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To Think
About
Regulations

By Daniel Oliver



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The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999
U.S.A.
202/546-4400

How to Think about Regulations

By Daniel Oliver

Last fall there was good news about regulations. The news was that during the presidential campaign Candidate Clinton quoted a Heritage Foundation piece complaining that President Bush had re-regulated with a vengeance. Truly, that was a wonderful sight: a Democrat complaining about too much regulation. Maybe that's why so many people came to see the inauguration. And why people who believe in limited government allowed themselves to be minimally optimistic—to see the glass as half full.

Candidate Clinton was correct: during the previous four years, we had seen explosive growth in regulations under President Bush. I guess if you're the Education President, and the Environment President, and the Foreign Policy President, there isn't much time left over for being the Deregulation President.

President Bush seemed to have learned nothing from his days as Chairman of President Reagan's Task Force on Regulatory Relief. Regulating got so out of hand in the Bush Administration that President Bush had to impose a moratorium on his own people—a datum that was not lost on candidate Clinton or the American electorate. That looked like good news.

The bad news, of course, is that this new Administration is far from bashful when it comes to regulating. There are already stories here inside the Beltway that the Clinton people intend to re-regulate the airlines—just for starters. That is bad news indeed for American consumer.

Now it's true that not all regulations are bad. Some regulations can produce efficiency or other socially desirable effects. A simple example is the traffic light at a busy intersection, which promotes efficient movement of traffic. A more complex example may be the antitrust laws. Obviously there are others. The point is, you don't have to be an anarchist to be a deregulator.

By way of self-preservation, the American consumers will, I'm afraid, have to become more involved in the regulatory process than any reasonable person would want to be.

In order to prepare for the task that lies ahead, I want to suggest three rules to remember when thinking about regulations.

First: Because regulations are as numerous as weeds, people tend to think regulations grow like weeds, all by themselves, in the dark. They don't. Regulations grow like orchids, each one carefully cultivated in the hothouse of politics by some interest group that desperately wants it and is willing to spend millions of dollars and years of effort to make it flower.

The second rule is a corollary of the first. Someone is going to benefit from each regulation. Often, it will be a specific industry or commercial interest. Sometimes it will be only the power-hungry bureaucracies in Washington. People who will benefit are people who will lobby. They may say they have the public interest in mind. Watch out.

Daniel Oliver is a Senior Fellow at The Heritage Foundation and co-chairman of The Heritage Foundation's Advisory Council on Regulatory Reform. Mr. Oliver served as Chairman of the Federal Trade Commission from 1986 to 1989.

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Many regulations which are actually economic regulations are dressed up in the rhetoric of health and safety. But strip away the white coat and stethoscope and you will find underneath a rule designed to benefit one group at the expense of another, designed to transfer wealth from one group to another group with more political power.

We should remember that most legislation is special interest legislation.

The third rule is a corollary of the second. There's no such thing as a free regulation. Somebody has to pay for each regulation, as somebody has to pay for lunch.

It may not always be apparent who pays. Sometimes it may be a small group, probably, in fact, a "target" of the regulation—targeted because the disadvantage they will suffer is what produces the advantage for someone else.

Sometimes it may be the general public that suffers, in higher prices or a less efficient national economy. But someone always pays.

Categories Defined

Regulations have traditionally been divided into two categories, economic and social. I prefer to categorize them with more specificity, however, in terms of what they actually do.

- 1) **There are what might be called "market failure" regulations**—regulations that purport to correct failures in the working of the free market.

In an economy as large as ours, it's always possible to find things that go wrong. That gives government people a chance to trade their wares—legislation and regulation—for votes. But their cures are almost invariably worse, and longer lasting, than the diseases. Air-line regulation lasted for decades.

Does the market fail sometimes? Sure it does—but we have to remember that the market doesn't have to work perfectly to work better than government.

- 2) **There are wealth transfer regulations**—regulations that transfer resources from a politically weak group to a politically powerful group. Often wealth transfer regulations masquerade as health and safety regulations.
- 3) **There are genuine health and safety regulations**—regulations that actually have the health and safety of the public in mind. Of course, some people will profit from those regulations in the course of providing health and safety to the public, but their profit is ancillary; it is not the underlying reason for the regulation.
- 4) **There are "civil rights" regulations**—regulations governing the way people behave towards each other.
- 5) **There are social regulations**, like the Family Leave Act and plant closing legislation, and perhaps zoning laws, and also provisions in the tax codes that favor charities.
- 6) **There are environmental regulations**—but I think it makes sense to segregate them into two categories. So in category number six I put those environmental regulations that affect the things that are reasonably common to all of us—things we all enjoy or care about, like clean air and clean water.
- 7) **But, there is also a group of environmental regulations that protect things that are elite and esoteric**, things the intellectuals and the jabbering class tell us we ought to enjoy even if most of us don't: primeval forests, the spotted owl, the snail darter, the California gnatcatcher, the Red-cockaded woodpecker, the Least Tern, the Winter-run Chinook Salmon—and even

the Furbish Lousewort, who—or I should say “which”—turns out to be neither a creature nor a lawyer, but a plant.

That’s a lot of categories, and I freely concede that there may be other ways of categorizing regulations. But I find these categories useful because I think they help identify discrete aspects of the regulatory problem—and identifying the problem is a good first step toward solving it.

For example, a regulatory reform easy enough to state in a single sentence would be: abolish all wealth transfer regulations. That does not mean we should abolish all health and safety regulations, so it’s important, if not always easy, to tell them apart.

Well now, we’ve just disposed of an entire category of regulations—wealth transfers—and it’s tempting to rest. Unfortunately, we’ve done only the easy part—say what should be done, not do it. And besides, there are still a bundle of categories to go.

Examples

Let me go back and give some examples of the various categories of regulations.

Market Failure Regulations

First, “market failure” regulations that purport to correct failures in the market place.

Right away, people should be suspicious. Who says the market has failed? Generally, it’s the politicians. But why should we expect them either to be impartial in making that decision, or wise enough and skilled enough to make improvements on the workings of the market economy? We have to remember that regulations are the politicians’ stock in trade. Regulating (and passing legislation that regulates) is what they do for a living. It’s their life. Public servants act in their own interest just as much as corporate moguls do. Politicians are just people, who desire, no less than businessmen, to enjoy the pomp and glory of the world, and to be warmed by a bonfire of vanities, spiritual and material. So we must be as suspicious of their intentions as we are doubtful about their abilities.

Is there such a thing as “market failure”? I think there is, but I suspect there are people who disagree. Some won’t like the concept at all, on the grounds, I think, that even though the market might be said to fail in the short run, it will correct itself in the long run. Some won’t like my examples, concluding that although the market can indeed fail, in my examples it hasn’t failed yet.

Let me give two examples from the Federal Trade Commission’s jurisdiction.

One example would be fraud, especially fraud that consumers cannot easily detect. You take your automobile in for an oil change, and are told your McPherson struts are cracked and must be replaced immediately. The last time you heard someone say “McPherson struts,” he was criticizing your stuffy college roommate, whom you wisely replaced the following year. Replacing perfectly good McPherson struts, however, is fraud, and is the kind of activity the FTC is charged with rooting out. Something else is the selling of oil that will damage your car’s engine—but not until long after you’ve forgotten which gas station sold it to you. That kind of activity hurts consumers. They lack sufficient information to protect themselves. That lack of information is market failure.

As is a practice that the eyeglass industry once engaged in. For a number of years it observed a self-regulation that forbade advertising the prices of eyeglasses. As a result of FTC agitation, the industry dropped the ban on advertising, and the price of eyeglasses fell about 30 percent. That self-imposed ban might be described as market failure.

But I suspect it’s fair to say that most of what politicians call market failure is not that at all.

Certainly the FTC's activities have not always improved the market. In the 1950s, cigarette firms competed to reduce tar and nicotine and reduced the content of each of those substances by 30 percent to 40 percent. In 1960, apparently unsatisfied that the then-existing scientific evidence indicated that reduced tar and nicotine provided significant health benefits, the FTC obtained an industry-wide agreement to ban all tar and nicotine claims. Because the consumer no longer received information on tar and nicotine content, it was no longer as advantageous for cigarette firms to compete to reduce those substances. Subsequently, public service organizations, including the American Cancer Society and the National Interagency Council on Smoking and Health, decried the ban, and the FTC changed its policy. The market was once again allowed to work and firms began again to advertise, and to compete with regard to tar and nicotine content—and smoking became less dangerous. Alas, no congressional watchdog ever bothered to investigate to see how many lives might have been saved if the government had not meddled in the market and the improvements had been made sooner.

Other examples of misguided legislative attempts to cure what some described as market failures are ceilings on credit card interest and price controls.

Wealth Transfer Regulations

Wealth transfer regulations are indefensible, and ought to be abolished. The most obvious examples, perhaps, are farm and farm-related programs. Marketing order programs limit production, and trade restrictions limit imports: both kinds of programs make consumers pay more to farmers for agricultural products. The General Accounting Office reported on May 17 that the federal program which restricts imports of sugar costs consumers \$1.4 billion a year in higher grocery bills. That's just one program. The total cost of such programs is in the billions, and is truly regressive.

Wealth transfer regulations often masquerade as health or safety regulations. In New York State, there used to be a law that authorized the State Agriculture Commissioner to protect the citizens from "destructive competition" in the milk industry. But the only people who were really protected from "destructive competition" were the members of a cartel of milk producers. The Commissioner prohibited producers from other states from selling milk in New York, and that, of course, kept the price up. When I was Chairman of the FTC, we made a lot of noise and put the spotlight on the issue. As a result, milk from New Jersey was allowed to be sold in New York City, and the price went down as much as 70 cents a gallon. The health and safety justification—guaranteeing a supply of a commodity important to good health—was a fraud.

Genuine Health and Safety Regulations

There are, of course, genuine health and safety regulations—though there is always the question of whether the market, left alone, would supply an adequate level of safety. Federal Aviation Administration regulations mandate certain safety precautions. But some people claim that the airlines' own safety standards exceed those of the government—for perfectly understandable reasons. People will tend not to fly on airlines that have difficulty keeping their planes afloat.

The quest for health and safety is understandable, but neither health nor safety can be had for free. Two questions arise: How much are we willing to pay? And, as always with regulations, are there unintended, and harmful, consequences that will flow from seemingly beneficial regulation?

The outstandingly ridiculous rule is the Delaney Clause that prevents a product from containing any trace at all of a substance that has been found to cause cancer in laboratory animals.

The Food and Drug Administration has become the symbol of bureaucratic obstructionism. We live in the most technologically innovative and advanced place and time in history—and yet we are more scared of progress and improvements than the cave man was of fire from the sky or of total eclipses. It is probably fair to say that over a hundred thousand people have died because the FDA blocked the production of life-saving drugs.

Some regulations backfire: The Consumer Product Safety Commission required children's sleepware to be fire retardant—but it turned out that the leading fire-retardant chemical possessed (or was said to possess) carcinogenic properties. A requirement that some medicine container tops be child-proof was found by one study to have increased the risk of death because the tops were so difficult to get off, parents tended simply not to put them back on once they had succeeded in getting them off.

In 1991, the EPA formulated a labeling rule for wood-preserving chemicals that would have cost over five trillion dollars for each death from cancer that would have been averted. That's a steep price for health and safety. Fortunately the Council on Competitiveness, which was abolished by the current Administration, intervened.

The New York Times on March 21 ran a story about regulatory excess in Columbia, Mississippi. That city is finishing a \$20 million EPA-supervised Superfund cleanup project. Soil tests had turned up traces of compounds the federal government defines as hazardous—though the amount of the offending material discovered was only about two ounces per ton of soil. Some experts said the best way to cure the problem was simply to spread a layer of cleaner soil on top of the contaminated soil—for a cost of only one million dollars. But the supersafe EPA Superfundniks said no and required the most expensive solution: dig up more than 12,500 tons of soil and haul it away to a commercial dump in Louisiana. The EPA's goal was to make the dirt safe enough—you're not going to believe this—safe enough for a child to eat half a teaspoon of dirt every month for 70 years and not get cancer. Because, said the EPA, some day houses might be built on the land.

We have the best health system in the world, but we have become a nation of hypochondriacs. That is an expensive disorder. Public health literature demonstrates that workers with lower incomes are less healthy. According to an estimate published in the journal *Risk Analysis*, every \$7.5 million increase in regulatory compliance costs results in one statistical death. There is no such thing as a free lunch. And there is no such thing as a free regulation.

We need to be better at calculating the relationship between the cost of a regulation and the benefit it provides. But calculating will not be enough. We need also to determine what cost is proper, and what cost is too high.

Civil Rights Regulation

If the question of cost is difficult to answer in regard to health and safety regulations, it's even more difficult to answer in civil rights regulation. The problem is not so much the goal but the method of achieving it. Civil rights regulation is a bonanza for lawyers.

Not long ago, *The Washington Post* ran a story by a businesswoman who wrote that at any one time she was defending against four or five lawsuits that claimed she had exercised prejudice in hiring or firing someone. "Everyone," she wrote, "is female, gay, foreign-born or of foreign ancestry, religious or atheistic, dark-skinned or melanin-im-

paired, single or married, old or young. They are physically, mentally, or culturally disabled; otherwise disabled,... or something else. It is impossible to find anyone not entitled to a group entitlement.” And, she said, “legal fees run to between \$15,000 and \$30,000 per case, win or lose.”

Peter Brimelow and Leslie Spencer, writing in *Forbes* magazine (February 15, 1993), put the total direct and indirect cost of “civil rights” laws—that’s law enforcement, compliance, and resources diverted from other activities—at \$236 billion a year, or about 4 percent of GNP. We can measure—or at least estimate—the cost of “civil rights” regulation. But how do we measure the benefits?

Environmental Regulation—Common

And how do we measure the benefits of environmental regulations like the Air Pollution Control Act of 1955, the Water Pollution Control Act Amendments of 1956, the Water Quality Act of 1965, the Clean Air Act of 1963, and the Motor Vehicle Air Pollution Control Act of 1965, the Safe Drinking Water Act, the Clean Air Act Amendments of 1990, and the Pollution Prevention Act of 1990? Murray Weidenbaum (the former Chairman of the Council of Economic Advisors under President Reagan and now Director of the Center for the Study of American Business at Washington University in St. Louis) estimates that the 1990 Clean Air Act Amendments “will cost an added \$25-35 billion a year, over and above the more than \$100 billion [already] spent annually on all pollution controls.”

The federal standard for dioxin—an industrial byproduct—is 13 parts per quintillion in drinking water—the equivalent of a single drop in Lake Michigan.

Manifestly, some environmental regulation is inefficient. Only a small number of cities in the U.S. have pollution problems—caused by concentrations of automobiles and industry, and, sometimes, geographical location, like Los Angeles. Those pollution problems could almost certainly be solved more cheaply by devising local solutions than by requiring all automobiles sold in the U.S. to have antipollution devices, which add \$1,500 to \$2,000 to the cost of each car.

Environmental Regulation—Elite

The Wilderness Act and the Endangered Species Act are examples of what I call esoteric environmental law. They are not without cost. The Endangered Species Act is now being used to prevent logging in the northwest in order to protect the spotted owl.

Douglas Wheeler, a lawyer who helped write the Endangered Species Act in 1973 when he was a legislative aide in the Nixon Administration, and who is now secretary of the California Resources Agency, says, “The Endangered Species Act just doesn’t work.”

There are people who say that the spotted owl is only the means to an end: the end is not protecting the owl, but protecting ancient forests. That may be, but ancient forests are, I think, as esoteric as spotted owls. The cost, in jobs, of the protection is significant—said by some to be between 30,000 and 50,000 jobs. The price of lumber has doubled in the last six months, partly because of excessive regulations. That’s an additional cost. How do you measure the benefit?

Well, those are ways of categorizing regulations. There may, as I say, be other ways.

Quantifying the Costs of Regulations

There are also ways of quantifying regulations. In 1991, the *Federal Register*, at something like 70,000 pages, published the largest number of regulations since President Carter left office.

In 1992, the federal government spent 22 percent more in real dollars on regulatory agencies than in President Carter's last year.

In 1980, the government employed 121,670 regulators. By 1985, that number had been cut to 101,963. In 1992, I believe the number rose to 122,406. We don't seem to be good at learning from history.

The most widely cited estimates of the combined cost of all federal regulations put the figure between \$595 billion and \$667 billion per year for 1992 measured in 1991 dollars. Add in state and local regulations and the indirect toll on output and employment and the figure rises to between \$810 billion and \$1.7 trillion—even after taking into account the benefits of regulations. That's a total of between \$8,400 and \$17,100 per year per household.

It's important to remember that these are only estimates, and it's probably best to think in magnitudes not details, and to compare those figures with other figures—for example: taxpayers pay out about \$1.053 trillion in federal taxes, or about \$10,897 per household, which means that the total cost of regulations may now exceed total cost of federal taxation.

Institutional Reforms

Well, that's the problem. The question is, what do we do? There are institutional reforms, but they are not likely to be adopted by this Administration. No President who said in his first State of the Union address, "I believe government must do more" and whose principal spokesman promised a "reversal of Reaganism" is likely to encourage either substantive or procedural measures that will reduce the detrimental effects of regulation.

Still, we can dream. And there are good dreams to be had. Dozens of bills that seek to alleviate the regulatory burden have already been introduced into Congress.

There are two different "Paperwork Reduction Acts," like the one which was introduced in 1991 by Senators Dale Bumpers, Bob Kasten, and Sam Nunn. That one would have strengthened the Office of Information and Regulatory Affairs (OIRA) (the office within the Office of Management and Budget which coordinates regulatory review for the executive branch) and it would have required the agencies to reduce their paperwork burdens by five percent a year. Unfortunately Senator John Glenn blocked it.

There are proposals that would provide that the federal government can't pass legislation that requires the states to take action unless the federal government funds those actions; and also proposals that prohibit legislation and regulation from being considered unless the states' and local governments' cost of complying with it is considered.

Another bill would have required the General Accounting Office to prepare an economic and employment impact statement to accompany legislation—but Senator Glenn didn't like that one either.

Another set of proposals would make regulatory review procedures tougher, and provide flexibility in regulating.

Another would protect private sector whistle-blowers against reprisals for publicizing outrageous regulations or mismanagement.

Still another bill would require agencies to document anticipated benefits and, in addition, to outline reasonable alternatives for achieving the benefits. It would also require calculation of all costs associated with satisfying the regulation. In promulgating any new regulation, an agency would have to select the most cost-effective method, and would have to offset the cost by revising current regulations, streamlining the paperwork process, or revoking an ineffective rule.

In addition to those proposals, we need others that would replace technology standards with performance standards. Environmental regulations now require companies to use the best available technology (BAT) to treat problems, rather than simply setting a performance standard which can be met. As technology improves, it gets ever more difficult and more expensive to meet the best available technology standard.

And—always—the executive branch should devote more resources to regulatory review. But few people hold out much hope of that.

If the politicians won't take action, the citizens must. Individuals, small businesses, big businesses—everyone who cares—must make the effort to understand the problem, and become salesmen for the solution. It will not be easy. Deregulation is not one of the world's most exciting subjects. But deregulation is important to freedom, which we risk losing if we fail to pay attention.

Does Anybody Care?

One question we should ask ourselves is: Does anybody care about the costs of regulation or about the effects of regulations?

Lets face it: Americans live very well, both by historical standards, and compared to other people in the world today. Per capita disposable income in the U.S. is about \$12,500. Do a few bucks here and there really matter? Is two or three thousand dollars extra for an automobile only a number? Is the total cost of regulations—whatever it is—only a number, too?

If Americans don't care, we have a problem. If they would care if only they knew the magnitude of the burden, we still have a problem, but, it seems to me, it's a more manageable one.

Yes, Americans need to be told how much regulations cost. But because they may be willing to pay that cost, they also need to be asked the good government question: Just because you may be willing to pay more, why should the governmental apparatus be used to force your neighbor to pay more?

And also, because Americans may be willing to pay extra for regulations that sound beneficial, they need to be told that the costs of many regulations exceed their benefits.

That's why we at The Heritage Foundation have started a special project on regulations. We have formed a Regulatory Advisory Council and hope to develop a plan for teaching the American people about the tremendous cost of the regulatory state, a cost that has to be measured not only in dollars but also in frustration, in loss of creativity, and ultimately, in loss of freedom.

Telling Stories of Arrogance and of Success

We must tell the regulation stories over and over again—stories of the failures of regulation, and of the success of deregulation, stories that make congressmen shrink from just the idea of passing another regulation.

For example: The EPA is chasing a small Vermont company that sells small cedar blocks and claims that "Moths hate the fresh woody scent." According to the EPA, the company is violating environmental rules because it failed to list the blocks' ingredients, failed to list the product's toxicity, and because it provided inadequate directions for using the blocks.

In Florida, the owner of a three-person silk-screening company was fined by OSHA—the Occupational Health and Safety Administration—for not having a Hazardous Communications program for his two part-time employees. The market doesn't have to work perfectly to work better than government.

Those are stories of failure and arrogance. There are also stories of great success—airline deregulation which lowered fares and allowed people to fly who'd never been able to afford to fly before. Consumers have saved an estimated ten billion dollars annually. Deregulated fares are estimated to be 18 percent lower than they would have been under regulation.

Trucking deregulation lowered rates over the first two years by 25 percent for large shippers, and by 15 percent for small shippers. During the first four years following deregulation, the number of authorized carriers increased from 18,000 to 48,000. The total number of jobs in the trucking industry has increased by about 30 percent. Savings to the economy are estimated to be \$7.8 billion a year.

Deregulation has been a huge success and should convince anyone not married to or sleeping with big government how beneficial less government can be. Yet there are many who want to regulate, and they remind us that resistance to progress is as old as progress itself.

In 1939 Henry Ford wrote:

The evidence is everywhere about us—attested every time we press a button, turn a knob, open a can or a door or a World's Fair—what machinery can do to make life easier, simpler and richer. So it is astounding to some of us to realize that there are still in this world men who actually believe that machinery is a menace and a curse and that we should cease to devise new mechanical ways to make life's burdens easier.

That was 1939. Today, there are people who believe that deregulation is a menace and a curse. But I think we, having experienced so much resistance to progress, are less astounded today at that resistance than Henry Ford was in 1939.

How Much Regulation Should We Have?

How much regulation should we have? Abraham Lincoln was asked how long a man's legs should be. He replied, "Just long enough to reach the ground." How much regulation should we have? The answer is only just enough. Anything more unnecessarily diminishes our freedom.

At the very least we should always ask three questions before we adopt any regulation:

- 1) **What's the cost?**
- 2) **What's the benefit?**

And—perhaps most important:

- 3) **Who'll get hurt?** Or, put otherwise, are the people who will pay the bill the same people who will get the benefits? If not, it sounds like a typical political scheme for using the regulatory process to benefit the powerful at the expense of the poor.

We should have no regulations that simply transfer wealth from a politically favored group to a politically unfavored group. That much is easy.

We should be far more suspicious of people who say the market has failed, and that therefore we need "market failure" regulation. We should remember that the market doesn't have to work perfectly to work better than government.

We should also recognize that there is an optimal level of market failure, for example of fraud—even as there is an optimal level of highway deaths. You don't have to be in favor of highways deaths to be against a national speed limit of 30 mph. We must be willing to take some risks—and remember, for example, that not all products will be perfect when they are first introduced.

How much health and safety regulation do we need? How much environmental regulation do we need? Those are more difficult questions, but always we should be suspicious of regulators. Angelo Codevilla writing in *National Review* describes the environmental movement as

the biggest impetus for the growth of government in our time. Having largely abandoned the claim that government power makes for prosperity, efficiency, and progress, a whole class of would-be rulers now claim power as stewards of Mother Earth. The very same people who so recently marched under the banner of socialism now pursue precisely the same ends under the green banner.

One person who might once have been comfortable marching under that banner but who seems to have been mugged by reality is George McGovern—yes, the very same. His business in Connecticut went bankrupt partly as a result of the burden of regulations. McGovern wrote last year, “I... wish that during the years I was in public office, I had had this firsthand experience about the difficulties business people face every day.” Just so.

I note in passing that term limits may open the eyes of legislators to what will happen to them in the real world during their post-legislative days.

Conclusion

The regulatory burden is huge—and hugely difficult to quantify with any precision. But we must not let its size or its complexity paralyze us. In the next decades we will be demanding more and more from our economy as the baby-boomers approach retirement and there are fewer and fewer people to drive our world-famous engine of creativity and production.

Perhaps the good news is that we have this heavy regulatory rock on our back, the unstrapping of which will allow us to sprint forward to even greater prosperity.

There's a deregulation dividend in our future—if we will only declare it.

At least that's one way of making the glass look half full.

