Currents

In This Issue: Contracts, Torts, and Regulation

Defenders of the current intrusive, Washington-centered regulatory regime claim that though the system should be reformed, it must be retained since it is the only means of protecting public health and safety. Without federal regulatory agencies, they contend, workers would be killed or injured on the job more frequently; consumers would be exposed to dangerous products and services and poisoned by tainted food; and the environment would be defiled to the point of causing illnesses and shortening lives.

Inherent Problems. But the command-and-control regime is a very costly and inefficient way to guard the health and safety of individuals. In addition, the resulting politicized system grants special favors to offenders who should be held accountable for irresponsible actions and wipes out jobs, livelihoods, communities, and industries in response to loud voices complaining of nonexistent hazards.

Further, there is an inherent problem in trying to make government bureaucrats more efficient. To give them leeway gives them power to act in an arbitrary manner, abusing the rights of citizens. To tie them too tightly with checks and controls can wrap innocent citizens in red tape as well.

How, then, can the health, safety, and property of individuals be protected from threats from other individuals as well as from abuses by bureaucrats? A return to a reliance on contracts and tort law offers the best alternative to the current regime.

Return to Rule of Law. The principal role of government is to protect life, liberty, and property. In a free society, that is done through the rule of law. It is important to stress that a risk-free society is impossible to achieve. The very effort to reduce or eliminate certain risks will probably increase other risks.

Given that fact, the situation should be as follows. When individuals deal with one another on a voluntary basis, they should have the option to define acceptable levels of risks and terms of liability. Freedom to contract is the basis of a free society.

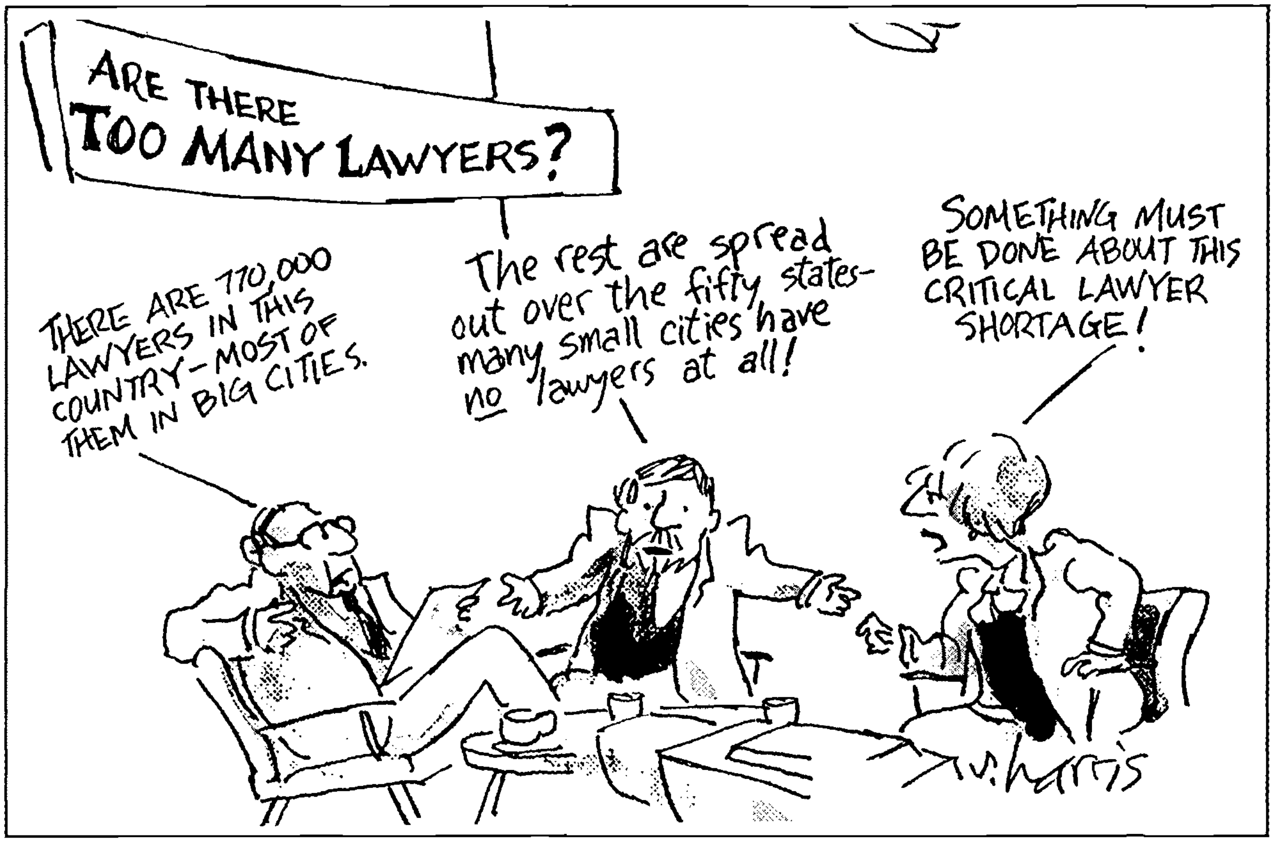
In cases of nonvoluntary encounters, (e.g., with pollution or with another car's bumper) or in which contract terms are implicit at best (e.g., when one assumes that a purchased product will not cause harm if used correctly), tort law historically has been and should be the remedy.

Ideally, in many cases, legal concepts such as negligence and reckless endangerment should allow citizens to protect themselves without the overhead costs and abuses of armies of regulators. They should be able to go to court to get compensation for damages or restraining orders against the potentially harmful actions of others.

Yet critics might maintain that the American legal system is hardly in good working order. The United States has more lawyers per capita than any other major country and is notoriously litigious. Do we want courts handling more regulatory issues?

But since regulatory agencies and policies are also too arbitrary, the entire system, legal and otherwise, must be changed. It is best that policymakers focus their efforts on replacing the current regime with the best possible alternative.

A Need for Analysis. In these pages we open a discussion on how a return to the rule of law, including the sanctity of contracts and a rational tort regime, can supplant the current regulatory system. There is hardly unanimity among policymakers, scholars, and others in the limited-government movement on exactly which reforms are best. Republicans in Congress would mandate certain tort reforms on the states. Others would leave each state to deal with its own reforms, merely removing federal barriers to action. Some would limit contingency fees that could be paid to lawyers, while others see such fees as a way to ensure access for all to justice. Some would cap



(usually subjective) "pain and suffering" damages and force losers in legal suits to pick up the legal bills. Others (e.g., Peter Choharis in this issue) would not.

But for supporters of free markets, it is clear that reinventing, cutting, or shutting agencies must be accompanied by tort reform that will allow for protection of life, liberty, and property with minimal delays and expenses.

This issue of *Regulation* offers the following:

Paul Rubin:
"Fundamental Reform of Tort Law"

Before 1960, parties agreeing to an exchange of goods and services could implicitly, if not explicitly, agree to rules and limitations in cases of injury, usually restricting compensation to cover actual damages and losses. Such contracts also had the effect of holding down prices for consumers.

But Paul Rubin points out that beginning with a 1960 Supreme Court decision, the judiciary has restricted this freedom to contract. The result: a growing number of lawsuits seeking not only compensation for economic damages, which might be settled out of court or with insurance companies, but also huge "pain and suffering" awards.

The excuse for this limit on voluntary transactions is that most such agreements are "contracts of adhesion" in which one party is at such a disadvantage that the contracts should not be valid. Rubin, however, points out that such an excuse can be used to justify the voiding of many contracts. For example, it could be said that retail stores in small towns or rural areas charged prices "of adhesion," taking advantage of their customers, until, of course, Wal-marts and K-marts moved in to remedy the situation.

And today in a key area for defining risk and liability, warranties, consumers are offered choices. When one purchases a new car, one usually can choose different levels of protection, for example: bumper-to-bumper or just major systems; different lengths of coverage; or to purchase the warranty from one's auto dealer or from an independent company.

Rubin observes that one estimate finds the 1991 costs of the tort system in the United States to be $132 billion, or 2.3 percent of Gross Domestic Product, compared to only 0.9 percent on average for a sample of other industrialized countries. Rubin suggests that if Americans' right to determine the terms of liability before a transaction is restored, the rush to go to court will be stemmed, and costs to the economy and the consumer reduced.

William Niskanen:
"Do *Not* Federalize Tort Law"

Congress is considering the first major federal tort law, including a $250,000 cap on noneconomic damage awards for medical malpractice and a cap on punitive damages in civil cases. Though he supports tort reform, Bill Niskanen argues that it is basically the job of the state governments.

First, he maintains that the U.S. Constitution gives Congress the authority only "To regulate Commerce . . . among the several states." For the past 60 years this clause has been used to impose every manner of regulation on the states. But with the case of *U.S. v. Lopez*, the Supreme Court has begun to restrict this power to its proper limits. Niskanen suggests that tort law regulation has been and should be a matter for the states.

Second, Niskanen points out that Congress is as likely to err in tort law as are the states. When a state makes a mistake, its own citizens are the main victims. States can learn from the mistakes of others; if the federal government makes a mistake, however, all states suffer.

Niskanen points out that states today have a strong incentive to improve their tort regimes to allow enterprises to increase productivity and jobs. And many states are changing. State legislatures have taken up more than 70 new tort bills during their current sessions.

Some critics contend that if liability reform is left to the states, there would be a "rush to the bottom" as states seeking to attract industry reduce the rights of injured consumers to sue. But Niskanen points out that there are always many more consumers who vote in each state than there are employees of industries. The need of state governments to encourage commerce and to meet voter concerns would help create the proper balance in tort law.

Peter Charles Choharis:
"Creating a Market for Tort Claims"

When a plaintiff files a tort case accusing someone of causing injury or property damage, the claim can take years to adjudicate. Peter Choharis offers a thought-provoking approach to reforming the system: allow plaintiffs to sell their claims, creating a market for torts.

Specifically, plaintiffs could sell the right to sue to other interested parties, such as law firms, for immediate cash or for funds paid out over a period of time. Plaintiffs would benefit since they would not have to wait for a ruling and risk losing the case and collecting nothing. In a sense, the ability to sell a tort claim would act as an insurance policy. Even if I do not have a policy to pay damages if I am injured by a defective product, a party willing to take the time to take the case to court will, in effect, help foot the bills for my injury.

The price paid for the right to adjudicate a particular tort would be based on the purchaser's evaluation of the soundness of the suit and the likelihood of a favorable verdict. Under such a system, a nuisance case that had little likelihood of winning a victory in court would be rated accordingly. This might help reduce the number of such cases.

Choharis also maintains that different kinds of cases could be bundled together to protect purchasers from losses on any particular type of case. Futures and derivatives based on tort claims could ensure financing of cases and protection from losses.

Thomas Kniesner and John Leeth:
"Abolishing OSHA"

When stories of dangerous workplaces come to light, some workers and policymakers ask why the federal government's Occupational Safety and Health Administration (OSHA) did not detect and deal with the problem. When told that the agency has only enough inspectors to check workplaces rated hazardous once every 13 years and other workplaces once every 70 years, the agency's boosters suggest that OSHA needs more money and personnel.

But Thomas Kniesner and John Leeth show that workplace fatalities were dropping before OSHA's creation and continued to drop after it came into existence, though not at as fast a rate. Of today's 3.5 annual deaths per 100,000 workers, 40 percent are from vehicle accidents and 20 percent from homicides, hardly dangers that OSHA safety standards are likely to prevent. And a disproportionate number of deaths are among the self-employed, not a group easily protected by OSHA. Other studies suggest that OSHA's efforts have reduced nonfatal injuries by as little as 1 percent.

In Congress, both Democrats and Republicans have offered proposals to reform OSHA. But Kniesner and Leeth observe that the greatest influence on workplace safety comes from the over $55 billion paid by firms under state-level workers' compensation insurance plans. (States are struggling to hold down premium costs in these programs, for example, by limiting fraudulent claims.) Further, estimates find that firms pay some $200 billion annually in higher wage differentials for workers who take riskier jobs. Fines of $160 million in 1993, levied by OSHA and state-level agencies, have little impact on employers' safety policies.

Kniesner and Leeth suggest that if even more protection of workers is needed, perhaps they should have stronger rights to sue employers in cases of clear-cut negligence. As for OSHA, it might be best to phase it out. That is why the editors in the second issue of *Regulation* this year picked the agency as one of the 12 priority targets for action over the next two years.

Vern McKinley:
"Sunrises without Sunsets"

Rep. David McIntosh and others are considering a law requiring regulations to contain sunset provisions so that they expire on a set date unless renewed by Congress. This would force a review of all regulations.

But in this issue's one non-tort piece, a review of the sunsetting approach, Vern McKinley finds that it has not worked well in practice. There was one notable success, the demise of the Civil Aeronautics Board. This was more of an agency review with a determination to shut the agency. Unfortunately, in other cases congressional committees went through the motions of a review but did not consider whether the agencies were still needed or whether a private-sector alternative existed.

Of course, the dynamics of sunsetting an agency and a regulation are somewhat different. Agencies usually have defined beneficiaries receiving concentrated handouts, while costs are spread out over millions of taxpayers. Regulations, however, often have defined victims who would have a strong incentive to complain to Congress about their tormentors.

In any case, members of Congress who wish to use sunsetting to rein in regulators must take a serious look at the past problems with this approach if they are to be effective.

Edward L. Hudgins

Subsidies Are Not Property Rights

At a time when we are rethinking the role of government and working to make it both more efficient and less costly, do we want to elevate federal subsidies to the level of constitutional rights?

That is exactly what the Omnibus Property Rights Act of 1995, S. 605, could do. The stated intent of S. 605 is "To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the Fifth Amendment," but in its current form, the bill could give ammunition to a legal argument that subsidies for resources like water and grazing land are constitutional rights.

Such subsidies already represent substantial costs to taxpayers. For example, the largest recipient of subsidized water in California during 1994 was the Westlands Water District, located in that state's Central Valley. Last year, the District paid $8 per acre foot of water, whereas the estimated cost for delivering the water was $64, according to the Bureau of Reclamation. The public picks up the other $56.

Similarly, in 1993 the charge for grazing one animal on public lands for one month was $1.86. The actual value, according to the Department of the Interior, was $3.99.

In both cases, the public was not only subsidizing the cost of the water or land used, but was, in effect, also subsidizing the value of private property as well. If a farmer gets a subsidized water or grassland allotment, the value of the farm or ranch is higher.

S. 605's definition of "property" includes "the right to use or the right to receive water" and "property rights provided by or memorialized in a contract." That language could be interpreted so broadly that property owners who receive bargain-basement, federally subsidized rates for water or grazing land could sue if the government tried either to change the rates or access to those resources.

Under current law, landowners who receive subsidized water supplies are not entitled to compensation if their water supply is reduced by diversion to cope with an emergency or to comply with environmental laws. Neither are they entitled to compensation if the price for that water goes up.

Nor can a livestock rancher who holds a federal grazing permit, for which a taxpayer-subsidized fee is charged, be compensated if the grazing fee goes up; if the number of livestock allowed on land is reduced; or if access to that land is temporarily limited.

Last March the Ninth Circuit Court of Appeals, in *O'Neill v. United States*, ruled that landowners who had allotments of subsidized water furnished through Westlands could not sue the federal government for damages when supplies of subsidized water were limited in order to protect fish under the Endangered Species Act.

Enactment of S. 605 or something similar could lead to a different result in such cases, because it creates this new property right. A different result could have dramatic and expensive consequences for taxpayers. If S. 605 or some variant thereof became law with the expanded definition of property and other provisions intact, and the government tried to increase the cost of water or grazing fees, for example, the affected landowners could sue under the Takings Clause of the Fifth Amendment, which forbids the taking of private property for public use without just compensation.

However, "just compensation" would, like "property," take on a whole new meaning. Under S. 605, an aggrieved farmer suing to maintain a water subsidy could win compensation for (1) the fair market value (not the lower, subsidized cost) of the water; (2) the reduction in market value of the land irrigated by the water; (3) the loss of profits attributable to the loss of water; or (4) the loss of the market value of crops not planted because of the loss of water.

Further, the aggrieved farmer could sue for lost profits from the sale of the subsidized water received. You see, a farmer who does not use the allotment can sell it at a profit to another farmer. The same is true for grazing permits. Under the scheme described in S. 605, a permit holder could sue if the government attempted to increase the fee or limit access to grazing land.

Areas covered by damage awards could include (1) the decreased value of the permit itself; (2) the decreased value of the permit holder's own property; and (3) the loss of profit or reduction in value of a sublease of the permit to another rancher.

I support the general thrust of regulatory reform, the effort to make government more efficient and regulation less onerous, but I believe it would be bad public policy to protect government subsidies in the same way we protect a person's home or land.

These, by the way, are not partisan concerns. In the op-ed pages of the *Wall Street Journal* earlier this year, conservative writer and Manhattan Institute senior fellow David Frum argued, "The removal of a subsidy is not an abridgement of a property right." Senators on both sides of the aisle have raised questions about this bill. Sen. John Chafee, (R-R.I.) testifying recently before a Senate Judiciary Committee hearing on property rights, called this greatly expanded right to compensation "a dramatic departure from the careful balance reflected in the Takings Clause."

On both points, I believe there is sufficient reason to fear such a radical change in our laws. We should talk about regulatory reform and make necessary changes, not open the floodgates of litigation and, possibly, the gates to the U.S. Treasury.

Sen. Russell D. Feingold (D-Wisc.)

OSHA Targets Bridge Painters

"I haven't seen anything like this since I lived under the Nazi occupation of Greece in World War II," said Nick Manganas, referring to Occupational Safety and Health Administration (OSHA) agents in camouflage and the state troopers and federal marshals accompanying them, videotaping him from the woods above his bridge-painting job.

Manganas Painting Company of Canonsburg, Pennsylvania has been hit with the second largest fine in the history of OSHA, $4 million, for allegedly exposing its workers to lead while sandblasting the Jeremiah Morrow Bridge, the tallest bridge in Ohio, which spans the Little Miami River on Interstate 71 near Cincinnati.

John Manganas Jr., who painted the Fort Pitt, Fort Duquesne, and many other bridges around Pittsburgh, cannot believe that he has been charged by OSHA with "willfully" trying to poison his men. "This is uncalled for," says Manganas, vice president and laborer at the company. "I thought I had done everything that was necessary to make this job safe. Money was no object in protecting my men from lead."

OSHA appeared at his job site on August 2, 1993, the very day that the new safety laws went into effect, and slapped Manganas Co. with a $1.3 million fine. John Manganas Jr. says that fine, combined with another $2.7 million OSHA fine, will be the end of his company if upheld.

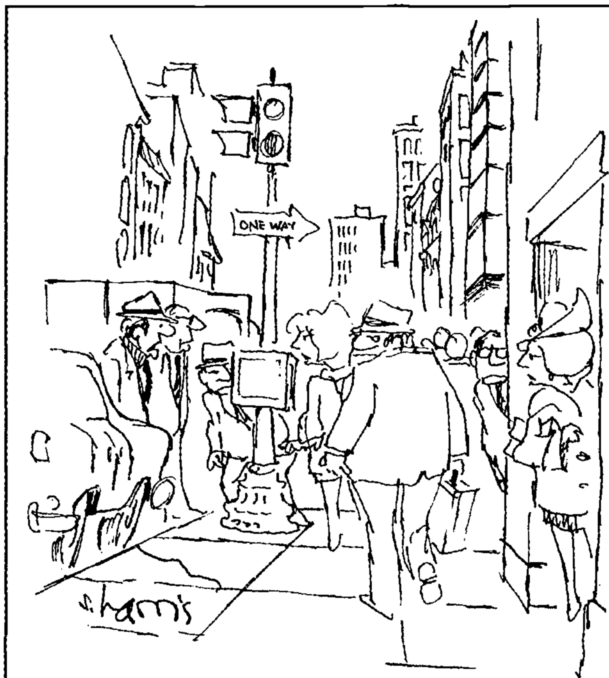
Secretary of Labor Robert Reich even went on television to denounce the Manganas Co. on the day it was cited by OSHA. "Manganas is a bad actor," said Reich, "He didn't provide the least bit of respiratory protection for his employees."

John Manganas Jr., who has been working since he was 16 in the business his father founded, was stunned by the fines and by Secretary Reich's comments—especially since Manganas had purchased hundreds of thousands of dollars worth of state-of-the-art safety equipment before beginning work on the bridge. He had been given no warnings, he says, and had no chances to correct any problems before the multi-million dollar fines. "I know the secretary means well," he said, "but I'm not the kind of man to willfully poison my men. In this business your reputation is all you have."

OSHA administrator James A. Dear explains that the agency increased its penalties during a strategy review undertaken after the Clinton administration took office. "OSHA is indeed trying to be more aggressive," says Hank Muranko, the former president of the American Industrial Hygiene Association.

The bridges that Manganas Co. paints have old, lead-based paint that must be sandblasted off before applying any new coatings. Lead, which is hazardous when ingested or inhaled, is a danger to the men doing the work. New environmental and worker safety rules, many coming in the past three years, have caused bridge-painting costs to jump sharply. OSHA's lead standards, for example, cover 32 pages of fine print.

Manganas is caught in a changing regulatory environment and in the middle of the conflicting regulatory goals of OSHA and the Environmental Protection Agency (EPA). New EPA guidelines require an enclosure tent to be placed over bridges during paint removal to protect rivers and streams from falling paint chips and dust.



"I CAN REMEMBER WHEN PARANOIA WAS UNUSUAL."

Manganas says that the health threat to his workers is made worse by the containment enclosures required by the EPA. He thinks that painting a bridge in a tent may be the reason that some of his men were found to have elevated lead levels. Sanford Weiner, a researcher at the Massachusetts Institute of Technology, says, "Enclosure can be very dangerous to the workers, and is not likely to be worth the effort."

The EPA has recently ordered the state of Michigan to remove the old lead paint from the Mackinac Bridge, which spans the peninsulas where Lake Michigan and Lake Huron meet—in spite of the fact that unremoved lead paint on bridges has never been shown to be a health hazard to anyone. The EPA-mandated cleanup will cost Michigan taxpayers $50 million and represents a health threat to the workers who are conducting it.

"In 35 years of sandblasting and repainting, no one has ever documented any harm by paint chips falling from the Mackinac Bridge," reports Burton W. Folsom, a senior fellow at the Mackinac Center for Public Policy in Michigan. The Mackinac Bridge has been sandblasted and repainted every nine years since it was built in 1957. "In fact," Folsom writes in *Human Events*, "the greater risk may well be from workers inhaling paint particles or having accidents during the enclosure process."

Michigan State Senator Walter North, former chief executive of the Mackinac Bridge Authority, is even more blunt. "It's flirting with death. We have strong Michigan winds that could hit that tent, break it apart and kill someone in a passing car. That's why I said no enclosure when I was in charge."

Manganas and other paint contractors in the Western Pennsylvania chapter of the Painting Contractors of America travelled to Harrisburg in 1989 to discuss what they considered to be health hazards in the EPA's new law mandating containment tents. "What about the guys working inside the tents?" they argued. "That's a different department," replied a state official. An administrator told Manganas that if paint dust were allowed to fall into the river, mosquitoes would die and fish would starve.

Manganas believes that he was singled out for what his mother refers to as "the catastrophe" because of the size of the Jeremiah Morrow Bridge job. It was a $10 million job, the biggest Manganas had ever done, and he believes that OSHA wants to make an example of him to send a message to contractors all over the country. His young daughter cried when she saw her dad on television being accused of "trying to poison the men."

Manganas believes that many members of the International Brotherhood of Painters will support him. Several painters walked off his jobs due to what they considered to be harassment by OSHA. The painters, who make between $22 and $30 per hour plus benefits, became irritated and said they could not concentrate on their work because of OSHA's monitoring. Edward Pence, a member of Local 643 of the International Brotherhood of Painters, says OSHA might be overzealous. "It looks to me like this case is bogus," Pence says.

Manganas has lost several bridge-painting jobs because of his problems with OSHA. This is the first year in 35 years, he says, that his company has lost money. "People tell me that I should get politically active," says Manganas, "but I don't know what to do. I don't even know how to deal with lawyers."

Meanwhile back in Washington, OSHA is being refashioned by a new Congress; many of the new congressmen criticize OSHA as the archetype of an agency gone astray. Freshman Rep. Charles Norwood, a dentist from Georgia, says he was "pushed too far" by OSHA and that he is chomping at the bit to rein in the agency. "They've been sitting in their cubicles for 25 years thinking they knew what was best for every industry in this country," says Representative Norwood. "They don't. And they don't want to know. All they want to know is what they can get away with to collect money from us."

"Most employers would describe OSHA as the Gestapo of the federal government," says Rep. John A. Boehner (R-Ohio), a former plastics salesman. A bumper sticker expressing the feelings of many business owners proclaims, "OSHA is America's KGB: It Turns The American Dream Into A Nightmare."

Freshman Rep. Lindsey Graham (R-S.C.) says he understands, however, that government action was needed to correct past abuses of employees. He tells of growing up in Seneca, where his parents ran the Sanitary Café, a bar outside the gates of a textile plant. Graham saw the workers covered every day with a film of cotton, and noticed fingers missing on many of the workers. "The textile plant placed a greater emphasis on productivity than safety," he says, and he believes that it was necessary for the government to come in and make workplaces safer.

"But by the time Graham ran for Congress last year," reports the *Washington Post*, "he had long since become convinced the pendulum had swung too far toward federal intervention. He thought the role of the government in regulating workplaces had 'gone from being helpful to being the biggest obstacle dividing the nation by race and by employers and employees.'" Representative Graham now sees his mission in Congress as an attempt "to correct the excesses of government from the past generation."

And so the battle goes on in Washington and Pittsburgh, between a small businessman caught in the pendulum swing—John Manganas Jr., accused of willful negligence regarding the health and safety of his men—and an OSHA that some say is out of control.

President Clinton, responding to the growing complaints about OSHA and other regulatory agencies, recently said: "Today we are ordering a government-wide policy. Enforcers will be given the authority to waive up to 100 percent of punitive fines for small businesses so that a person who acts in good faith can put his energy into fixing the problem, not fighting with a regulator. In other words, if they want to spend the fine money fixing the problem, better they should keep it and fix the problem rather than give it to the government. We will stop playing 'gotcha' with decent, honest businesspeople who want to be good citizens. Compliance, not punishment, should be our objective."

John Manganas Jr. carries the president's message with him. He has shown it to OSHA officials. So far his pleas have fallen on deaf ears. "Maybe things are changing," he says, "but maybe too late for me. I may be the first and last case like this."

The key issue is whether there is a less punitive way for regulatory agencies to work with businesses to eliminate workplace hazards, without eliminating the workplaces. Manganas has hired an industrial hygienist. He says that he is willing to cooperate, willing to do whatever it takes to improve the safety of his men. As *Regulation* goes to press, Manganas is awaiting the verdict on his first trial for the $1.3 million fine, and is about to go to trial for the second fine of $2.7 million. Stay tuned.

Sarah J. McCarthy
Co-Owner
Amel's Restaurant, Pittsburgh, Pa.

The Great Taxpayer Rip-Off of 1995

Imagine if the federal government owned an old resource that was invisible and intangible, but available for immediate sale at an open-market price of approximately $37 billion, as estimated by the government itself. Too good to be true? Hardly. That resource is the electromagnetic spectrum. But instead of selling it off to private investors to help reduce the federal deficit and allow the spectrum to be put to its most efficient use, the Republican Congress is about to give large chunks of it away free to one of the Republicans' most frequently mentioned enemies—television broadcasters, including ABC, NBC, CBS, Fox, and their many affiliates.

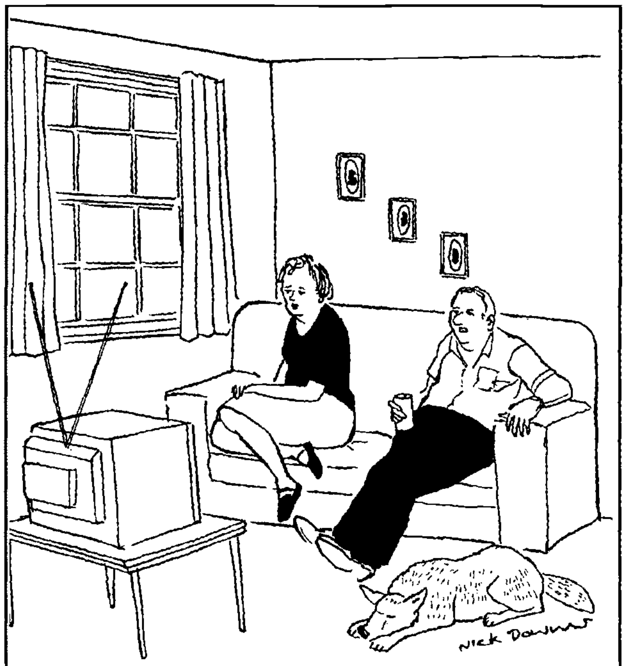
A Multi-Billion Dollar Free Lunch

The telecommunications deregulation legislation that recently passed both houses of Congress contains a provision requiring the Federal Communications Commission (FCC) to honor an ill-conceived plan set in motion some time ago. That plan would grant television broadcasters additional licenses to use part of the spectrum for broadcasting digital television. Currently, broadcasters already possess licenses for use of portions of the spectrum over which they provide the traditional analog television programming. Now the broadcasters have convinced Congress and the FCC to give them additional licenses to make the transition to superior-resolution digital television.

Yet this multi-billion dollar free lunch is not quite good enough for the broadcasters. Now they have even persuaded Congress that they should be allowed to do whatever they want with their free licenses. That means they could provide high-definition digital television, or they could thumb their noses at this emerging industry and instead use the free spectrum to provide cellular services, paging services, or any other combination of services they find profitable. While operational flexibility is usually a wise policy, one has to remember that the beneficiaries of this giveaway would be competing against other industry rivals at virtually no cost. More importantly, their competitors have not been granted comparable flexibility to use their licenses however they see fit, which means that the proverbial playing field is highly uneven.

That explains why just about everyone else in the industry—from cellular firms to local telephone companies to cable operators—opposes the plan. Other spectrum users are justifiably angry that they were forced to spend billions of dollars in recent auctions of other spectrum licenses for nonbroadcast services. "Why should they get it for free when we have to pay for it?" those firms are now asking policymakers. No good answer is forthcoming. Congress has said that broadcasters will have to pay fees to the Treasury if they use the free spectrum licenses for something other than digital television, but that hardly makes a difference. It will be a pittance compared to what other firms are forced to put up to compete in this expensive marketplace.

Even many FCC officials will state off the record that this is now the wrong way to go. In fact, it was FCC officials who placed the $37 billion estimated price tag on the value of the spectrum set to be given away. Many in the industry



"They say with high-definition TV we'll be able to tell one show from the next."

think that may be a low-ball estimate too. Although no comprehensive study has yet been conducted to value the spectrum if sold through an auction, the Manhattan Institute's Peter Huber has estimated that it could bring in anywhere from $100 billion to $300 billion, which means that the broadcasters will be taking a very expensive spectrum bath at taxpayers' expense.

Liberty and Licenses

The principal argument the broadcast industry offers to justify the spectrum giveaway is that without it they will not be able successfully to make the transition from analog TV broadcasting to high-definition TV or some other form of digital-based broadcasting. Basically, the broadcasters say that all Americans will first have to purchase new digital-ready televisions before the broadcasters can completely make the transition to that standard and turn off their old analog signals.

That argument does not pass muster. There is no technical reason why the broadcasters cannot simply use their current television licenses to begin the transition to digital television. All they need is legal permission from the FCC to start the process. The transition from black-and-white television to color took considerable time, but consumers and the industry realized the benefits of the superior color system and invested accordingly. Just as no major market disruptions were felt then, it is unlikely that any will be felt on the road to fully digitalized television. In any event, it is hard to believe that the market cannot accommodate dual television signals for a time. How long will it be before Radio Shack offers some converter-box gadget that allows consumers to switch between analog and digital signals?

Even if it turns out that broadcasters really do need additional licenses to make the transition, they can buy them. The major broadcasters have plenty of capital to purchase the spectrum on the free market, the same way everybody else does. It is hard to sympathize with companies like Disney, which just paid $19 billion to acquire ABC, and Westinghouse, which spent $5 billion for CBS, when they plead poverty as a defense. Just as pharmaceutical and fiberoptic firms must invest billions of their own dollars up front and often find venture capital to match, broadcasters could follow suit.

The broadcasters also argue that the Republican plan is not really a giveaway at all, since they are supposed to give their old analog channels back to the federal government for auction sometime in the future. Yet simple economics should tell policymakers that the most efficient use of the spectrum could immediately be found if they simply allowed the broadcasters to use their current licenses for whatever purpose they wished while auctioning off all new spectrum allocations. Delaying this auction is hardly a good compromise.

Worse yet, it is unlikely that the broadcasters will ever give back their old spectrum licenses for auction without a fight. Instead, when Congress asks for the old licenses to be returned, broadcasters will likely beg for sympathy and argue that without both the old and new spectrum licenses, they will still be at a disadvantage relative to the rest of the industry. When Congress applies more serious pressure for the return of the old licenses, the broadcasters will threaten dirty public-information and lobbying campaigns and less-than-favorable political advertising treatment. Furthermore, even if the government forces them to turn over the old licenses at some indefinite point in the future, without a firm cut-off date, the broadcasters will stall the transition period to squeeze profits out of both licenses.

Public-Interest Fallacy

Broadcasters also fall back on the claim that the spectrum giveaway is in the public interest since it serves consumers. That is, broadcasters say that they will continue to air a wide array of children's programming and other educational fare, but only if Congress gives them additional free licenses. But this is somewhat akin to saying that more money for federal welfare programs will make recipients work harder. The quid pro quo social compact between broadcasters and Congress (quality programming in exchange for a free license) can best be settled in the marketplace. With cable stations such as Nickelodeon, Bravo, the Discovery Channel, the Learning Channel, and Arts and Entertainment, to name but a few, offering quality broadcasting fare, the offer to air a documentary now and then in exchange for billions of dollars in free spectrum is so transparently a losing deal for the American public that it cannot be taken seriously. Somehow broadcasters expect Congress and the American people to ignore decades of lowest-common-denominator couch-potato fare and instead give them just one more chance to prove themselves. The quality of broadcast television will only improve through vigorous competition from alternative vendors, not by giving broadcasters another handout.

Worst of all, the giveaway sacrifices market efficiency for the continued socialization of the spectrum. The Republicans have missed a rare opportunity to privatize completely a resource that has remained quasi-nationalized for almost seven decades. This means that the FCC will continue to play the role of spectrum kingpin, zoning and allocating the spectrum according to outdated centralized planning techniques. As a result, the government, not communications consumers, will continue to play a greater role in deciding which technologies prevail on the open market.

If the spectrum giveaway sneaks through Congress, policymakers will miss a rare opportunity to obtain enormous revenues that could be generated from an immediate auction of the spectrum, which could be crucial for meeting deficit-reduction targets. Before Congress asks the American people to make additional sacrifices in the name of deficit reduction, it should first look to sell off any federal property that could fetch money on the free market. Spectrum is such property; auctions are the way to extract the money. Giving the spectrum to the big broadcasters instead would constitute the greatest taxpayer rip-off of the decade. There is still time for Congress to do the right thing. For the sake of American taxpayers and a more efficient communications industry, making the broadcasters pay their fair share is the least Congress can do.

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Watching Paint Dry

For 25 years the federal government has regulated emissions from factory smokestacks and automobiles. Last year the Environmental Protection Agency (EPA) added lawnmowers and motorboat engines to the list of controlled items. This year it will propose controlling air pollution from paints and hair sprays. Beginning next year new regulatory mandates are scheduled to take effect. Despite significant air quality improvements over the past several years, the EPA is under a statutory mandate to extend regulatory controls to a whole new range of potential emission sources.

A Broad-Brush Approach

Section 183(e) of the Clean Air Act Amendments of 1990 requires the EPA to regulate emissions of volatile organic compounds (VOCs) from the use, consumption, storage, disposal, destruction, or decomposition of consumer and commercial products. VOCs are a component of urban smog. Products that fall under this designation include everything from aerosol spray paints and wood-furniture coatings to air fresheners, underarm deodorants, and floor waxes. Anything that contains potentially evaporative VOCs can be included on the list, and by 2003 most such products will be regulated. The EPA estimates that such items are responsible for over one-quarter of manmade VOC emissions and represent perhaps the last unregulated source of significant smog-causing emissions.

A primary target of section 183(e) is paint, whether used to cover the walls of one's living room or to dot the midstrip of a two-lane highway. The EPA is now seeking to regulate paint content in the hope that this will lead to a reduction in pollution-causing emissions. The EPA's rules set maximum VOC content, as a percentage of the product's weight, for a wide range of paint types. The first round of standards will take effect in 1996, with more to follow.

It is unarguable that drying paints can emit VOCs. It is the solvent or water content of paints that makes them "wet"—and the water and solvents evaporate as the paint dries. Some paints, particularly solvent-based paints, have significantly higher VOC content than others. Latex paints, such as those frequently used for painting homes, have relatively low VOC content. However, many high-VOC paints often have particular uses for which there is no ready low-VOC substitute, due to their enhanced gloss and durability. Barring some tremendous technological breakthrough, controlling VOC content effectively bans certain paints.

As is often the case with EPA rules, there is significant evidence that the federal government is overestimating the environmental benefits of regulating paint. For starters, the regulations do not address the emissions from particular paints; rather, the rules are based on a paint's VOC content. The EPA merely assumes that VOC content is always a fair indicator of a paint's potential to contribute to smog formation. Moreover, not all VOCs are created equal. Some are far more likely to contribute than others. Some, such as acetone, hardly contribute to smog formation at all. The less reactive a VOC, the more likely content standards are to be met by replacing it with a more reactive substitute. This will not reduce air pollution.

Controlling all VOC content is a drift-net approach that may not achieve the desired result, a point that the EPA actually acknowledges. Yet due to "uncertainties, inconsistencies, and lack of reactivity data on individual compounds," the EPA could not take such considerations into account during the formulation of its rule.

There is also reason to believe that the EPA's efforts may undercut themselves. Some high-VOC paints have specialty applications for which there are no ready substitutes. If a lower-quality, low-VOC paint must be applied in greater volume, with greater frequency, or must be thinned with additional solvent to achieve the desired result, it is possible that net VOC emissions could actually increase as a result of the rule.

This issue has been raised before. Environmental officials in California have been regulating paints for quite some time. In the late 1980s some regional authorities sought to control certain high-VOC paints, but their actions were successfully challenged in court when paint manufacturers accused local regulators of ignoring the negative environmental effects the rules could produce.

Stifling Small Businesses

The EPA's paint regulations are largely the result of a statutory mandate; however, the agency has also had some encouragement from paint producers themselves. Stringent regulations requiring reductions in the VOC content of paints will not impact all segments of the industry equally. Indeed, it is smaller, regionally based firms that will bear the brunt of any effort to control VOC content.

It is well known that smaller firms have a more difficult time shouldering regulatory costs and that regulation tends to increase firm concentration within an industry. Smaller companies are typically without the armies of lawyers, regulatory specialists, and professional staff necessary to ensure regulatory compliance, and regulatory costs often serve as a powerful barrier to entry for new firms. Moreover, when new technical requirements must be met, smaller firms also lack sizable research and development teams that can find new ways of meeting the federal standards. Since the required VOC content reductions go beyond existing technology for certain coatings, this creates a real concern.

The discriminatory impact in the paint industry will be particularly severe. By recent estimates, there are over 500 makers of architectural coatings in the United States. Approximately two dozen such firms produce over half of the industry's coatings. Those firms are large, national manufacturers. The remainder are smaller, regional firms. The larger paint manufacturers specialize in producing latex and other water-based paints—those that are used most often by consumers. The smaller firms, in contrast, are the primary suppliers of specialty coatings and fill many niche markets. Because the EPA is seeking to control VOC content, this rule will undoubtably have its greatest impact on the smaller, regional firms. For this reason, smaller paint producers would prefer to see regional or state-based regulations—and then only when absolutely necessary.

Some states are certain to regulate even if the EPA does not. The Clean Air Act Amendments require states to meet emissions reduction targets, and addressing paint emissions is one way to get credit with the EPA. This only strengthens the larger corporations' tendency to urge national regulations to gain competitive advantage. Faced with the choice between a patchwork of state and local laws and a single nationwide standard, the national paint manufacturers would prefer the latter, even if a national standard is to be more stringent. Marketing a single product line in all 50 states is far preferable to large firms than being forced to tailor goods for particular markets. The voicing of this concern has allowed the EPA to claim that issuing a national rule is actually pro-business because "representatives of the consumer product industry . . . [have] urged the EPA to issue rules for consumer products to provide consistency across the country." Indeed, in 1994 the larger paint manufacturers, represented by the National Paint and Coatings Association, proposed a framework for the regulation of paint VOC content that would establish a nationwide rule.

Smaller firms have protested the EPA's move toward national paint-content standards. In a letter to the EPA, an association of small and regional producers complained that "the perceived benefits of national regulation would be reaped by one segment of industry . . . yet the burdens would fall on a different segment of the industry. . . . Many industry observers believe that a substantial portion of smaller and local or regional manufacturers would not survive for long under stringent regulation."

Proprietors of smaller firms might be less upset were there a clear justification for the EPA's rules. Yet the EPA itself has acknowledged their deficiency, and, to make matters worse, evidence suggests that poor regulation would actually do more environmental harm than good. It seems the federal government might have better things to do than regulate how paint dries.

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