Deregulation and Reregulation: Rhetoric and Reality

by Susan Rose-Ackerman*

Deregulation was an article of faith for many policy makers in the Reagan administration. They saw their political mandate as a crusade to get the government "off the backs" of the people so that the benefits of free enterprise could flourish.¹ The momentum for deregulation was provided by the Ford and Carter administrations and the Congress with legislation that moved toward the deregulation of air travel, intercity trucking, railroads, and banking and financial services.² The rhetoric of many of those in the Reagan administration was, however, more sweeping and less nuanced than that of its predecessors. Earlier officials had sought regulatory reform—revising regulations and statutes to improve their effectiveness and removing those which lacked a strong policy justification.³ Reagan policy makers, in contrast, favored regulatory relief—reducing the "burden" of both economic and social regula-

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¹ Ronald Reagan in his first inaugural address stated: "[G]overnment is not the solution to our problem; government is the problem." Pub. Papers 1 (Jan. 20, 1981). See also R. Harris & S. Milkis, The Politics of Regulatory Change: A Tale of Two Agencies 5 (1989). In his first "Economic Report of the President," President Reagan wrote that "Economic policy must seek to create a climate that encourages the development of private institutions conducive to individual responsibility and initiative. People should be encouraged to go about their daily lives with the right and the responsibility for determining their own activities, status, and achievements." Economic Report of the President 3 (1982). Reagan claimed that over the past decade "the government has spun a vast web of regulations" that has reduced productivity and raised prices. Id. at 3-4. The solution proposed was "a substantial reform of Federal regulation, eliminating it where possible and simplifying it where appropriate." Id. at 4-5.

Immediately after taking office, Reagan established the Presidential Task Force on Regulatory Relief, which was to review major regulatory proposals, assess regulations currently on the books (especially those that were burdensome to the national economy or to key industrial sectors), and oversee the development of legislative proposals. 17 Weekly Comp. Pres. Doc. 33 (Jan. 22, 1981). See also G. Eads & M. Fix, Relief or Reform?: Reagan's Regulatory Dilemma 108-09 (1984).


³ G. Eads & M. Fix, supra note 1, at 1.
tion on consumers and businesses. Without a careful assessment of the causes for ineffective regulation, they began with a presumption that government was lumbering, cumbersome, and even corrupt so that the burden of proof on anyone making a proposal for government intervention was very high. 

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4 Id. The term “social regulation” is often applied to “the set of federal programs that use regulatory techniques to achieve broad social goals—a cleaner environment, safer and more healthful workplaces, safer and more effective consumer products, and the assurance of equal employment opportunities.” Id. at 12. “Economic regulation,” by contrast, “refers to the programs that attempt to control prices, conditions of market entry and exit, and conditions of service, usually in specific industries considered to be ‘affected with the public interest.’” Examples of the latter include regulation of airlines, telecommunications and securities transactions. Id.

5 Executive Office of the President, America’s New Beginning: A Program for Economic Recovery (1981). See also R. Harris & S. Milkis, supra note 1, at 3-16. For a more balanced argument in an official publication, see the Economic Report of the President 29-46, 134-46 (1982). Murray Weidenbaum, the Chairman of Reagan’s first Council of Economic Advisors, is one of the moderates. In an assessment of the regulatory reform effort he is careful to state that he does “not equate regulatory reform with minimizing the costs of complying with regulation. . . . [Rather, he thinks] in terms of optimization, of moving toward more efficient regulatory activity (an approach that is guaranteed to upset our libertarian friends).” Weidenbaum, Regulatory Reform Under the Reagan Administration, in The Reagan Regulatory Strategy 15 (G. Eads & M. Fix eds. 1984) [hereinafter Reagan Regulatory Strategy].

6 One of the strongest statements of this position, under the heading “Ticking Regulatory Time Bomb,” is in a memo prepared by David Stockman and Jack Kemp for the incoming President in December 1980, entitled “Avoiding a GOP Economic Dunkirk.” In that memo they wrote:

McGovernite no-growth activists assumed control of most of the relevant sub-Cabinet policy posts during the Carter Administration. They have spent the past four years “tooling up” for implementation through a mind-boggling outpouring of rule-makings, interpretative guidelines, and major litigation—all heavily biased toward maximization of regulatory scope and burden. Thus, this decade-long process of regulatory evolution is just now reaching the stage at which it will sweep through the industrial economy with near gale force, preempting multi-billions in investment capital, driving up operating costs, and siphoning off management and technical personnel in an incredibly morass of new controls and compliance procedures.

Memorandum to President Reagan (Dec. 1980) (Avoiding a GOP Economic Dunkirk), reprinted in W. Greider, The Education of David Stockman and Other Americans 137, 146 (1982). The Reagan administration’s efforts to limit regulation had one exception. In matters of private life, it favored the regulation of morality through statutes and rules to restrict abortions, control sexual activity, and prohibit family members from withholding treatment from severely damaged babies or comatose relatives. For example, in early 1988 the Department of Health and Human Services (HHS) issued a regulation prohibiting any organization which received federal funds from offering abortion counseling. See 53 Fed. Reg. 2941-42 (1988) (later codified at 42 C.F.R. § 59.10 (1988)). The rule’s status is unclear. It was struck down by a district court on free speech grounds, Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988), affirmance withdrawn pending reh’g, 873 F.2d 1528 (1st Cir. 1988), and upheld by one circuit court. New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989). In another regulation, eventually withdrawn in the face of a successful Supreme Court challenge, HHS sought to influ-
In spite of such rhetoric, the last administration did not succeed in dismembering the regulatory state. No major pieces of regulatory legislation were repealed, and in the latter portion of Reagan’s tenure an important regulatory statute was strengthened, and others were reauthorized. In 1983 the White House formally terminated its regulatory relief program. Although the Administration claimed to be shifting its emphasis from reducing the burden of administrative regulations to reforming the principal regulatory statutes, their efforts were

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7 Statutes deregulating intercity buses and further deregulating financial institutions passed in 1982. The Administration’s role, while supportive, was not central. See Economic Report of the President 196 (1989). See also Weidenbaum, supra note 5, at 15, 20-21.


concentrated on economic regulation, and largely ignored social regulation.¹⁰

The Administration's approach to social regulation was more subtle and may ultimately turn out to have been more destructive than a straightforward attempt at statutory reform. Its strategy was to encourage inaction by those regulatory agencies which imposed costs on business and to encourage quick and politically salient actions by agencies that had favors to bestow. This was done by appointing people committed to supporting Reagan's ideology even if they were not well-informed about the programs of the agencies in which they served,¹¹ and if such people were unavailable, by failing to appoint people to fill key regulatory positions.¹² It was also furthered by simply not initiating many major rule making proceedings except those required by the courts.¹³ These actions fueled the claims of those wishing to


¹¹G. Eads & M. Fix, supra note 1, at 140-48; R. Harris & S. Milkis, supra note 1, at 6, 113-24; J. Tunstall, supra note 10, at 210-12. See also Goldenberg, The Permanent Government in an Era of Retrenchment and Redirection, in The Reagan Presidency and the Governing of America 381-404 (L. Salamon & M. Lund eds. 1985); Lynn, The Reagan Administration and the Penitent Bureaucracy, in id. at 339-74. Goldenberg points out that political appointees extended much farther down the ladder of the bureaucratic hierarchy than in previous administrations. Along with providing examples of unqualified appointees, Eads and Fix also provide counter-examples of some highly qualified and effective appointments. G. Eads & M. Fix, supra note 1, at 145.

¹²In the EPA, the positions of administrator and deputy administrator were not filled in the first six months of Reagan's term, "forcing the EPA to operate without clear, decisive policy guidance. This made it difficult to design new policies or solve old problems. It was also impossible to construct a legislative agenda without someone firmly in charge." Crandall & Portney, Environmental Policy, in Natural Resources and the Environment: The Reagan Approach 62 (P. Portney ed. 1984). See also McLaughlin v. Union Oil Co. of California, 869 F.2d 1039, 1041 (7th Cir. 1989)(Occupational Safety and Health Review Commission had lacked a quorum for 17 months); National Treasury Employees Union v. Bush, 715 F. Supp. 405, 406 (D.D.C. 1989) (Federal Labor Relations Authority has had only one member since November 1988). In the latter case the district court found that the federal courts could not legally direct the President to make an appointment. Id. at 407.

discredit the regulatory policies of the Administration and made efforts at constructive reform suspect as well. "Regulatory reform" was taken by critics to be a codeword for selling out to business.\textsuperscript{14}

The polarization between Reagan loyalists seeking to dismantle the regulatory state and critics wishing to discredit the Administration is unfortunate. Given the deep flaws in most regulatory statutes, even those which seek to correct obvious and important market failures, informed debate is required, not name-calling. It is no answer to the imperfections of the Clean Air Act\textsuperscript{15} simply to repeal the act. Instead, amendment of existing statutes and changes in the practices of regulatory agencies can, in principle, bring regulatory policy closer to the ideal of an economically efficient program.\textsuperscript{16} Some of the policies of

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the Reagan administration could, in fact, be part of such a progressive reform of administrative law. Regrettably, critics have lumped them in with other initiatives directed in a simplistic way toward reducing the influence of government on the economy. In some ways the Reagan administration invited such criticism by administering their purported regulatory reforms in a way that left the White House open to the charge of selling out to special interests.

Section I outlines the ways in which regulatory policy during the Reagan administration has failed to fulfill the promise of genuine reform. Section II follows up this critique with some suggestions for the Bush administration if it wishes to make genuine reform a priority.

I. Reform or Sellout

Four different types of action and inaction pushed regulatory policy in a retrograde direction in the last decade. First, the White House attempted to impose rationality and coordination on executive branch regulatory agencies in a way which invited criticisms of undue political influence. Second, by assuming that deregulation was per se desirable, policy makers neglected to observe that deregulation of one set of industry practices might increase the need to regulate other aspects of behavior. Third, in areas of social regulation, such as environmental policy and occupational health and safety, where the underlying statutory purposes are popular, the administration shied away from genuine incentive-based reforms. Finally, even in its own terms of reducing regulatory burdens, the administration failed to the extent that agencies were poorly run with unqualified appointees, vacant posts, and key decisions not made.


18 Weidenbaum believes that the Reagan administration may have reduced the chances for genuine reform. He writes:

[T]he public and, especially, the organized environmental groups, were aroused by the strong language and public stands of Secretary of Interior James Watt. EPA Administrator Anne Gorsuch evoked a similar public response. . . . As a result, the entire spectrum of environmental organizations . . . became a solid phalanx of opposition to virtually every regulatory change proposed by the Reagan administration. Weidenbaum, supra note 5, at 18-19. This had, by the middle of Reagan's term in office, created a climate in which Congress did not trust agencies to carry out their statutory mandates. Id. at 38. Weidenbaum worried in 1983 that the Administration's actions could "be leading inadvertently to a round of expanding governmental intervention." Id. at 39.
A. White House Oversight

The first difficulty arose in the context of White House oversight attempts. Early in the Reagan Administration the President issued Executive Order No. 12,291, which required cabinet level departments to prepare cost-benefit analyses justifying major rules. These analyses would be scrutinized by the newly-established Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) in the White House and approved or returned to the agency for revision.\(^{19}\) In 1985 Executive Order No. 12,498 was issued, requiring these same agencies to submit a regulatory plan detailing the agency’s priorities for the next fiscal year and reporting regulatory actions taken.\(^{20}\)

This assertion of White House involvement in agency rule making was not an entirely new initiative. Similar programs were carried out in the Ford and Carter administrations.\(^{21}\) The Reagan plan, however, was more secret, more centralized in the White House, and did not provide for public input or for public reports from OMB.\(^{22}\) From the beginning the goals of the first Executive Order were confused: was it designed to produce better, more well-thought-out regulations and improve inter-agency coordination, or was it set up to give the White House more political control over regulatory programs?\(^{23}\) Accusations of undue political influence were countered by technocratic arguments about the merits and demerits of particular rules, by data showing that few rules were delayed, and by revisions in OMB practices to provide for a more


\(^{22}\) R. Harris & S. Milakis, supra note 1, at 104-05.

\(^{23}\) As Eads and Fix note, “OMB’s actions were . . . vulnerable to being perceived as politicizing the technocratic process of translating legislative intent into implementing regulations.” G. Eads & M. Fix, supra note 1, at 110.
open, accountable process. Even if the claims of political influence were overdrawn, criticisms of the OMB process unfortunately could be used to discredit all attempts to introduce more rationality and consistency into the regulatory process.

In spite of doubts about the effectiveness of the oversight process even in its own terms, the OMB staff appears to have frequently pointed out serious deficiencies in individual regulations, and the quality of staff work seems to have been quite high. The earnestness and professional commitment of the staff is well reflected in the memo prepared by a staff member, entitled “Regulatory Impact Analysis Guidance,” which was designed to help agency bureaucrats responsibly comply with the Order.

To those in the policy analysis community committed to the proposition that regulators should consider all of the effects of their policies, the aims of the Order appear laudable. Agencies, focusing on the benefits expected to flow from the statutes they administer, may avoid the hard work of assessing costs. While definitive cost-benefit analyses will frequently be impossible and while concerns with distributive consequences and fair process are also often important, a well-focused attempt to assess social costs as well as benefits should be part of regu-

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24 Compare Morrison, supra note 21, at 1065 (criticizing the process because “[t]he Administration has principally used the system of OMB review . . . to implement a myopic vision of the regulatory process which places the elimination of cost to industry above all other considerations”) with DeMuth & Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075, 1081, 1085-88 (1986) (defending the process as appropriately requiring cost-benefit analysis and against claims that it is dominated by special interests, too secretive, and too time- and resource-consuming). A summary of arguments on both sides is found in Verkuil, Symposium on Presidential Control of Rulemaking: An Introduction, 56 Tul. L. Rev. 811 (1982). For White House attempts to respond to the critics, see Office of Information and Regulatory Affairs, Additional Procedures Concerning OIRA Review Under Executive Orders Nos. 12291 and 12498 (Revised), reprinted in Office of Management and Budget, Regulatory Program of the United States Government, April 1, 1988-March 31, 1989 app. III at 529-43 (1988) [hereinafter Regulatory Program].

25 In cases where the Office of Information and Regulatory Affairs clashed publicly with agencies, the agencies emerged as winners. G. Eads & M. Fix, supra note 1, at 135-38.

26 Harris and Milkis conclude that “the short-term impact of the OMB oversight may have jeopardized the prospects for long-term change in the substance of regulatory policy.” R. Harris & S. Milkis, supra note 1, at 113.


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31 See G. Eads & M. Fix, supra note 1, at 135-38 (evidence supporting perception that cost-benefit analysis is but a technique to achieve the pro-business political objectives of the president).

32 See, e.g., Environmental and Energy Study Institute & Environmental Law Institute, Statutory Deadlines in Environmental Legislation: Necessary but Need Improvement ii (1985) (finding that by mid-1985 only 14% of EPA’s deadlines had been met). See also Developments in the Law—Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1474 (1986) (stating that EPA has failed to meet statutory deadlines for the implementation of federal hazardous waste legislation).

to expire, OMB may review the regulations only until the time at which OMB review will result in the deadline being missed.\textsuperscript{34}

If this judicial assertion is followed, Congress has a convenient way to emasculate OMB review. It simply writes a statute with very tight deadlines and relies on the agency to meet the statutory schedule with no time left for OMB review. Such deadlines are already common. The RCRA amendments at issue in the above case contain 44 deadlines, 29 of which were to have been satisfied within twenty months of the 1986 case.\textsuperscript{35} The result of such limits can be hurried and poorly researched standards—a worse result than a statute with more permissive deadlines and OMB review. The final irony of such a congressional attempt to hurry up rule making and prevent OMB oversight may be successful court challenges on the ground that the rules are arbitrary and capricious.\textsuperscript{36}

\textit{B. The Regulation of Deregulated Markets}

The major deregulatory successes of recent years have occurred in industries that do not share the natural monopoly characteristics of traditional public utilities. The phasing-out of price, entry, and quality regulation in industries ranging from airlines to stock brokerage to telecommunications has markedly increased competition in the deregulated industries.\textsuperscript{37} While most of these deregulatory efforts were begun before Reagan took office and involved the active support of Congress, Reagan officials did promote these efforts and made marginal contributions to their implementation.\textsuperscript{38}

The deregulation of what Alfred Kahn calls “structurally competitive industries”\textsuperscript{39} was, however, the source of the second failure of deregulation. It is a failure that must be laid at the doors of both Congress and the President and that must be understood from the perspective of

\textsuperscript{34} \textit{Environmental Defense Fund}, 627 F. Supp. at 571. Cf. Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (noting that OMB involvement in agency rule making “presents difficult constitutional questions concerning the executive’s proper rule [sic] in administrative proceedings,” but finding “no occasion to reach the difficult constitutional questions presented by OMB’s participation”).

\textsuperscript{35} \textit{Environmental Defense Fund}, 627 F. Supp. at 571.


\textsuperscript{37} For a summary see A. Kahn, The Economics of Regulation: Principles and Institutions xviii-xxiii (1988).


\textsuperscript{39} A. Kahn, supra note 37, at xviii.
economic analysis. To an economist, even if some airlines and banks go out of business and some cities are served by fewer air carriers and financial institutions than before deregulation, these results do not imply policy failure. One must distinguish the inevitable costs of life in a competitive market, where firms are permitted to fail in the interest of maintaining efficiency, from genuine market imperfections that may become more important when firms are given more freedom of action. The response to such issues should not, however, be a return to the regulatory patterns of the past but rather a careful attempt to isolate the remaining sources of market failure and regulate them effectively.

Deregulation of one area of the economy may itself produce the need for more regulation someplace else. In moving toward a more competitive situation in one dimension, bottlenecks and market imperfections in other dimensions may become newly relevant. This lesson has been poorly incorporated into recent deregulatory efforts.

For example, airline deregulation with its accompanying increase in flights and congestion on some routes has placed additional strains on the system regulating airline safety and on the allocation of space in airports. In both safety and airport management there are strong economic arguments for a public sector role, and these arguments are stronger the more deregulation of routes and fares increases air travel. More resources for Federal Aviation Administration inspec-

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40 Kahn writes that deregulation led to entry that produced marked declines in market concentration; it also set off price wars, business failures and consolidations, and labor unrest, along with other rapid changes in accustomed ways of doing business. . . .

. . . [T]he fact that competitive markets—and especially markets suddenly opened to competition after decades of close regulation—tend to be more turbulent than regulated ones is in itself neither surprising nor dispositive of the comparative merits of the two institutions.

Id. at xviii. See also Breyer, Reforming Regulation, 59 Tul. L. Rev. 4, 15 (1984) (disputing that “the fault lies primarily in deregulation” for the bankruptcy of Braniff Airlines and the financial troubles at Continental and Eastern airlines); Rehn, Charter Curbs Seen Hurting Competition, Am. Banker, April 11, 1989, at 2 (discussing the views of the Comptroller of the Currency, Robert Clarke, that new banks must be permitted to enter the market for the sake of efficiency).

41 See Breyer, supra note 40, at 15 (“The simple fact is that a competitive world leaves firms to sink or swim on the basis of their service, prices, and efficiency”). See also Cutler, Regulatory Mismatch and Its Cure, 96 Harv. L. Rev. 545, 549 (1982) (reviewing S. Breyer, Regulation and Its Reform (1982)) (agreeing with Breyer’s view that isolated failures should not defeat deregulation).

42 See Breyer, Antitrust, Deregulation, and the Newly Liberated Marketplace, 75 Calif. L. Rev. 1005, 1015-16 (1987) (asserting that business travelers must realize that airports are more crowded because prices are lower and airlines are more efficient).

tors and air traffic controllers are required, and the construction of airport capacity is a public works issue of central importance, not just to the citizens of the city involved, but also to those affected by flights in and out.\footnote{44} 

Furthermore, deregulation of price and entry may require more diligent government efforts to enforce the antitrust laws and to protect consumers from misrepresentation and "violations of implicit contracts."\footnote{45} Kahn suggests that both types of government intervention may be required to deal with examples of monopoly pricing on thin routes and complaints of "lost baggage, misleading scheduling, last minute cancellations of flights with few bookings, involuntary bumping of passengers on overbooked flights, and severe delays."\footnote{46}

As a second example, consider the deregulation of financial institutions that has permitted much diversification by banks and other financial service companies.\footnote{47} In the banking and savings and loan industries the loosening of constraints on loan portfolios was not accompanied by any change in the deposit insurance system. Thus while bank and savings and loan managers have always had an incentive to finance risky loans because of the lack of monitoring by protected depositors,\footnote{48} the opportunities actually to finance risky ventures were limited before deregulation.\footnote{49} With more and riskier possibilities avail-

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L. Rev. 1285, 1304 (1983) ("The successful deregulation of airline rates does not lead to a sense that we should leave to the free market the question of whether DC-10 engines are attached in a proper way.").
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\footnote{44}{As Kahn notes:}

\begin{quote}
[T]he upsurge of traffic need not have entailed the great increase in congestion that we have actually experienced. Responsibility properly rests, instead, with major failures of government policy—inadequate staffing of the Federal Aviation Administration with safety inspectors and flight controllers; failure to expand airport and air corridor capacity sufficiently; inefficient pricing of airport takeoff and landing "slots" at congested airports.
\end{quote}

\footnote{45}{A. Kahn, supra note 37, at xxii.}

\footnote{46}{Id. at xxii n.14.}

\footnote{47}{Id.}


\footnote{49}{For recent discussions of this issue see R. Litan, What Should Banks Do? 109-11 (1987); Lovett, Moral Hazard, Bank Supervision and Risk-Based Capital Requirements, 49 Ohio St. L.J. 1365 (1989); Macey, The Political Science of Regulating Bank Risk, 49 Ohio St. L.J. 1277 (1989).}

\footnote{48}{See, e.g., Bennett, A Banking Puzzle: Mixing Freedom and Protection, N.Y. Times,
able after deregulation, the need for public monitoring increased. However, at least in the savings and loan industry, the opposite appears to have occurred. In keeping with the deregulatory spirit of the times, budgets and personnel did not keep pace with the growth in industry assets.\textsuperscript{50} As two policy analysts at the Federal Home Loan Bank have written:

A private insurer implements immediate changes when faced with an important structural event. First, it collects data to determine if the actuarial basis for its pricing system needs to be changed; then if it remains profitable, it offers insurance. Second, it examines the behavior of those insured to determine if insurance should be limited or denied. Third, the insured are segmented by risk characteristics, with the deductible and premium established for each segment.

The federal deposit insurers took none of these actions when faced with the deregulation of the institutions whose deposits they insured. In fact, in some important ways, the federal insurers took actions directly opposite to those that would have been taken by a private insurer. By not instituting practices more similar to those of private insurers, the guarantee aspect of federal deposit insurance became more important.\textsuperscript{51}

By the end of the Reagan administration even the economists on the President’s Council of Economic Advisors recognized the importance of this problem. Their last report included a section which called for reform of banking regulation and oversight in response to previous deregulation efforts. They supported reform of the deposit insurance system and a redefinition of “the appropriate sphere of competition for depository institutions.”\textsuperscript{52}

In short, deregulation in one area often requires new regulation and oversight in another areas. Failure to see this point indicates that one espouses a rigid ideology in which symbol is elevated above the substance of insuring a more efficiently operating economy.

C. Incentive-Based Systems

The third dimension along which the promise of regulatory reform went unfulfilled was in the redesign of programs that have clear eco-

\textsuperscript{50} J. Barth & M. Bradley, Office of Policy and Economic Research, Federal Home Loan Bank Board, Thrift Deregulation and Federal Deposit Insurance 46, 47 (Nov. 1988) [copy on file in the offices of The Journal of Law & Politics].
\textsuperscript{51} Id. at 45.
\textsuperscript{52} Economic Report of the President 204 (1989).
onomic justifications. Too often the use of incentive schemes which use prices or subsidies as part of a regulatory plan are viewed as deregulatory and therefore suspect to all good liberals.\textsuperscript{53} Thus one might have hoped in 1981 that an administration insulated from the appeal of such rhetoric might have moved in a balanced way to introduce incentive-based elements into the regulation of environmental and product quality.\textsuperscript{54} Yet this did not happen in more than a very limited way. One explanation may be that while the incentive systems favored by economists and policy analysts rely on market-like constructs, they at the same time require regulated firms to pay for the damage they do. Therefore, they may be opposed by the very firms which praise the virtues of the market in other contexts.

Such schemes, if properly designed, represent not deregulation at all, but regulatory redesign which can permit the more cost-effective achievement of statutory goals. The use of financial incentives, particularly in areas such as air and water pollution control, may mean that higher levels of cleanup are possible than with command and control systems with no increase in costs. Shifts to incentive-based schemes could produce genuine reform, not a sellout to the regulated firms. Efficient regulation implies a concern for both costs and benefits; it does not imply less regulation.\textsuperscript{55}

The use of more decentralized incentive mechanisms for regulation should be distinguished both from simple agency inaction and from a slavish devotion to business interests. Regulation in the Reagan administration appears to have suffered from the latter two failings, and policy makers did little to promote market-based reform.\textsuperscript{56} Some limited attempts were made at the Environmental Protection Agency\textsuperscript{57} and the Federal Communications Commission,\textsuperscript{58} but the mood was deregulatory not reformist.

\textsuperscript{54} Eads and Fix note that "economists hoped that Reagan would embrace the concept as the principal vehicle for the regulatory relief he was pledging." G. Eads & M. Fix, supra note 1, at 104-05.
\textsuperscript{56} G. Eads & M. Fix, supra note 1, at 163-90.
\textsuperscript{58} G. Eads & M. Fix, supra note 1, at 171-72. The FCC instituted lotteries to allocate low power television stations under conditions which permitted the winners to sell their station franchises to the high bidder after one year. J. Tunstell, supra note 10, at 253-54.
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D. Deregulation and the Business Community

The final failure of the Reagan administration is filled with irony. The administration sometimes failed even in its perception of what was best for the business community. Accepting the inevitability of regulation and wanting some clarity and certainty in their environment, business leaders occasionally pressed recalcitrant agencies to promulgate regulations.

In a federal system, when the central government is inactive, state and local governments may step in to fill the gaps. This can produce a hodgepodge of different rules that are costly for national firms selling and producing in many markets. Such regulations may be explicitly designed to favor locally-based firms over others. Therefore, in areas without absolute federal preemption, firms may prefer an active federal agency which establishes uniform rules. In spite of their states’-rights rhetoric, the Reagan administration did respond in a limited way to these concerns by proposing preemptive federal rules concerning hazardous waste transport and the generation of nuclear waste.

Most dramatically, shifts in products liability law and medical malpractice have made tort law into something close to an insurance system for those harmed by risky products and practices and, in the process, have increased the implicit regulatory role of the courts. This trend in decentralized, nonstatutory lawmaking even pushed the Reagan administration into proposing legislation that would preempt these state court initiatives, a strange reversal for an Administration supposedly committed to deregulation and decentralization.

A federal government that has hobbled itself by cutbacks in regulatory budgets and personnel is unable to respond expeditiously to

59 D. Vogel, supra note 8, at 266. See also Mashaw & Rose-Ackerman, Federalism and Regulation, in Reagan Regulatory Strategy, supra note 5, at 111, 127-36: Fix. Transferring Regulatory Authority to the States, in id. at 153-79.
60 Mashaw & Rose-Ackerman, supra note 59, at 112.
62 In April 1986, the Reagan administration sent three bills to the Senate proposing a $100,000 cap on punitive damage and pain and suffering awards. None of the bills was voted on by the full Senate. Administration Proposes Changes in Liability Law, 44 Cong. Q. Weekly Rep. 1002 (May 3, 1986).
63 From FY 1981 to FY 1985 the Federal Trade Commission lost 11% of its funding and over one-third of its permanent staff positions. R. Harris & S. Milks, supra note 1, at 124-25. The Consumer Product Safety Commission lost 16% of its funding and over 40% of its positions. Id. The budget of the Environmental Protection Agency fell from $1.347 million to $1.099 million between 1981 and 1983 and full-time employees fell by 1500. The research and development budget was cut in half. Id. at 255-56. The overall budget of the federal regulatory agencies, after falling in real terms in the early years of
business calls for clarity and uniformity in regulations. Furthermore, if the agency, when it does act, is so lacking in qualified personnel that its product is sloppy and poorly justified, it will face court challenges that will further delay the promulgation of rules and take resources away from other efforts. It seems simply a mistake to suppose that business wants regulatory agencies to run poorly. They might wish the laws off the books or at least amended, but given the laws' reality, I would suppose that firms, in general, favor competent administration.\textsuperscript{64}

Nevertheless, while the business community as a whole may prefer competence and clarity, an individual firm or industry may in a particular instance benefit from the inattention and incompetence of a regulatory agency. At least one case has gone to court in which a firm used the under-staffing of an agency as an argument for delaying compliance with some public rule or order. In \textit{McLaughlin v. Union Oil Company of California}, Judge Posner refused to allow the absence of a quorum on the Occupational Safety and Health Review Commission to generate a remand to that body now that an appointment had been made.\textsuperscript{65} The Commission had only one member out of three at the time of the original appeal.\textsuperscript{66} Judge Posner was unwilling to allow the administration's slowness in appointing commissioners to permit a firm to reap a benefit,\textsuperscript{67} and the courts will likely continue to be unsympathetic to such

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\textsuperscript{64} See, e.g., D. Vogel, supra note 8, at 266-67 (quoting a Washington attorney for the Chemical Manufacturers Association as stating, "The chemical industry certainly doesn't want to see EPA dismembered," and quoting a business lobbyist as saying, "We're in favor of intelligent implementation of the laws, but an agency in disarray can't do that."). See also R. Harris & S. Milakis, supra note 1, at 260-62 (documenting business criticisms of the EPA under Anne Burford):

As far as the NAM [National Association of Manufacturers] was concerned, the lack of any clear intellectual framework for deregulation or sense of mission at the EPA cast Reagan, Watt, and Burford as despoilers of the environment catering to the whims of businesses at the expense of public health and environmental quality. This displeased business interests as much if not more than it displeased the Sierra Club.

Id. at 262.

\textsuperscript{65} 869 F.2d 1039 (7th Cir. 1989). The lone Commissioner, in declining to review the Administrative Law Judge's findings, stated: "We have lacked a full Commission since September 1986, over 17 months; we have lacked a quorum to take official action since April 27, 1987, over ten months. . . . I am no longer optimistic that the Commission vacancies will be filled in the foreseeable future." Id. at 1041. By the time the case reached the Court of Appeals a second Commissioner had been appointed, but the appointment was during a recess, and thus subject to being overridden by the new President. The Commission had a "terrible backlog", estimated at two years. Id. at 1043.

\textsuperscript{66} Id. at 1041.

\textsuperscript{67} Judge Posner wrote that:
excuses, giving firms yet another reason not to support ineffective agencies.

Business may, of course, also benefit from efforts by regulatory agencies to repeal or revise existing rules. However, if an agency acts in a rushed and careless manner, their efforts may not be upheld by the courts. The most important example of this was the attempt early in the Reagan administration to repeal the passive restraint standard for automobiles without a careful analysis of alternatives. This effort was turned back by the Supreme Court with even the most conservative members of the Court supporting the basic requirement that obviously relevant options be considered. Countering this decision, however, were two other Supreme Court cases giving agencies discretion to overrule a previous administration's interpretation of a statute and upholding an agency's power to determine its own enforcement agenda. Nevertheless, the lesson of these cases, taken together, seems to be that regulatory reform efforts within agencies can only succeed if officials articulate a principled justification based on an understanding of the facts. Simple inattention can reduce the pages in the Federal Register, but genuine reform requires expertise and commitment.

It might be a scandal for the President or the Senate to prevent an important federal commission from operating by failing to fill vacancies in it (we are not told who was responsible for these particular vacancies), but it would not follow that decisions by the Commission's staff were unappealable.

Id. at 1042.


70 "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 42. In a recent article Judge Wald argues that judicial review can

dull somewhat the meat axe, 'damn the torpedoes, full speed ahead,' attitude that sometimes overtakes zealous political appointees advancing a political or ideological agenda. . . . [I]t's value may be greater . . . in times when the Executive is embarked on radical change. It is in such times that the temptation to cut corners, to mow down the intransigent opposition is greatest. Wald, The Realpolitik of Judicial Review in a Deregulation Era, 5 J. Pol'y Analysis & Mgmt. 535, 543 (1986).

71 The Reagan administration made much of the reduction in Federal Register pages during its tenure. Total pages peaked at 87,012 in 1980 and reached a low of 47,418 in 1986. The total rose to 49,654 in 1987. Final rule documents fell from 7745 in 1980 to 4381 in 1987. However, while in 1982 five percent of final rule documents were eliminations of existing requirements, by 1987 only two percent fell in that category. The percent representing revisions rose from 24% to 27%. The Federal Communications Commission, an agency in the forefront of the deregulation movement, increased the number of final rules from 393 to 444 between 1982 and 1987.
II. POLICY CHOICES

Regulation and deregulation are difficult political issues. In the abstract they have little salience beyond the appeal of vague slogans such as promises to “get the government off the backs of the people” or, conversely, “to preserve health and improve the quality of life of every American.” Slogans, however, are largely irrelevant as policy tools. Most economic sectors which are candidates for regulation or deregulation not only are technically and economically complex but are politically complex as well. Inter- and intraindustry effects are pervasive, and most regulatory initiatives affect some geographical regions and voting blocs differently from others. The political alliances are often strange ones, and the political fallout can be unexpected and severe in some cases and disappointingly lackluster in others. But despite these liabilities, the current system has such glaring flaws that it must be on the agenda of anyone concerned with effective government. While one of the points of my overview is the importance of seeing each regulatory issue as uniquely dependent on the particulars of the industries involved, nevertheless, I can suggest some guidelines for the new administration, beginning with the obvious.

*Do not leave key posts vacant. When someone is appointed to a long vacant position, the backlog of trivial but pressing matters is likely to be so large that the individual will have no time for thought. Unfilled positions create not deregulation but disorganization.

*Appoint people on the basis of knowledge of the area and competence, not political purity. The Gorsuch/Burford/Lavelle incident at the EPA should be taken as a warning. Many competent people in

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Sometimes one must regulate to deregulate. In contrast, large declines were tabulated for the Department of the Interior and the Environmental Protection Agency. Executive Order No. 12291 Annual Report for 1987, reprinted in Regulatory Program, supra note 24, app. IV at 558-59.

72 For example, consider the alliance between Eastern coal interests and environmentalists in seeking air pollution policies that would disadvantage Western low sulphur coal. B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981). Environmentalists also sided with representatives from old industrial states to support policies prohibiting the environmental deterioration of areas that surpassed federal air pollution standards. See R. Crandall, Controlling Industrial Pollution: The Economics and Politics of Clean Air (1983).

73 Anne Gorsuch (later Anne McGill Burford), Reagan’s first Administrator of the EPA, and Rita Lavelle, one of her deputies, were in charge of the toxic waste program and allegedly stalled a California toxic waste clean-up for political reasons. The EPA scandal eventually resulted in the resignation or firing of 22 persons after investigations of alleged mismanagement and deal-making with the industry. Lavelle was fired in early February 1983 for lying to Congress, and one month later Gorsuch resigned. Lavelle subsequently spent four months in prison. See Russakoff, Party Leaders Blame Reagan
the policy analysis community have not been Republican activists, but are, nevertheless, committed to the reform of regulatory programs to improve their efficiency. The present administration should recall that the deregulation of the airlines was initiated by people in the Civil Aeronautics Board and Congress who were economically-oriented Democrats. If it refuses to consider such people, the administration will have drastically shrunk the pool of available talent in a world where government salaries cannot compete with those in the private sector.

*In the area of social regulation, where strong economic efficiency arguments for regulation exist and where public support seems strong, consider reforms that make more use of economic incentives to reduce costs and add flexibility. Such measures have been prominent in the reform proposals of policy analysts for decades, and several limited applications have been tried. Many of these proposals are close to being operational. The Bush administration, in fact, has recommended a limited market-based scheme for the control of sulfur dioxide air pollution. The Supreme Court has opened the way for the introduction of such incentive-based plans by upholding the constitutionality of user fees promulgated by the Department of Transportation to cover the costs of administering federal pipeline safety standards.

*In the field of economic regulation of prices, entry and service, the “easy” victories have been won and further progress requires one to understand how too little and too much regulation can coexist in a single industry. The Reagan strategy of picking out a single industry, e.g. automobiles, for special treatment under social regulatory programs in order to improve its economic health is unlikely to succeed. The remaining regulated industries are either not primarily regulated by the federal government, e.g. electric power and professionals such as medical doctors or pharmacists, or are under the jurisdiction of independent commissions, e.g. communications, and are subject to presidential


influence mainly through the appointment of commissioners. 78 Furthermore, natural monopoly arguments apply to many of these industries, and sorting out efficient from inefficient regulation will not be a straightforward exercise. 79 My hunch is that, at the federal level, most real progress can be made in the area of social, as opposed to economic, regulation.

* Proponents of regulatory reform should not ignore the fact that a high proportion of the regulations issued by government are not part of regulatory programs at all but are promulgated as part of the administration of spending programs of various kinds, from agricultural subsidies to social security disability payments to defense contracting. 80 Many of these rules may be ripe for reform as well, but the issues may be quite different, involving the accountability of private individuals and organizations who receive government subsidies or obtain public contracts. 81 General proposals to reform the regulatory process should take account of the special, but pervasive, impact of regulations that accompany spending programs.

* A major failure of existing programs has been the lack of good follow-up data indicating the impact of regulations. 82 In addition, more research is needed to advance both our understanding of the phenom-

78 See generally Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169 (1978) (assessing the role played by both the Executive and Congress in the appointment process). See also Strauss & Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Admin. L. Rev. 181, 202-03 (1986) (noting that Reagan requested and was refused voluntary compliance with Executive Orders by most of his independent agency appointees, and arguing that Reagan likely had the power to force compliance, but simply did not exercise it).

79 See A. Kahn, supra note 3, at xxiii-xxxvii for a discussion of current issues in public utility regulation.

80 See Office of Information and Regulatory Affairs, Additional Procedures Concerning OIRA Review Under Executive Orders Nos. 12291 and 12498 (Revised), reprinted in Regulatory Program, supra note 24, app. III at 529-43. The agency that submitted the most rules to OMB for review during 1987 was the Department of Agriculture (420 rules, of which 19 were major). Next in line was Health and Human Services (314 rules, 3 major). Third was the Environmental Protection Agency (205 rules, 19 major).

81 The special problems that can arise from deregulating and privatizing public subsidy programs are illustrated by current revelations involving the Department of Housing and Urban Development and by concern about unsupervised contracting-out of work at the National Aeronautics and Space Administration. See Gerth, Loss of $4 Billion Is Found in Audit of Mortgage Fund, N.Y. Times, Sept. 28, 1989, at A1, col. 6; Gerth, NASA's Reliance on Contractors Is Seen as Eroding Its Capabilities, N.Y. Times, Sept. 28, 1989, at A1, col. 4.

ena being regulated and the options for control. All of these possibilities for providing research and information have strong public-good features and are suitable for public support. Such work might be financed by fees imposed on regulated entities rather than by general taxes.

* The informal rule making process has proved a less flexible and effective tool than one might have predicted from an examination of the Administrative Procedures Act. Court decisions have added to the procedural and substantive requirements facing agencies, and statutes have imposed requirements on agencies that go beyond the APA. Since most important rules are challenged in court, the time elapsed between when an idea is put on the regulatory agenda and when the final rule is enforced is often several years. Executive oversight has added further delays. The consequences are several. Since each rule making is costly and time consuming, very few can be completed even by a conscientious agency. The same factors mean that once a rule is put into effect, it may be obsolete because new information has come to light. However, the last thing anyone in the agency wants to do is reopen the proceeding. The burdens of rule making have led agencies to try other alternatives: adjudications, interpretive rules, and other non-APA procedures such as product recalls that obviate the need for rules. The result can be expected to be a less transparent and coher-

83 See Crandall & Portney, supra note 12, at 58, 68-69, 78, 80 (citing the EPA for failures along both dimensions). The research budget of the EPA fell 38% between 1981 and 1984, and funding of long-term research was even more severely cut. Id. at 68-69.


86 See, e.g., Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (final resolution of challenge brought by environmental and industry groups to emission controls promulgated by EPA two years earlier). See also Final OSHA Rule on Occupational Exposure to Benzene, 52 Fed. Reg. 34,460 (1987) (codified at 29 C.F.R. § 1910.1028) (standard for benzene exposure promulgated seven years after the Supreme Court invalidated an earlier standard in Industrial Union Dep't).

87 See Mashaw & Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257 (1987); Scanlon & Rogowsky, Back-Door Rulemaking: A View from the CPSC, 8 Reg. 27 (1984). The courts appear to be unsympathetic to the use of interpretive rules as a way around the difficulties of notice-and-comment rule
ent pattern of regulations. Thus serious consideration should be given to reform of the APA and of the related procedural requirements in substantive statutes. The link between substance and procedure should be articulated and should guide the reform of process.

* The aim of executive branch oversight which seeks to improve the rationality and consistency of regulatory initiatives appears a good one, but has been compromised by certain features of the current program under Executive Orders Nos. 12,291 and 12,498. The Administration should consider removing this function from direct White House control and making all regulatory analyses public. The reviewing office should also either obtain more staff or reduce its mandate to assure expedited treatment of proposed rules.

* The reader familiar with debates over regulatory reform will notice that I have not espoused a "regulatory budget" or any of its variants such as a legislative regulatory calendar. These recommendations seek to impose budget-like constraints on agencies which make few demands on the Treasury but which, nevertheless, may impose large costs on the private sector. My basic lack of sympathy for these proposals stems from the belief that they fail to incorporate benefits and focus undue attention on the costs of regulation. While some regulatory statutes, agency rules, and judicial decisions have certainly gone too far in overemphasizing benefits and ignoring costs, that is no excuse for going in the opposite direction. Both the costs and benefits of regulations are largely outside the federal budget and are therefore unconstrained by the check-writing ability of the Treasury. A regulatory budget would simply invite creative accounting with very few means or incentives for the Treasury to monitor such behavior. Far better, it

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88 Robert Litan and William Nordhaus provide a cogent critique of regulatory budget proposals. R. Litan & W. Nordhaus, Reforming Federal Regulation 133-58 (1983). They go on to propose a legislated regulatory calendar that would require executive submission and legislative assent for major regulatory proposals. Even if their proposal could be designed to comply with the prohibition on legislative vetoes of Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), it has some of the same failings of such vetoes. It does not give enough weight to the benefits of delegation to agencies in complicated regulatory areas, and it would exacerbate some of the currently perceived difficulties with rule making.

seems to me, would be a system which encourages agency-specific attempts at cost-benefit analysis—attempts which can be frank about information imperfections and unquantifiable benefits and costs. These agency-based efforts could then be combined with executive branch oversight which highlights areas of interagency overlap and inconsistency.