Rulemaking as a Tool of Democracy

Reclaiming the Debate on Regulation

MICHAEL LIPSKY

DISTINGUISHED SENIOR FELLOW

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demos.org
220 Fifth Avenue, 2nd Fl.
New York, NY 10001

Media Contact
EGRAY@DEMOS.ORG
212.633.1405 EXT. 551

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INTRODUCTION

A fundamental task of government is to enact rules for human interactions. As Adam Smith explained long ago, among the functions of such rules is establishing binding agreements among people, making possible private property and contracts, the essential ingredients of commerce. In more modern times, governments also develop rules to protect people who cannot protect themselves, and to protect the commons now and for the future.

Like all decision-making in a democracy, rule-making requires diverse parties coming together to agree on the desired objectives and to assess the benefits and costs of different ways of achieving them. This pragmatic approach to rule-making is challenged today by advocates of an ideological perspective who appear to regard virtually all laws designed to set rules for business activities as inconsistent with prosperity and a well-functioning society.

These advocates regard unimpeded markets as the primary instruments of societal well-being. They claim that commercial interests will be harmed if constraints are imposed on business behavior, and they also insist that regulation is inconsistent with the common good *in principle*.

Libertarians present this perspective in purist form. The Cato Institute declares on its website: "… there is no greater impediment to American prosperity than the immense body of regulations chronicled in the Federal Register." The think tank in response proposes to "set forth a market-oriented vision of 'regulatory rollback' that relies on the incentive forces of private property rights to create competitive markets and…provide consumer information and protection."[1]

Others closer to the political fray seemingly condemn virtually all efforts to solve significant social problems through legislative initiatives if they give rise to regulations that may impact business. Referring to recent efforts to expand health insurance, reduce volatility in financial markets, and address critical issues of global warming, Thomas Donahue, President of the U.S. Chamber of Commerce, proclaimed that the "onslaught of rules is creating uncertainty, stifling hiring and investment, and undermining our recovery. It is upsetting the constitutional balance of powers and giving unelected bureaucrats unprecedented control over the lives and businesses of people across this nation."[2]

The familiar argument that regulation is generally harmful because it constrains business activity and interferes with market efficiency is faulty on at least two general grounds. It is wrong empirically: business activity unconstrained by rules generates unacceptable social conditions such as child labor and fouled water supplies. It is wrong theoretically: modern markets frequently bear little resemblance to the academic models from which economists derive their notions of how markets work.

To be sure, we have a widely accepted interest in insuring that markets work effectively. There are few propositions on which people of divergent political viewpoints agree more. But that doesn't mean that all business activity is consistent with the public interest or achieves optimal market results. Our economy requires a balance between well-functioning markets free of unnecessary impediments *and* an empowered public sector to insure that our economic system works well and works for all.

In today's polarized debates about the role of government, no one is suggesting that all regulation should be dismantled. Yet the relentless drumbeat of anti-regulatory rhetoric from ideological advocates, trade associations, and other interested parties has made regulation more difficult and elevated de-regulation almost to a default position in everyday politics. As a result, we are in danger of losing sight of the centrality of rule-making as a critical dimension of democratic practice and economic success.

We need to talk about regulation differently, articulating and amplifying the idea that regulation is fundamentally about making the right rules to balance society's multiple and often conflicting interests. We also need to cultivate a common understanding of the democratic principles and processes that produce regulation. In this formulation, the interests of business are important, but they are not the only interests requiring attention, and, in any event, business interests frequently benefit from regulation, in a number of different ways.

The proposition that rules and markets work together should be a matter of common sense and general consensus. In the following analysis, I challenge the perspective reflected by many in current political debates that protective safeguards are intrinsically suspect. I argue, instead, that regulation, in concert with healthy markets and effective social policy, is essential for securing the common good.

I start in Section I with a reminder of the evident public benefits of regulatory safeguards, and describe some of the overlooked contributions of regulation to our political system—contributions to the quality of everyday life, and to our collective well-being as expressions of democratic activism. In Section II, I review some of the many ways business interests are served by the nation's regulatory system, and then turn to some of the flaws in the arguments of anti-regulation advocates when they assert that the logic of markets provides a guide to real-world prosperity. Not only are some of the core arguments of free-marketeers inapplicable in theory, but, as I demonstrate in Section III, recent efforts to discredit regulation on the basis of empirical evidence are unsupportable as well. I conclude, in Section IV, with some notes on how advocates of a respected place for regulation in democratic politics can begin to retrieve the shattered discourse from the misguided voices currently dominating the discussion.

I. RULES AND THE PUBLIC INTEREST

Regulation and Crisis

One might have thought that "the less regulation the better" would be a discredited perspective. The catastrophe of the Great Recession, from which the country has not yet fully emerged, is substantially attributable to failed adventures in deregulation—of the mortgage industry, the stock market, investment banking and the banking industry in general. "The unfettered free market has disgraced itself in full public view," as the economics writer John Cassidy put it in his 2009 book, *How Markets Fail.*[3]

Inadequate regulation has also been widely recognized as setting the stage for the Gulf oil spill disaster of 2010, and it fuels public concerns over building new oil pipelines and authorizing shale fracturing technologies. The changing structure of food production and distribution, resulting periodically in calamitous health incidents, has led to widespread public outcries over contaminated beef and chicken, tainted spinach and lettuce and other so-called "fresh" packaged vegetables produced at home and abroad.

In every society, technology sometimes fails, and people and business enterprises make mistakes. But when protective systems fail in modern economies, the results can be catastrophic. Then, the public instinct is not only to blame the responsible party but also to look about to see where systems of public protection fell short. This was the case in the BP oil rig blowout in the Gulf of Mexico; the explosion in the Big Branch coal mine in West Virginia in 2010; the drug compounding disaster in 2012 (when fungal meningitis was injected into patients through contaminated steroid medications); and in virtually every occurrence of wide-spread injury to workers, consumers and citizens in recent memory. When a West Virginia chemical storage tank failed in January 2014, leaving the state's capital without drinking water for a week or more, public attention immediately turned to the question of why the state's regulatory authorities allowed this to happen.[4]

Historically, regulations have often had their origin in shocking developments or exposure of dangerous practices that compel national attention and law-makers' commitment to change. Building code reforms following the Triangle Shirtwaist Factory fire in 1911, and reforms in the wake of Lincoln Steffens' exposure of horrific conditions in the meat packing industry during the Progressive Era, fall into this category.

At other times, the accumulation of knowledge and steady changes in society's expectations are regulation's guiding hand. Regulations arising in these ways have led to broad improvements in living conditions independent of catastrophic developments or scandalous revelations.

Regulation and Social Progress

"Government's greatest achievements," according to political scientist Paul Light, in a Brookings Institution book by that name, include providing safe food and clean air and water, improving workplace safety, protecting consumers from unsafe products, and insuring open access to public accommodations—all achieved through federal laws.[5] From the perspective of solving important social problems, James Lardner has compiled the stories of ten "Good Rules" that demonstrate how government engages difficult issues to derive solutions—often in highly contested environments. Such dynamics reflect the origins of the Fair Labor Standards Act (1938), rule-making to increase auto safety (1966), the banning of DDT (1967), and limiting the incidence of acid rain (1990).[6]

In 2011, David Arkush of Public Citizen assembled an accounting of some of these accomplishments in remarks prepared for Congressional testimony:

- Following the creation of the Occupational Safety and Health Administration (OSHA) in 1970, annual deaths from workplace injuries declined from an average of 14,000 to about 4,300, even though the workforce doubled during that period. An OSHA rule requiring the cotton industry to reduce dust in textile factories helped reduce brown lung disease among workers by 97 percent, from roughly 50,000 cases in the early 1970s to about 1,700 workers ten years later. As a result of processes initiated by OSHA rules, fatalities from cave-ins at construction sites declined by 40 percent and from dust-related explosions in grain-handling facilities by 95 percent.
- The vehicle safety standards of the National Highway and Transportation Safety Administration have reduced by more than half the traffic fatality rate, from nearly 3.5 fatalities per 100 million vehicles in 1980, to 1.41 fatalities per 100 million vehicles traveled in 2006.
- As a result of rules promulgated by the Environmental

> Protection Agency the air and the country's rivers, lakes and ponds are vastly cleaner than they were. The EPA estimates that Clean Air Act rules saved over 160,000 lives of adults in 2010, in addition to obviating the need for many others to seek costly medical care.[7] When Americans learn through news reports how hard it is to breathe in Chinese and Indian cities, they count themselves fortunate to live in a society that limits using the environment as a dump.[8]

As the country contemplates new investments in early childhood education, nothing could be more important than insuring children are safe. In this light, the EPA regulations phasing out lead in gasoline, which have significantly reduced lead levels in U.S. children, are notable. Between 1976 and 1980, 88 percent of all U.S. children ages 1 to 5 had blood levels in excess of the medically-determined danger threshold. During the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that amount, a twenty-fold decrease.[9]

Not all of these results are attributable to regulation alone; greater awareness of a problem, improved technologies and other interventions may have played a role. Such dramatic before-and-after trends, however, clearly point to a specific and important role for regulation in improving health and safety in numerous areas.

Public Confidence: A Regulatory Windfall

These achievements notwithstanding, the primary case for regulation to protect health and safety and insure environmental standards does not rest on lives saved or reducing people's need to seek medical care. Nor does it rest on compelling accounts of spectacular failures or corporations run amok, although periodic catastrophes and high profile disasters play their part. Rather, the primary case rests on the public's day-to-day confidence that it is protected in the most basic ways by the laws of the land.

People go about their business and live their lives with confidence that buildings won't collapse or burn, food is safe to eat, drugs are safe to ingest, water is safe to drink, and children's toys won't injure them. People expect that they won't be exposed to poisonous or hazardous materials, and that public transportation is safe to use. When new technologies appear on the horizon—genetically modified food and fracking, for example—they look to the public sector to evaluate the risks to public health and protect them from harm.

At their margins, all of these areas are contested, and it is true that in many areas the regulatory safety net is incomplete. But the point that can get lost in debates about particular potential hazards or whether some unregulated substance or process should be covered by rules limiting exposure or use is that we look to the public sector to protect us from things we cannot understand or manage on our own. In colloquial terms, when faced with a new threat to public health, the citizen's first thought is: "there ought to be a law."

Confidence that we are protected from unseen harms is precious. Public agencies contribute substantially to that confidence, though regulated industries rarely acknowledge it. Sometimes, however, circumstances conspire to lift the veil of opposition business interests usually display. In his history of the Food and Drug Administration, Philip J. Hilts describes the efforts of the pharmaceutical industry during the presidency of George H. W. Bush to improve the FDA's reputation. Following a period in which the agency had been strongly attacked and left undefended, he writes that "[t]he companies…acknowledged...they depend for their credibility on the FDA's reputed toughness. If the FDA falters, the reputation of their own products falters with it." In this period, the pharmaceutical industry even established a lobbying operation, the FDA Council, to support the agency's mission.[10]

Surely consumers and citizens are guarded in their trust of business, but not nearly so much as they would be if confidence in our spectacularly successful marketplaces eroded significantly. For this reason, industry organizations are typically eager to work with regulators to restore public confidence when lapses in safety occur, even as they try to isolate what they like to call rogue offenders.

Regulation and Democracy

While many people have the impression that regulations are written exclusively by industry and cooperative legislators, many of the safeguards on which we depend were not developed in this way. In fact, many regulations have their origins in popular movements and responsive democratic institutions.

Food regulation followed public outrage and alarm provoked by muckraking exposés during the Progressive Era.[11] Impetus for establishing the Environmental Protection Agency in 1970 came from the emergent environmental movement. From Mothers Against Drunk Driving, who fought successfully for zero-tolerance laws and raising the eligibility age for driver's licenses,[12] to wilderness advocates who fought for wild lands, witnessed passage of the Wilderness Act of

1964, and continue their militancy against commercial development of wilderness, our rules are often propelled by social movements and activists who use the democratic process to enact public laws for common protection and security.

The question of regulation and democracy arises in the context of debates on the two international trade treaties currently being negotiated by the United States. A primary issue in bargaining over the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership (with European nations) is the variation in protective regulations of the negotiating countries. Business supporters of these treaties say that international trade could be more robust if regulations did not vary from country to country. They seek to lower regulatory requirements among the signatories in the name of what they call "harmonization."

However, national commitments to protective safeguards are not simply administrative contrivances. As economist Joseph Stiglitz emphasizes in a recent *New York Times* opinion article focused on the dangers in negotiating these international treaties, variations in nations' regulations should not be understood simply as insubstantial variations in domestic policies, but as manifestations of democratic practice. "[T]hose regulations…to protect workers, consumers, the economy and the environment," he writes, "were often put in place by governments responding to the…demands of their citizens."[13]

As social media and the capacity for information sharing accelerate, the rule-making process has evolved into a mash-up of citizen engagement as interest groups rally their sympathizers to submit comments during the rule-making period. By August of this year, the Department of Agriculture had received over 36,000 individual comments on the proposed rules to establish standards for growing, harvesting, and packing produce under the 2011 Food Safety and Modernization Act.[14] In 2012, when the Environmental Protection Agency issued its preliminary regulations on limiting carbon dioxide emissions from power plants, 2.1 million people communicated with the agency during the comment period.[15]

Admittedly there is much truth to the proposition that rules are sometimes made "behind closed doors." But a parallel truth is that our system of rules is a common project. The regulatory structure of the country has the signatures of every town that developed zoning regulations to separate slaughter houses, waste pits and chemical plants from residential neighborhoods, every jurisdiction that enacted civil rights protections in the workplace, every state that has acted to save its wetlands and waterways from pollution and other harms.

In connecting rule-making with civic action, we should pay attention not only to the origins of rules but also to the role of rules in laying the groundwork for future political engagement. Rules not only reflect society's values, they also help shape them. When society, through its political institutions, embraces new norms—environmental responsibility, say, or opposition to racial discrimination—regulation helps to create the social space for values to be renewed and reproduced. It also transforms private sentiments into public standards, adding additional weight to the moral claims that gave rise to the new laws.

This dynamic plays out, for example, in the case of the Americans with Disabilities Act (1990). Codifying the rights of disabled people not only provided a legal structure that required access to public places and greater accommodation of disabled people by businesses and employers. It also legitimized the claims of disability rights advocates and brought disabled people into the public arena where their needs are being recognized. Relatedly, when young people with physical and mental disabilities began to be accommodated in public schools following passage of The Education for All Handicapped Children Act in 1975, attitudes toward these previously hidden children could begin to evolve. When consumer waste recycling became a mandatory practice under the law in many places, the importance of recycling gained additional weight in the public mind.

These are not just examples of rules that prohibited or dictated particular practices; they also influenced politics downstream.[16] Broadly speaking, when a claim becomes "the law of the land" it also gains legitimacy based upon public respect for law and the processes that give rise to it.

Another democratizing aspect of regulation is that they display the formal criteria of public goods: no one can be excluded from their application, and one person's enjoyment of regulations' protective umbrella doesn't diminish their use by others. Members of society thus broadly share their benefits, minimizing the burden on individuals, households and businesses to look out for their interests. Residents of a society with good police protection and respect for the rule of law do not have to hire bodyguards or locate their houses behind walls. With good rules in place, householders do not have to spend the morning asking the baker what went into today's bread or tour the bakery to see if it is infested with vermin.

In a small town, one might know or even be related to the butcher or baker. As societies become more complex, citizens' costs of acting in their own interest increase as information becomes harder to come by. The modern consumer cannot know the conditions under which Argentine beef is slaughtered, packaged and shipped to her supermarket in the United States.

In a society without rules, relations between people would be consumed with gaining information and establishing trust in the marketplace, or would be limited to one's narrow trust circle. In a society without rules, adoption of innovative products and practices would be frustrated because people would favor the tried-and-true to a much greater degree than they do now.

If trust is absent, securing one's interests becomes much more expensive. A perhaps under-appreciated quality of a sensibly-regulated society is that when public institutions make and enforce rules, civic life can evolve relatively free from the costs—real but also psychological—of constantly having to investigate or defend one's interests.

An additional point related to rule-making as a public good is that regulations reduce the income biases that result when people have to pay for protections out of pocket, with the likely result that only the wealthy end up being well-protected. The king who has his own food taster need not worry that he will be poisoned or sickened by what's put in front of him. All over the world, where public protections are weak, the poor live unguarded in makeshift housing or on the streets, while people with means live behind gates where they can filter their water, condition their air, and draw on cisterns if a fire breaks out.

Whether the subject is "environmental racism" or payday lending, it is no accident that those with less power and fewer resources are disproportionately disadvantaged when regulations are weak. Many of the victims in the recent financial crisis that resulted in part from loosely regulated mortgage practices were relatively uneducated people who didn't have lawyers to warn them away from predatory loans and risky mortgages.

Advocates of unfettered markets contend that self-interest will drive producers to offer safe and high quality goods in order to build and protect their brands. This logic may apply to some people and enterprises striving to secure their reputations with customers. Market societies depend upon such self-interest, and upon the pride vendors take in offering trustworthy goods and services.

But this theoretical argument isn't sufficient when examined in real world contexts, where countless examples prove otherwise. In the United States and many other countries, extensive regulation was needed in the early 20th century to ban misleading and fanciful labels on popular but harmful or useless potions and concoctions. Another obvious example is environmental regulation, where massive public mobilizations were the generative force.

The logic that consumers entering markets will drive out socially undesirable or unreliable products by refusing to buy them might apply to some enterprises that cultivate brand loyalty. One example may be the airline industry, although the logic of the marketplace did not prevent ValuJet from improperly storing cargo, resulting in a crash in the Everglades in 1996 that killed the 110 people aboard. It may also apply to automobile manufacturers, although it didn't prevent them from colluding to keep certain safety features off the market, as Ralph Nader famously revealed in his 1965 book, *Unsafe at Any Speed.* Almost a half-century later, the need to create and maintain customers' confidence certainly didn't prevent General Motors from concealing evidence of the deadly consequences of its flawed ignition systems.[17]

The logic is entirely implausible in such industries as processed foods, which regularly create many new products with slightly different formulations, or in industries dominated by offshore companies unfamiliar to domestic consumers. Furthermore, in highly competitive industries such as pharmaceuticals, the urge to rush things to market is patently in tension with consumer safety, as countless class-action lawsuits against the drug companies indicate.

II. REGULATION AND PROSPERITY

Rules are Good for Business

Although American business interests regularly complain that regulation hurts the economy, some of the most important benefits of regulation are enjoyed by the business sector. For example, sound regulations contribute to stable commercial environments, allowing businesses to plan for the future with confidence. When master investor Warren Buffett decided to buy stock in electric utilities and railroads, a key factor in his decision, reportedly, was that, as heavily regulated public utilities, those companies might be expected to enjoy a high degree of stability.[18]

Businesses also benefit from the contribution of regulation to consumer confidence. People shop at supermarkets without questioning whether their purchases are safe to eat. They buy over-the-counter medicines with the same habitual comfort. Who would feed a can of beans to their children if they did not know that systems of food safety were in place?

There was a time when processed food and drugs were not held to any standards. In the early years of the 20th century, the predecessor to the Food and Drug Administration pursued companies that put decomposing tomatoes into bottled ketchup and parts of dead horses into lunch meats. In 1937, a Tennessee provider of one of the new sulfa miracle drugs was able to send an untested version to market that killed over 100 people before the FDA mobilized a campaign to inform doctors of the threat and was able to remove the product from drugstores.[19] A key factor in the growth of the American drug industry was congressional action that prevented medicine manufacturers from making false or unsupported claims about their products. This development led to the discrediting of ineffective elixirs and potions and the beginnings of modern pharmaceutical research.

Business leaders are well served by the regulatory regime for additional reasons. Businesses are often glad to let taxpayers pay the expenses of insuring strong health and safety standards. A case in point arose in the summer of 2009, when nine people died and hundreds were sickened in a salmonella outbreak that was traced to contamination at a Georgia facility of the Peanut Corporation of America. The Kellogg Company, the largest purveyor of processed peanuts in the country, recalled seven million cases of Keebler cookies and other peanut-based products during this period.

In his testimony on the recall before Congress, David Mackay, then President of Kellogg, asked the federal government to play a greater role in food safety inspection. He urged Congress to establish a single agency with responsibility for food safety, to undertake annual inspections of food processing plants that were particularly vulnerable to disease outbreaks, and to enact into law federal authority to recall food products directly (instead of relying on voluntary compliance). He explained that the task of inspecting all of the peanut processing plants in its supply chain was beyond his company's capacity.[20]

Partly in response to the peanut crisis, the Congress adopted the Food Safety and Modernization Act in 2011. The FSMA was shaped in part and later praised by the industry trade group, the Grocery Manufacturers Association, because it would "increase consumer confidence in the food they eat."[21]

Another reason companies may seek comfort under a regulatory umbrella is to create favorable distinctions in the market that have the force of law. In recent months, a leading producer of hummus, the popular Middle Eastern spread, asked the Food and Drug Administration to establish a hummus "standard" to protect it (and consumers) from imitators who were using the name but not using chick peas or other essential ingredients.[22] In short, both the Kellogg executive and the hummus manufacturer asked the federal government for more regulation.

It is important to remember that business interests are not monolithic. When a business spokesperson claims that some regulation would be harmful, it is very likely that there are business counterparts who would welcome that same regulation. Regulations creating more stringent requirements of the coal industry, for example, are welcome not only by environmentalists but also by suppliers of natural gas and renewable energy. Regulations placing greater safety requirements on foreign food imports give a boost to domestic growers of the same products. Chemical manufacturers in West Virginia may be wary of additional regulation, but small businesses in the state, which have been devastated by their loss of revenues following the contamination of the Elk River in January, 2014, strongly support safeguards that would prevent similar events in the future.[23]

When the Environmental Protection Agency proposed new rules in March, 2014, to clarify which waters required protection under its jurisdiction, the bulk of news coverage focused on the positive responses of environmentalists and the negative responses from some farm groups and home builders. But many farm groups as well as businesses support the new rules because they benefit from regulation that insures clean drinking water and promotes wildlife preservation.[24]

Elon Musk, the founder and CEO of Tesla Motors, recently pointed out that nimble regulators help shape the future when they show sensitivity to their effect on innovation. "…[R]egulators can play an extremely important role in the advent of sustainable energy," he said, "by ensuring that there is a means for people to establish solar on their roof or to buy wind and other renewables and to essentially make sure that the right thing happens."[25]

Thus regulations help commerce expand in socially-desirable directions. Competition is no less robust in electronics because government worked with industry to develop a high definition standard for new television sets, thereby creating a common playing field for manufacturers. It is no less robust in the automobile industry because regulations channeled the industry into developing safer and more efficient cars.

Undoubtedly, some businesses are disadvantaged when Congress decides to limit their activities. Leaders of the asbestos industry could not have been happy when various environmental and occupational safety laws restricted asbestos use. In general, however, there is a strong case that rule-making can advance the common good while sustaining a prosperous business sector. Indeed, good rule-making is essential for a thriving business climate.

Rule-Making Needs to Adapt

The need for and desirability of public safeguards would seem incontestable, but that does not mean that any particular rule achieves the greatest good for the greatest number. Rules may be poorly designed, or enforced inadequately, or enforced in a cumbersome manner. Rules may also be outdated—perhaps no longer needed. Conversely, new rules may be needed as new hazards are identified and public expectations rise.

Consider the importance of keeping up-to-date and relevant in light of changing circumstances in home construction. In recent years, builders have been taking a new look at construction standards in the face of climate change. Roofs will need to withstand stronger winds, and in flood-prone areas houses will have to be built higher from the ground. Responsible builders will welcome revisions to building codes as the threat of weather-related damages increases, because they will all be held to the same higher standard and unscrupulous low-bidding competitors will face legal hurdles. True, the cost of houses in hurricane alleys might rise, but so would the value of such houses as their capacity to withstand severe weather increases.[26]

Financial regulation is illuminated by a similar analysis. A major problem with the sector in the period leading up to the recent financial crisis was not that there were no laws in place. The problem was that, in large part because of the opposition of the largest financial institutions, the regulatory system had not adapted to control hedge funds, mortgage securitization, and financial instruments that had not even been invented when the financial sector had last been a subject of widespread public concern. The country did have a regulatory regime for the financial sector at the time of the 2007 financial crisis, but it was outdated.

The big banks may have been content to discourage modernization of financial regulation as they innovated with exotic financial instruments, but we should not assume that business interests always resist modernization. On the contrary, business interests may be all too eager to support regulatory modernization when it supports their purposes. For example, over the opposition of labor unions and consumer groups, meat producers successfully championed a revision of chicken processing regulations that will speed up the time for inspecting each carcass (to almost three per second for each inspector), and replace government inspectors with company personnel. The change will lighten the regulatory pressure on producers while still offering the advantages to consumer confidence that go along with the public's belief that government still exercises oversight.[27]

Regulation will always be contested because the adoption and enforcement of rules is inherently political. Rules bestow advantages on some and disadvantages on others. As one historian of regulation aptly if bluntly stated: "regulatory mechanisms and regimes distribute wealth,"[28] by which he meant the distribution of position and opportunities from which wealth flows. It follows that interested parties, including both business groups and public interest organizations, will continuously seek to influence the rules of the game.

Rules and the Market-based Perspective

It would be one thing, and a good thing, if debates on regulation focused on the immediate consequences of particular regulations, including the ratio and distribution of benefits and costs. This would at least locate rule-making as a facet of democratic discourse.

Unfortunately, the critical role of government in enacting and enforcing protective safeguards is often overshadowed by the view that rules providing social and environmental protections are generally inconsistent with the needs of a healthy society. Following free-market theorists and political leaders aligned with organized business, adherents of this perspective assert that the well-being of the greatest number results when government is small and fewer and weaker rules are the norm. In this view, the public welfare comes from unfettered business activity, and regulations restricting business practices to insure public health are secondary to the benefits of free, competitive markets.

To be sure, there are plenty of defenders of regulations enacted to advance the public interest, but their advocacy of particular public safeguards is rarely joined to a critique of the market-first perspective. This creates a void in the public discourse: supporters of regulatory safeguards do not typically embed their advocacy in an understanding of the relationship of rules to markets.

There are at least three perspectives advanced in the discourse on regulation that should be regularly challenged. These are:

- Markets are the preeminent institutions of society;
- Markets somehow precede government and can operate without public support; thus regulation of markets is unlikely to be consistent with the natural order; and
- Markets would generate optimal outcomes if left unencumbered by rules, however well-intentioned the rules might be.

Markets are Preeminent

One dimension of the free market perspective with respect to regulation is the conceit that markets somehow are fundamental in the structuring of human affairs, and that governments should interject themselves only when markets "fail" to achieve public purposes or their actions give rise to unacceptable consequences. Such so-called "market failures" as environmental pollution, dangerous consumer products, racial and gender discrimination, excessively expensive health care, poverty, redundant workers, and many other common social problems are, in this puzzling version of political economy, all to be understood as "failures" of markets that otherwise are said to produce the right amount of goods at the sweet spot where demand and supply intersect.

For everyone except professional economists, this language—widely used and often parroted reflexively by non-economists—is extremely odd. The term "market" describes a set of structured interactions between buyers and sellers who freely exchange goods and services at arm's length. In everyday language, to say that the market has failed if air pollution or gender discrimination occurs is to imply that markets are endowed or created with responsibilities they could never accept or discharge. To say that markets have failed when negative externalities are deemed to be unacceptable or regrettable is to accept the questionable premise that markets are the primary instruments of social organization.

Strictly speaking, "market failure" is an economist's term of art, meaningful within the field of economics, but nowhere else.[29] The broad use of the phrase might be acceptable if economists took the time to explain that "market failure" is a technical term, and defined it accordingly. But economists don't do that, leaving their audiences to believe that the economy can be conceptualized as being shaped by market forces except in those unusual circumstances when "market failures" occur.

Language matters beyond the precise meaning of the words. When repeated often enough, the language of "market failure" reinforces the questionable notion that "the market" is the primary social force, and is somehow responsible for everything else. As Murray Edelman observed in his treatise on the subject, "…language forms shape the meaning of what the general public and government officials see. It is language that evokes most of the political 'realities' people experience."[30] The language of "market failure" diverts attention from an alternative narrative: democratic governments are created to moderate the behaviors of people and corporations when those behaviors are inconsistent with the common good.

For that matter, in the case of specific "market failures," one could even say that the language undermines the observation that undesirable developments such as air pollution and gender discrimination represent "*government failures*" to curb unacceptable behaviors of firms and individuals.

Markets Arise First

Remarkably, the view that markets are preeminent pervades public discourse despite the fact that, historically, governments have often been responsible for creating markets and setting their rules. In the contemporary imagination, there is no clearer example of buyers and sellers coming together spontaneously to exchange goods than the local farmers market. But the history of food markets tells a different story.

Before there were markets, there were authorities concerned with whether critical goods such as food were widely available at reasonable prices. In 18th century Paris, city government provided market venues to insure that Parisians had access to affordable fresh foods in sufficient quantities. The city government also generated rules to make sure citizens were given priority over speculators—for example, by requiring that individual consumers be allowed to shop before wholesalers.[31]

In post-Colonial America, every major city provided a market where farmers could sell directly to households. Washington, New York, Baltimore and other prominent cities all constructed market buildings and set the rules of trade. A primary task of these municipal governments—at a time before welfare state programs and substantial charities—was to insure that the population had access to an adequate food supply.[32]

Even today, in the local institutions seemingly best designed to maximize buyers' trust of sellers ("get to know your local farmer"), farmers markets are shaped by state and municipal regulations affecting the making and sale of home preserves, the marketing of meat and eggs, and the accuracy of scales. When market vendors accept food stamps, nutrition vouchers issued to low-income women, infants and children, and other public benefits designated for food purchases, they are also governed by elaborate rules to protect against fraud.

Of course governments support markets in other ways. When governments are not establishing markets, they are subsidizing them (as in the case of promoting airlines through air mail delivery contracts) or creating the infrastructure that allows markets to develop (as in the case of canals and "farm-to-market" roads). When they aren't subsidizing markets they are improving them—by requiring labeling of foods and drugs so consumers can make informed choices, for example. The voluminous evidence of how public authorities precede markets, establish them, set their rules, and subsidize them, documented again and again, thoroughly discredits the notion, promoted assiduously by free market theorists, that markets are the preeminent social institutions.

Unencumbered Markets Would be Better

To be sure, the libertarian assumption that markets are primary is not mostly based on an historical argument, but rather on the assumption that unfettered markets, guided by no greater intelligence than everyone pursuing his or her self-interest, provide optimal results for society. And it is easy to acknowledge that free-market dynamics yield positive results when the right (or "pure") market conditions apply. But public understanding of market dynamics in the real world has evolved to recognize that markets and public institutions work best when they work together—not just in practice but also because markets require regulations *even in theory*. From the perspective of economic theory, markets require regulation because the fundamental assumptions of free market theory—that independent buyers and sellers come together with full information and knowing their interests—rarely apply in the real world.

Specifically, government regulations are necessary for market operations in the following ways:

- When one party to the transaction lacks vital information (the economists call this information asymmetry), as in the case of consumers who are not able to tell whether a car will function properly or what the fine print in financial documents might mean for them;
- When regulations correct for monopoly dominance, as in the case of internet companies which could charge excessively high prices if they lack competition;
- When regulations correct for negative externalities such as pollution (the cost to others when the full effects of their activities are not incorporated into the cost of doing business), as in the case of dumping sulfur dioxide into the air, creating acid rain.

A relatively new perspective on regulation comes from behavioral economics, one that seems to challenge a central tenet of free market theory: that people know and are able to act on their preferences. In well-reported experiments, for example, behavioral economists have been showing that people's expressed interest in whether to enroll as an organ donor, or in a retirement plan, can be manipulated by establishing enrollment as a default option (people are enrolled unless they express a contrary interest) rather than requiring them to "opt in." In these experiments the subjects' circumstances haven't changed, just the way choices are presented to them. No one who has noticed that American corporations spend billions of dollars on advertising—apparently to successful effect—will be surprised to learn that consumers do not always know and act on their preferences until their choices are teed up.

III. REGULATION AND THE WAR OF IDEAS: THE ATTACKS ON REGULATION

For over 40 years, Americans have been subject to a concerted campaign to persuade them that government is inherently incapable of effective action, and that aside from some basic functions such as national defense, government is generally inimical to the national interest. A critical feature of the terrain on which this campaign has been carried out has been the proposition that healthy markets are primary in establishing the common good. The campaign has been carried out by think tanks, foundations, ideologically-driven associations for students, lawyers, and state legislators, as well as related journals, publishing houses, and broadcast media.[33]

Asymmetry in the Debate

Much has been written about the extraordinary conservative campaign to develop a powerful institutional apparatus to compete in the public arena. Here I want to focus on how the campaign for unfettered markets and against government and its role in the economy has skewed our political discourse in favor of economic self-interest instead of the broader public interest.

On the one hand, we have ideologically driven anti-regulation advocates who admit to virtually no redeeming aspects of protective rules, while reflexively promoting the virtues of markets. To these advocates, less regulation is almost invariably better. Those advancing the view that less regulation is better include professed libertarians who offer a principled if problematic perspective on the subject, and representatives of business who echo libertarian perspectives when it suits them, while welcoming regulation, government oversight, access to regulatory bodies, and public subsidies when these things serve their interests.

But in today's politics, the opposite of a general aversion to rules is not advocacy of more rules, but rather a respect for rules, combined with support for particular rules. People who take such positions are advocates of food safety, consumer protection, workplace safety, endangered species and other particular policy concerns. They focus on improving particular aspects of public health and safety and the environment. In other words, one side of the broad debate on regulation views public protections as intrinsically suspect, while the other side treats public protections as necessary for specific purposes.

The asymmetry consists of the mismatch between a view which presumes as a matter of course that less regulation is better, and a position which advocates regulation issue by issues to achieve common objectives.

Broadly speaking, those who generally oppose regulation can be divided into two camps: libertarians whose policy views derive from a consistent theoretical perspective and advocates who reference economic theory to advance their material interests.

The Libertarian Perspective

Up to a point, libertarians recognize the importance of rules that protect property rights. They even extend legitimacy to some environmental protection of air, water and land, so long as the regulatory intrusions are focused on protecting others' individual property. Restricting behaviors affecting water quality, for example, would be acceptable if they affected someone else's water, but not if they affected public lands or rivers and oceans in general.

Some libertarians acknowledge that regulatory objectives such as safe consumer products, access to health insurance, and eliminating racial and gender discrimination may be valid. However, as David Boaz writes in *Libertarianism: A Primer*, "the attempt to realize such goals by regulation is self-defeating," and better achieved through market mechanisms.[34] To be fair, libertarians do not say that they are indifferent to environmental quality. But they believe that private ownership and the stewardship that is said to go with private ownership is the surest road to environmental protection.

In the libertarian world view, the market will drive out unsafe or ineffective drugs such as those that are produced in vast quantities in under-regulated India and shipped to the United States.[35] In the meantime, presumably, individuals should be constructing private solutions to guard against irresponsibly formulated medicines that may come from abroad.

Conservative Opportunism

No doubt there are many principled people who consider themselves conservative, who in general favor small government, low taxes, and minimal restraints on individual behavior. There are others who call themselves conservatives, however, who like to knock away at government capacity when it suits them, while supporting expansion at other times. This is evident in the public pronouncements of the U.S. Chamber of Commerce and like-minded business groups, and by the actions and pronouncements of their allies in the U.S. House of Representatives, who captured the microphone when Republicans gained a majority in the House in the 2010 elections.

These conservatives deserve particular attention since they figure prominently in the current debate. Their assault on regulation has been wholesale, and untethered to particular regulatory matters. At every turn, no matter what the issue or circumstance, their opinion machine equates federal regulation with negative impacts on employment. Analysis of their public pronouncements confirms that they are entirely ideological in their advocacy, by which I mean that their advocacy resembles a belief system that is not subject to falsification among people who subscribe to it.

Asserting that virtually all regulations affecting commerce and industry are inconsistent with job growth, the critique is indifferent to concerns over or the value of workplace safety, public health and the environment. They say that regulations are simply "job killers"—a focus-grouped phrase repeated over and over again—and are particularly hurtful to small business. If these conservatives pay "lip-service" to the value of public protections, they nonetheless dismiss regulations as unaffordable when people need jobs.

To be sure, it is reasonable to probe the effects of regulation on employment. Such an inquiry would specify particular regulations in question, and examine their employment effects in balance with the objectives targeted by the proposed rule. It would weigh the effects on jobs against the consequences to participants in the sector—workers, owners, consumers—to determine the regulations' likely overall impacts.

This is not the inquiry in which these opponents of regulation choose to engage. Whether it is the oil drilling moratorium following the BP-Deepwater drilling disaster in the Gulf of Mexico, an EPA proposal to curb greenhouse gas emissions, the Dodd-Frank financial reform bill responding to the great crash of 2007, the creation of the Consumer Financial Protection Agency, or enactment of the Affordable Care Act in 2009—all were predicted to be job-killers by the U.S. Chamber of Commerce.[36] No matter what the issue, the Chamber promotes the notion that employment will suffer if public protections are put in place. The rhetoric has become so predictable that a *Washington Post* columnist wondered whether calling a proposed government action a "job-killer" was a requirement imposed by the leadership on Republican members of the House of Representatives.[37]

The proposition that regulation reduces jobs presumes that they will increase business costs, resulting in fewer sales and thus lower demand for labor. But the "job-killer" argument is not primarily dependent on theory. Proponents of this perspective maintain that it is confirmed empirically, referring repeatedly to a report authored by Nicole Crain and Mark Crain that the annual cost of regulation was $1.75 trillion, a report one Chamber of Commerce vice president called "the only comprehensive estimate of the impact of federal rules on the U.S. economy."[38] The report, however, is hardly comprehensive. Most conspicuously, it focuses exclusively on the costs of regulations without any attention to their benefits or, more importantly, to the jobs *created* by new regulatory requirements.

The Office of Management and Budget has systematically studied the costs of regulation for many years. In the 10-year period ending in 2010, it found that in the cases of 106 major regulations for which cost and benefit data were available, benefits were three to ten times greater than costs. For every agency considered, benefits exceeded costs. In June of this year, OMB reported to Congress that the economic benefits of federal regulations were in the hundreds of millions of dollars over the last decade, while the costs were a mere fraction of that total.[39] Study after study, as Isaac Shapiro and John Irons observed in a devastating critique, show that regulations have little impact, or a slight positive impact, on employment.[40]

To illustrate the scope of the omission more concretely, consider the requirement of automobile companies to reduce air pollution drastically, which led to the broad use of catalytic converters. Required adoption of air pollution reduction equipment might lead to a marginal increase in the price of cars, perhaps driving people to purchase less expensive vehicles and possibly leading to some layoffs as auto sales declined. However, under such a mandate jobs would be created among firms involved in making, installing and inspecting the converters. To bemoan the costs while ignoring the benefits, mourning the jobs lost in one part of the auto industry without recognizing the jobs gained elsewhere, is not analytically credible. One could tell the same story about banning climate-damaging coolants in refrigerators and requiring seat belts.

Of course, focusing only on the employment consequences of regulations says nothing about the value of increased health and safety, which inspired the regulatory market interventions in the first place. Nor does it say anything about the savings to the economy resulting from reduced health services claims. Carrying this thinking to its extremes, by the logic of the Chamber of Commerce we should question ongoing support for our schools, court systems and armed services because we incur costs to operate them.

The chorus that regulations are job killers was particularly shrill in 2010 and after, when the Republicans took over the House of Representatives, but the message continues to animate conservative rhetoric. As recently as January 2014, the American Action Forum summarized the previous year in regulation by ignoring benefits while proclaiming that the federal regulations in the previous year cost $112 billion.[41]

Another criticism conservatives leveled against regulation during this period is that regulatory "uncertainty" suppresses employment by discouraging business investment. The basic idea was that financial reform, implementation of the Affordable Care Act, and a dense regulatory agenda made planning difficult for American enterprise.

This claim was repeated endlessly and just as certainly was criticized by opponents as a weak stick for the Chamber to try to influence the regulatory agenda. For one thing, to the extent that business expansion was dampened during the recession it almost certainly resulted from reduced consumer demand, not inability to plan for the future because of possible changes in regulations.[42] Opinion surveys have been deployed to support both sides of this debate, but they do not reliably support the "uncertainty" perspective. In a poll of small business owners, for example, one-third of respondents reported that weak consumer demand was the most important business impediment, while fewer than half that number identified the level of government regulation as most important.[43]

These rebuttals support skepticism of the claim that inability to project the regulatory environment explains stalled job growth, but they miss a broader point. Undoubtedly, business people would prefer to know the outcome of particular debates sooner rather than later so that they can plan with greater information. But marketplaces always have a degree of uncertainty. Successful market actors find ways to minimize costs, maintain and improve product quality, and cope with new environments.

An irony of the conservative complaints that regulations impede business growth is that they ignore—almost absurdly—the role of innovation in successful business enterprises. It is as if the Chamber needs reminding why capitalist enterprises work so well. Successful businesses change their formulas, modify manufacturing processes, invent new products, automate, find profitable uses for waste, and send jobs overseas in their continuous search for competitive advantage. New rules—to eliminate toxic materials, improve safety in the workplace, or write contracts in plain language—are just a few of the myriad challenges firms have coped with in recent years to remain competitive. Compared to more profound challenges—whether skilled workers are available, interest rates on business loans will remain low, exchange rates (and the cost of materials and labor sourced overseas) will remain stable, or consumer spending will rebound—regulatory requirements do not necessarily loom large as sources of uncertainty, however much the Chamber of Commerce demonizes them.

It was front-page news in January when the *New York Times* reported that Coca-Cola, one of the biggest companies in the world, was ready to acknowledge that climate change presents it with extraordinary problems. Greater frequency of floods and droughts around the world are disrupting the company's supply of sugar cane, sugar beets, citrus and other ingredients. Clean water, critical to a global soft drink company, is getting harder to come by or becoming more expensive to obtain.[44] Compared to the climatological shifts forcing such disruptions, American businesses would count themselves fortunate if the greatest source of uncertainty they faced was whether new regulations, targeted to reduce the incidence of specific hazards or injustices, will be forthcoming.

The assertion that uncertainty is responsible for impeding job growth is particularly rich because, if it were true, conservatives surely have been primary authors of the impedance. They want it both ways: first objecting to new rules in environmental protection, financial regulation, and other regulatory arenas, then bemoaning the length of time it takes to resolve objections they raise.

If one believed that part of the cost of regulation is the uncertainty about regulatory change, one might think that conservatives would favor streamlining the regulatory process. On the contrary, they devote extraordinary resources to try to encumber it. They have proposed adding layers of responsibilities onto regulatory agencies greatly beyond what the agencies currently have to do, and seek to have Congress micro-manage the regulatory process even though the primary reason regulations are written by administrative agencies and not legislatures is that legislators lack the organizational capacity, time and expertise to develop detailed rules.

Following their takeover of the House of Representatives in 2010, the House Republicans promoted two pieces of legislation that would have greatly encumbered the government's regulatory ability while adding layers of procedural complexity. The Regulations from the Executive in Need of Scrutiny (REINS) Act of 2011, and the Regulatory Accountability Act of 2011, would have further encumbered an already complex regulatory process by adding layers of congressional oversight, for which the Congress is poorly staffed, and would have required time-consuming analysis of the costs of regulation that would do little to improve the quality of resulting rules.

More recently, the proposed Regulatory Accountability Act of 2013 would lay additional burdens on federal agencies already heavily encumbered in the rule-making process by calling for additional reviews, and setting time limits for completing the assessment of regulations' potential impact. In addition, they would require greater congressional oversight of the regulatory process, introducing a formula for rule-making paralysis considerably beyond the complex and far-from-satisfactory situation that currently exists.

Conservative contempt for the regulatory process was on full display in the Regulatory Improvement Act of 2014. This proposed legislation would create a Commission to eliminate or modify regulations based on a fast-track review of secondary materials and the testimony of expert witnesses. Regulations that had been previously authorized by Congress and adopted by the agencies after deliberate study and revision—based on comments from the public and interested parties—would be put to an up-or-down vote without the benefit of the thorough rule-making process through which the regulations were originally developed.[45]

A reading of this perplexing history suggests that conservatives are for smaller government when it comes to reducing regulation and its enforcement, yet they are for larger government when it comes to encumbering regulatory agencies with greater responsibilities for study, analysis and reporting to Congress.

It Isn't Enough to Resist Attacks on Regulation

A healthy society should expect to review its rules periodically. New problems arise. New interests emerge that need to be accommodated. New ways of addressing old problems should be explored. Existing ways of addressing old problems may be ineffective, or become obsolete. In short, the country's regulatory framework from time to time needs to be revised, elaborated, streamlined and upgraded. These observations apply to governmental administrative practices just as they apply to corporations, religious institutions and civic associations.

Public officials with pragmatic approaches to governance share these perspectives. Senator Jon Tester of Montana, for example, hit many of these points when he opened a hearing on federal regulation in March, 2014. "Over the years," he said, "regulations have helped keep our drinking water clean. They've ensured our food is more sanitary and labeled more accurately. And they've led to dramatic improvements to workplace health and safety." At the same time, he pointed out, "…some [regulations] have gone too far, and… some haven't gone far enough. While some regulations have grown increasingly irrelevant or costly over time and can no longer be justified, there are others that have been on the books for years and years but remain relevant today."[46]

Senator Tester was at pains to provide a balanced perspective. Unfortunately and paradoxically, in today's polarized political environment, the balanced perspective actually reinforces the extreme view with which it appears to be contrasted. The partial focus on unnecessary or obsolete regulations, regrettably, enlists the balanced commentator in a tacit alliance with conservatives who oppose regulation in general. The larger message is that one side is entirely opposed to regulatory interventions, while the other side is opposed to substantial portions of the regulatory agenda. President Obama's reasonable 2011 call for a review or updating of obsolete regulations, seen in the context of the Republican onslaught on regulation, skews public consciousness with similar effect.[47]

An irony for liberals in their efforts to defend government's regulatory capacity is that, quite aside from the possibility that regulations may need to be revised, they very much have their own frustrations with the inadequacy of the existing regulatory regime. Liberals are dismayed by what seems to be the disproportionate influence of business interests in regulatory practices, particularly in industries' access to decision makers, and the appointment of industry personnel to top positions in regulatory agencies.[48] Where the federal government partners with states to enforce the regulatory agenda, as in the cases of environmental protection and workplace safety, liberals are distressed as they see reductions in state budgets undermine the nation's ability to provide regulatory protections.[49]

Liberals are frustrated as they watch the Congress increase responsibilities of agencies such as the Commodity Futures Trading Commission, the Security and Exchange Commission, the EPA and others, while limiting or even cutting their personnel.[50] Likewise, they are alarmed as they watch the number of firms and facilities requiring regulatory oversight increase as the economy expands, without corresponding increases in inspection personnel.

Liberals are frustrated that the Obama Administration has delayed important pending rules, such as regulating coal ash disposal sites and extending minimum wage and overtime protections to home-care workers.[51] Particularly frustrating are the delays attributable to processes put in place by the George W. Bush Administration and continued under President Obama that involve the Office of Management and Budget as a gatekeeper of the regulatory agenda.[52]

Perhaps most of all, liberals are concerned that many areas in which protective safeguards are incomplete do not get the attention they deserve because the conservative attack on regulation seems to put regulators entirely on the defensive.[53]

It was not so long ago that liberals had to mobilize to strengthen the regulation of drugs when the big pharmaceutical companies dominated drug regulation, and to fight the tobacco companies' ability to thwart regulation. They continue to rail against the incomplete system of safeguards that leaves workers in coal mines, chicken processing plants and other workplaces vulnerable.

In this they are playing familiar roles. Liberals are not reflexively supportive of government policies. They know that, historically, American governments have promoted the interests of the powerful at the expense of the powerless, denied relief to workers exploited by employers, and tolerated deeply unjust private behaviors. At any juncture, liberals may be at odds with prevailing regulatory practices, which may be misguided, underfinanced, lacking in enforcement capacity, or otherwise deficient. But at the very least they retain an understanding that democratic rule-making is a critical component of a prosperous market economy that works for all.

CONCLUSION

The critique of regulation as inconsistent with the common good is part of the larger conservative project to undermine hard-won rules limiting business activity. The critique is consistent with efforts to undermine the reputation of government and make it smaller and less capable, to resist initiatives to make public services affordable and widely available, and to limit public policies that reduce inequality. The attack on regulation is only one element in a struggle with a much larger canvas. One implication of this assessment is that turning around the conversation on regulation is part of a broad contest that goes beyond the focus on the implications of regulation for businesses and the economy.

Although the struggle takes place along many fronts, it cannot be engaged in the abstract. Engagement has to come in the concrete experiences of people's lives. The role of government in protecting people against things they cannot protect themselves from is a good place to start.

I conclude with several propositions outlining the common-sense arguments and talking points we should be deploying in the public debate about government regulation and government's rule-making role in society and the economy.

- **Making rules to achieve the common good is the essence of self-government.** The small government/market-knows-best perspective, when applied broadly to the regulatory process, places unproductive and distorting limits on the rule-making agenda. Americans need to hear a new and much clearer message about how government and markets interact. The message needs to concentrate on rule-making as a facet of democratic decision-making, on the improvements in Americans' lived experiences as a result of protective laws and safeguards, and on the need to assess existing and proposed rules pragmatically—on their merits rather than on preconceived assumptions about their effects on the economy.
- **Americans consistently favor regulations that they know have contributed to improved quality of life**. Discussion of regulation should be linked to food safety, consumer protection, environmental safeguards, and other rules that are associated in the public mind with specific

achievements. Supporters of regulation need to remind people of the conditions they enjoy and protections they experience through regulation.

- **Americans value democratic governance**. Although they are skeptical of government in many respects—in this contentious period particularly—they have positive associations with the American commitment to self-government. They take pride in the accomplishments of their communities. Many regulations, such as drunk-driving restrictions and environmental protections, clearly have these associations.
- **People should be helped to recognize the links between regulations and the democratic institutions that give rise to them**. Laws and the regulations that implement the laws are *our* laws and *our* regulations. If a regulation is not working or is counterproductive, that doesn't mean that regulations in general are deficient. It means that *we* need to authorize our representatives to replace the unproductive rules with better rules.
- **This democratic perspective contrasts with one of the cornerstones of anti-regulatory propaganda—that regulations originate with so-called faceless, unelected bureaucrats.** For the most part, regulations do not originate inside a public agency. Most of the rules in place today started with the concerns of citizens and legislators' responses to those concerns. In addition, many of the rules are written, in very complex work environments, by scientists, physicians, statisticians, engineers, attorneys and other professionals who in other times were called dedicated civil servants. Supporters of regulation should put a spotlight on this professionalism.
- **In the swirl of competing views on American politics, advocates of a measured perspective on regulation may want to embrace the perspective of "democracy as problem solving."**[54] It is widely said that people are tired of partisan conflict and political paralysis. But to move that state of affairs to a better place they need access to a broad perspective that goes beyond scolding their representatives for being unable to work together. An element of that new perspective must be that government and markets, far from being inherently incompatible, can be mutually supportive and, indeed, must work, and work best, together.

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