy of the complete text of President Clinton's message is available from the source listed at the top of this press statement.

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Coal Mining Fatalities, Production, and Employment, 1968-1994

<u>Year</u>	<u>Deaths</u>	<u>Millions of Tons Produced</u>	<u>Employment</u>
1968	311	553	134,000
1969	203	569	133,000
1970	260	610	144,000
1971	181	563	142,000
1972	156	535	162,000
1973	132	558	147,000
1974	133	566	177,000
1975	155	611	218,000
1976	141	647	215,000
1977	139	671	230,000
1978	106	632	246,000
1979	144	742	250,000
1980	133	798	242,000
1981	153	788	239,000
1982	122	812	230,000

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Coal Mining Fatalities, Production, and Employment, 1968-1994 (continued)

<u>Year</u>	<u>Deaths</u>	<u>Millions of Tons Produced</u>	<u>Employment</u>
1983	70	762	189,000
1984	125	884	198,000
1985	68	863	187,000
1986	89	880	176,000
1987	63	904	164,000
1988	53	944	157,000
1989	68	972	155,000
1990	66	1,019	160,000
1991	61	988	150,000
1992	55	989	144,000
1993	47	943	133,000
1994	43**	N/A	N/A

** As of Dec. 28, 1994.

N/A Figures not yet available.

Coal Mining Roof Fall Fatalities, 1947-1994

<u>Year</u>	<u>Deaths</u>	<u>Year</u>	<u>Deaths</u>
1947	510	1971	61
1948	508	1972	51
1949	311	1973	45
1950	348	1974	49
1951	327	1975	53
1952	264	1976	38
1953	263	1977	37
1954	204	1978	33
1955	217	1979	66
1956	239	1980	32
1957	228	1981	41
1958	176	1982	52
1959	153	1983	23
1960	163	1984	34
1961	144	1985	18
1962	113	1986	28
1963	136	1987	19
1964	123	1988	8
1965	131	1989	19
1966	115	1990	20
1967	101	1991	20

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Coal Mining Roof Fall Fatalities, 1947-1994 (continued)

<u>Year</u>	<u>Deaths</u>	<u>Year</u>	<u>Deaths</u>
1968	99	1992	10
1969	78	1993	12
1970	84	1994	8**
Totals	5,035		777

** As of Dec. 28, 1994.

Coal Mine Methane and Dust Explosion Fatalities, 1947-1994

<u>Year</u>	<u>Deaths</u>	<u>Year</u>	<u>Deaths</u>
1947	189	1971	0
1948	47	1972	5
1949	6	1973	2
1950	8	1974	0
1951	163	1975	0
1952	16	1976	23
1953	14	1977	5
1954	23	1978	1
1955	4	1979	0
1956	9	1980	5
1957	68	1981	37
1958	42	1982	7
1959	12	1983	8
1960	4	1984	3
1961	27	1985	3
1962	52	1986	1
1963	36	1987	3
1964	4	1988	0
1965	19	1989	10
1966	11	1990	1
1967	12	1991	3
1968	92	1992	12
1969	1	1993	1
1970	42	1994	3**
Totals	901		133

** As of Dec. 28, 1994.

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THE WHITE HOUSE

WASHINGTON

December 27, 1994

Greetings to everyone commemorating the twenty-fifth anniversary of the Coal Mine Health and Safety Act of 1969.

America's modern mining industry is a beacon of productivity and technological advancement for the entire world. The contributions of the dedicated men and women who work in our nation's mines help to power our homes and cities, build and maintain our roads and bridges, bolster scientific innovation, and strengthen our economy. These hard working Americans have earned our respect and gratitude, and we must continue to ensure that their dangerous jobs are made as safe as possible.

Twenty-five years ago this week, the Federal Coal Mine Health and Safety Act was signed into law, bringing together the mining industry and the government in a joint effort to reduce miner injury, illness, and death. The law has been an overwhelming success, saving thousands of lives and reminding us of the great achievements possible when the public and private sectors work together for the common good. As we celebrate the twenty-fifth anniversary of this historic legislation, I encourage laborers, managers, manufacturers, mining associations and schools, and federal officials to rededicate themselves to the noble principles on which this law was based: the protection of those who toil for our country's greater prosperity.

Best wishes to all for a memorable celebration.

Bill Clinton

RIGHTING THE RECORD ON REGULATION: AN INTRODUCTION

Carol Tucker Foreman and Maureen S. Steinbruner

"I'll get government off the backs of the American people."

Ronald Reagan, 1980¹

"My Administration is committed to using necessary Federal regulation, reasonably applied, as an effective tool for positive change."

George Bush, 1990²

A CENTRAL HALLMARK of the presidential administration of Ronald Reagan was its rhetorical assault on the very idea of federal regulation. In part, Reagan's attack on regulation was a natural extension of key deregulatory initiatives launched by his predecessor Jimmy Carter. In part the attack was more opportunistic. It was designed to create a symbol with which to capitalize on generalized public and corporate distress over the economic stresses of the 1970s—oil and other price shocks, inflation, high unemployment, double-digit interest rates.

In part, though, the Reagan attack on regulation was pure politics: it picked up on and nurtured, in stridently partisan terms, public disillusion with the results of several decades of federal activism. In key respects, that activism had characterized the presidencies of Richard Nixon and Gerald Ford as well as the presidencies of John Kennedy and Lyndon Johnson, and under Carter it was already on the wane. But federal activism had not won the War on Poverty, wage and price controls had been unpleasant and ineffective, the economy was not working well, and "the other Party" could be blamed. Happily for the Reagan team, welfare recipients, hyperactive federal regulators and the Democratically-controlled Congress could all be tarred with the same anti-regulation brush. It was not long, however, before episodes such as those involving James Watt's unsteward-like admin-

istration of the Interior Department and Anne Gorsuch Burford's programmatic recalcitrance at the Environmental Protection Agency—episodes that the public saw as “unregulation” run amok—became a political metaphor for Reagan Administration excesses. The practical public was able to recognize the difference between specific, useful efforts at regulatory course correction and politically inspired anti-regulatory overkill.

The broad Reagan assault on regulation eventually petered out, but not before it had wreaked havoc in a number of areas. One of the most serious negative results was that it encouraged in the public mind a severe general cynicism about government and its effectiveness. Another was that it freed various self-interested parties from regulatory scrutiny. As the 1980s gave way to the 1990s, one of the worst legacies of too-tepid federal regulation—rampant misfeasance and outright malfeasance in the savings and loan industry—produced a major scandal and a serious financial burden for the taxpayers.

This volume attempts to make the case that an important period in American regulatory history is now behind us: the transition from New Deal-era regulatory structures to a more modern system is now fully underway; and, the era of know-nothing diatribes against the very idea of federal regulation is over. For the future, we need to articulate a positive, balanced and pragmatic view of federal regulation. We need to turn in seriousness to the specific regulatory issues that currently confront American government. The underlying thesis here, offered as a contribution to developing such a pragmatic view, is that human affairs require some regulating; that the processes involved in government regulatory action—including political processes—are legitimate and necessary to the functioning of a modern, complex decentralized economy; and, ~~that what we should be focusing on in coming years is how to get better, not necessarily less, regulation.~~⁹

The positive lessons of a decade and a half of deregulation are that regulation does not have to be intrusive, that it should not be insensitive to costs, that it should not attempt to delay evolution in industry structure, and that it should accomplish what it is designed to do. The primary negative lesson is just as important: there are many cases in which no regulation, slack regulation, poorly thought-out or overly ideological deregulation are “cures” worse than the disease.

Deregulation and Politics in the 1980s

At the beginning of the 1980s, it seemed that “deregulation” might become a new core theme of American public policy. Following a

decade and a half of federal regulatory activism, Jimmy Carter's presidential campaign of 1976 represented a clear change in emphasis. Though a Democrat, Carter ran against the federal establishment, promising to “end economic regulation.” In office, he proposed legislation to do away with price regulation in the airline and trucking industries, issued an Executive Order requiring federal agencies to conduct economic impact analyses of their proposed regulations,³ and created the Regulatory Analysis Review Group whose purpose was to control regulatory activity that might have a negative impact on the troubled economy.⁴

Ironically, in view of Carter's intentions and some of his major policies, Ronald Reagan campaigned for the presidency in 1980 charging Carter with being an advocate of big government, and promising to “get the government off the backs of the American people,” to allow American businesses “free rein” to build the nation out of a period of recession and high unemployment. Reagan acted on his promises by naming Vice President George Bush head of a Task Force on Regulatory Relief, appointing devoted deregulators in high level positions across the government and issuing an Executive Order that gave the Office of Management and Budget (OMB) power to oversee all major regulations promulgated by executive branch agencies.⁵ With its new authority, OMB managed to limit new regulatory initiatives in health, safety, the environment and civil rights through most of the 1980s.

Reagan campaign rhetoric did not represent “new thinking.” To the contrary, from the early 1970s on, government regulation had been a favorite target of attack by everyone from the media, members of Congress and the business establishment, to the President of the United States. Hundreds of books and articles blamed regulatory activity for virtually every economic problem the nation faced. Criticism of regulation came from both ends of the political spectrum. Consumer advocates and lawyers like Ralph Nader and Mark Green attacked economic regulation from the left. Economists Murray Weidenbaum and James C. Miller, representing the anti-regulatory intellectual firepower of the Reaganauts, went after both economic and social regulation from the right.

By the end of the 1980s, however—in spite of the sweeping nature of the critiques and campaigns—federal regulatory activity had not exactly withered and died. President Bush, the leader of Ronald Reagan's deregulatory effort in 1981, opened the second year of his own presidency with endorsements of “reasonable” regulation. He embraced the effort to re-authorize the landmark environmental regulatory statute, the Clean Air Act. He supported new restrictions on savings and loans and he endorsed mandatory nutrition labelling.

INTRODUCTION

The Progressive Era was characterized by the development of a new and more aggressive federal presence in all areas, including the economy and social and political life. The Hepburn Act (1906) gave the Interstate Commerce Commission its first real power. The Federal Trade Commission Act (1914) expanded the national government's economic regulation of business. The first major anti-trust cases, *Standard Oil of New Jersey* and *American Tobacco* were decided. Federal power was expanded by creation of the Federal Reserve (1913) and approval that same year of the 16th Amendment, authorizing the first federal income tax.

The federal government also moved into "social regulation" of the economy during this era, with passage of the Pure Food and Drug Act (1906) and the first Minimum Wage Act (1912). In addition, government regulated individual behavior to conform to prevailing conservative social attitudes. The Prohibition Amendment, for example, brought extreme federal intrusion into personal behavior. This period also brought expansion of access to the political process with women's suffrage in 1920 and the institution of such direct democracy devices as: recall, referendum and initiative.

A second major round of regulatory activity was initiated when President Franklin D. Roosevelt took office. The extreme economic circumstances that gave rise to the New Deal prompted numerous efforts to limit market entry and control prices. Legislation enacted during these years included the Securities Act (1933), the Glass-Steagall Act (1933), the Communications Act creating the Federal Communications Commission (1934), the Securities and Exchange Act (1934), the Motor Carrier Act, extending the ICC to trucking (1935), and the Civil Aeronautics Act (1938).¹¹ Social regulation also expanded during the New Deal, with passage of the Social Security Act (1935), the Fair Labor Standards Act (1938), and the Food, Drug and Cosmetic Act (1938).

The third period of regulatory activism got underway with President John F. Kennedy's term, and extended to the middle of the next decade and the end of the Ford Administration. This was a time of major federal regulatory expansion, with passage of the Civil Rights Act (1964) establishing the Equal Employment Opportunities Commission, the Equal Credit Opportunity Act (1972), the Fair Housing Act (1968), the Fair Packaging and Labeling Act (1966), the Mine Safety Act (1969), the Occupational Safety and Health Act (1970), the Highway Safety Act (1968), the Consumer Product Safety Act (1972), the Federal Meat Inspection Act (1967), the Toxic Substances Control Act (1976), the Clean Air Act (1970), and the Environmental Protection Act (1970). The thrust of all of these later regulatory efforts was

"social," in that they did not target directly either the price-setting or structural characteristics of economic activity.

In a nation that was founded on and continues to be driven by a deep distrust of central government, what initiated and sustained these periods of regulatory activism?¹² It seems that, from time to time, we are willing to overcome our innate distrust of centralized authority as represented by the federal government, because of an equally strong distrust of non-governmental institutions, or anxiety about large social and economic forces that seem to threaten the established order. At these times, in comparison with other things too big, too powerful or too threatening, the power of the federal government has come to be viewed as a less undesirable—on occasions, an outright attractive—alternative. When this has occurred, the American political system has usually opted to set up a process through which to make the countervailing powers of government and private institutions or non-governmental forces interact.

The Progressive movement was generated in part by a rapid, chaotic transition from an agrarian society to a modern urban one. It also reflected the change from what had been perceived as a homogeneous Yankee, Protestant society to one buffeted by waves of European migration, bringing differences of language, religion and mores. Political theorist Richard Hofstadter has referred to Progressive Era initiatives as an effort to "restore a type of economic and political democracy that was widely believed to have existed in America and had been destroyed by the growth of great corporations and corrupt political machines and to bring back a kind of morality and civic purity" that also seemed to have been lost.¹³

In the New Deal era, Americans were frightened by the impact of the depression affecting the world economic system. Federal regulatory action seemed to offer average people a necessary protection from extreme economic instability.

The last period of regulatory activism, focused in the fifteen years between the Kennedy campaign and the election of President Jimmy Carter,¹⁴ was characterized by attempts to deal with diverse issues such as racial and sexual inequality, technological change, corporate disregard for safety, and criticism of the political process brought on by the Vietnam War and Watergate.

Corporations were viewed as caring more about the shape of hood ornaments than auto safety, as unfairly resistant to the efforts of minorities and women to gain jobs, housing, education or credit, and as refusing to make workplace changes that would prevent workers from being maimed or killed. Consumers were alienated, too, as costs went up and the products broke down. The promise of "better living

through chemistry" became a bad joke as the undesirable, unintended consequences of DDT and DES and PCBs became apparent.

It appeared that free markets not only didn't address these problems, they often encouraged them. Americans organized, one issue at a time, to demand that the government address discrimination, toxic chemicals, unsafe food processing and dirty air. The optimistic idea that Americans, who had used government to beat depression and win a world war, also could use it to resolve other problems was the hallmark not just of Kennedy and Johnson, but to a large extent of Nixon and Ford, as well.

There was another factor that made this an era of regulation, as well. During the Kennedy and early Johnson years, general prosperity made it possible to address many social objectives through an expansion of government grant programs. As the costs of the Vietnam War mounted, however, and Johnson tried to advance his domestic agenda without tax increases, and thus turned increasingly to regulation as less expensive than new benefit programs. But the economic and social costs of federal government activism combined with calamitous economic events at home and abroad to cause a reaction. America in the 1970s was hit by one economic shock after another. Paying for the continuing war in Southeast Asia drove up deficits, interest rates and inflation and ultimately caused President Nixon to invoke wage and price controls in 1971. The Administration's effort to improve relations with the Soviet Union led in 1972 to a major grain sale in the midst of worldwide shortages and American food prices went up. Then, in November 1973, OPEC launched the first oil embargo. With high domestic prices and a strong dollar, international competition in autos, consumer electronics, clothing, and textiles increasingly added to pressure on American manufacturers.

Some industries were especially hard hit by the cumulative impact of new regulatory requirements imposed simultaneously with mounting economic pressures. The auto industry had to comply with regulations governing occupational health, auto safety, clean air and fuel efficiency. There was no coordination of these new regulations and requirements sometimes conflicted. Fuel economy regulations pushed auto companies to make lighter cars but safety regulations favored heavier ones. There was not much buyer demand for safety or for fuel economy, and such demand as there was, was being met by the Japanese or the Europeans.

We spent the late 1960s and most of the 1970s trying to adjust to new realities in which our economic well-being was determined by events and competitors in countries far away. While the first response was more regulation to deal with the economic dislocations of the oil

embargo, the longer-term effect was further disenchantment with the effectiveness of government in general, and disaffection from regulation in particular. The accumulated costs of the new regulatory programs enacted during the period of government activism might have been acceptable under ordinary circumstances, but these were extraordinary times.¹⁵

In reaction, businesses fought back, blaming regulation for every economic and social ill that plagued the country. No regulatory idiocy went unremarked. Fed up with the pressures of ten years of inflation, and primed by the constant attack by business, the public was ready by the mid-1970s to believe that regulation was more of a problem than a solution. There was, according to Carter's Federal Trade Commission Chairman Mike Pertschuk, a "revolt against regulation." Ironically, the same Jimmy Carter who had campaigned as an economic deregulator was himself one of its victims.

Reagan and Regulation

The unexamined premise of much political commentary during the 1980s was that Ronald Reagan ran for the presidency advocating less government regulation, overcame a passionately pro-regulation Jimmy Carter, and instituted a major rollback of federal regulatory activity that lasted throughout his two terms. As noted, the trend toward economic deregulation began much earlier, well before Reagan came to office. In addition, Reagan's own record on regulation was more complicated and ambiguous than the conventional wisdom would have it.

Over the eight Reagan years, there was a substantial extension of economic deregulation, and there was an intense effort to pull back in areas of environmental, food, drug, product safety, and anti-discrimination regulation. FDA eliminated "patient package inserts" that explained both benefits and possible harmful side effects of drugs. EPA withdrew proposed regulations requiring pre-treatment of toxic chemicals before they could be dumped into sewage treatment plants. The Department of Labor's Office of Federal Contract Compliance postponed implementation of regulations to prohibit government contracts to companies that discriminate. The Department of Agriculture rescinded the regulation that made public the names of meat and poultry companies consistently failing to meet safety standards. Enforcement programs at virtually all health and safety regulatory agencies were scaled back. Reagan's Executive Order 12291, giving final approval of regulations to OMB, represented a

refinement of Carter's attempt to give the White House more control over regulatory decisionmaking. OMB became the graveyard of the few social regulations Reagan's political appointees in the agencies approved. Regulatory agency budgets were cut. The Administration noted with approval that the number of pages in the *Federal Register* shrank substantially.

In important respects, however, the campaign to undo social regulation reached its zenith early, in 1981–82 at the Environmental Protection Agency, where government officials' former employers were allowed undue influence in the regulatory process. The misfeasance of EPA Administrator Anne Gorsuch Burford, and of Rita Lavelle, a former public relations official who Reagan named to head the hazardous waste program, was so blatant that Congress and the public began to react. By March 1983, a majority of Americans were telling pollsters that they thought Ronald Reagan would rather protect polluters than the environment.¹⁶ The mess at EPA was an effective issue for Democrats in the 1982 congressional elections, a sign that the regulatory pendulum was already beginning gradually to swing back to the center.

Indeed, regulatory activity is now so much a part of our scheme of government that President Reagan and the business community made use of it even at the height of deregulatory fervor. They simply redirected it to achieve different goals. The Reagan Administration used regulation aggressively to limit federal and state spending and to advance the social and moral behavior it favored. The Department of Agriculture revised regulations to reduce the number of people eligible for food stamps. Regulations were used to tighten ineligibility for food stamps and welfare, so that striking workers could not benefit.¹⁷ Regulations prohibited states from making Medicaid payments to women before their sixth month of pregnancy. The USDA proposed school lunch regulations to reduce portion sizes and allow ketchup and relish to meet the requirement that vegetables be served.

Business interests sought additional federal regulation. Industry lobbyists found federal rules useful in restoring public confidence after the quality or safety of products had been impugned.¹⁸

In addition to these examples of non-adherence to a pure deregulatory philosophy, there also were cases of outright overuse of the regulatory process as the Reagan Administration attempted to achieve its own programmatic aims. Reagan officials who abhorred federal meddling in areas like the environment were regulatory activists when it came to advancing the agenda of the social conservatives who formed an important core of the President's support. The so-called "squeal rule" issued by the U.S. Department of Health and Human

Services in early 1983 required federally-funded family planning programs to notify parents of young people who received contraceptives. The "Baby Doe" rule proposed at that time would have required hospitals receiving federal funds to post a notice and hotline number so that medical personnel could inform the government when they believed doctors had not taken all steps necessary to preserve the life of babies born with severe birth defects.

In general, Reagan's presidency was characterized by the same ambiguities about federal regulation that had begun to appear by the time Jimmy Carter came to office. One of the effects of this ambiguity was, first, an enhancement of the role of state regulation. The reduction of federal regulation didn't eliminate the problems that had caused Americans to seek regulation in the first place, and state governments moved to fill the vacuum. During the 1980s, one or more states went far beyond federal requirements in requiring data on pesticide residues in food, passing stringent "lemon laws," requiring business to warn consumers when products contain toxic substances, and mandating that employers provide some minimum health insurance coverage for employees.

Anti-regulation activists at the federal level have tended to accept this trend.¹⁹ As noted, business interests that so vigorously pursued federal deregulation a decade ago now frequently seek new federal standards and a preemption of strong state laws.²⁰ At the same time, environmental, consumer, civil rights and labor representatives, who used to urge federal action because it went beyond the minimal standards of some states, also have reversed course. Rather than federal regulatory uniformity, they now want federal minimum standards that leave states free to enact more stringent regulation. In supporting or opposing federal regulation, the old saw, "Where you stand depends upon where you sit," still applies.

Back to Regulatory Basics

A fundamental task of government in any society is to work out the conflict between the rights of individuals and the needs of the community. Government must determine which acts of individuals are so harmful they cannot be freely permitted, and which harmful acts may rightfully be performed even though they harm others.²¹ Thomas Jefferson advocated for America a "wise and frugal government which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement and shall not take from the mouth of labor the bread it has earned."²²

The problem is, almost every human activity has the potential to injure someone, and human beings have a tendency to take advantage of one another. Many acts that have some potential to cause harm will be permitted because, on balance, a majority of the public is presumed to benefit. One task of a representative government is to decide where the lines should be drawn. Regulation is simply one of the devices that the people use to draw a line and police it.²³ Because the act of regulation can involve choosing between different and strongly held values or between deeply felt interests within the society, it will always excite controversy.

As most Americans have always recognized, the need for civilized societies to agree collectively on appropriate rules for behavior extends to the marketplace as well as to other areas of life. In a highly sophisticated, rapidly changing, technologically advanced, heavily populated and largely urban society, regulation is an essential element for resolving conflicts that courts, markets, or individuals and groups acting informally cannot resolve satisfactorily. As one scholar has observed, "If government really left the economy alone, there would be no system of competition, but Hobbes's war of each against all."²⁴ That does not mean that there will not be or should not be serious disagreements about the nature and form of specific regulation that best suits any given period in history.

The existence, the persistence and the growth of regulatory structures in the United States reflects the interaction of two fundamental strains in American political culture, strains which come together to produce what has been called "the halfway house of the American political economy."²⁵ The first is our strong preference for individual over collective action—or, for decentralized decision-making. The second is the related, and equally strong, belief in the singular importance of "process" as a social good in and of itself. Indeed, process may be the one social good that a majority of Americans will almost always agree ought to be available as an absolute minimum right. The proliferation of rule-making governmental institutions is as much a reflection of values we hold about how best to run a society as is our commitment to the economic rule-systems that we call "markets."

This plain truth was obscured by the virulent criticism of federal regulation that dominated national political debates during the "Reagan Era." As a result of the politics of deregulation that dominated the late 1970s and early 1980s, there arose the appearance—but not the reality—of a groundswell of public demand for less government regulation of the economy in all areas. As opinion polls throughout the 1970s and 1980s showed, citizens were never overwhelmingly

negative about federal regulation. Their support for it declined at certain points in relation to specific issues.

For example, a survey in 1978 reported a strong plurality (50 percent) saying there was "too little" regulation of the oil industry. By 1985, the plurality saying "too little" dropped to 35 percent (with 28 percent saying "too much," and the remainder distributed between "right amount" and "don't know.") Asked about telecommunications regulation in 1982, respondents were pretty evenly split between "too little" and "too much." In 1985, a survey indicated that unhappiness with telephone deregulation had grown, 56 percent of those polled saying it had not been in the best interests of consumers or the nation. By 1988, this unhappiness had declined (51 percent), with the remainder distributed between "in the best interest" and "not sure." On the general issue of whether regulation of business helps or hurts consumers, 33 percent were saying there was "too much" regulation in 1979 and 40 percent were saying that in 1985. But in 1988, only 27 percent were calling deregulation "helpful."²⁶

A case can be made that the American public is not so much interested in less regulation in the abstract, as they are in having effective regulation, and having it confined to areas where there is broad agreement on the need for it. Americans seem to understand that without a basic framework of rules, there would be no effective markets in the first place, and without certain additional regulation, markets tend to be "imperfect," or to produce socially unacceptable outcomes.

Toward a New Politics of Regulation

As Daniel F. Spulber notes in *Regulation and Markets*,²⁷ markets essentially function only "within the context of a variety of implicit or explicit rules. . . . Market transactions take place within a framework of administrative institutions and legal rules and frequently follow patterns established by custom and standard practice. Regulations applied by government need to be justified as a supplement to the common law of property, tort, and contracts. The judicial system may often adequately handle the problems regulations are meant to address."

In this volume, author Peter Kahn takes a look at the question of how the courts function in interpreting the common law, examining the role that various "interests" play in the development of a body of legal precedent over time. He compares the involvement of specific interests in determining the behavior of courts with what happens in

non-judicial governmental bodies. He attacks as unbalanced, and therefore essentially incorrect, the argument that the self-interest of legislators (and those who influence them) inevitably results in actions that are contrary to the general welfare. He explains that the absence of government action, or regulation, can also be due to the influence of "special interests."

Kahn's perspective is a critically important one in restoring a sense of what is really at issue in the public debate about regulation. Referring to the theories popular during the Reagan era, Kahn says, "These arguments would have us reject the role of 'government,' as embodied in the explicit regulatory programs and legislative enactments which have since the 1930s played so large a role in the American economy. . . . [but] they do not in fact lead to the conclusion that smaller government and less regulated markets would produce more attractive results." Looking at the body of legal precedent that some scholars hold to be a preferable alternative to government regulation, Kahn notes that precedent is also subject to the influence of "special interests."

The polemics of Reaganism aside, basic tenets of economic theory posit several situations in which political action to regulate is called for. It is recognized that the ideal of "perfect" competition presupposes conditions of market structure, availability of information, and so on, that are hardly ever fully met in the real world, even though they may be approximated closely enough most of the time to permit government involvement to be minimized.

The individual chapters in this book deal with four circumstances in which there is a general agreement that government involvement is necessary.²⁸

Imperfect information, social inequities, the existence of "externalities" and the tendency of some markets to become overly concentrated, or monopolized, have all along been considered justification for action to improve the functions or results of market operations. Major regulatory decisions confront U.S. policymakers on issues that classically reflect these four cases. These are: the appropriate regulatory approach to controlling the development of biotechnologies; an increasing desire by workers and citizens for requirements that employers provide social welfare benefits that in many other countries are provided directly by government; the need to enact new and stronger environmental controls in a way that does not impose unnecessary costs on business, workers or consumers; and, the critical question of how much, how little, and what kind of competition to grant telecommunications companies in an era of rapidly changing technology.

In order for a market to function, "perfect" competition requires access to information. It must be possible at some reasonable cost for the potential buyer of a product or service to know what he or she needs to know in order to make a rational purchasing decision. This argument provides the public interest rationale for bureaus of medical and other forms of licensing set up in various states, for some food and drug laws, and for the establishment of the Consumer Product Safety Commission. All of these institutions can be said to provide the means necessary to ensure that "*caveat emptor*" or, "let the buyer beware," is an injunction that can be followed in daily life.²⁹ This area of regulation maybe the one most attended to by the general public, because it most often translates into issues related to health and safety. It can have a high emotional content for the least political of individuals, and it can be as thoroughly intrusive for a firm or professional entity in the regulated industry as any form of regulation.

Protection of the public through expert review and approval is, of course, one of the key justifications for regulation of the new and highly important field of bio-engineering, or biotechnology. As revolutionary as was the introduction of inorganic chemical engineering to our industrial base—from miracle drugs to fertilizers to plastics—the introduction of potential new organic chemical and biological forms poses the prospect of still more striking changes for the economy and society. The biotechnology industry has been highly responsible in recognizing the need for and cooperatively participating in an effective regulatory regime. At the same time, competitive pressure to be the first to test and introduce important new products has created an anxiety in the industry that fear of change and uncertainty will lead to unnecessary restrictions on testing and applications.

Noting the extensive benefits that developments in biotechnology promise, author Thomas McGarity reviews the current U.S. regulatory framework for the industry, an outgrowth of the complex structure of existing laws governing drugs, food and toxic substances. McGarity believes that the laws and regulations now used to monitor basic research and applications in the field, on balance, result in a responsible approach—assessing risks reasonably, while permitting a healthy pace of commercial development. Nonetheless, he also believes that we would be better served with a more comprehensive, coordinated framework. He warns that it is risky for Congress to postpone consideration of what such a framework should involve until after some now unforeseen crisis occurs.

A second purpose for which government intervention in private

transactions has long been accepted in principle is to counteract the negative effects of a competitive market structure on the well-being of individual citizens in their role as members of the labor force. Thus, a minimum wage and unemployment insurance have been enacted, along with welfare and social insurance programs, to ensure that the relatively less powerful and less economically successful members of society will still receive what are deemed socially desirable "basic" economic protections. In recent decades, this is the area in which Americans' preference for decentralized decision-making over the collective provision of goods or services has resulted most extensively in the need for a broad array of complicated regulations. For example, numerous rules have been enacted to control hospitals and doctors' fees and constraining the establishment of new medical facilities, in an effort to hold down health care costs while still allowing providers and patients the freedom to make insurance-funded decisions about the allocation of health care resources.

Author Daniel J. B. Mitchell addresses the current state of mandated social benefits and their implications for the workings of the economy. Mitchell reviews the changing relationship of employers and employees, as formal membership in labor unions has declined, as workers more frequently change employers, and as even the identity of corporations has become susceptible to frequent change. He points out that complex administrative issues—issues of regulation—will inevitably arise when social benefits are legislated as employment-based entitlements rather than being provided directly on a uniform basis for the entire population.

Mitchell says the forces now favoring mandatory benefits invoke broad questions of social welfare and the general terms and conditions of employment in the United States. He argues that rather than legislate piecemeal, we would be better served by establishing a national commission to look at "the larger question of what Americans want from the employment relationship" as we move toward the next century.

A third area in which the need for government intervention in the functioning of the economy is widely accepted involves issues where "third parties" or other entities external to a specific transaction are adversely affected by it. The clearest and politically most significant instance of active public sentiment in favor of this type of regulation in recent years, of course, has been related to the environment. During the late 1960s, activists began ultimately successful campaigns for federal controls on private activity to reduce air and water pollution, and later, to control the release and disposal of hazardous materials into the environment. During the 1970s, as new rules were

promulgated and applied dictating the adoption of specific and sometimes costly control technologies, businesses rebelled. In the 1980s, the Environmental Protection Agency became the most visible target of the general attack on regulation. What has eventually emerged from the debates of these three decades seems to be a relatively stable political equilibrium that favors an active federal role, but wants that activism constrained by attention to costs and other economic consequences.

Author Robert Stavins examines a number of areas in which he argues market-type mechanisms can and should be used to achieve regulatory objectives in relation to the environment. The central principle underlying this argument is the need to find cost-effective methods of controlling pollution and otherwise regulating environmentally-costly economic activities. As Stavins makes clear, traditional methods of forcing the same degree and type of clean-up across the board inevitably reduces the incentive for those firms with relatively low-cost controls to reduce more than firms with relatively high-cost controls. The net effect is that, as a society, we spend more to achieve any given level of environmental enhancement than we need to.

With the arrival of a number of new environmental concerns on the agenda in recent years, along with a need for increasing productivity to meet the challenges of international competition, the requirement of finding more efficient ways to achieve our goals has become more pressing. Stavins offers specific recommendations for making pollution control and clean-up efforts more efficient, by letting market forces dictate more of the choice of method. He argues that a more market-oriented approach to environmental regulation should form the core of a new era in U.S. environmental policy.

The technological realities of a given industry can lead to, or in some cases might effectively require, a high degree of concentration, which leads to the acquisition of monopoly power. Without intervention by an equally powerful outside force, prices that are higher than efficiency demands will be set by the monopoly producer. This is the basic logic of public utility theory, and the motive force behind anti-trust policy as well. In the latter case, it is assumed of an industry that legal action taken to reduce concentration or break up a monopolistic enterprise will restore or maintain the competitive structure of a given market, and that on-going "utility-type" supervision is not required. The U.S. telephone system developed originally as a quasi-public utility and a quasi-monopoly, in typically American fashion substituting regulation for what in most other countries has been a public service. Changes in technology brought about the decision to go even further toward privatization plus regulation, with the court-

administered partial break-up of the Bell System. After some years' experience, we are now at a very difficult and complex point in regulating the changing U.S. telecommunications systems. The question of how much further to go, and in what direction, must be addressed.

The regional spin off from AT&T but still heavily regulated as local monopolies, Bell companies, argue that the United States may lose primacy in telecommunications, if they are not allowed more room to compete. They have launched a major lobbying effort to convince Congress to overrule court restrictions and allow them to enter different types of markets. Their competitors, the long distance companies and information service providers such as cable TV operators, are opposed to loosening restrictions on the Bells, because they fear that monopoly control over local markets—or simple size and reach—will allow the local operating companies to dominate a range of markets. They, too, are lobbying hard for their point of view.

Because the debate over the issue of telecommunications regulation is so sharply drawn, in terms of industry interests, two sides are presented here. Authors William H. Davidson and Ronald Hubert argue that freeing up Bell companies by changing administered profit formulas and by relaxing restrictions on types of activity would lead to increased investment and more innovation.

Telecommunications specialists representing long-distance carriers and consumer organizations argue the contrary. They say that the Bells have all the incentive they need to invest, and that the United States is ahead of the competition now. Freeing up the Bells, this argument says, would only lead to a stifling of their domestic competitors and increased prices for U.S. consumers.

Both sides of this debate agree on one thing: the choices confronting the United States in the area of telecommunications are serious and fundamental. Making these choices in the best interests of the nation will require judgments that go far beyond simple slogans favoring "more" or "less" regulation.

The Future of Federal Regulation

This century began with an era of regulatory activism and it appears that it will end with an era of regulatory renewal. As the chapters in this volume make clear, the events of the last hundred years prevent us from addressing federal regulation with the innocent faith in expertise that motivated the Progressives, or with Lyndon Johnson's belief that a benevolent federal government can solve all the world's

social problems. But the discussions also demonstrate that we have moved beyond the Reagan era misconception that all of society's needs can be served by the unfettered pursuit of private interest. We understand better that society requires some mediating force to counteract negative market outcomes, to resolve conflicting value judgments, and to protect the public from those dangers that rational humans acting responsibly can't always avoid.

There are several reasons to think we may be entering a new era in federal regulation. First, it is clear that increasingly large majorities of the public want clean air and water, safe food and drugs, stable financial institutions, reliable airline systems, and fair treatment for women, minorities and the disabled. We seem ready, even eager, to have government help us achieve those goals. Second, the social and economic context we face now is similar in many ways to those that spawned the Progressive era and the regulatory activity of the 1960s and 1970s. We need to constrain the adverse effects of rapid economic and technological change. We need to respond to outside forces and we need to address the pressures of a changing population—this time one that is aging rapidly as well. If Americans historically turn to the federal government when we find that private or local public action can't meet a clear need or adequately manage change, then a new era in federal regulatory activity seems certain.

It is also the case that there are general political factors at work likely to affect the attitude toward regulation. Some of the excesses of the deregulation movement have been linked to the rise of political action committees and increasing cost of running for office. Americans generally think of Republicans as the party of big business, but congressional Democrats also have become extremely reliant on large contributions from commercial interests—some of which have spent the past 15 years seeking primarily to avoid regulation. Recent scandals have brought about a new public consciousness about the effect of business PACs and business lobbying on the political process, and Congress may well be more supportive of appropriate business regulation in the future than it was during the Reagan era.

No one suggests a return to the law-a-day regime of the 1960s and 1970s, but a renewed attention to government is on the horizon. The biggest challenge may be simply to restore public belief in the notion that, in a democratic society, the government is supposed to be "we" acting in concert, that "we" should not be the enemy, and that "we" surely want to be competent to achieve common goals.

Rather than abandoning government generally and regulation in particular, we have to make it work better. Michael Pertschuk, consumer advocate, "national nanny," and wise observer of the process

has suggested that regulation will work better if federal regulators and supporters of federal regulation would remember to answer the following questions, among others, before making rules.

- Will the rule minimize the cost burdens of compliance while achieving its objective?
- Does the regulation preserve freedom of informed individual choice to the maximum extent consistent with public welfare?
- Is the problem an appropriate one for federal action or should it be left to the states?
- Is the rule consonant with market incentives to the maximum extent feasible; does it respect the power of self-interest?³⁰

In line with Pertschuk's principled admonitions for better regulations, there are procedural suggestions to note as well.

First, a significant degree of presidential control over executive branch regulatory policy is appropriate and necessary. Presidents Ford, Carter and Reagan all attempted to coordinate regulatory activity in the Office of Management and Budget, and for good reason. There is and will always be some conflict between the demands of an individual agency's constituencies, and the general policies that the president was elected to carry out. The problem arises with OMB's role when it is exercised by those whose agenda contravenes either statutes, reasonable process requirements or Congressional authority. The Reagan requirement for rigid cost-benefit analysis and consistency with overall Administration regulatory policy for example, sometimes conflicted with specific statutory requirements. Business has justifiably viewed each administration's attempts as sometimes unnecessary duplication. Environmental, civil rights, and consumer advocates have rightly viewed each administration's efforts as sometimes giving business an appropriate opportunity to thwart regulation. The process often has been carried out behind closed doors with no obligation for OMB to notify the public about who was seen, what arguments were made or what message OMB sent back to the agency.

It might be useful for Congress to amend the Administrative Procedures Act to provide a process for presidential oversight that would impose time limits for review, and "sunshine" requirements to let the public and media know who objected to an agency decision, put on record communications between OMB and interested parties, have OMB make its reasons for intervention in the process public, and provide opportunity for opposing voices to be heard.

A second issue in the regulation debates of the past twenty years

was as an outgrowth of vague legislative mandates. Too often, when Congress wanted to pass a bill, but it couldn't resolve a particular problem, the problem was "fudged" in law and left for the regulators to sort out. One side-effect of a decade of "divided" government—with Democrats controlling Congress while Republicans controlled the White House—is that Congress is now somewhat more specific about exactly what a regulatory agency is to do, how it should proceed and how much weight should be given to various factors. Getting Congress to resolve the hard questions from the beginning, rather than passing a vague general statute, improves the process. It may take longer to get the law passed, and surely might make one side unhappy, but the regulatory result is likely to be clearer.

~~Regulatory decision-making is rarely a clear matter of right or wrong. It is a process of weighting data to arrive at some reasonable solution. This is especially true in health and safety regulation. Citizen groups, whether they be veterans or civil rights activists or environmentalists, are at a procedural disadvantage when they bring to the table only moral suasion and anecdote and not data. We need to improve the effectiveness of public participation in regulatory decision-making.~~

Under the 1972 Moss Magnuson Act, the FTC was required to provide funds for public intervenors to argue points of view that the commission might not otherwise hear. The Carter Administration attempted to expand that process to regulatory functions in the executive branch agencies. Business reacted violently and the Reagan Administration effectively shut down the programs. In the intervening decade, both government agencies and most businesses have learned some hard lessons about regulations made without the opportunity for effective presentation of the other side's views. Sooner or later the media, the public and public interest groups will know what has gone on, and will be heard.

If decisions are biased or based on bad data, those forces will do everything possible to thwart implementation. The resulting delay and bad publicity do not serve business, government or the public well. ~~On the other hand, if public interest groups have the ability to generate data, have access to the agency's data, and get to make their points in an orderly fashion, two important things are likely to happen. First, the agency decision is likely to be better because the chances are each position will be challenged earlier, in more detail and with more substantive arguments. This is likely to reduce unintended consequences that accompany decisions made only on information available to the agency and industry. Second, in the long run, it may be cheaper, easier and faster to involve advocates for environ-~~

mentalists, consumers, minorities and other generalized interests at the earliest possible time in the decision-making process, before anyone's position is set in stone. Decisions made with limited and one-sided data, in small rooms, with limited access to challenge, have a much greater susceptibility to unintended, unanticipated and negative consequences. They also are more likely to be challenged. They are less likely to be challenged if the process can be demonstrated to have been fair in the first place.

Effective participation requires access, but it also requires data. Good data gathering and analysis are always expensive procedures, and public interest groups almost always have too little data and too little money. Not only should government consider returning to the funding of public intervenors, but it might be useful to establish a mechanism whereby intervenor groups whose members may be significantly harmed by a decision could present proposals for research and suggest researchers.

There is another reason for encouraging intervenors at the earliest possible time. Today, there is a core of impressive professionals who represent the public on environmental, civil rights and health and safety issues. These professionals have devoted their lives to the issues they work on and are as knowledgeable in their fields as the industry experts and government experts they challenge. Experts from the public interest side often have credentials and experience that matches or exceeds that of their counterparts in government or industry. Their ranks may be thin and their pay low, but their expertise is first-class. The public does have an interest in the data and perspective they might bring to decision-making.³¹

On the other side of the ledger, there ought to be more attention to the possibilities for negotiation in the regulatory process. Some public interest advocates have been suspicious of the negotiated regulation approach on the grounds that mediated processes always involve some limitation on the right to fight an ultimate decision. In earlier times, the public interest movement won some of its most important victories in the courts. Given the changes Ronald Reagan has brought to the judiciary and the present tendency of federal courts to defer to an agency's interpretation of its statutes, this may not be much of a sacrifice.

There is a need to find mechanisms that will avoid the endless delay and uncertainty of the completely adversarial system of decision-making. Judges aren't particularly well-equipped to make decisions about the highly technical issues involved in environmental and health and safety regulation. The delay and uncertainty brought on by resorting to court action can be highly detrimental to the public and

to businesses which live with no action at all, as well as the continuing threat of action they oppose.

In the late 1970s, when regulation first came under active attack, a number of efforts were made to try to develop a new mechanism to improve the process. The Reagan era heavy-handed approach to deregulation slowed these developments and postponed their widespread adoption, but they continue to deserve consideration. The few that have been developed might be applied to additional areas. The National Coal Policy Project, the Joint Labor-Management Committee of the Food Industry, the Health Effects Institute (HEI), and Clean Sites all offer variations on the theme.

The Joint Labor Management Committee of the Retail Food Industry was organized in 1973, at the behest of the Cost of Living Council, to get food retailers and their unions to find some way to resolve wage and price problems, rather than face the possibility of reimposition of controls. The committee, representing most of the large food retailers and three major unions, has acted on a variety of issues since then, including development of safety standards they jointly prepared and proposed to OSHA. The Health Effects Institute was created in 1980 after Congress amended the Clean Air Act to require EPA and the auto industry to generate and evaluate additional health data on auto emissions. Industry had complained that EPA based its regulations on poor science. The HEI has appointed two scientific boards. One determines appropriate research to be performed and oversees it, while the second group provides peer review for the research. The result gives EPA and the industry a scientific base of agreed upon data, from which EPA can develop regulations. The National Coal Policy Project was created by representatives of environmental organizations, coal producers and coal users, to resolve conflicts over environmental regulations for mining and burning coal.³² The project was successful in developing mutually acceptable alternatives that assisted EPA in regulation writing and Congress in amending the Clean Air Act.

The conditions that make negotiated action workable probably include the following³³: the problem must be clear and well defined; each party must see the issue as a threat; no party should want a delay; and, one or more government agencies with authority need to be available to serve as government representatives in the process. In addition, other conditions will improve the likelihood of success. Constituencies should be organized and well defined. The problem areas should be those where joint fact-finding has some reasonable possibility of leading to common ground. A reasonable balance of power should exist between opposing groups. The proceedings

should allow sufficient time to create a mood for exploration and compromise. Finally, all sides need to be prepared to change their behavior, and government regulators must be willing to allow the process flexibility.

During the 1980s three agencies, the Department of Transportation, the Environmental Protection Agency and the Department of Labor took the lead in using negotiated rulemaking in their regulatory processes. The Federal Aviation Administration was the first agency to use the process to develop a rule, employing negotiated rulemaking successfully to revise regulations governing maximum hours for pilots on flight duty, an issue the agency had been stymied in dealing with through traditional rulemaking processes.

In late 1990, Congress passed new legislation that establishes a framework for the conduct of negotiated rulemaking by federal agencies.³⁴ The new law, added to the salutary experience of the agencies that have used the negotiated process successfully, has the potential to expand this more reasoned and flexible approach to regulation.

CONCLUSION

During the Reagan era the very idea of regulation became the issue, rather than the practical implications of any specific regulatory matter. We must not let that legacy hamper the search for practical, effective, and non-ideological approaches to current questions of what should be regulated and how. The future health and the international competitiveness of the U.S. economy are at stake in the specific regulatory issues dealt with in this volume. The health and welfare of the public, and the fundamentals of our "social compact," are at issue in these areas as well. It's time to let a new era of substantive, pragmatic, nonideological debate about regulation begin.

NOTES

1. Michael D. Reagan, *Regulation: The Politics of Policy*. Boston: Little, Brown and Co., 1987, p. 72.

2. "Message to the Congress Transmitting the Regulatory Program of the United States Government, August 3, 1990," *Weekly Compilation of Presidential Documents*, August 2, 1990, p. 1194.

3. Executive Order 12044 (1978). In his "anti-inflation" statement, Carter said, "In the past, Federal regulations have often done more to protect regulated industries than to promote efficiency and cost reductions. There is

much we can do to reverse this situation." Public Papers of the Presidents of the U.S. Jimmy Carter 1977, Book I, January 20-June 24. U.S. G.P.O., Washington, D.C., 1977.

4. President Carter's approach to regulation was mixed. He pursued economic deregulation and, in response to economic pressures, he tried to centralize review of regulation in the White House. On the other hand, he also began his term by appointing consumer, environmental and civil rights activists to lead regulatory agencies, and most of his Cabinet members were also sympathetic to increased regulation to achieve social goals. This ambiguity seems to reflect two factors. First, like most American presidents, Carter was responsive to various and sometimes conflicting constituent pressures. Second, he served during a period when public views with respect to regulation were in transition.

5. *Executive Order 12291*, 1981.

6. Congress passed the Interstate Commerce Act in 1887 and the Sherman Act in 1890. Congress had also ventured into social regulation, with passage of the Comstock Law in 1873, barring shipment of "obscene items, including contraceptives," through the mail. In addition, states had begun to pass social legislation governing child labor, conditions for women's labor and employers' liability.

7. Michael D. Reagan, *supra* note 1, p.15. This definition does not specifically include one of the most central components of U.S. regulatory policy, anti-trust law. The Reagan Administration's anti-trust enforcement policy was considered lax, and received a good deal of criticism on the grounds that vigorous action to prevent undue economic concentration and monopolistic practices is necessary to the functioning of a competitive system. Although the issue is clearly related to regulation policies, it is too broad to be considered in the context of this volume.

8. See the discussions of economic regulation by Thomas K. McCraw in *Prophets of Regulation*. Cambridge: The Belknap Press of Harvard University Press, 1984 and U.S. Congress, Joint Economic Committee, *Special Study on Economic Change, vol. 5: Government Regulation: Achieving Social and Economic Balance*. 96th Congress, 2nd Session, December 8, 1980.

9. For a discussion of the issues in financial industry regulation see *Regulating the New Financial Services Industry*. Washington, D.C.: Center for National Policy Press, 1988.

10. McCraw, writing at the end of the 1980s, saw the years at the end of that decade as belonging to the period of regulation that started with the Kennedy Administration. The argument is being made here that by the time Jimmy Carter was running for office the era's unambiguous commitment to activism had already ended. Thus, the Carter Administration should be seen as implementing the start of a transition away from activism, and should not be considered an integral part of the preceding period.

11. As McCraw has suggested, much of the economic regulation of this era was shaped to respond to a unique set of economic circumstances; thus, the regulatory structures of the New Deal certainly deserved to be critiqued systematically in the very different economic circumstances of the 1970s.

REGULATION AND IMPERFECT DEMOCRACIES

Peter L. Kahn

AFTER A DECADE of deregulation, there is growing dissatisfaction with its results. The environmental problems, soaring air travel costs, and savings and loan failures with which we must now grapple were not averted by dismantling activist government. The return to private markets has proven far more daunting than originally imagined. We must, therefore, examine the problems that remain in the wake of deregulation, and think creatively about the role government can play in enhancing our national well-being.

There is not, however, universal agreement on this conclusion. Some argue that these newly apparent problems exist, not because of the regulation that was removed, but because of the regulation that remains.¹ The problems of the savings and loan industry, for example, have been blamed not on the removal of regulatory safeguards, but on those still in place: federal deposit insurance allegedly insulates bankers from market discipline when they invest their depositors' assets unwisely.² Problems which have surfaced in airline deregulation have been attributed to remaining federal regulation of airports and ground capacity. The list could go on at some length.

Indeed, many have questioned whether there exists any positive role for regulation in our economy.³ While private markets are often a highly efficient means of allocating resources, many believe that government is all but incapable of reaching efficient and genuinely public-spirited decisions.⁴ It would therefore be a mistake, in this view, to trust the government with any but the most elementary of regulatory tasks.

This pessimistic view of government's ability is rooted, not in the weaknesses of a particular administration or in the inherent intractability of regulatory problems, but in a perceived defect in the way decisions are made in a democracy. In the gritty real world, the theory goes, democratic government serves the interests of whichever

interest group turns out to be most powerful. Unfortunately, the dominant interest group is unlikely to be the general public. Economic regulation, as a result, is mere special interest legislation, and will not serve the public interest because it is not designed to do so. This view, which provided the underpinnings of the deregulatory revolution of the last decade and which continues to be heard to this day, would have us reject the role of "government," as embodied in the regulatory programs and legislative enactments which have since the 1930s played so large a role in the American economy.

These arguments, however, provide no reason to believe that smaller government and less regulated markets would produce more attractive results. Some form of social control modulates all social interactions, both economic and non-economic. Free markets are not simply "free"; they are regulated implicitly by the underlying rules of contract, tort, and property that make up the common law, as well as by the supplementary structure of legislatively-enacted federal and state statutes. Markets are dependent for their efficiency on the effectiveness of this legal framework. The attractiveness of explicit regulatory programs can only be evaluated in comparison with the results of the implicit common law structuring of markets.

While many private interactions proceed perfectly well relying only on traditional legal rules, some do not. Efficient resource allocation is not always achieved, in part because the body of existing case law has failed to create the rules needed to produce such results. The outcomes of private economic activity might be unfair or otherwise unattractive; the continued public demand for some regulatory protection against the excesses of the marketplace—from early laws banning child labor and slavery to modern environmental protection—makes that clear. Not surprisingly, it is precisely to such problems that regulation has often been directed. Regulatory efforts must be evaluated, not against an abstract norm of perfection, but against the reality of markets which work in a less-than-perfect legal setting.

The unavoidable presence of special interest politics in a democracy likewise does not present a persuasive case against assigning regulatory responsibilities to government. The reason is simple. That problem lies with politics, not with government. A political decision *not* to enact regulation or to remove existing governmental programs has its origin in the very same political logic that creates or extends regulation. It is not to government, but to the process of political decision-making about government, that this argument directs our attention.

There remains a positive role for government in our economy. This conclusion arises not out of faith in the sober efficiency of government, nor out of a belief that the role of special interest

influence in our system of government is so small that it may safely be neglected. On the contrary, Regulatory solutions to social problems must remain carefully considered alternatives, despite their frailties, simply because the alternatives are vulnerable to the same frailties, and because there can be no determination, except on a case-by-case basis, as to which allocation mechanism poses the least risk of distortion of the public's welfare.

THE ALTERNATIVE: MARKETS AND THE COMMON LAW

The case against regulation rests on the assumption that free markets can be relied upon to produce desirable and efficient outcomes. If "unregulated" markets do not produce such attractive results, however, then explicit government regulation is relatively more appealing. While regulation can never reasonably be expected to approach perfection, it may on occasion do better than a flawed alternative.

Given proper incentives, well-functioning markets will produce economically efficient results. If individuals are allowed to pursue their economic self-interest, they are likely to respond as swiftly as possible to the incentives of the marketplace. The vast informational and organizational requirements of an economy virtually ensure that individuals will do this better than even the most diligent and enlightened central decisionmaker.⁵

The incentives individuals face, however, are not always reliable, in part because those incentives are affected by the legal system. The traditional rules of contract, tort, and property regulate even seemingly unregulated economic markets.⁶ If those rules are appropriate, markets can function smoothly and productively. If they are not, market incentives can be dramatically counterproductive.

The old common law doctrine of "privity" in tort, for example, protected a manufacturer from liability if the consumer was injured by a product bought from a retailer and not from the manufacturer itself. Because the consumer had not bought directly from the manufacturer, the courts held that the consumer was not "in privity" (that is, not in a direct contractual relationship) with the manufacturer, and thus could not collect compensation.⁷ This led manufacturers to be less concerned about the safety of their products than they should have been, and to invest too little in making their products safe. A legal rule now generally held to be incorrect led the market to produce an undesirable result.⁸

Because any economic system is vulnerable to the weaknesses of

the legal rules that have come to govern it, the more militant advocates of free markets have made two arguments to reassure us that these rules do not undercut the attractiveness of market outcomes.

First, they argue, though the body of rules may not always be correct, evolutionary forces lead the courts towards the right rules over time.¹⁰ The essential evolutionary force arises from the normal business of the courts: inefficient rules will be challenged in court more frequently than efficient rules. With proper incentives, for example, manufacturers will take greater account of the need for investments in product safety. Because products are safer, there will be fewer accidents, and hence less litigation; and therefore the legal rules which foster this safer state of affairs will be challenged less frequently and are more likely to survive.¹¹ "Efficient" rules will come to constitute the reigning body of precedent, and "inefficient" legal rules will gradually be discarded.¹²

The second market-oriented defense of traditional legal rules takes a different approach. It denies the existence of the problem: even if common law rules are seriously in error, goes the argument, it really doesn't matter. An ingenious bit of economic theory called the Coase theorem says that, when the cost of transactions is negligible, the same economic result will be arrived at by negotiation between the parties, no matter which party has formal legal right or liability.

Thus in the tort privacy example, consumers might have banded together to compensate producers for the costs of making safer products. The law would be irrelevant, in that manufacturers would agree by contract to provide product safety just as if they had been liable for the injuries their products would cause to consumers. Nevertheless, the prohibitive costs of finding and negotiating with all present and future consumers of a manufacturer's products make that possibility at best a theoretical curiosity. In fact, as this chapter explores in greater detail later, the theorem is effective only under limited conditions, and recent experience with changing tort liability seems to indicate its domain of application is at best limited.

There are numerous problems with the evolutionary argument. For one, the argument misuses the concept of efficiency, on which it so heavily relies. Any legal rule which reduces the number of accidents will reduce the volume of litigation. Yet reducing the number of accidents is costly. An ideal rule would reduce the number of accidents until the cost imposed on society by an additional accident about equalled the cost of taking precautions to avoid the accident.¹² The rule which instead minimizes the number of accidents would be litigated least frequently, but that result is efficient only if the cost of reducing the number of accidents is so small that it may be safely ignored.

The argument also relies on the dubious view that rules most often implicated in litigation are the most likely to change. The relationship between the number of cases which implicate a rule and the survival of the rule is weak. Many cases may rely upon a rule, yet none may overtly threaten it. Though frequently "challenged," such rules are unlikely to change. Many cases involve corporate law, for example, but the legal rule granting limited liability to shareholders is highly unlikely to change. And a rule firmly adhered to by the courts, no matter how imperfect, may lead potential parties to litigation to reach settlements to avoid the costs of litigating, or may lead them not to press their claims; few cases will challenge rules strictly observed, no matter how poor they are.

Furthermore, the evolution of the common law is hardly unerring in its sense of direction. Tort liability has evolved over the last several decades in response to new concern among legal scholars and judges for its economic efficiency.¹³ Many parties have been conspicuously unhappy with those changes, and some judges and state legislatures have reversed them. Over several decades, then, the states have reversed course more than once on basic issues of tort law. Some states are now moving in one direction, while others move in the opposite direction. Though apparent errors in judge-made law may be reversed eventually by future cases, as was the case with tort privacy,¹⁴ the restrictive effects of precedent make this process slow and uncertain.

The issues are different, but no less problematic, in other areas—for example, with respect to the environment. In the period prior to the major federal initiatives of the early 1970s, state common law proved largely unable to deal with environmental problems, and there is little reason to think the states would have been able to address these concerns without federal administrative action. Since the federal government so decisively entered the environmental field two decades ago, the states have often deferred to a federal agency's decisions. It is in light of such experiences with the common law that the success of federal regulation must be evaluated.

Many injuries, for example, simply are not readily amenable to solution by the legal system. Environmental injuries far distant in time and place from the injurious activity pose unusual difficulty for demonstrating cause and effect. It is extremely difficult to identify, years after the fact, the particular plaintiffs injured by exposure to asbestos or Agent Orange,¹⁵ or which of several manufacturers sold DES to a given plaintiff's mother. Efforts to assign liability in such cases have caused great stress to the liability system, and have had undesirable effects on the incentives facing insurers and manufactur-

ers subject to such indiscriminate liability.¹⁶ On the other hand, a refusal by the courts to confront such difficult cases would leave plaintiffs with serious injuries uncompensated and would wrongly give manufacturers reason to ignore the effects of their actions. No remedy now in the purview of the courts appears to adequately address the problem. Furthermore, reliance on legal evolution in such situations necessarily subjects economic actors to uncertainty about the extent of their future liabilities.

Administrative remedies can be far more effective in dealing with such problems. By their nature, they define in advance the actions that should be taken by private parties, avoiding the need to assign after-the-fact liability. ~~Administrative agencies have the ability to arrive at integrated policies which courts, by virtue of their necessarily reactive role, cannot. Courts are able to deal only with the case before them, and cannot establish rules for cases which have not yet happened.~~ While agencies may choose not to exercise these abilities—for example, in recent years, the federal health and safety agencies have been limited in their effectiveness, in part because of the political direction they have been given—courts have nevertheless long respected the superior abilities of administrative and legislative bodies in arriving at such policy decisions, and have tried to avoid decisions which infringe on these “legislative” functions.¹⁷

The fundamental problem with the “efficiency by evolution” view of the common law, however, is that efficiency is not the only evolutionary force at work. The legal system is subject to competing pressures which also affect its development. Most importantly, the legal system is subject to some of the same problems faced by the political system: that is, it is subject to the influence of special interest groups.

As many critics of regulation have pointed out, small, cohesive and intensely interested lobbying groups have organizational advantages in pursuing their group interests, advantages which often overwhelm more numerous but less effective opponents. Members of small, homogeneous groups have a greater incentive to spend their time, money, and influence furthering the group’s legislative goals than do members of larger and more diverse groups.¹⁸ The smaller the group, the more likely it is that an individual member will prefer to contribute to the achievement of the group’s goals rather than risk failure. If the group is small, each member bears relatively more responsibility for the success of the group’s agenda and will get a larger share of the total group benefits if the agenda succeeds.¹⁹

These groups’ advantages, however, do not cease at the boundaries of the political arena, but extend to the legal arena as well. Whether

pooling funds to finance legal battles through trade associations, or adopting a joint litigation strategy to press their common viewpoint, they will have the ability to pool resources more successfully than their opponents: after all, they are the very groups able to do so successfully in the political context.

A legal rule will be reexamined only when someone has the incentive and ability to bring it to the attention of the courts. Organizationally effective groups have greater ability to sustain continued assaults on legal rules than do groups less able to defend their interests. Laws with powerful and effective enemies are surely as vulnerable to evolutionary pressure as rules which are simply inefficient.

The fact that some law firms consistently charge substantially higher fees than others, and that their clients willingly pay the premium, suggests that higher-quality legal services often produce valuable results less likely to be achieved by less costly providers.²⁰ Expenditure therefore will often correlate with result. Groups better able to muster resources will succeed more frequently in establishing favorable legal rules, just as they seem more likely to succeed in the political context.

Once a group has shaped a common law rule to serve its interests, it will have every incentive to resist changes from political sources. When it has achieved its goals through the courts, politics can only threaten gains already made.²¹ Whether a group seeks to preserve advantage gained through the legal system by resisting political change, or instead to achieve advantage by political means and preserve it by resisting legal challenge, will depend simply on the relative costs of the two strategies. It will often surely be cheaper and more reliable to seek to establish common law rules, buttressed by *stare decisis*, or the rule of precedent, than to rely on the ongoing vagaries of politics. In any case, it seems impossible to predict which will be chosen. Closing off one route by deciding in principle not to regulate economic matters will simply lead interest groups to emphasize the other, and would enhance the ability of interest groups to preserve the gains they make through the courts.²²

In short, the group will view the common law outcome, and potential change in that outcome through political activity, as alternatives. The choice between them will be determined by a belief as to which will yield the highest value. The decision by an interest group not to seek regulation of its industry cannot be viewed as benign. When regulation is not sought, it must be presumed to yield less value to the group than its alternatives.

Furthermore, courts make mistakes. “Efficiency by evolution,” if it is achieved at all, may be at best glacially slow and highly uncertain.

For example, the broadening of tort liability over the last several decades²³ was motivated by the desire to find "efficient" legal rules,²⁴ yet has evoked intense protests by affected interest groups and their apologists.²⁵ It now seems that some courts are backing away from these changes.²⁶ The experience suggests we face a dilemma. If we freeze the common law at the traditional rules, we surrender whatever efficiency gains are still in the process of evolution. If, instead, we allow the courts to discard traditional rules and concoct new ones, we might as well let legislatures do the same; there's no telling which will be the less bad.

There is reason to doubt that the rules chosen by the legal system evolve towards some efficiency standard, or are clearly better than the rules chosen by legislatures. Even if they did evolve towards more efficient rules, the rules in place at any given time could be seriously flawed, and the attainment of clearly preferable rules might be years away. Furthermore, the political system itself is not a static enterprise; as some economists have suggested, there may also be evolutionary pressures which push legislative outcomes towards desirable decisions, though they may be flawed at any moment.²⁷ Recent experience with deregulation surely should persuade its advocates that legislative outcomes can become more efficient over time.

There is, however, another reason offered for the view that the weaknesses of the common law do not diminish the attractiveness of private markets: that is, that the legal regime really doesn't matter anyway.²⁸ The parties affected by a legal rule—say, a factory owner who wants to pollute the air to reduce production costs, and the neighborhood residents who want the courts to rid them of this nuisance—are free to settle their differences out of court. If the courts give factory owners the right to pollute, victims may offer payment sufficient to persuade them to change their behavior. If factory owners are not allowed to pollute, they may buy the right to do so by paying potential victims enough to compensate for the injury the smoke will inflict. If the costs of reaching agreement is negligible, the Coase theorem tells us it doesn't matter which side has the benefit of the law: the parties will reach an agreement that allows the same amount of pollution in either case. Most important, whatever the legal rule, the outcome will be efficient, in that the parties could not be made better off by further negotiations. The only difference will be who pays whom. The parties will each prefer to have the legal right, but the virtues of free markets are independent of legal rules—so long as it is not costly to negotiate the necessary agreements, the crucial assumption in the Coase argument.²⁹

Endless argument has been spawned by this critical precondition

for the application of the Coase theorem: if it fails, then private markets can be badly skewed by poor legal rules. Fortunately, we have what we might call experimental data on the implications of the theorem. Recent experience with tort law reform suggests that changing legal liabilities have had dramatic effects on resource allocation. One must conclude that the legal regime is frequently relevant to market outcomes, and that incorrect legal rules raise the issue whether market outcomes might be sufficiently egregious to warrant public involvement, an issue which can be resolved only by case-by-case analysis of particular market problems and proposed governmental remedies.

The unmistakable tendency of many state courts has been to extend tort law to reach defendants more easily, to expand the size of damage awards, and to permit more plaintiffs to file suits. Strict liability, which is relatively favorable to plaintiffs, has replaced negligence standards in many contexts. In other areas, behavior once immune now often gives rise to liability. The doctrine of tort privity has been largely abandoned. Joint and several liability and the collateral source rule have expanded the ability of plaintiffs to collect damage awards from defendants. Contributory negligence standards often no longer apply, so that plaintiffs who help to cause the injury for which they sue are no longer barred from recovery. Standards of proof have relaxed, making it easier for plaintiffs to assign liability to defendants.³⁰ Both jury damage awards and settlement amounts have risen on average, and very large awards have become much more common.³¹ And the volume of tort litigation has expanded significantly in response to these incentives.³²

These changes in the legal regime apparently have had significant effects on the activities in which potential defendants engage, and on the willingness of liability insurers to provide coverage. According to some sources, insurance companies have refused to offer coverage for environmental liability, such as for the cleanup of toxic waste sites.³³ Hazardous waste management facilities have closed because they have been unable to obtain insurance.³⁴ Pollution control firms have refused to undertake toxic waste projects.³⁵ Doctors and hospitals also have changed their practices, responding to the increased frequency and severity of medical malpractice awards.³⁶ Traditional fee-for-service insurance coverage is being replaced by insurance plans which give patients and doctors incentives to reduce the cost and amount of medical care.³⁷ Some doctors have stopped providing certain services, or have withdrawn from practice altogether, in response to increased legal exposure.³⁸

These effects, caused by changes in an integrated body of legal

rules, indicate that changes in legal rules can have substantial effects on the allocation of resources. Cases involving non-negligible transactions costs, in which the Coase theorem does not yield tidy and comforting conclusions about the irrelevance of legal rules to the efficiency of markets, are an enormously important category of economic transactions. If transactions costs were negligible, the role of the courts would be minimal, since costless market transactions would replace the legal mechanism. In contract law, if legal rules were clear and impervious to change through litigation, there would be no point in challenging a valid assertion of legal right. Many contract cases, therefore, must involve non-negligible transaction costs. All torts involve transaction costs, since they are by nature involuntary interactions between the parties. In all such cases, the risk of litigation is, prior to the event which is the subject of the lawsuit, preferred by the parties to market interaction and must be less expensive than the perceived transactions costs. Furthermore, the absence of transactions costs requires that none of the parties to a potential transaction attempt to mislead others about the value they place on the transaction. This assumption is not only implausible; it renders the decentralization result embodied in private markets irrelevant, since in these circumstances a centralized authority in principle could direct resources equally effectively.³⁹

The Coase theorem, as a result, does not offer us reassurance about the irrelevance of legal rules. The desirability of market outcomes will depend on the strengths of the rules which structure market transactions. As we have already argued, in our legal system those rules are subject to influences which work to lessen their desirability.

At times the rules arrived at through the political or administrative process will be superior to the rules arrived at through the courts. At other times the reverse will be true. Nevertheless, legal rules matter to the efficiency of the market system. The common law is no less subject to error than rules arrived at through political or administrative means.

DEMOCRACY AND ITS DANGERS

In this democracy, government operates amid the push and pull of competing interest groups. The Framers of the Constitution anticipated this, and tried to design a system of checks and balances which would limit these pressures without immobilizing the government and without abandoning the accountability of democratic government.⁴⁰ Some contend these limits have not held.

In this view, we must examine every political action to see whose interest it truly serves: that of the public, or that of the officeholders responsible for it. Although public servants often have motives that are truly public-spirited,⁴¹ they are not always so benevolent. Politicians cannot be monitored every time they exercise public power, and may yield to temptations to seek political advantage, even when doing so is not consistent with the best interests of their constituents.

As a result, regulation often benefits the very industry apparently regulated. Governments may limit the entry of new competitors into an industry and thereby convert it into a cartel,⁴² as with many of the licensed professions. The effect of requiring taxicab medallions, issued in limited supply, on the wealth of medallion owners has become famous in economics textbooks.⁴³ Stockbrokers and stevedores, airline owners and truckers, butchers and beauticians, among a host of others, have been beneficiaries of the regulatory programs which allegedly governed them. The Civil Aeronautics Board and the Interstate Commerce Commission, created under the guise of nebulous public interest goals, often served the interests of the industries they controlled.⁴⁴

The form of political power which larger groups in principle should have—the power of voting numbers—is often less effective than it perhaps was intended to be. Members of the public have little incentive to vote: an individual can affect only infinitesimally the outcome of an election, yet bears significant costs in becoming informed and in voting. The incentives facing a marginally interested member of the general public are often less compelling than those which face a member of the affected industry: the occasional taxicab customer cares far less about rates than does his or her driver.

Because by this logic the political process seems stacked against the general public, some have concluded that extraordinary measures must be adopted to solve the problem. Over the 1980s, the power of special interest groups became the justification for a wide range of proposed changes in the institutional structure of the federal government, changes which, taken together, would constitute a legal counter-revolution.⁴⁵ Deregulation adopted thus far has only removed specific regulations in which public benefits seemed inadequate compared to the costs. These proposals, on the other hand, would sweep across the gamut of regulation without regard to the merits of individual programs. Such proposals, were they adopted, would constitute a formidable barrier to any future governmental role in the economy.

Although there is less political pressure to limit governmental power today than there was a decade ago, this legal counter-revolution

is more likely to be implemented through judicial edict than legislative enactment. Yesterday's theories, un rebutted, can be made tomorrow's law by a Supreme Court and lower federal courts which have grown increasingly conservative. For that reason, it is important to examine the strength of the arguments which underlie the conservative judicial agenda.

The reason offered for these proposals to use judicial fiat to limit the government's power to regulate is the manipulation of public power by private lobbies. Government often does seem to serve private interests. And yet the conclusion does not follow. We cannot eliminate special interest politics by eviscerating our power to govern. The problem of special interest lies in the political process, and not with government, and can only be resolved by reforming the political process itself. There is, after all, nothing which restricts special interest politics to positive acts of legislation. There is as much reason to suspect foul play when government does not act as when it does.

The defeat of a proposed action is not necessarily less "special interest" in nature than its victory. To conclude that these concerns apply only to affirmative acts of government, and not to the refusal of government to act or to the removal of existing programs, we must assume that powerful groups always favor new government programs, while weaker ones always oppose them. There is obviously no basis for that assumption.

Consumer protection legislation proposed by Senator Warren Magnuson in the 1970s was defeated because business lobbyists saw it as a threat to their interests. The legislation would have allowed consumers injured by defective products to file class action lawsuits against a manufacturer.⁴⁶ It was intended to enable consumers to share the otherwise prohibitive costs of a lawsuit, making available to a "class" the same relief which the legal system would have provided to an individual litigant. The bill was defeated by the lobbying efforts of groups representing manufacturers. Would legislation to make available previously unaffordable legal remedies have been government interference in the market on behalf of a special interest—or was its defeat the result of an interest group's desire to avoid the discipline the law otherwise would have imposed on it?

Tax cut legislation providing favorable treatment to some benefitted group is quintessential special interest legislation, though it reduces government's role in the taxed activity. The Steiger Amendment in 1977, providing for a reduction in capital gains taxes, was a successful result of business lobbying, and proved to be the inspiration for much more business political activism.⁴⁷ General tax reductions may also stem from self-serving motives. The tax cuts of the early 1980s were

widely popular. But these cuts were not accompanied by equivalent reductions in those transfer programs such as Social Security and Medicare which benefit politically powerful voting blocs. People seemed to anticipate that their own taxes would fall, but that any offsetting expenditure reductions would fall on others.

Another example is the struggle over the labor law reform bill in 1977, which would have strengthened federal protection for unions campaigning in representation elections. The labor movement had long sought such a measure, and indeed had received support from President Jimmy Carter prior to the bill's passage. Business lobbying groups, however, organized a campaign against the bill that resulted in an outpouring of more than six hundred thousand letters and telegrams to the White House. Hundreds of business lobbyists worked against the bill, spending an estimated \$5 million to defeat it.⁴⁸ As a result, the Senate ultimately defeated the bill.⁴⁹ If the bill had survived, it might well have been labelled "special interest" legislation; was its defeat any less so?

Indeed, the line between governmental action and inaction is frequently unclear. When the National Association of Manufacturers fought for and helped win passage of the Taft Hartley Act in 1947, banning the closed shop and ensuring the "right to work" for non-union workers, it used the power of the federal government to ensure that no state could permit labor unions to interfere with the freedom of individual workers to enter into labor contracts. As a result, employers preserved for themselves an important economic advantage: a comparison of states with and without such "right-to-work" laws has shown that new organizing by unions falls by over 30 percent when such a law is present.⁵⁰ The federal government acted to prevent action by the states designed to prevent action by some private parties, which in turn was designed to limit through contract possible actions by other private parties. It is obviously difficult in such situations to determine whether the successful lobby has enhanced or diminished the control of government over its economic activities.

There is no reason to presume, then, that only government intervention in the economy is evidence of a special interest group's victory. The interest group model should lead us to be skeptical of all political outcomes, whether those outcomes enhance or reduce the activities of government. There is no law of nature that the interest groups which support government action are always stronger than the groups which oppose it. The refusal of government to act can be a valuable favor to the interest group which would be harmed by some action. Such favors get handed out all too often.⁵¹

The deregulatory movement itself, for example, was largely suc-

cessful in meeting its objectives. But why should deregulation have succeeded, if regulation served the powerful interest groups which allegedly dominate our politics? The success of deregulation means either that these private interests sometimes are defeated (so that some implemented regulation really might serve the interests of the larger public), or that deregulation came to serve the interests of those groups which had once sought regulation. If the former is true, then we cannot readily conclude that political outcomes are contrary to the public welfare. If the latter is true, then interest group influence sometimes results in a smaller government than might otherwise exist.

Opposition to government actions contrary to a group's interest will often be a more productive investment of the group's lobbying dollars than would its support for favorable government actions. Courts normally hold to a far lower standard of review the failures of an administrative agency to act than they hold its overt actions.⁵² Since agency inaction is less vulnerable to judicial interference, dollars invested opposing actions harmful to the group may have a larger realized payoff than would equivalent resources spent supporting advantageous government actions, which could be reviewed by a skeptical court.

Indeed, it would be foolish for such groups not to oppose government actions which harm them. Interest groups have much to fear from an activist government. Governments have long imposed costly and onerous burdens on business and other groups.⁵³ Once a legislature has acted, its unfortunate victims are largely immune from judicial protection on constitutional grounds.⁵⁴

Because lobbyists do at times find it in their interest to oppose government actions, efforts to limit special interest politics by imposing judicial or constitutional constraints against activist government can only be self-defeating. Lobbyists working in this changed environment would note that the probability of success in opposing government action had become higher, and the probability of success in seeking new favors had fallen. Opposition to action therefore would be a relatively more certain investment than it is now. They therefore might reasonably divert lobbying dollars from the advocacy of self-serving government action to supporting self-serving government inaction. This would reduce the likelihood that desirable legislation would be enacted, and raise the odds that government would fail to act even when it should. It would therefore promote the public interest in one direction, but work against the public interest in the other.

Interest group politics, it seems clear, will sometimes enhance, and

sometimes reduce, the role of government. Government's proper role logically is independent of our distaste for special interest influence. Concern about the dominance of special interest groups in our political life logically leads to a preference, not for less government, but for a more truly representative politics.

CONCLUSION

There simply is no alternative to a straightforward, case-by-case comparison of government with its alternatives. Simple and sweeping conclusions are inappropriate. The difficulties of measuring inefficiency in private markets are such that its dimensions remain largely unexplored⁵⁵; the empirical importance of unjustifiable government inaction simply has not been investigated, and thus has been implicitly minimized. The common law is inherently an imperfect instrument of the public's welfare.

The ideal solution to the special interest problem is to constrain the influence of private interests on *all* public actions, those that would decrease or prevent government oversight as well as those that would increase it. Campaign finance laws, ethical standards for public officials, and so on, are all intended to achieve that goal. There is vast room for improvement in all of them, and thoughtful proposals along these lines have been made.⁵⁶

Whether these problems can ever be satisfactorily overcome is a matter for speculation. But they are endemic to democracy. We cannot escape the problems of democracy by wrongly attributing its shortcomings to just one of the several possible outcomes of the democratic process, nor can some general rule against government remedy its defects.

Can the government play an active and positive role in our economy? Sometimes, yes. The sweeping case that has been made against it simply does not stand up to hard scrutiny. Choices between explicit governmental regulation and implicit legal regulation of markets must be made case by case, coming to grips time and again with the hard facts, weighing disadvantage against disadvantage. The common law, whether of ancient standing or newly invented, has too often shown itself inadequate. It simply is not credible that the legislature, itself an institution with an ancient heritage, will in every case reach answers still less satisfactory. The challenge is to acknowledge the weaknesses of process in both institutions, and to find ways to help both better our society in the future.

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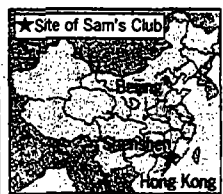
THE METRO AREA'S MOST COMPREHENSIVE BUSINESS COVERAGE

NOVEMBER 25-DECEMBER 1, 1994

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HEADING EAST

Butler will build Wal-Mart's first in China, a Sam's Club in Shenzhen, near Hong Kong.



Source: Butler Building Systems
Grossman/Mindes — KCBJ

Butler builds China's first Sam's Club

BY STEVE GROSSMAN

Wal-Mart Stores Inc. is set to build its first Sam's Wholesale Club in China and Kansas City-based Butler Manufacturing Co. is getting in on the ground floor.

Butler World Trade, a division of the manufacturing giant, will provide building materials and labor for the retailer's store in Shenzhen in the Guangdong Province.

The Shenzhen store is the first of three the company plans to build in the country, according to Millard Barron, chief operating officer for Wal-Mart's International division.

See BUTLER, Page 45

EDS eyeing locations in metro area

BY JOE GOSE

Electronic Data Systems Corp., the Plano, Texas-based unit of General Motors Corp., intends to establish a division in the Kansas City area that could create up to 500 jobs.

The company began searching for 60,000 square feet a few months ago and has narrowed its selection to at least two buildings, one on each side of the state line, sources said.

Which site EDS chooses could come down to the economic development package each state offers, but a decision is expected within weeks.

Chris Wally, president of the

See EDS, Page 46



WHOSE BUSINESS IS IT, ANYWAY?

Exaggerated Fears Fuel Environmental Anxiety

Even conscientious companies penalized

BONAR MENNINGER AND DAN MARGOLIES

Sometimes being a good corporate citizen just doesn't pay.

In 1987, Harmon Industries, a Blue Springs, Mo.-based manufacturer of railroad signal equipment, learned its employees were dumping cleaning solvent behind one of the company's assembly buildings. The solvent, kept in baby food jars and applied with paint brushes, was used to clean circuit boards.

After discovering the dumping, Harmon spent \$800,000 to shift to a water-based solvent and hired environmental consultants to assess the spill's effects on the soil and water table around the plant. The consultants concluded the chemicals posed virtually no health threat; one even recommended that the company just leave the stuff alone.

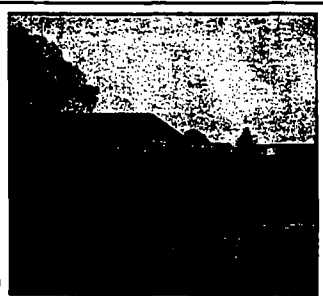
Harmon nonetheless notified the Missouri Department of Natural Resources of the contamination and, with the agency's assistance, began developing a cleanup pro-

gram and long-term monitoring plans.

Then came the sucker punch.

In September 1991, the Environmental Protection Agency slapped a \$2.7 million complaint against Harmon, alleging the company willfully violated environmental laws. Although the agency provided no evidence the spill posed a threat to human health or to the environment, the EPA characterized it as a "major" risk and ordered the company to comply with federal haz-

See EPA, Page 38



Rox himm photo

The Harmon Industries plant at Grain Valley, Mo., site of solvent dumping.

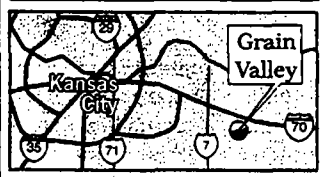
Nature of case: EPA complaint under hazardous waste law.

Alleged violation: Dumping cleaning solvent without permit.

Proposed penalty: \$2.7 million, later reduced to \$2.3 million.

Status: Awaiting administrative ruling.

Harmon compliance costs to date: \$1.4 million.



Creating a zero-risk environment

Flawed assumptions often drive EPA assessments

BY BONAR MENNINGER

From asbestos in schools to Alar in apples, the media-driven perception that America is awash in insidious health risks grows daily.

Congress and the Environmental Protection Agency have attempted to address these concerns with an

ever-widening net of regulation, and few would argue with the goal of creating a safer environment.

But beyond earshot of the same journalists who relentlessly report each new environmental danger, a growing chorus of critics contends that many of the country's environmental regula-

tions are, in fact, built on flawed scientific assumptions and absurdly inflated hypothetical risks.

The enormous costs of complying with many environmental regulations are simply not justified by the often miniscule health dangers the

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SECOND OF FIVE PARTS

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Obsessions

OSHA's
preoccupation with
minor infractions
slights training
and education.

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CEO DAVID AULL'S

razor-sharp instincts put ClubHouse Inns on the leading edge in the hotel business.



AULL

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BARNEY KARBANK'S

hot streak continues in the industrial market. The developer just bought the 195,000-square-foot Michelin Tire Corp.'s warehouse.

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A MISSOURI PANEL BEGINS planning ways to implement recommendations to make government more efficient.

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SO MUCH FOR THAT GIANT sucking sound. From January 1994 through July, NAFTA created 100,000 jobs in the United States and 27,000 in Mexico.

PAGE 9

STRATEGIES IN SMALL BUSINESS

AN EARLY START ON

retirement planning can only help at the end of the rainbow.



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FOCUS ON

MANUFACTURING

MANUFACTURERS SHORT ON

money and resources can rely on a non-profit technology center to boost productivity.

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WHOSE BUSINESS IS IT, ANYWAY?

ENVIRONMENTAL ANXIETY

ADMINISTRATOR'S ANSWERS



BROWNER

In September, EPA administrator Carol Browner was interviewed by the *Kansas City Business Journal* about the EPA's environmental policies. Excerpts follow:

Q: Many critics say the EPA's one-size-fits-all, "command and control" approach to regulation is overly broad and not sufficiently tailored to the individual requirements of different businesses. Could you respond to that?

A: We recently launched the common sense initiative, which will build on the success of the agency's work over the last 20 years but move us beyond mere regulation to real protection. We will be working on an industry-by-industry basis. We've collected six industries as the first phase of this effort in conjunction with representatives from each industry, environmentalists, community participants, state regulators. We'll be looking at how to best adopt a blueprint for that industry, an environmental compliance blueprint.

Q: Businesses complain about the vagueness of standards on the one hand and their incomprehensibility on the other. Will this initiative address those concerns?

A: The common sense initiative is about putting everything on the table. So we're going to take all the regulations that relate to the individual industry and put them on the table. We're going to look at pollution prevention opportunities. We're going to seek to find the best way for that industry to meet and to comply with environmental standards to ensure clean water and clean air. And it may mean in some instances that we will be rewriting rules, that we will be streamlining the process.

EPA

Continued from Page 1

ardous waste landfill requirements.

The case, now awaiting a decision by an administrative law judge, dramatically underscores the sweeping, often arbitrary power the EPA wields in enforcing its regulations and raises fundamental questions about the agency's sense of due process and fair play.

Harmon officials, leery of affecting the outcome of the case, declined repeated requests for comment. But a lawyer familiar with the case said, "I think this really hurts the EPA's reputation with the business community. Businesses feel like, 'Why should we do anything voluntarily if we're going to get hit with these maximum penalties anyway?'"

Struggling to cope

Whether they're mid-size manufacturers, family-owned farms or small dry cleaners, area employers are struggling to cope with a growing tangle of environmental regulations.

Though often well-intentioned, the regulations can spell the difference between a business's survival and extinction. At the same time, environmental regulations' effects on the problems they're designed to address remain open to question.

"You used to be able to spend the majority of your time running your farm and learning how to be a better farmer," lamented Douglas County, Kan., farmer Pat Ross. "Now, it seems like I spend an awful lot of time filling out paperwork or talking to regulators."

Few employers dispute the importance of environmental regulation in reversing years of degradation and neglect: the land is less polluted, the water purer and the air cleaner than it was more than two decades ago when the EPA was created.

But because much of the easy and obvious environmental remediation has been completed, the government's efforts increasingly have focused on improvements at the margin, where economic costs begin to outstrip environmental benefits.

"What's left are incremental changes that won't make much difference, but which are enormously costly," said Melinda Warren, assistant director of Washington University's Center for the Study of American Business in St. Louis.

For society, the direct costs of environmental regulation approach \$130 billion a year, according to the EPA. That figure doesn't include regulation's myriad indirect costs: lost time, productivity, jobs and business opportunities.

One of the few attempts to quantify the productivity losses

associated with environmental regulation was made by the U.S. Bureau of the Census last year. Instead of an expected dollar-for-dollar tradeoff, the bureau found that productivity in the oil, paper and steel industries tumbled by \$3 to \$4 for every dollar spent on environmental improvements.

Although the productivity costs did not reflect the benefits of environmental regulation, those benefits increasingly have been called into question by economists and scientists who believe the EPA's risk assumptions are based on flawed and selective analysis of the data. As a result, critics say, health and environmental risks are vastly overblown, generating public alarm that triggers more rules and regulations in an ever-expanding spiral of action and reaction.

Case in point: the Environmental Working Group, a Washington-based public interest organization, last month came out with a study, "Tap Water Blues," purporting to show that more than 14 million Americans living in the grain belt states are subjected to unreasonably high levels of cancer-causing herbicides in their drinking water. The group, which based its finding on an analysis of raw drinking water, expressed the risks of cancer as a multiple of the government's acceptable level of one additional cancer per million people exposed. It called on the government to phase out the chemicals within two years.

Yet based on the group's own data, water quality researchers David Baker and Peter Richards of Heidelberg College in Tiffin, Ohio, found the actual risk translated into less than three cancer cases a year among the 12 million Midwesterners with the highest exposure. Put another way, that figure represents .006 percent of annual cancer cases from all causes in a population of that size.

It's little wonder the Environmental Working Group did not express their results as cancer incidence rates, Baker said. "What kind of press attention would they have gotten if they did? Tap Water Blues' makes an excellent argument that herbicides in drinking water do not pose a significant health risk."

In fact, the currently known risks of the weed-killing chemicals are outweighed by the potential consequences of their elimination: a steep increase in the price of the very grains, fruits and vegetables regarded as the best natural defenses against cancer.

The general public must be educated to the fact that they face a multitude of risks in their everyday lives - driving a car, riding a bike or poor diets - many of which far exceed the probable health risks posed by substances and activities that



EARLIER THIS YEAR, HAVENS STEEL COMPANY WAS HIT WITH A \$6,000 FINE BECAUSE PAINT BUCKETS WERE NOT DESIGNATED AS HAZARDOUS WASTE.

Risk and Safety Manager Gregory Ward demonstrates special 55-gallon drums designed by his company to meet government regulations.

the EPA wants to regulate and restrict," said S. Fred Singer, a former professor of environmental sciences at the University of Virginia and president of the Science and Environmental Policy Project, a public policy think tank in Fairfax, Va.

Yet public alarm over the use of pesticides and herbicides has given rise to still another set of EPA rules requiring farmers, greenhouses, forestry operations and nurseries to provide safety training for employees who handle pesticides and instruct them in application procedures. The rules, scheduled to take effect in January, are rife with detailed directives and complex definitions, down to the precise size and type of warning sign that must be posted on fields treated with pesticides.

"I have no objection to a strong emphasis on safety, but I think it needs to be realistic and not ridiculous," said Roger Pine, a longtime farmer of 4,000 acres in Douglas County. "I think all of us have a certain amount of common sense, and if we follow the information about the safe handling of the pesticide that's on the package, that ought to suffice."

Pine added, "You shouldn't be required to put on a space suit just to go out and look at your crops."

Command and control

EPA's mania for intrusive and complicated procedures affects not just farmers but businesses in which chemicals are only a minor part of their operations.

A good example is Havens Steel Co., a 78-year-old Kansas City steel fabricator that helped build Kansas City's Bartle Exposition Hall and the RLDS Temple in Independence.

At least once each shift, company workers haul their empty five-gallon paint buckets to a storage area, where the residue is emptied into 55-gallon drums. Sometimes the buckets aren't empty and the remaining paint is usable, so workers leave the half-empty containers on the floor and discard them later.

Earlier this year, the Missouri Department of Natural Resources hit Havens with a \$6,000 fine because the paint buckets were not designated as hazardous waste. Under federal environmental rules, the department said, the buckets were considered "storage containers" and had to be labeled—even when the workers weren't finished with them and the buckets posed no hazard.

The company also was cited for hanging "No Smoking" signs in the wrong place, for labeling some hydraulic oil as "used oil" rather than "waste oil" and for

See EPA, Continued on next page

WHOSE BUSINESS IS IT, ANYWAY?

ENVIRONMENTAL ANXIETY



EPA

Continued from previous page

leaving the 55-gallon drums open when upending the paint buckets through a grate on top.

"These people haven't lived in the real world," said Gregory Ward, Havens' risk and safety manager, who figures he spent between 120 and 160 hours and \$1,000 in legal bills in 1994 negotiating with the state to bring the fine down from \$16,600. All together, Ward said, he devotes at least 25 percent of his time to the requirements of sundry environmental rules.

Adam Thierer, an analyst with the Heritage Foundation, a Washington-based policy institute, said compliance problems of the kind Havens faces are a product of the government's centralized, command-and-control approach in developing and enforcing the rules.

"Often, these regulations are simply arbitrary edicts passed down from Washington and enforced on business. And many times, they do not do what they're supposed to," Thierer said. "The command and control approach just doesn't work."

Testing their metal

Consider, for example, the case of a Kansas City metal-products manufacturer. Under EPA regulations, whenever toluene, a common solvent, is mixed with other chemicals, it's considered "processed" and subject to the reporting requirements of the Emergency Planning and Community Right to Know Act.

But because the company applied the chemical mixture to metal, EPA insisted the company was "using" rather than processing it and was subject to another set of reporting requirements. The company, which didn't wish to be identified, was fined more than \$40,000.

"Dealing with the EPA is like dealing with an abused dog," said William Denton, a lawyer with Gage & Tucker who represented the company and advises businesses on environmental compliance. "You may want to treat it decently, but be careful about trying to feed it because it may take your arm off to the elbow."

That fairly describes the sentiments of officials at Miles Inc., a chemical conglomerate whose agriculture division employs 1,300 workers in Kansas City. The division, which uses chlorine in virtually every segment of its operations, could be put out of business if EPA makes good on threats to ban the chemical.

The agency's rationale: Chlorine, a disinfectant used by nearly every water treatment plant in the country and in 96



**"YOU SHOULDN'T BE REQUIRED TO PUT ON A SPACESUIT
TO GO OUT AND LOOK AT YOUR CROPS."**

Roger Pine, a Lawrence area farmer, is grappling with pesticide-use restrictions.

percent of pesticide production processes, is a precursor of organochlorines, which have been blamed for a variety of environmental and health ailments, from depletion of the ozone layer to breast cancer.

The EPA is considering the ban despite the absence of a scientific consensus on chlorine's role in ozone depletion—or, for that matter, on whether there's an ozone depletion problem at all—or its link to breast cancer.

"These are people who want to eliminate anything that could be considered toxic from use in commerce. That's a very dangerous and short-sighted outlook," said Jack Lonsinger, director of regulatory and community environmental affairs at Miles' agriculture division, noting that the alternatives to chlorine could pose far greater risks to health.

In fact, there are four times as many natural sources of chlorine—volcanoes and the oceans, for instance—as man-made sources. But environmental lobbyists, abetted by lurid news accounts, have persuaded a credulous public that anything designated "hazardous" or "toxic" must be carcinogenic, irrespective of dosage, length of exposure, differences in individual susceptibility and the alternative risks of substituting something even more dangerous.

The EPA itself, in a 1987 report entitled "Unfinished Business: A Comparative Assessment of Environmental Problems," suggested that hazardous wastes account for no more than 0.2 percent of the nation's total of 1 million new cancers annually. And in a 1981 study commis-

sioned by the Office of Technology Assessment, the scientific watchdog arm of Congress, Oxford University epidemiologists Richard Doll and Richard Peto concluded that all forms of pollution accounted for less than 3 percent of new cancers. By contrast, they said, smoking, diet and other lifestyle choices accounted for three out of four cancers.

Cleaning up cleaners

Still, fueled by cancer-phobia, the regulations keep coming.

"With each passing week, it seems that there is a new agency and a new set of rules," said Scott Shmalberg, owner-operator of a group of Scotch Industries dry cleaning stores in Lawrence and Topeka.

Shmalberg, president of the Mid-American Fabric Care Association, a trade group of dry cleaners in Kansas and Missouri, said that a "little dry cleaning shop may be dealing with five, six or seven different government agencies, from the city up through the federal level."

Environmental and other regulations can increase the start-up costs of a dry cleaner by as much as \$138,700 and require filling out and following as many as 100 government forms and manuals, according to the Competitive Enterprise Institute.

Much of the regulation concerns perchloroethylene, a solvent commonly used by the nation's 30,000 dry cleaning stores. Perc, as it's known, is popular because it is nonflammable, can be recycled and is considered only moderately toxic, falling into the same category as



many household compounds, such as ammonia and bleach. No studies have demonstrated that perc causes cancer in humans.

But huge doses of perc have caused tumors in laboratory animals, leading the EPA to classify the chemical as a "possible human carcinogen" and subjecting it to a growing network of regulations. For Shmalberg, those regulations are a vague and often contradictory muddle of barely comprehensible directives.

"We can't find anyone in a position of authority who can clarify many of the regulations for us," he said.

Edward Hudgins, director of regulatory studies at the Cato Institute, a libertarian think tank in Washington, said the open-ended nature of such environmental regulations is no accident. Legislators purposely frame laws in broad terms when there is uncertainty or controversy over how best to implement them, he said.

"One of the distinctive features of a civilized system, as opposed to a barbaric system, is that you know what you can and what you cannot do under the rule of law. That's not the case with government regulations."

ADMINISTRATOR'S ANSWERS (CONT.)

Q: How does that differ from the EPA's approach historically?

A: Historically, the approach under the individual laws — we're responsible for the implementation of about 16 different federal laws — has been to adopt a rule, a regulation, a standard, and apply it to 30 or 40 different industries. And while in the early days of environmental regulation that was appropriate given the kind of problems we were dealing with, today when you look at the increasingly complex nature of our environmental problems, it makes more sense to focus on an industry-by-industry basis, to move beyond a one-size-fits-all.

Q: Is it fair to fine a company for a violation that doesn't represent a genuine health risk? For example, where an incorrect document or report is filed.

A: The agency's rules and standards are adopted in accordance with laws passed by the Congress. The Congress passes the laws, we have a responsibility to implement those laws. If someone is unwilling to follow the rules and regulations, to follow the law, then we have a responsibility to the American people to take an enforcement action.

Now, we've recently reorganized our office of enforcement. It's now the Office of Enforcement and Compliance Assurance. Strong enforcement is important. It's important to the business community. It levels the playing field. It is not fair to a businessperson spending the money to comply with environmental regulations ... to compete with someone who's not making that same commitment.

Q: Several legislative proposals would require the EPA to justify regulatory initiatives through cost-benefit analysis. What's your opinion of those proposals?

A: We already use cost-benefit and risk assessment as important tools in our decision making. We literally do hundreds of these sorts of analyses on an annual basis and we're continuing to do that. A number of specific bills, like the Superfund bill and drinking water, seek specifically to address, in the compass of those programs, how to better use those tools, and we've been very supportive of those provisions.



WHOSE BUSINESS IS IT, ANYWAY?

ENVIRONMENTAL ANXIETY

UNDER THE GUN

That the Environmental Protection Agency's priorities are often topsy-turvy has been noted frequently by Congress and by the EPA itself. Here is a sampling of some of their criticisms and those of third parties:

Overall, the EPA's priorities appear more closely aligned with public opinion than with our estimated risks.

— "Unfinished Business: A Comparative Assessment of Environmental Problems," EPA, February 1987.

Because most of the EPA's program offices have been responsible for implementing specific laws, they have tended to view environmental problems separately; each program office has been concerned primarily with those programs that it has been mandated to remediate, and questions of relative seriousness or urgency generally have remained unmasked.

— "Reducing Risk: Setting Priorities and Strategies for Environmental Protection," EPA, September 1990.

Federal budget priorities should reflect an understanding of relative risks to the environment and public health, as well as the feasibility and cost-effectiveness of various approaches to reduce these risks, rather than relying so heavily on public perceptions of risk.

"Environmental Protection: Meeting Public Expectations with Limited Resources," General Accounting Office, Report to the Congress, June 1991.

We all know firsthand of communities with budgets so strapped by environmental regulations that some of them threaten to turn authority over the program back to the Federal Government.

Statement of Montana Sen. Max Baucus, Hearings on EPA's fiscal 1994 budget request, May 11, 1993.

Superfund Spending Tops \$20 Billion

After more than two decades, just 224 of 1,300 sites are clean

BY DAN MARGOLIES

No program better illustrates how environmental regulation has gone awry than the Superfund.

Enacted by Congress 14 years ago in the wake of the panic over Love Canal, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was aimed at eliminating abandoned hazardous waste sites. At the time, Congress figured the problem could be solved for less than \$2 billion.

To date, compliance has cost the government and private industry ten times that much, according to the Congressional Budget Office. And that doesn't include the billions spent on so-called transaction costs: legal, consulting and other fees associated with Superfund litigation. Nor does it include the billions spent to clean up Department of Defense and Department of Energy facilities.

One academic study estimates cleanup costs will exceed \$150 billion in the next 30 years if current Superfund policies are continued.

What has the program accomplished?

Not much. Since 1981, just 224 of 1,300-plus abandoned dumps have been crossed off the Superfund list.

Who has paid?

Companies like Dean Machinery, a Kansas City heavy-equipment dealership that employs 100.

Dean was ensnared in the CERCLA net because its name showed up on a 1972 accounts receivable ledger showing it had shipped \$127 worth of waste to the now-closed Doepke-Holliday landfill in Kansas City, Kan. The company said the shipment contained office paper, cardboard boxes and similar debris, not hazardous waste. But the law places the burden on Dean to prove it.

Because Dean and 17 other companies were "de minimis," or minimal, contributors to the landfill, the Environmental Protection Agency has given them the option of paying \$10,000 to \$20,000 each to settle potential cleanup claims. Otherwise, they'll have to gamble that they won't get hit with much higher cleanup bills later on. Current estimates place the cost of cleaning up the site at \$10 million.

"Unlike normal litigation, where if you feel you're not liable you can sit back and wait to be sued, under Superfund, if EPA decides that they want you to pursue a cleanup remedy, they can order you to do it," said Joel Mosher, a lawyer with Shughart Thompson & Kilroy who represents Dean and the other small generators. "There's no pre-enforcement review. I can't go to

court and complain."

The Superfund, technically known as the Hazardous Substances Trust Fund, is financed largely through taxes on petroleum and feedstock chemicals. The EPA uses the money either for short-term removal actions or for long-term, permanent remedies that "significantly reduce the volume, toxicity, or mobility of hazardous substances."

CERCLA, and the 1986 Superfund Amendments and Reauthorization Act (SARA), authorize the government to force "potentially responsible parties" (PRPs) to clean up hazardous sites or to reimburse the government's cleanup costs. PRPs can include waste generators, waste transporters, site owners and site operators, both past and present.

In practice, PRPs can include anyone with even the most tenuous connection to a hazardous waste site. Because liability is "joint and several," a PRP like Dean Machinery theoretically can be held accountable for the entire cost of a cleanup.

Scattershot approach

So, for that matter, can small-time operators like Donovan and Ora Lee Ratliff, a Kansas City-area couple in their 60s. In 1966, the couple leased a shooting range in rural Johnson County that had been in operation since 1959 and was closed in 1976. They opened the range one night a week, Wednesdays, for skeet shooting. All together, they lost about \$1,500 on the venture.

The EPA wanted to hold them liable for the costs of cleaning up the lead shot on the site — both before and after 1966. The land was undeveloped and no one lived on it. The Superfund law didn't exist when the Ratliffs operated the range, and they complied with all existing regulations in effect at the time.

No matter. The EPA determined that the lead "may present an imminent and substantial endangerment to the public health, welfare, or the environment." Estimated cost of the cleanup: at least \$1 million.

"In theory, it's true they can be held liable," said David Cozad, associate regional counsel in the EPA's Kansas City, Kan., office. "But factors we've always taken into account are fairness and ability to pay. We intend to do that here."

The Ratliffs a few weeks ago agreed to settle the matter for \$30,000. That's in addition to legal fees of more than \$10,000.

"I'm not happy about it, but what can we do?" said Donovan Ratliff, who now runs a gutter supply company in Kansas City.

"It's been a very stressful, very depressing thing. My wife and I



Rory Truitt photo

"MY WIFE AND I HAVE WORKED EVERY DAY OF OUR LIVES, BUT THERE'S NO INCENTIVE TO WORK ANYMORE."

Donovan Ratliff surveys the shooting range he once ran, now a Superfund site that will cost an estimated \$1 million to clean up.

have worked every day of our lives, but there's no incentive to work anymore."

Just how much risk to human health does the site pose?

Currently, none. But the EPA said the site was "expected" to be used as residential property. So to make sure the contaminated soil doesn't wind up in someone's backyard where children might eat it, EPA is excavating and removing the dirt — a vastly more expensive remedy than simply capping it with another layer of fresh dirt or just fencing it in.

The EPA's go-for-broke approach is based on what Supreme Court Justice Stephen Breyer has described as the "classic administrative disease" of tunnel vision.

"The regulating agency considers a substance that poses serious risks, at least through long exposure to high doses. It then promulgates standards so stringent — insisting, for example, upon rigidly strict site cleanup requirements — that the regulatory action ultimately imposes high costs without achieving significant additional safety benefits," Breyer said in a series of Harvard University lectures he delivered in 1992, published last year as "Breaking the Vicious Circle: Toward Effective Risk Regulation."

The Superfund law's deficiencies are now widely acknowledged, even by the EPA itself,

and earlier this year the Clinton administration proposed reforms aimed at reducing the time and cost of cleanups, apportioning liability more fairly and providing more input from local communities.

But the legislation died in Congress last month, doomed by Republican opposition, although industry and environmental groups alike agreed the bill was a vast improvement over the current law.

Still, the underlying rationale of the program — that all abandoned waste dumps constitute an imminent and uniform hazard to public health and to the environment — remains a speculative proposition. As Judge Breyer noted in another context, more people are killed choking on toothpicks every year than by supposedly toxic hazards like asbestos. But billions of dollars aren't spent regulating toothpicks.

"The difference between a toothpick and a hazardous waste is that the hazards of toothpicks are known," said Beverlee DeStein Roper, a former prosecutor in the environmental enforcement division of the Justice Department and now an environmental lawyer with Blackwell Sanders Matheny Weary & Lombardi.

"But people are scared of the lurking menace. So death by toothpick is acceptable. Death by toxic waste is not."

WHOSE BUSINESS IS IT, ANYWAY?

ENVIRONMENTAL ANXIETY



Unfunded Mandates Hammer Local Communities

As federal funding falls, taxpayers foot the bill for environmental programs

BONAR MENNINGER

Strapped for cash, Uncle Sam is digging deep into the pockets of local communities to pay for costly, federal environmental projects.

Popularly known as unfunded mandates, the regulatory initiatives are taking a huge bite out of local tax revenues and have sparked a near-rebellion among community leaders nationwide.

"Unfunded mandates are pure political expediency," said Jonathan Adler, associate director of environmental studies at the Competitive Enterprise Institute in Washington.

"They allow Congress to enact programs that they don't have to pay for but that they can take credit for with their constituents. That way, Congress is able to get the best of both worlds, and accountability is eliminated."

For villages, towns, cities and counties, failure to comply with and fund the growing tangle of federal environmental rules can result in fines, the withholding of federal funds or both.

While most local officials don't question the need to attack environmental problems at the local level, many believe Congress and the Environmental Protection Agency have been grossly unfair in sticking local taxpayers with the tab.

And they question the wisdom of spending large sums of money addressing theoretical and arguably minuscule health and environmental risks, while more serious dangers are ignored.

"Some of these things need to be done, but with a lot of it, you reach a point of diminishing returns," said Ted Weis, assistant director of the Kansas City Water and Pollution Control Department.

Bad science?

The Safe Drinking Water Act, for example, requires that municipal water supplies test for at least 43 chemicals in drinking water on a regular basis, including pesticides used on pineapples in Hawaii. Tests for 25 additional chemicals are mandated every three years.

"The requirement is that you're supposed to test regardless of whether the substance is known to be a health threat, or whether the substance is likely to be present," said Tom Schrempp, assistant director of operations for production services for Water District No. 1 in Johnson County.

"The tests represent thousands of dollars of additional cost, and I don't think these requirements are based on good

Mandates	Fiscal Year 1993				
	Estimated Annual Staff Hours (Excluding Overtime) (000)	Estimated Annual Staff Costs (000)	Estimated Annual Direct/Indirect Budget Costs (000)	Total Costs (000)	Projected Total Costs (000)
1. Underground Storage Tank Regs	862	\$23,393	\$137,755	\$161,148	\$1,040,627
2. Clean Water Act	57,373	1,185,549	2,426,984	3,612,533	29,303,379
3. Clean Air Act	12,138	195,526	208,294	403,820	3,651,550
4. Solid Waste Disposal	9,680	173,384	708,191	881,575	5,475,968
5. Safe Drinking Water Act	4,444	94,549	467,783	562,332	8,644,145
6. Asbestos	898	19,554	109,754	129,308	746,828
7. Lead Based Paint	374	7,875	110,342	118,217	1,628,228
8. Endangered Species	252	6,934	30,024	36,958	189,488
9. Americans With Disabilities Act	4,701	114,935	240,746	355,681	2,195,808
10. Fair Labor Standards Act	1,227	22,765	189,358	212,123	1,121,524
TOTAL	91,954	1,844,464	4,629,231	6,473,695	53,997,545

science. There hasn't been any real evaluation that they're needed."

But even though the EPA is adamant about identifying the most minute chemical substances in drinking water, the agency has no similar requirements that water supplies be tested for dangerous microbes or similar organic contaminants.

In the spring of 1993, Cryptosporidium, a one-celled parasite, slipped through the filtering system in Milwaukee's water supply, killing at least 100 people and costing \$54 million in one of the worst water contamination outbreaks in U.S. history.

Calculating costs

In an effort to draw attention to the problem of unfunded mandates, the National League of Cities last year joined with the U.S. Conference of Mayors and other state and municipal groups in staging "National Unfunded Mandates Day."

Surveys by several of the municipal groups revealed that the most expensive federal mandates are costing cities and counties about \$11.3 billion annually. Between 1994 and 1998, those costs are expected to hit \$87.8 billion.

According to a survey of 314 cities by the U.S. Conference of Mayors, unfunded mandates consume an average of 11.7 percent of local revenues. The majority of the cities surveyed said they were forced to reduce services or postpone other activities because of the financial burden imposed by the mandates. Most of the foregone services involved infrastructure improvements or police and fire services, the survey showed.

One of the hardest-hit local municipalities is Kansas City, Kan.

According to the city's 1994

budget, \$7 million will be spent on a variety of federally mandated programs, including the Federal Clean Water Act, the Water Pollution Control Act and the Safe Drinking Water Act. (At least \$3 million of the total is slated to cover implementation of a non-environmental mandate for the Americans with Disabilities Act.)

"The impact of these mandates is unbelievable," said David Isabell, city administrator. "There are only X amount of dollars to go around, so it means that something else has to suffer in the process."

Across the state line in Kansas City, Mo., the one-time costs to the city of implementing all federally mandated environmental regulations now on the books total about \$56.2 million, a study produced last year by then-acting city manager Mary Vaughn concluded.

"That's an incredible amount of money," said Assistant City Manager Diane Dorman, who noted that the city's entire public works budget for 1994 was only \$68 million.

"In paying for all these mandates, you have to make a choice. Do you try to increase revenues, and to do that you have to raise taxes, or do you cut back, do you find things you can live without?"

"The difficult part for all of us," Dorman added, "is that mandates mean that someone other than citizens of the community is making decisions about where and how local dollars are spent."

Compounding the problem for many communities is that the use of mandates has grown as funds from a variety of federal sources have been cut back.

In 1979, for example, Kansas City, Kan., received a total of nearly \$17 million in federal revenue sharing and grants, Isabell said. By 1991, that amount had

dwindled to just \$2 million.

The city of Overland Park calculated that it spent \$5.3 million on mandate-related activities between 1991 and 1993, said Marc Farrar, an administrative assistant in the Overland Park city manager's office.

Mandate expenditures for the Kansas City suburb this year are estimated at about \$2 million. And next year, the city will hire a new employee whose sole responsibility will be to coordinate compliance with various federal, state and county mandates, Farrar said.

Regulatory relief

There are indications that Congress is beginning to realize that many local communities have been pushed to the edge by unfunded mandates.

In May, the Senate voted to reform the Safe Drinking Water Act. Among other changes, the proposed act would give local water systems much more flexibility in how best to protect their water supplies. Although the bill stalled in conference late this year, the legislation is expected to be reintroduced in the next Congressional session.

Other mandate relief bills were proposed in the 103rd Congress, ranging from one that would delay implementation of new storm water runoff regulations to another that would impose a two-year moratorium on any new federal mandate, as well as require the federal government to pay at least 20 percent of any future mandate.

Still, Adler of the Competitive Enterprise Institute said he has his doubts about Congress' and the administration's credibility on the mandate issue.

"If the Congressional leadership thought they could get away with ignoring this issue, they would," he said.

UNDER THE GUN

These businesses are raising legitimate concerns about excessive and duplicative reporting requirements and conflicting regulations, and they quite rightly complain that government regulators require them to install sometimes expensive equipment even when it doesn't seem to make sense or will result in no apparent or little apparent environmental protection.

Statement of Rhode Island Sen. John Chaffee, Hearings on Small Business Environmental Compliance, June 2, 1993.

Only two environmental statutes — the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Toxic Substances Control Act (TSCA) — actually require that the benefits and costs of regulation be balanced in setting environmental standards.

"When is a Life too Costly to Save?," Center for Risk Management, Washington, D.C., July 1993.

A University of Tennessee study calculates that the eventual costs of cleaning up all hazardous waste sites could reach \$752 billion.

"Administration of Federal Superfund Program," Report on the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation, November 1993.

The inefficiencies in most federal governmental programs are well known as the result of decades of research. But most environmentalists and their supporters in Congress appear uninterested in redesigning these programs.

"Why is the Cost of Environmental Regulation So High?" Center for the Study of American Business, February 1992.



WHOSE BUSINESS IS IT, ANYWAY?

ENVIRONMENTAL ANXIETY

INSTEAD OF SPENDING...

...\$119 billion¹

to avert one death under the Formaldehyde Occupational Exposure Limit

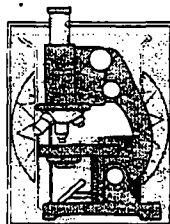


331

new drugs could be developed and brought to market.²

...\$92.1 billion

to avert one death under the Atrazine/Alachlor Drinking Water Standard



Cancer research funding at the National Cancer Institute could be **quadrupled** for the next 12 years³

...\$168.2 million

to avert one death under the Benzene Neshap Standard



3,064

more police officers could be placed on the street.⁴

¹1992 dollars; other figures in 1990 dollars.

²Based on a drug development cost of \$359 million per drug in 1990.

³Based on 1993 funding level of \$1,978,420,000.

⁴Based on a per officer operating expenditure of \$54,900 for fiscal 1990.

Source: The Heritage Foundation, Can We Save Even More Lives? Understanding the "Opportunity Costs" of Regulation

RISK

Continued from 1

rules are meant to address, the critics say. As a result, limited financial resources that could be used more effectively are wasted in pursuit of a "zero-risk environment."

"Our environmental policies suffer from a syndrome of paranoia and neglect," said Dr. John Graham, director of the Harvard University Center for Risk Analysis. "We go after minuscule risks, such as pesticide residue in food, and at the same time we're tolerant and neglectful of major problems in our daily life."

Said Jerry Taylor, an analyst at the Cato Institute, a libertarian Washington policy group:

"The fundamental problem is that environmental policies are driven by politics, and environmental politics are driven by fear. So, the entire structure of our environmental policies has little to do with actual science."

Vernon Houk, the former director of environmental health with the Centers for Disease Control in Atlanta, has called the EPA's ultra-cautious risk assessment approach "somewhere between five-year weather forecasting and voodoo." In developing risk models for particular substances, Houk said, the EPA "uses the upper-bound risk assessment that bears no resemblance to reality."

Dirt safe enough to eat

An example of the EPA's overzealous approach involved the agency's requirement that a private party in New Hampshire spend \$9.3 million to complete the cleanup of a hazardous waste site by incinerating dirt containing small amounts of highly diluted PCBs and other toxic compounds.

The EPA figured that the additional cleanup would make the site clean enough for children to eat small amounts of dirt daily for 245 days a year without significant harm, wrote Supreme Court Justice Stephen Breyer in "Breaking the Vicious Circle: Toward Effective Risk Regulation."

"Without the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt daily for 70 days each year without significant harm," Breyer said.

The bottom line: Children were unlikely to play at the toxic waste site; the dump was located in a swamp, and the prospects of development were remote.

A more costly example was the EPA's drive to eliminate asbestos from schools. In the 1970s, asbestos was identified as a serious carcinogen, and in the 1980s the EPA required that school districts nationwide

inspect for asbestos and notify students, parents and teachers of the substance's presence.

The notification requirement triggered panic nationwide as school districts and commercial building owners scrambled to remove what had been portrayed as a deadly compound.

More than \$7 billion in school remediation costs later, the EPA quietly admitted that the process of removing asbestos was probably more dangerous than simply leaving it alone.

The actual annual risk that a child could die prematurely from asbestos exposure in school? About one in 10 million, according to a study published in *Science* magazine in 1990.

The asbestos case underscores a salient feature of many EPA regulatory efforts: cancer phobia.

Environmental activist Samuel Epstein testified before Congress in 1976 that an "epidemic of cancer" was killing Americans at an alarming rate, and that between 70 percent and 90 percent of cancers were caused by environmental factors.

Yet a study done at the behest of the Office of Technology Assessment in the early 1980s by two Oxford University scientists, Richard Doll and Richard Peto, found that industrial sources and pollution actually accounted for only about three percent of all annual cancer deaths in the U.S.

"In general, the risks of cancer from man-made chemicals are far smaller than one might expect from the impassioned rhetoric of some environmentalists, or even from news reports that fail to distinguish between the dangers from tiny doses of exposure to humans on the one hand, and those from megadoses administered to rats on the other," wrote Richard Sroug and John Goodman in a recent study of environmental policy for the Dallas-based National Center for Policy Analysis.

Gerhard Stohrer, director of risk assessment at the Science and Environmental Policy Project, a Washington group focus-

ing on the use of science in environmental regulation, said the EPA had compromised traditional risk-assessment techniques in justifying its regulations.

Using what is known as linear extrapolation, the EPA generally takes a level at which a substance is likely to cause cancer in animals and then arbitrarily reduces that level to a point where the cancer risk approaches one in a million.

"People falsely assume that this is science, but it is not," Stohrer said. "The EPA is making assumptions that have no real basis in fact."

Stohrer is one of 4,000 scientists, academics and intellectuals worldwide who have signed a document dubbed the Heidelberg Appeal, a Paris-based effort that asks heads of state to abandon "irrational ideology" and "pseudoscientific arguments" in the pursuit of regulatory policy.

While a January study done by the National Research Council, the principal operating agency of the National Academy of Sciences, concluded with some qualification that the EPA's overall approach to assessing risk is "fundamentally sound," Stohrer, for one, takes issue with the group's findings.

"It's wrong, because it's not fundamentally sound. EPA makes unscientific assumptions of enormous risk," he said, adding that the study was "heavily loaded with people who depend on EPA funding" and have an interest in maintaining the status quo.

A \$72 million life

One of the clearest ways to understand the disparity between the costs and benefits of many environmental regulations is to look at the amount of money the EPA is theoretically willing to let society spend to save a single life.

For example, regulations requiring the removal of uranium mill tailings — waste from mining operations — cost society about \$35 million annually. Yet at that level of expenditure, the regulation doesn't prevent even one premature death a

year, according to the Office of Management and Budget.

OMB calculations show that twice as much — \$71.6 million — would have to be spent to prevent one premature death from tailings' toxicity.

"Although advocates of the uranium mill tailings mandate would argue a human life is worth any price, even \$71.6 million, they miss a crucial point," wrote Heritage Foundation analysts John Shanahan and Adam Thierer in a recent study focusing on the costs of environmental regulation.

"Using the same funds in alternative ways could save many more lives. If, for instance, \$71.6 million was devoted to additional colo-rectal cancer blood tests, which saves an estimated one life for every \$24,964 spent, approximately 2,858 lives could be saved overall."

Not surprisingly, there's growing sentiment that the EPA should conduct rigorous cost-benefit analyses of its regulatory initiatives before imposing them on society.

Last year, an amendment was attached to a bill granting the EPA cabinet level status that would require the agency to estimate the risk addressed by a regulation and the costs of implementing the rule.

The amendment, proposed by Sen. Bennett Johnston, a Louisiana Democrat, also would require the EPA to compare and contrast the risk in question with other risks to which the public is exposed.

Some environmental groups remain adamantly opposed to the measure, which stalled in Congress this year.

Said E. Donald Elliott, a former EPA general counsel:

"A lot of people in the environmental movement are really frightened about this, because I think they realize that a lot of what EPA does currently simply would not pass rigorous cost-benefit tests."

"But if Congress or EPA is going to mandate something where the costs are way off the chart compared to the benefits, then the public ought to know."



A LIFE AND DEATH COMPARISON

The chart below contrasts alternative ways to reduce the risk of death. All figures are in 1992 dollars except the Asbestos Ban and the Asbestos Occupational Limit, which are in 1990 dollars.

Regulation	Cost per life saved	Alternative use of regulatory resources	Cost Per Life Saved
DES Cattlefeed Ban	\$178,000,000	Cervical Cancer Screening	\$62,411
Asbestos Ban	110,700,000	Breast Cancer Screening	199,715
Coke Ovens Occupational Exposure Limit	83,400,000	Lung Cancer Screening	174,751
Arsenic Standards for Glass Plants	192,000,000	Kidney Dialysis	499,288
Arsenic Occupational Exposure Limit	125,000,000	Increase Mobile Intensive Care Units in Small Towns	149,786
Asbestos Occupational Exposure Limit	74,000,000	Hypertension Control	187,233
Cover/Move (Active) Uranium Mine Tailings	71,600,000	Colo-Rectal Cancer Blood Tests	24,964

Source: The Heritage Foundation

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Labor & Employment

In 1995, Congress is expected to change course dramatically in its consideration of labor issues. In the past, the Democratic-controlled Labor Committees focused predominantly on organized labor's top agenda items, such as striker replacement and plant-closing legislation or hiking the minimum wage. Given the make-up of the new Congress, conservatives have a historic opportunity to shift the focus of debate to a number of issues that the previous majority would never allow to be considered. High on the list for review should be restrictive labor laws enacted in the 1930s that do not address the needs of today's workplace. In addition, Congress should use its oversight power to review recently enacted civil rights laws and the Administration's regulatory agenda. Conservatives should work to achieve reforms that would:

Repeal the prevailing wage laws.

The Davis-Bacon (1931), Walsh-Healy (1936), and Service Contract (1965) Acts require the government to pay union-scale wages on federally financed construction sites and with regard to contracts for equipment and services. These laws make it virtually impossible for low-skilled workers, especially minorities and young people, to be hired on government jobs because their productivity cannot justify the mandated wages. Besides their inherent unfairness, these laws cost taxpayers dearly. The Congressional Budget Office estimated in 1993 that repealing the Davis-Bacon Act alone would save the federal government close to \$3.3 billion over five years. Repealing the Service Contract Act would save at least another \$1 billion over a five-year period.

Implement the Beck decision.

The Supreme Court decided in a 1988 case, *Communications Workers of America v. Harry Beck*, that Beck, a non-union member working for the Bell telephone system, was not required to pay fees to the union under its contract with AT&T. Beck objected to the union's using his fees to pay for political activities instead of job-related collective-bargaining issues. The Supreme Court correctly decided that American workers should not be forced against their will to give money to finance political candidates. The Bush Administration issued an executive order implementing the decision, but in one of his first actions in office, President Clinton rescinded it. Legislation is needed not only to codify the Beck decision, but also to require unions to disclose how much of their members' dues are spent on political activities.

Institute a freeze on existing rulemaking efforts and conduct hearings on the most controversial White House proposals.

The Labor Department's semiannual regulatory agenda lists 21 rulemaking proposals which the Clinton Administra-

tion intends to implement in the next year and which are expected to have "significant" impact, or to cost the economy more than \$100 million annually. Among these rules are two OSHA rulemakings already underway that would regulate indoor air quality and repetitive motion injuries. If implemented, these are expected to cost the economy billions of dollars annually. Other Labor Department rulemaking proposals affect child labor rules, the Fair Labor Standards Act, and the Service Contract and Davis-Bacon Acts.

In reviewing these regulatory proposals, Congress should require the Labor Department to justify the cost-benefit analysis and risk assessments prepared for the rules and rank them in order of priority. In addition, the Department should be required to offset the costs of proposed rules by repealing other rules that are no longer needed or that address lesser priorities. As mentioned earlier, the Davis-Bacon and Service Contract Acts should be repealed and all rulemaking frozen.

Conduct oversight hearings over the next two years that examine all aspect of the Occupational and Mine Safety Acts, Fair Labor Standards Acts, recently enacted civil rights laws, and child labor rules.

Congress should consider first the OSHA and FLSA statutes and the recently enacted civil rights laws. Among the many issues that could be considered:

- In examining these statutes, lawmakers should pay close attention to inconsistencies with regard to such questions as coverage thresholds, penalties, statutes of limitations, and posting requirements, among others, so that business can expect some degree of consistency in the different laws.

- With regard to OSHA, Congress should examine agency rulemaking, enforcement, and compliance assistance programs. Too often, proper risk assessments and cost-benefit analyses are not conducted on the agency's rulemaking proposals. And the agency spends too much time and money on enforcement rather than on its successful and underfunded voluntary protection and on-site consultation programs, which take a more cooperative approach to providing a safe workplace.

- The Fair Labor Standards Act, which was enacted in 1938, has not kept pace with today's workplaces. Among the issues that should be addressed are amending the law to allow flexible time schedules and private sector compensatory time in lieu of overtime wages and restoring the small business exemption from FLSA coverage.

- The 1990 Americans With Disabilities Act and the Civil Rights Act of 1991 have had an enormous impact on the workplace, affecting how an employer, hires, fires, and treats workers on the job. The litigation generated by these laws is shown by the substantial backlog of cases at the Equal Employment Opportunity Commission and the number of court cases that are determining what the laws mean for

employers. Congress should review the implementation of these acts to see whether the original intent in each case is being carried out.

Ultimately the well-being of the American worker depends upon the economy's ability to create jobs. U.S. companies

cannot compete in a global economy under the current patchwork of labor regulations and laws. Congress should not miss this excellent opportunity to conduct a thorough review of these issues and to throw out those laws and regulations that are no longer needed.

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THE METRO AREA'S MOST COMPREHENSIVE BUSINESS COVERAGE

DECEMBER 16-22, 1994

KC may be next stop for AmEx travel

BY JOE GOSE

American Express Travel Related Services Co. Inc. has Kansas City on its itinerary.

The \$12 billion division of American Express Co. is searching for a 35,000-square-foot office for 300 new employees. The operation will consolidate several of the New York-based company's regional offices and will handle business travel for corporate clients under the company's Travel Management Services unit. The unit provides service to about 1.5 million customers worldwide.

Melissa Abernathy, a

See AMEX, Page 49



Ray Inman photo

Midland's Plaza branch could be open to customers in March.

Midland Bank asks to open Plaza branch

BY CASEY GILMORE

The once-ailing Midland Bank wants permission to open a branch on the Country Club Plaza that was finished two years ago, but never opened because of the bank's financial problems.

A turned-around Midland hopes to persuade regulators that its finances are strong enough to support the new location at 4550 Bellevue Ave. The Missouri Division of Finance is

See MIDLAND, Page 49

JOHNSON COUNTY

Intertec eyes a dozen Chicago trade mags

BY BARRY HENDERSON

Intertec Publishing Corp. is negotiating to buy 12 Chicago-based trade magazines from Maclean Hunter Ltd. for more than \$60 million.

If the deal is consummated, sources close to the negotiations say, it will be the largest acquisition in the Overland Park company's history.

Intertec and Maclean Hunter acknowledged that discussions about a possible purchase were under way.

"I think it's fair to say they're interested," said John Skeels, president of Connecticut-based Maclean Hunter.

Eric Jacobsen, director of acquisitions and divestitures at

INTERTEC®
PUBLISHING

1994 Revenues: \$100 million

Employees: More than 500

Founded: 1886

Intertec, said that K-III Communications Corp., Intertec's parent company, is "looking" at the magazines. K-III executives typically handle the financial negotiations when Intertec acquires properties, he said.

Maclean Hunter's Chicago group, the company's largest publishing operation which

includes titles like American Printer, Textile World, Coal, and Dog World generated most of its \$8 million in operating income last year. Maclean's Stamford, Conn., publishing division, which includes Progressive Grocer and Frozen

See INTERTEC, Page 50

Last of five parts



WHOSE BUSINESS IS IT, ANYWAY?

Regaining Regulatory Control Critical to U.S. Competitiveness

Proliferation of rules saps businesses' vitality

BONAR MENNINGER
AND DAN MARGOLIES

Across half a dozen presidential administrations, through countless policy initiatives, the federal regulatory apparatus has insinuated itself into virtually every corner of American commerce.

For many employers, the tightening embrace of the federal government has become a death grip, squeezing ever-increasing amounts of time, energy and money out of their businesses.

Whatever the rules they contend with or the regulatory agencies they report to, employers voice similar laments about inflexible and incomprehensible rules, squandered resources, hampered productivity, mindless paperwork and capricious enforcement.

The net effect of the regulatory burden has been to promote uncertainty, frustration and fear among employers, hindering planning for the

future and spawning a deepening contempt for government.

At the macro-economic level, regulation's growth has had a corrosive effect on job creation. Many small employers say they deliberately keep their employment levels below statutory thresholds to avoid regulatory compliance requirements.

But an even more fundamental flaw, critics say, lies at the heart of the current regulatory regime: Centrally planned, command-and-control rules tend to produce results that subvert their goals — or achieve them only at enormous cost.

Consider:

- Anecdotal evidence suggests the Americans with Disabilities Act has contributed to a reduction in the hiring of disabled people because of employers' fear of litigation.

- The Family and Medical Leave Act has led companies to scrap more generous leave plans to

See SOLUTIONS, Page 45

See related columns on pages 18 and 19

NEWS GUIDE

BILL ECKHARDT, A VISITING

law professor at UMKC, has sought justice from My Lai to the Supreme Court.



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A SURVEY OF THE NATION'S manufacturers shows that Kansas City's varied industries keep its manufacturing base on solid footing.

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THE GROWTH OF GAMING IN neighboring states has Kansas racetrack operators running scared. The Woodlands Race-tracks reports that business is off 40 percent from 1993.

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THE DISCOUNT LINEN market in Johnson County is expected to spread, as three new stores enter the area.

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STRATEGIES IN SMALL BUSINESS

MICHAEL BARE TURNED A

love of flying into a niche-oriented business that matches pilots with companies needing private flights.

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FOCUS ON WORKERS' COMP

MISSOURI AND KANSAS

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avoid the logistical complications of having more than one leave policy.

- Reforms meant to shore up the nation's pension plans have compelled some smaller companies to abandon them.

- Anti-discrimination laws and regulations aimed at eliminating racial and gender bias in the workplace have exacerbated tensions by highlighting the very differences they seek to minimize.

- The quest for a pristine, risk-free environment has come at the expense of more cost-effective environmental remedies.

The growing conviction that government regulatory policies are not just counterproductive, but eroding the vitality of the private sector has led to a search for alternative solutions — ones that rely less on government-knows-best edicts and more on flexible, market-oriented approaches.

"The idea," said Cornell University economics professor Alfred Kahn, who as chairman of the Civil Aeronautics Board during the Carter administration helped deregulate the airline industry, "is to use market-like incentives to try to achieve the same results that you can rely on competition to achieve elsewhere."

At the very least, say critics of the current regulatory approach, reform must take into account differences among regulated entities, allowing companies to develop their own solutions within broadly prescribed policy goals. Less punitive enforcement, greater reliance on cooperation and more attention to technical training and education are additional elements of a more rational way to achieve broadly desired social goals.

"Rigid insistence on overly prescriptive processes often unnecessarily impedes flexibility and wastes resources of both employers and government compliance officials," write policy analysts Edward Potter and Judith Youngman in their just-published book "Keeping America Competitive - Employment Policy for the 21st Century."

"Employers whose programs and practices meet the objectives of public policy should not be penalized by an approach that exalts form over substance."

Environmental reforms

In the environmental arena, the current regulatory approach has been criticized as overly bureaucratic, insufficiently flexible,

enormously costly, overly confrontational and often unrealistic in its assessment of risks.

Proposed reform options include changing the Environmental Protection Agency's ultra-conservative risk-assessment procedures and requiring rigorous cost-benefit testing in the promulgation of new regulations.

Modifying EPA's risk assessment techniques, agency critics say, would create a more realistic framework for establishing priorities and addressing urgent environmental problems, free of the hysteria that often distorts environmental policies today.

"The government uses biased assessment as a matter of policy. They use a worst-case hypothetical scenario based on suppositions," said Thorne Auchter, director of the Washington-based Institute for Regulatory Policy, a think tank devoted to risk-assessment issues.

"The key to reform is that risk assessment must be objective — in that it can be reproduced — and unbiased. Right now, risk assessment is neither. It is not consistent. There is no commonly accepted policy or statute or methodology within the government for risk assessment. Each time it is different. There are no rules."

Jonathan Adler, associate director of environmental studies at the Competitive Enterprise Institute in Washington, said several pending risk assessment reform bills before Congress call for cost-benefit comparisons between perceived risks and the money that would be required to abate them. The bills also would require the establishment of comparative risk guidelines contrasting particular environmental risks with, for example, an individual's chances of being involved in a car accident or being struck by lightning.

With environmental risks properly identified and priorities set, market-based incentives, such as effluent taxes and marketable pollution rights, could be used to impose regulatory costs on the businesses responsible for polluting. Very simply, such incentives would require regulated firms to pay for the damage they do.

Effluent taxes could, for example, include fees for industrial pipe discharges, assessments on the highest polluting vehicles and per-bag charges for household garbage.

"Studies show that 7 percent to 9 percent of the vehicles on the road cause more than 50 percent of the pollution," said John Shanahan, a policy analyst with the Washington Heritage

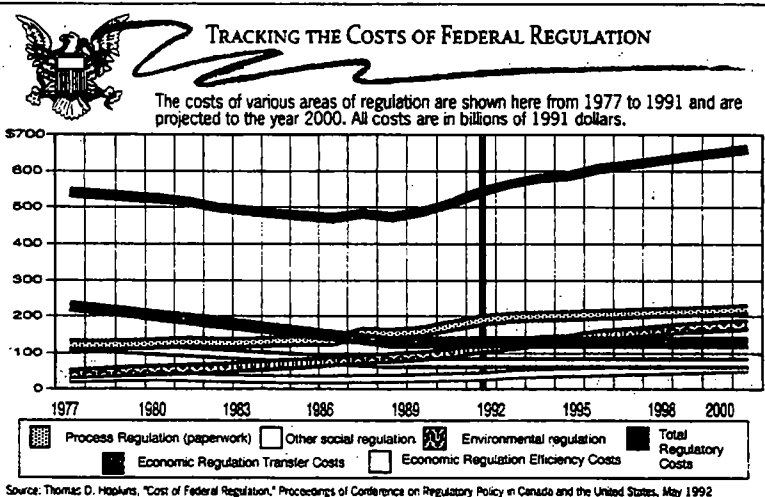


AUCHTER



KAHN

WHOSE BUSINESS IS IT, ANYWAY? REGAINING CONTROL



Foundation, a conservative policy group. "If you're able to target that 9 percent, you'd be able to cut pollution from autos by 50 percent. The idea behind effluent fees is that the polluter pays."

In the same way, marketable pollution rights or tradeable emission credits would authorize companies to discharge pollutants up to a pre-determined level set by the government. Companies exceeding that level would be fined on a progressive basis. If they fell below the maximum level through the use of new technologies or processes, they would have the right to sell their unused pollution credits in the open market.

"If you want to get the same level of cleanup at lower cost, or a higher level of cleanup at the same costs, then this is the way to go," said Murray Weidenbaum, director of the Center for the Study of American Business, a research organization affiliated with Washington University in St. Louis.

To be sure, market-based reforms are not without their own limitations. One problem with pollution taxes is how to determine the appropriate tax level — one that would yield the optimal level of pollution abatement at the lowest possible cost. A tax that is too low would provide companies with little incentive not to pollute. A tax that is too high would yield diminishing returns by discouraging business productivity and profits.

Tradeable pollution credits

likewise pose difficulties. For example, a program of emission credits for sulfur dioxide, a precursor to acid rain, was included as part of the Clean Air Act of 1990. While attractive in theory, it has proven problematic in practice, largely because the EPA has reserved the right to revoke the credits at any time, diminishing their perceived market value.

A more radical approach, known as free-market environmentalism, calls for the replacement of command-and-control regulations with a renewed reliance on property rights, supplemented by contract and tort law.

Under such a regime, pollution essentially would be viewed as a form of trespassing, and damages could be assessed in the courts. If, for example, a landowner along a river was affected by pollution emitted by a source upstream, the landowner would have the right to sue the polluter for damages.

"The advantage is that individuals closest to the problem would have an incentive to do something about it," said Bruce Yandle, a professor of economics and legal studies at Clemson University in South Carolina and a leading advocate of free market environmentalism.

Because plaintiffs must prove their damages, such an approach would shift the focus of environmental remediation from low-risk to high-risk areas.

"We are incurring a huge amount of regulatory costs going after risks that are minuscule," Yandle said.

Under current rules, property owners damaged by pollution often are prevented from suing if the polluter has complied with existing environmental regulations.

Although the property rights approach would not be appropriate in all situations, Yandle said, "it would augment alternatives."

Updating OSHA

In much the same way that government might set environmental goals and let the regulated parties decide how to them, a revamped Occupational Safety and Health Administration would set workplace safety and health standards and penalize businesses that don't comply.

Employers could, for example, be required to conduct certified self inspections, using private third-party inspectors or training employees to conduct the inspections themselves.

A more market-oriented approach would allow workers to trade their right to a safer workplace for higher pay, recognizing that some people are willing to sacrifice a measure of health for higher income. Government's role under such an approach, which presumes that workers are armed with sufficient knowledge to make informed decisions, would be to establish safety and health baselines and require employers to inform workers of the hazards they face.

Virtually all of OSHA's critics agree on the need for an approach that relies less on punitive and confrontational measures and more on cooperation, training and education. Now, for example, OSHA imposes penalties for trifling safety violations — even if a business has made good-faith efforts to comply with OSHA standards.

"Even employers with exemplary records are cited for nit-picking requirements," said Potter, the co-author of "Keeping America Competitive."

Potter and co-author Youngman say adequate enforcement tools are still necessary, but they need to be aimed at employers who don't protect their employees. Accordingly, they propose that OSHA target only danger-

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ous workplaces. Those workplaces where safety and health are not an issue "should not be part of OSHA's enforcement scheme."

How would OSHA determine which workplaces are dangerous? One way, which the agency mostly overlooked until recently, is to draw on readily available workers' compensation data, which show occupational injury rates at individual work sites. Another is to focus on inherently dangerous industries, such as construction and meat packing, and not bother with others unless there are compelling reasons to do so.

"You have to start with knowledge of what causes accidents," said Weidenbaum of the Center for the Study of American Business. "Then, you need to come up with the approaches that provide for safer work procedures, and you can't mandate that one-size-fits-all approach from Washington. You have to focus on the managements of each company to develop safer work processes."

And rather than focusing on paper-work violations, Potter urges that results be emphasized over process. Permitting OSHA inspectors to offer compliance advice and refrain from issuing citations in good faith cases "would enhance OSHA's credibility" and restore some balance to a system heavy on enforcement but light on education.

Currently the agency spends \$1 on training and education for every \$6 it spends on enforcement. Its Voluntary Protection Program, which encourages companies to voluntarily develop safety and health programs in exchange for exemptions from OSHA inspections, has been a conspicuous success, yet just 120 companies were involved in the program at the end of fiscal 1993.

Finally, as many OSHA critics have noted, OSHA needs to develop realistic cost-benefit analyses in formulating its regulations. Right now, for instance, OSHA is barred from using such analyses in setting permissible exposure limits required by its health standards. Instead, it requires the "lowest feasible" compliance level.

"Lowest feasible" means applying state-of-the-art technology, regardless of cost, unless the requirement would literally require the shutdown of an industry because of its cost of compliance," write Potter and Youngman.

Defensive measures

That cost-be-damned mentality, which fails to take account of the cumulative weight of regulations and their effect on job creation and the economy as a whole, has led to regulations that even limit employers' personnel decisions.

Most conspicuous are the rules implementing laws barring discrimination based on race, color, religion, sex, national origin, age and disabilities. The regulations, backed up by the threat of litigation, have forced many employers into defensive postures. Far from ensuring workplace harmony, they often have undermined it.

The anti-discrimination laws insist on neutral recruitment, hiring, promotion and transfer policies, yet the regulations in many cases require employers to adopt color- and gender-conscious remedies.

"In the employment area, one of the

more troubling effects ... is the heightened attention to differences between people that are necessarily brought about by these statutes," said Roger Pilon, director of the libertarian Cato Institute's Center for Constitutional Studies. "We've probably never had such race consciousness, gender consciousness, or ethnicity consciousness as a result of trying to eliminate prejudice."

One alternative solution would be to abolish the nation's anti-discrimination laws altogether, an approach favored by University of Chicago law professor Richard Epstein, who argues for market-place solutions. Few critics of the current laws are willing to go that far, but no one denies that the laws have produced a staggering amount of litigation and led to massive diversions of employer time and resources.

"I think they have a very powerful effect on the free market," Epstein said. "There are enormous costs, and it leads to a form of constant moral arrogance and constant warfare. I can't understand how in the long run this helps anyone."

The new chairman of the Equal Employment Opportunity Commission, Gilbert Casellas, has said he favors the use of arbitration and mediation to resolve some discrimination disputes. And he wants the EEOC to drop cases once an employer and employee reach a settlement. Currently, the agency continues some cases if it believes the employee's problems weren't fully addressed.

But greater reliance on alternative dispute resolution still leaves the laws' incentives to litigate intact. Almost every employment transaction nowadays is the potential subject of a lawsuit, and employers are forced to look over their shoulders virtually every time they hire, promote or fire.

"With increasing competitiveness from all over the world, a litigation-driven system is just not the way to go," Potter said. "Government has to reconcile the conflict between affirmative action and equal opportunity. On the one hand, there's pressure for quotas. On the other hand, there's pressure for equal opportunity, which is something quite different. We've got to allow legitimate business practices to proceed."

Workplace discrimination remains a problem, but as many economists have noted, factors like experience, education and age are far more responsible than discrimination for differences in group income and employment.

A more effective approach to the problem of workplace discrimination might be for government to support private employers' diversity efforts — perhaps through grants and tax credits — and leave it to the employers and their employees to devise solutions that best suit their individual circumstances.

The notion of affording employers maximum flexibility to adapt to the whirlwind of changes buffeting the workplace and marketplace, with government acting more as referee and mediator than as all-knowing overseer, ultimately lies at the heart of any sensible effort at regulatory reform.

"When you look at government regulations, you have to have a very skeptical attitude," Weidenbaum said. "You have to ask, who are the winners and who are the losers? Usually, the winners are very small specialized groups, and the losers are the American consuming public."



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REPORTER'S NOTEBOOK

Reporters recount businesses' tales from the regulatory crypt

When Bonar Menninger and I first began the series on federal regulation that ends this week, we were looking for examples of government overreaching and abuse. The *Kansas City Business Journal* has done many such stories over the years, and our initial idea was simply to compile a list of regulatory horror stories, lay them out for inspection and suggest that they represented a little-noticed but dangerous encroachment on the liberties Americans take for granted.

Our initial impetus was the criminal investigation of the late financier Frank Morgan and his colleagues, who were charged with bid rigging after a lengthy wiretap investigation by the FBI. The bureau was looking for wrongdoing in the operation of Morgan's Home Savings Association, which regulators seized in March 1991.

Having failed to find what they were looking for, the FBI sifted through hundreds of hours of secretly taped conversations and came up with the bid rigging charges instead. A federal judge threw out the evidence after concluding the bureau had overstepped its bounds.

The Morgan case arose not long after regulators seized another savings and loan, Franklin Savings Association, a once-obscure thrift that rose to national prominence on the strength of its complicated hedging strategies.

In September 1990, U.S. District Judge Dale Saffels ruled that the seizure was arbitrary and capricious and ordered the thrift returned to its owners. But the 10th U.S. Appeals Court in Denver reversed Saffels in May 1991, saying that the only relevant evidence in the case was the government's. The court thereby denied Franklin owner Ernest Fleischer a chance to be heard.

These and other less well-publicized examples of businesses being denied elementary due process sparked this series. Because hardly a day goes by without *Busi-*



NOTEBOOK
DAN
MARGOLIES

ness Journal reporters hearing employers complain about government interference in their affairs, we figured there would be plenty of grist for the mill.

There was. But while it became clear that regulatory abuse was a growing problem, our reporting also led us to question the regulatory enterprise itself — the idea that broad social goals such as a cleaner envi-

ronment and safer workplaces are best achieved through massive, and presumably benign, government intervention. That's because the anecdotes and stories we collected were not so much departures from as exemplifications of regulatory procedures: inflexible and capricious in their application, with little consideration given to their far-reaching economic effects.

The businesses that bear the brunt of these regulations aren't the faceless, heartless and monolithic caricatures of Hollywood myth. They're the dry cleaner around the corner, the family-owned construction company, the restaurant struggling to get by.

Most Americans share the goals of a

cleaner environment, safer workplaces and equal opportunity for all. But few Americans are aware of the costs of trying to achieve them by government fiat: the market distortions, skewed priorities and debilitating effects on the economy of rules that make little provision for the varied circumstances of different businesses.

That's not to say the private sector can be relied upon to do what's right, or that everything the government does is wrong. It is to say that not every wrong or injustice or risk in the world warrants government intervention.

To put it simply, regulation by government decree invites abuse. And unless that tendency is checked, we'll have plenty more horror stories to write about in the future.

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Continued from preceding page

been throwing off the shackles of extreme central planning, this country races forward to more and more government control as if it were immune from the forces that have ruined the lives and environment of so many millions. Education, housing, medical care, financial systems — think of the course of these since increasing government intervention. Even things that are traditionally in the sphere of government conduct, such as crime and lawlessness and highway infrastructure, are a mess.

Government has gotten too big. It spends about 50% of every dollar earned in the country. The cost of regulation is estimated to be about half a trillion — T — dollars annually. That's over \$5,000 per average household. Products can take up to ten years to be approved for marketing. And every facet of business is intimately regulated — the development and approval of products, their pricing, the hiring and firing and caring process, where and how to build a plant or office, and on and on. The same intrusiveness extends to individual lives. The demise of liberty is the defining issue of our age.

Richard Duesenberg is senior vice president, general counsel and secretary of Monsanto Co. He is co-author of one volume and author of two volumes on commercial codes and has written numerous articles for law journals and other publications.

OPINION

THE KANSAS CITY BUSINESS JOURNAL

■ **COMING UP:**
Readers speak out.

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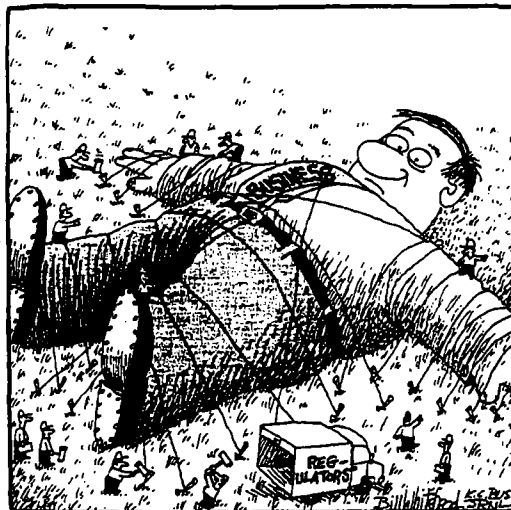
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CITY BUSINESS JOURNALS



K.C. Business Journal

EDITORIAL

Government should partner business, not stand in its way

Government has slapped the easy panacea of regulations onto business-related problems for so long, it has forgotten how to work with private industry and not against it.

When government officials originally sat down to write what is now a 202-volume, 131,803 page compendium of regulations under which businesses now operate, it is doubtful they meant to create the tangle of red tape that exists today.

Instead, they probably sat down with the purest of intentions, hoping to outlaw the ills of discrimination, workplace hazards and pollution, which have plagued our country.

But, like any monopoly left unchecked, the government has gotten out of hand. The rules have exceeded their original intent and become stifling and prohibitive. In 1992, private businesspeople spent an estimated 6.6 billion hours simply filling out forms. Officials have become so accustomed to throwing a regulation at every problem that arises, they have forgotten to look for solutions, leaving large and small businesses drowning as they attempt to keep up.

In a market-based economy, businesses must find a supporter in government, not a foe. Instead of stifling business,

government should empower it.

In a free-market society, it makes sense to offer free-market solutions. If business were offered incentives, such as tax credits, for compliance with hiring and environmental standards, instead of penalties for noncompliance, the level of adherence to these standards would rise.

Business, the backbone of our economy, is not attempting to exist without regulation; it is looking for solutions that will not cost business, its employees and customers more time and money.

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COMMENT

Liberty's demise defines our age

By any standard, the 20th century has been a spectacular experiment. Two great forces collided: those of liberty and of command and control.

Out of that collision have emerged two overwhelmingly persuasive teachings. Some theorists had previously forecast the results of command and control organization, but nothing is more dramatic and impressive than an actual, real life happening. These didactic experiences are, first, that centralized planning and control are economic disasters; and second, as a moral standard for social organization, centralized control is a sordid fraud.

No century in history has been witness to a greater number of persons being deprived of their life, liberty and pursuit of happiness for failure to conform to the demands of central planning than has been true of the 20th. Conservatively, the estimates run considerably upward of 100 million. The figure is really unknown. And that figure applies only to the ultimate deprivation — death. Incarceration, isolation, and expropriation of property would magnify the figure many times.

It's not particularly surprising that this should have occurred. Whether addressing its economic or other social interests, the objective of organizing society according to a central plan requires the exercise of arbitrary power over others.

Whoever has control over determining the ends to be achieved must also control the means of achieving them. To accomplish the ends identified and selected, central planners must create power — the power to deny to others what they would voluntarily choose to do to achieve the same objectives.

Since the success of central planners is measured by the achievement of their ends, it is inevitable for them to push the power they create for themselves to the level they deem their success to demand. This explains the criminalization in this country of much conduct which throughout our history has otherwise been held laudable.

When several hundred bureaucrats sat down recently to map out a plan for national medical services, the act of consensually selecting a physician and agreeing to services and fees was



**RICHARD
DUESENBERG**

GUEST
COLUMN

proposed to be made criminal, subject to the penalty of incarceration. Yet, that is exactly what Americans have done for two centuries. The power to jail is power indeed.

Frederick Hayek warned a half century ago: "There are strong reasons for believing that what to us appear the worst features of the existing totalitarian systems are not accidental by products but phenomena which totalitarianism is certain sooner or later to produce. Just as the democratic statesmen who sets out to plan economic life will soon be confronted with the alternative of either assuming dictatorial powers or abandoning his plans, so the totalitarian dictator would soon have to choose between disregard of ordinary morals and failure." And he asked: "Is there a greater tragedy imaginable than that, in our endeavor consciously to shape our future in accordance with high ideals, we should in fact unwittingly produce the very opposite of what we have been striving for?"

While the history of the 20th century underscores the Hayekian warning, the worst has not yet happened in our country. Could it? Of course. Liberty is something to be protected by each generation for itself; power is always lusted after by those wishing to do good as they would define it. Our Constitution stands in the way. But less and less. The contemporary judicial notion of due process seems to be to encourage or enable individuals and businesses to exhaust their life savings doing battle in courts with overbearing government bureaucrats.

Aside from this moral dimension, however, central planning as a substitute for the market system is a demonstrable failure. Who can reasonably contend that government intrusion into most if not all social ventures that historically have been the province of private action has been successful?

While much of Europe has

Continued on next page



WHOSE BUSINESS IS IT, ANYWAY?

REGAINING CONTROL

REGS STIFLE MANUFACTURING EMPLOYMENT, SURVEY SAYS

Government policies and regulations discourage employment, say the overwhelming majority of more than 2,000 manufacturing executives polled earlier this year by the National Association of Manufacturers. NAM's 13,000 member companies and subsidiaries produce approximately 85 percent of U.S. manufactured goods and services and employ 18 million people. Manufacturing accounts for 23 percent of the nation's gross national product.

THE RESULTS:



• **88 percent** of the respondents said government policies over the past five years have discouraged employment.



• **64 percent** said they have delayed hiring more workers because of government regulation.



• **42 percent** said they have reduced their work force because of regulation.



• **80 percent** said they have used overtime or temporary help rather than hire new employees.



• **55 percent** said they have had to shift resources to legal affairs and compliance areas in order to deal with regulations.



• **50 percent** of exporting companies said they had experienced difficulties handling the paperwork required for exports.

BY BONAR MENNINGER AND
DAN MARGOLIES

We can no longer afford to pay more for - and get less from - our government. The answer for every problem cannot always be another program or more money. It is time to radically change the way government operates - to shift from top-down bureaucracy to entrepreneurial government that empowers citizens and communities to change our country from the bottom up. We must reward the people and ideas that work and get rid of those that don't. President Bill Clinton, 1992.

With those bold words, President Clinton set in motion the National Performance Review, a sweeping reassessment of government operations aimed at making "government work better and cost less."

The much-vaunted effort was headed by Vice President Al Gore, who collected ideas from employees at every major federal agency, as well as from citizens, academicians and business leaders.

The result was a series of recommendations, popularly known as the "Gore Report on Reinventing Government," that were introduced with considerable fanfare in September 1993.

The effort has produced some notable successes, according to a status report issued by the NPR in September: 71,000 full-time government jobs eliminated; \$46.9 billion in projected payroll savings; more than 100 agencies setting customer-service standards for the first time; nine agencies beginning major streamlining programs; the creation of 135 "reinvention" labs in which employees experiment with new ways to do business; and the auctioning off for the first time of new radio frequencies.

Although the performance review focused "primarily on how government should work, not on what government should do," the initiative acknowledged many of the problems associated with regulation and suggested a number of improvements.

"I think we've made a lot more progress than was expected," said Mark Pelofsky, a Kansas City native who heads up the reinvention efforts at the U.S. Department of Labor in Washington. "But I think most Americans would say they haven't noticed a difference yet."

"When the average taxpayer starts noticing, then we'll have succeeded. But I don't think we've gotten there yet."

Vesting line bureaucrats with greater decision-making power has been one result of the reinvention efforts at DOL. For example, a pilot program at

of the New Jersey offices of the Occupational Safety and Health Administration, an agency within the labor department, allows field inspectors to cut penalties by 10 percent if an employer abates a hazard immediately.

Likewise, officials with the Pension Benefit Welfare Administration, a labor department agency that enforces pension benefits laws, now have authority to answer customers' questions in the field, rather than having to go through the bureaucratic maze.

"The vice president's group put together a lot of recommendations, but it also created an environment where people ask questions. It has made people realize we have a customer — the taxpayer. So the report is not just a set of recommendations but an attempt to get at the underlying ways we do business in government," Pelofsky said.

That attempt to change the way the government does business included the creation of an interagency regulatory coordinating group designed to share information and coordinate approaches to regulatory issues. The group was created a year ago and has focused on exploring a number of other reforms proposed in the report. Among its recommendations:

- Emphasize the use of negotiated, consensus-based rule making, under which representatives of an agency and affected parties would come together "in a cooperative effort to develop regulations that not only meet statutory requirements, but also are accepted by the people who ultimately will have to live with the regulations."

- Encourage alternative dispute resolution in the enforcement of regulations. Currently, adjudication of enforcement disputes often leads to unsatisfactory outcomes "and may undercut future efforts to ensure effective compliance by creating an atmosphere of antagonism and distrust. In the long run, encouraging compliance is likely to be more effective than litigating over enforcement."

- Rank the seriousness of environmental, health or safety risks because "risk prioritization can help agencies distinguish between regulatory targets that demand immediate attention and those that allow for mid- or long-range corrections."

- Improve regulatory science by requiring "heads of regulatory agencies that conduct rule-making or other proceedings that depend heavily on scientific information and judgments to create a science advisory board or explain why such a board is

not needed."

- Use market-oriented regulatory approaches, including performance standards, marketable permits, financial incentives and greater information disclosure. More specifically, the Gore report supported the call for greater reliance on market-based approaches to reduce pollution. "Rather than dictating exactly which technologies industry should use to reduce pollution, the government would set the standards and let the market handle the details."

Similarly, the report recommended that in the area of workplace health and safety, government set standards and impose penalties on workplaces that don't comply.

"The Labor Secretary already is authorized to require employers to conduct certified self-inspections. OSHA should give employers two options with which to do so: They could hire third parties, such as private inspection companies; or they could authorize non-management employees, after training and certification, to conduct inspections. In either case, OSHA would set inspection and reporting standards and conduct random reviews, audits and inspections to ensure quality."

Report reviewed

In an August assessment of the Gore report, the non-partisan Brookings Institution concluded that it "accomplished, in just its first year, far more than anyone thought possible."

"It energized employees, it attracted citizens, it drew media attention to government management, and it made the point that management matters," according to the economic and government research organization.

Nonetheless, the report noted some significant shortcomings in the initiative. Chief among them, it said, was the focus on how government works and not what government does.

"...the distinction is artificial: the how powerfully shapes the what because means embody ends; from the beginning, the how has to be driven by the what," said the report's author, Donald Kettl, a professor of political science and public affairs at the University of Wisconsin.

Kettl also faulted the Gore report's preoccupation with savings over performance improvement, and noted that "many members of Congress supported the (National Performance



Review) in the whole, but then tugged at its individual threads in ways that threatened to unravel it."

In an interview, Kettl said the recent Republican takeover of Congress probably will give the reinvention effort added momentum.

"If anything, the Republicans have been a lot more enthusiastic about this than many of the Democrats," he said.

But Kettl said the administration and Congress might still get into a "bidding war" focusing more on cutting costs and reducing the number of government employees than on increasing performance or examining fundamental questions about government's role in the first place.

Others have questioned the Clinton administration's commitment to reinventing government altogether.

Susan Eckerly, director of economic policy at the active Heritage Foundation in Washington, pointed out that the administration effectively blocked efforts to strengthen the Regulatory Flexibility Act in the last Congressional session. The act, which was passed in 1980 and requires agencies to weigh the impact of their regulatory initiatives on small businesses and small governments, is largely ignored by many agencies because it "has no teeth," Eckerly said.

"It's one thing to pay lip service to regulatory reform, but there is no commitment," she said, adding that the Clinton administration has pushed a number of costly regulatory initiatives, including OSHA's indoor air-quality rule. Some estimates put the costs of complying with that rule at \$8 billion.

Said Dan Mitchell, a colleague of Eckerly's and a senior fellow at the Heritage Foundation: "The Gore Commission doesn't address the fundamental problem. There is too much regulation, period. Flexibility within a bad regulatory regime doesn't solve a thing."

passed 1990 or so

Dr. Klaus Toepter

Grading of
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- Germany
- planning

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THE METRO AREA'S MOST COMPREHENSIVE BUSINESS COVERAGE

DECEMBER 2-8, 1994



WHOSE BUSINESS IS IT, ANYWAY?

OSHA's Obsessions Trivialize True Hazards

Employers resent high-handed enforcement at education's expense

DAN MARGOLIES AND BONAR MENNINGER

Ask Gary Adams, owner of La Bonne Bouchée, about last year's OSHA inspection of his pastry shop and you're apt to get an earful of expletives.

Adams was cited for violating OSHA's "lockout" standard because the switches on his ovens weren't padlocked while they were being repaired.

Sounds reasonable, except Adams, who did much of the repair work himself, had removed the fuses and the appliances couldn't possibly be activated.

"That wasn't good enough for them," Adams grouched. "What aggravates me is this is the first time in 17 years I'd ever been inspected. Rather than give us informational advice, they assessed us \$1,250 for each of the three ovens."

"When I asked about that, the area director told me, 'Washington reviews us to see how much we collect.' I said, 'Are you in the safety or the money business?'"

In Kansas City business cir-

cles, the Occupational Safety and Health Administration is the agency companies love to hate. While few employers quibble with OSHA's goals, many complain that it's more concerned with citing trifling violations than helping them reduce workplace hazards.

OSHA's tough stance undoubtedly has increased manager and worker awareness of occupational health and safety. But a random survey of two dozen businesses out of more than 250 cited by OSHA in metropolitan Kansas City last year suggests it has come at consider-

See TRIFLING, Page 52



Roy Inman photo

"WHAT AGGRAVATES ME IS THIS IS THE FIRST TIME IN 17 YEARS I'D EVER BEEN INSPECTED."

Gary Adams, owner of La Bonne Bouchée pastry shop, which was cited for not padlocking oven switches and fined \$3,750.

OSHA Enforcement Does Little to Ensure Safety, Contractor Says

OSHA proof doesn't mean accident free

BY BONAR MENNINGER

William Linn doesn't need to be reminded that construction can be deadly.

"A contractor's worst nightmare is when he gets a call that he's got a man down," said Linn, president of A.D. Jacobson Co. Inc., a mechanical contracting firm in Kansas City. "Life is dangerous. You do everything you can."

In March, 25-year-old Todd Willis, an apprentice pipe fitter

for Jacobson, was crushed to death when a one-ton air conditioner broke free as it was being hoisted into place at Bartle Hall. The fatality was the first in Jacobson's 75-year history.

After several months of investigation, OSHA cited Jacobson for a minor violation: The lifting straps used to position the AC unit were not marked to indicate safe working loads. Actually, it

See JACOBSON, Page 53

Third of Five Parts

Next Week:

WORKPLACE WORRIES

Increasingly intrusive workplace rules leave employers fearing litigation.

NEWS GUIDE

CORPORATE MAGICIAN

Ken Courtney would rather jump off a bridge than saw a woman in half or, worse yet, make a balloon dog.

Page 3



COURTNEY

THE MEINERS FAMILY

grocery stores are closing in on a deal with J.C. Nichols Co. to lease the former Muehlbach's West grocery store location on the Country Club Plaza.

Page 7

A DIVISION OF KANSAS CITY- based Havens Steel Co. is a finalist for a \$16 million bid to supply steel to Hilton International's first hotel project in Mexico City.

Page 23

STRATEGIES IN SMALL BUSINESS

THE OWNER

of the Perfect Scents shop in Westport recently opened a second store among some of the highest-ticket retailers in the country.



Page 18

FOCUS ON

ESTATE PLANNING

MANY INVESTORS FIND them complicated, but charitable trusts can ease their tax load.

Page 23

Sale in sight for the Americana, Cleaver says



Americana Hotel

Location: 13th & Wyandotte

Owner: Americana Hotel & Realty Corp.

Asking: \$3 million cash

Specs: 28 floors, 486 rooms, 8,000-square-foot meeting space

KRISTA MARTIN KLAUS
AND JOE GOSE

Kansas City Mayor Emanuel Cleaver says a deal for the purchase and rehab of the 25-year-old Americana Hotel adjacent to Bartle Hall will be inked by year's end.

"I am absolutely certain that before the first of the year we'll announce a redevelopment project at the Americana Hotel,"

Cleaver said.

Real estate industry sources say the sale could be announced within a week.

Three groups of Kansas City businessmen are reportedly among prospective purchasers scrambling to assemble financing to buy the downtown hotel, which ranks fourth on the Kansas City Business Journal's Top 25 list of

Kansas City area hotels. Last week Americana management announced the hotel would close Dec. 30 if no one stepped forward to buy it.

Local lawyer Bernard Craig represents one group of local hotel insiders who reportedly have a contract in the works.

"A deal has not been executed by either side,

See AMERICANA, Page 51



WHOSE BUSINESS IS IT, ANYWAY?

OSHA'S OBSESSIONS

TRIFLING

Continued from Page 1

able cost: pervasive alienation and growing resentment over what employers view as the agency's heavy-handed ways.

Although, contrary to myth, OSHA is not self-funded through fines, business owners say the agency's punitive approach makes little distinction between small and large employers, or between inherently dangerous and relatively risk-free workplaces.

Created by Congress 24 years ago to establish and enforce workplace safety and health regulations, OSHA has a budget of just \$300 million (EPA's budget, by contrast, is nearly \$7 billion), and 2,000 inspectors, including those attached to OSHA-approved state programs, to monitor the nation's 6.2 million workplaces.

Because it can only monitor a tiny fraction of those workplaces — it would take OSHA 87 years to inspect every job site in Missouri and 147 years to inspect every job site in Kansas — OSHA sees its role as deterring potential wrongdoers, not unlike the way IRS audits are designed to instill fear in taxpayers.

OSHA officials make no bones about their hard-nosed attitude, stressing that the agency's principal mission under the Occupational Safety and Health Act is to set standards and enforce them. Training and education take a back seat.

"Our statutory mandate requires that we promulgate and enforce standards. So more than half, 75 percent of our resources are dedicated to those tasks. Anything else we do is almost a luxury for us," then-OSHA Director Dorothy Strunk told U.S. Rep. Jan Meyers of Overland Park during Congressional hearings in August 1992 on OSHA's impact on small business.

She added: "When we promulgate our standards, they apply the same to all employers, regardless of their size."

One size fits all

That was the case with Space Center Distribution Kansas City Inc., an underground food warehouse and distribution center located off South 291 Highway and sprawling over 1.4 million square feet. The company was cited by OSHA last year for 25 safety violations, ranging from improper fire extinguisher placement to inadequate eye-wash stations. An OSHA inspector told the company it needed to have extinguishers every 75 feet — although the cave's supporting columns and the storage layout made that impractical, and the space was covered by a sprinkler system.

The inspector also insisted

that Space Center install "safety showers," and even included directives detailing copper pipe specifications, for employees injured by battery acid. Because Space Center changes the batteries in its forklifts regularly, the inspector reasoned that a worker could be injured if a battery were dropped and exploded — although that has never happened and, according to Space Center officials, probably never will.

"The inspector was quite educated on his guidelines and could state the OSHA regulations real well. But he had no real knowledge of our business, and the things were kind of impractical to do," said Space Center operations manager Tony Kraus.

OSHA ultimately agreed with the company's suggestion that the fire extinguishers be placed on the forklifts. The company, which initially was fined \$17,000, settled for \$9,000 — although Kraus said Space Center's total compliance costs so far have amounted to \$75,000.

The experiences of employers like Space Center Distribution underscore not just the capriciousness of OSHA's citations, but the disproportionate attention it devotes to nonserious violations, those OSHA defines as unlikely to cause death or serious physical harm.

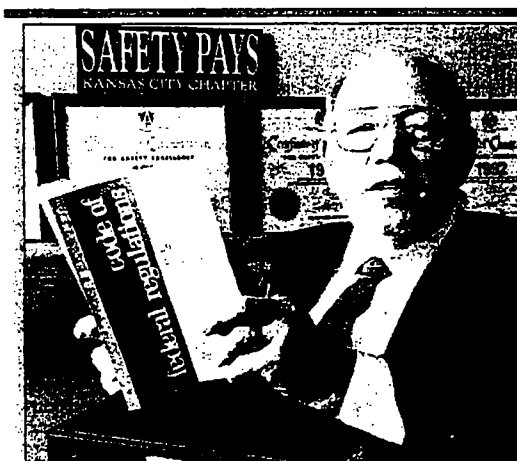
Take Industrial Excavating & Equipment, for example. The nine-year-old, family-owned company with 40 employees was cited for improper trenching because it failed to measure the density of the soil in an eight-foot-deep sewer trench. The company was ordered to widen the trench from eight feet to 30 feet — OSHA's requirement in worst-case scenarios involving loosely packed soil — although there was no indication the soil was unstable.

"But without a test, it didn't matter what the soil was. They assume the worst case," said Jeff Kranz, Industrial Excavating's general superintendent.

The company initially was fined \$10,000, which it contested and the agency eventually dropped. But the citations remain on OSHA's books, meaning Industrial Excavating can get slapped with punishing fines as a repeat offender if OSHA returns and discovers similar violations.

Similarly, Hoffman-Cortes Contracting Co., a third-generation, family-owned Kansas City construction company, got into trouble with OSHA after a couple of its workers, anticipating a snowstorm, scrambled up the roof of a partially-constructed building at the Bartle Hall site to cover it with a tarpaulin. An OSHA inspector happened to see them and said the company should have installed guardrails first. The company was fined \$700.

"We told him it was an emer-



Roy Imman photo

"WHAT OSHA SHOULD BE DOING IS CONDUCTING TRAINING INSTEAD OF MY HAVING TO SEARCH OUT WHAT THE LAW IS ALL THE TIME."

Gary Cortes, president of Hoffman-Cortes Contracting Co., which was fined \$700 after workers scrambled up a partially finished roof without a guardrail to protect it from an oncoming snowstorm.

gency situation. He said it didn't matter," said Hoffman-Cortes President Gary Cortes, whose company doesn't exactly skimp on safety: It spends tens of thousands of dollars a year on compliance and has an exemplary safety record — zero lost employee workdays in the last couple of years.

"There's just no flexibility. And since you have to live with these guys, it's like having to walk on eggs," Cortes said.

Arbitrary citations

OSHA's own numbers show that more than two out of five agency inspections result in findings of no serious or willful violations.

As the General Accounting Office pointed out in a 1990 report, one way for OSHA to get more bang out of its limited bucks is to spend less time on inspections with no serious violations, freeing up inspectors to concentrate on inherently dangerous workplaces.

OSHA's failure to home in on the serious violators is, to a large extent, a function of its flawed data-collection and evaluation process. Employers are not required to report to OSHA most of the injury and illness data they already record under the OSHA act. Instead, they only report fatal accidents or "catastrophes" — accidents in which five or more workers are hospitalized.

Nor does OSHA fully exploit the availability of workers' compensation records, accident reports or other data that would help it identify hazardous job sites. As the GAO noted nearly five years ago, improved inspection targeting would produce "a greater return" for its enforcement efforts and might also

encourage employers to eliminate hazards before inspections.

Regional OSHA Director John Phillips said his office, which covers Missouri, Kansas and Nebraska, only recently began a pilot program, called "Missouri 500," aimed at targeting "the worst actors in the state" using workers' comp data.

"OSHA hasn't really been all that successful in the past in either scheduling on construction or general industry to just get at the bad actors," he acknowledged. "I mean, we know that about 20 to 25 percent of the employers here in Missouri have a huge influence on the work comp rates for everybody."

But even if OSHA were to develop a systematic program to target high-hazard businesses, one stubbornly inconvenient fact of workplace life would remain: Experts estimate that as many as 75 percent of workplace accidents result from willful safety violations or carelessness not by employers but by their employees.

OSHA's response, however, is to put the onus on the employer.

"If there's a (construction worker) on the roof who's not tied off and he has a history of that, and the company has records showing it disciplined him, then more than likely there won't be a citation," Phillips said. "But we will say to the employer, dammit, either you're going to send this guy home or you've got to do something more than you've done so far to get their attention."

There's little question that workplace fatalities have decreased since the Occupational Safety and Health Act was passed in 1970, even as employment has increased significant-

ly. The Bureau of Labor Statistics' occupational injury data show that workplace fatality rates have dropped from 9.4 per 100,000 workers in 1974 to 4.3 in 1991.

But whether OSHA is the reason for the drop is far from clear. While fatalities have gone down, a third of them involve workplace homicides and traffic deaths. And occupational injuries and illnesses have actually gone up during the same period, from 8.4 per 100 full-time private workers in 1991 to 8.9 in 1992. That suggests that OSHA's impact, at best, has been mixed.

Where OSHA could have the greatest impact, business owners say, is in the area of consultation and education. Rather than emphasizing enforcement and punitive action, "what OSHA should be doing is conducting training instead of my having to search out what the law is all the time," said Cortes of Hoffman-Cortes Contracting.

Currently, less than 15 percent of OSHA's budget is devoted to compliance assistance. And those consultations that OSHA does provide usually must be done away from the workplace; otherwise employers risk the imposition of sanctions.

While it's true OSHA rarely levies the maximum allowable civil penalties — Congress raised them seven-fold in 1990, from \$1,000 to \$7,000 for serious and nonserious violations and from \$10,000 to \$70,000 for willful or repeat violations — the penalties still sting, particularly for small businesses. Throw in the expense of fighting citations, and the sum can be considerable.

OSHA Regional Director Phillips, an outgoing man whose folksy manner belies a pugnacious attitude toward enforcement, makes no apologies.

"My philosophy has always been — and this is the philosophy of the agency — that you start off with firm, fair, strict enforcement. We think the only way to get the attention of the employers who would either ignore or not do what they should do in protecting their workers is to hammer the bad ones when we find them."

Phillips' zeal is, perhaps, understandable.

In 1967, while working in a Portsmouth, Ohio, steel mill, he lost his right foot because his employer, attempting to skimp on costs, wired around the limit switch on a crane hoist. The crane toppled out, the cable snapped and the load came crashing down on Phillips' leg.

"As of last week," said Phillips during an interview in late August, "we've had 53 fatalities in our region. There's a war going on out there."

The question is whether OSHA is waging it the right way.

WHOSE BUSINESS IS IT, ANYWAY?

OSHA'S OBSESSIONS

OSHA DIRECTOR ANSWERS



DEAR

Joseph Dear, 43, was named director of the Occupational Safety and Health Administration in November 1993.

In an August telephone interview, Dear outlined his view of OSHA's mandate and the changes he plans to make at the agency.

Q: Do you think the agency should take more of a carrot or more of a stick approach?

A: It's not an either/or question. Enforcement works. Effective enforcement, credible enforcement helps create a demand for voluntary compliance. But OSHA cannot inspect and enforce its way to widespread safety and health in the U.S. Compliance assistance is extremely useful, but we can't depend on voluntary efforts entirely to produce safe and healthy workplaces. So the question is degree and relative emphasis. We're trying to step up enforcement and increase opportunities for compliance assistance.

Q: Is there too much of an emphasis on paperwork?

A: We need to focus on the most serious threats to worker health and safety. I think the illustration ... of the focused inspection program in construction is a direct programmatic response to the concern that's been expressed about looking at so-called paperwork issues. We're working to adapt that program to general industry. Clearly that would mean that increased attention to standards like energy lockout and confined space and entry are in the works. I don't want employers to be worried about their paperwork. I want them to be worried about the direct safety and health of their employees. I'd like them to voluntarily address those hazards, but we're not apologetic if the threat of enforcement is what provides the incentive for employers to tackle their safety and health issues on the job.

COSHRRA Could Cost Business \$62 Billion

Reform expands record-keeping

BY BONAR MENNINGER

If you think OSHA is intrusive now, just wait for the "new and improved" version.

President Bill Clinton is backing a bill that would inject OSHA into every workplace in the country and, by some estimates, cost American business as much as \$62 billion a year.

Known as the Comprehensive Occupational Safety and Health Reform Act, or COSHRRA, the legislation represents the first significant change in the Occupational Safety and Health Act since it was enacted in 1970.

Although the bill died in committee this year, Capitol Hill observers say COSHRRA could be reintroduced in the next session of Congress.

Sweeping in scope, the legislation has generated a storm of controversy among business owners nationwide.

"Give us some guidance, some cooperation, and some understanding. Don't cripple us with new regulations," pleaded Richard Pouliot, president of Beltsville, Md.-based Applied Specialties Inc., a manufacturer of communications equipment, in testimony before Congress early in the COSHRRA debate.

Cost estimates vary

"The net effect would be to increase confrontation, delay abatement of hazards and deny employers their legitimate right to due process," said the Coalition on Occupational Safety and Health, a group organized to fight the bill.

Organized labor, a major proponent of the bill, sees things

differently.

Peg Seminario, director of occupational safety and health at the AFL-CIO's headquarters in Washington, said the business community's criticisms were "opposition for opposition's sake."

"The opposition is more ideological than anything else," she said.

Because the debate about COSHRRA has largely fractured along ideological lines, even estimates about the cost of legislation are sharply divided.

By OSHA's reckoning, enforcing the new regulations would require an additional \$300 million annually, or a doubling of the agency's current budget.

But while OSHA has estimated the annual compliance cost for companies at \$10.7 billion, the Employment Policy Foundation, a Washington think tank, has calculated the direct cost to business at \$62 billion.

To put that figure into perspective, \$62 billion represents 2.9 percent of the nation's total non-government payroll and 11.8 percent of all business net income in 1990, the foundation says.

"It could be one of the most expensive regulations ever imposed on business," said Bradley Cameron, vice president of public affairs at the Employment Policy Foundation. "We've been told by some large corporations that their compliance cost alone could reach \$5 million to \$10 million."

Beyond COSHRRA's costs, the Coalition on Occupational Safety and Health, which represents 330 companies and professional societies, asserts that requiring companies to create safety com-



SOME OF COSHRRA'S PROVISIONS:

- Requiring detailed, written safety and health programs at every one of the nation's approximately 6 million work sites, regardless of size, type or potential hazard.
- Mandating safety and health committees made up of employees and management for any business with more than 10 employees.
- Adding new and expanded criminal penalties, including criminal penalties for managers and supervisors.
- Increasing OSHA enforcement and "shut-down" authority.
- Expanding record-keeping and reporting requirements.
- Eliminating cost-benefit analysis in the development of new safety regulations.

mittees would actually undermine workplace safety.

"By prescribing a rigid committee structure, selection process and duties, COSHRRA fails to recognize the vitality and effectiveness of the many types of successful employee involvement mechanisms currently in operation," the Coalition says. "A 'one-size-fits-all' approach is out of touch with the reality of today's workplace and might well stifle innovation and creativity."

But Seminario, who said she "worked very closely" in developing the bill with COSHRRA's sponsors, Sen. Ted Kennedy of Massachusetts and Rep. William Ford of Michigan, called mandatory workplace safety committees the most effective way to foster a safer workplace environment.

"It's long been recognized that to improve safety and health in the workplace, you need an affirmative commitment by management, and you

need to involve workers," Seminario said, adding that workplace safety committees are already mandated in 12 states that have their own occupational safety and health programs.

The provision of the bill that seems to trouble critics most is its elimination of cost-benefit testing for new safety standards.

"It will basically give the agency carte blanche to establish standards regardless of the cost to business," said John Tyse, an official with the Labor Policy Association in Washington, a lobbying and policy group made up of 220 of the nation's Fortune 500 companies.

Tyse said the provision runs counter to recent legislative efforts aimed at exacting more financial accountability from regulatory agencies.

"It's almost like they are produced in a vacuum, with no thought given to compliance costs in the context of all the other regulations that are out there."

A SAFETY SUCCESS

Companies reduce inspections with voluntary compliance programs

BY DAN MARGOLIES

In the old days, Dave DeVoe wasn't exactly thrilled when OSHA inspectors showed up at his door.

"Our relationship with OSHA was, if you want to come in, you'd better have a warrant," said DeVoe, safety manager at Teepak Inc., a manufacturer and printer of synthetic meat casings in North Kansas City.

Funny how attitudes change when confrontation is replaced by cooperation.

Teepak, which has 68 employees, is the metro area's lone participant in OSHA's Voluntary Protection Program. The 10-year-old initiative is designed to encourage companies to develop safety and health programs

by removing the threat of OSHA sanctions. In exchange for meeting — and exceeding — all relevant OSHA standards, VPP participants are exempt from routine scheduled OSHA inspections.

Teepak's numbers speak for themselves: Workers' compensation costs have plummeted since it became a VPP participant. From July through June 1992, its workers' comp costs totaled \$128,381. For the comparable period in 1993, they totaled \$55,100. And for the same period in 1994, the figure was \$24,965.

More significant, says DeVoe and Teepak plant manager Cliff Harper, has been the boost VPP participation has given to employee morale and produc-

tivity.

"I thought, 'Oh, boy,'" DeVoe said, recalling his initial reservations about the program. "But it turned out to be a good way to get into TQM (total quality management) and employee involvement."

Trouble is, the 10-year-old VPP program represents less than 1 percent of OSHA's total budget. Nationwide, just 120 companies participated in VPP as of the end of fiscal 1993 — although OSHA Director Joseph Dear said he hoped to raise the figure to 185 by year-end fiscal 1994.

"That represents a 50 percent expansion in one year of a program that's more than 10 years old," Dear told the *Kansas City Business Journal* in August. "So

I think that's a clear demonstration of our interest in encouraging and recognizing high-performance workplace safety and health programs."

Teepak joined the program nearly three years ago when, after a rigorous application process, OSHA accepted the company into its VPP Merit Program. That was a stepping stone to the agency's more exacting Star Program, which Teepak qualified for in September 1993.

The Star Program is open to companies that have reduced their injury rates well below the national average for their industry. To remain eligible, Teepak must maintain its written safety

See SAFETY, Continued on next page

WHOSE BUSINESS IS IT, ANYWAY?

OSHA'S OBSESSSIONS



Safety Data Sheets Difficult to Understand

BY BONAR MENNINGER and
DAN MARGOLIES

From mind-numbing work procedures to complex hazardous chemical rules, businesses are expected to comprehend and comply with up to 700 different OSHA regulations.

But the regulation that provokes the most disdain among employers is the Hazard Communication Standard, more commonly known as the right-to-know regulation.

The standard, which accounts for more citations than any other OSHA rule — 23,531 out of a total of 166,088 citations in fiscal 1993 — was established in 1987 and requires employers to identify workplace chemical hazards, communicate them to employees and provide written precautions for their safe use and handling.

The information must be provided by chemical manufacturers and importers in the form of "material safety data sheets," or MSDSs. Employers, in turn, are responsible for maintaining MSDSs on the chemicals they use in a location accessible to employees.

In theory, the regulation sounds reasonable. In practice, the result often is a blizzard of paperwork that many employers say serves no useful purpose.

As the retired owner of a Kansas City wholesale distributor put it: "Most of the information contained (in MSDSs) is so esoteric as to be understood only by professionals trained in chemistry or toxicology. Consequently, there is not much impetus for the worker to retain the little information that can be comprehended, no matter how much training the employer

provides."

The General Accounting Office, in a 1991 report, said that 55 percent of all employers who use MSDSs told the GAO they believed all, or nearly all, of them were too technical for the typical employee.

And when the information isn't too complicated, it often borders on the absurd. MSDSs, for instance, are required for sawdust and charcoal dust. The suggested remedy for exposure to sawdust: "Flush with water." The proposed remedy for exposure to charcoal dust: "Seek air."

Craig Brightup, spokesman for the National Roofing Contractors Association, said a construction company once was cited by OSHA for failing to have an MSDS for Joy dishwashing liquid.

"There is clearly a disconnect between many of OSHA's regulations and true issues of safety," he said. "The Hazard Communication Standard probably brings that home more than anything else."

Brightup said an informal survey of his association's members revealed not one instance in which an MSDS had actually been used by an employee in an accidental chemical exposure case.

"I would contend that there is a quota mentality at work among inspectors, and (MSDSs) represent a cheap ticket," he said.

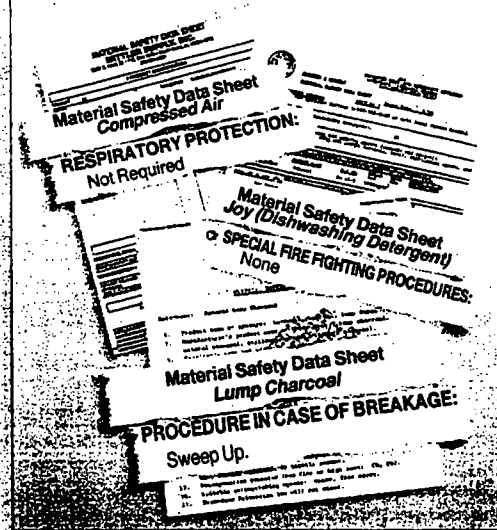
OSHA Director Joseph Dear said the agency is working on producing standards "in what we call complete packages."

"By complete packages I mean a standard which is readily comprehensible, that's enforceable and that's technically and economically feasible,"

HAZARDS BORDERING ON THE ABSURD



The hazards listed on the Material Safety Data Sheet may seem ludicrous, as the samples below show, but not having MSDSs available at an OSHA inspection can lead to a citation. MSDS infractions are cited more than any other single rule, accounting for 14% of OSHA citations in fiscal 1993.



he told the *Kansas City Business Journal* in August.

If that tack doesn't work, Congressional pressure may compel changes in the Hazard Communication Standard anyway.

An advisory group assembled by Rep. Larry Combest of Texas and Rep. Norman Sisisky of Virginia several years ago recom-

mended developing a centralized, electronic MSDS database and labeling materials for easy identification. The changes, designed to reduce employer "information overload," will be introduced when comprehensive OSHA reform legislation is resurrected, probably in the next Congressional session.

DIRECTOR ANSWERS (CONT.)

Q: What should OSHA's proper role be?

A: The mission is saving lives, preventing injuries, protecting the health of America's workers. We do that through enforcement programs to block the low road, by setting standards to define the rules of the road and by encouraging high-road practices through recognition, education and training. All three of those elements are important to the nation's safety and health program. OSHA's budget is about \$300 million. Its staff is about 2,300 people. Together with our state plan partners, there are a little over 2,000 inspectors for six million workplaces in the United States. The question is how to make the most of the resources that are available, given an enormous mission and greatly constrained resources.

Q: Is there any consideration being given to just providing broad guidelines and allowing businesses to find solutions on their own?

A: In general, performance-oriented standards are preferable because they provide flexibility to adapt to conditions at a workplace and are less likely to be made obsolete by technological innovation. But performance standards are also considered to be a problem in certain cases because they're necessarily vague. So in some cases, OSHA adopts a specification standard and it's criticized for being too detailed. In other cases, it adopts a performance standard and it's criticized for not being specific. The question, again, is not either/or but what's the right mix.

Q: Is there anything else you'd like to comment on?

A: I think the biggest obstacle and the most important challenge is for management commitment to the issue. Employers have to break free of the thought that safety and health costs money and recognize that poor safety and health is a cost and quality issue. And that they can reduce their workers' compensation premiums, they can improve their employee morale, they can increase the quality of their work by paying attention to safety and health. That in the end this is an issue that provides a return on investment, not a cost of doing business.

SAFETY

Continued from previous page

program, regularly update its training and job-safety analysis procedures and undergo an OSHA audit every three years.

Worker participation

Jerry Helmick, business representative of United Food & Commercial Workers Local 576, which represents Teepak employees, said the union was skeptical of VPP at first, viewing it as "a way for the plant to get away from OSHA and coerce employees into not reporting accidents."

"That is not what has happened at Teepak," he said. "The plant allows people to give their viewpoints on safety without retaliation. The participation of the employees is what makes it work."

Virtually every observer concedes VPP is a model of how regulatory agencies can bring the most out of limited resources. OSHA, with its \$300 million budget and 2,000 inspectors, can hope to inspect only a fraction of the nation's 6.2 million work sites. But VPP allows it to accomplish vastly more than the program's small scope suggests.

That's because VPP is a two-way street, benefiting not just its participants but OSHA also. VPP participants typically provide outreach and training to other companies, freeing up OSHA to focus on the worst safety and health offenders — the small percentage of employers who willfully overlook or violate safety and health standards. One VPP work site even operates as a training ground for OSHA compliance officers.

So why does VPP remain so

small?

For one thing, VPP requires a major commitment by employers. The application process is extremely tough and the program can't work without full cooperation between labor and management.

Second, "there's a lot of pockets of resistance because anything that smacks of government involvement causes fear," said Ted Bach, VPP and training grants manager in OSHA's regional office in Kansas City.

And finally, there's union skepticism. Labor pushed hard for the original Occupational Safety and Health Act and still tends to see the agency's mission primarily in terms of enforcement.

Dear's plan to expand the VPP program is in line with Vice President Al Gore's National Performance Report on "reinventing government," which

said that worker health and safety could be "vastly improved" by relying more on employer self-inspections. But at least in Kansas City, that's not likely to happen in the foreseeable future.

Investigations of workplace fatalities and employee complaints remain the top priorities at OSHA's regional office, whose 100 or so employees oversee workplace health and safety in Missouri, Kansas and Nebraska. And as of August, there had been 53 on-the-job deaths in the region.

"...That means 53 intensive investigations which can take a compliance officer the better part of six months to do," said OSHA Regional Director John Phillips. "By the time we answer those and employee complaints and referrals, I just don't have the manpower to do a lot of VPPs."

Kansas City Business Journal

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THE METRO AREA'S MOST COMPREHENSIVE BUSINESS COVERAGE

DECEMBER 9-15, 1994

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stock with
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Building's future in the dark

Owner's debts drive tenants from former Home Savings building

BY JOE GOSE

One of Downtown's oldest office buildings could go dark at the end of the year.

Tenants in the 17-story building at 1006 Grand began retreating from the structure earlier this fall. Barring a last-minute

transfer of ownership, the few remaining tenants will follow suit. The 150,000-square-foot former Home Savings building was erected in 1928.

The building's owner, New York-based 1006 Grand Corp., is in arrears on several bills, including real estate taxes for

three years that amount to roughly \$200,000, and a Trigen-Kansas City District Energy Corp. steam heating bill of \$45,000.

The law firm of Berman DeLeve Kuchan & Chapman, a tenant in the building, has assumed electricity payments

after the owner failed to pay. The firm will move to the 19th floor of the Commerce Tower Building Dec. 29.

"In the last 30 days tenants have really cleared out," said Don Chapman, a Berman

See DARK, Page 48

NEWS GUIDE

JOHN McDONALD, OWNER

of Boulevard Brewing Co., can never consume beer the way it consumes him.

Page 3



MCDONALD

THE WRECKING BALL SOON will speed toward the old Ashcraft building at Eighth and Oak streets to clear a spot for the Civic Mall.

Page 5

KANSAS CITY TOPPED 184 metro areas to rank second in affordability among home builders across the nation.

Page 8

AN EIGHT-PAGE POCKET guide to gestures, gift-giving and gracefulness could save millions for companies doing international business.

Page 14

STRATEGIES IN SMALL BUSINESS

SMALL COMPANIES ARE not immune to trademark theft in foreign markets.

Page 18

FOCUS ON

NORTHLAND

RESIDENTS UP HERE ARE

tired of seeing their taxes go for public projects outside their area, says City Councilman Chuck Weber.

Page 23

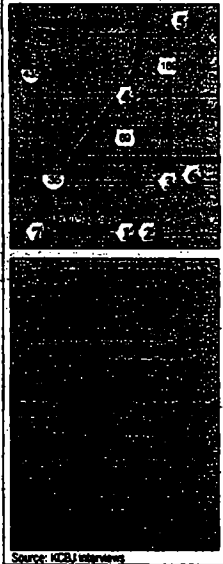


WEBER

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DASH FOR CASH
Banks based in Kansas City, Mo., are leading the charge south to serve emerging Johnson County markets.



Source: KCBJ interviews

O'Brien/Hinds — KCBJ

**JOHNSON COUNTY
KC's banks
are making a
dash for cash**

BY CASEY GILMORE

Missouri banks that entered Johnson County in the wake of interstate banking are leading a southbound race for the hottest locations in a fast-developing landscape.

"The banks want to be like any retailers, they want to be where the rooftops are," said

See BANKS, Page 49



WHOSE BUSINESS IS IT, ANYWAY?

Workplace Worries Put Employers in Quandary

*Rules that help some workers
can hurt employment for all*

DAN MARGOLIES AND BONAR MENNINGER

Of all the burdens government imposes on business, few are more controversial than the laws and regulations telling employers who they can hire, promote and fire.

Or, strictly speaking, who they can't.

Case in point: Restaurateur Hal Islitzer, who owns a pair of Burger Kings in Overland Park and Blue Springs, fired a counter employee after customers complained she was rude and he discovered cash shortages on her watch.

See EEOC, Page 44



Hal Islitzer, a local Burger King owner, wrestles with the constraints of employment regulations.

Disabling Concerned Employers ADA's vague requirements put companies at risk

BY BONAR MENNINGER

Hailed as a breakthrough in civil rights legislation, the Americans with Disabilities Act of 1990 has created a quagmire of legal risks for employers.

"Employers are the ones charged with carry-

ing out this act, and it takes a lot of time, a lot of energy and a lot of money," said John Mook, a Washington labor lawyer and an expert on ADA.

"And if they don't do it right, they're facing a lawsuit. Employers want to do the right

thing, but it's not easy given the vague requirements of the mandate."

Title I of the ADA requires that employers take steps to ensure that their hiring, promotion and employment policies don't discriminate

See ADA, Page 46

FOURTH OF FIVE PARTS

Next Week:

REGAINING CONTROL

Marketplace
Solutions:
Restoring
employer control



WHOSE BUSINESS IS IT, ANYWAY?

WORKPLACE WORRIES

EEOC CHARGES BY ISSUE DURING FISCAL YEAR 1992

ADVERTISING—
TOTAL CHARGES 23
% OF ALL CHARGES 0.0

APPRENTICE—
TOTAL CHARGES 0
% OF ALL CHARGES 0.0

BENEFITS—
TOTAL CHARGES 1,905
% OF ALL CHARGES 2.6

DEMOTION—
TOTAL CHARGES 2,888
% OF ALL CHARGES 4.0

DISCHARGE—
TOTAL CHARGES 35,980
% OF ALL CHARGES 49.9

DISCIPLINE—
TOTAL CHARGES 4,043
% OF ALL CHARGES 5.6

EXCLUSION—
TOTAL CHARGES 135
% OF ALL CHARGES 0.2

HARASSMENT—
TOTAL CHARGES 8,276
% OF ALL CHARGES 11.5

HIRING—
TOTAL CHARGES 6,960
% OF ALL CHARGES 9.7

INTIMIDATION—
TOTAL CHARGES 1,592
% OF ALL CHARGES 2.2

JOB CLASSIFICATIONS—
TOTAL CHARGES 498
% OF ALL CHARGES 0.7

LAYOFF—
TOTAL CHARGES 5,152
% OF ALL CHARGES 7.1

MATERNITY—
TOTAL CHARGES 1,429
% OF ALL CHARGES 2.0

OTHER—
TOTAL CHARGES 3,914
% OF ALL CHARGES 5.4

PATERNITY—
TOTAL CHARGES 27
% OF ALL CHARGES 0.0

PROMOTION—
TOTAL CHARGES 6,237
% OF ALL CHARGES 8.7

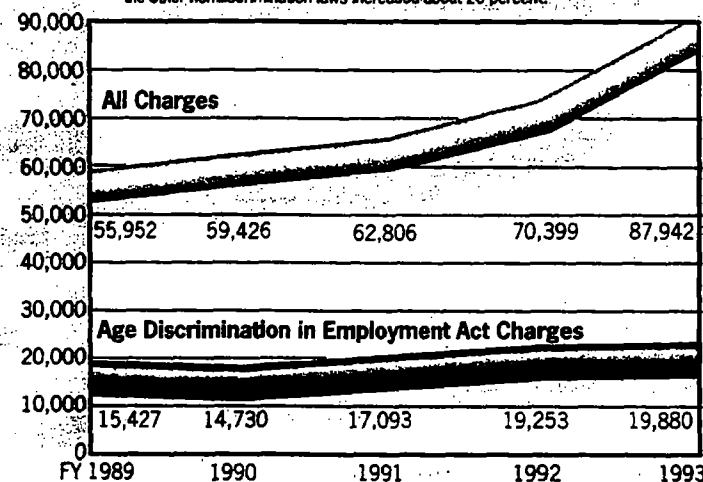
QUALIFICATION—
TOTAL CHARGES 138
% OF ALL CHARGES 0.2

RECALL—
TOTAL CHARGES 747
% OF ALL CHARGES 1.0

EEOC PROCESSING CHARGES KEEP INCREASING



From 1989 to 1992, the number of ADEA charges that EEOC received for processing increased about 25 percent. The number of charges received for processing under the other nondiscrimination laws increased about 26 percent.



Source: General Accounting Office

EEOC

Continued from Page 1

Four weeks before he terminated her, the employee discovered she was pregnant. After Islitzer let her go, the woman sued, claiming she was a victim of sex discrimination. The Equal Employment Opportunity Commission found in favor of Islitzer, but the case took 1½ years to resolve and cost the fast-food franchisee approximately \$1,500 in legal fees.

"I'm extremely careful with my documentation, because it just costs too much otherwise," Islitzer said. "It just changes your thinking."

"I keep on employees who probably shouldn't have a job. I put up with a lot of things that I probably wouldn't because, even if you win, it costs you a bunch of money."

Good intentions

Three decades ago, in passing the most sweeping civil rights legislation since the end of the Civil War, Congress aimed to abolish Jim Crow—the apartheid-like laws in the South that barred blacks from freely entering the nation's stream of commerce.

Today, that well-intended piece of legislation has mutated into a complex patchwork of rules that limit employers' autonomy and force them to carefully calibrate whether their work force has just the right racial, gender and ethnic mix.

Various courts have interpreted Title VII of the Civil Rights Act of 1964 to mean that employers can't use scored

physical exams, or educational, licensing and experience requirements as the basis for hiring or promotion decisions.

In some cases, even a criminal record can't be considered. That was the finding of the Eighth Circuit in the case of Green vs. Missouri Pacific Railroad Co., which remains valid in Missouri today. The court ruled that Missouri Pacific's policy of not hiring job applicants with criminal convictions had a disparate impact on blacks and therefore was discriminatory.

"No one likes discrimination," said Roger Pilon, director of the libertarian Cato Institute's Center for Constitutional Studies in Washington. "But at the same time, we discriminate every day as employers, employees, buyers and sellers in a thousand different ways, every time we make choices. What these statutes do is in effect limit choices."

There are scores of laws regulating the terms of employment, ranging from minimum wage and collective bargaining legislation to licensing requirements and drug-free workplace mandates. Few, however, have had the wide-ranging effects of the anti-discrimination statutes.

Title VII bars discrimination on the basis of race, color, religion, sex and national origin. The Age Discrimination in Employment Act of 1967 prohibits discrimination against workers age 40 and older. The

Americans with Disabilities Act of 1990 bans discrimination against disabled citizens—defined so vaguely as to embrace more than one out of six Americans. The Civil Rights Act of 1991 amended Title VII, raising the damage ceiling to \$300,000 and providing lawyers with greater financial incentives to sue employers.

How restrictive are Title VII and its progeny?

When General Motors a few years ago was filling positions for its Fairfax plant in Kansas City, Kan., African Americans comprised some 40 percent of the 30,000 applicants. But only 26 percent of the applicants hired by GM were black. Two of the rejected applicants sued, contending GM's selection procedures had a disproportionate impact on blacks. The case was settled on undisclosed terms.

"All that plaintiffs have to prove was that there was x percent in the pool and x percent who were hired, and if there's a disparity, the plaintiffs win," said Jack Yates, an employment lawyer at Gage & Tucker who represented GM.

Big employers like GM can afford to litigate, but small employers rarely can. And there are a lot of small employers potentially subject to liability because state anti-discrimination laws typically apply to companies with fewer than the federal anti-discrimination laws' 15-employee threshold. In Kansas, for example, state anti-discrimination laws apply to companies with as few as four employees.

The plight of small firms is compounded by state court

decisions that have vastly expanded employer liability in wrongful termination cases, limiting the circumstances under which businesses can fire employees.

"What happens is anytime an employee is fired, if they think they have a cubbyhole they fall into, they'll file charges," said Henry Cox, an employment lawyer at Blackwell Sanders Matheny Weary & Lombardi. "It's the small employers who bear the brunt of frivolous claims, because those suits cost the same to defend whether you're a large or a small employer."

And for every legitimate grievance resulting in a bigtime monetary award, employers complain that there are scores of spurious claims that cost the complainant nothing to file, but cost them plenty to defend.

That's because individuals who think they were the victims of discrimination can file a charge, at no cost, with the EEOC. If the charge meets EEOC's "minimally sufficient" standard, the agency notifies the employer and then requests information pertaining to the charge.

"Where it costs us is when our executives have to deviate from their primary responsibilities toward the business," said Abe Haddad, vice president and head of human resources at Winstead's and Waids Co., a Kansas City restaurant chain with 950 employees. "It deters our attention and keeps us from achieving our primary objective, which is running the business."

"Collectively, it makes the job of operating a restaurant a lot harder than it was, say, 10 years ago. Then you could tell people to go home, I don't want you working here anymore. Now you have to cover your butt with loads of documentation."

Haddad said he spends anywhere from 15 percent of his time per week "on the low side" to 75 or 80 percent "on the high side" dealing with employee grievances and responding to agency requests.

Burgeoning backlog

Once a claim is filed, EEOC cases can drag on for months, or even years. The agency currently has a backlog of 97,000 cases, and fully a third of all civil cases now filed in the federal courts are discrimination cases.

The General Accounting Office, citing EEOC estimates, reported in February that, with the passage of the Americans with Disabilities Act and the Civil Rights Act of 1991, EEOC case processing times are likely to reach 20 months by fiscal 1996.

It doesn't help that EEOC's regulations often are impenetrable, as the GAO has noted, leaving employers trying to puzzle out how best to comply with



PILON

WHOSE BUSINESS IS IT, ANYWAY?

WORKPLACE WORRIES



EEOC

Continued from previous page

agency guidelines.

"There are a lot of land mines out there," said Cox, "and employers who aren't well-versed in (EEOC regulations) have stepped on them, even where there's no liability."

"In a workplace facing increasing competitiveness all over the world, there should be a better system to resolve disputes quickly," said Edward Potter, president of the Washington-based Employment Policy Foundation, which examines the effects of government employment policies. "A litigation-driven system is just not the way to go."

But as more and more groups lay claim to victim status, the incentive to resolve disputes informally has given way to a rising cacophony of demands for additional legal protections.

"There is competition to become a member of a victim group," said Morgan Reynolds, an economics professor at Texas A & M University in College Station, Tex. "Legitimate victim status becomes a goodie to pursue."

Because intentional discrimination can rarely be proved, the government has resorted to looking at whether an employer's business practices have a disproportionate effect on a protected group. The practical result has been to subvert Title VII's explicit rejection of quotas, since employers, loathe to risk litigation, either hire by the numbers or keep their employment levels beneath the Title VII threshold of 15 workers.

"I think (these laws) have led to a lot of mischief," said William Williams, an economics professor at George Mason University in Fairfax, Va. "It's given rise to a lot of quotas both by sex and race. In certain areas, this is demeaning to real accomplishments when they occur."

"It's a fundamentally flawed idea," he added. "If you're against quotas against blacks, then you have to be against quotas for blacks."

The EEOC's fixation on statistics didn't happen by accident. It was virtually ordained by the U.S. Supreme Court, which ruled in 1971 that employment practices which are "fair in form but discriminatory in operation" must be justified by "business necessity."

In effect, the court said, if an



REYNOLDS



WILLIAMS

employee could show that an employment practice or policy acted to disqualify members of a protected group at a higher rate than members of another group, the burden is upon the employer to prove that the practice was directly related to the job and not meant to discriminate.

In 1978, the EEOC, the Department of Labor, the Department of Justice and the Civil Service Commission enshrined the decision in their Uniform Guidelines on Employee Selection Procedures. While the guidelines endorse the standard of "best qualified" candidate for a job, they also set out an 80 percent rule: A scored test or other selection procedure is considered to have an adverse impact if it has a "selection rate for any race, sex, or ethnic group, which is less than four-fifths ... of the rate for the group with the highest rate ..."

In other words, the guidelines said, it didn't matter if an employment practice or policy was neutral on its face. If it screened out 20 percent more members of one group than another, the EEOC would deem the practice discriminatory.

That's what happened to a Kansas City financial services company two years ago, when it ran afoul of the Office for Federal Contract Compliance Programs, a division of the Department of Labor that ensures federal contractors meet government affirmative action requirements. The OFCCP decided that the company, which sought anonymity, had not hired enough women and minorities.

The company's mistake? It took job applications and kept them on file even if it didn't have openings. OFCCP compared the number of company hires with the number of applicants and, not surprisingly, found a statistical disparity.

"The OFCCP is incredibly mechanical," said William Martucci, a labor lawyer with Spencer Fane Britt & Browne, which now represents the company. "They look at two things: the general population that's available for certain enormously broad categories of employment and the number of applications. If there's a disparity, they're inclined to say you have underrepresentation."

Although the company had an exemplary record of hiring women and minorities, the OFCCP ordered it to hire 20 additional minorities and women and pay them several hundred thousand dollars in back pay.

"By taking applications on a routine basis, they set themselves up," Martucci said.

As often happens in such situations, the case wasn't publicized. Hundreds of thousands of businesses nationwide do business with the government, and most would rather settle discrimination charges, no matter how unfair, than risk forfeiting their federal contracts.

Yet far from eliminating discrimination from the workplace, employers say, the numbers game has exacerbated it by giving rise to a pervasive sense of victimization and grievance by anyone turned down for a job or promotion or by anyone fired for whatever reason.

"The mind set is, if you do anything to me, I have a lot of recourse," said Isiltzer, the Burger King Franchisee. "It's not going to cost me, it's going to cost you. I'm going to sue you."

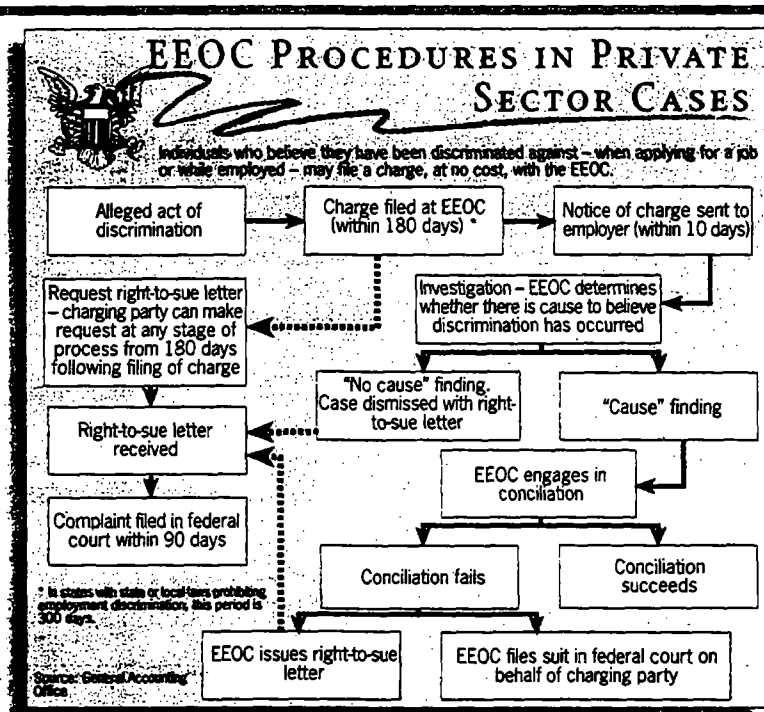
That notion — that every wrong must have a legal remedy — was behind a recent EEOC proposal, this one on workplace harassment, which the agency also monitors. The EEOC proposed guidelines that would have covered not just harassment based on sex or national origin, which are covered by its current rules, but also harassment based on race, color and religion.

Although the agency said the proposed guidelines reflected policies already in place, in fact they expanded the concept of harassment to embrace virtually any action that anyone might find offensive — including words or conduct showing hostility to an individual's friends or relatives.

Critics maintained the guidelines not only would have greatly increased employer liability, but would have exerted a chilling effect on workplace expression. The guidelines were withdrawn in late September after a public outcry.

"Once you open the door, once you take control out of the hands of the employer, you have by definition, put control in the hands of someone else," said Pilon of the Cato Institute.

"It's going to be the government acting on behalf of anyone who has a complaint. You're going to have government controlling every aspect of the workplace and the loss of freedom."



EEOC CHARGES BY ISSUE DURING FISCAL YEAR 1992 (CONT.)

REFERENCE	
UNFAVORABLE—	
TOTAL CHARGES	230
% OF ALL CHARGES	0.3

REFERRAL—	
TOTAL CHARGES	193
% OF ALL CHARGES	0.3

REINSTATEMENT—	
TOTAL CHARGES	414
% OF ALL CHARGES	0.6

RETIRE	
INVOLUNTARY—	
TOTAL CHARGES	707
% OF ALL CHARGES	1.0

SEGREGATED FACILITY—	
TOTAL CHARGES	59
% OF ALL CHARGES	0.1

SEGREGATED LOCALS—	
TOTAL CHARGES	7
% OF ALL CHARGES	0.0

SENIORITY—	
TOTAL CHARGES	454
% OF ALL CHARGES	0.6

SEXUAL HARASSMENT—	
TOTAL CHARGES	5,639
% OF ALL CHARGES	7.8

SUSPENSION—	
TOTAL CHARGES	5,567
% OF ALL CHARGES	7.7

TENURE—	
TOTAL CHARGES	100
% OF ALL CHARGES	0.1

TERMS OF EMPLOYMENT—	
TOTAL CHARGES	11,509
% OF ALL CHARGES	16.0

TESTING—	
TOTAL CHARGES	164
% OF ALL CHARGES	0.2

TRAINING—	
TOTAL CHARGES	939
% OF ALL CHARGES	1.3

UNION REPRESENTATION—	
TOTAL CHARGES	552
% OF ALL CHARGES	0.8

WAGES—	
TOTAL CHARGES	5,951
% OF ALL CHARGES	8.3

Total charges include multiple bases and issues raised in each charge.

Source: U.S. Equal Employment Opportunity Commission, Combined Annual Report, Fiscal Years 1991 and 1992



WHOSE BUSINESS IS IT, ANYWAY?

WORKPLACE WORRIES

WORKPLACE WORRIERS

Relying on its constitutional authority to regulate interstate commerce, the U.S. Congress has enacted 26 key statutes governing the workplace, according to the General Accounting Office. They are:

1. Americans with Disabilities Act
2. Age Discrimination in Employment Act
3. Consolidated Omnibus Budget Reconciliation Act of 1985, group health plan continuation coverage provisions
4. Contract Work Hours and Safety Standards Act
5. Davis-Bacon Act
6. Drug Free Workplace Act
7. Employment Polygraph Protection Act
8. Equal Pay Act, Amendments to the Fair Labor Standards Act
9. Employee Retirement Income Security Act
10. Fair Labor Standards Act
11. Family and Medical Leave Act
12. Immigration Reform and Control Act
13. Labor-Management Reporting and Disclosure Act
14. Mine Safety and Health Act
15. Migrant and Seasonal Agricultural Worker Protection Act
16. National Labor Relations Act
17. Occupational Safety and Health Act
18. Rehabilitation Act-Section 503
19. Railway Labor Act
20. Selective Training and Service Act, veterans' re-employment rights provisions
21. Service Contract Act
22. Surface Transportation Assistance Act, anti-retaliatory provision
23. Title VII of the Civil Rights Act
24. Unemployment compensation provisions of the Social Security Act
25. Walsh-Healy Act
26. Worker Adjustment and Retraining Notification Act

Source: U.S. General Accounting Office

ADA

Continued from Page 1

against individuals with disabilities; Titles II and III require that government entities and commercial facilities provide physical access for the disabled.

Despite the ADA's laudable goals, critics say the muddled, overly broad language of the act leaves employers legally vulnerable in a wide range of areas.

And though local personnel directors say that implementation of the ADA has caused them few problems so far, critics assert that the lack of any practical mechanism to thwart or discourage frivolous claims invites abuse.

"Most employees are excellent, but there is a small percentage that works the system, and they'll find it very convenient to do that under ADA," said David Wing, a labor attorney with Spencer Fane Britt & Browne.

"Anyone can go in and file a claim with the Equal Employment Opportunity Commission, and it doesn't cost them a dime," added Shelly Freeman, a labor lawyer with Blackwell Sanders Matheny Weary & Lombardi.

"The EEOC is required to investigate," she said. "It's very frustrating for an employer to spend thousands of dollars to go in and defend a frivolous charge."

Freeman was quick to point out that the ADA is "fundamentally" a good law. "It's clear that people who have bona fide disabilities have benefited greatly from it."

One area individual who hopes to benefit from ADA's Title II provisions is 63-year-old Donald Lautzenhiser of Weston, Mo. Lautzenhiser lost both legs and an arm in a 1977 accident. Last summer, he filed an ADA charge against the city of Weston, claiming the city's repeated refusals to provide access for the disabled have on occasion forced him to crawl up the steps of City Hall in order to attend public meetings.

Frivolous filings

But for every case involving a legitimate complaint under ADA, there are many more that are without merit. According to Freeman: "The frivolous claims are just rampant."

In one recent case, for example, an employee claimed to have a back problem that left him unable to work and was awarded \$50,000 from his employer's self-funded disability fund.

Now, Freeman said, the employee has filed suit against the employer under ADA, claiming the company discriminated against him because of his back problem during the period he was employed.

"He's trying to double-dip," she said.

Larry Schumaker, an employment lawyer with Shook Hardy & Bacon, said, "What we often see are people trying to take advantage of the system. We see it day in and day out."

The absence of any effective mechanism to screen out frivolous claims is problematic for employers, but the law's real difficulty lies in the vague, subjective nature of its definitions and requirements, Wing said.

"The ADA is one of the more burdensome regulations for employers because with every claim that comes up, you have to look at the particular facts and circumstances," he said. "There are no safe harbors."

For example, the act defines a disability as any mental or physical impairment that "substantially limits one or more major life activities."

Under that definition, a disability can mean anything from alcoholism and drug abuse to toothlessness and sleep apnea. Recent EEOC pronouncements and court rulings have suggested that obese individuals and people with "poor judgment" are protected under ADA.

In Florida, an employee filed an ADA discrimination suit against GTE Data Services after he was fired for bringing a gun to work. Joseph Hindman charged that a "chemical imbalance" left him with poor judgment, which caused him to bring the gun to his job.

A federal judge refused to throw the case out, saying that "when poor judgment is a symptom of a mental or psychological disorder, it is defined as an impairment that would qualify as a disability under the ADA. Under that criterion, Hindman's chemical imbalance certainly qualifies as a disability."

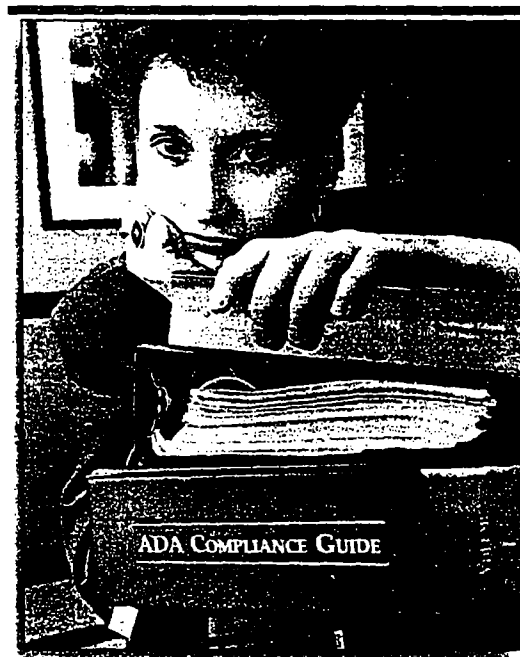
Of the 34,800 total ADA claims filed since the law took effect in 1992, approximately 11 percent have been for alleged discrimination based on emotional and mental impairments, according to EEOC statistics. Back impairments account for the largest class of claims at 20 percent.

Observers say determining just what constitutes a mental disability can be a tough call.

"The difficulty is drawing the line between what is an unprotected character trait, such as obnoxiousness, and a protected disability, such as a personality disorder," said Wing.

Ambiguity also marks a second major provision of the ADA - that employers make "reasonable accommodations" to allow disabled persons to perform the "essential functions" of the job.

What that means is far from clear. Accommodation might include anything from modifying workplace responsibilities and hours for someone with a chronic illness to hiring a proof-reader for an individual with a



"ANYONE CAN GO IN AND FILE A CLAIM WITH THE EEOC, AND IT DOESN'T COST THEM A DIME."

Shelly Freeman, an attorney with Blackwell Sanders Matheny Weary & Lombardi, says frivolous claims are rampant under the ADA.

reading disability.

And no dollar threshold is set on how much an employer should spend on accommodations, although the law says the accommodation must not pose an "undue hardship." But undue hardship likewise isn't defined. Generally, attorneys say, the larger a company is, the more it is expected to spend on accommodation.

Still another gray area in the law centers on the types of questions employers can ask prospective employees in pre-hire interviews.

On this point, EEOC itself apparently isn't even certain. In a technical assistance manual that accompanied the law's rollout in 1992, EEOC said job applicants could be asked such questions as, "Are you able to perform these tasks with or without an accommodation?" or "How would you perform the tasks, and with what accommodation(s)?"

But in an interim enforcement guidance booklet distributed to field investigators in May 1994, EEOC asserted that "at the pre-offer stage, an employer may not generally inquire whether the applicant needs reasonable accommodation for the job."

"For example, an employer may not make inquiries such as, 'Would you need reasonable accommodation in this job?' or 'Would you need reasonable accommodation to perform this specific function?'"

Freeman said many employers were probably unaware of EEOC's flip-flop, since the latest guidelines have not been widely disseminated.

"This is just an example of employers relying on something EEOC has said and then EEOC decides to change its mind, after thousands of job applications have been printed up."

Wendy Lechner, a legislative representative with the National Federation of Independent Business, said she thought the practical effect of the ADA so far has been to reduce employment opportunities for disabled individuals.

"What we're hearing is that employers are terribly fearful of hiring someone with a disability because they might get sued," Lechner said. She noted that, historically, between 60 percent and 70 percent of the working disabled have been hired by small businesses.

"Before, they were hired and fired like anybody else. But now employers feel that if they hire anyone with a disability, they could face a charge whether it's valid or not."

A recent survey conducted by the National Organization on Disabilities seems to bear out Lechner's claim. According to the survey, about 31 percent of disabled persons age 16 to 65 are currently working part time or full time, down from 33 percent in 1986 - six years before the ADA took effect.

WHOSE BUSINESS IS IT, ANYWAY?

WORKPLACE WORRIES



Family and Medical Leave Act Poses Problems for Employers

Unintended consequences continue to bedevil well-meaning, but ambiguous, legislation

BY DAN MARGOLIES

Unlike civil rights laws, which tell employers what they may not do, the Family and Medical Leave Act tells them what they must do.

But the 1993 statute resembles civil rights laws in one important respect: Enacted with the best of intentions, it dramatically illustrates how unintended consequences can bedevil the most well-meaning legislation.

The act, which applies to businesses with 50 or more employees, mandates up to 12 weeks of unpaid leave a year for the birth or adoption of a child or the serious illness of an employee or family member. Employers must continue to pay employees' health insurance during that time and reinstate them to the same job, or an equivalent one, upon their return.

Sounds reasonable enough.

The problem, as critics point out, is not just the law's many ambiguities — for example, what constitutes a serious illness? — but its assumption that the market will fail to provide what government now requires.

"We were granting leave anyway, so this is a bit of a burden,

with all the administrative work that goes with it," said Richard Miles, president of the Government Employees Hospital Association, a not-for-profit organization with 750 employees that provides health benefits to 270,000 civilian federal employees and retirees. "It's unfortunate the government felt other employers aren't able to extend these benefits without government intervention."

In fact, corporate America, aware of the competitive advantages of providing flexible working arrangements for its employees, was moving toward providing even more generous leave benefits than mandated by the government. But many businesses now have opted to conform their policies to FMLA to avoid the logistical headaches of implementing different policies with different requirements.

"I know several companies have had to revise their more liberal policies to bring them in line with the act," said Kimberly



MILES

Japinga, a lawyer with McGuinness & Williams in Washington, D.C., which represents mainly Fortune 500 corporations. "In some cases, it's simply easier for a lot of them to cut back on benefits than to try and follow the ins and outs of the act."

For some employers, FMLA's record keeping, paperwork and notice requirements are just more trouble than they're worth. So rather than submit to its jurisdiction, they keep their employment levels beneath the act's threshold of 50.

For example, Fidelity State Bank & Trust Co. in Topeka, with 43 full-time employees, outsources much of its data processing, janitorial and other work so it won't exceed the threshold, according to Fidelity State Chairman and President Anderson Chandler.

"We try to do the right thing, and we think we were before the leave law was passed," he said. "But for government to say we have to pay insurance for someone who might quit after taking a leave raises our cost of doing business."

In theory, FMLA aimed to eliminate the Hobson's choice faced by some employees of trying to

meet family obligations and risking the loss of their job and health insurance coverage. But as Chandler suggests, one unforeseen consequence of the law has been to retard job creation.

Another unforeseen consequence has been to add tension to employer-employee relations. In one unexpected development since FMLA took effect, employees have begun to complain that employers seeking information under FMLA are invading their privacy.

"A lot of employers who provided leave in the past would just allow their employees to take it. Now, because the employer is allowed to determine what the purpose of the employee's leave is, we're hearing a backlash from employees that their privacy is being invaded," said Sue Messenger, a spokeswoman for the Society for Human Resource Management in Washington.

"Employers just want to know so they can count the time properly, but employees are saying it's none of your business."

In a survey taken earlier this year by Messenger's 60,000-member group, 300 human resource professionals com-

plained that lost productivity and problems tracking employees' use of leave were the biggest expenses associated with FMLA.

Fully 64 percent said the act had created "little or no benefit." Nearly nine out of 10 said they had to revise their companies' leave policies to conform to FMLA.

Adding to the administrative burden, neither Congress nor the Wage and Hour Division of the Department of Labor, which is charged with administering the act, has addressed the question of how FMLA interacts with other federal workplace laws.

In its interim regulations — final regulations have yet to be adopted — the Wage and Hour Division noted that employers and employees have inquired about the effect of FMLA on various tax-related benefits such as cafeteria plans, flexible spending accounts and the continuation of health benefits under COBRA.

Wage and Hour's response?

"The department urges that employers and employees with an interest in these areas consult directly with the IRS to obtain guidance."

Diversity Debate Rages On 30 Years After Civil Rights Laws' Adoption

Has affirmative action solved — or worsened — the problem of workplace discrimination?

BY DAN MARGOLIES

When four prominent Kansas City businessmen took part in a symposium on the hot topic of workplace diversity earlier this year, the sparks started flying as soon as they took their seats.

If the exchange demonstrated anything, it's that the highly charged issue of workplace diversity, and its conceptual forerunner affirmative action, continue to stir passions three decades after Title VII of the 1964 Civil Rights Act barred employer discrimination based on race, color, religion, sex and national origin.

"Imagine diversity in a context where talent is easily recognized — baseball, for example," said Chris Kemper, president of UMB Bank of St. Louis. "Do we want a Chinese lesbian in a wheelchair as a relief pitcher for the Royals?"

But Louis Smith, head of AlliedSignal Inc.'s Kansas City division and a leading black business executive, said employee diversity was just "good business sense."

"We're not talking about quotas here or government mandates," he said. "No one tells us what to do. 'Quota' is a word that's

continuously thrown out in order to maintain the status quo."

Woody Cozad, a lawyer with Morrison & Hecker and a Republican activist, rejoined: "We would never expect by operation of chance and nondiscrimination for an employer to achieve a work force reflecting the population. But today, if new hires don't reflect that makeup, the government tells us that's discrimination."

Vic Poirier, manager of community affairs at Kansas City Power & Light Co., insisted that discrimination remains an unfortunate fact of business life with "direct business consequences."

"This area is our marketplace. If the community falters, we falter," he said. "That's why we deal with the economic needs of minorities."

Title VII was explicit in rejecting quotas, but court decisions, administrative rulings and government regulations focusing on statistical disparities have inevitably led to the adoption by employers of numerical goals that do precisely that: establish quotas for the hiring and promotion of women and designated racial and ethnic groups.

That has raised a host of

thorny questions, both practical and philosophical:

- Which groups deserve to benefit from affirmative action policies?

- What determines whether a group is deserving?

- Who qualifies as a Hispanic, say, or an African American? Should someone from Spain be entitled to affirmative action benefits? More than half of Hispanics consider themselves white — do they qualify?

- Has the creation of "protected classes" opened up opportunities at the expense of other groups?

- Has affirmative action led to the dilution of standards based on merit?

- Does it make sense to insist on color- and gender-blind policies by adopting color- and gender-conscious remedies?

In short, has the noble aim of eliminating social and economic inequities based on past discrimination only exacerbated the problem of discrimination today?

The debate rages on, with the recent emphasis on diversity adding a new ingredient to the rhetorical stew. Workplace diversity, or prizing cultural differences, say its proponents, is

not about redressing past wrongs but simply about doing smart business.

"It's the idea of valuing differences — not because they're legislatively mandated — but because they're based on survival," said diversity consultant Alexandra Leslie. "If you're going to succeed in the marketplace, particularly an ever-changing one, then you need diversity."

Said Poirier: "If you look at diversity strictly as a problem to solve, the questions will be (about) the way you do it and mandates. But if you embrace it as a resource to be used, you see it as an opportunity, and the questions simply melt away."

But to others, the banner of diversity is just a cover for quotas, dressed up with a more intellectually fashionable name.

"What do we mean by diversity?" asked Kemper. "I think it's a code word. We got through affirmative action in the '60s and '70s and didn't like what we saw, so we changed the name."

Diversity, he said, has led to "people who are hired to hold seminars to make us feel good about ourselves and create groups of victims who seek



"IMAGINE DIVERSITY IN A CONTEXT WHERE TALENT IS EASILY RECOGNIZED — BASEBALL, FOR EXAMPLE. DO WE WANT A CHINESE LESBIAN IN A WHEELCHAIR AS A RELIEF PITCHER FOR THE ROYALS?"

Chris Kemper, president of UMB Bank of St. Louis.

empowerment from corporations and government — everyone except themselves."

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WHOSE BUSINESS IS IT, ANYWAY?

Regulatory Overkill is Pushing America's Businesses to the Brink

BONAR MENNINGER AND DAN MARGOLIES

From Main Street to Wall Street, from board rooms to back rooms, the runaway growth of government regulation is trampling free enterprise and crushing America's entrepreneurial spirit.

Increasingly, employers attempting to cope with the avalanche of mandates imposed by local, state and federal governments find themselves buried beneath the dead weight of regulatory requirements.

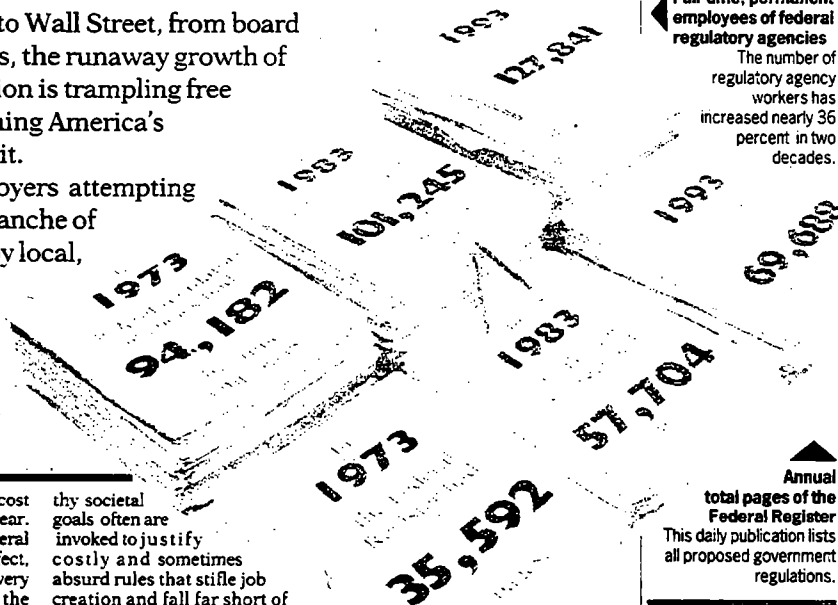
One estimate puts the total cost of compliance at \$1 trillion a year. That's roughly equal to all federal taxes collected in 1992—in effect, a 100 percent hidden tax on every business and household in the nation. Put another way, \$1 trillion equals 15 percent of the U.S. gross domestic product.

While some regulation is clearly desirable, a six-month investigation by the *Kansas City Business Journal* reveals that wor-

thy societal goals often are invoked to justify costly and sometimes absurd rules that stifle job creation and fall far short of achieving their ends.

Take, for example, the local bank that was ordered by regulators to put a Braille keypad on a drive-through ATM at a cost of \$5,000.

"Keep in mind this is a



Stacking up 20 years of regulation

Regulations have exploded in the last 20 years. The paperwork pictured here illustrates the growth in regulatory activity.

Full-time, permanent employees of federal regulatory agencies

The number of regulatory agency workers has increased nearly 36 percent in two decades.

Annual total pages of the Federal Register
This daily publication lists all proposed government regulations.

First of Five Parts

SERIES PREVIEW:

Next Week:
ENVIRONMENTAL ANXIETY
Is the growing profusion of environmental regulations doing more harm than good?

Part 3:
OSHA'S OBSESSIONS
OSHA's preoccupation with minor infractions slights training and education.

Part 4:
WORKPLACE WORRIES
Increasingly intrusive workplace rules leave employers fearing litigation.

Part 5:
REGAINING CONTROL
Marketplace solutions: restoring employer control.

NEWS GUIDE

JIM MORRISON DRIVES

dysfunctional managers to take a hard look at themselves.

PAGE 3



MORRISON

A LOCAL TAX CONSULTANT, tired of all the talk about helping Bosnian refugees, uses his business skills to give victims homes in Kansas City

PAGE 9

THE KANSAS CITY AVIATION Department nets big results with an advertising campaign that lures travelers from Des Moines and Wichita to fly out of KCI.

PAGE 10

STRATEGIES IN SMALL BUSINESS

DREW HISS, a modern-day time tracker, turns to a high-tech computer system to save companies the expense of keeping employees' hours.



HISS

PAGE 18

FOCUS ON JOHNSON COUNTY

SMALL TOWNS LIKE Gardner in Johnson County are suffering some growing pains as residents come to grips with good fortune.

PAGE 25

READERS' COMPLAINTS, CONCERNS SPARKED SERIES

Recurring employer complaints that government regulation was throttling their businesses prompted this investigation by the *Kansas City Business Journal*.

Veteran reporters Dan Margolies and Bonar Menninger spent six months on the project. The two interviewed more than 150 business owners, government officials and legal and academic experts. In addition, they reviewed dozens of government reports, read hundreds of pages of congressional testimony and surveyed nearly 50 non-government papers and books on the subject of regulation and its effects.

Numerous local executives served as sources. Many

were willing to speak for the record about the increasing intrusiveness of government into their affairs. Others, however, were unwilling to use their own, or their company's, name for fear of retribution.

"Whose Business Is It, Anyway?" examines federal-imposed rules that have a significant impact on the private sector. Those include environmental, workplace safety and employment regulations.

Each area will be addressed in successive weeks in the *Kansas City Business Journal*, preceded by today's overview story and followed by a look at ways to ease regulation's burden on business.

Sources:
Center for the
Study of American
Business, Washington
University, and the Office of the
Federal Register.

GRAPHICS BY JAMES HINDS



WHOSE BUSINESS IS IT, ANYWAY?

REGULATORY OVERKILL

REGS

Continued from Page 1

Alson Martin:

The IRS spent five years proposing, revising, re-revising and finalizing pension regulations barring pension plans that discriminate against lower-paid employees. The regulations, when finally issued, took up 600 pages. About a month later, the Labor Department proposed to eliminate a big chunk of them.



lawyer at Shook Hardy & Bacon and president of the Small Business Council of America

Samuel Alpert:

Today the greatest hazard we face is not to what we may be exposed — second-hand smoke, fire in high-rise buildings, fat in our diets, lead paint or bacteria. Instead we should focus on the consequences of over-regulation and unfunded mandates, which cripple our collective ability to operate competitively and generate employment.

executive director, Heartland Apartment Association, in *The Forum*, a quarterly publication of the association

Aaron March:

We had to delay the construction of the Midland Bank drive-through facility near the Plaza by six months or more because the building that was going to be torn down could possibly be considered historically significant, even though it was vacant and the bricks were falling off the facade. The bank regulatory agency kicked it over to the Interior Department, which kicked it over to the federal parks bureau, which kicked it over to the state people, who kicked it over to the Kansas City Landmarks Commission. The bank had to hire two outside consultants to catalog the building. The thing is, no one during this process ever said the buildings were historically significant. It was the mere possibility that they might be that caused the delay.

lawyer at Polsinelli White Vardeman & Shalton

drive-through we're talking about," said the bank's lawyer, Steve Mauer of Bryan Cave.

Or take the Boise, Idaho, plumbing company penalized by the Occupational Safety and Health Administration because its workers didn't take required safety precautions when they rescued a construction worker from a collapsed trench. OSHA initially fined the company \$7,875 because the workers didn't don hard hats and shore up the trench before pulling the man to safety. Public outcry forced the agency to rescind the fine.

Or consider the notorious case of Chicago-based Daniel Lamp Co., which was ordered by the Equal Employment Opportunity Commission to cough up \$123,000 in back pay for workers who had applied for jobs but were not hired. The company, which was in a Hispanic neighborhood, employed 21 Hispanics and five blacks. Still, the EEOC said that the racial mix didn't reflect the area's population and that the company should have employed 8.45 black workers.

Weighty mandates

The government doesn't keep track of the total number of federal regulations, but a quick trip to the public library shows how rapidly they have grown.

The Code of Federal Regulations, the compendium of all rules enacted since the U.S. was founded, now embraces 202 volumes and 131,803 pages, taking up 19 linear feet of shelf space. In 1970, the register had just 114 volumes and 54,834 pages.

Similarly, the Federal Register, the daily government publication in which all proposed regulations are announced, totaled 20,036 pages at yearend 1970. By 1993, it had more than tripled in length, to 69,688 pages.

Another benchmark: The number of permanent, fulltime positions at the 50-plus primary federal regulatory agencies swelled from 28,000 in 1970 to 127,842 in 1993. Meanwhile, the annual cost to the government of administering federal regulatory programs climbed from \$4 billion in 1970 to \$13.5 billion in 1992 (in constant 1987 dollars), according to Washington University's Center for the Study of American Business in St. Louis.

The paperwork burden alone is mind numbing.

According to the Office of Management and Budget, the private sector in 1992 spent nearly 6.6 billion hours filling out forms, answering survey questions and compiling records to meet federal tax and regulatory requirements. That's the equivalent of employing 3 million people full time just to collect, maintain and report



The Code of Federal Regulations, the compilation of all federal rules, has expanded from 54,834 pages in 1970 to 131,803 pages today.

information to the government, the OMB concluded.

"There's a growing feeling among the business community that they're simply being regulated to the point where many of them can't survive," said Thomas Gray, a Washington economist and independent consultant. "We're strangling ourselves. We're hurting our standard of living terribly because we're preventing businesses from doing what they can to improve our lives."

In a recent national survey by Arthur Andersen & Co., 52 percent of 100 mid-sized companies said that dealing with government regulation was now their biggest challenge. In contrast, just 20 percent consider health care their greatest problem.

Closer to home, 40 out of 50 area companies surveyed earlier this year by the Greater Kansas City Chamber of Commerce said business was over-regulated, while 85 percent thought regulatory agencies failed to strike the proper balance between enforcement and assistance.

"Individuals who occupy these positions at agencies like EPA or DNR (the Missouri

Department of Natural Resources) don't have any practical business experience outside of being a regulator," said Tony Reinhardt, vice president of government affairs for the 3000-member Missouri Chamber of Commerce. "They don't know what it's like to keep up with regulations on a daily basis."

Explosive growth

The enormous growth in federal regulation is a relatively recent development, dating back 25 years to the administration of Richard Nixon, when the Environmental Protection Agency and OSHA were created.

Following a decline in regulatory initiatives during the administrations of Jimmy Carter and Ronald Reagan, George Bush presided over the enactment of some of the most expensive and far-reaching regulatory statutes ever. Among them were the Clean Air Act Amendments of 1990, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991 and the Nutrition Labeling and Education Act of 1990.

Ironically, it was Bush who headed a White House task force on regulatory relief while he was vice president. And despite recent talk of easing the burden, the regulatory steamroller has continued to advance under Bill Clinton's administration.

"For politicians, all of the incentives are for them to continue spending and regulating," said Edward Hudgins, director of regulatory studies at the Cato Institute in Washington, a libertarian think tank. "And no bureaucrat has ever been rewarded for not regulating."

Gauging benefits

Broadly grouped, the majority of federal regulations fall into two categories: economic regulations, which govern prices and quantities and restrict who may do business (import quotas, for example); and social regulations, which aim to protect people or the environment from existing or potential hazards.

Although estimates of the aggregate costs of both kinds of regulation vary widely, by any measure they are enormous. Rochester Institute of Technology economist Thomas Hopkins in 1992 conservatively calculated the direct costs at \$500 billion, while economists Nancy Bord and William Laffer have estimated the number to be between \$810 billion and \$1.7 trillion in direct and indirect expenditures. Compare that with 1992 tax revenues, which totaled slightly more than \$1 trillion.

Are the huge costs associated with regulation matched by offsetting benefits?

As Hopkins, a former deputy administrator of OMB's Office of Information and Regulatory Affairs, noted, rising regulatory costs are "not necessarily troublesome and may indeed be laudable if those regulations are well designed and lead to incremental benefits whose value is at least equal to the incremental costs."

But many economists say that most regulations fail those tests: Often poorly designed, their benefits are rarely commensurate with their costs.

"We have a lot of well-intended, well-meaning regulation that does more harm than good," said economist Murray Weidenbaum, director of the Center for the Study of American Business and chairman of the Council of Economic Advisers during the Reagan administration. "Specifically, it results in the phenomenon that I call the 'discouraged employer.'"

"Traditionally we hear so much about the discouraged worker who doesn't think there's a good or suitable job available and drops out of the job search. But think of all the employers who, fundamentally, need more workers but are so discouraged

WHOSE BUSINESS IS IT, ANYWAY?

REGULATORY OVERKILL



REGS

Continued from previous page

by the combination of affirmative action, EEOC, ADA, etc. in terms of the job hiring process."

In a recent paper on the costs of environmental regulation, the largest single body of federal rules, analysts John Shanahan and Adam Thierer of the conservative Heritage Foundation, wrote:

"Policy makers must understand that federal risk regulation involves important trade-offs, or opportunity costs, that should not be ignored. Regulatory policy in the U.S. has been distorted because lawmakers typically have looked at only half the equation.

"To look at the other half they must ask: Would the regulation actually endanger more lives? Would the same spending save more lives if used in other ways? Is the regulation a wise use of economic resources?"

Examples of the disparities between costs and benefits abound. To take just two, OMB has calculated that under EPA's Hazardous Waste Disposal Ban, \$4.2 billion would have to be spent to avert a single premature death. And OMB estimated that EPA's Formaldehyde Occupational Exposure Limit would require a theoretical \$119 billion to prevent one premature death.

"Society should strike a balance between how much money we spend to reduce risks and pick the targets where we can reduce risk most effectively," said Duke University economist W. Kip Viscusi, who has written extensively on the subject of regulation.

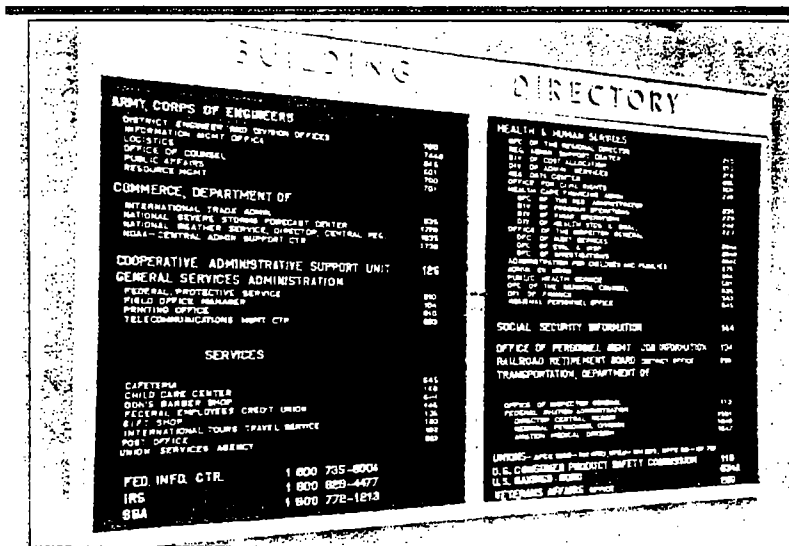
"The science the (EPA) uses now in assessing risk is what I call dishonest science," Viscusi said. "They look at the worst-case scenario, the highest exposure, when what they should be looking at is the average risk, the average exposure."

Added Thorne Auchter, a former OSHA director under President Reagan and currently director of the nonpartisan Institute for Regulatory Policy in Washington: "If the public knew the basis for some of the EPA decisions, the agency would be laughed out of town."

Behind the urge to regulate lies the belief that risk can be legislated out of existence, said Fred Smith, president of the Washington-based Competitive Enterprise Institute, a market-oriented, public interest group.

"Something has happened in America in the past 20 years, a failure of nerve, a complacency brought on by wealth, a feeling that maybe things are too good, and that we must somehow be punished. But we're empowering the fearful.

"There is an attempt in America to create a world where the choices you make have no consequences," Smith said. "If I jump off a building, there should be pillows below. But when you



Roy Innman photos

Of the 50-plus federal regulatory agencies, many have offices in Kansas City's massive federal building at 12th and Cherry streets.

anesthetize individual responsibility, you create a much more dangerous world."

Added Weidenbaum: "In our personal lives, we do not opt for zero or near-zero risk. If we did, we'd have planes land in Lambert Field once every thirty minutes. We wouldn't race across crowded highways; we'd wait for the light. We wouldn't go rappelling. We wouldn't go sky diving. There are all sorts of risky, voluntary things that we do.

"And for government to say that in certain areas you can take all the risks you want, but when it comes to products and the workplace, it's going to be zero—that doesn't make any sense. If they really carried out a zero-risk mandate across the board, we'd be back in the Stone Age, which was a very dangerous period of human existence."

Lost opportunities

While costs and benefits can be measured, however imprecisely, critics note that what economists can't measure is regulation's insidious damage to the nation's entrepreneurial vitality. No one can say how many businesses never got off the ground or perished, how many products never saw the light of day, or how many jobs were destroyed under regulation's cumulative weight.

For small businesses, the burden is disproportionately large. Big companies, with their vastly greater resources, often support regulations because they hit small companies harder, putting them at a severe competitive disadvantage and sometimes squeezing them out of the market.

"We're moving from a flexible, dynamic economy to a rigid, petrified economy that is increasingly being directed by politicians and bureaucrats," Smith

said.

That shift, from a vigorous, bottom-up entrepreneurial economy to a top-down regulatory state, reflects the widening chasm between the American people and their government, said William Dennis, an economic analyst with the National Federation of Independent Business.

"The Congress passes laws in a very sloppy manner. They don't spell things out in great detail the way they should, because that requires hard work and technical expertise, and those are two things that are in short supply in Congress."

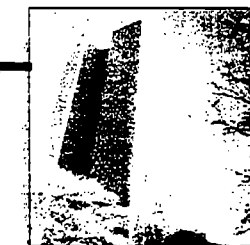
Congress' reliance on agency bureaucrats to flesh out lawmakers' intentions gives unelected officials vast discretionary powers, but "oftentimes regulators are confused about what Congress wants and then Congress loses control over what regulators do," said Susan Ecklerly, director of economic policy at the Heritage Foundation.

"The regulators prescribe very unworkable solutions, and Congress says that's not what we had in mind, but by then, we're all stuck with the regulations."

Nor is there any incentive for Congress to apprise the public of the regulatory bill "for it realizes how upset people get when they learn how big their tax bill is," Hopkins wrote in 1992.

"... So if you are a Congress that wants to get something done without making the deficit worse or federal taxes higher, you can reach into your policy tool kit and pull out a regulation. Regulation looks beguilingly inexpensive to the federal government, which helps explain why we have so many of them."

Said economist Weidenbaum: "The cost of complying with reg-



ulation is off the government's budget. Is it real money paid by Americans? Sure. But it's a hidden tax that's buried in the price of everything you and I buy."

The U.S. Chamber of Commerce once challenged regulations one at a time. Now the Chamber regards that strategy as ineffective because it failed to address regulation's conceptual roots, according to Nancy Fulco, a chamber staff attorney.

Fulco said the chamber's newly formed Regulatory Affairs Committee, which includes 85 people from across the business spectrum, will focus on bringing about fundamental, comprehensive changes in the way regulations are developed and implemented—a change in approach that mirrors business's growing disillusionment with the entire regulatory enterprise itself.

"We have increasingly been hearing from our membership that the regulatory burden they're experiencing is reaching crisis proportions," Fulco said. "The bottom line is that we're facing a regulatory infrastructure that is out of control."

"Lost jobs, businesses that can't grow, products that can't be developed, a loss of research and development. All of these are fundamental dangers that affect not just business, but ultimately every citizen in this country if the system is allowed to continue unchecked."



John Phillips:

An employee filed a harassment complaint against a

client of ours that did federal contracting work. The OFCCP (Office of Federal Contract Compliance Programs) investigated, concluded the complainant was harassed and told the client to pay x amount of dollars, or they'd launch a full-scale investigation into whether there was a pattern of such practices. The client questioned the merits of the complainant's case but was afraid of costs—attorney's fees, let alone the loss of contracts—and capitulated. We had to advise the client that the OFCCP can indeed come in anytime it wants if you're a federal contractor or subcontractor and investigate.

lawyer at Blackwell Sanders Matheny Weary & Lombardi

Gerald Foley:

I was cited by OSHA a few years ago for not instructing my employees on the proper use of Lysol and Clorox. I contested the citation and OSHA agreed to drop it but only if I wrote a letter to the regional director saying that I had instructed my employees on the products' proper use.

Independence dentist



Logan Wilson:

Previously we'd exported our low-grade explosive devices under a general

license. Under a new Commerce Department regulation, we needed a specific export license for each recipient in every foreign country. The regulation was advertised as allowing turnaround in less than a week. It took us more than a year. This is what happens when statutes and regs aren't clear. Highly unintended results will occur.

senior vice president legal affairs, Fike Corp.



WHOSE BUSINESS IS IT, ANYWAY?

REGULATORY OVERKILL

Proposed and final federal regulations are compiled twice a year in the Unified Agenda of Federal Regulations, a compendium of regulatory actions under development. Here are four, culled from the thousands of proposed regulations listed in the Unified Agenda's April 1994 edition, that illustrate the government's long reach into the most minute crevices of commerce.

The Animal and Plant Health Inspection Service of the Department of Agriculture proposed to change existing rules to allow honeybees and honeybee semen to be imported from New Zealand.

The Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, said it was considering new labeling requirements for Gamay Beaujolais wine. "Since Gamay Beaujolais is not the name of a grape variety, its usage on wine labels may be incorrect," the bureau said.

The Department of Interior, U.S. Fish and Wildlife Service, said it would revise the list of migratory birds listed in a section of the Code of Federal Regulations to bring it into conformity with accepted taxonomy and nomenclature, "as reflected in four published supplements to the 6th (1983) edition of the American Ornithologists' Union Checklist of North American Birds."

The Department of Transportation proposed to extend existing Super Bowl rules to other special events. The rules state that a tour promoted as including a ticket to the Super Bowl game may not be advertised or sold until the operator has game tickets in hand or under contract. Anyone who doesn't receive a promised game ticket is entitled to a refund of the entire tour price. The department said the new initiative was prompted by ticket problems involving the 1994 Rose Bowl.

Regulations Rough on Kansas Contractor

BY DAN MARGOLIES

Pemco Inc., a small construction company in Paola, uses four attorneys: one for fringe benefits, one for labor issues, one for construction matters and one for general corporate work.

Thanks to Uncle Sam, those lawyers stay pretty busy.

For each of the last five years, the Kansas company has been inspected by the Occupational Safety and Health Administration, even though its safety record is excellent. And since 1988, Pemco has been fighting the U.S. Labor Department over whether it owes back pay to workers that Pemco classified as pipe layers but the department insisted were plumbers.

In the mid-1980s, Pemco jettisoned its pension plan because new requirements designed to shore up the faltering Pension Benefit Guaranty Corp. made it too unwieldy and prohibitively expensive. And this year, the company, whose subsidiaries build water and wastewater treatment plants and do general contracting work, must decide whether to continue paying 100 percent of its employees' health insurance now that a new Kansas law will add \$40,000 to \$50,000 to the tab.

"I just can't afford that," said Denis Kurtenbach, president and principal owner of Pemco.

Pemco's numerous encounters with regulators illustrate an increasingly common fact of life in the business world: the pervasiveness of government in spheres once thought to be outside its proper domain.

Whether it's the structure of a pension plan or the height of a scaffold, the wording on a paint can or the racial makeup of the workplace, the long arm of government now reaches into areas once regarded as the province of individual entrepreneurs who, however ill-advised their actions, were free to fail or succeed on their own terms.

Whose business is it, anyway? Increasingly, it seems, the government's.

"It's rare that we don't have state or federal intervention on a project," said the 59-year-old Kurtenbach. "I can't think of a job offhand of any magnitude that hasn't had a state or federal Department of Labor inspection."

Much of Pemco's construction work is for government entities — cities, towns and counties — so the government's interest in Pemco's work is understandable. And as a builder of water and wastewater facilities, Pemco has benefited greatly from environmental regulations.

But as Kurtenbach describes it, government rules seem not so much designed to assure satisfactory completion of a project as



"HAS REGULATION AFFECTED US? HELL, YES, IT'S AFFECTED US."

Denis Kurtenbach, president and principal owner of Pemco Inc. in Paola, holds copies of government specifications for construction projects.

to impede it by throwing up obstacles every step of the way. And in a business where 2 percent profit margins are the industry norm, "any little regulation on a million-dollar job that costs you, say, \$2,000, is 10 percent of my taxable profit on that job," Kurtenbach said.

"So has regulation affected us? Hell, yes, it's affected us."

Over inspected

Until recently, OSHA inspectors had visited every Pemco job site for the previous five years, although no Pemco worker had ever been killed or seriously injured on the job. Why? Kurtenbach can't figure it out, although he hints it may have to do with Pemco's nonunion status.

OSHA says the inspections are 100 percent random, but they still cost Pemco money. Although Pemco has been cited for only a few minor OSHA infractions — workers not wearing safety glasses, a scaffold not enclosed on one side and the like — Kurtenbach insists on fighting every OSHA citation, because "if you're cited again for the same violation you can be ruined."

"I would guess over the last five to 10 years," Kurtenbach said, "we've averaged \$7,500 to

\$10,000 a year in management time and legal costs just to fight OSHA."

"It's harassment, there's no question about it," said Topeka lawyer Bill Haynes, who represents Pemco on OSHA matters.

Haynes also represented Pemco in a lengthy dispute with the Department of Labor. In 1988, after completing a federal contract for a wastewater treatment plant in Webb City, Mo., Pemco had to lay additional pipe across a field to fulfill a change order. Under the Davis-Bacon Act, federal contractors are required to pay prevailing local wages and fringe benefits to their laborers. Pemco classified the workers who put down the pipe as pipe layers, and paid them the prevailing wage for pipe layers.

Wrong, said the labor department. They should have been classified as plumbers and paid accordingly — from \$3 to \$5 more an hour. The department's rationale: The local union classified the work as a plumbing job, and even though Pemco was not a union shop, "they jumped to the conclusion that all work of this kind in the area was performed by plumbers," Haynes said.

"Whether we were right or wrong isn't important," Kurtenbach said. "It was just a night-

mare. We'd give them information and six or nine or 12 months later we'd get an answer. It took forever."

Or 5½ years, to be exact. The case and a companion matter were settled last month when Pemco agreed to come up with \$6,000 in back pay for the workers.

Back in the 1980s, Pemco, which grossed about \$10 million last year and employs anywhere from 50 to 125 workers, provided pensions for its workers through three pension plans, all of which had more than ample funds to cover pension payouts. But then the underfunded plans of corporate giants like LTV Corp. and the nation's automakers threatened the solvency of the Pension Benefit Guaranty Corp., the federal agency that guarantees basic pension benefits. So complex new pension plan rules were drawn up that imposed additional requirements on small companies like Pemco.

"They penalized the innocent more than the guilty," Kurtenbach said. "We just didn't want to put up with the hassle."

The result: Pemco liquidated its plans and paid out the money to its employees. Today, it has an employee stock ownership plan but no pension plans.

"For 35 years in this company, I've tried to provide some support for our employees for their retirement," Kurtenbach lamented. "Now I can't afford it."

"Mainly, overregulation was the reason," said Pemco's benefits lawyer, Alison Martin of Shook Hardy & Bacon. "It just got to be too complicated."

And now Pemco may have to cut back on its health plan as well. A new Kansas law aimed at reducing premiums for small employers may have the unintended effect of preventing Pemco from paying its employees' premiums in full, as it currently does. That's because one of the law's provisions reduces the waiting period for pre-existing conditions to 90 days. That translates into an additional annual expense for Pemco of more than \$40,000, another expense the company can ill afford.

"Now they can't qualify for the group discount rate, and yet they're not big enough to get their own reduced rate," Martin said. "They really fell through the cracks."

So how does Kurtenbach feel about the myriad regulations that affect his business?

Not very happy.

"In the last 20 years, there's probably been 20 major new regulations that have affected us," he said. "It's an erosion of productive overhead away from the business to regulation-tending. You can't plan quite as well, and you can't design as well."

"And you just don't have the time to do the business as well."

WHOSE BUSINESS IS IT, ANYWAY?

REGULATORY OVERKILL



Consultants Cash in on Regulatory Growth

BY BONAR MENNINGER

Not all businesses dread the growth in government regulation. Some companies, in fact, thrive on it.

Across the U.S., consultants, lawyers, accountants and others are carving a niche helping businesses through the labyrinth of federal rules, standards, permits and paperwork.

From environmental regulations to defined benefit plans, nearly all areas of business-related regulation have become grist for compliance consultants.

"(Regulatory consulting) is a hot area, a boom area, and I think more law firms are beginning to realize that," said Harvey Tettebaum, a Jefferson City attorney and head of the Missouri Bar's administrative law committee.

"It's growing because the government is growing," Tettebaum added. "We're getting into more complex regulatory schemes in a lot of different areas, and the result is that the need for regulatory advice is expanding."

Because of the wide variety of compliance issues and the diversity of the consulting firms themselves, hard numbers on the size of the overall market are not available.

But industry observers say the rollout of nearly any new standard or regulation affecting business, regardless of the type, usually sparks a boom for consultants as companies scramble to figure out what the rules may mean for them.

"When you see a new rule is when you usually see the big

gold rush by consultants," said Mike Zarski, legislative counsel with the American Medical Association in Chicago.

Environmental rules

In the environmental sector — the single largest body of business regulation — the consulting market in 1993 was estimated at \$9 billion by Farkas, Berkowicz & Co., a Washington-based management consulting firm specializing in environmental issues.

Generally, environmental consulting falls into three areas: water, air and solid waste. One of the major regional players in all three is the Kansas City-based engineering firm Burns & McDonnell.

Approximately 40 percent to 45 percent of the company's revenues derive from environmental engineering and consulting for public and private sector clients, said Daniel Froelich, vice president for air pollution control/planning and environmental services.

"We study, we design, we provide solutions," Froelich said. "Everything we do is directed toward helping our clients achieve compliance."

Richard Schultze, president of Dallas-based Trinity Consultants Inc., an air pollution consulting firm with offices in Overland Park, likened the work of an environmental consultant to that of a tax accountant.

"A company can learn how to do this, but it's generally more efficient to rely on people that do it 100 times a year," Schultze said.

Demand in the air, water and solid waste arenas is steady and



FROELICH



PETROSHAK

will likely remain so, according to Burns & McDonnell executives.

For example, approximately 35,000 existing sources of air pollution — facilities constructed before the original Clean Air Act of 1970 — are preparing to comply with the so-called Title V permit and emissions inventory requirements of the Clean Air Act Amendments of 1990.

"(The Title V regulations) have caused a mini-boom," said Schulze, noting that Title V emissions inventory and permitting costs can run anywhere from \$10,000 for a petroleum refueling depot to \$150,000 for a large paper mill.

Driven by fear

Another major realm of compliance consulting involves Occupational Safety and Health Administration regulations. Paula Petroschak, president and founder of Compliance Coordinators Inc., an Independence, Mo.-based firm, said that growth in the OSHA market had accelerated dramatically since Congress increased OSHA fines seven-fold in 1991.

The growth followed an earlier surge in 1988 after OSHA began to regulate non-manufacturing businesses, including churches, dental offices, restau-

rants, funeral homes and auto dealerships, through its Hazard Communication Standard. The rule is designed to identify hazardous materials in the workplace.

Among the services provided by Petroschak's firm are mock-OSHA inspections, which are aimed at identifying those elements of an operation that may be subject to inspection and citation.

The company also helps businesses develop written compliance programs, and even queries OSHA on behalf of firms that are seeking answers to compliance questions but are afraid to identify themselves lest they trigger an inspection.

Petroschak said that fear often prompts companies to contact her firm for assistance.

"We've had people say, 'I'm going to close up shop; there is no way I can comply with this.' There is certainly a lot of frustration out there," she said.

While consultants may provide an essential service for many companies, economists say that the money spent on compliance consulting could be put to far better use.

"In general, the economy would be better off if those resources were devoted to ongoing productive capacity rather than compliance," said Martin Regalia, chief economist for the U.S. Chamber of Commerce.

"Obviously, there is some economic benefit to the people performing the compliance work, but otherwise, it's just a dead-weight loss. It's an expense with no productive benefit coming from it."

The overwhelming majority of companies responding to a 1994 survey by the Greater Kansas City Chamber of Commerce on regulation, and environmental rules in particular, said that there is too much regulation and that regulators don't strike a proper balance between enforcement and assistance.

Fifty local companies that regularly deal with transportation, energy and environmental issues responded to the poll, although some companies chose not to answer some questions.

THE RESULTS:

80 percent
said business is over-regulated.

85 percent
said regulatory agencies fail to balance enforcement and assistance.

95 percent
said regulatory enforcement is excessive.

94 percent
said compliance issues have affected their business.

51 percent
said regulations have increased their costs and reduced their operating revenues.

11 percent
said their compliance costs are greater than \$1 million.

39 percent
said their compliance costs range from \$10,000 to \$50,000.

55 percent
said regulations have increased their legal expenses.

47 percent
said regulations require them to hire additional administrative staff.

13 percent
said they have cut jobs to pay for compliance.

28 percent
reported paying some type of regulatory fine or penalty.

50 percent
said it is realistic to expect a shift toward market-oriented solutions.

FEDERAL REGULATORY AGENCIES

Department of Energy

11. Economic Regulatory Administration
12. Petroleum Regulation
13. Federal Inspector for the Alaska Natural Gas Pipeline

Department of Housing and Urban Development

14. Consumer Protection Programs

Department of Interior

15. Fish and Wildlife Service
16. Office of Surface Mining Reclamation and Enforcement

Department of Justice

17. Drug Enforcement Administration
18. Antitrust Division

Department of Labor

19. Employment Standards Administration
20. Labor Management Services Administration
21. Pension and Welfare Benefits Administration
22. Mine Safety and Health Administration
23. Occupational Safety and Health Administration

Department of Transportation

24. Coast Guard
25. Federal Aviation Administration
26. Federal Highway Administration
27. Federal Railroad Administration
28. National Highway Traffic Safety Administration

Department of the Treasury

29. Bureau of Alcohol, Tobacco and Firearms
30. Comptroller of the Currency

INDEPENDENT AGENCIES

31. Architectural and Transportation Barriers Compliance Board
32. Commodity Futures Trading Commission
33. Consumer Product Safety Commission
34. Copyright Office, Library of Congress
35. Council on Environmental Quality
36. Environmental Protection Agency
37. Equal Employment Opportunity Commission
38. Farm Credit Administration
39. Federal Communications Commission

40. Federal Deposit Insurance Corp.

41. Federal Election Commission
42. Federal Energy Regulatory Commission
43. Federal Maritime Commission
44. Federal Reserve Banks
45. Federal Reserve Board System of Governors
46. Federal Trade Commission
47. International Trade Commission
48. Interstate Commerce Commission
49. National Credit Union Administration
50. National Labor Relations Board
51. National Transportation Safety Board
52. Nuclear Regulatory Commission
53. Occupational Safety and Health Review Commission
54. Securities and Exchange Commission

Note: Agencies concerned primarily with taxes, subsidies and entitlements are not included on the list. Regulatory agencies with nominal budgets are also excluded.

Source: Center for the Study of American Business, Washington University, St. Louis, Mo.



CABINET AGENCIES

Department of Agriculture

1. Agricultural Marketing Service
2. Animal and Plant Health Inspection Service
3. Federal Grain Inspection Service
4. Food Safety and Inspection Service
5. Packers and Stockyards Administration

Department of Commerce

6. International Trade Administration
7. Export Administration
8. Patent and Trademark Office

Department of Defense

9. Army Corps of Engineers

Department of Health and Human Services

10. Food and Drug Administration

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Regulatory Reform—the Whole Story

By ROBERT W. HAHN

This week the House is set to consider major regulatory reform legislation. It's a good first step, but it will neither simplify your tax forms nor significantly reduce the \$450 billion of annual regulatory costs that the federal government now imposes on businesses and consumers. Real regulatory reform will require a fundamental, principled reform of the underlying laws—a task that may be beyond the reach of this Congress.

The new Congress is developing three kinds of reform proposals—a regulatory moratorium aimed at slowing the flow of regulations; a limitation on unfunded mandates imposed by the federal government on state and local governments; and a risk assessment bill that requires an examination of economic costs and benefits before laws and regulations are passed.

Largely Symbolic

The regulatory moratorium bill, which the House passed Friday, will be largely symbolic. Moratoriums have been tried before. President Bush introduced a 90-day moratorium that required agencies to take a serious look at improving and streamlining regulation. Some good ideas surfaced, but the impact on the quality and quantity of regulations coming out of the agencies was nil.

A moratorium from Congress will be even less effective than a presidential moratorium. Regulations still could be passed to address an "imminent threat to health and safety." The Clinton administration could use this emergency provision to pass more regulations, thus flaunting the prerogative of the executive branch to implement the laws. Indeed, it is a bit bizarre for Congress to ask the executive not to implement the laws it writes. Why not change the laws themselves? No moratorium is required for that.

The unfunded mandates bill, which already passed, and the risk assessment bill, which comes to the House floor today, are more far-reaching. They will have three important effects:

First, they will slow the rate at which major laws and regulations are developed, and could also require agencies to re-examine some existing regulations. Some of these bills contain a "super-mandate" provision that allows a business to challenge regulations if it can show that the benefits are not likely to exceed the costs, or the goal can be achieved with less money.

Second, the requirement for mandatory cost-benefit analyses of regulations whose economic impacts exceed \$50 million will help sensitize regulators to the cost side of

the equation—the side that is often hidden from view when bureaucrats and legislators promote pet regulations. If a strong version of the risk bill passes, like Bob Dole's Comprehensive Regulatory Reform Act, these cost-benefit analyses could determine the fate of the proposed regulation. If benefits exceed costs, thumbs up; otherwise thumbs down.

The third and most important impact of these proposals will be the development of a public record on the costs and benefits of regulation. A partial record is available within academia—and this record strongly suggests that the benefits of most proposed environmental, health and safety regulations fall short of the costs. For example, economists estimate that the 1990

created the regulatory state. That will take a clear vision of what the GOP wants to accomplish—a vision that so far seems lacking on Capitol Hill.

To provide such a vision, Congress should:

1) *Re-examine laws that do not pass a benefit-cost test.* The first step is to have economists at the Congressional Budget Office do a cost-benefit analysis of existing statutes. Then, armed with this information, Congress should focus on those statutes that reduce the average living standard of Americans after all benefits have been considered.

For laws that limit competition where competition is viable, the decisions are easy—eliminate them unless they serve a

There is a certain irony that the Republican-led Congress will add more red tape to rein in regulation. But clogging the bureaucracy isn't necessarily a bad thing.

Clear Air Act will impose a net annual drain of over \$15 billion on the economy, even after accounting for benefits. Filling in the gaps in this research and making it available to the public in sound-byte form will have an important impact on future legislation.

Critics of these bills argue that they will end regulation as we know it. President Clinton said last week the GOP plan "would stop new protection from deadly bacteria in our drinking water, stop safer meat and poultry, stop safer cars, stop final implementation of the law that lets parents take leave to care for a sick child." That simply isn't true. Companies will continue to produce safer cars and local communities will continue to offer safe drinking water because the public demands it, not because Washington ordains it.

Critics are right, however, in claiming that the bills will add red tape. The New York Times editorial page boldly claims that the House regulatory reform bill is a "recipe for paralysis." There is a certain irony that the Republican-led Congress will add more red tape and judicial oversight to rein in regulation. But considering the alternative—more inefficient regulations that reduce living standards—clogging the wheels of the federal bureaucracy isn't necessarily a bad thing.

Still, as House Commerce Committee Chairman Tom Bliley puts it, the GOP's regulatory bills represent only "the first steps toward bringing the federal regulatory monster under control." The next step is tackling the individual laws that have

useful social function. The Interstate Commerce Commission and the Federal Maritime Commission, which artificially raise some trucking and shipping rates, and the Davis-Bacon Act, which raises the cost of government services, should all be abolished. Laws governing technologically dynamic industries, such as banking, telecommunications, electricity and cable, should be revised to permit more competition. Allowing more competition could easily add \$50 billion to the economy annually.

For laws that protect the environment, health and safety, Congress should work to refocus the efforts of agencies charged with administering these laws. Requiring companies to label sand as poisonous and citing firms for not filling out forms for their Windex and Joy cleaning products is a waste of taxpayers' money. So are requirements that dirt at a hazardous waste site be clean enough to eat 245 days a year. On the other hand, some government regulations pass a benefit-cost test. These include removing lead from gasoline, seat belt requirements, and fire safety standards for aircraft.

2) *Get rid of the one-size-fits-all approach.* Local standards should be allowed to vary, particularly where problems are local. The decision of how clean to make hazardous waste sites or how much money to spend on reducing local air pollution should be left up to the citizens who directly bear the costs and benefits of those actions. Even well-intentioned bureaucrats in Washington are unlikely to be able to make better decisions for

Peoria than the mayor of Peoria can. The federal government can help in the standard-setting process by providing information on the costs and benefits of using different methods for achieving specific environmental, health and safety standards.

3) *Adopt market incentives.* An ambitious schedule introducing low-polluting vehicles is being mandated for California and the Northeast. For example California requires that one in every 10 cars sold by 2003 be an electric vehicle. An alternative to this mandate is to allow polluters to pay others to reduce an equivalent amount of pollution if it is less costly. Replacing the clean car mandate with a flexible market approach could save \$10 billion while achieving the same result.

Individual companies should be encouraged to search for better ways to meet overall objectives. Amoco's Yorktown refinery was required to spend \$31 million to reduce a small amount of benzene from its wastewater treatment plant, when it could have reduced five times as much benzene elsewhere in the refinery at a cost of only \$6 million. Congress should encourage regulators to promote the cleaner, less expensive result by advocating flexible market approaches in the enabling statute.

Stick to Principles

Rewriting the substantive laws has obvious political risks. Moreover, the cure may be worse than the disease, if business interests are able to co-opt the process to gain special exemptions and loopholes. If the exercise turns into a feeding frenzy on the part of business, the advocacy groups from the left are likely to return again, only this time stronger than ever.

The solution is to stick to principles and educate the American public on the rationale for regulatory reform. Then the public can be used as an antidote to special interests from all sides.

The new Congress needs to demonstrate that it stands not only for less regulation, but more prudent regulation that is based on sound economics. The regulatory revolution will not be complete until Congress moves from procedural reforms to substantive reforms based on a principled revision of the statutes. Such reforms may not be possible until we have a new occupant of the White House.

Mr. Hahn is a resident scholar at the American Enterprise Institute and an adjunct professor of economics at Carnegie Mellon.