Perspectives
on current developments

Building Access: Cost No Barrier?

The movement to make federally financed buildings "accessible" to the handicapped began, like most movements, with an appeal to common sense and humane feeling. People confined to wheelchairs had always needed attendants to get most places, but that placed a continuing demand on the time of their family and friends and of building personnel. Blind and deaf people could get around by themselves, but only by being very careful. So why not take a little extra trouble to help them out? Making buildings "barrier-free," as it was called, would not be very expensive, at least not if it were done in the design stage, and it would both foster the virtue of self-reliance and free a certain number of attendants from their duties.

Thus when Congress first addressed the question in the Architectural Barriers Act of 1968, its approach was more that of a Boy Scout than a cop. It allowed three federal agencies (the General Services Administration and the Departments of Housing and Urban Development and Defense), in consultation with the Department of Health, Education, and Welfare, to issue regulations to make the buildings they used or helped pay for accessible, and left the details mostly to the agencies' own initiative. Other agencies would then rely on their standards; when HEW paid for a college dormitory, for example, it would hold the college to GSA's standard. In 1969 the agencies duly adopted standards modeled on those of the American National Standards Institute.

During the next five years the handicapped community became a formidable political force. By 1973, its most vocal members had begun to think of their cause as a matter of civil rights. They began to argue that handicapped persons were being denied government services, not to mention government employment, if they could not get around government buildings without assistance. Offering to provide such assistance was definitely not enough, they said, for it smacked of "separate-but-equal," while the real need was for "mainstreaming." When Congress passed the Rehabilitation Act of 1973, it included at their behest, with little debate, a section modeled on the language of the 1964 Civil Rights Act. The section said that no "otherwise qualified handicapped person" could be excluded from federally subsidized programs. What this meant in practice (could blind people be barred from driving federally subsidized buses?) was left for another day and, perhaps more important, for other branches of government.

One of the complaints of handicapped activists was that the agencies had been lax in pursuing accessibility. Thus the 1973 law created an Architectural and Transportation Barriers Compliance Board to serve as an independent overseer of the agencies' efforts. Its hearing examiners were to have the power to issue orders binding on the agencies (adjudication) but not to issue prospective regulations (rulemaking). The scheme was still, in a sense, one of self-regulation by the agencies, since it was representatives of nine agencies who made up the board's membership.

In 1976, Congress turned up the heat further. It amended the Architectural Barriers Act to include the Postal Service as a standard-setting agency and to require, first, that each of the four "standard-setting" agencies (the Postal Service, GSA, HUD, and Defense) prescribe accessibility standards and, more important, that they "insure wherever possible," rather than act "as may be necessary to insure," a state of accessibility.

Under this prodding the standard-setting agencies did continue to develop new regulations, though at a slow pace. The American National Standards Institute joined with them to rewrite the model standard, a task that was finally finished in 1980. Meanwhile, divergent state accessibility standards were proliferat-

ing amid mounting confusion in the building industry.

In 1978, ten years after the ball started rolling, Congress acted yet a fourth time, and now the well-organized handicapped community won a decisive victory. The lawmakers amended the Rehabilitation Act to add eleven "public" representatives, at least five of whom were to be handicapped themselves, to the board. Congress also gave the board what amounted to rulemaking authority over the other agencies' rulemaking authority—specifically, the right to establish "minimum guidelines and requirements" to govern the standards issued by the agencies under the Barriers Act. All this transformed the board from a rather sleepy agency with very little to do into a body with both massive powers and the will to use them.

The shift in its make-up also finally succeeded in emancipating the board completely from cost considerations, by diluting to almost nothing the influence of the agencies that paid the bills. The quota for handicapped members turned out to be needless, since virtually all the "public" members were taken from the ranks of ardent handicapped advocates. The federal agency appointees were no longer actually outnumbered after 1980, when their number was raised to eleven, but they still did not put up much resistance. Some agencies did not pay the costs of the accessibility requirements themselves, except indirectly in leasing buildings from GSA, and some shifted the cost to their grantees. At any rate, the agencies' senior officials tended to turn their duties over to staffers from units whose job within the agencies was to promote accessibility. The upshot, of course, was that the board was not disciplined by any budgetary or other constraint on the compliance costs it could impose.

Some observers still professed surprise, however, at the sweep of the standards the board came up with in August 1980. Those standards covered a wide variety of design features for both new construction and additions, and for transit facilities as well as federal and federally financed buildings. They prescribed standards for parking, entrances and exits, the height of drinking fountains, and how fast elevator doors could close. They required tactile warnings for the blind and visual fire alarms for the deaf, too. Among other requirements:

- All new houses and apartments built with federal money, not just some reasonable percentage, would have to be accessible. Likewise, every bathroom, including private single-user toilets and toilets in every hospital room, had to meet the standards. Agencies estimated that such complete coverage would increase the cost of government-financed housing by more than $600 million a year compared with the old standards.
- Alterations costing more than 50 percent of a building's value would trigger extensive "retrofitting." If an existing subway system replaced stairs with escalators, for example, it would also have to install costly elevators.
- Newly leased buildings would count as "new" and would have to comply with the guidelines' essential features. There was a sort of logic in this rule, since it prevented agencies from evading the rule by shifting to leases. But its effect was to require massive, immediate retrofitting work on a large number of old buildings—putting an end to the principle that only new or renovated buildings would have to be changed.

Critics of the guidelines charged that they would not even halt the proliferation of different state accessibility standards that was bedeviling the building industry. Several of the provisions deviated—unnecessarily, in the critics' view—from the 1980 ANSI standard.

After public comment—including objections from three of the four standard-setting agencies (Defense had given its proxy to the newly elected chairman, one of the "public" members)—the board adopted a final rule on January 6, 1981. As an emergency "midnight" rule, it escaped President Reagan's freeze. The new administration soon began an effort of sorts to force the board to back off from the newly adopted rule. It even proposed cutting off the board's funding entirely at the end of fiscal 1981—but then failed to lobby hard for the cutoff and lost out in Congress. That spring, the standard-setting agencies developed a counterproposal based on the 1980 rewrite of the ANSI standard, and managed to win over one of the public members. In July the board issued a notice of proposed rulemaking to rescind the January rule.

By this time, the public members of the board had decided that they could best achieve their goals through compromise, and sat down

In Brief–

The Regulated Pizza . . . A pizza with everything on it must comply with no less than 310 regulations, according to a survey by *U.S. News & World Report*. Tomato sauce must be red or at least "reddish," mushrooms must not be marinated in vinegar, and onion slices must come from the bulb, not the stalk. Green peppers must not have too much salt, while olives and anchovies must not have too little. Each pound of flour must contain at least thirteen—but on no account more than sixteen—milligrams of iron. No data are available on the miscellaneous toppings adventurous New Yorkers have been known to order, including crab, squid, and octopus.

. . . and the Regulated Chef. School cooking classes that fail to tell students about Indian and Chinese cuisine are guilty of racial discrimination, according to the British government's civil rights commission. It doesn't matter if none of the students themselves are members of minority groups, reports London's *Daily Mail*, or if all of them have a taste (unaccountably) for traditional British cooking. "What counts," the commission says, "is that white children should not grow up regarding the culture of ethnic minorities as unimportant."

Vindication without Remuneration. As was pointed out in these pages recently, the federal government is increasingly willing to pay the legal fees of its opponents in court, even when they have lost their case (see "The Private Attorney General Industry: Doing Well by Doing Good," *Regulation*, May/June). It is therefore interesting to note that at least one agency plans to head off in the other direction. The Defense Acquisition Regulatory Council asked for industry comments July 29 on a proposal to deny reimbursement for any legal fees that a defense contractor incurs in defending itself against a government allegation of fraud—win or lose. James Brannen, director of the council, attributes the shift to "increased civil, criminal and administrative emphasis being given to eliminating the effects of fraud in the contracting process."

In the case of contractors, of course, denying reimbursement has a punitive ring, since contractors are normally entitled to reimbursement for all the business costs they incur in connection with their contract. Thus it is especially notable that the proposal would deny reimbursement not only for lawyers' salaries, but also for costs including but "not limited to . . . the costs of services of accountants, consultants, or other professionals; and the salaries and wages of employees, officers and directors."

Risk-Benefit Analysis Redefined. In a review by Langdon Winner in the *New York Times Book Review* (August 22, 1982) appears this memorable definition: "One widely used style of argument, so-called risk-benefit analysis, insists that the possible harm of a technology must be weighed against its economic payoff. People shouldn't agonize over the probabilities of cancer from air pollution, for example, if the firms involved are generating jobs and profits." Winner, who teaches politics and technology at the University of California at Santa Cruz, goes on to decry the "unsavoriness" of this type of analysis. Perhaps regulatory analysts shouldn't agonize over misstatements of their position by reviewers if the newspapers involved are generating good copy.

Kitchen Sinks Are Next. As part of an effort to stem the outflow of metals and other valuables, the Mexican government has banned the export of doorknobs and hinges. Capital flight is a common enough phenomenon, but this may be the first time houses have tried to escape piece by piece across the border.

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to negotiate with the standard-setting agencies. Nearly a year later a compromise was finally reached, and on May 4 the board unanimously agreed to its terms. Among the highlights of the compromise, which was issued September 3:

- The provisions for renovations were relaxed. Transit systems will not have to install elevators in old systems when making other changes, at least so long as the elevators would be "structurally impracticable." (Specifically, if they install an escalator, they will not have to install an elevator too if it costs more than half as much as the escalator. Since elevators generally do cost more than that, older transit systems may not have to be concerned with them henceforth.)
- The board agreed to postpone for pending court decisions the questions of whether the Barriers Act applies to leased buildings and housing.
- The new rule makes many lesser changes in such areas as bathrooms, entrances, and exits in order to bring the guidelines as a whole closer to the 1980 ANSI standard. It also takes explicit note of the ANSI standards, which makes it easier to determine where the two differ.
- The rule tries to soothe the agencies' sensibilities by emphasizing that it is only providing guidelines for their standards, not the standards themselves, and thus is not really usurping their authority.

The compromise notwithstanding, the administration has again proposed cutting off the board's funding, this time for fiscal 1983. Still, the board may well survive, if only because its

membership is changing so rapidly. The new chairman, Assistant Attorney General for Civil Rights William Bradford Reynolds, is unlikely to pursue the activist course of the public member who was his predecessor. Furthermore, the administration has appointed three public members of its own choice—including a non-handicapped graphics designer—and has one vacancy to fill.

Accessibility became an increasingly contentious cause as its advocates moved from earnest appeals to good will, through increasingly sharp and peremptory demands, to a full-blown, categorical civil rights claim. Although those advocates may not have lost much in the terms of the compromise, the fact that they were opposed at all—and that an administration was willing, if necessary, to brave the public relations nightmare of wheelchair demonstrations—is a major departure from the past.

Airline Competition and the Slot Market

In deregulation, it sometimes seems, there are no won causes. Four years ago the Airline Deregulation Act of 1978 phased out the Civil Aeronautics Board's powers over, among other things, airline route entry. Now these powers have been revived by another agency, the Federal Aviation Administration, which regulates the technical and safety aspects of air travel. Moreover, former CAB chairman Alfred Kahn has charged that the FAA is now regulating the air carriers "in a more thorough and detailed way than the CAB ever did."

The backtracking resulted from the PATCO strike in August 1981, in which 11,400 of the nation's 17,400 air traffic controllers illegally walked off their jobs. Faced with a reduction in air traffic capacity, the FAA had to cut back landings at twenty-two of the nation's busiest airports and flights through the twenty control centers that handle flights en route. (Before the PATCO strike, landings had been restricted only at four big-city airports: O'Hare, LaGuardia, Kennedy, and Washington National.) The agency's methods of assigning to airlines the resulting hourly landing rights—known as "slots"—have led it into one textbook example after another of economic inefficiency.

Throughout the year since the strike, the FAA has sought to achieve an elusive "fairness" in its treatment of its constituents, the airlines. Thus, the agency's first reaction to the strike was to cancel the carriers' landing rights on a proportionate basis. Each carrier flying into LaGuardia, for example, lost the same proportion of its landing slots. Economists protested: how could the agency know it was canceling the least important or least productive slots? Giving incumbent airlines rights to all existing slots, furthermore, excluded new entrants.

To address the latter problem, the FAA announced that, as the air-traffic control system began to recover and new slots became available, it would grant preference to new entrants in distributing them. Forty percent of all new slots would go, in a random drawing (an actual lottery drum was used), to such "new entrants"—defined as carriers new to the industry, not just the local market. To qualify, a carrier had to have applied for route authority before the strike, but could not have begun operations by February 17, 1982. (Carriers that applied after the strike were out of luck.) The rest of the new slots were to be allocated in a second random drawing to incumbent carriers and unlucky would-be new entrants from the first draw.

There soon arose the question of whether airlines would be allowed to transfer slots to each other. If the slots had initially been distributed inefficiently, economists noted, an "aftermarket" in slots would get each slot into the hands of whatever airline could put it to its highest-valued use. Even if the initial distribution had been efficient, there would still be strong reasons for carriers to adjust their route systems as time went on, in response to changes in both passenger demand and technology. Allowing slot transfers would, for example, help airlines move closer to the "hub-and-spoke" pattern that was emerging in the industry.

Not until March 1982, seven months after the strike, did the FAA overcome its hesitance and allow trading. Even then, it permitted only one-for-one bartering of slots, not buying and selling. The swaps had to be "blind"—that is, anonymous—because the agency feared anti-competitive effects if carriers knew whom they were trading with.

The economists were not especially satisfied with this limited concession, even though

some trades did occur. They noted that barter, unlike money trading, requires what is sometimes termed a "double coincidence of wants." Even airlines with many slots may find it difficult to come up with an even trade when money cannot be used as a balancer. This problem might have been eased had airlines been allowed to hold slots speculatively, for rebartering, but the FAA prevented this through a "use-it-or-lose-it" requirement. A barter policy also tends to freeze existing market shares, since new entrants cannot barter with slots they do not yet have. Even if a new entrant does manage to pick up slots in the FAA lottery, the system hardly permits it to construct an entire route system the way it could if it were allowed to buy slots.

Two months later, on May 10, the agency surprised its critics by agreeing to sales, although only as an "experiment." During a thirty-day period, later extended by two more weeks, a true market in landing rights was thus allowed to operate. Carriers were quick to respond. By June 30, the FAA had taken applications for the transfer of 314 slots. Although carriers did not have to report the amount of cash changing hands, an estimate in *Aviation Daily* put the amount at more than $10 million during the first month alone, and the *Washington Post* reported that slots at several airports sold in the $100,000–200,000 range. The record price may have been the $1.75 million and three Boston slots that People Express gave Altair Airlines in exchange for five slots at Washington's National Airport.

That airlines were willing to pay these prices is all the more impressive because several factors were working to keep slot prices low. The FAA reserved the right to revoke slots at its discretion, either because a carrier was not using them or because it felt "essential" air service was not being provided. In addition, more and more slots were to become available as the air traffic control system recovered, and carriers could hope to get them for free through the lottery system.

The high prices paid for slots provide one measure of the implicit subsidy to the airlines

represented by the initial slot giveaway, as well as of the economic loss the nation incurred from the controllers' strike. That so many slots changed hands during the experimental period also reveals the gains to be had from trading, as Christopher DeMuth, administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs, pointed out. If the slots were already being put to best use before the experiment began, sales would not have occurred, at least until market conditions changed. (The differences in slot prices between airports, incidentally, signal where additional air traffic capacity—including not only new airports but also newly trained controllers and new equipment—is most urgently needed. In the absence of a slot market, the FAA has made these decisions on non-market grounds.)

Aside from OMB and the economists, however, not many raised their voices in favor of the buy/sell policy. Among the airlines that commented on the policy, opinion was split in an interesting way. Several carriers, including the low-cost newcomers New York Air and People Express, supported free trade in slots, while most of the major air carriers, along with their associations, opposed it. (Naturally, the airlines that favored ending the policy in principle did not choose to protest it symbolically themselves by abstaining from trading.)

Avoiding potential competition is not the only reason major airlines might oppose a buy/sell policy (even if the policy helps them achieve more efficient route networks). A slot market, after all, reveals the value of the resources they had been given for free. Paying for slots also set a precedent for eventual "slot auctions" from which the federal government or local airports would pocket the proceeds. Nor is their position on the latter issue entirely unreasonable. They have already paid once for at least some of the airport capacity they use, through the Airport and Airway Trust Fund, and auctioning off slots would require them to pay a second time.

The experiment also drew adverse comment from lawyers, who warned that letting carriers buy and sell slots could violate the Federal Aviation Act by transforming slots into pieces of property. Section 308(a) of the act, perhaps in fear of a government-granted monopoly, forbids the agency to bestow an "exclusive right for the use of any landing area"—in other words, a property right. This leaves unexplained the question of why a slot is property when it may be bought and sold but not when it is granted by the FAA in the first place. Perhaps the answer is that the FAA's right to revoke slots at will makes the slot less "exclusive." Surely, too, the law at least lets the FAA keep two aircraft from landing on a runway at the same time. But if all but one craft must be excluded, someone must be granted a right to the scarce resource thereby created. In any event, it may have been possible to please both lawyers and economists (though not airlines) by distributing slots in periodic auctions, as OMB proposed. Making landing rights temporary instead of permanent is one way to make them less than "exclusive" without inviting actual crashes.

It would hardly have been a transportation dispute, of course, without a claim that reform might hurt service to small communities. And sure enough, commenters pointed out that an airline carrying passengers on a route from a small community might sell its landing slot to an airline that would use it to land flights from a large city. (Of course, the reverse might as easily happen as well.) The economists, of course, had no desire to reopen the old debate—seemingly closed by the Airline Deregulation Act—on whether the most economically valuable routes should be the ones to be served.

On July 6, the FAA announced that it was ending its policy of free trading: while slot trading could go on, cash payment would be forbidden. It cited strong opposition from the "aviation community" and asserted that the policy had been so successful at providing scheduling flexibility that it was unnecessary to continue it. Implicitly, however, the FAA still recognizes the need for some flexibility, since it continues to allow barter.

The slot problem may be a self-correcting one, since the FAA estimates that the air traffic control system will be largely restored by July 1, 1983. After that, a slot system will no longer be needed at many airports, at least for a time, while at others there will be scarcity only at peak hours. In the meantime, although the FAA's actions seem to please most of the incumbent airlines, they strike many economic reformers as a throwback to the old days of industry regulation.

Regulatory Reform in the States: A View from New York

If the Reagan administration ever manages to decentralize regulatory power through a "new federalism," it will accelerate a notable trend of the past two decades: the enormous growth in size and power of state governments. Although state regulation comes under less academic scrutiny than federal regulation, it presents many of the same problems in miniature —and sometimes not so miniature—form.

For some time now, too, there have been stirrings of regulatory reform at the state level. Florida and other states have deregulated transportation within their borders. Arizona has experimented with a variety of regulatory reforms. Thirty-five states have enacted "sunset" laws providing for periodic review of existing programs.

Still, the sheer volume of state regulatory activity has never been higher. New York is a good example. Private citizens there must file a notice or obtain a permit from the state before they can engage in any of more than a thousand activities. It takes eighteen permits to open a pizza parlor that serves beer. The New York senate's commerce committee estimated in 1980 that it cost the state's businesses as much as $2.5 billion a year to comply with state regulations, almost one-third as much as the estimated $8 billion they spent to comply with federal regulations.

Although some of the state regulations result from federal mandates, Albany can hardly complain, since it employs mandates in just the same way Washington does. In 1978 the Advisory Commission on Intergovernmental Relations reported that New York imposes mandates on its local governments in sixty-six of a total of seventy-seven functional areas of governmental concern, more than any other state. The state has not kept a running tally of how many of its laws impose mandates, but there are known to be hundreds.

New York may be an extreme case, but if so it is all the more interesting that the winds of regulatory reform are blowing even there. This spring a New York State Bar Association panel issued a report proposing a wide-ranging agenda of regulatory reform measures, some adapted from federal practice, some from other states, and some that are quite new. Among its recommendations:

- *Centralizing executive oversight.* No one seems to know how many states have regulatory review offices, but there is evidence of continued movement. In 1980 California created its Office of Administrative Law to review and approve state regulations. OAL has a number of strong deregulatory features, including the right to review old regulations over a six-year period, a budget insulated from the legislature, and a charter forbidding agencies from taking it to court; moreover, repeals of regulations are exempted from its review. (See "More Governmental Innovation from the Golden State," *Regulation*, January/February 1981.) In its first three months OAL presided over a 30 percent decline in the number of proposed regulations. The New York bar association report recommends that the state move closer to the California system, and also that its Office of Business Permits be given central paperwork oversight powers like those enjoyed by the federal Office of Management and Budget.

- *Getting a handle on subregulatory guidance.* A great deal of agency activity other than formal regulation affects the regulated public, including adjudications, guidelines, policy statements, and new proposals. "This body of 'informal law' should be easily accessible to interested parties," the report says. It calls on agencies to publish or otherwise make available an index of all such information, aside from "housekeeping matters" not of general interest —a proposal that goes well beyond anything in force at the federal level.

- *"Sunset" for mandates and newly created agencies.* According to a Common Cause survey, the most common complaint among state legislators about "sunset" laws is that they take too much time and money. (North Carolina has actually repealed its law.) The New York panel accordingly recommends sunset only for newly created agencies—in order to discourage their creation, if nothing else— and all mandates to local governments. With remarkable political candor, it adds that in order to "alleviate the potential for political polarization," sunset reviews should take place in nonelection years if possible.

- *Limiting the flow of new legislation.* One of the panel's more offbeat ideas is to forbid legislators from filing any new bills in either

house of the state legislature after March 1. Any bill filed after that date would have to be cleared first by the house's rules committee and —showing the panel's keen appreciation of the incentives of legislators—could not bear its sponsor's name or identify a legislator in any other way.

The bar panel also includes an extensive discussion of one of the special concerns of state government, occupational licensure. If licensure is at all typical of the way state governments operate, they may indeed be in dire need of an overhaul. Licensure continues to proliferate in New York "in spite of the fact that virtually everyone who has ever studied the phenomenon has concluded that it is rife with abuse." The state now licenses or otherwise certifies entry into at least 359 different occupational categories, including baby chick seller, frozen dessert handler, private school recruiter, outdoor guide, cider retailer, industrial homeworker, second-hand bedding wholesaler, and wrestling match ticket taker.

In addition, scores of measures now before the New York legislature would extend licensure to new categories. Most would set up a board of practitioners of the affected occupation to help out state authorities in their regulatory chores. One bill would create a licensing board with virtually undefined powers over "custom tree workers." Another would prevent all but licensed recreation organizers from calling themselves "professional recreators"—a boon, perhaps, for English usage, whatever its effect on competition. The entry requirements for aspiring "recreators" would be fairly typical: they would need a year of experience and a college degree in recreation or a related field, and would have to pass a special exam.

"Once an occupation is licensed," the bar panel says, "there are periodic pressures for change, usually in the direction of greater restrictiveness," such as requirements for continuing professional education and elimination of previous licensing exemptions. Teachers, for example, have convinced the state Board of Regents that they should be recognized as a separate licensed profession with their own eighteen-member professional practices board, even though public school teachers are already screened and certified by public agencies and are closely supervised by the state Department of Education.

Members of the occupations concerned often say that licensure is needed to protect consumers. Proponents of licensure for athletic trainers, for instance, warn darkly that at "the present time there are no criteria or educational requirements for becoming an athletic trainer. Any person qualified or not may simply claim that he is an athletic trainer." Likewise, in the case of the recreators, "the full-time professional recreation leader, therapist, supervisor or administrator must have a variety of special skills. By affording these persons a certification, their contributions will not go unnoticed." Not only have governments invested large sums in public parks, the recreator advocates argue, but amateur-led fun can pose a safety threat.

The alternative, as the bar association panel points out, is for the state to ban directly any occupational conduct it thinks dangerous. For its own part, the panel shows a concern for competition in the professions that goes beyond mere window dressing. In a section calling for a state-wide corps of administrative law judges, it proposes that the positions be open to nonlawyers—which, for a bar association, is surely the sincerest possible gesture toward reform.

Dress Codes Decontrolled

On July 28, the Department of Education revoked—after six years of non-enforcement—its dress code and hair length rule. It thus ended a long saga of infighting, stalling, neglect, and reversal that exemplifies the difficulties of changing, or even pinning down the meaning of, an unpopular regulation once it is on the books.

The dress code rule derived from Title IX of the Education Amendments of 1972, a laconic provision that bans sex discrimination in educational activities receiving federal aid. In the implementing regulations promulgated in 1975, the Department of Health, Education, and Welfare forbade schools receiving federal funds from engaging in sex discrimination in a long list of areas ranging from athletics to requirements on dress. The regulation on the latter prohibited discrimination "against any person in the application of any rules of appearance." It did not take long for the implications to become clear: schools around the

country could no longer require boys to wear short hair or girls to wear dresses.

The Ford administration suspended active enforcement of the dress code rule in 1976, just one year after it went on the books, but students and others could still call the issue to HEW's attention by filing complaints. During 1977 and 1978, these complaints began to accumulate. Along with cases where particular students had been disciplined, there were also general challenges to school requirements that female nurses wear caps, that girls wear skirts and boys slacks in choral groups, and that boys and girls wear graduation robes of different colors.

Joseph Califano, President Carter's first secretary of HEW, faced controversies on both the athletics and dress code issues. He decided that the department should stand firm on the former—its demand that schools spend equal amounts on male and female athletes—while giving way on the latter. On December 11, 1978, HEW issued a Notice of Proposed Rulemaking to rescind the dress code rule, explaining that "most Americans feel" such cases "are handled with more common sense at the local level" and that HEW could use its newly freed resources to stamp out more salient instances of discrimination (see "Dress Codes and Sports," *Regulation*, January/February 1979). Editorial writers leaned back in their chairs, convinced that common sense would be allowed to take its course, and promptly forgot about the issue.

They should have known better. In the half-year until Califano left office the next summer, HEW did little to push the rescission. And when his successor, Patricia Harris, took office in July 1979, she easily succumbed to the external pressure of women's rights groups and the internal pressure of the department's Office for Civil Rights, both of which thought of the rule as a symbolic means of overcoming sex stereotypes. Thus on November 20, 1979, Harris withdrew the Notice of Proposed Rulemaking, explaining that "the discrimination that stems from appearance codes can be as seriously damaging and demeaning as other types of discrimination."

Harris may have seen mostly symbolic value in the regulation; at least, her office never handed down any concrete guidelines for its enforcement. This may have resulted either from a common-sense view of the department's priorities or from sheer paralysis resulting from the impending transfer of Title IX responsibilities to the new Department of Education. HEW's Office for Civil Rights, for one, was in chaos, as its personnel speculated over who and what would have to move. Whatever the reason, the regulation continued without enforcement or even interpretation, leaving both schools and the department's own enforcement officers unsure as to what sort of dress codes, if any, would be upheld: could schools ban culottes, for instance, if they enforced the ban equally on both sexes?

This state of desuetude persisted even when the inexorable grind of court orders could be heard approaching. The U.S. District Court for the District of Columbia had already imposed on HEW a series of orders mandating timetables within which agency investigations and enforcement actions had to be completed. These orders, known as the *Adams* orders, covered the enforcement of Title IX complaints, among other things, and seemingly therefore the enforcement of hair length and dress code complaints, which nevertheless continued to accumulate year by year. (Although one group of *Adams* plaintiffs did bring up the dress code issue, they did not press it to a resolution, perhaps because they feared that publicity would bring new pressure to rescind the rule.) Whether from fear of coming under a court order or from general enthusiasm for the cause, OCR decided that a show of enforcement was needed: in January 1980 it ordered the regional HEW offices to reinvestigate the complaints and issue findings. But since there was still no clear policy guidance on how to handle the cases, even the minor ones, little was accomplished.

In May 1980 the Department of Education was born, and responsibility shifted to Shirley Hufstedler, a third Carter administration secretary. Hufstedler, preoccupied by the burdens of setting up a new department, and perhaps disinclined to be responsible for any further reversal in policy at this point, did not take a public stand on the question during her short term in office, and the complaints piled higher.

January 1981 would have been expected to be, and to some extent was, the turning point in the effort to rescind the regulation. The Reagan administration, after all, was willing to brave civil rights lobbies on other issues, how-

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ing began in September 1975 with a formal investigation and culminated in a rule promulgated in June 1978. It was based from the outset on the theory that restrictions on the provision of information would raise prices. Econometric studies comparing eyeglass prices in states with and without such restrictions confirmed the theory, establishing both that removing the restrictions would work as intended and that significant benefits were likely from doing so. And the rule was issued in less than three years—near record time for a major FTC rulemaking proceeding.

In contrast, the inquiry into funeral industry practices, which ignored these precepts, took ten years. Had it begun, rather than ended, with the baseline survey and had it included studies of the natural experiments discussed above, it is extremely unlikely that it would have lasted so long. Moreover, there would be greater confidence today that the commission had acted in the interest of consumers.

Some have suggested that requiring systematic evidence will put an end to all rulemakings or at least prolong them to absurd lengths. They are wrong. The streamlined used-car rule that FTC Chairman James Miller now proposes is based on reliable surveys showing that used-car buyers frequently misunderstand the extent of their warranty coverage. (Studies of a similar law in Wisconsin also provide evidence that better information can produce benefits exceeding the low costs of disclosure.) Moreover, the FTC's 1964 rule requiring warning labels for cigarettes was, in my view, adequately supported by the available evidence. Finally, the eyeglass rule demonstrates that it is possible for the commission not only to complete a rulemaking proceeding that is based on reliable evidence but to do so quickly. Rulemaking that relies on systematic evidence is quite feasible. It requires only concerted effort.

SOME CRITICS of my position charge that it is revolutionary to ask a body of lawyers and economists not to impose its own view of proper regulation on the world without first systematically evaluating the problem. If so, I must cheerfully admit to being a revolutionary. I doubt, however, that the seditious implications will trouble Congress, the courts, and the public at large. ■

Dress Codes Decontrolled

(Continued from page 13)

ever temporarily. But the process of paper-shuffling was still extraordinarily slow.

Incoming Education Secretary Terrel Bell found that he had to reinvent the regulatory wheel. In April 1981, he published a Notice of Proposed Rulemaking to rescind the regulation, much like the original Califano notice of 1978. The *sans-culottes* were no longer much in evidence: of the fifty-three comments that drifted in on the proposal, thirty-one favored rescission, seventeen opposed it, and five expressed no clear opinion. After the proposal had cleared the necessary internal channels, which took until early fall, it was sent to other agencies for approval: first the Civil Rights Division of Department of Justice, which since 1980 has had coordinating responsibility for all Title IX and other civil rights regulations, and then to the Office of Management and Budget. In September 1982, finally, six years after enforcement was first suspended, local schools recovered their ancient right to require haircuts of little boys.

Certain lessons can be learned from the tortuous history. First, it is often far easier to add nine stitches to the regulatory web than to take out one. Interest groups that never cared much when the dress code rule was added saw rescission as a "retreat" in the supposedly inevitable forward ratchet of history. Opponents of the rule, satisfied by soothing statements of general policy, did not know how to push the process toward actual decision. The rule was also an instance of a sort of "compromise" fairly common in government: overweening regulatory ambition tempered by nonenforcement. Refusing to apply a regulation can seem easier, even less controversial, than proceeding through the cumbersome channels of deregulation. Although the *Adams* orders made that option less comfortable in the case at hand, they obviously did not make it impossible.

Finally, personnel and organizational change can hold up even the most minor deregulatory reform for years; should one link in the succession be unsympathetic, all reform not yet completed can be wiped out, setting the process back to square one. To some extent, it seems, the urge to change letterheads conflicts with the urge to change policy.