Currents

This Issue

On April 23, 1992 California's Council on Competitiveness, headed by Peter Ueberroth, issued a report on *California's Jobs and Future*. The report maintained that "the major problems besetting California are self-inflicted. Through our indifference to the need for job creation in this state, we are crippling ourselves. . . . Jobs leave because staying is too hard and too expensive. California has created a nightmarish obstacle course for business, job and revenue growth."

A week later, proving the report correct in the most frightening way possible, rioters were burning, looting, and killing in Los Angeles. The excuse was the verdict in Rodney King case, though no excuse could justified the rioters' crimes. But the riot did focus attention on the recession in California, and particularly the grave economic conditions in inner city Los Angeles.

Riot of regulations. The Competitiveness report for the most part exposed a riot of state regulations that had decimated California's economy. Among them: "A permitting and regulatory quagmire that overwhelms small and medium-sized business managers." And "A system in which agencies support themselves by means of self-determined fees and fines for which they are both judge and jury." And "A worker' compensation system that is a national disgrace because of its tolerance of fraud and abuse."

The report recommended immediate and drastic reforms. Unfortunately, two and a half years later, only minor changes have been made.

Entrepreneurs' eye view. Articles in this issue of *Regulation*, by Joseph Farah and Mike Antonucci, and by Steven Hayward, document the destructive nature of California's regulatory regime principally from the perspective of entrepreneurs and businessmen who find their productive efforts frustrated at every turn and their enterprises driven out of the state.We also welcome in our "Currents" section the observations of Rep. Edward Royce (R-Calif.) on his least favorite California regulation, stress as a workers disability.

The article by James L. Johnson reviews failed attempts to deal with air quality problems through emissions trading. Rodney Smith examines water policy in the Golden State and finds that it is not a matter of *if* a more market oriented approach for allocating water emerges but, rather, *how* and *when*. On a positive note, Matthew Hoffman praises California as the first state to adopt a policy for a complete free market in the sale of electricity.

Beyond California. Regulatory policy, like tax policy, can come from a state as well as the federal government. In recent years the public and policymakers have come to understand that high tax states harm their own economies. The same is true for regulations. Just as New York has become a paradigm of what not to do with tax policy, so California should be the model of which regulatory policies to avoid. State governments do have it in their power to create a regime conducive to job and business creation. The states more and more are laboratories for policy innovations in such fields as education and welfare. The successes and failures of different regulatory regimes should also provide lessons for policymakers as well.

Edward L. Hudgins

Takings, Mandates, and Markets

On September 27 Republican candidates for the House of Representatives are scheduled to announce a "Contract with the American peo-

ple" summarizing their initial legislative agenda if voters were to elect a Republican majority of the House. One of the ten bills that constitutes this agenda proposes a range of regulatory reforms. The two most important of these reforms would require full compensation for any federal regulatory taking of private property and for any federal mandate on state and local governments.

The newly aggressive House Republicans have focused on an important issue: the federal government has increasingly used regulation and mandates, rather than fiscal policy, to direct resources to politically favored ends. The major health reform bills are only the most recent examples; only a small percent of the additional $100 billion or so of annual benefits is financed by explicit taxes—with the rest financed by a combination of mandates on employers, price controls on providers, insurance regulation, and wishful thinking.

There are two general problems of this increasing use of regulations and mandates:

• The scope of federal control is larger than if the same activity is financed through the budget, because the costs of the activity are largely hidden and are not subject to periodic review and reapproval. A health reform bill financed entirely by explicit taxes, for example, would have no significant support.

• The distribution of the costs of regulations and mandates is more arbitrary than the distribution of federal taxes. The major health reform bills again provide examples: the cost of employer mandates would be borne primarily by low skilled workers, and the cost of "community rating" of insurance premiums would be borne primarily by young people and by those who maintain healthy lifestyles.

So the House Republicans are correct to focus attention on the means to limit regulations and mandates.

The problem is that their proposed regulatory reforms do not reflect very much careful thought. Instead of stating a set of general principles and then proposing specific changes to substantive legislation, they have offered a bill that would codify the principles but without addressing their substantive applications. This may prove to be a good campaign statement but for several reasons, it would not be an effective legislative agenda.

First, the Constitution is the appropriate place for general principles ("Congress shall make no law..."), not a statute. An attempt to bind a set of existing and potential future statutes by some statute-based rule is not likely to be effective, even if approved. The fate of former Senator Harry Byrd Jr.'s 1978 balanced budget law is only the most dramatic example of this point.

• The proposed requirement for full compensation of regulatory takings reflects careful drafting but is curiously both too broad and too narrow in different dimensions. The proposed legislation makes no distinction between regulations that reduce a public nuisance and regulations that require the property owner to provide a public benefit. In the first condition, the case for requiring compensation for a regulatory taking is weak; in the second condition, the case is very strong. And, for whatever reason, this protection is limited to property rights in land and water.

• The proposed requirement for full compensation of federal mandates on state and local governments reflects a broadly shared concern but would be bad legislation. State and local governments should <u>not</u> be exempt from federal laws to which the private sector is also subject, nor should they be selectively compensated for the cost of meeting such general mandates. The proposed legislation would probably also be unworkable. The purpose of requiring federal compensation for mandates is to prevent the federal government from exploiting the state and local tax base to meet federal objectives. The proposed requirement to pay "the total direct costs incurred by State and local governments", however, invites abuse of the federal tax base by providing no incentive to meet the federal mandate at minimum cost. This issue needs a *lot* more careful thought.

Far better for the House Republicans to articulate a set of shared principles that will guide their legislative agenda and then propose an initial set of specific changes to substantive legislation consistent with these principles. My preference is to start with a comprehensive proposal to eliminate the federal authority to take property to protect endangered species, wetlands, and historic properties, paired with an increase in the budget authority of the Land and Water Conservation Fund to buy easements for this purpose. Substituting a purchase for a taking of easements for these objectives would substantially improve the incentives of both the federal government and the property owners. (More on this proposal at your request.) The initial

agenda might also include the elimination of some federal mandate specific to state and local governments, paired with the offer of a conditional federal grant to induce the governments to meet some national objective. As a general matter, the Republicans should recognize that, if the existing regulations and mandates serve a valuable national objective, some selective increases in federal spending are the appropriate correlates of measures to reduce uncompensated takings and mandates.

Over the longer run, the policy analysis community needs to think about creating legal markets for changes in property rights. Such changes take place now, but by political processes that are arbitrary and sometimes corrupt. Many property owners have been subject to a reduction in their rights by regulation without the presumed constitutional protections of due process, public use, and just compensation. Many developers have made a fortune by convincing zoning commissions to increase the allowed uses of land they own. In the absence of a legal market for a change in property rights, property owners are forced to use political processes to defend themselves against a government-initiated reduction in their rights or to obtain government permission for an expansion in these rights. This process benefits the politicians who make this market and those who are especially effective in using political processes, often at the expense of those who most value the affected property rights. The problem of land use zoning, for example, is not the existing set of limits on land use; most current owner purchased their property with these limits in place. The problem is that there is no legal market for changing these limits.

After several decades during which firms obtained the rights to use the electronic frequency spectrum only by bureaucratic discretion, political favoritism, or lottery, the federal government has finally been convinced to experiment with auctions of newly available parts of the spectrum. The first auction in July was most successful, led to higher revenues than expected, and will encourage the government to extend the use of auctions to allocate other parts of the spectrum. Some form of auction would probably also be a superior way to allocate an increase in the rights to use other types of property.

An effective market for changes in property rights should be symmetric. The government should pay full compensation to the property owner for any reduction of the existing bundle of property rights. And a property owner should pay the government (presumably acting as an agent for the other affected interests) for an increase in the rights to use his property. Stricter enforcement of the constitutional protection against uncompensated takings is probably dependent on also developing the other side of this market, substituting a market for the political process that now allocates both reductions and increases in property rights. Creative ideas on this issue are welcome.

Similar institutional innovation would be valuable to sort out the serious problems of unfunded mandates on state and local governments. Reimbursement for the total cost of meeting a mandate is not a satisfactory rule, because it does not induce an efficient response to the mandate and accounting procedures are not sufficient to identify the minimum necessary cost. Some form of bidding process may be the best institutional solution to this problem, but for this process to work there must be more potential bidders than the specific unit of government subject to the mandate. Other qualified bidders might include both private firms and other units of government that are capable of meeting the mandate in a specific jurisdiction. Also, at some point, the federal government must be prepared to withdraw the mandate if the minimum qualified bid is too high. This discussion may seem rather fanciful at this time, but so did the ideas for auctioning the frequency spectrum when they were first proposed several decades ago. Again, creative suggestions are welcome.

In summary, the House Republicans deserve credit for making a major issue of regulatory takings and unfunded mandates, but they have not yet drafted a satisfactory legislative response. They should not, however, be blamed for the failure of the policy analysis community to develop creative institutional responses to these serious problems.

William A. Niskanen

The Worst California Regulation: Stress as a Workers' Disability

Much of California's economic dilemma is self-inflicted. When I served as a member of the

state senate from 1982 to 1992, I witnessed the sad spectacle of the state legislature crippling the ability of its entrepreneurs to create jobs and enterprises.

Among the worst of California's bad regulations are those governing workers' compensation. Particularly harmful to businesses are rules making stress a workers' disability. If the state is to halt business flight and revive its economy, it must thoroughly overhaul the workers' compensation system.

The state workers' compensation system was established in 1911 to provide those injured on the job with compensation during times they find themselves out of work and, thus, without their regular paycheck. Today employers are required by the state to carry insurance or to self-insure to cover a growing list of supposed workers' disabilities. According to the April 23, 1992 report of the California Council on Competitiveness, "The cost of this inefficient and fraud-ridden system rose from less than $4 billion in 1981 to over $10 billion in 1991—an increase of over 200 percent in a decade. **During this same period, the workforce only increased by about 25 percent, and the incidence of disabling work injury per 1,000 workers actually decreased."** (Emphasis in report.)

Stressing the Ridiculous

Adding especially to costs and caseloads in California is treatment of stress as a workers' disability. The laws in 44 other states do not allow workers to collect benefits for normal work stress. According to the Competitiveness report, the number of stress claims increased by over 700 percent over the past 10 years. The actual number of cases went from 1,178 in 1979 to 10,444 in 1990. According to another report issued on May 24, 1993 by Californians For Compensation Reform, the California Chamber of Commerce, and the California Manufactures Association, stress claims have grown by 1,200 percent if you look at the past 15 years. This report finds that "Workers' compensation benefits for job-stress injuries are routinely paid to workers facing the stress of disciplinary investigations into their misconduct; to workers with marital problems aggravated by job stresses; to workers distressed by loss of a parent and reminded of it by frequent on-the-job contact with elderly people; to workers distressed by boring and repetitive work."

A 2 inch thick Business Survey Report by Californians For Compensation Reform covering June 15 to July 31, 1992 contained hundreds of cases of businesses delaying hiring, laying off workers or preparing to move out of state due to high workers' compensation costs, with stress costs as a frequent culprit. Examples:

- Ocean Specialty Manufacturing of Chatsworth, which employed 90 workers, had to pay out $17,000 to minimum wage workers for stress-related trauma supposedly caused from packing boxes.
- Sohnen Enterprises, Inc., a Santa Fe Springs electronic service company employing 200 workers, had 15 stress claims over a one-year period. One was from a janitor who had to quit after the government refused to renew his temporary work permit. In addition to his stress claim he sought vocational rehabilitation payments from his employer so he could train to be a cattle farmer in Guatemala. Because of high workers' compensation costs, Sohnen not only was unable to add 50 employees but has opened a plant in Mexico and was planning to move its operations South-of-the-Border.

Stress is Subjective

Making stress a workers' disability distorts the original intent of the workers' compensation system, which was to help workers over periods of convalescence from definable physical injuries. Conditions that can produce stress in the workplace are often ills that cannot be avoided. Some workplaces have many things happening at once, with many deadlines, tasks to be juggled, and long or unusual hours.

And many individuals thrive in such a situation, finding it exciting and challenging. Other individuals prefer more sedate circumstances. In other words, what is stressful to some individuals is exhilarating for others. The matter is subjective. When an individual chooses a career or seeks a certain position, the working environment should be a consideration. And what one worker seeks, another might avoid. The workplace conditions that might cause stress in some individuals are not conditions that should be a concern of government or the subject of disability laws.

An employer can take practical and prudent

precautions to reduce physical dangers in the workplace that might result in real physical injury. But it is not possible for an employer to take steps to minimize a subjective "risk" like stress. The problem was well summed up in a March 3, 1993 opinion by California's Second Court of Appeals in the case of *Hunio v. Tishman Construction* :

> If the job isn't 'fulfilling' or doesn't build the employee's 'self-esteem,' the employer is somehow derelict, in spite of providing good pay and good benefits. . . . We seem to be on the verge of guaranteeing the right to a 'nice and easy' career. I don't see how a company can operate when it must cater to those of tender sensibilities.

California has gone from being the Golden State and the state of greatest opportunity to something more akin to one of the high unemployment, slow growth countries of Western Europe, thanks in part to similar labor policies. In the Netherlands, for example, some 18 percent of all workers receive some form of disability payments from the government. Indicative of the results of that country's destructive policies is the 48-year old assistant professor at Delft University who stopped working for three years and collected $1,630 per month: He was on disability assistance because his job was too stressful. (The average annual per capita income in the Netherlands, by the way, is only about $16,500 in real purchasing power terms, compared to about $22,500 for each American.)

Some changes were made in California's workers' compensation system in the past year. For example, some of the more obvious fraudulent medical and legal evaluation practices have been eliminated. While exact figures are still unavailable, this reform appears to have reduced many types of compensation claims, including those based on stress. But more needs to be done. For example, the terms of treatment that drive up medical costs should be changed. And a judicial system that facilitates fraudulent and costly cases should be reformed.

The lesson from California's workers' compensation system for the rest of the country is "Don't do what we did." The lesson for California is "Change the system before more jobs evaporate."

Rep. Edward Royce (R-Calif.)

Rumblings Over Regulations

The continuing concern on Capitol Hill over excessive regulations is manifest now in legislation introduced by Texas Congressman Dick Armey, the Chairman of the House Republican Conference. While a flat tax is the centerpiece of Armey's Freedom and Fairness Restoration Act (H.R. 4585), the Act also contains proposals for regulatory reform. The essence of Armey's measures was adopted as one of ten proposals that House Republicans pledge to introduce next year if they win control of the House. In addition, significant parts of these measures, in other forms, have been supported by Democrats. This suggests that come what may, these approaches to regulatory problems will be on the congressional agenda in 1995.

Compensation for Regulatory Takings

The proposed measure would require the federal government to pay compensation for regulatory restrictions on the otherwise lawful use of property when the resulting loss of value is "measurable and not negligible." This enforces, by legislation, the 5th Amendment right of citizens not to have property taken for public use without being paid just compensation. The act specifies that a 10 percent or greater reduction in value would be deemed not negligible. This compares to a requirement in a bill introduced by Congressman Billy Tauzin (D-La.) that a takings loss be 50 percent or more to qualify for compensation. But by defining a takings to have occurred when a loss is "measurable and non-negligible," the Armey bill leaves open the option for property owners who have suffered regulatory losses of less than 10 percent to collect compensation. The 10 percent figure simply means that compensation is automatic.

Regulatory budgeting

Each year a president must submit to Congress proposed levels and types of taxes and spending in the form of a budget, and Congress must approve that budget. The magnitude and wisdom of the levels of taxes and spending is subject to intense public debate.

But the federal government also can affect wealth transfers or place spending burdens on

businesses or local governments indirectly, through regulations and mandates. But the public and policymakers would search in vain for any indication of the magnitude of this burden. No such official accounts are kept.

Armey's bill requires the president to submit to Congress proposed levels of regulatory burdens, compiled by the Office of Management and Budget with the regular annual budget, and Congress to approve regulatory levels. This reform was suggested in 1979 by then-Senator, now Treasury Secretary Lloyd Bentsen when he was Chairman of the Joint Economic Committee of Congress, in the first annual report endorsed by both the majority and minority of this committee.

Risk Assessment and Cost/Benefit Analysis

Armey's bill also would require all major legislation coming to the floor of Congress to be accompanied by a Congressional Budget Office estimate of the costs incurred by the private sector if the regulation is imposed, an estimate of the risks to the public health and safety that would result *from* the regulation, and an estimate of the effects on the economy, including the rate of GDP growth, job loss, and price stability.

Why not just deregulate? A critic might ask why not simply begin repealing regulations rather than changing the procedures for making regulations? Here the equation of federal spending and regulating in the proposal for regulatory budgeting is seen to be particularly apt. The unfortunate fact is that cutting regulations suffers the same public choice problems as cutting spending.

Regulations usually help definable interest groups, be they producers protected from import competition, workers or citizens paid mandated benefits by employers or state governments, or environmentalists who can enjoy the pristine condition of other peoples' land. The burdens of regulations, while often more concentrated than the burdens from spending programs, still are disbursed throughout the economy. This makes it politically easier to mobilize beneficiaries—including members of Congress whose political power is based in part on control of regulations—to keep regulations than it is to mobilize victims to repeal them.

Further, because even the aggregate costs of regulations often are not apparent, opposition to regulations based on cost considerations is difficult. In addition, regulations are complex and the connection between them and the damage they do to the economy is often blurred. Therefore a focus by lawmakers on strategies to make the costs and effects of regulations more apparent is warranted.

In this context it may be worth noting that House Republicans have pledged that if they are in the majority next year, they will have a period set aside for repealing unneeded or wasteful laws and regulations. This could be an opportunity to deregulate.

Paying for property. The wisdom of paying for regulatory takings is quite clear. First, of course, it is a right guaranteed by the 5th Amendment. But in addition, if regulators are forced to ask Congress explicitly for extra funds in their budgets to pay for takings, such takings can be expected to slow down dramatically.

Preparing the ground. Regulatory budgeting helps prepare the ground for any major push for specific deregulation. First, each year Congress would be forced to address the question of the actual costs of regulations. No doubt proponents of regulations would attempt to understate their costs. But currently the costs are assumed to be zero. The quite credible estimate by Thomas Hopkins of the Rochester Institute of Technology is that federal regulations add an approximate $600 billion burden on the economy. With regulatory budgeting, critics would have many annual opportunities to point out these costs.

The progress in the fight against excessive federal spending offers lessons for the fight against regulations. With George Bush's and Bill Clinton's tax and spending hikes has come a growing public awareness that a lot of spending is wasteful pork. In the popular media such spending is a more frequent topic. Clinton was not able to pass his "investment" package in 1993 in part because the public saw much of it for the pork it was. Clinton's crime bill was stalled in part due to a similar perception. And the politicians' trick of increasing spending while claiming to cut it was more a topic of public discussion as Clinton pushed through his tax hike. More Americans seem to understand what "current services budgeting" and cutting projected spending really means. While spending and taxes continue to go up, the cost to policymak-

ers in terms of loss of political support and prestige is growing as well.

Regulatory budgeting, and the requirement that proposed regulations have attached a regulatory price tag, will help set up a similar dynamic, raising public awareness about the real costs of regulations.

The States Against Federal Regulations. The greatest resistance to federal regulatory mandates comes from the state governments that must foot the bill out of their own budgets. Some states call for no mandates without the federal government providing the needed funds. But this approach simply shifts the burden to other parts of the economy.

Regulatory budgeting could provide a means to help states counter federal mandates. The federal government no doubt will attempt to understate the regulatory burden. State governments, of course, have an incentive to add up every cost. If both federal and state governments keep accounts, then there would be a better chance of the true burden being revealed. It would be good to see governors in their state of the state addresses highlight the portion of the state's budget not under control of the state's elected officials and citizens, and appraise the burden and costs in jobs and GDP loss to the state's economy. This could further focus public attention on the regulatory burden, and intensify the conflict between the states and the federal government that could set the stage for true regulatory reform.

The proposals set forth by Armey and the Republicans assure that regulatory issues will be discussed next year. But members of Congress in both parties should understand that while procedural changes could slow the spread of new costly regulations, substantive reforms ultimately will be needed to roll back the existing sea of restrictions.

Edward L. Hudgins

Property Rights and "Rough Proportionality"

On June 24, the Supreme Court issued its long awaited decision in *Dolan v. City of Tigard*. This case pitted the property rights of a businesswoman against the power of government to regulate land use development. By a 5-4 vote, the Court ruled in favor of private property rights. Although there will be few noticeable effects in the short term, the *Dolan* decision is, without doubt, an important milestone in the Supreme Court's takings jurisprudence.

The facts in *Dolan* were straightforward. The plaintiff, Florence Dolan, wished to expand her family's plumbing and electric supply store, which was located in the central business district of the City of Tigard. She applied for a permit to redevelop the site. The City Planning Commission said it would grant a development permit on two conditions. First, the Dolans would be required to dedicate a portion of the property that ran along a local waterway known as Fanno Creek. The idea was to preserve the land as a greenway so as to minimize flood damage to structures. Second, the Dolans would also be required to dedicate an additional 8-foot strip of land adjacent to the floodplain as a bicycle/pedestrian pathway. The city maintained that the Dolan's enlarged business would exacerbate traffic congestion in the central business district. The proposed bicycle pathway would therefore "offset" some of the traffic on nearby streets.

The Dolans attempted to secure a variance from the proposed conditions, but their efforts were unavailing. After exhausting all of her administrative remedies, Mrs. Dolan sought relief in the courts. Dolan's attorney argued that the city's dedication requirements constituted an uncompensated taking of property since they were not genuinely related to the proposed development. Various ordinances, for example, showed that the City of Tigard had contemplated the construction of a city-wide floodplain greenway and bicycle/pedestrian pathway. Dolan plausibly argued that the city had planned to use its permit and zoning powers to force certain landowners to pay for the public improvements in a piecemeal fashion. The case eventually worked its way up to the Oregon Supreme Court, which ruled in favor of the City of Tigard. The U.S. Supreme Court agreed to hear the case last November.

Chief Justice Rehnquist began his legal analysis of the *Dolan* case by noting that if the city had simply seized the Dolan's property for the purpose of building a bicycle/pedestrian pathway, the Fifth Amendment would have clearly required "just compensation" for the land taken.

But Rehnquist also observed that the Court has long recognized the authority of state and local governments to "exact some forms of dedication as a condition for the grant of a building permit." In residential neighborhoods, for example, a strip of land is often required to be dedicated so that sidewalks can be constructed. The question to be resolved in *Dolan* was whether the City of Tigard was using its permit power for legitimate land use planning or whether it was engaged in an "out and out plan of extortion."

While most everyone agrees that government bureaucrats are capable of using land use planning as a pretext for simple extortion, the disagreement begins with the seriousness of the danger. The perception of the conservatives on the Court is that the permit power is abused frequently. That apprehension leads them to the conclusion that the courts ought to closely scrutinize the proffered justifications of public officials. The liberals on the Court, however, seem to believe that land use extortion is, at best, a remote possibility. They assume that land use decisions are largely the result of a deliberative process whereby disinterested bureaucrats consider all of the relevant information and use their expertise to impose restrictions and conditions that will ultimately further the "public interest." That view leads them to the conclusion that courts should adopt a deferential posture whenever they review the decisions of land use specialists—especially in the commercial context. Justice John Paul Stevens, for example, believes exactions associated with the development of retail businesses ought to be entitled to a "strong presumption of constitutional validity." In *Dolan*, the conservatives carried the day by a single vote and they pronounced the following rule: Municipalities must demonstrate a reasonable relationship or "rough proportionality" between the projected impact of the proposed development and the required dedication.

The *Dolan* ruling is significant for two reasons. First, the Court placed the burden of proof on the government to justify its proposed dedications. This was a welcome departure from previous takings precedents. The Supreme Court requires police officers to justify the reasonableness of their searches under the Fourth Amendment and FCC officials to justify any regulatory restrictions upon free speech. The idea that the government ought to shoulder the burden of proof is perfectly consistent with the premises of our limited, constitutional government and distinguishes the American legal system, most favorably, from the despotic legal doctrines of other countries. The *Dolan* Court could find no valid justification in reason or law for turning the table on the individual citizen with respect to his property rights.

Second, the Court considered, but ultimately rejected, the "rational basis" standard of review for regulatory decisions with respect to land use. The rational basis test is the most deferential legal standard that the Court employs in constitutional adjudications. The "test" is essentially whether there is any "conceivable basis" that might provide a rational basis for the government's condition or exaction. Such a standard would have enhanced the power of local bureaucracies because only the most outrageous land use restrictions would warrant the attention of the courts. By explicitly rejecting the rational basis test for takings cases, the Supreme Court sent a clear message to the lower courts: Municipalities should not be able to avoid the Fifth Amendment's just compensation requirement on the basis of facile findings and conclusory assessments of planned development. The "rough proportionality" standard requires cities to make "an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

When the Court applied its rough proportionality test to the factual record in *Dolan*, it found that the city had not met its burden of proof. Although the proposed greenway appeared to be a reasonable flood control measure, the city never explained why it was necessary for the Dolans to surrender the tract of land to the government. A private greenway, the majority noted, would presumably be as effective as a public greenway. The city also failed to carry its burden with respect to the bicycle pathway. The Court ruled that the city had to do more than speculate about the increase in traffic that the proposed development would generate and then propose conditions that *could* offset traffic demand. Some effort to quantify those findings would be necessary in order to sustain the constitutionality of that permit condition.

The rough proportionality standard will not be an easy rule for the lower courts to apply. In fact, the trial and appellate courts will have considerable discretion in individual cases. In close

cases, judges who are sympathetic to property rights will give the benefit of the doubt to property owners. Other judges will give the benefit of the doubt to government. This is, of course, an unfortunate state of affairs, but it is certainly better than the 1960s and 1970s when the law was so painfully clear that attorneys advised homeowners and developers against filing lawsuits because of the overwhelming odds against a successful outcome.

One can only hope that the Rehnquist Court will continue to move in the right direction. If the Court put property rights on the same constitutional plane as free speech rights and privacy rights, every judge would have to apply a strict standard of review to regulations and permit conditions. Under the "strict scrutiny" standard, the government must demonstrate a *compelling* interest in order for a statute to pass constitutional muster; if that burden is not met, the statute or condition would fall. The *Dolan* majority intimated that the two-tiered approach to property rights and "personal" rights may be ending. The Chief Justice wrote: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." The sentiment expressed in that sentence spoke volumes to court watchers. It was an unmistakable indication of a shifting paradigm. As the dissenting justices bitterly noted, "the doctrinal underpinnings of [the] decision ... run contrary to the traditional treatment of these cases."

Despite the gratifying victory in the Supreme Court, it should be noted that the Dolans' battle with city hall is not over. The Supreme Court remanded the case to the Oregon courts for further proceedings, which means the City of Tigard will have another opportunity to justify its permit conditions. Whatever the outcome in this particular case, the Supreme Court's *Dolan* ruling deserves two cheers from everyone who cares about property rights and economic liberties. The *Dolan* precedent will help free private property owners and developers from the extortionate demands of public officials.

Timothy Lynch
Cato Institute

Air-Conditioning and Refrigeration Costs Heat Up

Now is the summer of our discontent. Millions of Americans are paying more than ever to have their air-conditioners repaired as a consequence of laws enacted to protect the environment. And at the same time people are being hit in the wallet by these measures, they are learning that it may not have been necessary. What once seemed like a cost effective victory for the environment is becoming increasingly clouded.

Chlorofluorocarbons (CFCs), a once ubiquitous class of refrigerants used in over $100 billion of equipment, are now being phased out of production for fear that they leak into the atmosphere, where they eventually rise to the stratosphere and deplete the earth's ozone layer. Under the Clean Air Act, the Montreal Protocol on Substances That Deplete the Ozone Layer, and the EPA regulations promulgated thereunder, CFC production in 1994 and 1995 is limited to 25 percent of 1986 levels, with all U.S. production ceasing at the end of 1995.

Throughout the ozone depletion/CFC phaseout controversy, the policy debate was dominated by dire predictions of environmental and human health catastrophes. With the future of the planet and its inhabitants reputedly at risk from CFCs, the question of the cost to get rid of them seemed almost irrelevant and was given little attention. To the limited extent costs were discussed at all, they were usually understated.

But now a growing number of scientists are saying that the severity and imminence of the environmental threat has been overstated. The extent of ozone depletion and its predicted impacts are considerably less than once thought. Even those scientists responsible for sounding the alarm have backed away from a number of their more apocalyptic claims. Most notably, on February 3, 1992, NASA called an "emergency" press conference to announce that severe ozone depletion over the Arctic and much of North America was imminent. The announcement received extensive television coverage and made the front page of many newspapers. However, a few months later, NASA quietly admitted that their prediction was wrong, but the little-noticed retraction was too little, too late to undo the effect on the law.

Justified or not, the accelerated CFC phase-

out is shaping up to become the most expensive environmental measure to date. With CFC production to end in 18 months and costs already increasing, many owners of air-conditioning and refrigeration equipment will have to prematurely replace their equipment, or modify it to use the new non-CFC refrigerants being introduced. Others may continue to use CFCs, but their cost is steadily rising, and the possibility exists that CFCs will be unavailable at any price in a few years. Further, much of the non-CFC equipment currently being introduced is distinctly inferior as compared to CFC systems. The phaseout is occurring so quickly that manufacturers have not had the time to adequately design and test CFC-free systems. Higher operating costs, more frequent breakdowns, and shorter useful lives are likely. In effect, a multi-billion field test of experimental equipment is being conducted at public expense.

The most immediate impact on consumers is the increased cost of maintaining car and truck air-conditioners. Americans own 140 million air-conditioned vehicles which use CFC-12 as their refrigerant. Over 20 million of them need servicing each year, the most common problem being loss of refrigerant through leakage. CFC-12, which cost only $1 per pound a few years ago, now sells for at least $16 per pound retail, as a consequence of decreased supply and newly imposed excise taxes. The cost is expected to rise further, perhaps doubling or tripling within three years. A vehicle typically needs 2 to 4 pounds to be fully operational. Further, the law requires those who service air-conditioners to take additional steps to reduce the amount of refrigerant that escapes during servicing. These procedures take as much as a half hour and require equipment costing $1,000 or more.

As a result, those who service vehicle air-conditioners say they are charging $50 to $200 more than they used to. Assuming the 140 million CFC-12 air-conditioners need an average of two additional servicings before being retired, and each costs $100 to $150 more than it used to, the additional cost will be $28 to $42 billion.

There are no cheap solutions for car and truck owners. It is no longer possible to repair one's own vehicle air-conditioner, as the law now forbids the sale of small cans of CFC-12 to the general public. Vehicle owners have the option of modifying their CFC-12 air-conditioners to use HFC-134a, a refrigerant allowed by law that is currently used in most new cars, but retrofits of vehicles originally designed to use CFC-12 are expensive and unreliable. Simply not repairing a broken air-conditioner may also be costly, as it reduces the vehicle's resale value.

Interestingly, a simpler and cheaper phaseout was never considered. If the goal is to reduce CFC usage in vehicle air-conditioners, it could have been achieved by requiring that, beginning with model year 1994, all new cars and trucks use CFC-free air-conditioners, without imposing any expensive restrictions on the systems already in use. Since motor vehicles have a 10 percent annual attrition rate, few cars and trucks with CFC-using air-conditioners would be in use within a decade, and the transitional cost of eliminating them would be significantly less. Unfortunately, the shrill claims of looming environmental disaster eliminated any chance of instituting reasonable approaches to CFC reductions.

The phaseout will also affect the cost and quality of domestic refrigerators. Luckily, most existing refrigerators, which use CFC-12 in their cooling system, rarely leak and thus are unaffected by the phaseout. But refrigerator manufacturers are already beginning to make the transition to CFC-free systems. Within two years, virtually all new refrigerators will use HFC-134a. These refrigerators will probably cost more than comparable CFC models. Assuming they predominate beginning in 1996, and each costs $50 to $100 more than a comparable CFC refrigerator, the nearly 10 million sold each year will cost an additional $4 to $8 billion over the next decade. In addition, HFC-134a refrigerators will probably need replacement 3 to 5 years sooner than their CFC-12 predecessors.

As with automobiles, a more consumer-friendly solution was ignored. Because CFC-12 refrigerators rarely leak, and only use about 4 to 6 ounces of refrigerant each, they are negligible contributors to atmospheric CFC levels. Exempting CFC use in refrigerators for just a few more years would have offered manufacturers more time to develop non-CFC refrigerators of comparable cost and quality, and the difference to the environment, if any, would have been inconsequentially small. The savings to consumers, however, would have been significant.

To a lesser extent, residential central air-conditioners have been affected by the phaseout.

They use hydrofluorocarbon-22 (HCFC-22), a close relative of CFCs. HCFCs are being phased out, but under a much slower timetable than CFCs. Thus, they should be readily available throughout the useful life of existing equipment, although at a higher cost, and thus there is no immediate need to replace or retrofit HCFC-22 systems.

Nonetheless, the costs of maintaining this equipment have increased. Rules preventing the escape of refrigerant during servicing, similar to those covering vehicle air-conditioners, are applicable to residential air-conditioners, and add approximately $50 to most service calls. Assuming 20 percent of the nation's 45 million HCFC-22 air-conditioners need servicing each year, the additional cost will be $4.5 billion over the next decade.

In addition, there are indications that the EPA, which has been given generous authority under the Clean Air Act to accelerate any phaseout, is considering doing so with HCFCs. Some have noted that a large number of bureaucrats, as well as various scientists, private contractors, and environmental activists, have come to depend on the ozone depletion issue for their livelihood. But with the end of CFC production already achieved, they are desperate to find new putative ozone depleters to focus their efforts upon, and HCFCs may fill that role. If the HCFC phaseout is accelerated, the costs to America's homeowners could be tremendous.

Business and property owners will also be affected by the CFC phaseout. Over one million supermarkets, convenience stores, restaurants, and other establishments that use refrigeration equipment will spend approximately $5 billion to replace or modify these systems. A comparable amount will be spent by the owners of 80,000 large buildings that are air-conditioned with CFCs. These costs are likely to be passed on to consumers in the form of higher food costs and increased rents in air-conditioned buildings.

In total, cost of the CFC phaseout in the United States will be as much as $100 billion over the next decade. The needless acceleration of the phaseout from 2000 to 1995 greatly increased the cost. The burden will largely fall on unsuspecting consumers, who have little idea what the federal government plans to do to them. It is uncertain whether a public backlash can change the law at this late date. But even if it is not possible to win this issue back for the consumers, it may serve as a lesson for subsequent environmental debates—that the American public is best served by examining the potential costs when setting environmental policy.

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