13. The Revolution Spins toward More Regulation

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Most people assumed that Republican politicians replacing Democrats on Capitol Hill in 1995 would lead to small-government, anti-regulation policies. That assumption turned out to be wrong. Libertarians have long observed that both Democrats and Republicans seek power; they just seek power over different sorts of activities. Stereotypically, Republicans want government to regulate personal behavior (the "bedroom"), while Democrats want to regulate economic activities (the "boardroom"). But during the past decade, this difference between the parties has blurred. Republicans signed on to increased financial regulation in the wake of the Enron scandal, and Democrats have favored increased regulations on free speech, including campaign finance restrictions and controls on the nation's media firms.

The deregulatory image of the Republican Party is a curiosity. Republicans helped create one of the core regulatory interventions in American commerce: the Sherman Antitrust Act in the 1890s. Interventions like the Pure Food and Drug Act followed in the early 20th century. The Nixon administration created the Environmental Protection Agency, the Consumer Product Safety Commission, and the Occupational Safety and Health Administration. President George H. W. Bush signed the Americans with Disabilities Act into law, which has created large regulatory costs.[1] Those and other interventions supported by Republicans have had a huge effect on the economy.

The Contract with America, as Amended

Some Republicans in the past decade did try to reduce regulations and limit government power. For example, House Republicans successfully passed the Risk Assessment and Cost-Benefit Act of 1995, which included compensation for regulatory "takings" of property and for the costs imposed by federal mandates.

But after the government shutdown in 1995, which resulted from budget disagreements with President Bill Clinton, the GOP zeal for regulatory reform waned. Republican attempts to reform the regulatory process lost steam under a rhetorical barrage. Opponents caricatured GOP reform efforts as "mad-dog Republican ideologists join with robber-baron capitalists to regain the right to add poison to baby food bottles," as Fred Smith of the Competitive Enterprise Institute noted.[2] A Senate version of comprehensive regulatory reform never passed.

Part of the decade of Republican control of Congress was under President Clinton and part was under President Bush. There were some notable Republican-driven reform bills under Clinton's watch. Legislation dealing with unfunded mandates on state and local governments passed. An annual Office of Management and Budget cost-benefit report was made a permanent undertaking by the Regulatory Right to Know Act in 1999. Other limited successes included reforms to address the paperwork burden, congressional review of regulations, and small business regulatory relief.

President Bush's tenure began with the issuance of the "Card memo," by which White House Chief of Staff Andrew Card notified agencies to freeze pending final rules for two months. This effort dealt with a flurry of proposed rules issued as the Clinton administration was leaving office. Clinton's "midnight regulations" swelled the *Federal Register* of January 22, 2001, to 944 pages with rules relating to such things as air pollution in National Parks caused by snowmobiles.

The Bush administration has relaxed some rules, such as rules on logging and items related to the Clean Air Act, including a rule that power plants need not install state-of-the-art controls in some circumstances. The Department of Labor's controversial ergonomics rule (on repetitive-motion injuries) was halted by a "resolution of disapproval." Meanwhile, Bush's Office of Information and Regulatory Affairs under John Graham has required greater peer review and scientific review of agency rules.

In May 2004, the House passed HR 2432, the Paperwork and Regulatory Improvements Act, to improve regulatory accounting and to set up a pilot project for regulatory budgeting. A recent

Washington Post story recounts Bush's efforts to "put his anti-regulatory stamp on government" by canceling more "inherited" regulatory proposals than he has completed and starting fewer new ones than either Clinton or the first President Bush.[3] But lower numbers of rules can still mask high costs. Also note that as government program spending has expanded under President Bush, it portends more rules being imposed in future years.

Despite modest reforms, agency regulatory overreach and turf-building can be a concern no matter which party is in power. More discouraging are prominent Republican-driven interventions, such as the ephedra ban, media ownership restrictions, and a new prescription-drug benefit. The Republicans who have stood up to articulate better market alternatives to these big-government policies have been outnumbered by pro-regulation forces.

Republicans, who are united in power under Bush, have made numerous concessions to the regulatory state. Their policies have not all been activist government proposals, but they have been unable to cogently defend free markets against frequent charges of "market failure." The result is disheartening. On top of the $2 trillion in tax revenues that the federal government collects, more than 50 departments, agencies, and commissions issue more than 4,000 rules and regulations every year. Regulations cost Americans more than $800 billion every year.[4] As of 2002, there were 25,000 registered Washington lobbyists, or 47 per member of Congress, many of them working night and day to alter federal regulations.

Are regulations increasing? Well, yes and no. The *Federal Register* is at record high levels, hitting 75,606 pages in 2002, but it is not a good measure of regulatory burdens. The number of rules has been down or flat under the Republicans, but the GOP budget boom may herald a future regulatory boom.

Regulations and the Republican Budget Boom

Regulations are a way of getting the private sector to finance government activities without increasing taxes. Both taxes and regulations transfer wealth from some Americans to others. Interest groups get involved in those transfers, and soon much of the private sector gets seduced into the wealth-transfer game with many producers having to defend themselves against unwarranted new burdens. In some cases, certain firms are able to absorb regulatory costs better than others, as in the case of pollution controls, and those firms may lobby in favor of new regulations.

Regulations and spending are alternate ways for the government to control the economy, but they also increase together. Rapidly rising federal spending during the past five years anticipates a regulatory boom.[5] Bush's rising education spending has heralded state mandates galore. The Republican Medicare prescription-drug benefit means new medical mandates and constraints on doctors and insurers. The highway bill considered in 2004 would have the National Highway Traffic Safety Administration issue numerous car-design safety regulations dealing with power windows, rollovers, and door-lock enhancements. Other automobile rules in the works include those for daytime running-light glare, brake hose reliability, radiator safety caps, and Corporate Average Fuel Economy standards for light trucks. Proposed new rules for side-crash protection will impose costs of more than $1 billion.

Security concerns since September 11, 2001, have generated much new spending and attendant regulation. As it stands in September 2004, 300 of 4,200 new rules in the works come from the new Department of Homeland Security, such as the Transportation Security Administration's rules for screening checked bags. Meanwhile new Food and Drug Administration regulations on food shipments, meant to protect against terrorist contamination, promise high burdens. For example, more than 425,000 food manufacturers and processors will be required to provide daily updates to FDA on food shipments.

Many new Republican regulatory initiatives do not have a security rationale, such as the new multibillion National Nanotechnology Initiative that President Bush signed into law in December 2003. That law invites government regulation of this frontier industry for little apparent reason other than to channel federal dollars to important congressional districts. Thus, the progress of the nanotech industry may be wrapped up in regulations and sacrificed for the sake of pork spending.

Health and Safety Regulation

Recent health and safety rules address a procession of risks from which the government assumes that we cannot protect ourselves. New rules regard workplace slip-and-fall hazards, indoor air quality, sausage casing labeling, bathroom grout manufacture, smoke alarm locations in homes, backyard play sets, and appliance efficiency standards. Some regulations in these areas are well intended, but the result is to substitute political controls for market solutions.

In many cases, new rules are just plain silly. We do not need the Department of Agriculture dictating the size of holes in Swiss cheese, for example. Nor do we need government fighting over an "official" food pyramid—the provision of healthy food information is a function that belongs to the private science, health, and medical sectors.

The burden should be on regulators to prove that regulations better serve the public than do competitive markets. Unfortunately, Republicans have not done a good job defending the ability of competitive markets to deal with safety and efficiency concerns. The Republicans have proven to be just as susceptible as Democrats to knee-jerk health and safety regulation on the basis of newspaper headlines.

One example is the ephedra ban. This regulation was an expansion of the FDA's power into a new area—the banning of herbal supplements. Such activity was not authorized by Congress, and it deserved a legislative debate that it did not get. Another example is a vast new livestock tracking system. This national identity system for farm animals was initiated after the discovery of a single sick animal with mad cow disease.

If the government tries to answer every societal ill, it will nullify the free market's disciplinary role in consumer and safety protection. Republicans in power have lacked the language and ability to make the case that markets are the best protector of consumer safety. Competitive markets impose discipline in the form of *reputation* and *disclosure* when those forces are allowed to work. Misguided safety regulation is a poor substitute for those disciplines. For example, regulations can make people behave in a more risky manner and can impose more dangerous alternatives on consumers. A good example is the fuel efficiency standards that force Americans into smaller cars.[6] A professor of mine joked that if we want increased highway safety, we should not require seatbelts and air bags because these make people drive more carelessly. Instead, we should require a 6-inch dagger sticking out of car steering columns!

Regulation of Technology and Communications

The explosion of the World Wide Web in 1995 coincided with the Republican takeover of Congress. Many Republicans proclaimed "hands off the Internet." But an exception was the Communications Decency Act of 1996, a notable incursion into free speech. CDA was ultimately struck down by the Supreme Court, but it was a precursor to further interventions. In the Internet and technology sectors, new regulations and mandate proposals are common. Some examples are online marketing to children (ban it); porn filtering (mandate it); Internet gambling (ban it); digital copy protection (some say ban, some say mandate); and cybersecurity (mandate it, even though we cannot define it).

With respect to cybersecurity, government funding virtually guarantees new regulations. The regulation of emerging Internet phone calls, called voice over Internet protocol (VoIP), is also being seriously proposed. However innocuous-sounding they may seem, calls by President Bush in 2004 for "universal broadband" and an end to the "digital divide" invite continued regulation.

Another example of increasing regulation under the Republicans is the Federal Communications Commission do-not-call registry, which was embraced by Congress and President Bush. It includes $11,000 fines for each illegal call made. Granted, few like getting telemarketing calls, but marketplace products offer a variety of solutions, such as caller ID.

Republican anti-spam regulation has been costly and ineffective. Spam was outlawed as of January 1, 2004, by the CAN-SPAM Act signed by President Bush. But by setting rules of engagement for when a commercial e-mail may legally be sent, it actually means that you "can spam." The real issues underlying the torrent of unwanted e-mail—authentication and pricing—have to be solved by the market, and there is no alternative to that.

The introduction of the Internet and new telecommunications services into society has not been without speed bumps. But new government regulations entail false shortcut solutions to problems that may preclude superior market solutions from emerging.

The stock market and telecom collapse was in part caused by contrived markets created when Washington forced incumbent providers to "share" their infrastructure with opportunistic competitors following the Telecommunications Act of 1996. Those competitors could not survive under free markets and they made the telecom sector unstable.

FCC Chairman Michael Powell has taken a pro-deregulation stance, but he was not solidly backed by President Bush early in his first term, which was dominated by other issues. Perhaps the administration might have been concerned that prices would go up temporarily under full telecom deregulation. But many alternatives are available to consumers that dampen any ability to overprice in most markets. Full deregulation should be moved ahead because, ultimately, competition in the creation of networks is as important as competition in the telecom services that are sold over them.[7]

Privacy

The political impulse to regulate undermines the market's ability to self-regulate. Federal Trade Commission proposals to regulate Internet privacy were properly opposed by many Republicans because they recognized the role that markets play in coping with preferences regarding personal information. Unfortunately, large-scale digital surveillance is now possible and irresistible post-9/11. Proposed programs such as Total Information Awareness and the airline Computer-Assisted Passenger Protection program would have required firms to hand over customer information to the government. Such programs would make it impossible for businesses to make the privacy guarantees that today's commerce requires. New rules for health insurance portability rules and financial services have also led to confusing regulatory requirements in the name of protecting privacy.

On the bright side, demands for broad-based privacy legislation, and the regulation it would entail, are dormant. And the current sentiment seems to be for Congress to stay out of the regulation of new VoIP, even though the Federal Bureau of Investigation and others seek enhanced wiretap capabilities for this new class of communications.

Incursions on Free Speech

Free speech has suffered regulatory incursions in recent years. Apart from the Communications Decency Act, new campaign finance restrictions passed in 2002 have increased regulation. Also, Republicans failed to endorse the FCC's 2003 rollback of media ownership rules. In that debate, the concern was that media concentration allowed some to wield excessive control over the media and squelch information from alternative voices. The Republicans did a poor job explaining that media and information cannot be monopolized in a free society when the government does not practice censorship. These days, peer-to-peer networks and weblogs undermine monolithic information. Also, upstream and downstream partners help regulate any monopolizing behavior. The media also face the scrutiny of consumers, advertisers, venture capitalists, and Wall Street. Plus, any monopoly would have to monopolize infrastructure as well as content, a very tall order. In sum, the notion that media must be controlled or forced to behave by government misunderstands free speech and free-market dynamics. Yet media ownership regulations remain and will add 250 pages to the *Federal Register*.

Antitrust Intervention

It used to be said that in the technology industry things moved on "Internet time" and that smokestack-era antitrust laws could not keep up. Many in the free market community warned that high-tech antitrust would not stop with Microsoft, and true to form there have been numerous antitrust cases in play. The AOL–Time Warner merger was held up and its Instant Messenger subjected to conditions by regulators. The Echostar–DirecTV merger was blocked by the Bush FTC.

"Plain vanilla" antitrust actions as well as high-tech interventionism are common under the Republicans. Washington stopped the Heinz-Beechnut baby food merger. The Phillip Morris–Nabisco merger was not allowed to go through until the sell-off of the intense mints business (Ice Breakers) because of a supposed monopoly in this *candy* market. The FTC has even considered whether premium ice cream and jarred pickles are important markets that can be monopolized. The FTC has put on hold the LensCrafters–Pearle Vision eyewear merger because of supposed price increases in the chain store market.

Such antitrust actions would be expected in a Democratic administration of decades ago, but antitrust understanding has evolved and the actions are remarkably anti-market for 21st-century Republicans. In the tech and cyber sectors, antitrust often takes the form of calls for "open access" to infrastructure and technology, such as instant messaging and phone and cable networks. This is a crucial time for Republicans to take a solid stand against such managed competition. Mandating access to infrastructure and networks amounts to picking winners and losers among business models. It amounts to saying proprietary is out—open, common carriers burdened with obligations are in.

Another problem with recent interventions is that they have left policymakers with no time to advance major reforms such as electricity or telecom deregulation, which would likely be accompanied by industry consolidations. But today's policymakers seem incapable of defending industry restructuring against misguided antitrust attacks. They have also gone down the wrong road with open access in the electric industry, which has set back electricity reform for years. Rather than abandoning open access after the northeast blackouts of 2003, Republicans called for mandatory reliability rules that would enshrine open access and more regulation from Washington.

Other Economic Regulation

Numerous other areas face new regulatory intervention, but a final two merit mention—new accounting regulations and frontier science. With respect to recent accounting scandals and the resulting Sarbanes-Oxley legislation, government regulation likely will interfere with market pressures that would otherwise have moved toward better disclosures of corporate financial data. And instead of a market system that would force competing accounting systems to prove their worth, government oversight now dominates.

As for cutting-edge science, there is too much eagerness for government funding and oversight in areas such as biotechnology and nanotechnology. In nanotechnology, the choice is to treat it like software and leave it mainly unregulated, or treat it like medical products with heavy FDA regulation. Because federal spending and regulation go hand in hand, the new $3.7 billion National Nanotechnology Initiative invites new regulations.

Conclusion

On the whole, Republicans in power seem to be as receptive as Democrats to a large regulatory state. In numerous fields—financial accounting, cybersecurity, telecommunications, antitrust, science—Republicans have failed to replace regulatory bureaucracies with marketplace disciplines.

Instead, Republicans should start holding the regulatory state to higher standards of disclosure and accountability. On disclosure, the administration should publish an annual "Regulatory Report

Card" that contains numbers of rules and their costs. Also, Congress should establish a bipartisan Regulatory Reduction Commission modeled on the military base-closure commissions of the 1990s.

On accountability, major regulations should not take effect until Congress approves them, and they should be "sunsetted," or set to expire on a date certain. By delegating sweeping powers to unelected bureaucrats, Congress has created a disconnect between the power to establish regulatory programs and responsibility for the results. Federal agency employees are not held accountable to voters. Accountability does not necessarily mean that Congress will do right, but accountability is a necessary (although not sufficient) condition for good government.

Ronald Reagan described government as "the problem, not the solution." In many areas, regulations stand in the way of free markets creating solutions that would benefit consumers. If regulatory growth is to be constrained, Republicans need to stop being part of the problem and let markets and entrepreneurs discover lasting solutions.

Notes

1. Associated Press, "Travel Sites Agree to Be More Accessible to Blind," August 19, 2004, www.siliconvalley.com/mld/siliconvalley/news/editorial/9443805.htm.

2. Fred Smith, "Making Regulatory Reform a Reality: A Heritage Foundation Symposium," *Heritage Lectures*, no. 559, January 31, 1996.

3. Amy Goldstein and Sarah Cohen, "Bush Forces a Shift in Regulatory Thrust," *Washington Post*, August 15, 2004, p. A1.

4. Wayne Crews, "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State" (Washington: Cato Institute, June 15, 2004).

5. For recent spending trends, see Chris Edwards, "Downsizing the Federal Government," Cato Policy Analysis no. 515, June 2, 2004.

6. See Sam Kazman, Competitive Enterprise Institute, "CAFE Standards: Do They Work? Do They Kill?" (speech, Heritage Foundation, Washington, D.C., February 25, 2002), www.cei.org/gencon/027,02414.cfm.

7. This theme is explored in Adam Thierer and Clyde Wayne Crews Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* (Washington: Cato Institute, 2003).