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REGULATORY REFORM: WHERE ARE WE GOING?

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In this brief overview of regulatory reform, Professor Rose-Ackerman discusses issues that form the landscape upon which the professors, legislators, and regulators who have contributed to this symposium will debate. Professor Rose-Ackerman touches on two bills which were proposed in the most recent congressional session and concludes that the most fervent supporters of the reform movement do not likely understand the policy behind the tools with which they propose to prune the regulatory thicket. She goes on to delineate the differences between risk assessment and cost-benefit analysis, concluding that the uncertainties and unquantifiable nature of risk assessment make it too unreliable a test upon which to base serious decisions to cut resources which protect human health, safety, and the environment.

Regulatory reform stalled in Congress in 1995. The Risk Assessment and Cost-Benefit Act of 1995[1] passed the House at the end of February 1995. A majority for some kind of reform exists in the Senate, but the members were unable to find a compromise that could get both majority support and avoid a filibuster threat. The moderate Democratic Party proposal introduced by Senator John Glenn was defeated in July,[2] but the Senate then failed to support cloture on the Republican bill sponsored by Senators Bob Dole and Bennett Johnston.[3] Given the Congress's preoccupation with the budget last fall, regulatory reform was put on the

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Earlier versions of these remarks were presented at roundtables at the Annual Meetings of the Association for Public Policy and Management in November 1995 and the American Economic Association in January 1996.

1. H.R. 1022, 104th Cong., 2d Sess. (1995).
2. S. 1001, 104th Cong., 1st Sess. (1995).
3. S. 343, 104th Cong., 2d Sess. (1995).

back burner. Nevertheless, the issue is likely to arise again, and since there are important difficulties with existing regulatory policies, it is well to examine the options proposed and taken seriously by the Congress.

At first glance the reforms look like the answer to a policy wonk's prayers. Regulatory agencies are to be required to engage in risk assessment and cost-benefit analysis before issuing regulations. The bills are a response to data showing that the cost of a life saved varies widely across regulations. In one widely circulated table, costs vary from $100,000 to many billions of dollars for regulations issued by such agencies as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission.[4]

These numbers indicate that something is wrong in the way priorities are set by the regulatory system. They do not tell us, however, whether the problem is in the underlying substantive statutes or in the way these statutes are implemented by the agencies. The numbers also say little about agency priority setting since they do not include the lives lost from agency failure to regulate in one area or another, and they omit benefits other than lives saved. Furthermore, even if one is only concerned with the life savings effects of federal policy, the numbers are incomplete since they focus only on health, safety, and environmental regulation, not on major spending programs such as Medicare, Medicaid, and Veterans' Hospitals.[5] Finally, they focus too uncritically on numbers of lives saved without considering the age of the potential victims or the impact of programs on the quality of life. Especially for programs that primarily affect the aged, it is not clear that simply keeping people from dying as long as possible ought to be the primary goal. In short, the table is a good way to mobilize concern about the irrationalities of regulatory policy, but it is not a responsible guide to their solution.

Unfortunately, the bills before Congress in 1995 were too strongly influenced by the partial truths included in this and other tables. They were too focused on individual regulations instead of overall policy. They also failed to recognize the tension between risk assessment and cost-benefit analysis. The major bills combined both techniques and, in spite of some softening language, appeared to be premised upon a belief that these are entirely compatible techniques that can be applied unproblematically to regulatory issues. Supporters of these bills do not appear to really understand the techniques they are espousing. Risk assessment and cost-benefit analysis are policy exercises, not just technocratic tools. They must be grounded in policy choices that set the stage within which analysts can work. There is a cynical explanation for the support some legislators have given to the most restrictive versions of these bills. Some supporters care nothing about whether analysis is or is not competent. They are only interested in legislation that will reduce the

4. OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, Apr. 1, 1991 - Mar. 31, 1992, at 12. This table is reprinted in STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 24-27 (1993).

5. H.R. 1022, *supra* note 1, § 5(4).

number and strength of regulations. Tools designed to help an active government perform its tasks competently are being used by these legislators as a device to limit government. There would be nothing wrong with such a result if the tools were applied consistently without a bias for or against public action. That is not, however, what the strongest bills do. Rather, they put the burden of proof on those seeking to regulate so that uncertainties are resolved in favor of doing nothing. For example, the cost-benefit provisions in H.R. 1022 state that "no final rule . . . shall be promulgated unless the agency certifies . . . [t]hat the incremental risk reduction or other benefits of any strategy chosen will be likely to justify, and be reasonably related to, the incremental costs."[6] This sentence, of course, contains some weasel words, so it is hard to figure out exactly how strong the burden of proof actually would be in practice, but it suggests that those seeking to defend a regulation will have a harder task than the opponents. The Dole bill has stronger language stating that no final major rule may be issued "unless the potential benefits to society from the rule outweigh the potential costs of the rule to society."[7]

The motivations of some supporters are, in fact, quite explicit in the language of the bills themselves. The bill which passed the House states that risk assessment is only one of a number of methods that could be used "to secure prompt relief from the burden of unnecessary and overly complex regulations."[8] More telling perhaps is the fact that in the House bill both the risk assessment and cost-benefit sections of the bill apply only to regulatory programs designed to protect human health, safety, or the environment.[9] Unlike the cost-benefit provisions of the Democratic substitute proposed by Senator Glenn, the House Republicans are not prepared to apply cost-benefit criteria across the board to include programs that might fall in the "corporate welfare" category. Furthermore, regulations accompanying the sale or lease of federal resources are exempted from the risk assessment provisions.[10] The Dole bill exempts from risk assessment any programs that authorize the sale or manufacture of products (e.g., drugs) and does not apply to the pesticide reviews of the Federal Insecticide, Fungicide, and Rodenticide Act,[11] or the review of substances carried out under the Toxic Substances Control Act.[12] In short, where delay would disadvantage the business community, the Senate bill does not apply. A final issue that reveals the Republican sponsors' attitude is the failure to provide financially for the analytical capacity needed to carry out the bill. The bills mandate that agencies cannot regu-

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6. *Id.* § 202(a).

7. S. 343, *supra* note 3, § 2(a) (proposed 5 U.S.C. § 623(a)).

8. H.R. 1022, *supra*, note 1, § 2(6).

9. *See, e.g., id.* § 102(1) (stating that the purpose of this legislation is to provide "the most scientifically objective and unbiased information concerning the nature and magnitude of health, safety, and environmental risks").

10. *Id.* § 103(b)(3)(A)(iii).

11. 7 U.S.C. §§ 135, 135a-135k, 136a-136y (1994). *See* S. 343, *supra* note 3 § 621(4)(B)(ii).

12. 15 U.S.C. §§ 2601-2629 (1994). *See* S. 343, *supra* note 3, § 621(4)(B)(ii).

late without doing analysis and that existing rules will become invalid in time unless they too are reviewed. Therefore, regulatory activity will be impossible without an increase in the agencies' budgets to support the analytic exercise. Instead of increasing agency budgets, the same members of Congress who support regulatory reform also support massive cuts in the budgets of the same agencies they claim to want to reform. Such an approach reflects a deeply cynical attitude toward regulatory activities that appear to have broad public support and undermines Congress's seemingly high-minded discussion of rationalizing policymaking.

I have recently argued that courts should review the fit between the goals of substantive statutes and the funds appropriated.[13] If the funds are too low to permit a reasonable attempt to achieve an act's goals, the courts should declare that Congress has by its actions de facto repealed the law. The court's judgment would not take effect immediately. Instead, Congress would be given a chance either to repeal or amend the statute itself or to appropriate more money. If it does not correct its inconsistent actions, however, the act would then become invalid. The regulatory reform laws provide a good example of just the kind of problem such a judicial doctrine is designed to solve. Yet, I do not want to seem entirely negative. In spite of the biases in the bills' language and the lack of funding, there is much to applaud in these reform efforts. They do represent an effort to require better analysis for individual rules and, even better, they require the executive branch to look across regulatory areas and try to establish some consistent standards of analysis. If the agencies are well funded and staffed, the studies required by these bills would enhance our knowledge of the benefits and costs of regulation and permit a more rational set of regulatory policies.

The problem is not in the required processes, but in the substantive standards that presume a level of scientific certainty that does not exist. The uncertainty comes both from imperfect knowledge that might be improved by spending more money on analysis and from underlying conflicts over values. In the case of imperfect knowledge, it may be better to regulate at some level while awaiting the results of studies rather than to bear the costs of failing to regulate. Generic regulatory reform should not be biased in favor of no regulation. After all, if the Congress and the President think a substantive regulatory law serves no valid purpose, they can repeal or amend the statute and thus eliminate the problem.

Regulatory reform must support, not undermine, the underlying statutes. That is why the issue of a super mandate is so controversial. The House bill states that the cost-benefit test supersedes the decision criteria in the underlying statutes.[14] Super mandates are a bad idea because they

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13. SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 63-79 (1992).

14. H.R. 1022, *supra* note 1, § 202(b)(1). In contrast, under the House bill risk assessment is required only to the extent it is consistent with the underlying statutes. Note that the title of the act requiring such risk assessment is advisory in nature, not—like the cost-benefit provisions—required decision-making criterion. *See id.* § 202(a) (stating that "[n]o

uncritically replace specific statutory language in substantive statutes with an overall criterion. I believe that democratic principles, as well as solid economic analysis, support the use of the cost-benefit criterion as a background norm for laws designed to correct market failures. A background norm does not, however, imply anything about the burden of proof. Uncertainties can be resolved in favor of or against regulation. Furthermore, the norm is one that legislators ought to be able to override by the language of particular statutes. In fact, before this issue was put on the Congressional agenda, I argued that a statute is not necessary to establish such a background norm, but that the federal courts could do it themselves in the name of democratic accountability.[15] I do not mean that they should do the analysis themselves or judge the quality of agency studies, but that they should insist on the use of these techniques within agencies. That proposal, however, is a much more modest claim than a statutory requirement that overrides inconsistent language in substantive laws.

Conflicts over values cannot be resolved by science. It is to the credit of the drafters of the House bill that they recognize this issue. They state that in presenting risk assessments, assumptions and inferences must be made explicit, and policy or value judgments identified.[16] Such ambiguities are not mentioned in the cost-benefit part of the bill which is, in general, less thoughtfully drafted than the title dealing with risk assessment. This is unfortunate since the risk assessment title simply requires studies, while the cost-benefit section requires that cost-benefit criteria be used to make decisions. Yet any good cost-benefit analysis must contain value judgments. Of course, the decision to use cost-benefit criteria is itself a value judgment, but that is, at least, reasonably obvious from the text of the bill. What is unclear is how analysts are to resolve vexed issues such as how to set the social rate of discount, how to value lives saved and improvements in the quality of life, or how to value ecological harms not related to human health and safety. The bill does recognize that some benefits and costs are not quantifiable and permits these to be qualitatively described,[17] but it does not take notice of difficulties that raise issues of policy that cannot be resolved by looking up the "best" practice.

The final issue I would like to discuss concerns the differences between risk assessment and cost-benefit analysis. If policy analysts want to make a constructive contribution to the debate over regulatory reform, they need to confront this issue. It has been ignored in the discussion of the bills before Congress that focused on such issues as the existence of a supermandate, the repeal of the Delaney Clause,[18] the sunset provisions

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final rule subject to the provisions of this title shall be promulgated unless the agency certifies" that the benefits of the rule outweigh the costs).

15. ROSE-ACKERMAN, *supra* note 13, at 33-42.

16. H.R. 1022, *supra* note 1, § 104(b)(2).

17. *Id.* § 201(a)(2) ("Costs and benefits shall be quantified to the extent feasible and appropriate and may otherwise be qualitatively described.").

18. The Delaney Clause, 21 U.S.C. §§ 376(b)(5)(B), 349(c)(3)(A), 360b(d)(1)(I) (1988),

for old regulations, and the provisions for petitions, "peer" review by interested parties, and judicial review. In conclusion, I want to highlight a tension at the heart of the regulatory reform debate between economists advocating cost-benefit criteria and scientists advocating risk assessments.

Cost-benefit analysis is the effort to set marginal costs equal to marginal benefits so that total net benefits are maximized. Other factors such as distributive concerns and attitudes toward risk may lead the analyst to recommend something other than the value maximizing solution, but the principle of considering both costs and benefits is paramount. In contrast, risk assessments sometimes assume that the goal is to equalize risks across activities. It is taken to be irrational for the government to regulate risks that are less severe than everyday risks people experience, such as the risks of fatal automobile crashes or the smoker's risk of death from lung cancer. But once costs are taken into account this may not be so. If the relative benefits from different activities differ, there may be nothing irrational about a person who both goes hang gliding and never drives above the speed limit. Hang gliding may be so much fun that it is worth the risk. Similarly, a very high risk industrial process may, nevertheless, be worthwhile if the net benefits are high enough. Conversely, a low probability risk may be worth controlling if it is inexpensive to do so.

Another related problem with risk analysis is deciding what units to use. Risks are always risks *of* something. For dramatic effect, critics of the current system use the risk of death and calculate the cost of saving lives. This technique is not a practical one for actually setting priorities. One must look at the incidence of illness and injury and of any other harms. Many policies, especially in the environmental field, cannot easily be put into the risk assessment framework. It is artificial and unduly limiting to characterize their benefits as risk reduction. Cost-benefit analysis, in contrast, is a more comprehensive criterion. Although risk assessment can help by developing scientific techniques to measure risks, it should not be at the center of the regulatory reform exercise. The uncertainties and assumptions implicit in cost-benefit analyses need to be recognized and included in the policy debate, but the technique provides a better framework for regulatory reform than risk assessment which leaves out too much and provides no criterion for decision except a mechanical attempt to equalize risks of something (death, injury, malnutrition) across policy areas.

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which prohibited small traces of pesticide residue in foods, was repealed by the Food Quality Protection Act, H.R. 1627, 104th Cong., 2d Sess. (1996).