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# Viewpoint

**Antonin Scalia**

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## Regulatory Reform— The Game Has Changed

**I**N THE EARLY DAYS of the Ford administration, the Justice Department was having great difficulty filling a major vacancy at the political appointee level. The search had gone on in vain for a number of weeks when, at a staff meeting one morning, Attorney General (and renowned homespun wit) William Bart Saxbe announced that he had figured out why he was having so much trouble inducing a qualified Republican to accept a powerful and prestigious office. "It has to do," he said, "with the basic difference between Republicans and Democrats. I never fully understood it until someone explained it to me at a cocktail party last night—but once you hear the explanation it's entirely clear. The *basic* difference between the parties is quite simple: The Democrats want to run the country, and the Republicans don't want them to."

I have since come to call this profound insight the Saxbe Hypothesis—the proposition that the basic goal of the Republican party is not to govern, but to prevent the Democrats from doing so. It is applicable, of course, not merely to Republicans but more generally to all those who seek to reverse the trend of increasing government control over economic and social affairs. Distrustful of government in general and executive government in particular, they are not only less eager than their political opponents to grasp the levers of government power but are also inclined to view all impediments to the exercise of that power as a victory for their cause.

The Saxbe Hypothesis springs vividly to Antonin Scalia, co-editor of *Regulation*, is adjunct scholar at the American Enterprise Institute and visiting professor of law at the Stanford Law School.

mind as one examines some of the supposed regulatory reform devices now under consideration in Washington. At a time when the GOP has gained control of the executive branch with an evident mandate for fundamental change in domestic policies, Republicans, and deregulators in general, seem to be delighting in the prospect of legislation which will make change more difficult. Those in the Congress seem perversely unaware that the accursed "unelected officials" downtown are now *their* unelected officials, presumably seeking to move things in *their* desired direction; and that every curtailment of desirable agency discretion obstructs (principally) departure from a Democrat-produced, pro-regulatory status quo. Their attitude promises to do major harm to the drive for genuine regulatory reform.

*Item: The Bumpers amendment.* This proposal would eliminate the traditional legal rule that, in reviewing administrative actions, the courts will give great deference to agency judgment, even on matters of law. The rule has enabled the Federal Trade Commission (FTC), for example, to impose some very expansive notions of what constitutes "unfair or deceptive trade practices." It would be bad enough, from the viewpoint of an enlightened deregulator, if Bumpers merely eliminated the Reagan administration's authority to give content to relatively meaningless laws. Worse still, however, Bumpers does *not* eliminate that authority—but merely transfers it to federal courts which, at the operative levels, will be dominated by liberal Democrats for the foreseeable future! The result: If a Reagan-appointed FTC reverses earlier action and determines that a particular commercial activity is *not* unlawful, one of the 250 federal judges recently appointed

by Jimmy Carter will be more readily able to prevent the change. (If and when a Reagan Supreme Court comes into being, it will be able to review only a handful of these cases.)

*Item: Magnuson-Moss rulemaking procedures.* These procedural requirements convert simple notice-and-comment rulemaking into a proceeding that more closely resembles court litigation—with oral hearings, cross-examination of witnesses, and judicial review under a standard that imposes a higher burden of proof upon the agency. Many “anti-regulatory” legislators favor the extension of these procedures from the FTC (where they now apply) to other agencies. The result: Since existing rules can only be eliminated or amended *by rulemaking*, impositions adopted with facility in earlier years will only be removable with difficulty.

*Item: The legislative veto.* This device subjects new agency rules to nullification by Congress, without the impediment of presidential veto that accompanies ordinary congressional action. The most popular form of the proposal, the so-called one-house veto, enables either house of Congress acting alone to stop agency rules. Since, as noted above, existing rules can only be changed *by rule*, the net effect in the present Congress is that the Democrat-controlled House will be able to prevent the dismantling of regulatory controls.

*Item: Statutory requirements of cost-benefit analysis to justify new rules.* Such measures would demand that the benefits to be derived from a new rule match or exceed its anticipated costs, and in some versions would even provide for judicial review of the agency determination. But a rule which merely undoes a preexisting rule has costs and benefits as well—the costs being the forgoing of the previously anticipated benefits, and the benefits being the elimination of previously imposed costs. The result: Unless the statutes are carefully drawn so as to apply only to rules that increase the burdens imposed on the private sector, extant regulation will be accorded a sort of presumptive validity, and the elimination of regulation will be subjected to a burden of proof that the original adoption of regulation never confronted. In some areas, it may be impossible to sustain that burden of proof (especially if it must be sustained to the satisfaction of regulation-prone courts) because of the irremediable absence of hard data—for example, data on the effects that would

be produced by competition in a field traditionally committed to government-protected monopoly, or data on the carcinogenicity of certain substances. In other words, for areas already subject to regulation, the cost-benefit statutes that have been proposed in effect adopt the rule: when in doubt, leave it regulated.

Other items might be added. The point is that with the executive branch in control of deregulators the play of forces has been fundamentally reversed. It can no longer be assumed that any impediment to executive action must produce a net gain for the private sector. In fact, that assumption has never been universally correct, as the nuclear power industry learned to its sorrow. Where government action is needed by the private sector, as it is for the licensing of new nuclear plants, the procedural safeguards and judicial-review protections so carefully nurtured in other contexts by the corporate bar have proven to be a Frankenstein—affording licensing opponents unlimited opportunities to impose costly delays. So also, such provisions can be used to frustrate deregulation, sought by the private sector from an executive evidently eager to accord it.

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upon a regulation-prone executive, they will on balance slow the increase of regulation; but imposed upon an executive that is seeking to dissolve the encrusted regulation of past decades, they will impede the dissolution. Regulatory reformers who do not recognize this fact, and who continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team.

Of course not all of the continuing support for such restrictive measures can be attributed to the deregulators' failure to realize that the goal posts have been reversed. There are other potent factors involved. The legislative veto, for example, reflects a basic power struggle between the executive and legislative branches,

whose causes and effects extend well beyond regulatory policy; and many members of Congress may value the augmentation of legislative power above the regulatory policies narrowly involved, and above party loyalty to a Republican-controlled executive. Moreover, much of what passed for support of deregulation during the last administration was in fact merely opposition to change. Specifically, some of the business support for the measures discussed above sprang from a well-informed desire, not to prevent further regulation, but to impede the elimination of anti-competitive protections that existing regulation affords. Now that the election has altered the game, so that those who are anti-regulation and those who are anti-change are not generally on the same team, we would expect to see a falling-out among prior allies. (When the defections have occurred, by the way, the deregulation forces may be much less numerous than they once appeared.)

But still, I continue to attribute much of the support for executive-enfeebling measures to the philosophy of government (or of non-government) described by the Saxbe Hypothesis—the understandable but nonetheless disastrous aversion of the proponents of limited government to making vigorous use of the legitimate machinery of government to achieve their goals. Their enemy, of course, has no such aversion—so they are an army doomed to attack on foot and retreat by mechanized personnel carrier. This is not to suggest that unbridled executive discretion, during *any* administration, is a good thing; it assuredly is not, and no one has been more enthusiastic than I for legislated *substantive* standards to replace the meaningless generalities of many existing laws. But so long as those generalities continue to exist, then the imposition of new procedural impediments can only succeed, during the Reagan administration, in preserving the administrative decisions of the past. And one can predict that when the wheel comes full circle, and the proponents of government ordering are once more in control, the impediments will be eliminated (as they were, massively, during the New Deal) or evaded (as they have been during the last decade through the imaginative use of rulemaking rather than adjudication to make new law). It is, alas, an unequal struggle, the forces of deregulation, for the time being, battling forward—as they prefer—on foot. ■

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