KEY MILESTONES IN REGULATION

CHAPTER TWENTY-FOUR

SUSAN DUDLEY
Key Milestones in Regulation

- Susan E. Dudley

In the 130 years since Congress created the first regulatory agency, the number of agencies and the scope and reach of the regulations they issue have increased dramatically. In 2019, more 70 federal regulatory agencies employed almost 300,000 people to write and implement regulation. Every year, they issue thousands of new regulations, which now occupy more than 180,000 pages of regulatory code. This essay summarizes efforts to constrain that growth, identifying five key milestones that have shaped regulatory practices in the United States from the middle of the last century to today. It is based on an article published in the Penn Regulatory Review.

Milestone 1: The Administrative Procedure Act

Congress created the Interstate Commerce Commission (ICC) in 1887 to regulate railroad rates. In the following decades a variety of agencies were established to regulate interstate trade, water and power, communications, commodity exchanges, etc. In the 1930s, President Franklin D. Roosevelt’s New Deal expanded the jurisdiction of these agencies and added new ones, but their sweeping authorities began to raise concerns that the apparent delegation of Congress’s Article I powers might be unconstitutional. Years of debate on this question led to the passage in 1946 of what was arguably the first regulatory reform bill—the Administrative Procedure Act (APA). The APA reflected a “fierce compromise,” balancing the competing goals of bureaucratic expertise and legislative accountability. Its requirements—that regulations be grounded in statutory law and an administrative record that includes public notice-and-comment—continue to guide rulemaking today.

Milestone 2: Economic Deregulation

The 1970s and 1980s brought a wave of deregulation. The “economic regulation” prevalent at that time relied on economic controls such as price ceilings or floors, quantity restrictions, and service parameters. Although one justification for agencies such as the ICC, the Civil Aeronautics Board (CAB), and the Federal Communications Commission was protection of consumers from the exercise of producers’ market power, observers noted that they seemed to get “captured” by the industries they regulated. By the early 1970s, legal and economic scholarship generally recognized that economic regulation of prices, entry, and exit tended to keep prices higher than necessary, benefiting regulated industries at the expense of consumers. This awareness motivated bipartisan deregulatory efforts across all three branches of government that eventually led to the abolition of some agencies, including the ICC and CAB, and removal of unnecessary regulation in several industries. The deregulation of transportation and telecommunications that occurred in the 1970s and 1980s succeeded in increasing competition,
which lowered consumer prices and increased choices, and provided tens of billions of dollars per year in consumer benefits.

**Milestone 3: Benefit-Cost Analysis**

While economic forms of regulation were declining in the 1970s, a new type of “social regulation” began to emerge, aimed at protecting health, safety, and the environment. Concerns over the reporting and compliance burdens these rules created led to the next wave of regulatory reform, focused not on deregulation but on ensuring that regulatory benefits outweighed costs. In 1978, President Carter issued Executive Order (E.O.) 12044, which established procedures for analyzing the impact of new regulations and minimizing their burdens. In 1980, Congress passed and Carter signed the Paperwork Reduction Act, which created the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget to review and approve all new reporting requirements. Benefit-cost balancing has since become standard practice in most regulatory agencies, and increasingly is expected by reviewing courts.

**Milestone 4: White House Review**

Soon after he took office in 1981, President Reagan issued E.O. 12291, giving the newly created OIRA a gatekeeper role in reviewing draft regulations (as well as paperwork) to ensure that their benefits exceeded their costs. While this order was initially controversial, each subsequent president has continued and expanded OIRA’s central regulatory oversight role, as well as the economic principles embodied in Reagan and Carter’s orders.

In 1993, President Clinton replaced E.O. 12291 with E.O. 12866, which remains in effect today, despite the very different regulatory rhetoric of Presidents Bush, Obama, and Trump. E.O. 12866 retained OIRA’s review of significant new regulations; it reinforced the philosophy that regulations should be based on an analysis of the benefits and costs of all available alternatives, and directed agencies to select regulatory approaches that maximize net benefits to society unless otherwise constrained by law.

**Milestone 5? Regulatory Budgeting**

Are we witnessing the next wave of regulatory reform? President Trump has made deregulation a high priority. Although he retained E.O. 12866, he overlaid its requirements to maximize net regulatory benefits with an incremental regulatory budget. His E.O. 13771 requires agencies to remove two regulations for every new one issued, and to offset the costs of new regulations by removing or modifying existing rules. This emphasis on reducing regulatory costs reflects a dramatic departure from the focus on net benefits that has prevailed for social regulations.
To date, E.O. 13771 has led to a **sharp reduction** in the issuance of new regulations, as well as to the modification and removal of some existing regulations. Nevertheless, Trump’s initiatives have not come close to achieving his **promise of cutting regulations by 75%**, and that is due to the regulatory process that previous reforms have instituted. To remove or revise an existing regulation, agencies must follow the notice-and-comment procedures of the APA to build a regulatory record they can defend in court. They must also demonstrate that the benefits of proposed deregulatory actions outweigh the costs.

Whether Trump’s policies become a permanent fixture of the U.S. regulatory landscape remains to be seen. The next president could rescind his executive orders with the stroke of a pen. Like earlier milestones in regulatory reform, the nascent regulatory budget has been initially controversial, and it is too soon to tell whether it will achieve comparable durability. Looking back, however, it is striking to see the degree of bipartisan consensus on the need to develop practical tools for managing the administrative state. As President **Carter’s Economic Report of the President** concluded in 1980:

> The Nation must recognize that regulation to meet social goals competes for scarce resources with other national objectives. Priorities must be set to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits. Admittedly, this is an ideal that can never be perfectly realized, but tools like the regulatory budget may have to be developed if it is to be approached.
Susan Dudley is director of the George Washington University Regulatory Studies Center and distinguished professor of practice in the Trachtenberg School of Public Policy and Public Administration. She is a past president of the Society for Benefit Cost Analysis; a senior fellow with the Administrative Conference of the United States; a National Academy of Public Administration fellow; on the boards of the National Federation of Independent Businesses Legal Center and Economists Incorporated; on the executive committee of the Federalist Society Administrative Law Group; and chair of the Regulatory Transparency Project regulatory process working group.

Dudley served as the presidentially appointed administrator of the Office of Information and Regulatory Affairs (OIRA); directed the Regulatory Studies Program at the Mercatus Center; taught courses on regulation at the George Mason University School of Law; served as a staff economist at OIRA, the Environmental Protection Agency, and the Commodity Futures Trading Commission; and was a consultant to government and private clients at Economists Incorporated. She holds an MS degree from the Sloan School of Management at MIT and a BS degree (summa cum laude) in resource economics from the University of Massachusetts, Amherst. Her book Regulation: A Primer, coauthored with Jerry Brito, is available on Amazon.
# Table of Contents

**Past as Prologue to the Future**

## An Opening Conversation

Chapter 1. Why Choose Economic Freedom?.................................................................6  
*George P. Shultz and John B. Taylor*

## Free to Choose: 1980 to 2020 and the Network

Chapter 2. Introduction to Free to Choose 1980 to 2020 and the Network...................14  
*Robert Chatfield*

Chapter 3. Milton, Rose, me and Poetry.................................................................16  
*Robert Chitester*

## Removing Obstacles on the Road to Economic Freedom: 1947 to 1980

Chapter 4. Removing Obstacles on the Road to Economic Freedom.........................24  
*Eamonn Butler*

Chapter 5. Milton Friedman: The Early Years.........................................................26  
*Jennifer Burns*

Chapter 6. Mont Pelerin 1947.................................................................................32  
*Bruce Caldwell*

Chapter 7. The Road Not Taken of “Nuovo liberalismo”.............................................85  
*Alberto Mingardi*

## Spread of Free-Market Ideas in the 1980s

Chapter 8. The Reception of Free to Choose and the Problem of Tacit Presuppositions of Political Economy.................................................................102  
*Peter Boettke*

Chapter 9. The Spread of Free-Market Ideas in the 1980s (With a Nod to the Late 1970s)........131  
*David Henderson*

Chapter 10. Ideas of Freedom and Their Role in Active Policymaking..........................142  
*Condoleezza Rice*
# Table of Contents

## Lessons Learned from History for the Future of Freedom

Chapter 11. Assaults on Freedom and Citizenship.................................................................147  
*Victor Davis Hanson*

Chapter 12. Fed Chair Agonistes.........................................................................................152  
*Amity Shlaes*

Chapter 13. Keynes v Hayek: The Four Buts......................................................................160  
*Robert Skidelsky*

## Ideas for a Free Society

### The Role of Law as Protector of Liberty

Chapter 14. Capitalism, Socialism and Nationalism: Lessons from History........................168  
*Niall Ferguson*

Chapter 15. Magna Carta, the rule of law, and the limits on government..............................200  
*Jesús Fernández-Villaverde*

Chapter 16. The Commerce Clause, the Takings Clause, and Due Process..........................208  
*Douglas Ginsburg*

### How to Deal with the Reemergence of Socialism

Chapter 17. The rise and fall of environmental socialism: Smashing the watermelon........221  
*Jeff Bennett*

Chapter 18. Understanding the left....................................................................................226  
*John Cochrane*

Chapter 19. Economic systems between socialism and liberalism and the new threats of neo-interventionism...............................................................233  
*Lars Peder Nordbakken*

### Measures of Economic Freedom

Chapter 20. Economic Freedom Matters & Charts...............................................................248  
*Anthony Kim*
TABLE OF CONTENTS

Fred McMahon

Chapter 22. The World Bank’s Doing Business Indicators........................................................................... 310
Valeria Perotti

Restraining Expansions of Government

Chapter 23. Common Sense Approach to Addressing America’s Entitlement Challenge........................... 318
John Cogan

Chapter 24. Key Milestones in Regulation..................................................................................................... 339
Susan Dudley

Chapter 25. A Quest for Fiscal Rules............................................................................................................ 343
Lars Feld

ACTIONS FOR A FREE SOCIETY

Taking Ideas to Action around the World

Ayaan Hirsi Ali

Chapter 27. Culture and the Free Society....................................................................................................... 380
Samuel Gregg

Chapter 28. Taking Ideas to Action Around the World.................................................................................. 394
Bridgett Wagner

What Happened in Chile?

Introduction......................................................................................................................................................... 402

Chapter 29. Presentation I............................................................................................................................... 403
Axel Kaiser

Chapter 30. Presentation II.............................................................................................................................. 406
Ernesto Silva

Chapter 31. Presentation III............................................................................................................................ 409
Arnold Harberger
# Table of Contents

**Taking Ideas to Action: Making the Case for Freedom**

Chapter 32. Restoring Liberty for American Indians.................................................................411
  *Terry Anderson*

Chapter 33. The Effect of Economic Freedom on Labor Market Efficiency and Performance........434
  *Lee Ohanian*

Chapter 34. Making the Case for Liberty......................................................................................466
  *Russell Roberts*

**Taking Ideas to Action in the Private Sector**

Chapter 35. Brexit: Taking a Good Idea into Action....................................................................473
  *Jamie Borwick*

Chapter 36. Taking Ideas to Action in Central Governments—The US Case............................476
  *Tyler Goodspeed*

Chapter 37. Ideas and Actions for a Free Society......................................................................487
  *Ruth Richardson*

**Taking Ideas to Action in the Private Sector**

Chapter 38. Public Policy, Private Actor......................................................................................491
  *Dominique Lazanski*

Chapter 39. Libertarianism is Dysfunctional but Liberty is Great..............................................508
  *Joe Lonsdale*

Chapter 40. The False Promise of Medicare for All....................................................................514
  *Sally Pipes*

**A Closing Conversation**

Chapter 41. China, Globalization, Capitalism, Silicon Valley, Political Correctness, and Exceptionalism.................................................................................................................527
  *Peter Thiel and Peter Robinson*