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Murray L. Weidenbaum
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Progress in Federal Regulatory Policy, 1980-2000

Murray Weidenbaum

A sea change has occurred in public attitudes toward government regulation in the two decades since 1980. Like the state, the federal regulatory apparatus has not withered away. In some important dimensions, regulation has expanded substantially. Nevertheless, a fundamental shift has occurred in the public policy process.

"Command and control" is no longer a phrase used in polite company. Its place has been taken by almost obligatory references to "the magic of the marketplace." The proponents of regulation now feel obliged to talk about costs as well as benefits, private as well as public sector alternatives, incentives and disincentives, and thus to consider the disadvantages as well as the advantages of this form of government intervention in the larger society.

Despite significant achievements, the regulatory reform effort of the past two decades seems to have run its course. A new strategy is needed, one that focuses greater attention on reducing the shortcomings of the basic regulatory statutes, both to eliminate the barriers to agencies doing regulatory analysis as well as to reduce the discretion they often take in

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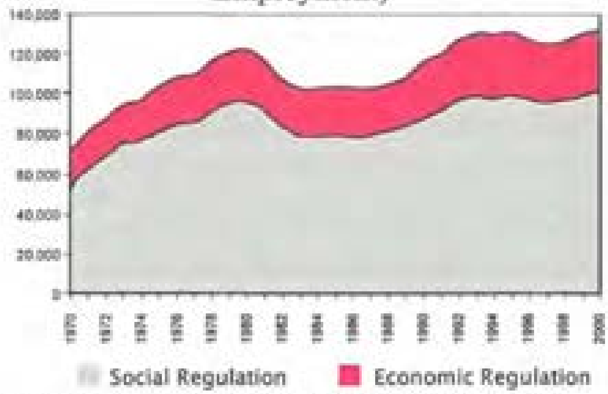
Figure 1

Staffing of Federal Regulatory Activity, 1970-2000

(Fiscal Years, Full-time Equivalent Employment)



Source: Center for the Study of American Business, Washington University in St. Louis.

going beyond the role envisioned by Congress. Each congressional committee ought to be required to present estimates of the likely benefits and costs of regulatory actions necessary to implement proposed legislation. To improve the credibility of these estimates, Congress should establish an independent Congressional Office of Regulatory Analysis staffed with experienced apolitical analysts willing to let the chips fall where they may.

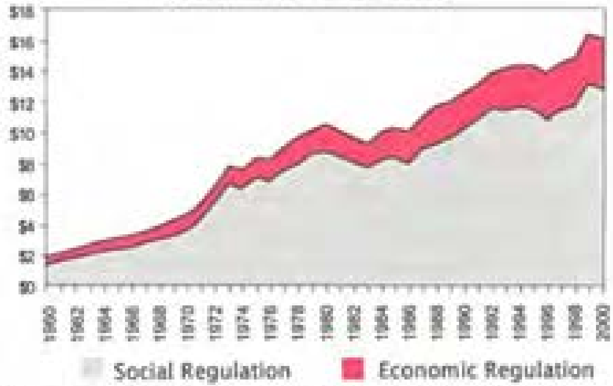
1980: A Watershed Year

In many regards, 1980 was a turning point in government regulation. That year the regulatory workforce of the federal government reached a new high. The total of 121,791 employees represented a steep average annual rise of 5.8 percent from 1970 (see Figure 1). The next several years witnessed the sharpest decline in the employment of the federal regulatory agencies, at least in modern times. (Figure 2

Figure 2

Spending on Federal Regulatory Activity, 1960-2000

(Fiscal Years, in Billions of Constant 1992 Dollars)



Source: Center for the Study of American Business, Washington University in St. Louis.

shows a similar trend in another widely used measure of regulatory activity, federal outlays for regulation.)

Substantive policy changes, in the main, tended to follow a comparable trajectory. In the 1970s, Congress enacted a plethora of new or expanded regulatory programs covering consumer product safety, antitrust, toxic substances, overseas bribery, energy, strip mining, minimum wages, debt collection, age discrimination, water pollution, noise pollution, speed limits, campaign finance, product warranties, employee pensions, drinking water, hazardous materials, air pollution, job safety, and credit cards.

In the latter part of the decade, the stirrings of regulatory reform began to be visible. Congress passed a landmark airline deregulation bill in 1978. In the area of procedure, President Jimmy Carter expanded the process of reviewing proposed regulations launched earlier in the decade by President Gerald Ford.

The year 1980 was a period of transition. On the positive side, Congress eliminated much of the detailed apparatus of railroad and trucking regulation. In addition, the Regulatory Flexibility Act and the Paperwork Reduction Act were enacted.

Because it enjoys substantial bipartisan support, centralized regulatory review can be expected to stay regardless of the outcome of the elections in 2000.

The regulatory flexibility statute was perfunctory. Although it nominally required rulemaking agencies to write regulations in a manner that would minimize the burdens on small business, actual compliance has been minimal. The paperwork law, which took effect in 1981, turned out to be a sleeper. It established the Office of Information and Regulatory Affairs (OIRA), the part of the Office of Management and Budget that carries out the centralized regulatory reviews mandated by President Reagan and continued by his successors.[1] Because it enjoys substantial bipartisan support, centralized regulatory review can be expected to stay regardless of the outcome of the elections in 2000.

Not all change on the regulatory front in 1980 represented progress. That year, Congress also created Superfund, a monument to the encouragement of costly litigation as a deterrent to environmental cleanup. The partial banking deregulation law enacted in 1980 produced a mixed bag of results. Phasing out interest rate ceilings was a direct move to a more competitive financial system. However, the change

also contributed to the subsequent financial collapse of the savings and loan associations (S&Ls).

In late 1980, presidential candidate Ronald Reagan promised to rein in the expansion of regulation, especially by requiring detailed cost-benefit analyses for all new regulations.[2]

Expectations and Reality

At the beginning of the 1980s, proponents of regulatory reform were enthusiastic. After years of massive expansions of the federal regulatory apparatus, at long last the tide would turn. Events in early 1981 surely seemed to confirm that expectation. Newly-elected President Reagan quickly eliminated energy price and allocation controls and the vestige of "voluntary" wage and price controls of the past. In the February 18, 1981 message outlining his supply-side economic program, President Reagan listed regulatory reform as one of the four key components. Fulfilling his campaign pledge, he issued a key executive order requiring federal agencies to demonstrate that the benefits of proposed new regulations exceeded their costs. President Reagan also charged OIRA with the responsibility to enforce this requirement. At the same time, he established a high-level Regulatory Relief Task Force chaired by the vice president to oversee the entire regulatory reform effort.

In many ways, results were very heartening. As noted earlier, the size of the federal regulatory establishment was curtailed for several years. Further, the regulatory review process instituted by President Reagan had a substantial impact. Although only a small proportion of the thousands of regulations reviewed by OMB was returned or withdrawn, the threat of such severe action often motivated substantial changes, including deferring some regulatory initiatives.

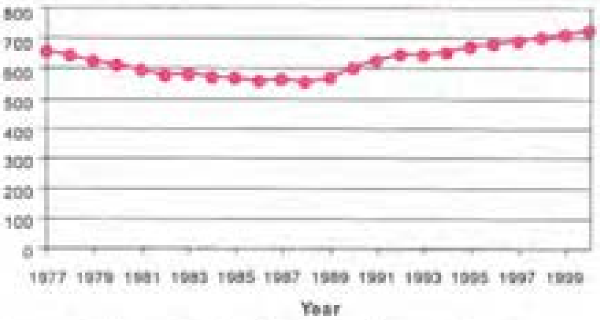
Several deregulatory statutes were enacted, such as the Bus Regulatory Reform Act of 1982 and the Shipping Act of 1984. The most significant accomplishment was so undramatic that it went unnoticed: during the Reagan presidency—and unlike other administrations in recent decades—no new regulatory agency was established nor was any major regulatory program substantially expanded. It was reminiscent of the Sherlock Holmes tale where the most significant clue was not action at all, but the fact that the dog did not bark.

The most significant accomplishment of the 1980s was so undramatic that it went unnoticed: during the Reagan presidency no new regulatory agency was established nor was any major regulatory program substantially expanded.

The best available evidence on overall regulatory cost is illustrated in Figure 3, indicating that the aggregate burden of regulation declined substantially in the late 1970s and early 1980s. This reduction is attributable to significant economic deregulation of airlines, surface transportation, telecommunications, and financial services. In the mid-1980s, this wave of economic deregulation ended and the pace of environmental regulation intensified. Aggregate regulatory costs resumed their upward climb.

Figure 3

Annualized Regulatory Costs, 1977-2000
(1995 dollars, in billions)



Source: Thomas D. Hopkins, *Regulatory Costs in Profile* (St. Louis: Washington University, Center for the Study of American Business, August 1996).

In the early 1980s, forecasts of regulatory doom and gloom were prevalent. The critics thought that the green eye-shade people in the Reagan administration were so determined to grant business "regulatory relief" that they were oblivious to the great damage that would be done to the environment, workers' health, and other vital social goals.

These dire forecasts did not come to pass. By every important standard, the environment is cleaner, the workplace is safer, and substantial progress has been made toward achieving the other goals at which social regulations are aimed. The major measures of workplace accidents maintained by the Bureau of Labor Statistics are down significantly from 1979. Almost all of the pollutants for which the Environmental Protection Agency has set national standards show substantial declines in emissions from 1982. More of the nation's rivers and lakes are now "fishable and swimmable." Most fundamentally, the average life span of Americans continues to lengthen.

Moreover, the economic deregulation that started in the late 1970s and accelerated in the 1980s has injected competition into the market economy with strongly positive results. Costs and prices in the deregulated industries have come down while the pace of innovation has accelerated. The industries that have been or are being gradually deregulated include airlines, railroads, trucking, financial services, telecommunications, and utilities. These results have had a profound and pervasive influence in bringing down inflation, extending economic growth, and raising living standards.[3]

However, progress on regulatory reform has not followed a straight line. The restraint on enacting new or expanded regulatory legislation weakened in the mid-1980s. In 1986, Congress passed a statute requiring removal of materials containing asbestos from school buildings. (Horror stories quickly accumulated about the illnesses caused by the resultant movement into the air of hitherto dormant asbestos products.) This was quickly followed by expansions of the statutes covering hazardous waste sites, age discrimination, and single employer pension plans.

In the late 1980s, Congress passed a number of new regulatory statutes, among them laws requiring advance notice of layoffs of 50 or more workers, a reauthorization of the nation's pesticide law, and massive new restrictions on S&Ls. Legislation in the early 1990s included a huge expansion of EPA's authority to regulate air pollution, a new and draconian law governing oil tanker design, a new civil rights law, the Americans with Disabilities Act, and expansion of the enforcement powers of the SEC. The Family and Medical Leave Act of 1993 gave employees a legal entitlement to take extended leave while retaining job reinstatement rights. In few cases were the benefits and costs of these new laws independently estimated prior to enactment. No systematic evaluation has been conducted since.

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A variety of laws passed in the middle and late 1990s continued the renewed upward trend in regulatory enactments. Examples include the Lobbying Disclosure Act of 1995, the Food Quality Protection Act of 1996, the Health Insurance Portability and Accountability Act of 1996, and the National Securities Markets Improvement Act of 1996.[4] The federal regulatory agencies, especially EPA, responded with alacrity in generating another burst of rulemaking initiatives. These ranged from a new "environmental justice" program to toughened air quality standards (the former lacked specific statutory justification while the latter was devoid of adequate scientific support).

Simultaneously, Congress has taken a few important steps toward reducing the burdens of government regulation. The Interstate Banking and Branching Efficiency Act of 1994 permitted banks to set up more interstate branches. In 1999, Congress voted to eliminate the wall separating banks and other financial institutions that had been set up by the Glass-Steagall Act of the 1930s. The Telecommunications Act of 1996 was intended to open up competition for local telephone service. However, progress has been delayed, mainly by the attempt of the Federal Communications Commission to closely regulate the process of deregulation. Also in 1996, the Interstate Commerce Commission was abolished, but its residual functions were transferred to the new Surface Transportation Board.

The regulatory reform effort initiated in the late 1970s and early 1980s has run out of steam. What is needed is not a renewal of the earlier effort, but a shift in the basic thrust of regulatory reform.

In 1993, the Clinton Administration rescinded the existing executive orders on regulatory review and replaced them with a new one that reaffirmed OMB (via OIRA) as the central agency charged with reviewing proposed regulations. On the surface, the new executive order requires the regulatory agencies to do many sensible things in the process of drafting rules, including considering benefits and costs and identifying market-based alternatives for meeting governmental objectives.

In reviewing the actions under the Clinton executive order, however, the General Accounting Office reported discouraging results in terms of substantive compliance. Experienced reviewers of federal regulations note that the agencies are not likely to comply seriously on a voluntary basis and will only respond to stringent judicial oversight and informed public pressure.[5] As an indicator of the shortcomings

of the current regulatory review process, as of October 1998 the Competitive Enterprise Institute identified over 100 new rules, each of which was estimated by federal agencies to cost over $100 million a year. That is a costly pipeline of future regulation.[6]

Meanwhile, efforts to get Congress to pass a generic or comprehensive regulatory reform law continue. Under the Unfunded Mandates Reform Act of 1995, federal agencies are required to assess the benefits and costs of new regulations that impact significantly on state and local governments. Although the new law did not outlaw these mandates, it may have slowed down the creation of new ones. The same year, however, the proposed Comprehensive Regulatory Reform Act, which had passed the House of Representatives, failed in the Senate by one vote. The next year Congress did enact the Small Business Regulatory Enforcement Fairness Act, which established a procedure for congressional review of major rules. So far, not a single regulation has been overturned using these new procedures.

The Need for Further Regulatory Reform

The regulatory reform effort initiated in the late 1970s and early 1980s has run out of steam. What is needed is not a renewal of the earlier effort, but a shift in the basic thrust of regulatory reform. Virtually all proposals to date have focused on improving the way in which government agencies write regulations to carry out laws already enacted. Although this activity is useful, it ignores the compelling fact that the key decisions occur earlier in the process—when Congress passes an Occupational Safety and Health Act or an amendment to the

Food, Drug, and Cosmetics Act or any other important regulatory law, usually with hundreds of pages of detailed specifications.[7]

Each congressional committee should be required, when drafting a regulatory statute, to present estimates of the expected benefits and costs of the regulatory program in the report accompanying the legislation. The committee should affirm that these benefits justify the program in light of its estimated costs. Such a statement, and the benefit-cost analysis supporting it, should be required before a legislative proposal can be reported to the full House or Senate.

In contrast, the way many regulatory statutes are now written both requires the agencies to ignore economic effects and precludes them from even considering the most cost-effective approaches. Key provisions of the Occupational Safety and Health Act, the Food, Drug, and Cosmetics Act, the Clean Air Act, the Safe Drinking Water Act, and the Superfund Act have been interpreted by the courts to prohibit the regulators from taking account of economic impacts when setting standards. Despite well-intended presidential directives, it is impossible for regulators to strike any sensible balance between the costs they impose and the benefits they generate when the basic regulatory laws prohibit costs from being considered at all.

Congress should eliminate provisions in existing regulatory statutes that prevent or limit regulatory agencies from considering costs or comparing expected benefits with costs when designing and promulgating regulations. Regulations that seek to reduce health or safety risks should be based on scientific risk-assessment and should address risks that are real and significant rather than hypothetical or remote. Confidence in benefit-cost analysis of regulations would be enhanced by use of a common set of assumptions and the requirement for peer review of the analyses. Moreover, major benefit-cost analyses should undergo retrospective reviews and updates.[8]

Congress should eliminate provisions in existing regulatory statutes that prevent or limit regulatory agencies from considering costs or comparing expected benefits with costs when designing and promulgating regulations.

More fundamentally, all those involved in the government's decision-making process should realize that identifying a worthy objective does not necessarily create a need for regulation. Government is already a very substantial presence in the American economy. Today's large federal establishment has great difficulty carrying out the numerous responsibilities already assigned to it. In contrast, the ability of competitive markets to protect the public is very powerful and not fully appreciated. The burden should be on those who would replace the market with additional regulation to demonstrate with solid information and careful analysis that the public would benefit from a further extension of government into the private sector.

Small businesses are especially vulnerable to arbitrary actions by regulators. The Wisconsin toy producer who went out of business following an erroneous report by the Consumer Product Safety Commission is a classic example of a little firm unable to cope with large bureaucracy. The agency refused to correct its error in a timely fashion even after acknowledging the mistake—and the company lost much of its sales as a result.

A key barrier to reforming regulation is the common and erroneous perception that the costs of government regulation are of little concern to citizens because they are simply paid by business.

Often officials lack the authority to correct an error quickly, even when they want to do so. For example, the EPA admitted it erred in listing the household antibiotic Bacitracin as an "extremely hazardous" substance. However, the agency was precluded from deleting that erroneous listing without going through the same burdensome process that it does in newly listing a very hazardous product.[9]

A key barrier to reforming regulation is the common and erroneous perception that the costs of government regulation are of little concern to citizens because they are simply paid by business. That is not so. By and large, those costs are ultimately borne by the workers and consumers who make and purchase products and services produced under regulation. Moreover, much of the rule making extends to all employers, be they profit or nonprofit, in the public sector or in the private sector.

The American people deserve better results from the substantial resources devoted to regulation. Too many of these

regulations have been grossly inefficient, causing us to waste scarce resources in the pursuit of trivial or imaginary improvements in human health protection and environmental quality. Gains in these areas may be possible, but we will obtain them only by chance if we continue present practices. If we are truly serious about achieving cleaner air and water, safer workplaces and residences, and better living standards, especially for the poor, then a vibrant and relentless program of independent regulatory analysis and oversight will be necessary along with institutional changes that discourage old, discredited ways of legislating and regulating. The reforms proposed in this report are not merely matters of procedure and economic accounting. By enhancing the accountability of our legislators and regulators, they would improve the lives of the American people.

Notes

1. Murray Weidenbaum, "Regulatory Process Reform," *Regulation*, Winter 1997, pp. 20-26.
2. Statement by Governor Ronald Reagan, *Regulatory Reform*, Youngstown, Ohio, October 8, 1980, p. 4.
3. For details, see *Regulatory Reform in the United States* (Paris: Organization for Economic Cooperation and Development, 1999); Murray Weidenbaum, *Business and Government in the Global Marketplace*, Sixth Edition (Upper Saddle River, N.J.: Prentice-Hall, 1999), pp. 143-163.
4. *Ibid*., pp. 42-45.
5. Richard B. Belzer, *Independent Regulatory Oversight: A New Path to Regulatory Reform* (St. Louis: Washington University, Center for the Study of American Business, February 1999).
6. Clyde Wayne Crews, Jr., *Ten Thousand Commandments* (Washington, D.C.: Competitive Enterprise Institute, March 1999), p. 19.
7. *Modernizing Government Regulation* (New York: Committee for Economic Development, 1998).
8. See Roger G. Noll, *The Economics and Politics of the Slowdown in Regulatory Reform* (Washington, D.C.: AEI Press, 1999), p. 35.
9. *Modernizing Government Regulation*, p. 26.

Murray Weidenbaum has been an economist in three worlds—business, government, and academia. He holds the Mallinckrodt Distinguished University Professorship at Washington University in St. Louis, where he also serves as chairman of the University's Center for the Study of American Business.

Weidenbaum served as Assistant Secretary of the Treasury for Economic Policy in the Nixon administation and was President Reagan's first chairman of the Council of Economic Advisers. In the latter capacity, he helped formulate the economic policy of the Reagan administration and was a key spokesman for the administration on economic and financial issues.

He is a member of advisory boards of the Congressional Joint Tax Committee, the Center for Strategic Tax Reform, the American Council for Capital Formation, the American Enterprise Institute, the Committee for Economic Development, and the Foreign Policy Research Institute.

Weidenbaum is known for his research on economic policy, taxes, government spending, and regulation. He is the author of eight books, the latest being the sixth edition of *Business and Government in the Global Marketplace*. His previous book, *The Bamboo Network*, was a finalist in the 1996 competition for global business book of the year.

In June 1999 he was elected chairman of the new Congressional Trade Deficit Review Commission.