Repealing Rules

James V. DeLong

FOR ALMOST FIFTY YEARS regulation has tended to be a one-way ratchet. In discussions of regulatory policy, the question has almost always been whether to impose additional controls over some area of national life, and only rarely whether regulations should be eliminated.

In the last few years, the dialogue has begun to change, as unease about the underlying premises of the regulatory state—about not just its economic efficiency, but its social efficiency and moral legitimacy as well—has affected the academic and intellectual communities. As Harvard's President Derek Bok recently stated,

> judges, lawmakers, scholars . . . need to search for a new understanding that is no less sensitive to injustice but more realistic in accounting for the limits and costs of legal rules in ordering human affairs. . . . Lacking such a vision, judges and regulators will continue to drift toward a general willingness to intervene whenever they feel that one person has suffered at the hands of another. . . . What emerges from this process is a spurious form of justice. . . . [T]he law may seem enlightened and humane, but its constant stream of rules will leave a wake strewn with disappointed hopes of those who find the legal system too complicated to understand, too quixotic to command respect, and too expensive to be of much practical use [*Harvard Magazine*, May/June 1983].

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The current administration took office with the announced intent of reducing regulation, but it has not been easy for it to find reverse gear on the regulatory machine. Relatively few repeal efforts have been carried through to completion and, of those that have, several have not survived the courts. In the most notable of these, a case now awaiting review by the Supreme Court, the U.S. Court of Appeals for the District of Columbia reversed the decision of the National Highway Traffic Safety Administration (NHTSA) to repeal its rule requiring passive restraints in cars. But this is not the only example. The same court also nullified the repeal by the Civil Aeronautics Board (CAB) of its rule on smoking in airplanes, and district courts have invalidated both the Department of Labor's attempt to revise the regulations under the Davis-Bacon Act and the Treasury's reversal of position on its final, but not-yet-effective, requirements for ingredient disclosure on alcoholic beverages. (See page 29.)

The decisions have not gone all one way. The Federal Communications Commission (FCC) has been upheld in a number of deregulating actions, as has the Interstate Commerce Commission, and there may have been other revocations which did not arouse enough controversy to reach either the courts or the newspapers. Nonetheless, it is clear that, barring an unlikely Supreme Court decision giving agencies a blank check, this administration or any other that is interested in deregulating must approach the issues surrounding repeal systematically.

The Rules on Repealing Rules

On the surface, this does not seem to present any particular problems. The starting point is the recognition that current law provides no special track for revocation. The statutes governing rulemaking procedures include the unmaking of rules within the general category of rulemaking, so the basic process is the same in both cases. At a minimum, repeal requires an agency to publish a notice of proposed rulemaking, collect public comments and, in the end, accompany any final rule with a statement providing a rational explanation of the reasons for its action. If the statute that governs rulemaking in a particular area requires an agency to follow more elaborate procedures—oral hearings, for example—this will apply to revocation as well.

Nor is there any special track for judicial review of repeal. Under the statutes, a court will reverse the agency if its action was not in accord with its legal authority or if it was "arbitrary." In addition, many of the more recent rulemaking statutes expand judicial review to require courts to reverse the agency if its action is not supported by "substantial evidence." This term is ambiguous enough in the normal context of rule promulgation, and its meaning in the context of repeal is anyone's guess. The safe approach is to read it as requiring the agency to take cognizance of available empirical evidence.

The second crucial point about repeal follows from the first. Given that the agency must provide a rational explanation for an action and must in some cases support that explanation empirically, it is necessary for the agency to think through exactly why it *has* decided on revocation. The number of possible reasons is not infinite, and the following taxonomy of possibilities may be complete:

- *Change of circumstances.* The rule may have done its job and no longer be needed, or may otherwise have been made obsolete by events. Whatever the reason, the agency decides that the conditions that brought forth the rule no longer exist and, therefore, neither should the rule.
- *Failure.* The rule is not achieving its intended purposes and the agency believes that either a new approach is needed or the purposes must be given up.
- *Side effects.* The rule has unanticipated or excessive consequences of some kind, unrelated to the original purposes, that outweigh any benefits.
- *New knowledge.* The rule was premised on particular scientific, technical, or even legal assumptions that have since been refuted or rendered less certain than they were originally thought to be.
- *Original sin.* On reexamining the original record, the agency finds that its initial decision was not justified by the information available. This can take many forms, and is of course most likely to occur after a change of personnel. The new team decides that its predecessors misjudged the reliability of the data, or drew erroneous conclusions from it, or made some other technical error, or that that rule was in some other way flawed from the beginning.
- *Change of philosophy or policy.* This, again, is most likely to occur after a change of personnel, especially one following a shift in administrations. The new officials believe that the original decision represented a mistaken policy and that even in the absence of new information it should be reversed. This category could encompass some of the preceding ones, of course. A change in policy could include a change in the evidentiary standards to be applied to agency records. (See Timothy J. Muris, "Rules without Reason at the FTC," *Regulation*, September/October 1982.) Or it could ascribe great importance to certain side effects that a previous administration chose to ignore. The category could also include a reassessment of redistributions in favor of particular constituencies. It is unlikely, for example, that a Republican Department of Labor will regard labor unions with the same smiling countenance as will a Democratic one.
- *Broad philosophy.* All of the considerations cited above involve an agency's stance vis-à-vis a discrete rule. It is also possible for the government to take a broader view, akin to that expressed in the quotation from Derek Bok. It could believe that the crucial scarce resource is public understanding and acceptance of regulation, not just dollar costs, and that the necessary analysis is whether a particular regulation represents a good use of that resource. In a government that seems to be leaking legitimacy from every pore, this may be no small consideration.

The third point about repeal involves the application of these reasons. In theory, this is not a difficult task. The first five of the reasons, at least, are firmly anchored to the original purposes of the rule and involve technocratic considerations that will usually be susceptible to coherent factual explication. The last two, while more political, seem to be covered by the fundamental rule that an agency is operating with maximum discretion when it is making "policy choices" and that a court will rarely reverse an agency decision in this area.

The Default Drive

Finally, one must throw in a factor that is easy to forget, especially if one lives in Washington. Regulation is not a process by which the government creates order out of some primeval chaos. There are functioning nongovernmental decision processes in the form of the market, the common law, voluntary associations and standards, collective bargaining, and other private mechanisms. It is in fact an assumption of our political system that most of our national life should be governed by these processes—they are the "default drive," in current computer language. Regulation should be an exception, used only when these processes are for some reason inadequate or when they need government bolstering.

In consequence, a decision to repeal a rule does not necessarily mean that the result mandated by the rule will not or should not occur; it means only that the question will be returned to these other decision processes. Some good examples are given by the repeal cases that have come before the courts. Even in the absence of NHTSA's air-bag rule, consumers might demand passive restraint systems if insurance companies provided big enough rate incentives or if common law courts classified failure to wear seat belts as contributory negligence and barred recovery of damages by anyone injured as a result. Even without the FCC rule setting a maximum on how many minutes of commercials radio stations can broadcast per hour, stations will not broadcast sixty minutes' worth; rather, many of them will compete for listeners by boasting how few commercials they run. Even if the appeals court upholds the Treasury's revocation of its labeling rule for alcoholic beverages, that would not forbid labeling; it would simply turn the decision on that matter back to the market.

This factor is important because it implies that a rule should carry a continuing burden of justification. The question is, "Knowing what we know now, would we pass this rule?" If the answer is "no," then repeal is in order.

Application of this sort of presumption against regulation would make repeal considerably easier than it would otherwise be. It would limit the scope of inquiry in two important ways:

- First, most rules depend on a chain of reasoning each link of which is necessary to the final result. If the burden is on those who want to continue regulating, then a break in any of the links justifies repeal. So an agency could conduct a proceeding to analyze the questionable link alone. It would not have to replicate the entire initial effort—though, of course, it might have to look at the extent to which private parties had changed their positions in reliance on the rule. If the procedural requirements are complicated, this could make a considerable difference.
- Second, in any rulemaking much of the time and effort goes into an initial broad sweep for possibly relevant information and analysis, and an initial sorting of this material. If a repeal proceeding uses the results of this as a starting point, the agency is automatically far along the rulemaking road.

This schema is straightforward enough, and, if it holds, the only real requisite for future repeal efforts would be that the agencies get better organized to articulate and support their positions. It would not allow them to repeal regulations summarily on the ground that they offend the politically powerful, but they are not supposed to do this anyway.

A Right to Regulation?

However, it is not clear that the schema will hold, because the repeal cases—and this is one of their most interesting aspects—exhibit a somewhat different view of rulemaking. They do not presume that nonregulation is the default drive. Instead, they seem to assume that there may be a privately enforceable right to regulation and that, at best, consignment to the

The Track Record on Repeal

Among key recent cases in which courts have entertained challenges to the repeal of rules are:

FCC v. WNCN Listeners Guild (1981). In 1976, the FCC said it would no longer review changes in entertainment programming when considering applications to renew or transfer radio licenses, and argued that market forces would promote the diversity needed to protect the "public interest." (See "Reversing the D.C. Circuit at the FCC," *Regulation*, May/June 1981.)

The Supreme Court found that the FCC's explanation was adequately "reasoned" and its decision to rely on the market did not violate the statute.

NAACP v. FCC (1982). In 1964, the FCC announced it would not approve applications to buy TV stations in one of the top fifty markets without holding an evidentiary hearing on the issues. In 1979 the commission revoked this policy on the grounds that its fears of undue concentration had been exaggerated and that other multiple-ownership rules were sufficient to deal with any problem.

The D.C. circuit court upheld the decision, finding that the agency had adequately supported its conclusions and rejecting the plaintiff's argument that the agency had the burden of proving that "no harmful effects would flow from repeal." The agency's obligation was simply to attempt to have all views represented, not to seek out all available information, and plaintiffs could have introduced information on harmful effects if it existed.

Office of Communication of the United Church of Christ v. FCC (1983). This case involved a three-year rulemaking which ended in the "sweeping deregulation" of the commercial radio industry. Although the FCC rejected a totally market-oriented approach, it substantially relaxed requirements on nonentertainment programming, public-interest programming, and minutes per hour of advertising. It also eliminated the requirement that stations maintain program logs. (See "Radio Deregulation: Stay Tuned," *Regulation*, March/April 1981.)

The D.C. circuit court upheld all these actions but the last.

State Farm Mutual Automobile Insurance Co. v. Department of Transportation (1982). The air-bag controversy has become one of the great symbolic issues of regulatory politics. Under President Carter, NHTSA—after twelve years, sixty different *Federal Register* notices, two court of appeals decisions, and innumerable congressional interventions—promulgated a rule requiring automakers to install either air bags or automatic seat belts in their new cars. In 1981, after the rule had become final but before it had actually taken effect, NHTSA repealed it. The agency's reasoning was that most automakers would comply with the rule by using automatic belts that consumers could easily undo, that the costs of the restraints would be justified only if they raised seat-belt usage from its current level of 11 percent to at least 24 percent, and that the earlier predictions of such an increase were unreliable. (See "Active Judges and Passive Restraints," *Regulation*, July/August 1982.)

The D.C. circuit court reversed, primarily on the ground that—given the existence of the rule—the issue was "not whether evidence shows that usage rates will increase . . . but whether there is evidence showing they will not." The agency could not rest its decision on the uncertainty that the increase would in fact occur. In addition, the agency had not met its obligation to consider alternatives other than total repeal.

Center for Science in the Public Interest v. Department of the Treasury (1983). In 1980 the Treasury Department published a rule, effective January 1, 1983, requiring that liquor labels contain either a list of ingredients or a statement on how to obtain such a list. In 1981 the agency rescinded the rule with a two-paragraph notice to the effect that benefits did not justify the increased costs to industry and to consumers in general, and that the rule was incompatible with Executive Order 12291 and with international obligations.

The D.C. district court found itself "required to reject agency actions such as this which are ill-considered and superficially explained."

Action on Smoking and Health v. CAB (1983). The CAB started regulating smoking on airlines in 1973 by requiring separation of smokers and nonsmokers. In 1979 it also required that airlines accommodate all passengers desiring a no-smoking seat, that smoking be banned when ventilation systems were not functioning properly, and that cigar and pipe smokers be specially segregated. In 1981 the board rescinded the ventilation and pipe-and-cigar provisions, and allowed airlines to condition their guarantee of a no-smoking seat on receiving some reasonable pre-boarding notification.

The court reversed the action on the ground that the agency had not explained it adequately.

Building and Construction Trades Department, AFL-CIO v. Donovan (1982). This case involved the Department of Labor's attempt to change some of the definitions in the Davis-Bacon Act.

The D.C. district court found, with one exception, that the former definitions, which had been applied for almost fifty years under eight presidents and fifteen secretaries of labor, represented the correct interpretation of the law, and that the department did not have the authority to change them.

nongovernment decision processes of society is an option that stands on the same footing as regulation.

This view is especially noticeable in the passive restraints opinion. While Judge Mikva did not articulate the matter this way, his long discussion of the congressional history of passive restraints can be read as an inquiry into what presumptions Congress intended NHTSA to apply. Looked at from this perspective, he concluded that Congress intended the nonregulation option to be a last resort—the agency could reject regulation in the passive restraint case only after examining and refuting all reasonable affirmative options.

The same concepts run through some of the other cases as well, including those in which agency actions were upheld. In the FCC radio cases, for example, the court does not appear to regard a return to reliance on market forces as anything except one regulatory option, to be weighed against the more conventional possibilities of command-and-control. One of the reasons for the FCC's success in defending its deregulatory efforts has probably been its care in explaining the importance and likely impact of market forces. By way of contrast, in repealing its smoking rule the CAB seems to have been a bit cavalier in assuming that the "market will provide." The point may have been clear to the CAB economists, but it was not so obvious to the D.C. circuit judges.

The intellectual roots of the idea of a right to regulation are too complex to trace here. They involve the history of the Administrative Procedure Act of 1946, the nature of congressional delegations empowering agencies to make rules, developments in the concept of standing to sue, the anomalies surrounding judicial review of policy decisions, and other legal esoterica. For present purposes, it is enough to note that if such a doctrine ever establishes itself, especially if it includes the idea that benefits conferred by regulation become vested rights entitled to a presumption of continuance, it could make repeal of rules very difficult. In some cases it would require the agency to show that the beneficiaries of regulatory distributions of wealth were in some way morally unworthy, which is virtually impossible. In others, it might require the agency to demonstrate clearly that the default drive outcomes would be superior. That would put deregulators in a difficult bind, since one of the most important arguments in favor of private decision processes—especially the market—is that it is hard for the government to determine which outcomes are superior to which other outcomes. An agency can hardly lay claim to omniscience in court to defend decisions premised on its lack. A judge who does not share this skepticism of command-and-control is likely to be more impressed by the losses confronting the plaintiffs before him.

Furthermore, to the extent that a right to regulation creates a presumption in favor of the status quo, the link between the rule's original purposes and the repeal proceeding is likely to be cut. If the agency argues that the premises of the rule were flawed and the rule in fact unnecessary, the plaintiff will respond that the rule had serendipitous side effects, and that it is arbitrary for the agency to limit its focus to the original rationales. (This argument was in fact offered in one of the FCC cases, but the court rejected it on the grounds that the plaintiff's interests were adequately protected through other agency regulations.)

But if this link is cut, then it becomes unclear just what the agency must establish. Must it show only that there is some plausible set of circumstances under which repeal would make sense, ignoring alternative proregulation scenarios? Must it refute every argument in favor of the rule that the beneficiaries raise? Who has the burden of proving what, with what evidence? All of these questions become imponderable.

THE STATE FARM DECISION, expected to appear before this article reaches the newsstands, will provide the general framework within which these questions will be addressed in the future. However, given the special circumstances and idiosyncratic history of the passive restraints issue, it is unlikely that the case will provide any definitive answers. In the long term, the problems of repealing rules cannot be separated from the broader question whether rules made by federal agencies do in fact create new categories of vested interests that have a presumptive right to the continuation of regulation. If they do, if the courts rule that this is indeed what Congress intended, then reverse gear on the regulatory machine may not be just hard to find; it may be virtually nonexistent. ■

Federalism in the Supreme Court

The Fall of the House of Usery

Grover Rees III

FEDERALISM—THE IDEA THAT our central government's powers are delegated to it by the states and are therefore limited—is a rare and delicate flower that blooms briefly in election years. Even as Americans have become accustomed to having more and more decisions about their lives made by an organization known to its admirers as "the public sector," they have also come to expect that virtually all of the really important decisions will be taken at the organization's home office in Washington, D.C. The notion that the fifty states are "sovereign," that real and inalienable powers reside in deliberative bodies that meet in Topeka, Honolulu, and Little Rock, seems increasingly quaint. And perhaps worse than quaint, since it raises the specter of Balkanization of the national economy. The ritual invocation of that specter has long been used to frighten young constitutional scholars around campfires —even though, in view of the effects of the postwar de-Balkanization of the Balkan states, it does not seem unreasonable to fear other things more than having a central government that is too weak.

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Many Americans, even those who are aware that there is now in progress a struggle for the soul of the U.S. Supreme Court, would be surprised to learn that the struggle is mostly about federalism. The Supreme Court, in fact, has always taken the position that the states are true sovereigns, in the sense that there are some decisions of state legislatures that Congress cannot overrule, no matter how much it wants to. One reason the Court has taken this position is that the Constitution clearly requires it: the Tenth Amendment states that "all powers not delegated to the United States by the Constitution . . . are reserved to the States." That amendment was proposed by the First Congress as part of the Bill of Rights. It was designed to address the principal objection of those who had opposed the Constitution and an important misgiving of many who had supported it: that the federal government, once established, might eventually exercise all power to the exclusion of the states.

As Justice Sandra O'Connor has recently observed, those who ratified the Constitution had several reasons for wishing to ensure that the states would continue to hold ultimate power on all matters other than those delegated to