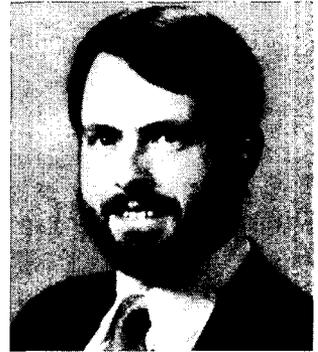


**IDEAS
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The Clinton Regulatory Miasma



It has been a sad spectacle: President Bill Clinton, desperate to salvage his scandal-laced legacy, crisscrossing the nation proposing new spending programs and regulatory initiatives with wild abandon. He seems determined to jettison perhaps his one good bequest to the nation: a less loony left-wing Democratic Party.

President Clinton's moderation was always heavier on rhetoric than practice. His original budget included the usual pork-barrel spending as well as tax hikes, and he proposed to turn control of the health-care system over to Uncle Sam.

Nevertheless, his early political defeats helped moderate his worst excesses, leaving left-wing social engineers apoplectic. They need not have worried. Bill Clinton has sought to bring back the liberal good ol' days of regulation.

The Clinton administration has some 4,538 regulations in process, 137 of which are termed "economically significant" and will cost at least \$100 million each. The number of these big rules is up nearly a fifth from just a year ago.

The biggest rule maker is the Department of Transportation, followed by the Environmental Protection Agency; each accounts for more than one-tenth of the total. The Departments of Treasury, Commerce, Agriculture, and the Interior follow.

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Last year the *Federal Register*, Uncle Sam's compendium of regulations, ran 71,161 pages, a 4 percent increase over 1998. That is the highest since 1980, when it peaked at 73,258 pages during the glory times of the Carter presidency.

The federal government spent about \$1.7 trillion last year. Despite the pervasive waste, at least there was theoretical accountability since Congress voted the money. Not so regulation, which Thomas Hopkins of the Rochester Institute of Technology figures cost Americans about \$758 billion, almost 45 percent of official federal budget outlays.

Indeed, Clyde Wayne Crews of the Competitive Enterprise Institute points out that Americans spend almost as much on regulation as on the personal income tax. Rule making runs about four times as much as corporate income tax collections, and more than total corporate profits.

All told, every American family is paying about \$7,400 a year for the privilege of being watched, controlled, prodded, nannied, and otherwise governed. That is essentially a separate income tax of almost 20 percent—on top of all the other government levies, which currently constitute the highest peacetime burden in U.S. history.

In effect, we are back to taxation without representation. As Crews puts it, "regulatory initiatives allow government to direct private-sector resources to a significant degree without much public fuss." Politicians pass general laws expressing unobjectionable sentiments (cleaner air and water). Unknown staffers

buried within the bowels of the bureaucracy become the real legislators by implementing the law. All told, more than 50 agencies employ nearly 130,000 people and spend \$19 billion to boss the rest of us around.

There was a time when some people thought the answer was to elect the right representatives. Give the Republicans control of Congress, it was said, and they will rein in the regulators. Now we know better.

Four years ago Congress enacted the Congressional Review Act (CRA), which requires all agencies to submit their rules to Congress. Lawmakers then have 60 days to use an expedited legislative process to block the proposals. Not once has Congress used the act, despite the administration's having implemented more than 14,167 new regulations since it was approved.

Too often Uncle Sam minimizes obvious regulatory costs and overestimates speculative benefits, thereby inflating cost-benefit calculations. For instance, the Office of Management and Budget proclaims that while environmental regulations cost between \$124 billion and \$175 billion, they yield benefits between \$97 billion and \$1.595 trillion. Transportation rules provide \$84 billion to \$110 billion in benefits at a mere cost of \$15 billion to \$18 billion. Similar is the case for other regulations, says OMB.

Costs Uncounted

Yet OMB doesn't count paperwork expenses, the cost of economic regulation, such as market-entry restrictions, and the price of "transfer" payments, like farm price supports. Some of the less obvious regulatory costs are quite high.

It has been evident for years that the Food and Drug Administration, by unnecessarily slowing the introduction of life-saving pharmaceuticals and medical devices, has actually cost lives. Indeed, a Harvard University study figures that regulation kills 60,000 people a year by diverting money from productive uses—medical research, safer homes, and more—to combat trivial dangers.

OMB's purported benefits are likewise dubious, being highly dependent on the

underlying assumptions. A benefit range between \$97 billion and \$1.595 trillion is essentially meaningless. Moreover, it is difficult to demonstrate many of regulation's alleged benefits in practice. There is, for instance, no evidence that OSHA, despite imposing billions in costs on American business and thus workers and consumers, has reduced deaths or injuries.

And many of the same benefits could be achieved at far less cost. Markets, backed by definable property rights, are the better way to go.

Where some overall regulatory framework is necessary (for the great common pools of air and water, for instance), the United States currently relies heavily on command-and-control rules, demanding that companies employ a particular clean-up technology, for instance. Setting overall emissions levels and allowing polluters to choose the most efficient reduction method would be a far better approach. Devices such as emissions trading—essentially allowing high-cost businesses to pay low-cost companies to cut pollution more—and effluent taxes also better use market forces to advance environmental goals.

One of the greatest flaws of the current process is that regulators rarely conduct risk assessment, that is, compare the relative degree and likelihood of different harms. Uncle Sam often focuses his time and our money on minute risks. Several rules, ranging from benzene to dichloropropane to formaldehyde to chloroform, are estimated to cost from hundreds of millions to literally trillions of dollars per life saved. This is not a good use of scarce financial resources.

To help fix the problems, Crews proposes "congressional approval—rather than agency approval—of both regulations and regulatory costs." The people elected to make the laws should take responsibility for them, instead of hiding behind nameless bureaucrats.

Contrary to the President's famous pronouncement, the era of big government never really ended. Federal rule-making continues to run amok. Only by returning the regulatory state to the rule of law can we secure our freedom. □

Constitutional Protection of Economic Liberty

by Norman Barry

The Supreme Court has been deliberately neglectful of traditional American economic liberties. With the exception of some important protections for property produced in the last 15 years (to be considered later in this article), economic liberties have been at the mercy of the legislature with little or no protection from the judiciary.

While the Court has been anxious to subject legislative intrusions into civil liberty to the most rigorous constitutional standards, this has not been so in relation to, say, contract, the individualistic rigor of which has been significantly diluted. The constraints on legislative action contained in the Fourteenth Amendment have been interpreted *substantively*, that is, the prohibitions on the taking of life, liberty and property (possibly) without due process of law are thought to protect specific liberties or rights that the states or the federal government (in relation to the original ten amendments) ought not to transgress irrespective of the procedural correctness of the legislation.

Not so with the right to reach a freely negotiated contract with a potential employer.

But this was not always so. In the early part of the twentieth century, the Court was assiduous in its protection of economic liberties;

indeed, substantive due process emerged then. The Court was particularly concerned to prevent the police power (not itself in the Constitution) being misused. It should be limited to the prevention of harm and not invoked to promote the morals and well-being of the community (though it sometimes did); such action was especially reprehensible if it interfered with contract. Its endeavors here were not primarily validated by the utilitarian value of the free market but by the Court's reading of the Constitution and the justices' understanding of the rights that it embodied.

The apogee of the free-market Court was reached in the famous *Lochner* decision of 1905 in which liberty of contract, derived from the Fourteenth Amendment, was used to strike down a New York statute that would have limited the hours per week (or day) that a baker could work.¹ This was followed by other decisions that freed the labor market and significantly slowed the pace of the New Deal until 1937 when, under the threat of Roosevelt's Court-packing plan, the Supreme Court upheld (in *West Coast Hotel v. Parrish*²) a Washington state statute that regulated the pay of female hotel workers.

Equally important was a case the following year (*U.S. v. Carolene Products*) in which the Court separated economic rights, for example, contract, from civil liberties and disavowed any obligation to subject the former to any serious scrutiny. The latter, however, could not be left to unreliable elected legisla-

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