



Winter 1-1-1989

The Honorable Profession of Regulation

William A. Lovett

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Administrative Law Commons](#)

Recommended Citation

William A. Lovett, *The Honorable Profession of Regulation*, 46 Wash. & Lee L. Rev. 201 (1989).
Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol46/iss1/7>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

THE HONORABLE PROFESSION OF REGULATION

WILLIAM A. LOVETT*

I. INTRODUCTION

Regulating the marketplace in consensus democracies like the United States of America is best described as a pragmatic art.¹ Regulatory agencies, boards, and executive departments accumulate through historic evolution. The legislative mandates of these bodies normally are compromises that are loosely defined at the outset, with occasional adjustments to suit recent developments and current problems. This evolutionary process never can reflect a single, clear-cut ideology because considerable latitude for discretion exists for appointees within each Presidential, Gubernatorial, and Mayoral administration in a large federal democracy with fifty states, hundreds of sizeable cities, and thousands of smaller towns and rural counties. Although simplifying slogans like the American System, Populism, Progressivism, New Freedom, Business Government, New Deal, Fair Deal, Eisenhower Republicanism, New Frontier, Great Society, New Federalism, Consumer Protection, Environmentalism, Least Restrictive Regulation, and Deregulation were fashionable in succeeding presidential administrations, there has

* Professor of Law and Economics, and Director, International Law, Trade and Finance Program, Tulane Law School, New Orleans, Louisiana.

1. The following works provide a broad survey and diverse perspectives on the evolution of regulation: AMERICAN ENTERPRISE INSTITUTE, LEGISLATIVE ANALYSES: REGULATORY REFORM; A SURVEY OF PROPOSALS IN THE 94TH CONGRESS (1976); D. BOIES & P. VERKUIL, PUBLIC CONTROL OF BUSINESS (1977); S. BREYER, REGULATION AND ITS REFORM (1982); COMMISSION ON LAW AND THE ECONOMY, AMERICAN BAR ASS'N., FEDERAL REGULATION: ROADS TO REFORM (1978); G. EADS & M. FIX, THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT (1984); G. EADS & M. FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA (1984); J. R. T. HUGHES, THE GOVERNMENT HABIT: ECONOMIC CONTROL FROM COLONIAL TIMES TO THE PRESENT (1977); R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION (1983); T. McCRAW, PROPHETS OF REGULATION (1984); T. McCRAW, REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS (1981); A. S. MILLER, THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION (1976); T. MORGAN, J. HARRISON & P. VERKUIL, ECONOMIC REGULATION OF BUSINESS (1985); F. POOLE, JR., INSTEAD OF REGULATION: ALTERNATIVES TO FEDERAL REGULATORY AGENCIES (1982); PRESIDENT'S FOR A NAT'L AGENDA FOR THE 1980s, GOVERNMENT AND THE REGULATION OF CORPORATE AND INDIVIDUAL DECISIONS (1980); PROMOTING COMPETITION IN REGULATED MARKETS (A. PHILLIPS, ED. 1975); ECONOMIC REPORTS OF THE PRESIDENT 1981-89; D. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980); L. SCHWARTZ, J. FLYNN & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATIONS: GOVERNMENT REGULATION (6th ed. 1985); L. WEISS & M. KLASS, REGULATORY REFORM: WHAT ACTUALLY HAPPENED (1986); *Public Control of Enterprise: Neoclassical Assault and Neo-Institutional Reform*, 18 J. ECON. ISSUES 353 (1984); Trebing, *Regulation of Industry: An Institutional Approach*, 21 J. ECON. ISSUES 1707 (1987); *The Burden of Government Regulation*, Ch 5 (1983); *Reforming Government Regulation of Economic Activity*, Ch 6 (1982), and *Reforming Regulation: Strengthening Market Incentives*, Ch 5 (1986).

been pragmatic latitude for many regulatory policies. And each slogan allows ample leeway for disagreement with respect to details.

The political, legal, and administrative problem we now face is determining how to make the best of this on-going "tradition". How can we wisely manage regulation in the public interest? Approaching this problem involves unavoidable controversies:² (i) deciding the extent to which the marketplace suffers failure or shortcomings and whether regulatory remedies can improve things; (ii) selecting the best, or at least a workable, mix of regulatory remedies when the corrective process itself may involve costs and distortions; (iii) limiting the distortions of "regulatory capture" by special interest groups that warp corrective remedies in their own favor; and (iv) limiting the distortions of "market capture" by trade associations, concentrated oligopolies, or dominant firms. At the heart of practical controversies within each channel of potential regulation are conflicting claims and estimates about these costs, benefits, and distortions. Special interest lobbies, trade groups, regulatory agencies, rival politicians and parties, usually disagree. These debates are often pejorative and sometimes confusing to the uninitiated and general public.

Cynical observers are tempted to throw up their hands in despair. Even worse, some observers simply join in the struggle for spoils and relative power and accept a jungle of selfish misrepresentation. Nonetheless, a good many countries, despite partial controversy, have achieved impressive records of industrial growth and technical progress. These success stories³ show that sustained, rapid economic growth, industrial progress, and supportive regulation to foster success are attainable objectives. More countries, including the United States, Great Britain, Sweden, Australia, and New Zealand recently, still maintain reasonably comfortable living standards and respectable environmental quality, although their industrial and economic growth has slowed lately. In many ways, these nations can be regarded as reasonably solid success stories for the regulatory art, even though the nations differ somewhat on the details of regulatory policy.⁴

2. See, e.g., J. DUE & A. FRIEDLAENDER, *GOVERNMENT FINANCE: ECONOMICS OF THE PUBLIC SECTOR* (5th ed. 1973); R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* (1959); see also H. HINRICH & G. TAYLOR, *PROGRAM BUDGETING AND BENEFIT-COST ANALYSIS* (1969); J. LAFFONT, *FUNDAMENTALS OF PUBLIC ECONOMICS* (1988); L. MEREWITZ & S. SOSNICK, *THE BUDGET'S NEW CLOTHES: A CRITIQUE OF PLANNING-PROGRAMMING-BUDGETING AND BENEFIT-COST ANALYSIS* (1971); D. MUELLER, *PUBLIC CHOICE* (1979); *PUBLIC REGULATION: NEW PERSPECTIVES ON INSTITUTIONS AND POLICIES* (E. Bailey ed. 1987); G. STARLING, *MANAGING THE PUBLIC SECTOR* (1977); C. WOLF, *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* (1988); Wolf, *A Theory of Non-Market Failure*, 22 *J. L. & ECON.* 107 (1979).

3. For example, the United States during the 1940s-1960s, Japan during the 1950s-1980s, West Germany during the late 1940s-1980s, Switzerland during the 1940s-1980s, Taiwan during the 1950s-1980s, and South Korea during the 1960s-1980s.

4. See L. REYNOLDS, *ECONOMIC GROWTH IN THE THIRD WORLD, 1950-1980* (1985) (spreading success of economic development, industrial progress, and encouraging regulations among "best performers"); W. LOVETT, *WORLD TRADE RIVALRY* (1987) 42-61 & nn. 37-72, Table P-2, Appendices A-1 to A-7 (1987) (same); see also, *OECD ECONOMIC OUTLOOK*, Nos. 29-44 (July 1981-Dec. 1988) (giving economic reports on progress of industrial nations).

Every modern industrial society employs at least twelve major channels of regulation.⁵ Widespread regulatory activity occurs in each of these channels. For sophisticated observers the issue is not really whether to regulate because considerable regulation is unavoidable. The real issue is how to regulate for maximum benefit and least cost in terms of the overall long term interests of each society. At each stage in history, the successful countries simply have achieved a more productive blend of regulation and the marketplace.⁶ These countries' overall economic performance reflects a higher level of play in most channels or sectors of regulation. Obviously, this success should not encourage a maximum amount of regulation or intrusive smothering, because overregulation is a common source of underachievement and sluggishness. On the other hand, inadequate or improper regulation often has led to serious breakdowns in or failures of performance.⁷

The challenge is to achieve and sustain regulatory policies in all twelve channels that assure high levels of national achievement and to maintain industrial progress in an efficient and humane manner. A constant search for improvement and a greater net benefit to society is the political and economic test for these regulatory policies.⁸ Total agreement or absolute

5. *Major Channels of Regulation—Modern Industrial Societies:*

- 1) Macro-Economics, Finance, Banking, Securities, and Insurance.
- 2) Basic Utilities and Monopolies.
- 3) Transportation — Highways, Railways, Airlines, and Shipping
- 4) Communications — Telephones, Cables, Broadcasting, and Postal-Delivery Services
- 5) Environmental — Land Use, Zoning, Pollution and Waste Control.
- 6) Depletable Resources — Mining, Fuels, Forests, Fisheries, Water Use.
- 7) Agricultural Regulation.
- 8) Industrial Development and Technology.
- 9) Labor Markets and Professions.
- 10) Health, Safety, and Welfare.
- 11) Tax Policies.
- 12) Competition and Liability Rules.

6. See *supra* note 4. The test for regulatory policy, and overall economic policy, is the best blend of growth, progress, efficiency, opportunity, fairness, healthy distribution, attractive environment, and aesthetics. See *infra* note 11.

7. See *infra*, notes 24-106.

8. See *supra* note 1 (citing works that deal with regulatory policies); S. BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATIONS, 1870-1880* (1913); R. BUCKHORN, *NADER: THE PEOPLE'S LAWYER* (1972); M. FRIEDMAN, *CAPITALISM & FREEDOM* (1962); J. K. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973) J. GARRATY, *THE AMERICAN NATION: A HISTORY OF THE UNITED STATES* (5th ed. 1983); J. HICKS, *THE AMERICAN NATION* (1946); J. HICKS, *THE FEDERAL UNION* (2d ed. 1952); S. KRISLOV & L. MUSOLF, *THE POLITICS OF REGULATION* (1964); C. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977); P. MACAVOY, *THE REGULATED INDUSTRIES AND THE ECONOMY* (1979); M. REAGAN, *REGULATION: THE POLITICS OF POLICY* (1987); R. STEEL, *WALTER LIPPMAN AND THE AMERICAN CENTURY* (1980); F. THAYER, *REBUILDING AMERICA, THE CASE FOR ECONOMIC REGULATION* (1984); M. WEIDENBAUM, *THE FUTURE OF BUSINESS REGULATION* (1979); C. WOLF, *supra* note 2; *Deregulation: A Fast Start for the Reagan Strategy*, *BUS. WK.* Mar. 9, 1981; Graham, *Regulative Political Theory: Language, Norms and Ideology*, 33 *POL. STAD.* 19 (1985).

consensus among all parties is an unrealistic expectation because conflicting interests always make these issues somewhat controversial. But cross-country comparisons over the long run are among the best ways to maintain reasonable objectivity about relative performance in each channel. This game obviously requires expertise and invites considerable on-going discussion within and among different nations. Internationally and within each society the experienced lawyers, economists, engineers, scientists, politicians and administrators, both in government and industry, who manage these regulatory efforts constitute the profession of regulation. To the extent their work is responsible and beneficial to society, we can truly respect this "Honorable Profession."

II. ECONOMIC STANDARDS FOR REGULATORY POLICY

Abraham Lincoln expressed the best of nineteenth century wisdom when he said: "Governments should do for the people what they cannot do for themselves, or do *so well* for themselves."⁹ Modern economic theory merely adds that: (i) Government activity should yield net social benefit; and (ii) the marginal social benefit from government activities should be positive and equalized in all channels. In other words, net gains to society from government activity are necessary, and yields from alternative program areas should be equalized so that greater gains from some activities are not neglected at the margin of public affordability.¹⁰ This approach implies, of course, that all tax burdens upon the public are offset by positive benefits to society.

While these guidelines make perfect sense in the abstract, the problem is determining how to implement the guidelines in practice. Politics brings special pleaders. Current advocates for government spending, regulatory, or accountability programs are resisted by those parties threatened by these programs, such as targeted tax payers, the "regulated", others uncomfortable with public disclosure, and their lobbyists.¹¹ The political game, with

9. A. LINCOLN, *Fragment on Government* in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 220, 221 (R. Basler ed. 1953).

10. In terms of the test for social net benefit that guides economic and regulatory policy, it is important to utilize the best of "theoretical welfare economics." See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); D. COLLARD, *PRICES, MARKETS AND WELFARE* (1972); J. DE V. GRAAFF, *THEORETICAL WELFARE ECONOMICS* (1967); I. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* (2d ed. 1957); E. MISHAN, *WELFARE ECONOMICS: TEN INTRODUCTORY ESSAYS* (2d ed. 1969); J. ROTHENBERG, *THE MEASUREMENT OF SOCIAL WELFARE* (1961); W. SAMUELS, *PARETO ON POLICY* (1974); Samuels & Buchanan, *On Some Fundamental Issues in Political Economy*, 9 J. ECON. ISSUES 15 (1975).

11. An examination of the following chart reveals many of the problems facing marketplace regulation.

Economic Analysis—Marketplace Regulation

Economic Tests: Net Social Benefit Required; MSBij Equalized (All Channels); Government Action Meets Test of Net Social Performance.

Market Problems: Lack of Sufficient Competition, Externality Distortions, Inadequate Knowledge, or Irresponsibility Can Weaken Performance, or Cause Substantial

its strange bedfellows and logrolling, often yields inferior compromises. Alliances commonly gather, especially in legislative bodies, to form a majority with doubtful elements, including projects for selfish promoters. Ideally a strong, competent, and responsible leadership should minimize extra baggage. But outcomes vary over time, and weak leaders often fail to control the corruption of political processes.¹²

Market Failure.

Government Sponsored Correctives—

Public Enterprise or Ownership

General Regulation (Price-Output Supervision)

Limited Regulation (Selective)

Corrective Taxes

Antitrust Remedies

Against Price Fixing

Against Exclusionary or Predatory Practices

Against Tying

Limits on Large Mergers

Deconcentration or Divestiture

Selective Support

Subsidies to Firms, Interests

Industry R&D Support

Patent Protection, Intellectual Property Rights

Relief Against Foreign Subsidies, Dumping, or Unfair Trade Practices

Tax Exemption or Relief

Tariffs on Imports

Accountability, Disclosure, and Public Information

Goals: Efficiency; Progress; Economic Growth; Broad Opportunity; Fairness; Healthy Distribution; Attractive Environment and Aesthetics.

Political Problems:

Market Capture or Distortion by Cartel Groups, Oligopolies, Monopolies, or Trade Associations

Can Weaken or Impair Market Performance (Often Becomes “Self-Regulation” or Facade Regulation)

Regulatory Capture or Distortion by Selfish Interest Groups, or Corrupt Alliances (Often Becomes Facade Regulation)

Can Frustrate Government Correctives—Weaken or Impair Overall Performance

Oversight-Accountability Process: Essential—For both Government, *and* the Marketplace

12. The problem of capture or distortion of regulatory agencies by special interests and of markets by dominant firms, oligopolies, associations, or elite classes, has been analysed extensively from many perspectives. See W. ADAMS & J. BROCK, *THE BIGNESS COMPLEX* (1986); J. BUCHANAN, R. TOLLISON & G. TULLOCK, *TOWARD A THEORY OF THE RENT SEEKING SOCIETY* (1980); A. DOWNS, *INSIDE BUREAUCRACY*, (1967); B. Frey, *Modern Political Economy* (1978); S. KRISLOV & L. MUSOLF, *supra* note 8; *LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE* (W. Samuels & A. Schmid ed. 1981); R. LEONE, *WHO PROFITS? WINNERS, LOSERS, AND GOVERNMENT REGULATION* (1986); R. NOLL & B. OWEN, *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* (1983); *PRIVATE WANTS AND PUBLIC NEEDS* (E. Phelps ed., 1972); A. SCHMID, *PROPERTY, POWER AND PUBLIC CHOICE* (1978); R. SOLO, *ECONOMIC ORGANIZATIONS AND SOCIAL SYSTEMS* (1967); G. TULLOCK, *PRIVATE WANTS, PUBLIC MEANS* (1970); D. WARWICK, *A THEORY OF PUBLIC BUREAUCRACY: POLITICS, PERSONALITY, AND ORGANIZATION IN THE STATE DEPARTMENT* (1975); O. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975); Buchanan, *Public Choice*, *CHALLENGE*, Mar./Apr. 1988, at 4; Christainsen,

Another common syndrome is "facade" regulation. Initial outrage, scandal, or an embarrassing mess provides enough public recognition of a problem to force response by government leaders. The industry in question and media discussion, help focus attention on the problems. The government throws together a regulatory panel with a loose mandate to do something—with an implicit side condition that the solution not be too tough, expensive, or painful. As public awareness fades into specialized expertise, the targets of regulation frequently take over, emasculate serious supervision, and establish a protective screen of self-regulation. In this way, regulation can become a useful facade, behind which the "regulated" industry or various other groups can support their own vital interests.¹³

The best solution to the corrupt logrolling and regulatory facade failures of politics is an energetic, responsible media-scholar supervision process, in which well-informed, idealistic "tribunes of the people" constantly seek out and challenge regulatory abuses.¹⁴ Ombudsmen agencies, legislators eager to

On James Buchanan, CHALLENGE, Mar./Apr. 1988, at 11; Lindsay, *A Theory of Government Enterprise*, 86 J. POLITICAL ECONOMY 106 (1976); Priest, *The Aims of Privatization*, 6 YALE L. & POL'Y REV. 1 (1988); Sah & Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 AM. ECON. REV. 716 (1986); Tullock, *The Transitional Gains Trap*, 6 BELL J. ECONOMICS 67 (1975).

13. Powerful elites or organizations in the marketplace often are often distortive and regulation frequently can be used as a cover for parochial agendas. *See supra* note 12; *see also* A. BERLE, *POWER* (1969); J. BROOKS, *THE TAKEOVER GAME* (1987); *CORPORATIONS AND SOCIETY* (W. Samuels & A. Miller eds. 1986); J.K. GALBRAITH, *THE ANATOMY OF POWER* (1983); A. JAY, *CORPORATION MAN* (1971); M. MACCOBY, *THE GAMESMAN* (1976); A. MICHEL & I. SHAKED, *TAKEOVER MADNESS: CORPORATE AMERICA FIGHTS BACK* (1986); D. MORGAN, *MERCHANTS OF GRAIN* (1979); C. SPRULL, *CONGLOMERATES AND THE EVOLUTION OF CAPITALISM* (1982); J. P. WRIGHT, *ON A CLEAR DAY YOU CAN SEE GENERAL MOTORS* (1979); Adams & Brock, *Corporate Power and Economic Sabotage*, 20 J. ECON. ISSUES 919 (1986); Dugger, *Power: An Institutional Framework of Analysis*, 14 J. ECON. ISSUES 897 (1980); Klein, *Confronting Power in Economics: A Pragmatic Evaluation*, 14 J. ECON. ISSUES 871 (1980); Lovett, *Teamwork, Markets, and Regulation: Distortions Arising From Legal Parochialism*, 15 J. ECON. ISSUES 409 (1981); Peterson, *Power and Economic Performance*, 14 J. ECON. ISSUES 827 (1980).

14. Accountability and performance remain the fundamental challenges for businesses, regulatory agencies, legislatures, and courts. *See* BUSINESS DISCLOSURE: GOVERNMENT'S NEED TO KNOW (1979); P. DICKSON, *THINK TANKS* (1971); W. GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1967); D. HAPGOOD, *THE SCREWING OF THE AVERAGE MAN* (1974); M. BRUCE JOHNSON, *THE ATTACK ON CORPORATE AMERICA* (1978); L. KOHLMEIER, *THE REGULATORS, WATCHDOG AGENCIES AND THE PUBLIC INTEREST* (1969); C. MCCARRY, *CITIZEN NADER* (1972); M. MINTZ & J. COHEN, *POWER INC.: PUBLIC AND PRIVATE RULERS AND HOW TO MAKE THEM ACCOUNTABLE* (1976); R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); R. NOLL, *REFORMING REGULATION* (1971); B. OWEN & R. BRAUETIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* (1978); *PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY* (1977); D. ROWAT, *THE OMBUDSMAN: CITIZEN'S DEFENDER* (1968); Arnold, *Political Control of Administrative Officials*, 3 J. L. ECON & ORGANIZATION 279 (1987); Beatson, *Legislative Control of Administrative Rulemaking: Lessons from the British Experience*, 12 CORNELL INT'L L. REV. 199 (1979); Branson, *Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility*, 29 VAND. L. REV. 539 (1976); Breyer,

gain favorable attention, a well-financed, responsible press, enlightened, protective guardians within universities, news organizations, and foundation think-tanks are invaluable to this process. Sadly, even in countries that generally enjoy fairly responsible governance, pockets of neglect or corruption exist. In these areas of governmental or market failure, it is often the tribunate accountability process that has broken down, or fallen into the hands of corrupt interests.

The Honorable Profession of Regulation requires a strong, healthy and, if at all possible, decentralized tribunate process to be successful. This process requires an independent press, ample access to information about government and the marketplace, extensive and competent scholarship, a liberal legal profession, and an open political system that accepts reasonable criticism of government and the marketplace. Except for smaller countries, where access may be easier in local community life, substantial decentralization is usually helpful. In large, centralized bureaucratic societies, problems of accountability for both government and the marketplace tend to be magnified, and an effective tribunate is often frustrated or incomplete.¹⁵

To avoid putting too much faith in the automatic workings of the marketplace without reasonable regulation and law enforcement, it is wise to remember the words of Adam Smith, the father of modern liberal

Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363 (1986); Brown, *The Courts and Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy*, 39 ADMIN. L. REV. 27 (1987); Byse, *Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies*, 29 ADMIN. L. REV. 157 (1977); Davis, *Deregulation and Administrative Law*, 40 ADMIN. L. REV. 67 (1988); Eads, *Harnessing Regulation: The Evolving Role of White House Oversight*, REGULATION, May-June 1981, at 19; Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985); Gerwin, *The Deference Dilemma: Judicial Responses to the Great Legislative Power Giveaway*, 14 HASTINGS CONST. L.Q. 289 (1987); Harter & Eads, *Policy Instruments, Institutions, and Objectives: An Analytic Framework for Assessing "Alternatives" to Regulation*, 37 ADMIN. L. REV. 221 (1985); Leighton, *Consumer Protection Agency Proposals: The Origin of the Species*, 25 ADMIN. L. REV. 269 (1973); Lovett, *Teamwork, Markets, and Regulation: Distortions Arising from Legal Parochialism*, 15 J. ECON. ISSUES 409 (1981); McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 ADMIN. L. REV. 399 (1986); Nader, *Corporate Secrecy v. Right to Know*, MULTINATIONAL MONITOR (1980); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981).

15. Most Americans take federalism for granted without fully appreciating the advantages of decentralizing economic power and fostering more responsive community life that federalism offers. While the American resistance to rapid change is understandable, the opportunities for pragmatic progress and experimentation generally should outweigh this conservatism. The replication of federalism within most states with counties, cities, and even townships is a blessing for responsive governance. In fact, most misgovernance and demoralization in American life is concentrated within very large urban areas that lack healthy neighborhood institutions and suffer from widespread poverty. See D. ENGBAHL, *CONSTITUTIONAL FEDERALISM* (1987); M. REAGAN, *THE NEW FEDERALISM* (1987); E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973); H. C. SIMONS, *AN ECONOMIC POLICY FOR A FREE SOCIETY* 78-120 (1948); Lightman, *Welfare Ideologies and Theories of Federalism*, 21 SOCIAL POLICY AND ADMINISTRATION 15 (1987); McKay, *Theory and Practice in Public Policy: The Case of the New Federalism*, 33 POL. STUD. 181 (June 1985).

political economy. "The interest of dealers. . .in any particular branch of trade or manufactures is always in some respect different from, and even opposite to that of the public. To widen the market and to narrow the competition, is always the interest of the dealers."¹⁶ By narrowing competition, dealers are allowed "to levy, for their own benefit, an absurd tax upon the rest of their fellow-citizens."¹⁷ These dealers are "an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it."¹⁸ In a comment anticipating modern antitrust policy, Smith observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."¹⁹

Smith was concerned about "the neglect, on the part of corporate directors, of 'other peoples money'; the inclination of lawyers who are paid by the length of their brief 'to multiply words beyond all necessity.'"²⁰ Smith clearly understood the problems of public interest advocacy, and the "difficulties that beset the path of those who oppose the 'sophistry of merchants and manufacturers who are always demanding a monopoly against their countrymen'"²¹

The member of parliament who supports every proposal for strengthening this monopoly is sure to acquire not only the reputation of understanding trade, but great popularity and influence in an order of men whose numbers and wealth render them of great importance. If he opposes them, on the contrary, and still more if he has authority enough to be able to thwart them, neither the most acknowledged probity, nor the highest rank, nor the greatest public services, can protect him from the most infamous abuse and detraction, from personal insults, nor sometimes from real danger, arising from the insolent outrage of furious and disappointed monopolists.²²

In these remarks, Smith provides prophetic insight on the problems of political distortion for the Honorable Profession of Regulation, and the contemporary challenge to sound economic analysis.²³

16. ADAM SMITH, *WEALTH OF NATIONS* 250 (1776). For an impressive tribute to Adam Smith, see J. GALBRAITH, *The Founding Faith: Adam Smith's "Wealth of Nations"* in *ANNALS OF AN ABIDING LIBERAL* (1979).

17. SMITH, *supra* note 16, at 250.

18. *Id.*

19. *Id.* at 128.

20. H. SPIEGEL, *THE GROWTH OF ECONOMIC THOUGHT* 235 (1971).

21. *Id.* at 235-236.

22. SMITH, *supra* note 16, at 435.

23. See *supra* note 11 (chart on economic analysis of market place regulation).

A. *Macro-Economics, Finance, Banking and Securities*

Despite sharp controversies among economists since the Great Depression, post-war recoveries, stagflation strains in the 1970's, and recent debates among Monetarists, Neo-Keynesians, Supply-Siders, and Traditional Bankers, greater consensus among OECD nations seems to be crystalizing for the late 1980s and beyond.²⁴ Mild government budget deficits provide a useful stimulus, if not carried to inflationary excess. Money and credit supplies should expand gradually and fairly steadily to support economic growth in accord with the needs of industry and trade. Tax levies must be adequate to maintain essential government and social insurance responsibilities, but should not become burdensome or a disincentive to healthy savings and investment. Countries violating these guidelines, usually with excessive government deficits or excessive surges of monetary expansion, normally experience significant inflation, a gradual depreciation of currency, and may suffer serious capital flight or net disinvestment in aggravated circumstances. Stagflation and economic sluggishness often follow.

Because international trade and capital flows broadened so greatly in the last generation,²⁵ economies of the countries involved are becoming more interdependent. This interdependence brings macroeconomic coordination.²⁶ We see this effect in recent Summit meetings,²⁷ the European Monetary System, and the Bank for International Settlements. The world economy faces two important economic problems. The first problem is the debt overloads of Latin American, African, and other developing countries. These debt overloads cause capital flight, inflation, and development slumps. The second problem is the large United States trade and payments deficits. These recent deficits are traceable to large United States budget deficits, higher interest rates, heavy foreign borrowing between 1983-88, and unequal market openness and export subsidies by many important trading nations.

Although debt problems have stalled economic growth in the most deficit prone developing countries, many less developed countries and newly industrialized countries [hereinafter LDCs and NICs, respectively] are doing

24. See, e.g., BANK FOR INT'L SETTLEMENTS, 58 ANN. REP. (1988) [hereinafter BIS 88]; BANK FOR INT'L SETTLEMENTS, 57 ANN. REP. (1987) [hereinafter BIS 87]; R. COOPER, ECONOMIC POLICY IN AN INTERDEPENDENT WORLD (1986); J. FRENKEL & A. RAGIN, FISCAL POLICY AND THE WORLD ECONOMY (1987); GROUP OF THIRTY, INTERNATIONAL MACROECONOMIC POLICY COORDINATION (1988) INST. FOR INT'L ECONOMICS, RESOLVING THE GLOBAL ECONOMIC CRISIS AFTER WALL STREET (1987); INT'L MONETARY FUND, 1988 ANN. REP. (1988); INT'L MONETARY FUND, 1987 ANN. REP. (1987); INT'L MONETARY FUND, 1986 ANN. REP. (1986); INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK (1987) [hereinafter IMF]; T. MAYER, J. DUESENBERY & R. ALIBER, MONEY, BANKING AND THE ECONOMY (1987); OECD, 43 ECONOMIC OUTLOOK (1988); OECD 42 ECONOMIC OUTLOOK (1987); H. STEIN, PRESIDENTIAL ECONOMICS: THE MAKING OF ECONOMIC POLICY FROM ROOSEVELT TO REAGAN AND BEYOND 307-76 (1984).

25. The countries involved in the broadening of trade and capital flows are those countries in the European Community and EFTA, together with the United States, Canada, Brazil, Japan, South Korea, Taiwan, Hong Kong, Singapore, Australia, and others.

26. See *supra* note 24.

27. For example, the G-5, G-7, and G-12.

better, and many manufacturing activities from industrial nations are shifting to lower wage locations.²⁸ Japan, West Germany, South Korea, Taiwan, and other countries still enjoy strong growth and prosperity. The United States achieved a considerable recovery after the 1981-83 recession, but most experts agree that the country's budget deficits had become excessive and that Gramm-Rudman deficit reduction efforts were too slow.²⁹ Political conflicts between Republican and Democratic leaders, along with logrolling alliances, made fiscal discipline difficult.³⁰ Gradual progress might come in the next administration, however, and improved fiscal discipline would align U.S. macroeconomic policies with recent OECD-IMF guidelines.

Debt overload countries, meanwhile, needed greater servicing relief and cut back on net capital flows to creditor nations.³¹ This reduction forced multinational banks to write off more LDC debts, although new lending or capital investment was not easy to obtain for the weakest borrowers. A broadening consensus favored additional IMF, World Bank, and regional development bank resources and more generous multinational bank re-scheduling. But the lower debt developing countries like India and China, along with NICs like South Korea and Taiwan, were growing rapidly. This rapid growth demonstrated that more responsible development strategies could be successful. This evolution further reinforced confidence in OECD-IMF consensus guidelines.

Banking regulation became more harmonized across international boundaries, with the Basle G-12 risk-based capital requirements of 1987-

28. See B. COHEN, IN WHOSE INTEREST? INTERNATIONAL BANKING AND AMERICAN FOREIGN POLICY (1986); R. DORNBUSCH, DOLLARS, DEBTS AND DEFICITS (1987); D. LESSARD & J. WILLIAMSON, CAPITAL FLIGHT AND THIRD WORLD DEBT (1987); W. LOVETT, WORLD TRADE RIVALRY 137-166 (1987); Kilborn, *A Rising Challenge to the Reagan Policy on World Debt*, N.Y. Times, Oct. 23, 1988 at E5, col. 1.

29. See R. BRYANT, G. HOLTHAM & P. HOOPER, EXTERNAL DEFICITS AND THE DOLLAR: THE PIT AND THE PENDULUM (1988); J. FAUX, GETTING RID OF THE TRADE DEFICIT: A CHEAPER DOLLAR IS NOT ENOUGH (1988); W. LOVETT, WORLD TRADE RIVALRY 189-238 (1987); S. MARRIS, DEFICITS AND THE DOLLAR: THE WORLD ECONOMY AT RISK (1985 & Supp. 1987); Bergsten, *Economic Imbalances and World Politics*, 65 FOREIGN AFFAIRS 770 (1987); Calleo, *Cleveland & Silk, The Dollar and the Defense of the West*, 66 FOREIGN AFFAIRS 846 (1988); Reich, *The Economics of Illusion*, 66 FOREIGN AFFAIRS 316 (1988); Silk, *The U.S. and the World Economy*, 65 FOREIGN AFFAIRS 458 (1986).

30. Most media commentators and the financial press agreed that the next presidential administration needed to show tougher budget discipline and to reduce deficits. Although neither Bush nor Dukakis could afford to target spending cuts or significant new taxes in their hard-fought 1988 political campaign, the consensus among economists in the United States and abroad was that the U.S. needed stronger fiscal discipline than it used in 1984-88. See *supra* notes 24, 29.

31. See Kilborn, *A Rising Challenge to the Reagan Policy on World Debt*, N.Y. Times, Oct. 23, 1988, at E5, col 1; see also *supra* note 28, Meanwhile, U.S. banks were forced to write off major amounts of Latin American debt in the second quarter of 1987 because of reduced payments by these debt overload countries. See Lovett, *Moral Hazard, Bank Supervision, and Risk-Based Capital Requirements*, 49 OHIO ST. L.J. 1366, 1394 Appendix Table I (1989) (discussing LDC debt exposure of major U.S. banks); see also Kilborn, *Debt-Policy Shift Set on Third World*, N.Y. Times, Mar. 11, 1989, at 17, col.6.

88.³² This harmonization strengthened capital adequacy for banking institutions and promoted a more level playing field. Although banking and savings & loan failures increased in parts of the United States and in some other countries, these failures reflected mainly overspeculative lending.³³ Tightened bank supervision, forced mergers, consolidation for weak institutions, and generous recapitalization credits were solving these problems. Experts agreed that the industry needed stronger "moral hazard" discipline to prevent excessive and imprudent lending. Stronger moral hazard discipline meant: (i) renewed bank and thrift supervision; (ii) stronger capital and risk based capital requirements; (iii) risk adjusted deposit insurance premia; and (iv) broader diversification and securitization of asset portfolios.

Securities regulation has improved greatly in the United States since the Great Depression.³⁴ The Securities and Exchange Commission (SEC) enforces extensive disclosure, and tries to limit unfair and deceptive practices. Private stockholder litigation reinforces the SEC's efforts. The SEC's regulatory efforts cannot prevent occasional surges of bull market optimism and subsequent sags or corrections. Although gradual increases in international ownership of securities could yield more volatility, broader diversification of investor portfolios seems desirable and might be reasonably safe, provided that the OECD-IMF consensus and stable, healthy growth are maintained in the global marketplace. Commentators are concerned, however, about possible overleveraging by many companies, undue takeover activity that neglects long-term productivity, strains on pension funds, and controversy over the level of integration of banking and securities firms that might be desirable.³⁵ Congressional attention has focused upon "firewalls" between banking activities, securities underwriting and marketing, insurance activities, and other industries, as it tried to develop compromise legislation on financial boundaries.³⁶

32. See LOVETT, *supra* note 31, at 1382-87 (giving complete description of recent Basle 9-12 risk based capital requirements that were implemented between 1987-88); see also R. DALE, *THE REGULATION OF INTERNATIONAL BANKING* (1986).

33. Examples of overspeculative lending include lending based on an oil-patch boom, farm land inflation, and real estate development.

34. See R. JENNINGS & H. MARSH, *SECURITIES REGULATION* (6th ed. 1987 & Supp. 1988); D. RATNER, *SECURITIES REGULATION* (3d ed. 1988); see also W. LOVETT, *BANKING AND FINANCIAL INSTITUTIONS LAW IN A NUTSHELL* 296-337 (2d ed. 1988).

35. See, e.g., J. BROOKS, *THE TAKEOVER GAME* (1987); H. KAUFMAN, *INTEREST RATES, THE MARKETS AND THE NEW FINANCIAL WORLD* 34-89 (1986); A. MICHAEL & I. SHAKED, *TAKEOVER MADNESS: CORPORATE AMERICA FIGHTS BACK* (1986); D. RAVENSCRAFT & F.M. SCHERER, *MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY*, (1987); *Deal Mania*, *BUSINESS WEEK*, Nov. 24, 1986, at 74-96. For a discussion of extensive concerns about strains on pension funds, see Lovett, *supra* note 31, at 1391 n.84. For a discussion of the controversy on bank and other financial institution boundaries, see *Reform of the Nations Banking and Financial Systems: Hearings Before The Subcomm. on Financial Institutions Supervision, Regulation, and Insurance of the House Committee on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess, Parts 1-4 [hereinafter *Hearings*].

36. For extensive discussion of the firewalls controversy, see R. LITAN, *WHAT SHOULD BANKS Do?* (1987); *Hearings, supra* note 35.

Meanwhile, good long-term growth and profits for insurance companies have encouraged more banking and securities firms to seek diversification in the insurance sector. Until quite recently, life and health insurance and liability and property insurance were independent industries, largely insulated from banking and securities, and regulated only at the state level by Commissioners or Departments of Insurance. Insurance regulation is comprehensive and includes chartering and licensing, capital requirements, reserves and solvency, rate making and supervision, standard contracts, and consumer protection responsibilities.³⁷ Most insurance companies are specialized to the insurance industry. But a few leading conglomerates, including Sears'-Allstate Dean Witter-Coldwell Banker and Prudential-Bache, have shown greater diversification interest, and bank lobbies have been fighting for broader insurance powers since the early 1980s. On the other hand, independent insurance agents, direct writer sales forces, and most insurance companies are fighting hard to limit these encroachments. Occasional, modest inroads by bank holding companies, local banks, and local thrifts have been made, and it remains to be seen whether the insurance sector might be commingled in any substantial way with the banking or securities distribution industries. If federally regulated banks and securities firms merge extensively with insurance companies, however, substantial pressures will develop to harmonize capital requirements, reserves, and solvency supervision, including firewalls to insulate affiliates from undue risks. Federal regulation of insurance may follow as an indirect consequence.³⁸

B. Basic Utilities and Monopolies

Monopolies exist when production costs allow only one firm in a market, and entry is not feasible or economical. Examples of these monopolies are electric power, natural gas, telephone, and water distribution networks. In these markets fixed costs are large and no room exists in a given locality for a duplicating network with expensive capital investment. Railroads, canals, urban transit, and even airlines were more monopolistic than they are today, even though they now are subject to more competition from

37. For standard texts on insurance regulation, see K. BLACK & H. SKIPPER, *LIFE INSURANCE* (11th ed. 1987); M. DOREMAN, *INTRODUCTION TO INSURANCE* (3rd ed. 1987); S.S. HUEBNER, K. BLACK, & R. KLINE, *PROPERTY AND LIABILITY INSURANCE* (3rd ed. 1982); W. LOVETT, *BANKING AND FINANCIAL INSTITUTIONS LAW IN A NUTSHELL* 338-379 (1988); G. REJDA, *PRINCIPLES OF INSURANCE* (2d ed. 1986); see also *infra* notes 100-06 and accompanying text (discussing current tort and related liability insurance controversies).

38. If banking and financial conglomerates extensively integrate or merge with insurance underwriting, increased federal supervision of insurance capital, reserves, profits, and insolvency risks is likely in one form or another. See W. LOVETT, *supra* note 34, at 374-79; *Hearings, supra* note 35, Part 3, at 45, 74-75, 80-82, and 226-31.

Insurance companies, agencies, and sales forces are greatly alarmed at the prospect that banks and thrifts will tie sales of insurance policies to commercial, real estate, home, car, and other consumer loans. This prospect, the insurers fear, would shift the larger part of insurance policy sales away from the presently established insurance markets into the hands of banks and thrift institutions. See *Hearings, supra* note 35, Part 3, at 1-40, 96-189.

other facilities. Alternative treatments for monopolies are public enterprise, public utility regulation, or taxation to limit monopolistic profits. A supplementary approach is to provide maximum freedom for vigorous competition, including substantial antitrust enforcement, to ensure more freedom of entry, at least in the nearby markets or fringes of the natural monopoly.

These treatments are designed to expand output, reduce prices, eliminate maldistribution, and enhance efficiency. At the heart of these treatments, regardless of whether public or private enterprise seems more desirable, lies a need to supervise efficient investments, choice of technology, range and quality of output and services, and the level and structure of pricing. Because monopolies lack competitive discipline, they often suffer slackness, overstaffing, excessive capitalization, and technological under-achievement.

For the United States, public utility regulation is the main solution for monopoly industries.³⁹ Federal, state, and municipal authorities supervise the rate of return and expenses of public utilities. The regulatory commissions review revenues from rates and tariffs by focusing on the permissible rate base, rate of return and expenses, together with some supervision of the rate or pricing structure. This effort can be summarized with two formulas:

- (1) Revenues [level] = $e + (b - d)r$, where e = expenses, b = rate base, d = depreciation, and r = allowable rate of return; and
- (2) Revenues [structure] = (rate structure) \times (usage or traffic).

Regulation of the rate structure controls revenue levels. In this way, regulators can prevent the worst inefficiency and overcharging, provided that a strong regulatory effort is made with sufficient access to the relevant information. Expenses (e) include labor, salaries, fuel, repairs, taxes, and other current operating costs. These costs must be covered in order to maintain service at adequate levels. And one way or another, the cost of capital also must be covered in order to maintain service. The cost of capital is reflected in $(b - d)r$. The rate base (b), reduced by accumulated depreciation (d), and multiplied by the allowable rate of return (r) equals the cost of capital. The rate base (b) represents capital invested in the enterprise, including plant, equipment, land and other assets. The regulatory commissions generally valued these assets in terms of historical costs for

39. For extensive background on public utility regulation, see J. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES*, (1961); M. CREW & P. KLEINDORFER, *THE ECONOMICS OF PUBLIC UTILITY REGULATION* (1986); A. DANIELSON & D. KAMERSCHEN, *CURRENT ISSUES IN PUBLIC UTILITY ECONOMICS* (1983); P. GARFIELD & W. LOVEJOY, *PUBLIC UTILITY ECONOMICS* (1964); E. GELLHORN & R. PIERCE, *REGULATED INDUSTRIES* (2d ed. 1987); K. HOWE & E. RASMUSSEN, *PUBLIC UTILITY ECONOMICS AND FINANCE* (1982); A. KAHN, 1 *THE ECONOMICS OF REGULATION* (1970); A. KAHN, 2 *THE ECONOMICS OF REGULATION* (1970); T. MORGAN, J. HARRISON & P. VERKUIL, *supra* note 1, at 73-342; *PERFORMANCE UNDER REGULATION*, (H. Trebing ed. 1968); *THE POLITICS OF REGULATION* 3-41 (J. Wilson, ed. 1950); *UTILITY REGULATION: NEW DIRECTIONS IN THEORY AND POLICY* (W. Shepard & T. Gies eds. 1966); C. WILCOX & W. SHEPHERD, *PUBLIC POLICIES TOWARD BUSINESS* 331-428 (5th ed. 1975); Trebing, *The Chicago School Versus Public Utility Regulation*, 10 *J. ECON. ISSUES* 97 (1976).

reasons of accounting convenience.⁴⁰ Rates should provide for: (i) adequate service; (ii) financial integrity and solvency; (iii) proper compensation for risk; and (iv) the need to attract further capital.⁴¹

Unfortunately, firms tend to pad expenses and the rate base, not only by conscious design, but simply as a result of inadequate incentives under cost plus pricing with fixed rates of return. Because each regulatory agency tends to establish a stable rate of return, normally ranging from seven to fifteen per cent of the rate base, net of depreciation, public utilities often lack incentive to minimize their costs.⁴² Despite these weaknesses in traditional public utility regulation, the supervision and public consciousness of regulated monopolies have reduced much of the worst monopolistic distortion, excess pricing, maldistribution and waste.

Unhappily, public utility or regulatory commissions too often lack the technical talent, expert consultants, information and administrative skill to do much more than passively review the accounting data prepared by utilities.⁴³ Thus, the success of public utilities depends frequently upon the

40. A majority of states in the U.S. use a more complex "fair value" standard for evaluating the rate base (b), which includes replacement cost as well as historical or original cost. But the needs for replacement capital normally are taken into account in determining the allowable rate of return (r), so that original cost is usually sufficient, as well as the most convenient method of rate base calculation. For more detailed discussions of rate making, see J. BONBRIGHT, *supra* note 39, at 26-406; E. GELLHORN & R. PIERCE, *supra* note 39, at 101-229; K. HOWE & E. RASMUSSEN, *supra* note 39, at 64-145; A. KAHN, 1 *ECONOMICS OF REGULATION*, *supra* note 39, at 25-199; T. MORGAN, J. HARRISON & P. VERKUIL, *supra* note 39, at 218-432; L. SCHWARTZ, J. FLYNN & H. FIRST, *supra* note 1, at 659-829; C. WILCOX & W. SHEPHERD, *supra* note 39, at 359-390; see also Miller, *Rate Structure Reform: A Review of the Current Debate* 12 J. ECON. ISSUES, 625-626.

41. See, e.g., *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); see generally A. KAHN, 1 *ECONOMICS OF REGULATION* (1970); A. KAHN, 2 *ECONOMICS OF REGULATION* (1970). Further controversy revolves around the relative importance of risk, the effect of inflation, the distribution of equity and debt in the capital structure, and, thus, the appropriate level of (r). Current rates of return generally range between seven and fifteen percent, depending on the regulatory jurisdiction. On more recent controversies, see D. ANDERSON, *REGULATORY POLITICS AND ELECTRIC UTILITIES* (1981); M. CREW & P. KLEINDORFER, *supra* note 39; A. DANIELSON & D. KAMERSCHEN *supra* note 39; E. GELLHORN & R. PIERCE, *supra* note 39; W. GORMLEY, *THE POLITICS OF PUBLIC UTILITY REGULATION* (1983); K. HOWE & E. RASMUSSEN, *supra* note 39; T. MORGAN, J. HARRISON & P. VERKUIL, *supra* note 1; Miller, *Rate Structure Reform: A Review of the Current Debate*, 12 J. ECON. ISSUES 609 (1978); Trebing, *Public Utility Regulation: A Case Study in the Debate Over Effectiveness Of Economic Regulation*, 18 J. ECON. ISSUES 223 (1984); Trebing, *Regulation of Industry: An Institutionalist Approach*, 21 J. ECON. ISSUES 1707 (1987).

42. A few regulatory bodies have experimented with performance standards for rate level determination, which try to build in more economic incentives for efficiency. See, e.g., Averch & Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. (1962); Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulations*, 17 J. L. & ECON. 291 (1974); see also generally E. GELLHORN & R. PIERCE, *supra* note 39; K. HOWE & E. RASMUSSEN, *supra* note 39; A. KAHN, 1 *ECONOMICS OF REGULATION*, *supra* note 39; TREBING, *supra* note 1. The problem is to select to the extent feasible the best blend of incentives, oversight, accountability and competition.

43. Strictly speaking, the expense of reasonable public accountability and oversight should

utilities' own engineering and executive talent. Common shortcomings are excessive investment, duplicating facilities, and generous operating expenses. On the other hand, an ample latitude for equipment and personnel often enables the utilities' quality of service to be relatively high, at least in comparison with poorly funded public enterprise monopolies in other countries.

Recent developments in U.S. utility regulation reflect the continuing challenge for adequate review of investments, costs, and rates.⁴⁴ In power regulation, many plants, often nuclear, were built with excessive cost overruns, delays, or controversy about location and design. Prudence review, though needed, frequently came too late, and costly blunders of excess capacity, gigantism or environmental impact accumulated. Excess cost estimates due to badly designed or unnecessary plants have run as high as one hundred to two hundred billion dollars for the power industry alone in the last twelve years.

A trend toward somewhat smaller generating plants allows more competition from cogenerators, and perhaps more regional and municipal rivalry for investments and pricing. But the scope for somewhat greater competition forces more regulatory and antitrust concern upon issues of system access, interconnection, joint usage of wires and transfer, and "wheeling" of power.

be worked into the cost of operating public utilities and other regulated firms. In this way, regulatory oversight expenses can be paid as a user tax and included within the prices charged for electricity, gas distribution, local telephone service, or regulated transportation fares. But care must be taken to minimize capture of the accountability process by parochial interests. In other words, *Quis custodes custodiet*, or who guards the guardians?

44. Acton & Mitchess, *Do Time-of-Use Rates Change Local Curves? And How Would You Know?*, 106 PUB. UTIL. FORT. 15 (1980); Allison, *Imprudent Power Construction Projects: The Malaise of Traditional Public Utility Policies*, 13 HOFSTRA L. REV. 507 (1985); Allison, *Judging the Prudence of Constructing Nuclear Power Plants: A Report to the Oklahoma Corporation Commission*, 15 TULSA L.J. 262 (1979); Barber, *A Workable Test of a Workably Competitive Bulk Power Market*, 121 PUB. UTIL. FORT. 13 (1988); Berry, *Least-cost Planning and Utility Regulations*, 121 PUB. UTIL. FORT. 9 (1988); Cavanagh, *Responsible Power Marketing in an Increasingly Competitive Era*, 5 YALE J. ON REG. 331 (1988); Gentieu, *The Equity Discounting Method in the Determination of Losses from "Direct" Utility Plant Cost Disallowances*, 121 PUBL. UTIL. FORT. 22 (1988); Gerber, *Questions for Regulators in a Competitive Electric Utility Environment*, 122 PUB. UTIL. FORT. (1988); Howard & Westfall, *The FERC Opens Pandora's Box: Increased Competition and Heightened Antitrust Exposure for Electric Utilities*, 121 PUB. UTIL. FORT. 22 (1988); Joskow & Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. ON REG. 1 (1986); Lennon & Meyers, *Net Energy Use Impacts of PURPA Implementation*, 121 PUB. UTIL. FORT. 28 (1988); Norton, *Regulation and Systemic Risk: The Case of Electric Utilities*, 28 J.L. ECON. 671 (1985); Nowothy, *Transmission Technology and Electric Utility Regulations*, 22 J. ECON. ISSUES 555 (1988); *Observers Predict Electric Proposals Will "Fundamentally Change" Industry*, 121 PUB. UTIL. FORT. 40 (1988); Romo, *Four Days in March: When NARUC Took on the FERC*, 121 PUB. UTIL. FORT. 25 (1988); Smith, *Currents of Competition in Electricity Markets*, 11 REG. 23 (1987); Studness, *Regulations and Future Electric Power Supply*, 121 PUB. UTIL. FORT. 40 (1988); Teisberg, *Investment Cost Recovery and Incentives for Power Plant Construction*, 121 PUB. UTIL. FORT. 9 (1988); Wellinghoff, *The Forgotten Factor in Least-Cost Utility Planning: Cost Recovery*, 121 PUB. UTIL. FORT. 9 (1988).

More supervision should be given to marginal cost discounting, cross-subsidy patterns, and predatory pricing to limit entry or destroy competitors. While somewhat greater competition may be allowed and is probably desirable for basic utility industries (at least on the margins or border lands of natural monopolies), the underlying scale economies that require close supervision in these industries⁴⁵ still seem to be operating. Thus, we see a continuing need for *competent* regulatory oversight, adequate staffing, and reasonable integrity in basic utility operations.⁴⁶ It also is important to avoid significant extra costs and potentially inadequate service from these industries.

C. Transportation - Highways, Railways, Airlines, and Shipping

The government spends substantial amounts of public funds for highways, bridges, airports, traffic control and safety, together with harbor, river, and coastal waterway maintenance. In their early development, railroads received solid encouragement through land grants, and the government still subsidizes rail passenger traffic. Although different modes of travel partly compete against each other, the government extensively regulates each mode. The regulatory agencies set limits and priorities on public funding. The agencies also regulate transportation industries to maintain safety, to organize traffic control efficiently, and to some extent, regulate, or at least supervise pricing.

The most important and pervasive transportation regulation involves the street and highway network, maintained through local, state, and federal programs that are supported in part by dedicated gasoline taxes, user fees, and licenses.⁴⁷ This grid is an integral part of urban and rural life and meshes with land use and environmental regulation. Regulatory agencies' handling of details may cause controversies, but all parties accept the overall need for extensive government funding, traffic control, and long-term planning. As public sector budgets have become strained with increasing competition for funding, the coordination of transport spending and infrastructure maintenance is a growing challenge, and needs to be more skillfully meshed with tax policy, allowing greater use of user charges.

Trucking should pay its fair share of road and highway maintenance, especially the larger vehicles that impose more wear and tear on highways and streets. Licensing and regulation for common carriers still exists, but pricing regulation for trucking largely was dismantled at the federal level

45. Electric power, gas distribution, local telephone and water networks.

46. See Allison, *supra* note 32, Barber, *supra* note 44; Gerber, *supra* note 44; Howard & Westfall, *supra* note 44; Joskow & Schmalense, *supra* note 44; Smith, *supra* note 44; Trebing, *supra* note 1.

47. See generally AMERICAN ASSEMBLY, THE FUTURE OF AMERICAN TRANSPORTATION (1971); R. CRANDALL, H. GRUENSPECHT, T. KEELER & L. LAVE, REGULATING THE AUTOMOBILE (1986); P. DEMPSEY & W. THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 1-48 (1986); P. KINCAID, THE RULE OF THE ROAD: AN INTERNATIONAL GUIDE TO HISTORY AND PRACTICE (1986); D. LOCKLIN, ECONOMICS OF TRANSPORTATION (5th ed. 1960).

during the late 1970s deregulation.⁴⁸ The great majority of trucks, however, were always operated directly by small and large business, including farmers, with only minimal licensee fees and supervision. Yet, with generous public subsidies, the trucking industry benefits greatly in competition with rail and water transport, particularly for heavy cargoes. The federal and state governments could force user charges for trucking activities more effectively.

Rail transport was important before cars and trucks became commonplace, especially from the 1830s through World War I. State public service commissions regulated railroad rates. The Interstate Commerce Commission regulated rates more extensively, especially after the Hepburn Act of 1906. Truck and car use mushroomed in the 1920s, but the Great Depression, widespread excess capacity, and cutthroat rate competition led to the Motor Carrier Act of 1935 and ICC regulation of interstate common carrier trucking. However, this regulation still left the majority of trucks operated directly by families, farmers, and businesses largely unregulated. In the later 1970s Congress dismantled most of the ICC rate supervision for common carrier trucking and railroads, allowing more price competition.⁴⁹ But extensive safety regulation still remains in place, along with ICC licensing for common carrier trucking, greater supervision for railroad operations, limited consumer protection responsibilities for the Department of Transportation.

Air travel began in the 1920s with air mail subsidies to support route development. The Civil Aeronautics Board (CAB) took over this responsibility, with licensing and rate supervision designed to foster airline growth through limited competition and cross-subsidization of routes. With bigger, faster aircraft, the airline industry flourished after World War II. Meanwhile, local communities and the federal government subsidized airport construction and expansion, together with an improving air traffic control system supervised by the Federal Aviation Administration (FAA). In the 1960s and 1970s many routes became self-sustaining and the government allowed more competition. This minor relaxing of regulation led in 1978 to substantial airline deregulation.⁵⁰ The CAB was abolished along with rate

48. See P. DEMPSEY & W. THOMS, *supra* note 47, at 1-48, 80-117; P. MACAVOY & J. SNOW, *REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION* (1977); Blair, Kaserman & McClave, *Competition on Trial: Florida Deregulates Trucking*, 30 CHALLENGE 60 (1987); Gallick & Sisk, *A Reconsideration of Taxi Regulation*, 1 J. L. ECON. & ORGANIZATION 117 (1987); Thoms, *Rollin' On . . . To a Free Market Motor Carrier Regulation 1935-1980*, 13 TRANSP. L.J. 43 (1983); Thoms, *Unleashing the Greyhounds—The Bus Regulatory Act of 1982*, 6 CAMPBELL L. REV. 75 (1984); Zerbe, *Seattle Taxis: Deregulation Hits A Pothole*, 7 REGULATION 43 (1983).

49. See P. DEMPSEY & W. THOMS, *supra* note 47; G. KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965); D. LOCKLIN, *supra* note 47; P. MACAVOY, *THE ECONOMIC EFFECTS OF REGULATION: THE TRUNK-LINE RAILROAD CARTELS AND THE INTERSTATE COMMERCE COMMISSION BEFORE 1900* (1965); R. K. WEAVER, *THE POLITICS OF INDUSTRIAL CHANGE—RAILWAY POLICY IN NORTH AMERICA* (1985); Thoms, *Clear Track For Deregulation of American Railroads, 1970-1980*, 12 TRANSP. L. J. 183 (1982).

50. *AIRLINE DEREGULATION: THE EARLY EXPERIENCE* (J. Meyer & C. Oster, Jr. eds. 1981); E. BAILEY, D. GRAHAM & D. KAPLAN, *DEREGULATING THE AIRLINES* (1985); see P.

regulation, and consumer protection responsibilities were transferred to the Department of Transportation. A rush of new entries into the industry and route expansion followed, with a lot of discounting on early purchase (discretionary travel) tickets. Average fare costs dropped for some years, as rivalry increased. Bottlenecks at many airports, however, limited competition, and many new airlines failed. Gradually, market concentration increased (in some markets higher than before deregulation), competitive rivalry eased, and access to discount fares tightened. Average charges to travelers began increasing substantially. What went wrong? While most experts liked substantial deregulation, easier entry, and greater price competition, a new consensus emerged which held that there was insufficient supervision and antitrust enforcement. In other words, for airline deregulation to work well, we need close supervision of airport bottlenecks and the new hub networks, and tougher antitrust enforcement, including some divestiture and transfers of routes, to limit concentration in many airport and route markets. Airlines have imposed the largest fare price increases on the routes with modest or no competition.

Shipping traditionally has received public subsidies through harbor and dock improvements. Shipping also received assistance through restrictive navigation laws to promote merchant marine and naval strength and limit excessive reliance upon foreign shipping. Internal rivers and canals also were improved through public subsidies. (Encouragements to railroad, highway, and air transport were extensions of these policies.) Cities, states, and the federal government carried these subsidies forward with special impetus during World War II's shipbuilding effort. Since the war, however, the United States' international shipping has declined, with businesses increasingly relying on low wage foreign flag carriers. Considerable rate cartelization applies to ocean liner "conferences", loosely supervised by federal authorities. Tramp vessels offer lower, competitive rates. But to retain a reasonable minimum of U.S. shipping capacity for national security purposes, the government has employed a mixture of shipbuilding subsidies, and some traffic subsidies and protection, including the exclusion of foreign flags from coastal waterways. Even the widespread use of foreign "flags of

DEMPSEY & W. THOMS, *supra* note 47; OFFICE OF TECHNOLOGY ASSESSMENT, *SAFE SKIES FOR TOMORROW: AVIATION SAFETY IN A COMPETITIVE ENVIRONMENT*, (1988); W. THOMS, *THE DEREGULATION SKIES—U.S. SUNSET LEGISLATION AND INTERNATIONAL AIR TRAVEL*, (1984); Bauer, *Competition, Concentration, and Fares in the U.S. Airline Industry*, FED. RES. BANK CLEVELAND ECON. COMMENTARY, (Sept. 15, 1987); Dempsey, *The Dark Side of Deregulations: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987); Dempsey, *The Rise and Fall of the CAB—Opening the Floodgates of Entry*, 11 TRANSP. L. J. 91 (1979); Moore, *U.S. Airline Regulation: Its Effects on Passengers, Capital, and Labor*, 29 J. L. & ECON. 1 (1986); Jones, *Airlines Deregulation: Has It Worked*, 20 BUS. ECON. 11 (1985); Kahn, *Surprises from Airline Deregulations*, 78 AM. ECON. REV. 316 (1988); Kaplan, *The Changing Airlines Industry in Regulatory Reform: What Actually Happened*, 40-77 (1986); Wilkins, *Airline Deregulation: Neoclassical Theory as Public Policy*, 18 J. ECON. ISSUES 419 (1984); Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319 (1983); Valente, *Flying Dinosaurs: Pan Am and TWA Battered by Rivals, Struggle to Survive*, N.Y. Times, Oct. 18, 1988, at 1.

convenience" for U.S. owned tankers and other cargo vessels has been monitored and delicately supervised because this practice might be considered a secondary mobilization reserve of U.S. international shipping capacity.⁵¹

The role of powerful unions⁵² has complicated U.S. transportation regulation since the 1940s. These unions enjoyed strong leverage from their potential for emergency strikes, although President Reagan's breaking of the air controller's union in 1981 and a decline in union membership has weakened the unions in recent years. Lately, some airlines are nonunion, with employee stock ownership plans (ESOPs). This innovation may offer potential for less adversarial, more collaborative work relationships. But competitive and world market pressures are greater in transportation industries lately and also affect other USA industries, reducing generous wage-premiums in the transportation sector.⁵³

D. Communications — Telephone, Cable, Satellite, Broadcasting, and Postal - Delivery Services

Messenger, postal, and early semaphore telegraph services received government encouragement for military and administrative reasons. The government extended this encouragement to telephone and radio broadcasting services and, later, to more recent uses of broadened spectrum communications: Radar, microwave, satellite, and extensive coding and computerization activities. Because commercial and private use is generally much larger than governmental use for most communication services, extensive market opportunities emerged. Some opportunities were rather monopolistic, but with increasing technical progress, more of the communications sector is becoming competitive. Nonetheless, the government still regulates the less competitive portions of the industry to ensure technical reliability, meet national security needs, and to promote fairness, easy access, and educational development in a federal democracy.

The telephone service industry has been the most monopolistic communications industry, with longstanding AT&T dominance and natural monopolies still operating for local phone companies. Until recently, the long distance telephone industry was also monopolistic. Microwave towers, however, increased cable and transmitter capacity, and communications satellites in orbital slots above the earth allowed new competitors like MCI to offer reliable, cheaper long distance phone service. This changing technology market allowed many independents into the field once antitrust court decisions assured MCI (and others) of access and hookups to the local Bell

51. See E. FRANKEL, *REGULATION AND POLICIES OF AMERICAN SHIPPING* (1982); N. FRIEDMAN, *THE U.S. MARITIME STRATEGY* (1988).

52. These unions include railroad brotherhoods, maritime and dockworkers' unions, airline and air controller unions, and the Teamsters' Union for a large part of the trucking industry.

53. See P. DEMPSEY & W. THOMS, *supra* note 47, at 297-311. See also Bauer, *supra* note 50; Moore, *supra* note 50; Wilkins, *supra* note 50; Valente, *supra* note 50.

phone monopolies. Similarly, independent subsystem and component suppliers were allowed access, and these companies' cheaper interconnections, phones and equipment permitted them to undercut the Bell system's monopoly prices. When it seemed likely that Judge Harold Green would decide in favor of the Justice Department antitrust prosecution and divest AT&T's phone system from AT&T's Western Electric subsidiary and Bell Labs, AT&T preferred to accept divestiture of its local Bell system monopolies. Thus, AT&T, shorn of natural monopolies, became a competitive firm in the long distance telephone, telecommunications equipment, and R&D markets. But regional Bell monopolies remain established in markets for local service. Continued, strong antitrust supervision is still needed for access, interconnection, and the prevention of anticompetitive practices by these local phone companies and AT&T, the leading long distance phone company.⁵⁴

Broadcast regulation began with allocations of the radio frequencies. The federal government sought to minimize interference and reserve frequencies for military, police, emergency, and other public needs. The government extended licensing and limited regulation from radio stations to television stations after World War II. Somewhat more regulation followed to limit concentration of media ownership, improve programming quality, achieve fair access, and promote educational and public service goals. Cable television developed as a means to extend the range of broadcasting to less populated areas. With great improvements in cable and satellite technology, new cable networks developed to challenge the big three broadcasters. This development of cable TV led to extensive attachment of cable wiring to established telephone power service hookups (poles and underground conduits). In urban areas, local governments offer cable TV franchises to local regulated monopolies. Some experts question whether exclusivity is needed now. Some rate regulation applies to these franchise systems where competition is weak, and significant antitrust enforcement is needed for more concentrated media markets.⁵⁵

54. See S. COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1st ed. 1986); A. DANIELSON & D. KAMERSCHEN, *TELECOMMUNICATIONS IN THE POST-DIVESTITURE ERA* (1986); Crandall, *Surprises from Telephone Deregulation and the AT&T Divestiture*, 78 *AM. ECON. REV.* 323 (1988); Dingell, Nulty, & McCarthy, . . . *Or a Free Ride for AT&T?* 27 *CHALLENGE* 30 (1984); Jost & Tolin, *Who Will Regulate Utility-Owned Fibre-Optic Networks? The States or the FCC?*, 121 *PUB. UTIL. FORT.* 32 (1988); Kahn, *A Needed Dose of Competition . . .* 27 *CHALLENGE* 24 (1984); Kahn & Shaw, *Current Issues in Telecommunications Regulation: Pricing*, 4 *YALE J. ON REG.* 191 (1987); Mansell, *The Telecommunications Bypass Threat*, 20 *J. ECON. ISSUES* 145 (1986); Militzer & Wolf, *Deregulation in Telecommunications*, 20 *BUS. ECON.* 27 (1985); Trebing, *Apologetics of Deregulation in Energy and Telecommunications: An Institutionalist Assessment*, 20 *J. ECON. ISSUES* 613 (1986).

55. HOUSE COMM. ON ENERGY AND COMMERCE, *REPORT ON FAIRNESS IN BROADCASTING ACT OF 1987*, (1987); D. ALTHEIDE, *MEDIA POWER* (1985); S. BENSON, *MISREGULATING TELEVISION NETWORK DOMINANCE AND THE FCC* (1984); I. STEIN, *CABLE TELEVISION: HANDBOOK AND FORMS* (1985) L.A.S. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987); J. TUROW, *MEDIA INDUSTRIES: THE PRODUCTION OF NEWS AND ENTERTAINMENT* (1984); H.

Mail delivery became an early, subsidized public service in the United States, although more competition exists now from parcel service companies like UPS and higher cost, fast delivery services like Federal Express, Emery and others. The basic, local delivery and collection of mail and small packages via the U.S. Postal Service is now largely self-supporting. Rate regulation is needed, however, to price access to this network and review cross-subsidation, discounts for books and educational materials, pre-addressed advertising, and government, international, and family service. Routine business communications, notices, bills and customer payments require a massive, low cost, but generally reliable mail or equivalent delivery system. Almost all mail, in fact, does get through to its destination, although substantial premiums can be charged to insure *guaranteed* prompt delivery and authenticated receipts.⁵⁶

E. Environmental — Land Use, Zoning, Pollution, and Waste Control

Local governments used limited zoning in early city development and planning, along with restrictions in the more affluent suburbs. This zoning included modest park spaces, museums, zoos, and other cultural amenities. With today's greater affluence and concentrated urban populations, substantial improvements in parks, sports facilities, historic and cultural places are now commonplace. Sophisticated land use, growth planning, and regional zoning became routine for urban areas and spread to many rural communities. Quality of results varies, but the overall attractiveness of an area is clearly an important dimension of rivalry for economic growth, high tech work forces, and locational choices for new plants, business and talented young people. Even modest improvements are popular politically and comprise part of the achievement agendas for local and state leaders. Significant resources in local, state, and, to a lesser degree, federal budgets are being allocated for these purposes.⁵⁷

ZUCKMAN & M. GAYNES, *MASS COMMUNICATIONS LAW IN A NUTSHELL*, (3rd ed. 1988); Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959); Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 VAND. L. REV. 1249 (1978); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978); Comment, *The Federal Communications Commission and Interactive Cable Technology: The Case for Minimal Regulation*, 97 HARV. L. REV. 565 (1983).

56. D. ADIE, *MONOPOLY MAIL: PRIVATIZING THE UNITED STATES POSTAL SERVICE* (1989); J. FLEISHMAN, *THE FUTURE OF POSTAL SERVICE* (1983); *PERSPECTIVES ON POSTAL SERVICE ISSUES* (R. Sherman ed. 1980).

57. D. BROWER & D. CAROL, *MANAGING LAND-USE CONFLICTS* (1987); C. COCKLIN, B. SMITH, & T. JOHNSON, *DEMANDS ON RURAL LANDS: PLANNING FOR RESOURCE USE* (1987); ELICKSON & TARLOCK, *LAND-USE CONTROLS* (1981); W. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985); C. HAAR, *LAND USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* (3d ed. 1977); HAGMAN & JUERGENSMEYER, *HORNBOOK ON URBAN PLANNING AND LAND DEVELOPMENT* (2d ed. 1986); M. HUGO-BRUNE, *THE HISTORY OF CITY PLANNING: A SURVEY* (1972); MANDELKER & CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* ((1985); URBAN

Pollution used to be accepted as an unavoidable blight in some rivers, industrial neighborhoods, and suburbs that more affluent people could avoid by relocating to nicer residential areas or nearby countryside. Most of the country remained relatively unspoiled and suitable for normal agricultural, ranching, or woodland usage. Farsighted idealists, however, began to set aside some of the most beautiful natural sites as national or state parks. The conservation movement added popularity to this endeavor, along with scouting and summer camps for young people. The federal government made extensive park and historic site improvements in the New Deal era, partly to utilize unemployed labor.

Further progress along these lines followed World War II, but by the late 1960s, more serious pollution became increasingly obvious. The country faced nasty air quality and smog problems, and dying rivers and lakes. A bit later, the nation experienced growing alarm at hazardous chemical and nuclear wastes, together with overloads in solid waste disposal in the most heavily populated regions of the country. Since the 1970s people in the United States and many other nations have become far more environmentally conscious, and widely have sought substantial progress in cleaning up our natural environment.⁵⁸

LAND POLICY FOR THE 1980's: THE MESSAGE FOR STATE AND LOCAL GOVERNMENT (G. Lefcoe ed. 1983); M. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987); J. WUNDER, WORKING THE RANGE: ESSAYS ON THE HISTORY OF WESTERN LAND MANAGEMENT AND THE ENVIRONMENT (1985); Gold, *Measures to Tame Development: New England Debates More Rules to Make the Best of Its Progress*, N.Y. Times, Oct. 23, 1988, at E2, col. 1.

58. B. ACKERMAN & W. HASSLER, CLEAN COAL—DIRTY AIR (1981); D. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987); ANDERSON, MANDELKER & TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY (1984 & Supp. 1988); BONINE & MCGARITY, THE LAW OF ENVIRONMENT AND POLLUTION (1988); R. BRICKMAN, S. JASANOFF & T. ILGEN, CONTROLLING CHEMICALS: THE POLITICS OF REGULATION IN EUROPE AND THE UNITED STATES (1985); L. CALDWELL, SCIENCE AND THE NATIONAL ENVIRONMENTAL POLICY ACT: REDIRECTING POLICY THROUGH PROCEDURAL REFORM (1982); R. CRANDALL, CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR (1983); J. DIMENTO, ENVIRONMENTAL LAW AND AMERICAN BUSINESS DILEMMAS OF COMPLIANCE (1986); ENVIRONMENTAL POLICY IN THE 1980's: REAGAN'S NEW AGENDA (N. Vig & M. Draft eds. 1984); FINDLEY & FARBER, ENVIRONMENTAL LAW (2d ed. 1988); C. RUSSELL, W. HARRINGTON & W. VAUGHN, ENFORCING POLLUTION CONTROL LAWS (1986); D. SOULE & D. WALSH, WASTE CONTROL IN THE OCEAN: MINIMIZING IMPACT, MAXIMIZING BENEFITS (1983); S. TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984); D. WILSON, WASTE MANAGEMENT: PLANNING, EVALUATION, TECHNOLOGIES (1981); Buresh, *State and Federal Land Use Regulation: An Application to Groundwater and Nonpoint Source Pollution Control*, 95 YALE L.J. 1433 (1986); Elliott, Ackerman & Millan, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORGANIZATION 313 (1985); Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351 (1986); Gray, *Octane, Ozone, and Obstinacy*, 11 REGULATION 37 (1987); Pendencygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117 (1988); Swanson, *Shifting the Burden of Environmental Regulation*, 18 J. ECON. ISSUES 251 (1984); Note, *The EPA and Biotechnology Regulation: Coping with Scientific Uncertainty*, 95 YALE L.J. 553 (1986);

Common-law nuisance suits proved weak in practice, but some successful ad hoc and class action litigations were followed by creation of the Environmental Protection Agency (EPA) and Clean Air and Clean Water legislation in the early 1970s. The government imposed mandatory standards to maintain, and in more troubled areas, to improve the quality of air and water. Better technology was sought for industry and automobiles and, in some respects, required. Lots of litigation ensued, with affected industries generally wanting relaxation of environmental standards, and environmentalists demanding stronger action. Some economists suggested auction-type licenses for pollution, allocated by market prices, so that only the most socially valuable industrial activities would pollute congested areas. Modest leeway along these lines was being allowed, although general restrictions against pollutants were more common remedies. By the late 1980s there was considerable progress in reducing air pollution, especially from auto emissions and the movement of noxious factories to lower wage countries. Rivers, lakes, and seashores were harder to clean up, but limited progress also occurred in this direction.

Chemical and nuclear waste control was more difficult to handle, and preliminary waste site selection represented only modest progress. Although some of the most dangerous chemicals and pesticides were banned, no strong consensus on dangerous materials, their treatment, or their removal had developed at that point. Even so, the public clearly wanted stronger limits on waste dumping and, if possible, improved treatment technology. Some poor areas volunteered themselves as chemical waste disposal sites, but nuclear wastes remained a political hot potato. A garbage barge from Long Island could not find a home away from home, despite a well-publicized odyssey thousands of miles into the Gulf of Mexico. Federalism and growing public anxieties greatly complicated the chemical-nuclear waste mess, but tougher regulation in some form was predictable.

Even solid waste dumping of trash was a growing dilemma in the most populated Northeastern and other big city areas. Although dumping in low population areas or at sea found favor as a stop gap measure, other states were being less receptive to requests to take the big cities' garbage. Meanwhile, run-offs and dumping into oceans became a notorious problem for the areas of the Mediterranean, North Sea, northeastern United States, and Inland Sea of Japan. Many lakes in industrial countries had deteriorated badly by now, and greater international collaboration became necessary.

Remedies for environmental pollution require improved technology, better accountability, more market like rationality, and yet stronger regulation. But many facts are greatly disputed and expert estimates diverge widely. This makes careful planning more difficult and tends to emotionalize

Butterfield, *Idaho Governor Is Firm on Blocking Atomic Waste*, N.Y. Times, Oct. 23, 1988, at 32, col. 1; Greenhouse, *Europe's Failing Effort to Exile Toxic Trash: The Saga of the Karin B.*, N.Y. Times, Oct. 16, 1988, at E6, col. 1; Stout, *The Economics of the Waste Crisis*, N.Y. Times, Oct. 23, 1988, at F4, col. 2.

the politics of environmental regulation. Experts divide into industry versus environmental camps, although a large public majority want somewhat stronger policies. But political parties have reacted more favorably to environmental concerns, and generally promised to be proenvironment in the later 1980s and beyond.⁵⁹

F. Depletable Resources - Energy, Forests, Fisheries and Wildlife.

Throughout history societies often have exhausted valuable resources and thus limited their prosperity. Although some resource depletion is unavoidable over the long run, wiser nations plan more carefully, limit waste, and arrange resource substitutes within a reasonable time. Improvidence brings penalties of disruption, and perhaps even suffering. The more affluent and younger nations like the United States, with natural abundance during most of their history, frequently are extravagant. But so far, the U.S. has enjoyed good luck, with enough new technology and increased imports to sustain prosperity; although U.S. economic growth has slowed since the 1970s. In contrast, the economies of Japan, Switzerland, and W. Germany have their retained forward momentum recently through somewhat greater self-discipline in their use of natural resources.⁶⁰ Rather troubling, though, in the mid to late 1980s, was a large U.S. trade deficit, one third of which came from oil imports and renewed dependence on foreign petroleum.⁶¹

59. See, e.g., *Changing Colour*, THE ECONOMIST, Oct. 15, 1988, at 15.

Green is the world's new political colour. Pollution is an issue in America's presidential campaign, for the first time ever. Some of Mikhail Gorbachev's recent speeches have put almost as much stress on *ekologia* as on *perestroika*. Deng Xiaoping, puffing on his 30th cigarette of the day, says that China's burgeoning industry is creating too much smog. Margaret Thatcher has begun to worry about the ozone layer. . . . Now, in the rich countries, people increasingly tell opinion pollsters that they are unhappy about the environment: about noise and filth, but also about the possibility that they are doing lasting harm to the fabric of the world that their children will inherit.

Id. For further discussion about politicians' environmental concerns, see *The Environmental Presidents*, THE ECONOMIST, Oct. 8, 1988, at 32 (reporting that both Bush and Dukakis support proenvironmental goals with considerable detail).

60. See D. BOHI & W. QUANDT, ENERGY SECURITY IN THE 1980'S: ECONOMIC AND POLITICAL PERSPECTIVES (1984); R. H. CARNEGIE, OUTLOOK FOR MINERAL COMMODITIES (1986); H. LANDSBERG, ENERGY, THE NEXT TWENTY YEARS (1979); Braetigam & Hubbard, *Natural Gas: The Regulatory Transition*, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED, *supra* note 1, at 137-68; Hubbard & Weiner, *Petroleum Regulation* in REGULATORY REFORM: WHAT ACTUALLY HAPPENED, *supra* note 1, at 105-36. For a report of recent stronger economic performance in Japan, West Germany, and Switzerland, see OECD ECONOMIC OUTLOOK, *supra* note 4; see also LOVETT, WORLD TRADE RIVALRY, *supra* note 4, at Table P-2.

61. See Fri, *Changing Times for Oil Imports and Energy Policy*, 87 RESOURCES 1 (1987); INT'L ENERGY AGENCY, ENERGY POLICIES AND PROGRAMMES OF IEA COUNTRIES, 1978 REVIEW (1979); INT'L ENERGY AGENCY, ENERGY BALANCES OF OECD COUNTRIES, 1970-85 (1987); INT'L ENERGY AGENCY, ENERGY POLICIES AND PROGRAMMES OF IEA COUNTRIES, 1986 REVIEW (1987). United States' oil imports have increased in volume, raising import dependence to fifty percent,

Extensive U.S. resource waste came with the clear cutting, and even burning, of forests, especially across the northeastern and midwestern tier of states. The government gradually imposed conservation measures that, along with better replanting and management techniques, saved considerable timber capacity. Controversy still exists about the extent to which the government should allow rapid exploitation of timber areas. Logging interests want more cutting, while conservationists and scenic beauty and wildlife organizations want to save forests, even at the expense of increased logging costs. At issue is the trade off between short-term sales and profits and longer-term environmental interests and future supplies. Forest and park management, along with logging regulation, should strive for reasonable balance.⁶²

Heavy hunting and deforestation depleted many wildlife species, including bison, bears, deer, and eagles. Overfishing occurred in many states. The regulation of hunting and fishing and park and forest management, and the restocking efforts by departments of fisheries and wildlife have saved considerable numbers of fish and even a few animal populations. Fish and seafood farming are becoming important, too. Ocean fishing also needs more regulation, not only to save endangered species like whales and seals, but to provide fair access to seafood on a more crowded planet.⁶³

The regulation of oil, gas, coal, and other energy industries needed to sustain prosperity and economic growth is another important area of regulation.⁶⁴ With generous free market incentives for exploitation (unlike many

since the big drop of world oil prices in 1986. Unfortunately, the world oil surplus may be only medium-term and U.S. oil reserves are limited. If another OPEC III oil price shock occurs, the impact on U.S. oil import costs may be severe. Either the United States must accept significantly larger trade deficits, or the United States must cut its nonoil imports sharply. Such a cut inevitably would depress the world economy again as a similar cut did in 1981-82.

62. See D. CLARY, *TIMBER AND THE FOREST SERVICE* (1986); W. ROBBINS, *AMERICAN FORESTRY: A HISTORY OF NATIONAL, STATE, AND PRIVATE COOPERATION* (1985); R. SEDJO, *GOVERNMENTAL INTERVENTIONS, SOCIAL NEEDS, AND THE MANAGEMENT OF U.S. FORESTS* (1986); *The Vanishing Jungle*, *THE ECONOMIST*, Oct. 15, 1988, at 25-28; see also D. GIBBONS, *THE ECONOMIC VALUE OF WATER* (1987); O. P. MATTEWS, *WATER RESOURCES, GEOGRAPHY AND LAW* (1984); W. VISSMAN, *WATER MANAGEMENT: TECHNOLOGY AND INSTITUTIONS* (1985).

63. M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1983); H. BROKAW, *WILDLIFE AND AMERICA* (1978); W. CHANDLER, L. LABATE & C. WILLE, *AUDUBON WILDLIFE REPORT 1988/89* (1988); D. FAVRE, *WILDLIFE: CASES, LAWS, AND POLICY* (1983); T. LUND, *AMERICAN WILDLIFE LAW* (1980); Acheson, *The Maine Lobster Market: Between Market and Hierarchy*, *J. L. ECON. & ORGANIZATION* (1985).

64. J. BLAIR, *THE CONTROL OF OIL* (1976); J. CLARK, *ENERGY AND THE FEDERAL GOVERNMENT: FOSSIL FUEL POLICIES, 1900-1946* (1987); *ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS* (C. Goodwin ed. 1981); A. SAMPSON, *THE SEVEN SISTERS: THE GREAT OIL COMPANIES AND THE WORLD THEY SHAPED* (1975); see also H. LANDSBERG, *supra* note 60; Braetigam & Hubbard, *supra* note 60; Hubbard & Weiner, *supra* note 60. Compare J. TOMAIN, *ENERGY LAW* (1981); Allison, *Energy Sectionalism: Economic Origins and Legal Responses*, 38 *SW. L.J.* 703 (1984); Pierce, *Reconsidering the Rules of Regulation and Competition in the Natural Gas Industry*, 97 *HARV. L. REV.* 345 (1983); Trebing, *Apologetics of Deregulation in Energy and Telecommunications: An Institutional Assessment*, 20 *J. ECON. ISSUES* 613 (1986).

countries where minerals are state owned), the U.S. unleashed strong domestic production, and extensive overseas exploitation by its leading oil and gas companies. Although worries about resource depletion and insufficient supply came periodically during the early 1920s, World War II and the immediate post war years, and the OPEC heyday from 1973 to 1980, new fields, deeper drilling, offshore exploitation, and diversified foreign production yielded new supplies of oil and natural gas. These new developments also led to more effective conservation measures in the last fifteen years.

Nonetheless, expanded U.S. oil imports strain the nation's balance of payments. The United States should make greater conservation efforts, like those efforts made in Japan and Europe, with greater emphasis on cleaner coal and renewable energy for the longer run. The drastic U.S. shift in the 1970s toward nuclear energy and increased coal use (without very effective scrubbers) that seemed essential in the OPEC squeeze period, lost some urgency with an oil-gas surplus in the 1980s. We should not, however, waste this breathing room. Tougher conservation measures still make sense to improve the U.S. balance of payments and to allow more leisurely progress toward cleaner coal (of which the United States has a large long-term supply), more efficient, safer use of other energy sources such as solar, wind, water, geothermal and nuclear energy, and longer term breakthroughs in technology, including super-conductivity in power transmission.

Sound resource development and conservation make sense for other strategic minerals and metals that are important for national prosperity and security. While efficiency and incentives are always desirable, the sad history of previous U.S. extravagance teaches that better accountability and long-term planning along with sufficient support for scientific and engineering progress, usually can make a valuable contribution. Regulation and stewardship for depletable resources, over the long run, is common sense. Market discipline should be combined with regulatory oversight.

G. Agricultural Regulation

From colonial times through the Nineteenth Century, the majority of Americans worked in the farming or rural economy. Most of these farmers operated farms, although large plantations flourished in the South before the Civil War. There were 13 million farms in the U.S. at the time of the Great Depression in a country with a population of 130 million. Approximately half the people in the country still lived on farms or in rural communities. Chronic surpluses, low prices, and reduced incomes for farmers were big problems. Federal price supports and production quotas were needed to relieve the agricultural economy. They were supplemented by USDA programs to encourage farm co-ops for purchasing fertilizer, seed, and supplies and marketing supplemented the price supports and production quotas. The government sponsored better farming techniques, and rural electrification. Although World War II shortages improved prices considerably, limited surpluses returned in post war years. Meanwhile, similar measures were employed in most of the world to promote more self-

sufficiency among farmers and strengthen incomes among peasants and farmers in many nations.⁶⁵

Meanwhile, U.S. agriculture was changing. Farm sizes increased greatly and relatively few small farms survived, except to provide supplementary income or semi-residential properties. In the late 1980s only two million full-time farms remain. Large, and often corporate, farms carry on the majority of production. While price subsidies and output quotas continue on a few basic commodities, at considerable expense to the federal government, the political constituency for generous subsidies is smaller and weaker. Reagan farm policies moved toward freer markets and reduced subsidies, although farm lobbies still mustered clout in Congress through a network of rural Senators and Representatives.

In many ways agricultural prices, marketing, and surpluses are now international trade policy problems.⁶⁶ The Green Revolution in India and in many LDCs reduced demand for U.S. farm exports. Farm policies in most countries, including the EEC's Common Agricultural Policy, featured agricultural subsidies, encouraged output and exports, and led to recent surpluses and low prices in world markets. The Reagan administration sought freer market farm policies and reduced subsidies everywhere, but farm lobbies were stronger in many other countries. Progress in this direction

65. J. BADEN, *THE VANISHING FARMLAND CRISIS: CRITICAL VIEWS OF THE MOVEMENT TO PRESERVE AGRICULTURAL LAND* (1984); CONGRESSIONAL BUDGET OFFICE, *PUBLIC POLICY AND THE CHANGING STRUCTURE OF AMERICAN AGRICULTURE* (1978); J. CONNOR, R. ROGERS, B. MARION & W. MUELLER, *THE FOOD MANUFACTURING INDUSTRIES* (1985); D. HATHAWAY, *AGRICULTURE AND THE GATT: RETHINKING THE RULES* (1987); D. HATHAWAY, *FARM COMMODITY PROGRAMS: AN OPPORTUNITY FOR CHANGE* (1973); D. HATHAWAY, *GOVERNMENT AND AGRICULTURE: PUBLIC POLICY IN A DEMOCRATIC SOCIETY* (1963); J. JUERGENSEMEYER & J. WADLEY, *AGRICULTURAL LAW* (1982); J. OPIE, *THE LAW OF THE LAND: TWO HUNDRED YEARS OF AMERICAN FARMLAND POLICY* (1987); J. PADDOCK, *SOIL AND SURVIVAL: LAND STEWARDSHIP AND THE FUTURE OF AMERICAN AGRICULTURE* (1986).

66. To appreciate current world trade problems in agriculture, the reader must realize that most major nations also subsidize agriculture. And yet U.S. agriculture, with larger farms, is naturally more efficient than most European or Japanese agriculture. *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, *THE COMMON AGRICULTURAL POLICY OF THE EUROPEAN COMMUNITY AND IMPLICATIONS FOR U.S. AGRICULTURAL TRADE* (1986); CONGRESSIONAL RESEARCH SERVICE, *JAPANESE IMPORT BARRIERS TO U.S. AGRICULTURAL EXPORTS* (1986); D. BALAAM, *FOOD POLITICS: THE REGIONAL CONFLICT* (1981); A. BUCKNELL, D. HARVEY, K. JOHNSON & K. PARTON, *THE COSTS OF THE COMMON AGRICULTURAL POLICY* (1982); F. DUCHENE, E. SZCZEPANIK & W. LEGG, *NEW LIMITS ON EUROPEAN AGRICULTURE, POLITICS AND THE COMMON AGRICULTURAL POLICY* (1985); R. FENNELL, *THE COMMON AGRICULTURAL POLICY OF THE EUROPEAN COMMUNITY* (1979); *THE FUTURE OF THE NORTH AMERICAN GRANARY* (C. Ford Runge, ed. 1986); B. GARDNER, *U.S. AGRICULTURE POLICY: THE 1985 FARM LEGISLATION* (1985); S. HARRIS, A. SWINBANK, & G. WILKINSON, *THE FOOD AND FARM POLICIES OF THE EUROPEAN COMMUNITY* (1983); B. HILL, *THE COMMON AGRICULTURAL POLICY: PAST, PRESENT AND FUTURE* (1984); H. DE HOEN, G. JOHNSON & S. TANGERMAN, *AGRICULTURE AND INTERNATIONAL ECONOMIC RELATIONS* (1985); J. MARSH & P. SWANNEY, *AGRICULTURE AND THE EUROPEAN COMMUNITY* (1980); A. McCALLA & T. JOSLING, *AGRICULTURAL POLICIES AND WORLD MARKETS* (1985); R. PAARLBERG, *INDIA, THE SOVIET UNION, AND THE UNITED STATES* (1985); J. SOLKOFF, *THE POLITICS OF FOOD* (1985); C. P. TIMMER, *THE SCOPE AND LIMITS OF AGRICULTURAL POLICY* (1986).

has remained slow. Many experts believe that an international cap on subsidies is the most attainable medium-term result, and that any general elimination of subsidies abroad is unrealistic.⁶⁷

Other agricultural regulatory issues exist.⁶⁸ First, how much "good" farm land should be preserved and kept free of residential and commercial development? Because the population will expand substantially, some commentators urge rural zoning to keep the more productive crop land for agriculture while using hillier, more marginal land for other purposes. Second, public lands and water rights "competition" is increasing in the Western states, with more conflicts between developers, agriculture, ranching, forestry, and environmental-parkland interests. Third, increased foreign investment and the buying of large U.S. farms has raised concerns for many rural communities about limits on purchases and the danger of absentee owners. State laws have established disclosure requirements and restrictions, while a weak dollar in the later 1980s increased the flow of foreign investment to buy farm lands. Fourth, agricultural credit had been strengthened with the Federal Land Bank and related facilities set up in the Great Depression. But a sag in land-crop prices during the 1980s stressed this credit system, resulting in widespread farm bankruptcies and foreclosures. Many U.S. farms were lost in this period, raising questions about the adequacy of price and income supports and credit facilities for family farms over the long-term. Fifth, environmental worries about pesticides and other chemicals affecting agriculture and its production have received greater attention and sparked continuing regulatory controversy.

H. Industrial Development and Technology

Most countries try to encourage industrial development and technical progress. United States policy always has stressed these goals, but the mix has shifted considerably since World War II. Free internal markets, fairly easy credit (with occasional surges of speculative excess often followed by recession), considerable protection against manufactured imports, patents for new inventions, and relatively low taxes were the traditional U.S. policies for industrial - technical advance.⁶⁹ But World War II brought substantially higher taxes which continued through the Cold War, with sizeable defense outlays,⁷⁰ and considerably higher civilian government outlays. Nearly half

67. In fact, Japan, many Common Market, and most British Commonwealth nations argued in recent trade negotiations that United States efforts to force a complete free market in world agriculture might be counterproductive and not conducive to realistic limitations on surpluses for greater price stability.

68. See *supra* notes 62, 65, 66.

69. For earlier U.S. policy supporting industrial development, see J. GARRATY, *supra* note 8; J. HICKS, *THE AMERICAN NATION* (1946); J. HICKS, *THE FEDERAL UNION* (2d ed. 1952); W. LOVETT, *supra* note 4, at 23-37, nn. 1-31; P. STUDENSKI & H. KROOS, *FINANCIAL HISTORY OF THE UNITED STATES* 1-435 (2d ed. 1963).

70. These defense outlays constituted 9-10% of the GNP from 1951 to 1969 and 5-6.5 % of GNP from 1975 to 1988.

of these higher taxes were payroll taxes that supported social security payments.⁷¹ Fiscal and monetary policy has remained fairly stimulative, except during periods of tightening (especially 1980-82) when the Federal Reserve halted inflationary momentum with very high interest rates. Unfortunately, large budget deficits between 1983-88 kept U.S. interest rates higher than the rates in the United States' leading financial and industrial rivals Japan, West Germany, and Switzerland.⁷²

Trade policy gradually shifted toward more open markets in the postwar years.⁷³ Initially, this reduction in trade barriers was balanced between the United States and major trade partners. But since the 1970s, a bigger U.S. trade deficit has reflected greater openness in the U.S. than in its major trade partners, Japan, Europe, Canada, and the countries in Latin America. With respect to low wage nations, GATT has entrenched a double standard; infant industry protection and extensive subsidies have been allowed for developing nations, but not for nations like the United States. Although Japan grew rapidly from a poorer nation to a wealthier nation with hard work and mercantilist industrial policies, it has remained much less open to U.S. manufacturers. Meanwhile, Japanese companies skillfully have blended components from low wage countries to keep their export prices competitive. Manufactured exports from NICs and LDCs have flowed into

71. For postwar policies, see J. GARRATY, *supra* note 8; J. HICKS, *THE AMERICAN NATION*, *supra* note 55; J. HICKS, *THE FEDERAL UNION*, *supra* note 55; W. LOVETT, *INFLATION AND POLITICS: FISCAL, MONETARY, AND WAGE-PRICE DISCIPLINE* (1982); LOVETT, *supra* note 4, at 37-61, 189-201; H. STEIN, *PRESIDENTIAL ECONOMICS*, *supra* note 24; P. STUDENSKI & H. KROOS, *supra* note 55, at 436-568.

72. See W. GREIDER, *SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY* (1987); D. KETTL, *LEADERSHIP AT THE FED* (1986); W. LOVETT, *BANKING AND FINANCIAL INSTITUTIONS LAW*, *supra* note 38, at 62-109; W. LOVETT, *WORLD TRADE RIVALRY*, *supra* note 4, at 189-204, Tables 4-2, 4-3; T. MAYER, J. DUESENBERY & R. ALIBER, *supra* note 24; H. STEIN, *PRESIDENTIAL ECONOMICS*, *supra* note 24. For recent U.S. interest rates, see FED. RES. BANK OF ST. LOUIS, *U.S. FINANCIAL DATA*. For comparative international interest rates, see MORGAN GUARANTY TRUST COMPANY, *WORLD FINANCIAL MARKETS*.

U.S. federal budget deficits for fiscal years ending September 30 were as follows:

1980—\$ 73.8b.
 1981—\$ 78.9b.
 1982—\$127.9b.
 1983—\$207.8b.
 1984—\$185.3b.
 1985—\$212.3b.
 1986—\$221.2b.
 1987—\$149.7b.
 1988—\$155.1b

Lovett, *Moral Hazard, Bank Supervision, and Risk-Based Capital Requirements*, 49 OHIO ST. L.J. (1988).

73. See generally K. KOCK, *INTERNATIONAL TRADE POLICY AND THE GATT, 1947-1967* (1969); D. LAMONT, *FORCING OUR HAND: AMERICA'S TRADE WARS IN THE 1980'S* (1986); W. LOVETT, *WORLD TRADE RIVALRY*, *supra* note 4; F. MEYER, *INTERNATIONAL TRADE POLICY* (1978); J. PECK, *A HISTORY OF THE WORLD ECONOMY, INTERNATIONAL ECONOMIC RELATIONS SINCE 1850* (1983).

the U.S. at an increasing rate, and many American corporations have relocated part of their manufacturing operations to low wage countries. Although U.S. patent monopolies are still attainable on new inventions, the monopolies have become less significant than they had been because research and development and industrial expansion in the United States has slowed down greatly. This less favorable environment for U.S. industrial development in recent years helps explain overall economic sluggishness during the last 15 years.

In contrast, Japan, Taiwan, and South Korea have enjoyed rapid industrial growth and improving technology with a more favorable mix of lower taxes, easier credit, greater protection against foreign manufactures, and a stronger research and development effort.⁷⁴ Increasing U.S. public and Congressional concern since the mid 1980s has focused on the trade equity issue. Tougher U.S. trade policy might be forthcoming, and substantial domestic support now exists for an end to unequal openness. Also, most experts have agreed that U.S. federal deficits were excessive between 1983-88 when they reached a total of \$1,000 billion. These deficits raised U.S. interest rates, overvalued the dollar, weakened exports, and encouraged excessive imports. In this way, unbalanced macroeconomic policies have aggravated problems of industrial competitiveness.⁷⁵

During the last fifteen years important debates raged among the slower growing, less successful nations.⁷⁶ The question of how to achieve progress quickly like pacesetters Japan, West Germany, Taiwan, South Korea offers no easy answers. Industrial policies have been successful, within limits, among the best performers. Whether societies with less cohesion or greater pluralism could emulate the successful countries is uncertain.⁷⁷ A helping

74. See W. LOVETT, *WORLD TRADE RIVALRY*, *supra* note 4, at 1-15, 75-96 (collecting extensive sources on economic growth policies of Japan, Taiwan, and South Korea); see also O. BELASSA & M. NOLAND, *JAPAN IN THE WORLD ECONOMY* (1988); D. HALBERSTAM, *THE RECKONING* (1986); R. HOFHEINZ, JR. & K. CALDER, *THE EAST ASIA EDGE: WHY AN ENTIRE REGION IS OVERTAKING THE WEST IN TECHNOLOGY, EXPORTS, AND MANAGEMENT* (1982); C. JOHNSON, *MITI AND THE JAPANESE MIRACLE, 1925-1975* (1982); T. McCRAW, *AMERICA VERSUS JAPAN* (1986); K. YAMAMURA, *ECONOMIC POLICY IN POSTWAR JAPAN: GROWTH VERSUS ECONOMIC DEMOCRACY* (1967); K. YAMAMURA, *POLICY AND TRADE ISSUES OF THE JAPANESE ECONOMY* (1982); van Wolferen, *The Japan Problem*, 65 *FOREIGN AFF.* 288 (1986-87).

75. See R. BRYANT, *EXTERNAL DEFICITS AND THE DOLLAR: THE PIT AND THE PENDULUM* (1988); J. FAUX, *GETTING RID OF THE TRADE DEFICIT: A CHEAPER DOLLAR IS NOT ENOUGH* (1988); W. LOVETT, *WORLD TRADE RIVALRY*, *supra* note 4; S. MARRIS, *DEFICITS AND THE DOLLAR* (1987).

76. See F.G. ADAMS & L. KLEIN, *INDUSTRIAL POLICIES FOR GROWTH AND COMPETITIVENESS* (1982); S. COHEN & J. ZYSMAN, *MANUFACTURING MATTERS: THE MYTH OF THE POST-INDUSTRIAL ECONOMY* (1987); *COMPETITION IN GLOBAL INDUSTRIES* (M. Porter ed. 1986); K. PHILLIPS, *STAYING ON TOP: THE BUSINESS CASE FOR A NATIONAL INDUSTRIAL POLICY* (1984); L. THUROW, *THE ZERO-SUM SOLUTION: BUILDING A WORLD-CLASS AMERICAN ECONOMY* (1985); see also W. LOVETT, *WORLD TRADE RIVALRY*, *supra* note 4, at 75-135.

77. See *supra* note 76. Increasing attention has been focused upon the United States' trade policy since World War II which sponsored trade by offering increasing access to U.S. markets and brought unequal openness in the 1970s and 1980s. See M. CZINKOTA, *EXPORT*

hand from a skillful government with dynamic, world-market-oriented industrial vitality has worked well. But a heavy hand from repressive or inefficient bureaucratic governments is not the answer. "Lemon socialism" and costly bailouts for sick factories or industries is unproductive industrial policy. Blind faith in unrestrained capitalism, where things are not working well or where too many actors have been cut out of the game or victimized by neglect, has not proven highly productive either. Important lessons have been accumulating on successful industrial and export development strategies. First, broader research and development efforts are needed with financing support or tax relief to promote success. Second, export enhancement, limited subsidies, and world market aggressiveness are helpful. Third, offsets to foreign trade restrictions, mercantilism, subsidies, and extensive discounting in world markets are justified and often necessary to promote a nation's own industrial development. Fourth, teamwork and strong incentives that are important for sustained industrial development require widespread sharing in the profits of economic growth. Finally, the proof of success for industrial development strategies is the overall rate of economic growth and wide sharing of benefits in the expansion process.

I. Labor Markets and Professions

A skilled work force is an indispensable complement to industrial development and higher technology. To achieve a skilled work force, a country needs a strong, well-disciplined educational system, good labor mobility and training networks, and a macroindustrial policy environment that fosters productivity and fuller employment. Reasonable continuity should be encouraged, but considerable turnover and relocation must be expected in modern family life. People naturally seek their best opportunities. One's best opportunity often includes a major move and the search for variety in work roles. Healthy educational, training, and labor markets allow flexibility, but also ensure competence, productivity, and reasonable fulfillment for most people. Fair treatment is highly desirable, and undue rigidity, shortages, or surpluses should be minimized. Artificial scarcity, overcharging and exploitation of the vulnerable are maladjustments. A society that takes pride in general achievement and prosperity is more likely to sustain progress.⁷⁸

PROMOTION: THE PRIVATE AND PUBLIC SECTOR (1983); R. DALE, ANTI-DUMPING IN A LIBERAL TRADE ORDER (1980); G. HUFBAUER & J. ERB, SUBSIDIES IN INTERNATIONAL TRADE (1984); D. LAMONT, *supra* note 73; W. LOVETT, WORLD TRADE RIVALRY, *supra* note 4, chs. 2, 3, 6 (including discussion of alternative responses to foreign industrial policies, extensive subsidies, widespread surpluses and discounting, and unequal openness); C. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD (1988).

78. For discussions of goals for an industrial relations system, see J. DUNLOP, THE INDUSTRIAL RELATIONS SYSTEM (1958); T. KOCHAN, H. KATZ & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986); LABOR AND THE NATIONAL ECONOMY (W. Bowen ed. 1965); R. MARSHALL, UNHEARD VOICES: LABOR AND ECONOMIC POLICY IN A COMPETITIVE WORLD (1987); *see also* R. LEVERING, A GREAT PLACE TO WORK: WHAT MAKES SOME EMPLOYERS SO GOOD (AND MOST SO BAD) (1988) (discussing outlook of workers and their families about employment situations and job roles); S. TERKEL, WORKING (1974) (same).

When the great majority of people were employed in agrarian life, family businesses or craft occupations, basic education, literacy, and normal contract law sufficed. But industrial production became widespread, and eventually, the great majority of people worked in bigger organizations like large farms, mining, manufacturing, and distribution businesses, service and finance businesses, local, state, and federal government, or the military. In this new environment the problems of management-employee relations became unavoidable. A variety of relationships emerged, partly competing with each other, yet building upon the accumulated gains and customs that evolved in the regulation of labor markets and professions.

Democratic trade unions and collective bargaining with large employers and corporations gradually developed in the late nineteenth, early twentieth centuries. The National Labor Relations Act of 1935 supported unionization, and the NLRB received authority to correct unfair labor practices by employers. World War II mobilization brought tight labor markets and the War Labor Board gave further encouragement to unions and contract settlements to minimize strikes and disruptions. By the early 1950s one fourth of the U.S. labor force was unionized. Even nonunion employees were helped by a trend toward higher wages, improved benefits, and more extensive pensions. Broadly similar unionization, often with higher union shares of labor forces, occurred in Europe, the Commonwealth countries, and even Japan (although company unions were preferred by the Japanese). Collective bargaining was seen as social progress and largely inevitable, with some regulation of wages, hours, and working conditions along the way.

By the 1960s this social compromise seemed nicely entrenched.⁷⁹ Political parties enjoying substantial trade union support usually governed among the prosperous industrial democracies. During the 1970s, however, greater wage and price inflation reduced public confidence in unions, increased tax burdens caused taxpayers substantial disgruntlement, and in some countries unions became irresponsible, staging wildcat strikes and making excessive wage demands. During the 1980s inflationary momentum was broken by sustained monetary restraint and a worldwide recession that considerably increased unemployment. Unions weakened substantially in the United States, and to a lesser extent in other industrial democracies. Other factors were long-term economic growth, improved prosperity, and higher education levels. A younger generation felt less antagonism toward employers, found unions less attractive, and preferred a teamwork oriented relationship in the workplace.⁸⁰

79. For a discussion of the 1960s consensus on labor relations, see H. NORTHRUP & G. BLOOM, *GOVERNMENT AND LABOR: THE ROLE OF GOVERNMENT IN UNION-MANAGEMENT RELATIONS* (1963); J. RAYBACK, *A HISTORY OF AMERICAN LABOR* (1966); L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* (6th ed. 1974). *But see* Tasini, *Why Labor Is At Odds with the N.L.R.B.*, N.Y. Times, Oct. 30, 1988, at F4, col. 1.

80. For summaries of the inflation problem from the late 1960s to the early 1980s, see R. FLANAGAN, D. SOSKICE & L. ULLMAN, *UNIONISM, ECONOMIC STABILIZATION, AND INCOMES POLICIES* (1983); W. LOVETT, *INFLATION AND POLITICS: FISCAL, MONETARY AND WAGE-PRICE*

Most of the New Deal and postwar network of labor law concerning unions and collective bargaining remains on the books, but is less important now. Only seventeen percent of the U.S. work force is unionized. Organized labor is less potent politically, and the Reagan administration was openly antiunion. Reagan's administration ruthlessly broke the air traffic controllers' union, and the NLRB became more pro-employer. Meanwhile, employee stock ownership plans (ESOPs) became rather popular. The majority of Americans like profitsharing in one form or another and seek a bigger stake in their jobs, companies or organizations. Pensions and health benefits are taken very seriously, however, and employee representation for these purposes is still necessary, whether through unions, ESOP trustees, or other modes of representation. Most people also now realize that better productivity, work discipline, and quality control are needed in a more competitive world market.⁸¹

A final change of importance for labor markets is the increase in "professionalism"⁸². In our increasingly sophisticated workplace force, using

DISCIPLINE (1982); *THE POLITICS OF INFLATION AND ECONOMIC STAGNATION* (L. Lindberg & C. Maier eds. 1985). Gradually, by the later 1980s there was a weakening of union support among working people. See, e.g., KOCHAN, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986); *Beyond Unions*, BUS. WK., July 8, 1985, at 72; Craver, *The Vitality of the American Labor Movement in the 21st Century*, 1983 U. ILL. L. REV. 633 (1983) *Smart Machines, Smart People: 'Gold Collar' Force Vital to Automation*, N.Y. Times, Oct. 17, 1988, at D1, col. 1. Even people sympathetic to unions felt more obligation to stress productivity and greater profit sharing. Kuttner, *A Progressive Labor Agenda After Reagan*, 31 CHALLENGE, Sept./Oct. 1988, at 4. Others suggested ESOPs as a rival method of achieving better results for workers. C. ROSEN, K. KLEIN & K. YOUNG, *EMPLOYEE OWNERSHIP IN AMERICA: THE EQUITY SOLUTION* (1986). Strictly speaking, however, the trend toward greater profit sharing and ESOPs was really part of a new generation's outlook—the outlook of a better educated, more affluent, and professional workforce seeking an equity role and profit sharing in business. See M. WEITZMAN, *THE SHARE ECONOMY* (1984); Lovett, *Profit Sharing and ESOPs: Improved Incentives and Equity*, in *CORPORATIONS AND SOCIETY* (W. Samuels & A. Miller eds. 1986). ESOPs and profit-sharing could be viewed as the next logical step beyond pensions for employees.

81. Most of the recent industrial policy literature has stressed the need to face the challenge of international competition and the need for stronger productivity discipline. See F.G. ADAMS & L. KLEIN, *supra* note 76; S. COHEN & J. ZYSMAN, *supra* note 76; *COMPETITION IN GLOBAL INDUSTRIES*, *supra* note 76; PHILLIPS, *supra* note 76; THURLOW, *supra* note 76; see also T. PETERS & R. WATERMAN, *IN SEARCH OF AMERICA'S BEST-RUN COMPANIES* (1982). ESOP advocates stress productivity and incentives, arguing that when workers own significant shares of companies (more than 15-20%), a noticeable bonus of increased productivity is likely to occur. See C. ROSEN, K. KLEIN & K. YOUNG, *supra* note 80; see also Lovett, *Profit Sharing and ESOPs*, *supra* note 80, at 302 n.14, 305 n.35. Stronger legal safeguards are needed, however, to protect employee owned share holdings and pension funds. See Lovett, *Profit Sharing and ESOPs*, *supra* note 80, at n.71; see also Smith, *The Cuomo Commission's 'New Realism'*, 31 CHALLENGE, Sept./Oct. 1988, at 37.

82. See, e.g., Levin, *Smart Machines, Smart Workers*, *supra* note 80 (emphasizing better rewards and treatment for rising gold collar class). One serious problem is that average real wages, discounted for inflation, per worker have been stagnant, and average families' incomes have not gained appreciably. L. MISHEL & J. SIMON, *THE STATE OF WORKING AMERICA* (1988). Further complicating the problem is that a sizeable minority is left with lower wage jobs and many workers often are trapped in poverty. See *Part-timers: Living on Half-Rations*, 31

more complex electronics, equipment, vehicles, word processors, and computerization to achieve higher productivity, a movement toward upgrading status, roles and even job titles has been evident. Older style adversarial unionism seems less appropriate. More of the work force is better educated and often enjoys professional rank as computer, engineering, marketing, accounting, nursing, technician, administrative assistant, or other "professionals". To some degree, the treatment of employees has become friendlier, more egalitarian, and less demeaning than it was for old style plant-gate, time-clock, lunch bucket, blue collar workers. While employee interests still justify representation, the marketplace and government are developing more up to date arrangements. Companies and organizations with greater sensitivity and real teamwork benefit from better morale and performance.

J. Health, Safety and Welfare

Improved health and longevity is an important goal for most societies, and progress in this direction is broadly popular. This issue involves public health and sanitation measures, communicable disease control, and the delivery of basic immunization and care services. The extent of additional service depends upon the mix of public and private care and private and social insurance for medical and hospital facilities. Affordability is obviously a constraint, but rising shares of health and medical care cost are typical of modern industrial societies. "Good care" is a general aspiration that the medical care professions and "industry" naturally promote. Choices need to be made for public health activities, and regulation has been developed to improve standards, maintain quality, avoid waste, and control costs and inflation for health care generally.⁸³

CHALLENGE, May-June 1988, at 9; Sawhill, *What About America's Underclass?*, 31 CHALLENGE, May-June 1988, at 27. Most people want good jobs at good wages, but achieving this goal requires improving productivity and economic growth. B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* (1982); F. DUCHIN & G. LANGE, *TRADING AWAY JOBS: THE EFFECTS OF THE MERCHANDISE TRADE DEFICIT ON EMPLOYMENT* (1988). Compare W. LOVETT, *WORLD TRADE RIVALRY*, *supra* note 4 and R. MCKENZIE, *THE AMERICAN JOB MACHINE* (1988).

83. For most families good health is a high priority. The amounts spent by governments, employers, and individuals tend to reflect this desire.

Fueled by everything from the use of new, expensive medical technologies to the increasing health care needs of an aging population, health insurance inflation will be in the double-digits in 1989 for the second consecutive year. The increase will bring the total health-care bill of the United States, already highest per capita in the world, to more than \$500 billion. . . . The projections also raise the question of whether the campaign to limit health costs—which began in earnest almost a decade ago—has failed.

Businesses Face Sharp Rise In Worker Health Care Cost, The Washington Post, Oct. 28, 1988, at A1, col. 5. See H. AARON & W. SCHWARTZ, *THE PAINFUL PRESCRIPTION: RATIONING HEALTH CARE* (1984); L. BROWN, *POLITICS AND HEALTH CARE ORGANIZATION: HMO'S AS FEDERAL POLICY* (1983); R. FEIN, *MEDICAL CARE, MEDICAL COSTS: THE SEARCH FOR A HEALTH INSURANCE POLICY* (1986); C. HAVIGHURST, *HEALTH CARE AND POLICY* (1988); E. KENNEDY, *IN CRITICAL CONDITION: THE CRISIS IN AMERICA'S HEALTH CARE* (1972); H. SCHWARTZ, *THE*

Health professions have developed licensing and standards regulation and are further disciplined, or maybe inhibited, by malpractice and liability suits. Medical procedures are often risky; the results vary, and there is a margin for error, negligence, or simply uncertainty. Similar complications are involved for the drug industry. Food and drug testing and supervision has become increasingly important for substances that can be hazardous. Extensive environmental regulation has been added for insecticides, fungicides, rodent control, and toxic substances. The Superfund of 1980 was a regulated program designed to help clean up chemical wastes. Other important regulation includes the Occupational Safety and Health Act (OSHA) and the extensive regulatory authority for the Consumer Product Safety Commission and Federal Trade Commission. Unreasonable risks should be eliminated, but achieving this goal is not so simple in practice.⁸⁴

Uncertainty and incomplete knowledge are characteristic problems in handling health hazards.⁸⁵ Liability rules that impose responsibility on those causing damage make sense, but complex investigation and litigation is often

CASE FOR AMERICAN MEDICINE: A REALISTIC LOOK AT OUR HEALTH CARE SYSTEM (1972); S. WOHL, *THE MEDICAL INDUSTRIAL COMPLEX* (1984); Babbitt & Rose, *Building a Better Mousetrap: Health Care Reform and the Arizona Program*, 3 *YALE J. ON REG.* 243 (1986); Macaulay, *Health Care Cost Containment and Medical Malpractice: On A Collision Course*, 21 *SUFFOLK U. L. REV.* 91 (1987); Pollack, *Medical Maloccurrence Insurance: A First Part No Fault Insurance Proposal for Resolving the Medical Malpractice Insurance Controversy*, 20 *J. L. REFORM* 1246 (Summer 1987); Malcolm, *Living With the Reagan Era's Cost Consciousness*, *N.Y. Times*, Oct. 23, 1988, at E3, col. 1.

84. See S. BROWN, *ENVIRONMENTAL HEALTH LAW* (1984); R. CRANDALL, H. GRUEN-SPECHT, T. KELLER, & L. LAVE, *REGULATING THE AUTOMOBILE* (1986); J. DALY & M. GREEN, *HEALTH SAFETY AND ENVIRONMENTAL REGULATION: HOW EFFECTIVE?* (1981); H. GRABOWSKI & J. VERNON, *THE REGULATION OF PHARMACEUTICALS: BALANCING THE BENEFITS AND RISKS* (1983); C. HAMENTE & B. WOLF, *EMPLOYER RIGHTS AND OBLIGATIONS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT* (1985); L. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY* (1981); W. WARDELL & L. LASAGNA, *REGULATION AND DRUG DEVELOPMENT* (1975); Bartel & Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 *J. L. & ECON.* 1 (1985); Claybrook & Bolliere, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 *YALE J. ON REG.* 87 (1985). An important distinction should be drawn between situations where well-informed people knowingly assume risks for potential payoffs (e.g., very sick patients hoping for a cure) and the uninformed, nonconsenting public, who become exposed to risks through chemicals or other dangers without foreknowledge.

For discussions of alcohol and drug regulation, see R. ROGERS, *THE LAW AND HISTORY OF INTOXICATING LIQUORS* (1985); I. SLOAN, *ALCOHOL AND DRUGS ABUSE AND THE LAW* (1980); *SUMMARY OF STATE LAWS AND REGULATIONS RELATING TO DISTILLED SPIRITS* (25th ed. 1985); Mudén, *Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 *EMORY L.J.* 1199 (1983); Lord, *Coming to Grips with Alcoholism*, *U.S. NEWS AND WORLD RPT.*, Nov. 30, 1987, at 58. In recent years, drug abuse—especially abuse of cocaine, crack, heroin, and other “hard” drugs—has brought widespread alarm and has led to increasing efforts to control or suppress illegal traffic in these substances. Candidates Bush and Dukakis pledged stronger efforts to deal with the drug problem.

85. See L. LAVE, *supra* note 84, chs. 2, 3, & 6; Ramo, *The Regulation of Technological Activities: A New Approach*, 67 *A.B.A.J.* 1456 (1981); see also Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 *COLUM. L. REV.* 277 (1985).

needed. Licensing and registration can force disclosure, within limits, but future negligence or costly impacts may be hard to predict. Government monitoring or research might seem desirable, but can be very expensive. The government more readily administers safeguard regulations and prohibitions without great expense, but helpful experimentation and progress can be limited thereby. Insurance might be developed, but premium costs are high when any expensive liability or clean up costs are incurred. Social insurance or government bailouts may be justified, but large outlays compete with other government budgetary priorities.

For victims of misfortune, the disabled, mentally ill, and those incapable of supporting themselves, the question of social insurance or welfare support is raised. Social Security, old age pensions, unemployment compensation, workmen's compensation, medicare, disabled assistance, medicaid, family aid programs, and considerable charitable relief are designed to fill these needs. Reasonable compassion, suited to the affluence of a nation and its communities, support these efforts. Payroll and general tax revenues are needed for this purpose, but it is obviously better to achieve economic growth and the broadest participation in gainful work to ease these welfare burdens.

K. Tax Policies

The basic goals for the tax system are to raise enough revenue for essential public services, provide for national defense, and meet social insurance needs. The government should avoid excessive taxation so that healthy incentives can operate throughout the economy. While tax relief may be an efficient, low-cost method of subsidizing or encouraging industrial growth, technical progress, and other social goals, care should be taken to minimize distortions or windfalls. Even though waiver of taxes may seem unobtrusive or escape general notice, tax expenditures should be evaluated as outlays of public resources. Tax expenditures must meet the same tests for net social benefits as direct spending programs. Unfortunately, special interests groups often seek tax subsidies to evade more careful scrutiny or demands for justification. This danger of loophole proliferation is a constant challenge to tax law administration and policy.⁸⁶

Modern tax systems use a medley of revenue sources: Personal income taxes; estate, inheritance, and gift taxes; corporate income taxes; sales, value added and excise taxes; payroll taxes; real estate and personal property taxes; and user taxes or license fees. The most progressive taxes tend to be personal income, inheritance, and capital gains taxes. Sales taxes may be regressive depending on the exemptions allowed. Advanced industrial coun-

86. Most tax experts attack loophole proliferation and the inequitable treatment of people in comparable situations. *See, e.g.,* A. ANDO, M. BLUME, I. FRIEND, *THE STRUCTURE AND REFORM OF THE U.S. TAX SYSTEM* (1985); J. PECHMAN, *FEDERAL TAX POLICY* (4th ed. 1983); S. SURREY, *PATHWAYS TO TAX REFORM* (1973); E. STEURLE, *TAXES, LOANS, AND INFLATION: HOW THE NATION'S WEALTH BECOMES MISALLOCATED* (1985).

tries use all these revenue sources, and collect from thirty to forty percent or more of their GNPs in taxes. Competition among nations for capital investments and industrial exports tends to enforce some degree of harmonization or restraint on excessive reliance upon any of these taxes. Within limits, this pressure toward harmonization operates between states or provinces in federal systems, and also among local governments and municipalities.⁸⁷

A moderate overall progressivity of taxes with respect to rising income seems fair. Extreme progressivity, however, is not easily maintained, other than in wartime emergencies and can be weakened by substantial international trade and capital flows. The more open OECD economies today no longer tolerate drastically progressive taxes. Thus a trend in the 1980s toward more consumption taxes, with somewhat reduced income taxes, has been noticeable. In many countries, partly because the wealthiest classes enjoy opportunities for investment abroad (known as capital flight), the effective marginal tax rate is now greatest for the middle or upper-middle classes who cannot shelter their incomes as low tax foreign investment or subsidized domestic investment. This "hump" in the tax curve is a problem that requires greater attention, and may require international harmonization measures.⁸⁸

Reasonable simplicity and integrity for tax collection is an important goal for any tax system. If a tax system becomes extensively riddled with loopholes, the revenue base erodes and public confidence in fairness declines.⁸⁹ General compliance and reporting must be maintained for public support in democratic nations. United States tax authorities have sought more simplicity through successive tax reforms, especially with the Tax Reform Act of 1986. But Congress and other legislatures have moved generally toward more complex tax laws since World War II, at the same time enlarging the government and the tax revenue base. Some of this complexity is unavoidable if incorporation of business ventures is allowed.

87. For recent studies of the structure of U.S. tax burdens for all levels of government, see A. ANDO, M. BLUME, & I. FRIEND, *supra* note 86; R. ARONSON & J. HILLEY, *FINANCING STATE AND LOCAL GOVERNMENTS* (4th ed. 1986); J. MAXWELL & R. ARONSON, *FINANCING STATE AND LOCAL GOVERNMENTS* (3d ed. 1977); J. PECHMAN, *WHO PAID THE TAXES, 1966-85* (1985).

88. A. ANDO, M. BLUME & I. FRIEND, *supra* note 86; R. GOODE, *GOVERNMENT FINANCE IN DEVELOPING COUNTRIES* (1984); OECD, *PERSONAL INCOME TAX SYSTEMS UNDER CHANGING ECONOMIC CONDITIONS* (1986); J. PECHMAN, *supra* note 87; *see also* Makin, *A Tax System Consistent with Fairness Growth and Simplicity*, AEI MEMORANDUM (Fall, 1985).

89. The problems of distortions and inequities provoked extensive reform effort. *See* A. ANDO, M. BLUME & I. FRIEND, *supra* note 86; J. PECHMAN, *supra* note 86; E. STEURLE, *supra* note 86. For discussions of the Tax Reform of 1986, see *AN UNEASY COMPROMISE: PROBLEMS OF A HYBRID INCOME—CONSUMPTION TAX* (Galper, Pechman, eds. 1988); J. BIRNBAUM & A. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987); D. BRADFORD, *UNTANGLING THE INCOME TAX* (1986); *see also* D. DAVIS, *UNITED STATES TAXES AND TAX POLICY* (1986); D. LEE & M. BOSKIN, *TAXATION AND THE DEFICIT ECONOMY: FISCAL POLICY AND CAPITAL FORMATION IN THE UNITED STATES* (1986); *NEW DIRECTIONS IN FEDERAL TAX POLICY* (C. Walker, M. Bloomfield eds. 1983); J. PECHMAN, *THE PROMISE OF TAX REFORM* (1985); J. PECHMAN, *FEDERAL TAX POLICY* (5th ed. 1987).

Enterprise earnings and accounting need reasonable opportunity for plow-back of working capital and expansion requirements. If the government forces owners to recognize major income gains at each step, the owners' tax burdens increase greatly, and economic growth slows. This problem leads to more favorable treatment for capital gains than ordinary income. Once the wealthier classes, who make the most investments, receive this boon, however, it becomes difficult to contain special treatment. Tax shelter treatment has spread to pension funds, Keogh plans, IRAs and ESOPs. In addition, states, local governments and municipalities routinely use tax concessions to encourage business investments to locate in their areas. When so many business interests receive relief, the government cannot, without difficulty, deny concessions to other worthy interests such as the elderly with reduced retirement incomes, the disabled, those people with extra health care expenses, and others. Significant tax exemptions long have been recognized for many charitable, educational, religious, and/or public interest activities.

In Congress and the state legislatures these complexities are compounded by logrolling politics. To gain majority support for tax changes, revenue increases, or cuts, legislators must fashion delicate compromises. Skillful bargainers in Congress and the state legislatures obtain significant concessions for their allies, and the leaders of tax writing committees enjoy clout in this respect. Sadly, the more complex a federal or state revenue code becomes, the more vulnerable it is to insider influence and lobbying. This politicking suggests the inherent and continuing challenge for oversight and tribunate work on tax law and its administration. Without doubt, modern tax law is among the most important, technically demanding, and most interesting areas for regulatory policy.⁹⁰

L. Competition and Liability Rules

A productive industrial society benefits greatly from healthy competition within its own marketplace and from reasonable access to world markets. Therefore, policies to promote fair competition, discourage cartels, restrictive practices and monopolization, and limit unfair or disruptive conduct in world trade, can improve long term economic performance.⁹¹ In the United

90. Leading experts on tax policy like Stanley Surrey, Joseph Pechman, and Boris Bittker must be considered important practitioners of the Honorable Profession of Regulation. See Robinson, *Retroactivity: The Case for Better Regulation of Federal Tax Regulators*, 48 OHIO ST. L.J. 773 (1987). Unfortunately, the villains, who need better regulation, are all those with conflicting interests, legislators, and advocates who play a significant part in each annual "crystalization" of evolving tax law compromises. It is hard to impose full accountability on the tax process. The game never ends; it just goes on. See Kilborn, *As Nominees Shun Tax Issue, U.S. Panel Quietly Ponders It*, N.Y. Times, Oct. 13, 1988, at 1, col. 4 (describing National Economic Commission, Co-chaired by Drew Lewis, Republican, and Robert Strauss, Democrat).

91. For standard texts that stress the importance of procompetition policies, see W. ADAMS & J. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR AND GOVERNMENT IN THE*

States a strong antitrust and fair trade law tradition has evolved over the last three generations. The Sherman Act outlaws price fixing and market allocation cartels, monopolization, and attempts to monopolize. The Clayton Act prohibits mergers, price discrimination, tying arrangements and exclusive dealing when these activities may tend substantially to lessen competition in any line of commerce in any section of the country. The Department of Justice and the Federal Trade Commission (FTC) share enforcement responsibility. Private actions for injunctive relief, treble damages, and attorneys fees greatly strengthen the potential for small business litigations. In addition, the FTC may challenge unfair or deceptive acts and practices. Under "Little-FTC" Acts states also may challenge these activities. Many other nations have emulated U.S. antitrust and consumer regulation since World War II, and most OECD nations have enacted somewhat comparable laws, including Articles 85 and 86 of the EEC treaty.⁹²

Antitrust enforcement in the United States has varied over the years, with reasonably strong efforts under Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt from 1937-41, Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford and Carter. Significant relaxation occurred in the 1920s and under Reagan in the 1980s. Some of this rhythm is ideological, with free market conservatives believing that less enforcement is needed.⁹³ Yet mod-

AMERICAN ECONOMY (1986); T. ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940); J. BAIN, *INDUSTRIAL ORGANIZATION* (1959); C.D. EDWARDS, *MAINTAINING COMPETITION: REQUISITES OF A GOVERNMENTAL POLICY* (1949); E. FOX & J. HALVERSON, *INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM* (1979); H. GOLDSCHMID, M. MANN & F. WESTON, *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (1974); D. GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* (2d ed. 1980); C. KAYSAN & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959); A.D. NEALE & D.G. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* (3d ed. 1980); F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (2d ed. 1980); W. SHEPHERD, *THE TREATMENT OF MARKET POWER: ANTITRUST, REGULATION AND PUBLIC ENTERPRISE* (1975); G. STOCKING, *WORKABLE COMPETITION AND ANTITRUST POLICY* (1961); H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION* (1954); R. WILLS, J. CASWELL & J. CULBERTSON, *ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY* (1987); Lovett, *Antitrust in the Current Economic Environment*, in *PUBLIC POLICY TOWARD CORPORATIONS* (A. Heggestad ed. 1988); *Anticipating Antitrust's Centennial*, 75 CALIF. L. REV. 797 (1987) [hereinafter *Antitrust Centennial*]; *Papers Presented at the Airlie House conference on the Antitrust Alternative*, 62 N.Y.U.L. REV. 931 (1987) [hereinafter *Antitrust Alternative*]; see also B. HAWK, *UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST* (2d ed. 1987) (summarizing spread of U.S. antitrust or procompetition policies to other countries).

92. See *supra* note 91; see also J. MAITLAND-WALKER, *INTERNATIONAL ANTITRUST LAW* (1984); NATIONAL CONSUMER LAW CENTER, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* (1982 & Supp. 1985); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972) (describing "Little" FTC Act developments).

93. The 1980s relaxation of antitrust enforcement was more intellectually developed than the easing of antitrust enforcement in the 1920s. The most extreme critic of extensive antitrust enforcement was Robert Bork. See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); see also W. BAUMOL, J. PANZAR, & R. WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (1982); R. BLAIR & D. KASERMAN, *ANTITRUST ECONOMICS* (1985). Antitrusters, however, mounted a solid counterattack. See W. ADAMS & J.

erate and liberal Presidents, including most administrations since 1902 consistently have favored moderate antitrust efforts. This attitude reflects broad constituency support among small business and farmers, most consumers and the general public. Only the largest corporations resist antitrust enforcement. The majority of people still feel antitrust law and enforcement are necessary limitations upon the excessive growth, power, and anticompetitive practices of the larger business organizations.⁹⁴

Quite apart from controversy over big versus small business in the economy, recent trends toward increased international trade and increased imports are also important. In many manufacturing industries foreign imports have enlarged competition substantially. This improved competitive rivalry has helped to reduce inflation and may ease the need for antitrust enforcement in the affected manufacturing sectors.⁹⁵ For many other sectors, however, foreign firms cannot seriously alter domestic competition, and the need for serious antitrust supervision is as strong, if not stronger than ever. Therefore, antitrust law and regulation are still important for public utilities, transport, communications, financial institutions, distribution and marketing, franchising, service, health care and insurance industries.⁹⁶ Regulators

BROCK, *supra* note 91; Mueller, *The New Attack on Antitrust*, in PUBLIC POLICY TOWARD CORPORATIONS (A. Heggstad 1988); *Antitrust Centennial*, *supra* note 91; *Antitrust Alternative*, *supra* note 91. In addition, see R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); Bailey & Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111 (1984); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Hawk *The American (Antitrust) Revolution—Lessons for the EEC?* EUROPEAN COMMUNITY L. REV. 52 (1988).

94. Since Thurman Arnold's years as leader of the U.S. Justice Dept. Antitrust Division (1937 to 1942), substantial antitrust enforcement had been maintained through Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford and Carter. For the Eisenhower administration, Bob Bicks and Earl Kintner were strong enforcers. The Nixon administration had Richard McLaren, Miles Kirkpatrick, and Robert Pitofsky, who were reasonably tough. Thomas Kauper was reasonably tough in the Ford administration. The only major retreat came in the Reagan years. Even Reagan's Merger Guidelines (1982 and 1984) concede that large mergers in relatively concentrated markets can be anticompetitive where serious entry barriers exist. Also, the Department of Justice continues extensively to prosecute small business price fixing cartels. See Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 818-829 (1987). For a poignant commentary, see Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984). Yet substantial state antitrust enforcement continues. See Continuation of State Enforcement, 55 Antitrust & Trade Reg. Rep. (BNA) 664 (Oct. 20, 1988).

95. The U.S. automobile, consumer appliance, and many other manufacturing industries have encountered significantly increased competition from foreign companies. The result of increased foreign competition has been a reduced market shares for major U.S. firms. By the mid-1980s, seventy percent of U.S. industry suffered from substantial import competition. See PRESIDENT'S NATIONAL COMMISSION ON INDUSTRIAL COMPETITIVENESS, 1 GLOBAL COMPETITION: THE NEW REALITY 9 (Jan. 1985).

96. Unlike the situation in U.S. manufacturing sectors, foreign companies have not displaced domestic firms to any significant degree. In these other sectors concentration remains unaffected, except for a growing number of buy-outs of U.S. owners by foreign interests. In these nonmanufacturing sectors, which account for roughly two-thirds of the value added in

should watch merger movements, takeovers, and concentration trends with special care in these markets.

1. International Trade Law

A strong network of U.S. remedies against unfair or disruptive conduct in world trade have evolved more recently. These remedies include countervailing duties for foreign dumping and subsidies or for market disruption from Communist countries. The government may respond against unjustifiable or unreasonable tariffs, import restrictions, or discriminatory policies by foreign governments. The government may impose further restrictions against imports causing serious injury, threatening national security, or causing balance of payments emergency. Industries suffering distress from imports also may obtain adjustment relief and assistance. Domestic firms may bring private actions under U.S. trade law against foreign dumping, subsidies, or unfair import practices. These firms also can mobilize lobbying efforts for relief under other statutory provisions. Recent legislation, including the new Trade Act of 1988, has somewhat strengthened U.S. trade law.⁹⁷

Trade law in the United States has grown controversial since the 1970s, especially with large and stubborn U.S. trade deficits in the 1980s. Many trade experts emphasize two major U.S. mistakes.⁹⁸ First, excessive U.S. budget deficits from 1983-88 raised domestic interest rates, valued the dollar, weakened exports, and encouraged excessive imports. Second, the United States failed to impose prompt and legitimate trade law relief against

the U.S. economy, the need for antitrust enforcement remains substantial. Even in the manufacturing sector, despite many foreign entrants, the danger of restrictive practices, excessive concentration, and weak competition still justifies considerable antitrust enforcement. See *supra* note 91.

97. Convenient summaries of U.S. trade law remedies for injurious imports or unfair trade practices involving foreign commerce are set forth in EXECUTIVE OFFICE OF THE PRESIDENT, U.S. TRADE REPRESENTATIVE, PREFACE TO TRADE (1982); U.S. INTERNATIONAL TRADE COMMISSION CITIZEN'S GUIDE TO THE STATUTORY PROCEDURES OF THE U.S. INTERNATIONAL TRADE COMMISSIONS. These remedies, however, as interpreted by enforcement officials in recent years, have proven weak and ineffectual (except for section 337 proceedings for patent, trademark and copyright protection against imports). See J. JACKSON & W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS, (1987). Congressional dissatisfaction with this weak enforcement, in part, led to the new Trade Act of 1988. W. LOVETT, *supra* note 4, at 105-135; see also Ehrenhaft & Meriwether, *The Trade Agreements Act of 1979: Small Aid for Trade?*, 58 TUL. L. REV. 1107 (1984).

98. Most trade experts agree that the first mistake was the buildup of excessive U.S. budget deficits between 1983 and 1988 which hurt U.S. trade competitiveness. See J. CULBERTSON, INTERNATIONAL TRADE AND THE FUTURE OF THE WEST (1984); J. FAUX, *supra* note 29. It remains to be seen whether the U.S. can eliminate poverty and achieve full employment with unequal trade openness. See C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1960-1980 (1984); W. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); Duchin and Lange, *supra* note 67; LOVETT, *supra* note 4, at 1-135 (collecting extensive literature); C. PRESTOWITZ, *supra* note 77; H. SHUTT, THE MYTH OF FREE TRADE (1985); Ramstad, *Free Trade Versus Fair Trade*, 21 J. OF ECON. ISSUES 5 (March 1987).

widespread foreign subsidies, extensive discounting, and dumping in world markets, and generally lacked an effective response to foreign mercantilism. Congress has become increasingly firm in its criticism of executive weakness in trade policy and the failure to enforce more effective reciprocity in world trade. In reality, successive U.S. presidents, including Kennedy, Carter, and Reagan, have tried to lead the world toward freer trade with more open U.S. markets. By the late 1980s, however, it was evident that the government could no longer maintain the unmatched openness of U.S. markets. The United States had lost its earlier lead in agricultural and manufacturing productivity. The U.S. lost its large net creditor lead and became the world's largest debtor nation due to big budget deficits and heavy foreign borrowing between 1983-88. Soon the United States must generate a sizeable trade surplus to service its growing external debt, which exceeded \$450 billion in 1988 or ten percent of the U.S. GNP. Although U.S. trade deficits averaged \$150 billion between 1984-88, this level was not sustainable. Meanwhile, stubborn U.S. trade deficits finally made most observers realize that world trade imbalances are partly structural; the imbalances reflect the unequal openness of U.S. markets.

Since the Eisenhower administration, U.S. leaders have proclaimed the slogan "trade not aid," and have sought to lead the world toward freer trade and open markets. Foreign markets did not open completely in response to the opening of U.S. markets, and the U.S. did not seriously use its own trade law remedies to enforce effective reciprocity. In the later 1980s, however, this "turn the other cheek" attitude began to change. A shift toward tougher trade bargaining and more effective reciprocity was gradually under way, with strong Congressional and public support. Negotiations toward an 8th GATT Round in Uruguay, began in the mid 1980s, and modest progress toward freer trade might develop through multilateral efforts. But the United States-Canadian "Free Trade" accord, and other recent U.S. trade bargaining efforts demonstrate that the period of one-sided openness is ending. More extensive U.S. use of trade law remedies seemed likely and closer supervision of trade and capital flows is clearly warranted.⁹⁹

2. Liability Rules

The general theme of tort law is responsibility for harm caused to others. Applying this principle under factual uncertainties can be tricky and requires liability rules, presumptions, and fact finding by lawyers. At least four major alternative liability rules have been employed: (i) Fault liability for intentional or negligent misconduct or breach of a duty of care; (ii) liability without fault or strict liability for those best able to minimize hazard or

99. J. FAUX, *supra* note 29; Garten, *The New Protection*, N.Y. Times, Oct. 24, 1988, at A17 col. 2; Greenhouse, *The Growing Fear of Fortress Europe*, N.Y. Times, Oct. 23, 1988, § 3, at 1 col. 2; Moreno and Ferry, *1992: A United and Prosperous Europe?*, FRBSF Weekly Letter, Aug. 12, 1988; Cheng, *Toward Trade Blocs?* FRBSF Weekly Letter, Aug. 5, 1988.

cover the cost of harm or injury; (iii) social insurance or government compensation (with some risk premia allocated to those responsible or most appropriate to share expenses); or (iv) victim self-insurance with no compensation from or liability for others. The problem is to achieve the most fair and efficient blend of these liability rules for different circumstances.¹⁰⁰ Key variables include likelihood of harm, controllability of injuries, complexity of investigation, access to information, ability to prevent harm, capacity to pay damages or, at least, insurance, costs of litigation, and uncertainties of fact. Regulation can be very helpful in reducing misconduct, and setting standards for responsible behavior. The existence of standards for responsible behavior greatly decreases the likelihood of harm and facilitates fair and efficient liability rule administration.

Broadly speaking, in the types of cases in which injuries are modest and determinations of cause are questionable or expensive, victim self-insurance is still the best solution. In the types of cases in which injuries can be very costly, or more easily preventable by manufacturers or employers through higher standards of care, strict liability, often supplemented by regulatory guidelines or standards, is widely employed by modern industrial societies. In the types of cases in which injuries are moderate, common, but hard to trace causally, even with expensive litigation, social insurance compensation or no fault insurance may be the least expensive solution for society. Workmen's compensation insurance is used widely in the latter situations, and many states employ no fault insurance for less expensive auto accident claims.

In other accident, harm, or damage situations, courts tend to apply traditional tort fault liability rules.¹⁰¹ These rules require reasonable proof by plaintiffs of the harm caused by an act or negligence of others and breach of a duty of care. Defendants often may mitigate their liability expense by showing contributory or proportional negligence by the plaintiffs or by an assumption of the risk of harm by plaintiff's own conduct. Traditional fault liability is the residual legal liability rule in which the

100. The problem of liability is as old as the law. Providing more peaceable solutions to human injuries and conflict than blood feuds and warfare was an achievement. But modern legal systems go much further in efforts to limit or remedy losses traceable to fault, negligence, or responsibility for modern industrial-high technology activities—with their mixed blessings of prosperity, harmful accidents and environmental externalities. *See, e.g.* HENDERSON AND PEARSON, *THE TORTS PROCESS* (3rd ed. 1988); PHILLIPS, *PRODUCTS LIABILITY* (3rd ed. 1988); PROSSER & KEETON *ON THE LAW OF TORTS* (5th ed. 1984 & Supp. 1988); PROSSER, WADE & SCHWARTZ, *TORTS* (8th ed. 1988); R. RABIN, *PERSPECTIVES ON TORT LAW* (2d ed. 1983). In addition, the modern literature of law and economics is greatly concerned with liability rules and has enriched substantially tort law analysis. *See* R. COOTER & T. ULEN, *LAW AND ECONOMICS* 326-584 (1988); N. MERCURO & T. RYAN, *LAW ECONOMICS, AND PUBLIC POLICY* (1984); *LAW AND ECONOMICS* (N. Mercurio ed. 1988); M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); *see also*, R. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (1986); Abel, *A Socialist Approach to Risk*, 41 *MD. L. REV.* 695 (1982).

101. *See supra* note 100 (listing standard tort law texts).

special circumstances supporting strict liability, social insurance, no fault liability, or victim self-insurance do not operate. Traditional fault liability is more expensive for plaintiffs and requires litigation, but factually stronger cases presumably lead to easier settlements or bigger judgements.

In the nineteenth century, victim self-insurance and occasional tort (fault liability) relief were the main solutions to accident and damage situations. Litigation costs were often unaffordable for poor plaintiffs, and the concepts of social insurance or strict liability were not yet established.¹⁰² With increasing affluence and greater social consciousness, a legal trend developed toward more extensive strict liability, or at least social insurance responsibility, for manufacturers and employers. In the last two generations, strict liability or social insurance responsibility has been widely established for manufacturers and employers.¹⁰³ More recently, however, rising tort liability costs, bigger verdicts and judgments, and increasingly expensive liability and malpractice insurance have caused a partial backlash against tort suits and tort liability.¹⁰⁴

Tort and liability reform movements have been proposed in most states and generally supported by business lobbies, though resisted by plaintiffs' lawyers, many legislators, and much of the public.¹⁰⁵ Some reformers want to roll back tort law all the way back to the nineteenth century and completely eliminate strict liability or social insurance for accidents or damages. Such a drastic reversal does not seem likely and commands only modest support. More likely is a broad effort to limit excessive claims, limit litigation expense, and reduce the overall costs of liability insurance and its administration. In this retrenchment effort, cutting waste and eliminating windfalls are important goals. Major targets are excessive insurance company profits, reserves, or administration expenses, unnecessary litigation and lawyer fees, nuisance claims and illegitimate recoveries, and unduly generous awards, settlements or windfalls for victim families and their lawyers.¹⁰⁶

102. See R. RABIN, *supra* note 100, at 98-138, 161-190; W. FRIEDMAN, *LAW IN A CHANGING SOCIETY* 2d ed. (1972).

103. See R. RABIN, *supra* note 100; W. FRIEDMAN, *supra* note 102.

104. See P. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* (1985); R. LITAN & C. WINSTON, *LIABILITY: PERSPECTIVES AND POLICY* (1988); U.S. DEPARTMENT OF JUSTICE REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (February, 1986); Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (1988); Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. (1987); O'Connell, *A Correct Diagnosis of the Ills of Liability Insurance—and a False Cure: A Comment on the Reports of the Federal Tort Policy Working Group*, 63 NOTRE DAME L. REV. 16 (1988); Geisel, *Few Denied Coverage in the Mid-1980s: Study*, BUSINESS INSURANCE, Sept. 26, 1988, at 3.

105. See also, *Hearing on the Cost of the Tort System Before the Subcomm. on Trade, Productivity and Economic Growth of the Joint Economic Committee of Congress*, 99th Cong. 2d Sess. (July 29, 1986).

106. See Claybrook & Bolliere, *supra* note 84; Harter & Eads, *Policy Instruments, Institutions, and Objectives: An Analytical Framework for Assessing "Alternatives" to Reg-*

Interestingly, strong regulation efforts can help achieve these goals. More careful accountability and supervision (maybe at the federal level) is needed for liability insurance companies, reserves and profits. For dangerous products, materials and procedures, regulation can provide better guidelines for reasonable conduct to minimize accidents or harm and limit liability for people or companies in compliance. Where causation is hard to trace or litigation is costly, more extensive social insurance or no fault liability, with tough ceilings on recovery, but providing that medical, hospital, and disability care expenses are covered, would often be cheaper, and more reliable than present tort litigations. Clearly, the problems of liability will not go away. In fact, modern engineering, chemicals, machinery, speed and industrial society make extensive injuries and damage inevitable, although their incidence can be reduced with greater care, better designs, and reasonable regulation. The real issue is to determine how to mobilize better collaboration between lawmakers, regulators, engineers and scientists, the business-industrial establishment, and the public at large. We should not despair. In the last three generations, there has been gradual, but very substantial cumulative improvement in longevity, living standards and prosperity for most industrial societies. When so much has been achieved, it does not seem unreasonable to seek further improvements in the administration of liability rules, and regulation generally.

III. CONCLUSION

This review of modern United States regulatory policies illustrates both the change and the continuity in U.S. regulatory practices. We see less comprehensive market control regulation (e.g., the retrenchment of agricultural production-price controls of the AAA era, deregulation of CAB control for airline routes and rates, and somewhat narrower public utility jurisdiction with AT&T's recent divestiture). This lessening of regulation reflects greater competition with new technology in some industries like communications and transport, and a broadened world market. Stronger government surveillance and disclosure disciplines, however, have developed for financial and securities markets, along with greater regulation and supervision to cope with health and safety problems, environmental externalities, and increased congestion in modern urban areas. Macroeconomic coordination

ulation, 37 ADMIN. L. REV. 221 (1985); Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 334-335 (1985); Nader, *Loss Prevention and the Insurance Function*, 21 SUFFOLK U.L. REV. 679 (1987). But see G. BLOOMQUIST, *THE REGULATION OF MOTOR VEHICLE AND TRAFFIC SAFETY* (1988); Craswell & Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORGANIZATION 279 (1986); Katz, *Measuring the Demand for Regulation: Is the English rule Really Cheaper?*, 3 J.L. ECON. & ORGANIZATION 143 (1987); Kraakman, *Gatekeepers: The Anatomy of a Third Party Enforcement Strategy*, 2 J. L., ECON. & ORGANIZATION 53 (1986); Plott, *Legal Fees: A Comparison of the American and English Rules*, 3 J. L. ECON. & ORGANIZATION, 184 (1987); Plott, *Occupational Self-Regulation: A Case Study of the Oklahoma Dry Cleaners*, 8 J.L. & ECON. 195 (1965).

is now an accepted responsibility of national governments and central banks. This responsibility forces substantial effort toward international collaboration among countries, with uneven results. International trade, while becoming freer and more open among many OECD nations, remains significantly regulated, often restricted, and influenced by exchange controls among the majority of developing nations.

Regulatory efforts are more selective and carefully limited in certain respects. Yet, more elements of modern industrial society are probably supervised and regulated today, taking into account the spread of financial, safety, health hazard, environmental, and land use regulations. The challenge for sound public accountability and responsible politics remains important. Wise regulatory compromises do not create themselves. We need solid expertise, pragmatic leadership, high quality journalism, objective reporting, and scholarship. We should cherish and nurture the "Honorable Profession of Regulation" for successful, long-term economic growth and overall performance.

Political trends show more watchfulness and concern for the mistakes of government bureaucracies. We worry about abuses and try to limit them. We have not, however, developed blind faith in large corporate bureaucracies as a substitute. People want individual initiative and prosperity to a greater extent, although the large majority of individuals work in teams for profitmaking enterprises, eleemosyary institutions, or government administration. A majority of people favors a strong and active role for smaller business, both for efficiency and a more democratic economy. They also favor freedom of choice and opportunity. We seek to strengthen market forces and make them work more effectively, fairly, and responsibly.

Unfair, deceptive, and anticompetitive trade practices should be discouraged and eliminated, wherever feasible. This regulatory policy should continue for domestic commerce and industry, and be applied to international trade. This policy requires antitrust enforcement against cartels, predatory behavior, exclusionary practices, and mergers that might significantly lessen competition. Antitrust enforcement is essential in recently deregulated industries, like telecommunications and airlines, in which high concentration and scale economies often limit competitive rivalry. Securities law and financial market regulation enforces reasonable disclosure and helps maintain fiduciary safeguards for banks, thrift institutions, brokerage firms, insurance companies, pension funds, and ESOPs.

International trade issues present serious complications. Many nations still employ significant subsidies and restrictions to foster industrial and technology development because these subsidies and restrictions are in the best interest of these nations' businesses. Most countries use trade restraints to some degree, and many employ protective tariffs, quotas, and multiple exchange rates. While expanding world trade often improves competition and may lower consumer prices, delicate problems of unequal openness and cross-subsidy patterns remain unresolved. In some markets, widespread excess capacity, substantial discounting, and even dumping cause disruptions and displacement. National safeguard and unfair trade practice remedies

still need to be utilized, even though gradual progress toward improved multilateral trade equity might be achieved over the longer run.

Finally, we must realize that basic tort, or delictual, liability, negligence, and contract, property, and personal rights enforcement are part of the regulatory environment for modern industrial societies. Administrative regulation merely complements and reinforces, to some degree, a sound basic legal system. Efficiency, fairness and social responsibility are reasonable requirements for the basic legal framework, along with sensible regulatory policy. Yet, liability rules and regulation obviously have economic consequences. Too much regulation, excessive legal restriction, and litigative red tape can be costly and distortive. On the other hand, a just and humane society needs healthy law and regulation to improve its morale, social cooperation, market performance, and remedy externalities. Achieving sensible compromises for these purposes is a continuing challenge for the Honorable Profession of Regulation.

WASHINGTON AND LEE LAW REVIEW

Volume 46

Winter 1989

Number 1

Editor-in-Chief

J. PATRICK DARBY

Senior Articles Editor

RONALD S. RANGE

Managing Editor

WADE MATTHEW FRICKE

Research Editor

KEVIN JAMES HENDERSON

Articles Editors

MARY HOGE ACKERLY

THERESA A. CALDARONE

MELISSA J. HALSTEAD-WHITE

JAMES D. HIGGASON, JR.

KATHRYN D. KIRMAYER

EDWARD S. MADARA, III

DAVID A. MCKAY

CHARLES S. MURRAY, JR.

ROBERT W. PONTZ

JILL SUZANNE TALBOT

ANNE R. YUENGERT

Staff Writers

ROGER ALSUP

R. MICHAEL CLICK

MICHAEL PAUL A. COHEN

KEITH PAUL DUET

F. RUSSELL DUPUY, III

SCOT A. DUVALL

WILLIAM E. FRAZIER

ROBERT K. GINTHER

JOHN STONE GOLWEN

DAVID L. GOODE

KAREN E. HAVENS

TIMOTHY A. HODGE, JR.

J. GARRETT HORSLEY

KATHLEEN S. MCLEROY

KRISTEN KEY MEAD

DIANE U. MONTGOMERY

BETH A. NIGHTINGALE

KYMBERLY K. OLTROGGE

J. STEVEN PATTERSON

THOMAS W. SMITH, III

JOEL A. WAITE

Faculty Advisor

SAMUEL W. CALHOUN

Staff Assistant

KAREN B. FREDENBURG

DEANS AND FACULTY—SCHOOL OF LAW

- JOHN D. WILSON, B.A., M.A., Ph.D., *President of the University*
RANDALL P. BEZANSON, B.S./B.A., J.D., *Dean and Professor of Law*
WILFRED J. RITZ, A.B., LL.B., LL.M., S.J.D., *Professor Emeritus*
ROY L. STEINHEIMER, JR., A.B., J.D., *Robert E.R. Huntley Professor of Law,
Emeritus*
EDWARD O. HENNEMAN, B.A., J.D., *Associate Dean and Associate Professor
of Law*
MEREDITH SUSAN PALMER, A.B., J.D., *Assistant Dean*
DENIS J. BRION, B.S., J.D., *Professor of Law*
ROGER D. GROOT, B.A., J.D., *Professor of Law*
MARK H. GRUNEWALD, B.A., J.D., *Professor of Law*
FREDERIC LEE KIRGIS, JR., B.A., J.D., *Professor of Law*
LEWIS HENRY LARUE, A.B., LL.B., *Professor of Law*
ANDREW W. MCTHENIA, JR., A.B., M.A., LL.B., *Professor of Law*
JAMES M. PHEMISTER, B.S., J.D., *Professor of Law*
J. TIMOTHY PHILIPPS, B.S., J.D., LL.M., *Professor of Law*
DOUG RENDLEMAN, B.A., M.A., J.D., LL.M., *Robert E.R. Huntley Professor
of Law and Director of Frances Lewis Law Center*
JOSEPH E. ULRICH, A.B., LL.B., *Professor of Law*
SAMUEL W. CALHOUN, B.A., J.D., *Associate Professor of Law*
WILLIAM S. GEIMER, B.S., J.D., *Associate Professor of Law*
STEVEN H. HOBBS, B.A., J.D., *Associate Professor of Law*
BRIAN C. MURCHISON, B.A., J.D., *Associate Professor of Law*
SARAH K. WIANT, B.A., M.L.S., J.D., *Law Librarian and Associate Professor
of Law*
GWEN T. HANDELMAN, B.A., J.D., *Assistant Professor of Law*
LYMAN PAUL QUENTIN JOHNSON, B.A., J.D., *Assistant Professor of Law*
ANN MACLEAN MASSIE, B.A., M.A., J.D., *Assistant Professor of Law*
JUDITH A. MCMORROW, B.A./B.S., J.D., *Assistant Professor of Law*
DAVID K. MILLON, B.A., M.A., Ph.D. J.D., *Assistant Professor of Law*
JOAN M. SHAUGHNESSY, B.A., J.D., *Assistant Professor of Law*
GREGORY HOWARD STANTON, B.A., M.A., M.T.S., J.D., Ph.D., *Assistant
Professor of Law*
THOMAS W. MAPP, B.A., J.D., *Visiting Professor of Law*
EVELYN L. WILSON, A.B., M.S., J.D., *Visiting Assistant Professor of Law*
RUDOLPH BUMGARDNER, III, A.B., LL.B., *Adjunct Professor of Law*
MALCOLM G. CRAWFORD, B.A., LL.B., *Supervisor, Western State Hospital
Legal Assistance Program*
LAWRENCE H. HOOVER, JR., B.A., J.D., *Adjunct Professor of Law*
J. STEPHEN LAWRENCE, JR., A.B., J.D., *Adjunct Professor of Law*
MARY ZANOLLI NATKIN, B.A., J.D., *Supervisor, Legal Writing Program*
WILLIAM W. SWEENEY, A.B., LL.B., *Adjunct Professor of Law*
PAUL R. THOMSON, JR., B.A., J.D., *Adjunct Professor of Law*
EDWARD L. WEILBACHER, B.G.S., J.D., *Supervisor, Lexington Legal Aid
Program*
LYN F. WHEELER, B.A., M.B.A., D.B.A., *Adjunct Professor of Law*
ROBERT C. WOOD, III, B.A., LL.B., *Adjunct Professor of Law*
HENRY L. WOODARD, A.B., LL.B., *Adjunct Professor of Law*
WARREN LEHMAN, A.B., J.D., *Frances Lewis Scholar in Residence*