

Dēmos

# GOOD RULES

**10 STORIES OF SUCCESSFUL REGULATION**

JAMES LARDNER

## ABOUT DĚMOS

Dēmos is a non-partisan public policy research and advocacy organization. Headquartered in New York City, Dēmos works with advocates and policymakers around the country in pursuit of four overarching goals: a more equitable economy; a vibrant and inclusive democracy; an empowered public sector that works for the common good; and responsible U.S. engagement in an interdependent world.

## ABOUT THE AUTHOR

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# INTRODUCTION

In the school of brutally hard knocks, America has relearned something about the business world: it needs rules. When we let corporate and financial insiders decide large questions of right and wrong for themselves, we invite trouble. The most devastating financial crisis since the Great Depression, the biggest mining disaster in four decades, and the worst undersea oil leak (and one of the worst environmental tragedies) ever have driven that point home.

This report documents another under-appreciated lesson of our national experience - that good rules and effective enforcement are within our power to achieve. It may be hard to look past the cascade of calamities; but if we make the effort (and turn down the volume knob on the cynical voices telling us to expect no better), a more hopeful story comes into view. That story is one of daunting health, safety, and environmental problems overcome or eased by acts of federal, state, and local rule-making; of measures that have saved lives, prevented sickness, empowered workers and consumers, spurred innovation, and advanced the common good.

## HOW REGULATION CAME TO BE

The United States was never, as some imagine, a land of unfettered commerce. Professional licensing, patent protection, rudimentary building and zoning codes, laws against the adulteration of meat, bread, and flour – these and other forms of regulation go back to the days of the Founders and before. But there have been times, like our own, when innovation and new business practices and institutions got far ahead of the rules.

After the Civil War, the new technologies of oil, steel, railroads, and electricity, and the giant corporations in command of those discoveries, overwhelmed the simple (and mostly state and local) regulation of the pre-industrial age. Out of that period of convulsive change came the first great wave of modern regulation. It included measures addressing the unsanitary practices of the meat-packers; the price-fixing and secret deals of the railroads; the exploitation of child labor in garment factories, mines, and other gritty and dangerous fields; and the brute power of the huge industrial combinations known as “trusts.”



1905: A Meat Packing Plant

Victories did not come easily. Nor did they come from on high, as edicts handed down by an elite. Time and again, the back-story of reform involved ordinary citizens banding together to call for action, industries resisting fiercely (or trying to co-opt the process), and elected officials responding slowly, often only after a galvanizing tragedy like the Triangle shirt-factory fire of 1911, which led to passage of some of this country’s first occupational safety laws.

Modern regulation arose out of crisis and struggle, but also, just as importantly, out of the momentum of accomplishment. By the middle decades of the twentieth century, Americans could look around and see an encouraging number of places where rules had been implemented and conditions had improved. This country’s successful experience with regulating the meat industry inspired a similar approach to the chicanery of the old-time pharmaceutical world. Airline safety regulation provided a template for auto safety regulation.

Such laws exist today because people fought long and hard for them. And they exist because of the benefits they have brought in one realm of life after another. Work-free weekends; childproof medicine caps; cleaner rivers and lakes; reduced teen smoking; infant car seats that do not crumple in accidents; civil-rights protections for people of color, women, and gays – that is just some of what we have gained as a nation through rules devised and enforced by the imperfect institutions of American democracy.

## DIFFERENT SITUATIONS, DIFFERENT SOLUTIONS

Good rules come in many shapes and sizes. Some of the measures described in these pages follow a “Thou Shalt Not” model (banning the use of DDT as a pesticide, for example). Some are affirmative (requiring seatbelts and airbags in automobiles). Some set a floor (the minimum wage); others set a ceiling (on the power-plant emissions responsible for the problem of acid rain).

A few of these stories turn on the efforts of a social movement to win passage of a piece of landmark legislation, such as the Americans with Disabilities Act. Others involve a series of measures taken over a span of years. The gains against cigarette smoking came through an incremental and opportunistic approach, including higher taxes and local and state smoking bans that applied at first to public buildings, later to private workplaces, and eventually to restaurants and bars. This was how a loose coalition of activists, public health specialists, and policymakers made headway against a politically powerful industry tapping into a strong national commitment to personal liberty.

Developing good rules, like developing good products, takes persistence and flexibility, not just in getting policies adopted but in getting them right. Rule-makers have sometimes been strikingly creative, devising measures (like the National Do Not Call Registry to address the problem of aggressive telemarketing) that achieve important results with a nudge rather than a shove. With the Home Mortgage Disclosure Act of 1975 and its sequel, the better-known Community Reinvestment Act of 1977, Congress found a way to use disclosure to prod mortgage and small-business lenders into a process of self-examination; by shedding light on the insidious practice of “redlining,” these laws empowered citizen groups to work with banks to change their practices. Reformers arrived at this imaginative formula after an earlier set of civil-rights and fair-lending laws had failed to do the job.<sup>1</sup>

## RULES NEED TO EVOLVE

When the business world moves on and regulation stands still, progress can unravel. We have seen it happen with the body of rules that used to govern the world of banking, lending, and securities. Developed in response to the financial meltdown of 1929-33, those rules gave America a long respite from the financial panics that had been regular and terrible occurrences as far back as anyone could remember. For nearly half a century, we had a stable financial economy – one that served the needs of the real economy, not just its own.

The success of financial regulation rested on a set of basic ideas (involving transparency, leverage limits, and capital reserve requirements, among other things) that stood the test of time. Written for a simple universe of regulated institutions and products, however, the regulations of the 1930s did not anticipate the private-label mortgage securities, off-balance-sheet accounting, credit default swaps, and other novelties introduced by the financial go-getters of the 1980s and ‘90s. And instead of moving to close the gaps, official Washington bought into the go-getters’ characterization of their innovations as risk-management tools that made rules unnecessary.

The theory of deregulation is to let markets function “freely,” without “government intervention.” In practice, regulated industries have often been permitted to pick and choose, keeping the forms of intervention they like and dispensing with the rest. Financial regulation was a two-way street, with banks receiving extensive public support (in the form of, among other things, deposit insurance and low-interest Federal

Reserve credit) in return for their acceptance of a set of safety and public-service requirements. Under the banner of deregulation, congressional leaders and administrations of both parties removed many of the restraints, but left the guarantees and supports in place, allowing the industry to develop a set of wildly speculative new products and practices that put the whole economy at risk. We are living with the results.

## RULES NEED TO BE ENFORCED

In addition to the disasters in mining, drilling, and finance, Americans have witnessed a series of defaults involving auto, food, and drug safety, clean air and water, and labor and workplace protections. In case after case, the breakdowns have been ones of enforcement as well as rule-making.

Some of these failures have been scandalous. Two years before the Minerals Management Service had to answer for its lax supervision of offshore drilling in the Gulf of Mexico, mining interests secured favorable rulings from regulators, who (according to an inspector general's report) had "frequently consumed alcohol at industry functions, had used cocaine and marijuana, and had sexual relationships with oil and gas company representatives."<sup>2</sup> It is certainly fair to wonder whether BP might have taken greater care in the Gulf if it had been dealing with a more credible watchdog.



Oil from the BP spill washed up on the beach.

Credit: Flickr/USFWS/Southeast.

But while the seamy tales get the most attention, the deeper problem may be the one known as "cognitive capture," in which regulators adopt an industry's priorities and concerns as their own. For much of the past two decades, leaders of the Food and Drug Administration have boasted about the accelerated approval of new pharmaceutical products – gains achieved, we know now, partly by cutting back on the monitoring of products already on the market.<sup>3</sup> Unsurprisingly, this period has also been marked by a growing number of product recalls.

In the world of financial regulation, too, regulators have often defined their mission as one of stimulating innovation rather than protecting the public. Not only did federal bank regulators fail to stand up for the victims of predatory mortgage lending, they did the predators' bidding by telling state agencies that only Washington, which had failed to act, had the authority to act.<sup>4</sup>

Stories like these (and there have been disturbingly many) feed a sense of despair. But regulatory capture, whether sordid or subtle, is not inevitable. The great majority of the people who go to work for watchdog agencies are looking for a chance to serve the public good. When cynicism sets in, as Rena Steinzor and Sidney Shapiro observe in their 2010 book *The People's Agents and the Battle to Protect the American Public*, it tends to start at the top – often with hostile second-guessing and deal-making by politically-appointed managers, White House overseers, and congressional committee leaders.

Some agencies have been beaten down by years of systematic underfunding and understaffing. The Wages and Hours Division of the Labor Department, for example - charged with enforcing federal child-labor, minimum-wage, and overtime-pay rules - has fewer than a thousand field investigators working across the country; that is just slightly more than it had in 1941, when the number of covered workers was about ten percent of today's figure.<sup>5</sup>

The Consumer Product Safety Commission is another agency with a huge mission and a woefully inadequate staff - now down to 400, half the number of people employed by the CPSC at the time of its founding in 1973. Consider just one of the commission's responsibilities - dealing with the problem of lead paint and other toxic chemicals used in toys imported from China, where there is little or no oversight of such things. In 2007, a year that saw the recall of millions of such products, the CPSC had one three-day-a-week field inspector assigned to the ports of Los Angeles and Long Beach, California, where Chinese imports were being unloaded at the rate of 15 million ship containers a year.<sup>6</sup>

## BEYOND DISASTER

As far back as many Americans can remember, free-market conservatives have been a loud voice in our national discourse. Amplified by a galaxy of lobbyists, pundits, and well-funded think tanks, their ideas continue to exercise a powerful hold.

The calamities of the past few years have stirred widespread calls for stronger oversight of the industries where things have gone glaringly wrong. And yet, when the discussion gets down to cases, the tough talk often fails to translate into tough action. Even many on the pro-regulation side of the debate seem to assume that the best regulation is the least regulation - just enough to guard against disaster, or, at least, against another disaster of the type that is freshest in our memory.

Washington has begun to absorb the lessons of regulatory failure, in other words, but has yet to wake up to the lessons of success. Good rules can, in fact, help prevent disasters; they can even provide a measure of protection against the mood swings that become known as booms and busts when they seize the economy as a whole. They do so by protecting us (businesses and consumers alike) against the temptation to take long-term risks for short-term gain. But, in the process, good rules also help create stable markets in which the energy and imagination of the business world are directed toward products and services of lasting value.

Thus, the financial reforms of the New Deal era did not just end the avalanche of bank failures that had greeted President Franklin Roosevelt on his arrival in office. They brought an end to the era when many Americans thought it was safer to keep their money under the mattress. From the 1930s until the aggressive deregulation of the 1980s and '90s, the banking and securities industries grew and prospered, unspectacularly but sustainably.

Drug safety regulation had a similarly positive effect on business. In the largely unregulated environment of the 1920s and '30s, anyone with a bathtub and a chemistry set could set up shop as a pharmaceutical company, and the honest firms found it hard to compete with the hucksters. It was only after passage of the Pure Food and Drug Act of 1938 that the U.S. began to have drug makers with labs, scientists, and a real interest in understanding and documenting the effects of their products.<sup>7</sup>

## THE CHALLENGE

After three decades of deregulation in its various forms, America faces policy challenges on many fronts. The Dodd-Frank law of 2010 marked a first step, no more, down the road of meaningful financial reform. Beyond the urgent concerns over mine and oil-rig safety raised by the tragedies in West Virginia and the Gulf of Mexico lie a host of long-term energy and environmental questions. One of them - climate change caused by greenhouse gas emissions - may be the toughest and most far-reaching issue ever to make its way onto this country's, or humanity's, policy agenda.

Whether we're talking about global warming or financial derivatives or infected eggs, progress will depend not only on the enactment of new rules but on the reinvigoration of public institutions suffering from what former EPA administrator William Ruckelshaus has called "battered agency syndrome."<sup>8</sup> Across the spectrum of industries and issues, agencies and officials will need to find the courage to stand



up to special interests armed with judicially approved powers to spend huge sums of money supporting the leaders they like, attacking those they don't like, and spreading a new cloud of fear about "wasteful," "burdensome," "job-killing" regulation.

The obstacles are daunting, but no more so than those facing the forces of reform at the outset of some of the struggles described in this report. Time and again, history reminds us, Americans have fought for, and won, measures that changed our country and our lives for the better. And the benefits of those measures have come, almost invariably, without the frightening economic costs predicted by their opponents.

In 1974, the newly established Occupational Safety and Health Administration announced a set of rules to reduce worker and public exposure to vinyl and polyvinyl chloride – two resins identified as major contributing factors to liver cancer. The affected manufacturers claimed at the time that they would have to spend a combined \$90 billion, and terminate thousands of workers, in order to comply. Toting up the results a decade later, the Reagan administration found a significant decline in deaths from liver cancer, achieved at a cost of \$300 million (1/3 of 1 percent of the forecast) and zero jobs.<sup>9</sup>

History tells us to have confidence, and, moreover, to raise our sights. Good Rules (as these stories show) are not a substitute for competition, innovation, or market forces; they merely help channel the forces of the market in more positive directions. The ban on vinyl chloride (like similar phase-outs of hydrofluorocarbons and other dangerous chemicals) stimulated the development of more efficient and safer technologies.

When rules address problems of wide public concern, they help establish bonds of trust between buyers and sellers; over time, that benefits businesses as well as their customers, workers, and neighbors. Effective consumer protection rules enhance economic efficiency, reducing the amount of time we need to spend checking out the things we buy or the people we buy from. By assigning a measure of investigative responsibility to public institutions, good rules make it possible for a civic and commercial life to evolve without the high psychological and real expense that people incur when they are forced to defend their interests one transaction at a time.

Well-conceived regulation is much more, then, than just a way to keep markets from going off the rails. As much as the physical infrastructure of roads, bridges, telephone networks, good rules are part of the foundation on which a strong and healthy economy and society depend.





### 1. BUILDING CODES AND CONFLAGRATIONS.

It wasn't just Chicago; New York, Philadelphia, Charleston, St. Louis, Boston, Seattle, and Atlanta had downtown-destroying fires too. Then, one by one, America's cities faced up to the need for serious rules of safe construction.



### 2. THE AMERICANS WITH DISABILITIES ACT.

Twenty years after its enactment, America's streets, theaters, restaurants, and workplaces are far friendlier to people with disabilities. It might not have happened without the partnership of a famously liberal Democrat and a staunchly conservative Republican.



### 3. CAR SAFETY.

Americans drive three times as much as they did when auto safety regulation began. Yet even the absolute number of fatalities has fallen – from 54,000 in 1972 to under 34,000 in 2009. Taking distance into account, the progress is even more remarkable - from 4.2 deaths per million miles in 1972 to about 1.16 deaths per million miles today.



### 4. BANNING DDT.

Until Rachel Carson blew the whistle, chemical and agribusiness companies could spray almost anything they pleased onto America's food and farmland. One favorite pesticide of the 1950s and '60s, dichlorodiphenyltrichloroethane, was decimating bird and fish populations as well as a host of small flying and crawling creatures.



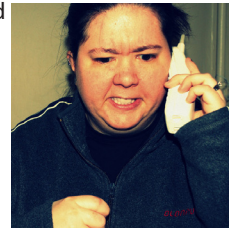
### 5. THE FAIR LABOR STANDARDS ACT.

In one law, the U.S. banned child labor, established a minimum wage, and made the 40-hour week a national standard.



### 6. "DO NOT CALL."

Regulation is often stereotyped as rigid and cumbersome. Here, Congress and the Federal Communications Commission developed a light-touch answer to the problem of aggressive telemarketing.



### 7. CIGARETTE SMOKING.

Stymied in Washington, anti-smoking forces shifted their efforts to the state and local level. Today, thanks to higher taxes and smoke-free zones (starting with public buildings, ending with restaurants and bars), just a fifth of all high school seniors smoke, down from a third in the mid-1990s.



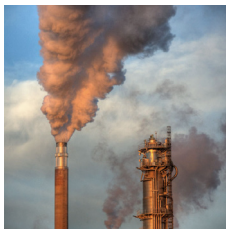
### 8. THE COMMUNITY REINVESTMENT ACT.

After sweeping civil rights and fair lending laws failed to address the problem of "redlining," congressional leaders devised a way to use disclosure to prod lenders into a process of self-examination and reform.



### 9. ACID RAIN.

In 1966, a graduate student dreamed up a new approach to the problem of "externalities" – the costs that industries offload onto society. Why not develop a system of permits, and let companies buy and sell the right to pollute? Three decades later, when Congress finally gave the idea a try, results came quicker and less expensively than almost anyone expected.



### 10. DRUG PRE-TESTING.

Thalidomide caused an estimated 12,000 birth deformities. Isoproterenol inhalers led to the deaths of 3,500 asthmatic children. Aminorex, an appetite suppressant, caused pulmonary hypertension and more than two dozen fatalities. In each case, other countries suffered while America was largely spared, through the diligence of the Food and Drug Administration.



## 1. THE GREAT FIRES

# Building Codes and Conflagrations

A cow knocks over a lantern – the Great Chicago Fire of October 1871 may not have started just that way. But the legend of Mrs. O’Leary’s cow captures a forgotten truth about urban America from colonial days into the early twentieth century: it was a world where small fires caused by chance accidents could grow and spread and end up destroying hundreds or (in Chicago’s case) thousands of homes and businesses.

“The appearance of things is awful-- nothing but an immense forest of walls, and chimneys is visible, and desolate heaps of brick and mortar,” one reporter wrote after the fire that leveled more than a quarter of Pittsburgh in 1845.<sup>10</sup> In St. Louis four years later, the losses included 23 steamboats and most of the city’s riverfront.<sup>11</sup> In Baltimore, the Great Fire of 1904 consumed more than 1500 buildings spread over 70 city blocks; in some places, the devastation was so complete that officials had to plant poles in the ground to remember where the streets and sidewalks had been.<sup>12</sup>



Chicago, the Morning After

### “FIRE TRAPS EVERYWHERE AND ANYWHERE”

The Great Fires (New York, Philadelphia, Charleston, Boston, Seattle, and Atlanta had them, too) laid down a challenge to a nation in hot pursuit of the economic, social, and cultural benefits of city life: could we figure out a way to have urbanization without conflagration?

Each fire was a story unto itself, and often people could point to some fluke turn of events that seemed unlikely to recur. The Great Fire that ravaged 65 acres of downtown Boston in November 1872, to take one example, might never have reached those terrible proportions if the city had not experienced a coincidental outbreak of equine flu, compelling humans to fill in for the horses that normally pulled Boston’s fire engines.<sup>13</sup> Nevertheless, in Boston and elsewhere, tragedy awakened a sense of vulnerability and a mood of resolve.

The most obvious problem was an inadequate firefighting capacity. Seattle was one of a number of cities inspired (after its Great Fire in 1889) to establish a professional fire department, rather than continuing to rely on ragtag neighborhood volunteers. In New York, the Great Fire of December 1835 called attention to the need for a public water system with underground mains and fire hydrants. Accustomed to drawing water from the East River, New York firefighters had found it frozen solid as a result of an unusual cold

spell. After the destruction of 17 blocks of lower Manhattan (including the last remaining vestiges of the original Dutch settlement), the city and state forged ahead with construction of a set of aqueducts to deliver water from northern Westchester County to a reservoir in what is now Central Park.<sup>14</sup>

But the biggest problem, and the most politically difficult, involved building methods and materials. In one city after another, the Great Fires inspired calls for rules of safe construction in crowded areas – rules that would cost money and trespass on what some citizens considered to be their unqualified rights as property-owners. And people were being asked to make these hard choices in order to reduce the likelihood of an infrequent peril that was usually far from their minds.

By the mid-1800s, a number of cities had adopted measures declaring their downtown areas off-limits to wooden construction. The rules were not well enforced, and they applied only to new buildings, not existing ones. Even so, many urban leaders thought that in principle they had found the answer, and Chicago's fire seemed to fit right in with that conclusion.

Chicago was a boomtown. Its downtown area not only had a good many wooden buildings; it had wooden streets and sidewalks as well. In residential sections of the city, many of Chicago's 300,000 people lived in flimsy shacks, representing a form of homeownership without land ownership. (Families would sometimes move these dwellings from one site to another if a property owner demanded too much rent.) On its race downtown from the O'Leary's neighborhood, the Chicago Fire ate up more than 15,000 wooden structures, leaving nearly 100,000 people homeless.

Easterners were horrified by the news of Chicago's tragedy. Many, however, consoled themselves that such a thing could never happen to *their* cities, where brick and stone were already becoming the norm. Even many Chicagoans thought they had brought their tragedy on themselves by erecting "fire traps everywhere and anywhere, on every fifty feet of ground in 30 square miles of populated area," as the Chicago Tribune put it.<sup>15</sup> Then, just a year later, Boston's fire clouded the picture by burning through block after block of buildings that had been touted as fireproof.

## LEARNING FROM DISASTER

Masonry-frame buildings, Boston found, could be firetraps too, if they had wooden roofs, walls, cornices, bay windows, and other adornments. Roofs were a key issue for Boston. Many of the city's

## THE AGE OF CONFLAGRATION

| YEAR | CITY         | LOSSES                                                                                                |
|------|--------------|-------------------------------------------------------------------------------------------------------|
| 1835 | New York     | 674 buildings spread over 17 blocks of lower Manhattan. \$20 million in damage. 2 known fatalities.   |
| 1845 | Pittsburgh   | Roughly 1,000 buildings.                                                                              |
| 1849 | St. Louis    | 430 buildings and 23 steam-boats.                                                                     |
| 1850 | Philadelphia | 400 buildings. 39 fatalities.                                                                         |
| 1861 | Charleston   | 600 structures, including every public building in the city. \$7 million in total losses.             |
| 1871 | Chicago      | 17,450 structures, 250-300 deaths, nearly 100,000 people homeless. Damage estimated at \$196 million. |
| 1872 | Boston       | 776 buildings. \$73.5 million in damage. 14 deaths, including 11 firefighters.                        |
| 1889 | Seattle      | Most of 25 downtown blocks.                                                                           |
| 1904 | Baltimore    | More than 1,500 buildings over 140 acres. \$29 million in insurance claims paid.                      |
| 1917 | Atlanta      | Nearly 2,000 homes, businesses, and churches. 10,000 people left homeless. 1 known fatality.          |

commercial buildings were crowned with elaborate French mansard roofs, which were not only wooden in themselves but served as lids for attics that local merchants liked to stuff full of lightweight, flammable goods. A tax exemption for attic storage encouraged this practice, which, like Chicago's wooden streets and sidewalks, could almost have been designed to spread fire from one building to the next.

To make matters worse, downtown Boston was a maze of narrow streets, laid out in colonial times. Unable to grow outward, businesses had expanded upward; after the fire, a panel of inquiry lamented the "great height" of some of the newer buildings, which stood five and six stories instead of the customary two or three. The panel also pointed to the narrowness of the streets, which had made it easy for the fire to spread and (along with the horse-flu epidemic) hard for firefighters to move and operate effectively. Yet even when they succeeded in getting equipment to the scene, Boston's firefighters often found that they lacked ladders tall enough, or water pressure strong enough, to reach the highest flames.<sup>16</sup>

After Boston, fire-safety experts began to think outside the box - about factors of land use, density, storage, and a concept that became known as the "fireload," or the total amount of combustible material in a given area. Gradually, they came to understand the ways in which the fire hazard had been aggravated by new technology, including oil-fed boilers, open-flame appliances, electricity, and elevators.

The building where Baltimore's fire began had an elevator, and, in keeping with common practice at the time, an unenclosed elevator shaft. Functioning as an ersatz chimney, the elevator shaft sucked the flames of a small basement fire upward, allowing it to find an additional source of fuel. Firefighters, summoned quickly to the scene by a thermostat-triggered alarm, saw smoke pouring down from the elevator shaft. Moments later, they heard a tremendous explosion. The fire had blown the roof off, creating a shower of gas, smoke and firebrands that set the whole neighborhood on fire.

Although no one could say for sure what had caused the blast, businesses in the area routinely stored such things as kerosene, fertilizer, chemicals, cotton, and grain side-by-side. Despite the efforts of more than 1,200 firefighters, including teams from Philadelphia and Washington, Baltimore's fire wound up gutting 86 blocks, including many of the city's leading banks, hotels, newspapers, and retail emporiums. The Baltimore Sun called it "a catastrophe which is without a parallel in the history of this city."<sup>17</sup>

## AN UNCELEBRATED VICTORY

Each fire produced a jolt of political will. Then, as time passed, people would begin to think more about the immediate cost of measures they were being asked to take in the name of averting a distant peril. In Boston, according to one contemporary account, a "clamoring clique of builders and lumbermen" persuaded the state legislature to drop some of the tougher rules (calling for brick-enclosed elevator shafts and self-closing hatches, for example) from an omnibus reform measure.<sup>18</sup> In Chicago, the biggest objections came from working-citizens after they learned of a proposed all-out ban on wooden construction.

Chicago's aldermen quickly backed off when hundreds of protestors stormed City Hall to voice their opposition to a measure that, many said, would put the cost of homeownership beyond their reach. "Instead of enjoying the blessings of independent homes," one protest group declared, "our laboring people would be crowded into those terrible tenement houses which are the curse of eastern cities." (In Chicago and again in Boston, a second fire followed a few years later, causing the pendulum of public opinion to swerve back toward reform.)<sup>19</sup>

The eventual walk never quite matched the original talk. Yet one after another, American cities addressed the safety problems of roofs, floors, windows, and interior as well as exterior walls. They drafted rules calling for fireproof boiler rooms and enclosed elevator shafts and staircases; they widened downtown streets and took steps to isolate industrial from residential areas. And they incorporated their rules into comprehensive building and safety codes, finally giving inspectors the power to monitor compliance and impose penalties when rules were flouted.



Insurers began to play a positive role, evaluating buildings and districts for fire safety, and basing their rates on what they found. Builders, who had fought many of the early measures, gradually adopted an “If you can’t beat ‘em, join ‘em” philosophy, forming regional alliances that developed so-called uniform codes, which came to serve as the starting point for many cities’ official codes. Working with industry groups, local officials developed regulations that were intended to spur the adoption of innovative construction techniques, such as fire-resistant cladding of steel beams, which led to bigger and more widely spaced buildings.<sup>20</sup>

There was no Eureka moment. It was a long, fitful process, with decisions invariably shaped by perceptions – or misperceptions – of the latest calamity. But by the early 1900s, huge multi-block fires had become increasingly rare, and soon they faded into history.

Today, even history books have little to say about them. Chicago’s fire lives on, at least in the name of a soccer team. By contrast, few Americans have any knowledge of the succession of Great Fires that came before and after. Lost with the memory of those tragedies is a recognition of one of regulation’s most decisive victories: the complex set of measures that finally brought an end to the age when a dropped cigar, a spark from a coal furnace, or possibly even a cow knocking over a lantern could be the start of a fire capable of leaping from building to building and block to block and destroying in a matter of hours what had taken decades to build.

### **POSTSCRIPT: FACTORIES AND EARTHQUAKES**

In the twentieth century, urban fire became a one-building-at-a-time phenomenon for the most part. But with buildings growing bigger and taller, the human cost of some fires was horrific. In the Triangle Shirtwaist Factory fire of 1911, 146 garment workers died, some leaping to their deaths after the fire escape collapsed. The horror of that scene led New York City and State to develop a body of rules dealing with fire escapes, emergency exits, sprinkler systems, and other occupational-safety issues. Some of these trail-blazing measures became models for regulations adopted by other jurisdictions.<sup>21</sup>

The U.S., unlike many countries, has left such questions largely to state and local governments working in partnership with industry groups. Builders sometimes complain about the need to navigate different rules in different jurisdictions; building inspectors and legislators are faulted for not enforcing the law honestly or evenhandedly. Yet this imperfect system, designed to balance safety and economic practicality, has continued to produce important benefits around the country.

Just as New York was a pioneer in factory safety, California took the lead in earthquake safety. The Long Beach earthquake of 1933 served as a catalytic event. Five of the 115 fatalities were children trapped in collapsed school buildings; far more children would have died if the quake, which had struck in the late afternoon, had come along just a few hours earlier. Following that tragedy, California passed a law establishing rigorous safety standards for public-school construction.

Since then, California’s many earthquakes have not caused a single fatal injury inside a school building.<sup>22</sup> California has also been a leader in making private buildings more earthquake-resistant. That body of regulation goes a long way toward explaining why fewer than a hundred people were killed in the Loma Prieta earthquake that struck the Bay Area in 1989 – a quake roughly comparable in magnitude to the one that caused a quarter of a million deaths in Haiti in 2010.<sup>23</sup>

## 2. THE AMERICANS WITH DISABILITIES ACT

# Opening Doors and Minds

Senators Edward Kennedy and Orrin Hatch were a political odd couple - a liberal Democrat from Massachusetts and a conservative Republican from Utah who learned to work together and forged a friendship. At Kennedy's memorial service in August 2009, Hatch recalled their mutual delight in discovering that if "the two of us, positioned as we were on opposite sides of the political spectrum, could find common ground," the rest of the Senate would often follow their lead.<sup>24</sup>

Hatch had a brother-in-law with polio. Kennedy had a sister who was mentally retarded and a son whose leg had been amputated as a result of bone cancer. In 1990, they joined forces in support of a bill extending to disabled Americans many of the same protections that earlier civil rights laws had given to women and racial minorities.<sup>25</sup>

### A POWERFUL COMPROMISE

The Kennedy-Hatch proposal was a trimmed-back version of a bill first introduced a year earlier. While the law, as enacted, sought to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," businesses with fewer than 15 workers got a blanket exemption, and larger employers were given time to adapt. No company would be asked to endure an "undue hardship" in order to accommodate a particular worker or job applicant. With these carefully negotiated concessions and the Hatch-Kennedy seal of approval, the bill passed the House and Senate by overwhelming margins.<sup>26</sup>

The Americans with Disabilities Act proved to be a huge breakthrough - for the disabled and for the country. The federal government had put its muscle behind the principle of universal design - the idea of adapting products, buildings, and public spaces to the needs of people with physical limitations. One leading disability activist, William G. Stothers, took stock on the tenth anniversary of the ADA's passage: "Now I can go to the grocery store in my wheelchair and not be blocked by a turnstile," Stothers wrote. "I can get on a bus that has a lift and go across town. I can go to a movie and not be limited to sitting in a corner at the back of the theater. I can go shopping and use an accessible fitting room. I can travel and find an accessible hotel room at my destination. I can go to the bathroom at the airport and use an accessible stall -- if someone who is not disabled is not in there with his luggage."<sup>27</sup>

### INVISIBLE GAINS

Like the other landmark civil rights laws of the past century, the ADA has begun to reshape attitudes as well as practices. A company may be listening to its lawyers when it starts down the path of compliance. But soon it starts to hear from front-line managers who have learned firsthand what workers with disabilities are capable of. In 2007, the Walgreen drugstore chain opened a distribution center in South Carolina that had been specially outfitted for workers with a range of disabilities. Employees with autism and cerebral palsy, among other conditions, now make up nearly 40 percent of the workforce at the facility. Walgreen executives have been so pleased with the results that they have decided to build additional warehouses on the same model. The company has set a target of filling 10 percent of its nationwide distribution jobs with disabled workers.<sup>28</sup>

Physical barriers may have been fated to fall before employment barriers. In a world of freer *access*, people with and without disabilities are increasingly likely to get to know each other. Familiarity dissolves prejudice and transforms thinking on both sides of an increasingly blurry line between “them” and “us.” Some of the most striking changes in attitude can be found among children and young adults with disabilities. Growing up in a less segregated world, they expect more from society, but also from themselves. Slowly but surely, the ADA is opening minds as well as doors.

### **POSTSCRIPT: COSTS AND BENEFITS**

Twenty years later, the ADA’s greatest effect has still been on access rather than employment. Despite the sweeping language of the statute, many jobseekers continue to be told that they are either “not disabled enough” to qualify for protection or, on the other hand, “too disabled” to qualify for a job. And yet, every year employers report an increased number of “accommodations” (adaptations made for the sake of employing someone covered by the statute), while surveys show a steady decline in the proportion of those with disabilities who perceive themselves as victims of workplace discrimination.<sup>29</sup> And the experience of most companies refutes the claims of those, like former Congressman Tom DeLay (R-Tex.), who opposed the law on economic grounds.

“The cost to the nation and the economy is going to be dramatic,” DeLay said at the time. “This goes way beyond the bounds of reason.”<sup>30</sup> In fact, the price tag for the typical accommodation has been under \$100. Often, the ability to employ someone with a disability turns out to depend on something as simple as raising or lowering a desk, or modifying a dress code or work schedule.

There have been surprises on the benefit side of the ledger, too. Ramps, curb cuts, and wheelchair lifts have made life easier for people with baby carriages and delivery carts. Color-coded stocking systems, designed for workers with reading or vision problems, have raised the efficiency of warehouse workers generally. Thanks to a ramp or a wheelchair-accessible bathroom, many companies have discovered that they can hold onto an older worker (and her experience and knowledge) despite an illness or injury that would have spelled retirement in the past. We hear a lot about the unintended consequences of regulation. The story of the Americans with Disabilities Act reminds us that many of those unintended consequences are good ones.



### 3. CAR SAFETY

# Good for General Motors and the Country

At the end of 1955, the Ford Motor Company launched an advertising campaign that took consumers – and carmakers – by surprise. “You’ll be safer in a ’56 Ford!” the company proclaimed.

The man behind that message, Group Vice President Robert McNamara, was trying to extricate Ford from a fashion contest – a contest it had been losing year after year to General Motors. By promoting safety, McNamara hoped to forge a new bond with consumers and help Ford regain its competitive edge.

Detroit did not think much of his chances. Ford was selling *safety* while General Motors sold *cars*, industry wags declared. Even as they ridiculed McNamara’s initiative, however, some high-ranking auto executives were rattled by it. One of the top people at GM reached out to a friend at Ford to suggest that the company reconsider. The Ford executive passed the word to his boss, Henry Ford II, who voiced his own doubts about the safety push.

We do not know the details of the ensuing deliberations. We do know the upshot: After just five months, Ford did an about-face. As unexpectedly as the new campaign had begun, it ended; so, very nearly, did the automotive career of its champion. McNamara (later to serve as Secretary of Defense under Presidents Kennedy and Johnson) fell ill, took a month’s leave, and returned to his post a chastened man – and a more conventional auto executive.<sup>31</sup>

## AN INDUSTRY IN DENIAL

McNamara’s mistake had been to point out the connection between car safety and car design. The annual highway death toll (39,628 in 1956) already exceeded the number of Americans killed in the Korean War.<sup>32</sup> Surgeons, insurers, and consumer advocates were beginning to take Detroit to task for pointy dashboard hardware, inadequate brakes, and a general emphasis on horsepower over control. Apart from Ford during McNamara’s moment of rebellion, however, the industry stood united in refusing to acknowledge responsibility. Safety, to hear the carmakers tell it, was the consumer’s lookout. Collisions were “accidents” – unpredictable and inevitable up to a point, and, beyond that point, a result of bad driving. The solution was good driving – a message pounded home in the relentless public service announcements of the Detroit-backed National Safety Council.<sup>33</sup>

What were the auto companies so afraid of? GM chief John Gordon, speaking among friends at an industry gathering in 1960, spelled it out: Once the public got the idea that the carmakers were in a position to do something about the problem, Americans would expect to see safety features in all cars; that, said Gordon, would mean regulation and an endless quest for the “foolproof” or “crash-proof” automobile. Cars would become gawky, expensive, and unappealing.<sup>34</sup>



**You'll be safer in a '56 Ford!**

For 1956, Ford announces the first major contribution to passenger and driver protection in accidents: New Lifeguard Design. It is the end result of more than two years of safety research and testing by Ford in cooperation with universities, medical associations, and leading safety experts. It is designed to give you added protection in the areas where you'll be most vulnerable in an accident.



Safety regulation did come, but only after another five years of obstruction and denial – and after hundreds of people had been killed or maimed in low-velocity, one-car “accidents” involving the Chevrolet Corvair. The Corvair became the symbol of Detroit’s indifference to safety. It was a vehicle so dangerous that one automobile columnist (a professed fan of the Corvair) dispensed tips for bringing it “back under control” after the “classic Corvair accident”: “a quick spin in a turn and swoosh! – off the road backwards.”<sup>35</sup>

Concern for GM’s own reputation, to say nothing of the public good, should have dictated an early recall. Instead, the company turned out more than a million Corvairs over four years, playing hardball in one lawsuit after another. When the young Ralph Nader laid out the story in his 1965 book *Unsafe at Any Speed*, GM responded by investigating Nader rather than his allegations. A team of detectives received instructions to “check Nader’s life and current activities, to determine what makes him tick, such as his real interest in safety, his supporters if any, his politics, his marital status, his friends, his women, boys, etc., drinking, dope, jobs, in fact all facets of his life.”<sup>36</sup>

## RESEARCH BEFORE RULES

The Corvair scandal led to congressional hearings (overseen by Connecticut Senator Abraham Ribicoff) and legislation (the Highway Safety Act of 1966), but to none of the travails that the carmakers envisioned.

The Highway Safety Act authorized a new federal agency, the National Highway Transportation Safety Agency, to make a study of the problem. By breaking the phenomenon of the auto accident down into three phases - pre-crash, crash, and post-crash – NHTSA scientists demonstrated that most accidents involved normal people driving in normal ways on normal roads. Safety features could make a huge difference, their research showed, not just in the likelihood of an accident, but, even more strikingly, in the magnitude of injury that an accident was likely to cause.

The NHTSA effectively became the safety research arm of the American auto industry. Working in partnership with Detroit designers and engineers, federal regulators helped conceive and develop a set of innovations that are standard in today’s cars. They include padded dashboards, collapsible steering columns, reinforced fuel tanks and roof structures, shatterproof glass, stronger brakes, and flexible, standard-height bumpers.<sup>37</sup>

Few Americans today appreciate how much cars have changed as a result of safety rules – or how much safer they have become. All told, Americans drive nearly three times as much as they did in the early 1970s, yet even the absolute number of fatalities has declined – from 54,000 in 1972 to under 34,000 in 2009.<sup>38</sup> With distance factored in, the progress is all the more remarkable - from 4.20 deaths per million miles in 1972 to about 1.16 deaths per million miles today. While auto safety regulation does not deserve all the credit (anti-drunk-driving initiatives may well have played a role), the evidence points to legally required improvements in car design and construction as the single most important factor. Seatbelts alone save about 10,000 lives a year, the NHTA estimates.<sup>39</sup>

If markets were self-correcting, as many economists appear to believe, consumers would have been asking for safer cars all along, and the auto companies would have been working hard to meet the demand. Unfortunately, most Americans had not even realized that some cars were safer than others; and while the industry had safety enthusiasts in its own ranks, it had ways of keeping them in line, as Robert McNamara discovered.

## OUT OF HIBERNATION

Safety regulation was a success on its own terms. It also paid off in ways that no one anticipated. The American cars of the 1950s and '60s were known for their eye-catching fins and grills. "In the place of product innovation," the maverick automaker John DeLorean recalled, "the automobile industry went on a two-decade marketing binge which generally offered up the same old product under the guise of something new and useful."<sup>40</sup> It was a formula for high profits in the short-term, but big trouble in the long term.

By the early '70s, European and Japanese cars were making inroads in the U.S. market. Some auto executives tried to blame their woes on the cost of regulation. Safety rules "have really killed all our business," Chrysler CEO Lee Iacocca complained to President Richard Nixon in a private (but tape recorded) White House meeting in April 1971. But it was a flimsy argument, as Iacocca later acknowledged. In the first place, both imported and American-made cars had to meet the same safety standards. More importantly, as Detroit learned to make safer cars, it began producing better and more competitive cars.<sup>41</sup>

To meet federal safety standards, the automakers strengthened doors, fasteners, brakes, and roof structures. In short, they made cars more durable. In a parallel development, government-mandated fuel efficiency standards encouraged the development of cars that required less maintenance as well as fuel. (The phased elimination of lead from gasoline would, in similar fashion, reduce the need for tune-ups and extend muffler life.) Thus, in its efforts to promote safety and reduce pollution, government actually helped the auto industry pull itself out of the style trap and begin to innovate again.

Left to its own devices, Detroit might have gone on ignoring and suppressing its safety problems for decades. No less an authority than Henry Ford II admitted as much. "We wouldn't have the kinds of safety built into automobiles that we have had unless there had been a federal law," Ford said after his retirement.<sup>42</sup>

### POSTSCRIPT: THE LOOPHOLE YOU COULD DRIVE A HUMMER THROUGH

In the mid-1980s, the cause of auto safety collided with the cause of deregulation. The result was the age of the sport utility vehicle.

Two of the first modern SUVs, the Jeep Cherokee and the Ford Bronco II, had established a conspicuous record of rollover accidents. And rollovers, then as now, were the worst kind of accidents. While accounting for fewer than 1 percent of all car crashes, they figured in a quarter of the fatalities, which meant nearly 10,000 deaths a year.) By the time the issue arose, however, the NHTSA had become swept up in the anti-government fervor of the Reagan Revolution. Over the objections of the agency's professional staff, its politically appointed leaders decided to treat SUVs as a separate vehicle type that should be exempted from normal passenger-car safety rules.

Retired Major General Jerry Curry, the NHTSA's director from 1989 to 1992, framed the question as one of personal liberty. "I like to go off-road where I live," said Curry, who had a house on a Colorado mountainside. "And I think people like me want that kind of vehicle... Is it more dangerous than a vehicle that is lower and wider? Yes. I'll take the tradeoff."<sup>43</sup>

There was one big hole in Curry's logic. The growing presence of these high-riding, poor-handling vehicles on America's roads had begun to change the safety equation for everybody, not just for SUV owners and passengers. A large SUV kills at an annual rate of 122 victims per million vehicles; by contrast, the Honda Accord's rate is 21 victims. The biggest gap involves side collisions. These accidents are unusually lethal to begin with: if you're riding in a car that gets hit sideways, you are 6.6 times more likely to die than an occupant of the striking vehicle; and if the other vehicle is an SUV, the odds rise to 30 to 1, because its high hood, bumper, and solidest parts tend to mash through the most vulnerable areas of a normal-size car, often hitting a driver in the head or chest.<sup>44</sup>

As SUVs sales took off, rising from 750,000 in 1990 to almost 3 million in 2000, industry insiders were delighted, but, at the same time, a bit mystified. Why were so many affluent Americans living in suburbs rather than mountainsides eager to have a four-wheel-drive capability that they would scarcely ever use? Why were so many people willing to pay a luxury-car price for what was basically a passenger compartment bolted onto a pickup-truck underbody?

Many of the early buyers had been male professionals and executives who liked the rugged-outdoors image of an SUV. (Some models came with jaw-like fenders and teeth-like grills.) Market research suggested that some of these people were eager to distinguish themselves from a demographic known as “soccer moms,” who had become associated with mini-vans. But as time passed, SUVs acquired an insidious new attraction: even many soccer moms decided that they would rather be inside an SUV than craning to see over one, or potentially involved in an accident with one. The very characteristics that made them dangerous, in other words, became part of their appeal.



And so, for nearly a decade and a half, the U.S. auto market became swept up in an arms race, with people buying bigger and brawnier vehicles, partly out of a new conception of safety: more for me and less for you. Of course, nobody really came out ahead in this competition. SUV occupants might fare better in a crash with a smaller vehicle, but they were more likely to be in a crash in the first place - and more likely to have the especially dangerous experience of rolling over. Their size and shape, along with the predilection of many SUV owners for dark-tinted glass (which was illegal in passenger cars), contributed to yet another disproportionate risk - of running over pedestrians, especially small ones, who, in a disturbing number of cases, were the drivers' children.

The SUV craze eventually proved to be unhealthy for Detroit as well as for safety and the environment. (SUVs had been exempted from passenger-car fuel-economy rules, too.) When gas prices went up and the economy tanked, SUV demand tanked with it; General Motors and Chrysler became wards of the state in large part because they had very few compelling or even profitable products beyond SUVs.

Although sales have plummeted in the last few years, America still has a remarkable number of SUVs and pickup trucks on its roads. That is the most striking difference between the U.S. and, for example, Canada and Australia, two geographically similar countries with lower highway fatality rates than ours.<sup>45</sup>

Twenty-five years after the first alarms were sounded, automakers are getting around to making safer SUVs, with more stable underbodies and lower bumpers. If fuel prices remain high (whatever the fuel), Americans may one day be able to go on the road in a normal-size car without feeling like minnows among whales and sharks.



## 4. DDT

# Some Things Should Be Banned

The peregrine falcon flew off the endangered species list in 1999. Ten years later, the brown pelican was poised for the same journey. Once close to extinction, these remarkable birds are breeding successfully again, thanks to a momentous act of regulation, and, in the first place, to a terminally ill scientist's determination to press on with her work.

As a woman in a male-dominated profession, Rachel Carson had to make do with a junior role in the federal bureaucracy. Away from her job at what is now the Fish and Wildlife Service, Carson spent much of her adult life caring for an aged mother, an ailing niece, and the niece's son, whom she eventually adopted. Only the unexpected success of her second book, *The Sea Around Us*, in 1951, allowed Carson to write full time. After a second bestseller, she decided to use her newfound freedom and clout to write a critical book about modern agriculture and its addiction to chemical pesticides.



### **SPEAKING TRUTH TO POWER**

World War Two had produced a great array of super-chemicals, none more seemingly miraculous than dichlorodiphenyltrichloroethane, or DDT. During the war, the U.S. military had used DDT to virtually eradicate malaria on several Pacific islands; Greece and Sardinia had achieved similar results. While other pesticides worked against one or two types of insects, DDT was all-purpose; spray it on a field or forest, and a host of small flying and crawling creatures would disappear.

Many powerful people and companies did not want to hear any criticism of this wonder product. But Carson knew what she was up against, and she laid out her evidence meticulously. While *Silent Spring* is best known for its nightmarish opening chapter about a town gripped by death, much of the book is constructed in the manner of a legal brief. Step by logical step, Carson established the link between DDT and the decline of bird species. Sprayed on beans, peanuts, and tomatoes, among other crops, DDT had lethal consequences for fish as well as birds. Used to ward off Dutch elm disease, it killed the earthworms that ate fallen elm leaves, and the robins that ate the earthworms. In falcons and other birds, it produced thin-shelled eggs that broke before the chicks were ready to hatch.

Carson was denounced as a hysteric and a Luddite. "If man were to faithfully follow the teachings of Miss Carson," one chemical company executive commented, "we would return to the Dark Ages, and the insects and diseases and vermin would once again inherit the earth." But her care paid off. A year after its publication in September 1962, *Silent Spring* came to the attention of President John F. Kennedy, and he asked his science advisors to investigate. They came back with a report that confirmed Carson in every important claim.



## BOOK, MOVEMENT, BAN

The Kennedy administration proposed a gradual phase-out of DDT and other highly toxic pesticides. But in 1969, the Nixon Administration ordered a new study, which delivered a different verdict. A ban was not called for, said William Ruckelshaus, head of the newly formed Environmental Protection Administration, because DDT had not been shown to cause direct injury to either human or animal health.

His announcement set off a torrent of protest. Although Carson had died in 1964, her book had helped create the modern environmental movement. A lawsuit brought by the Environmental Defense Fund (formed in 1967 with a ban on DDT as one of its explicit goals) led Ruckelshaus to order yet another inquiry. Six months later, the agency changed its mind yet again, and the ban finally went into effect.

In justifying this re-reversal, Ruckelshaus pointed to fresh evidence that DDT posed “a carcinogenic risk” to people. In truth, such a connection had not been proved. Carson, who had lived near an agricultural-research facility in Maryland, suspected her own cancer of being environmentally caused. But she was too careful a scientist to make such a claim when she appeared before a Senate committee a year before her death. The closest she came was an allusion to “the right of the citizen to be secure in his own home against the intrusion of poisons applied by other persons.”<sup>46</sup>

It was only natural to suppose that DDT, which accumulated in the fatty tissues of organisms up and down the food chain, would be bad for people as well as birds and fish. But the country no longer needed to be convinced of that. By now, millions of Americans had become infected with Carson’s respect for nature and distrust of corporate science. The consequences of unloosing such a powerful and long-lasting chemical on the world were almost impossible to predict. That being so, most people were no longer willing to entrust such a decision to those who stood to profit from it.

## 5. THE FEDERAL LABOR STANDARDS ACT

# Three Breakthroughs in One

The mines, mills, and factories of the late 19th century were unpleasant and dangerous places. Millions of Americans left home before dawn and returned after dark, and few had more than one day a week for a personal or family life. The length of the workweek was so onerous that the first great cry of organized labor was for shorter hours rather than higher pay.

A number of states responded with laws that sought to define the proper length of a workday or work week. Few of these early statutes carried any teeth, though, and the ones that did were soon overturned by the courts. In a landmark 1905 ruling, the United States Supreme Court declared that the Fourteenth Amendment (intended to protect the rights of freed slaves) barred interference in “the right of contract between the employer and employees, concerning the number of hours in which the latter may labor...”<sup>47</sup>



1901 Rally for an 8-Hour Day

### SWITCH IN TIME

The Supreme Court stuck to its guns for another three decades, applying the same logic to a series of early state minimum-wage laws. With the coming of the Great Depression, however, the laissez-faire pronouncements of the Court began to generate widespread resistance. In June 1936, the Supreme Court ruled 5 to 4 against a New York law calling for a statewide minimum wage of (at the time the case was brought) \$14.88 a week. The case involved a Brooklyn laundry owner, Joseph Tipaldo, who had tried to circumvent the law by paying his workers the lawful minimum, only to have them kick back \$4.88, so that they ended up with the \$10 he considered appropriate. Since the workers were free to object to the kickbacks (and lose their jobs), the Court ruled that Tipaldo’s arrangement was a legitimate – and constitutionally sacred – contract.

The decision set off a storm of protest. Campaigning for reelection, President Franklin Roosevelt cited the Tipaldo opinion as one of the outrages that justified his call for a constitutional amendment adding as many as six new Supreme Court justices to the original nine. The ruling was also condemned by prominent Republicans, including ex-President Herbert Hoover. Congressman Hamilton Fish – memorialized in FDR’s jeremiad against a trio of obstructionists named Martin, Barton, and Fish – spoke of a “new Dred Scott decision” condemning millions of Americans to economic slavery.<sup>48</sup>

Even one member of the Supreme Court itself seemed to have second thoughts. In March 1937, the Court ruled on a Washington State minimum-wage law. This time, Justice Owen Roberts shifted sides to join an unexpected new liberal majority in support of the measure. The decision, which signaled a more flexible attitude toward economic regulation, helped take the steam out of Roosevelt’s effort to expand the number of judges and “pack” the Court with new nominees. Roberts’ unexpected vote became known as the “switch in time that saved nine.”<sup>49</sup>

## FDR MAKES HIS MOVE

Buoyed by the Court's new mood and his landslide reelection, the President told Secretary of Labor Frances Perkins that it was time to go public with "that nice unconstitutional bill you tucked away."<sup>50</sup> He was talking about a nationwide pay-and-hours bill – a proposal they had been quietly preparing since the beginning of FDR's first term.

Even now, the idea faced stiff opposition. It took a year of Roosevelt's wheedling and wrangling to win over a sufficient number of conservatives in his own party. Organized labor also had to be soothed. Congress settled on an initial minimum wage of 40 cents an hour; most unionized workers already earned well over that, and their leaders feared that some employers, taking advantage of the desperate economy, would try to negotiate wages down, using the federal law as a benchmark. To get labor on board, Roosevelt agreed to add a child-labor provision to his proposal. A majority of the states already had child-labor laws, which the courts had sanctioned. But the federal proposal was stronger than most, making 16 the threshold for full-time employment and 18 for hazardous occupations.

The result of these negotiations, signed into law on June 1938, was the Fair Labor Standards Act, one of the last and most sweeping pieces of New Deal social legislation. In one law, the U.S. had abolished child labor, established a nationwide minimum wage, and declared the eight-hour day and the forty-hour week a national standard. While the FLSA did not set an absolute limit on the work day or week, it required employers to pay time-and-a-half for hours beyond eight and forty. The idea was to reward workers but discourage overtime so that as many people as possible could be employed. The strategy worked. In pre-war America, ten- and twelve-hour days and half-day shifts on Saturday had been common. By the 1960s, most people with full-time jobs in the mainstream economy worked eight hours a day and had weekends off.<sup>51</sup>

## THE GREAT COMPRESSION

In the postwar years, the jurisdiction of the Fair Labor Standards Act was extended to large categories of workers, such as schoolteachers and hospital workers, who had originally been excluded, while Congress gradually raised the minimum wage to a level at which it was well on the way to making full-time employment a ticket out of poverty. In the 1980s, though, sentiment in Washington shifted, and the power of the law was gradually diluted, both by letting inflation erode the power of the minimum wage, and by weak enforcement. By 2007, when Congress raised the minimum for the first time in nine years, its purchasing power had fallen more than 20 percent from where it had been in the 1960s and '70s.<sup>52</sup>

The architects of this de facto deregulation professed to be looking out for workers' interests. If companies were required to pay more than a "market wage," it was said, they would simply employ fewer workers – fewer young or unskilled workers in particular. Thus, the law was supposedly destined to hurt the very people it was meant to help.

This was not a new argument. Indeed, it was the theme of many who tried to prevent the Fair Labor Standards Act from being enacted in the first place. The ranks of that original opposition included employers, congressional Republicans, and many southern Democrats as well at a time when the South was the conspicuous have-not region of the country, relying on low wages to compete. Take away that competitive advantage, southern leaders warned, and the economy of the South would wither.

But the economy of the South did not wither. Economists who have looked at the initial impact of the law have found job losses in a few of the worst-paid occupations, such as pecan shelling, tobacco stemming, and cotton picking. But the shrinkage of employment in these fields was quickly overshadowed by gains in manufacturing and white-collar jobs, and by increased wages for workers in the timber, textile and

petro-chemical industries. The economic historian Gavin Wright, in his book *Old South; New South*, points to the FLSA (along with other New Deal policies and the stimulus of wartime production) as a key factor in drawing the South into the national labor market.<sup>53</sup>

As the South prospered, so did the country. From the 1940s until the early '70s, the poverty rate declined sharply and the economy grew faster than it had before - or has since. The Princeton University economist (and New York Times columnist) Paul Krugman is one of a number of authorities who have cited the minimum wage and the overtime-pay provisions of the Fair Labor Standards Act as major contributors to what has become known as The Great Compression — the remarkable narrowing of income differences and expanding middle class of the postwar era.<sup>54</sup>

### **POSTSCRIPT: THE CRIME WAVE NO ONE TALKS ABOUT**

Officially, more than 130 million American workers are covered by the Fair Labor Standards Act. But its promises remain hollow for many. In a 2008 survey of low-wage workers in Chicago, Los Angeles, and New York City, more than a quarter reported being paid less than the minimum wage; about a fifth said they had worked in excess of 40 hours a week without receiving overtime – often without receiving *any* pay for the extra hours. In the typical case, the annual losses came to more than \$2,500, or about 15 percent of what the worker should have earned.<sup>55</sup>

Few acts of federal regulation have been more widely flouted lately, perhaps because few have been less zealously enforced. By the end of the Bush years, the Labor Department had about 750 field investigators working on these problems – roughly the same number as in 1941, when the law covered scarcely a tenth as many people. Lacking committed leadership as well as resources, the unit responsible for FLSA enforcement fell into a pattern of responding only to narrow complaints, rarely making any effort to pursue evidence of industry-wide patterns. During the administration of George W. Bush, cases were often dropped on no basis other than a telephone reassurance from an employer, or even an employer's failure to return an investigator's phone call.<sup>56</sup>

“Wage theft,” in its various forms, is no petty offense. Nationally, the total cost has been estimated at \$19 billion a year – money extracted from those who can least afford to pay. It's the “crime wave no one talks about,” says Kim Bobo, Executive Director and founder of Interfaith Worker Justice, an ecumenical church group that has been working on these problems since the mid-1990s.<sup>57</sup>

The current Secretary of Labor, Hilda Solis, has vowed to turn things around. Under her leadership, the department has hired more investigators and launched initiatives to educate employees about their rights and streamline the complaint process. Employers have been asked to develop compliance plans and to specifically explain decisions to classify workers as contractors rather than employees – a widespread form of circumvention (which incidentally allows companies to escape their social security and Medicare obligations). The Department has committed itself to working collaboratively with the unions, religious organizations, and others that, until recently, have seemed to be the only groups taking these questions seriously.<sup>58</sup>

Thousands of companies large and small (retailers, child-care facilities, cleaning services, garment makers, car washes, and others) will need to be prodded and helped into compliance. (Even such mainstream corporations as Walmart, Cingular, T-Mobile, Allstate, IBM, and Citigroup have been cited for FLSA violations recently.) Solis and her department have a big task ahead of them, in other words. But that is just another way of saying that the Federal Labor Standards Act, after doing tremendous good in the seven decades since its enactment, still has plenty of potential to do more good.

## 6. “DO NOT CALL”

# Uncle Sam, Peacemaker

In the public sector, as in the private sector, the first idea may not be the best idea. But government, too, is capable of going back to the laboratory and coming up with something better.

Official Washington took a first crack at the problem of intrusive telemarketing in 1994. Computerized systems for dialing and weeding out no-answers, busy signals, and answering machines had produced a quantum increase in efficiency on the calling end – and a corresponding burst of rage and resentment on the receiving end. Congress responded with a rule (part of the Telemarketing Fraud and Abuse Act of that year) requiring every telemarketing firm to maintain a list of people who preferred to be left alone.

But many telemarketers already had such lists, and they had accomplished little. The company-by-company approach left it to individuals to deal with an array of telemarketers one by one, and, if their requests went ignored, to document and report violations to the authorities. Consumer and privacy advocates denounced the 1994 rule as a sellout to the industry. The critics were not greatly consoled by a clause in the legislation calling on the Federal Trade Commission to take a fresh look at the problem after five years.

### IN YOUR FACE AND HOME

Five years later, though, the FTC remembered its obligation, holding a series of hearings and inviting input from all concerned. Complaints poured in by the tens of thousands. Many focused on the growing number of so-called “abandoned calls,” in which someone answered the phone and heard nothing – not even an annoying recorded message. Abandoned calls were a byproduct of algorithmic software that was supposed to let telemarketers move quickly from one potential customer to the next; like airline reservation computers, the technology sometimes overbooked, reaching more people than the sales reps could handle.

Industry leaders played down the problem, insisting that it involved no more than 2 to 5 percent of all outbound sales calls. But with telemarketers placing close to 100 million calls a day, that was millions of people who found themselves getting a call from nobody. Some of the victims were elderly and infirm and had to haul themselves out of bed or even into wheelchairs to answer. (The AARP was one of many organizations to register its dissatisfaction with the 1994 law.)

The circumstances varied; the sentiment was universal. “They hate the interruption and intrusion,” said Allen Hile, assistant director of the FTC’s bureau of consumer protection, summing up the reactions of the vast majority of an eventual 64,000 public comments. “It’s in your face and in your home.”<sup>59</sup>

### REGULATION 2.0

In January 2002, the commission announced a tougher plan. It called for a single nationwide “Do Not Call” registry to be paid for by the industry and administered by the FTC itself.<sup>60</sup>



Now it was the telemarketers' turn to vent. The FTC's proposal would violate the free-speech right of businesses to communicate with the public, they protested. It would cost consumers money by robbing them of access to information about bargains. It would undermine a dynamic new industry and a growing source of employment among college students, single parents, and others who appreciated the flexible work schedules that telemarketing allowed.

The industry fought the idea at every turn and with almost every imaginable argument. To hear the telemarketers tell it, the FTC's proposal was not just a violation of the industry's free-speech rights and a threat to the nation's prosperity; the whole planet would be damaged, since fewer telemarketing calls would mean more shopping trips, gasoline consumption, and smog. Industry lawyers briefly attempted to block the plan by calling on the FTC to file an environmental-impact statement.

But the commission stood firm, and so did Congress, now that the public had had a fuller opportunity to express its feelings. The House and Senate endorsed the FTC plan by overwhelming margins, and in June 2003 the national Do Not Call registry went into operation.

### **SIGH OF RELIEF**

Seven years later, Americans have registered more than 190 million phone numbers.<sup>61</sup> People who want to be called can still be called. But those who want to be protected can be protected. Whether you register by phone or online, the process takes just a few minutes.

Companies are required to check the list and remove newly entered numbers every month, and most telemarketers have evidently learned to live with the rules. In a 2007 survey, 18 percent of the respondents said they were getting scarcely any calls, while 59 percent had noticed a significant change for the better.

The 2008 elections called attention to a large gap in the law – political campaigns were exempt, and many candidates took advantage to mount barrages of recorded messages to presumed supporters. Another escape clause, covering “established business relationships,” became an excuse for alarming calls to millions of Americans (including some who didn't own cars) about automobile warranties that were supposedly “about to expire.”<sup>62</sup>

The telemarketing industry has not gone away, in other words; nor have all the complaints. But the fury has faded. A decade ago, a *Time* magazine poll ranked telemarketing No. 4 on a list of the worst ideas of the 20<sup>th</sup> century.<sup>63</sup> For many who felt that way, the Do Not Call registry ranks as one the better ideas of the early 21<sup>st</sup> century.

## 7. TOBACCO

# Promoting a Smoke-Free Norm

What is a government of the people supposed to do about a deadly habit engaged in by tens of millions of its people? How, in an imperfect union, do you find the political will to challenge a multi-billion dollar industry? These were the tough questions posed in measured words by the 1964 Surgeon General's report declaring cigarette smoking "a health hazard of sufficient importance in the United States to warrant appropriate remedial action."<sup>64</sup>

Prohibition was not an option. (Leaving aside the political obstacles, the country had tried it, unsuccessfully, with alcohol.) Between the power of the tobacco lobby and the premium that many Americans and their elected leaders placed on individual liberty, even the kind of legal controls that governed nonprescription drugs seemed unattainable with cigarettes.

For three decades, anti-smoking policy consisted mainly of warning labels, TV spots, and reports and proclamations meant to frighten people into quitting or not starting. At first, these efforts seemed to make a difference. But after falling sharply through the 1970s and early '80s, per capita consumption of cigarettes began to stabilize in the early '90s, while teenage smoking surged, rising by more than a third between 1991 and 1995.

The case against cigarettes was stronger. Now the list of life-threatening, tobacco-linked conditions had grown to include strokes and emphysema as well as heart disease and lung cancer. Whistleblowers had come forward with grisly tales of cigarette-makers manipulating nicotine levels to keep people hooked, even as some companies reduced the tobacco content to save money.

But while the industry had taken a beating in the headlines, it seemed to be holding its own on the ground - in the battle to retain old customers and recruit new ones. Cigarettes, one market analyst wrote in early 1996, had mysteriously become "cool again" in spite (or maybe partly because) of all the effort to make them seem uncool.

### THE BREAKTHROUGH THAT WASN'T

In the summer of 1996, President Bill Clinton and Food and Drug Administration Commissioner David Kessler announced a new effort to reduce teen smoking. The tobacco companies would be ordered to end all marketing directed at the young - no more Joe Camel or Marlboro Man. Washington would set a nationwide minimum age of 18 for cigarette purchases; cigarette vending machines would be outlawed



except in bars, gambling casinos, and other businesses that did not admit minors in the first place. FDA Commissioner Kessler even spoke of having the tobacco companies pay stiff penalties for failing to hit a set of year-by-year targets for reduced teen smoking.

The proposal was hailed as a breakthrough by newspapers and public health groups. It would “reverberate into the future of the industry and American public health,” declared the *Miami Herald*.<sup>65</sup> But in March 2000, the Supreme Court intervened, ruling that the FDA had no statutory authority to regulate cigarettes. Instead of reverberating into the future, the Clinton administration’s plan had been stopped cold.

Fortunately, the anti-smoking forces had not pinned all their hopes on the federal government. Spurred on by a 1986 Surgeon’s General’s report on the dangers of secondhand smoking, activists had been working at the state and local level. Soon they were winning scattered victories that would prove to be more consequential than the drama of raised and dashed hopes in Washington.

## BEYOND WORDS

In 1988, a coalition of California health and environmental groups won approval of a referendum known as Proposition 99, which raised cigarette taxes by 25 cents and channeled some of the revenue into statewide anti-tobacco advertising. By 1992, cigarette use in the state had declined 27 percent. Massachusetts proceeded to approve a similar measure, achieving similar results.<sup>66</sup>

The National Cancer Institute launched a decade-long anti-smoking campaign known as the American Stop Smoking Intervention Study - ASSIST for short. Although the cancer institute was part of the National Institute of Health, ASSIST was conceived as a partnership of state public health agencies. The goal was to move beyond the “It’s bad for you and we’ll help you quit” approach; instead of trying to reach people one by one through words and programs, the ASSIST partners would look for ways to reshape the social environment, by promoting a “smoke-free norm.”

A group of public health-minded economists set out, with federal funding, to study the link between taxes and smoking levels. Higher taxes turned out to be a reliable way to discourage young people from smoking. One study suggested that a ten percent increase in taxes would yield a 4 percent decrease in adult smoking, and a 7 percent decrease in teen smoking. Soon, other states began to follow the lead of California and Massachusetts. In 1995, Arizona raised cigarette taxes by 40 cents; the following year, Oregon approved a 30-cent increase.<sup>67</sup>

## TOBACCO TIMELINE

### 1964

Surgeon General Luther Terry issues a report documenting the correlation between cigarette smoking and cancer.

### 1965

Cigarette packs, but not ads, are required to carry a warning message: “Cigarette Smoking May be Hazardous to Your Health.” Under the terms of the Cigarette Labeling Act, this carefully negotiated wording cannot be toughened for at least four years.

### 1967

The Federal Trade Commission invokes the Fairness Doctrine (subsequently repealed) to call for a balance of cigarette ads and anti-smoking messages.

### 1970

Congress strengthens the warning (“The Surgeon General has determined that cigarette smoking is dangerous to your health”), while extending it to ads as well as packages.

### 1971

Cigarette ads are banned from television and radio as of midnight Jan. 1, just after the Super Bowl. This one-day delay allows the networks rake in one last haul of tobacco-industry money. (The end of cigarette ads also means the end of some very effective public-service messages against smoking.)

### 1973

The Civil Aeronautics Board requires non-smoking sections on all commercial airliners.

### 1975

Minnesota passes the Clean Indoor Air Act, becoming the first state to restrict smoking in public spaces. Restaurants can comply by creating No Smoking sections. Bars are exempt.

**1986**

Secondhand smoke is the focus of a second landmark surgeon general's report.

**1988**

Congress bans smoking on domestic airplane flights of under two hours. California passes Proposition 99, hiking cigarette taxes 25 cents a pack to help fund local anti-smoking efforts.

**1990**

San Luis Obispo, California, becomes the first city anywhere to ban indoor smoking in all public places, including bars.

**1994**

Mississippi sues the tobacco industry, seeking the recovery of Medicaid costs for tobacco-related illnesses.

**1998**

Bars begin to comply with a sweeping California state law against smoking in workplaces. Boston bans smoking in restaurants, which suffer little or no decline in business as a result.

**2003**

New York City passes the nation's most comprehensive smoke-free law, also raising cigarette taxes to fund quit lines and counter-advertising.

**2007**

Los Angeles bans smoking in all city parks.

**2009**

More than a decade after the Clinton administration unsuccessfully sought to regulate smoking, Congress grants that authority to the FDA.

ASSIST became a vehicle for the states to experiment and learn from one another. Gradually, the partners converged on three strategies: higher taxes, crackdowns on sales to young people, and – the most potent of all – campaigns to limit smoking in offices, public buildings, and restaurants.

## THINKING GLOBALLY, ACTING LOCALLY

The smoking bans marked a crucial shift in the political dynamic. They brought public health advocates together with a growing non-smokers' rights movement. While the tobacco companies still had plenty of clout in Washington, they found themselves at a political disadvantage in cities and counties across the country. "We could never win at the local level," one ex-tobacco-lobbyist said later. "The reason is, all the health advocates, the ones that unfortunately I used to call 'health Nazis,' they're all local activists who run the little political organizations. They may live next door to the mayor, or the city councilman may be his or her brother-in-law, and they say, 'Who's this big-time lobbyist coming here to tell us what to do?' When they've got their friends and neighbors out there in the audience who want this bill, we get killed."

In 1990, San Luis Obispo, CA, became the first city to ban smoking in all public accommodations. Most restaurants at the time had No Smoking sections that shared the same air with the smoking sections. Most bars had no restrictions on smoking at all. In that context, San Luis Obispo's law was a radical step. But as soon as one city took the plunge, others followed. One of these pioneering communities was Sacramento, the state capital. Sacramento's move gave California officials a chance to get used to the idea. In 1994, the legislature voted for a statewide workplace ban that (after a four-year phase-in period) would include bars as well as restaurants.

Recognizing the California measure as a critical threat to their future, the tobacco companies mobilized retailers and shareholders behind a referendum measure, Proposition 188, that called for looser rules – basically, it would have maintained the status quo of restaurants with "separate" smoking and no-smoking sections and bars without smoking restrictions. Initial polling indicated that the measure might pass, taking away the power of California cities and counties to enact their own regulations.

Public sentiment shifted dramatically, however, after voters learned that the tobacco lobby had spent an estimated \$18 million on the campaign, with Philip Morris alone contributing \$12 million. In the end, the measure was overwhelmingly defeated, and the statewide smoking ban went into effect on schedule.

## NOT SO COOL

The success of California's smoking ban gave New York City the courage to adopt an even stronger measure in 2004. Since 2000, 24 states, the District of Columbia, and Puerto Rico have enacted smoke-free laws that cover bars as well as restaurants. Four more states - Florida, Idaho, Louisiana and Nevada — have passed similar laws that exempt stand-alone bars.

The tax increases have also continued. In Wisconsin, Iowa, and Texas, cigarette-tax hikes were followed by surging phone calls to state-sponsored Quit Lines. Wisconsin's Quit Line, which typically gets 9,000 calls a year, received a record-breaking 20,000 calls in the first two months after a \$1 tax increase. In 1997, Alaska approved a 71-cent increase; the next decade saw a smoking drop of 13.5 percent, compared to 4.7 percent for the country as a whole. Since January 1, 2002, the average state cigarette tax has risen from 43.4 cents to \$1.45 a pack.<sup>68</sup>

Some problems have no easy solutions. But if politics is the art of the possible, the anti-smoking forces should be hailed for their persistence and creativity in developing, over time, a combination of approaches that proved to be politically sustainable as well as effective.

### POSTSCRIPT: WHAT'S NEXT?

Tobacco regulation is "always a good news/bad news story," former Surgeon General C. Everett Koop observed in 2004. "It's one of our greatest triumphs and one of our greatest defeats."<sup>69</sup>

The good news: The proportion of Americans who smoke, now slightly over 20 percent, is less than half what it was at the time of the original Surgeon General's report. Teen smoking has declined even more sharply. According to study by researchers based at the University of Michigan, one in five high school seniors smoked in 2008, compared to more than a third in 1996. The figure for tenth-graders had dropped from 30.4 percent to 12 percent.<sup>70</sup>

The bad news: After another long decline, smoking rates have leveled off since 2005. The U.S. still has some 43 million smokers, more than two million of them under the age of 18.<sup>71</sup>

But the quest goes on. After decades in which most of the meaningful action was at the state and local level, Washington reentered the picture in June 2009, when Congress finally gave the FDA the authority that the Clinton administration had sought. Seeking to regain the offensive, the FDA has decided to follow the lead of Canada, Malaysia, Australia, and Brazil, among other countries, by requiring giant – graphic – warnings on cigarette packs. Manufacturers have vowed to fight that plan in court, contending that it violates their property and free-speech rights.<sup>72</sup> No matter how that battle ends, we can be sure it won't be the end of the struggle against a habit that leads to the premature death of roughly a third of those who take it up.



## 8. THE COMMUNITY REINVESTMENT ACT

# Regulation as Empowerment

In February 1975, a group of community leaders from around the country sat down with the new chairman of the Senate Banking Committee, William Proxmire of Wisconsin. They were there to talk about the practice of red-lining, in which banks declared minority neighborhoods off-limits to homeowners seeking mortgages and other forms of credit.

Moved by what he heard, Sen. Proxmire went on to engineer the passage of two momentous - but gentle - pieces of legislation. The Home Mortgage Disclosure Act of 1975 required lenders to disclose the quantity and amount of their mortgage loans, by zipcode. In 1977, Congress approved the Community Reinvestment Act (CRA), which went a step further, telling banks that in return for the benefits of deposit insurance and other forms of public support, they had a “continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.”<sup>73</sup> The statute called on regulators to issue periodic report cards and take the findings into account when banks sought permission to merge or expand.

In carrying out these laws, government would act more as a nudge or facilitator than as an enforcer. Nevertheless, the Community Reinvestment Act and the Home Mortgage Disclosure Act would unleash trillions of dollars in credit while contributing to important gains in home-ownership for low-income and minority families. They would achieve these good results, moreover, largely through straightforward loans that people could afford to repay.

### ENFORCEMENT GAP

Neither statute seemed to make much difference at first. Fair-lending advocates pointed to the fact that the job of interpreting and implementing the law had been had been left to federal bank regulators. Accustomed to viewing themselves as protectors of the banking system rather than of consumers, these agencies seemed to go through the motions of carrying out the law, while sending reassuring signals to banks. In one early circular, the Federal Reserve Board declared that a shortage of loans in a given neighborhood would not be considered “prima facie evidence of discrimination.”<sup>74</sup> Between 1985 and 1988, the Fed and other watchdog bodies conducted a total of 26,000 CRA audits; only 2.4 percent of the rated banks came away with grades of less than satisfactory.<sup>75</sup>

Things began to improve in the late 1980s. In May 1988, the Atlanta Journal-Constitution published a series of articles on discriminatory lending. In Atlanta, white neighborhoods had received about five times as many home-purchase loans as black neighborhoods with comparable income levels. In fact, relatively low-income white neighborhoods had fared better than high-income black neighborhoods.<sup>76</sup> Similar evidence surfaced in other parts of the country. At this time, Washington was under pressure to rescue thousands of financial institutions from a wave of irresponsible loans, often to faraway borrowers. As lending institutions came under criticism from several quarters, many in Congress thought it was time to step up the pressure on lenders to respond to the needs of their local communities.

The following year, Congress moved to tighten the HMDA disclosure system through provisions of the Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 - popularly known as the savings and loan bailout. Under the new rules, banks would have to release data on rejected as well as approved loans, and the numbers would be broken down by census tract, a smaller and more revealing geographical unit. Another important development came in 1993: banks until then had been able to win passing CRA grades by running advertising campaigns or making promises about future conduct; now, for the first time, the law insisted that regulators look at deeds rather than words.

## DELAYED IMPACT

In 1994, Congress repealed the restrictions on interstate banking, setting off a wave of bank mergers. In a flurry of high-profile cases, advocates seized the chance to make an issue of CRA compliance. Now that they had the data to document the problem bank-by-bank and neighborhood-by-neighborhood, community groups began to win over a widening circle of nonprofit and civic leaders, making their organizing campaigns harder for banks to ignore. Churches and foundations not only lent their names to these campaigns; in some cases, they used CRA data as a guide to decisions about where to deposit or invest their own money.

Gradually, the effects added up. Between 1993 and 2000, while home purchase loans increased by 53 percent over all, loans to lower-income borrowers and communities grew by 77 percent - the equivalent of more than half a million additional loans. By the end of that period, these loans accounted for 36 percent of all home purchase mortgages, up from 31 percent in 1993.<sup>77</sup> The law was having a salutary effect on loans to small businesses and farms as homeowners. Testifying before Congress in 1999, Fed chairman Alan Greenspan reported that in 1997, CRA loans included “525,000 small business loans worth \$34 billion; 213,000 small farm loans worth \$11 billion; and 25,000 community-development loans totaling \$19 billion.”<sup>78</sup>

## TARGETED TRANSPARENCY

Sunlight can be “the best of disinfectants,” Louis Brandeis wrote a century ago.<sup>79</sup> In their 2007 book, “Full Disclosure: The Perils and Promise of Transparency,” Archon Fung, Mary Graham, and David Weil examine an assortment of modern laws and regulations infused with Brandeis’ faith in the power of disclosure. The authors - two political scientists and a professor of management - point out that disclosure does not always deliver the hoped-for results. Even with heaps of information, consumers can make huge mistakes, not just individually but sometimes *en masse*.

But the book cites the Community Reinvestment Act and the Home Mortgage Disclosure Act as models of effective “targeted transparency.” Through report cards, ratings, and data disclosure, these laws have created a crucial body of information, which has served as an organizing tool, empowering citizen groups to identify problem banks, compile dossiers, gather allies, and mount advocacy campaigns.<sup>80</sup>

The reach of these laws goes beyond disclosure, of course. For banks, CRA creates a duty to extend credit in low- and middle-income communities. But the statute merely states that broad requirement; it does not spell out how much lending a bank needs to do, or what will happen if it falls short. The only penalty set forth out in the legislation - denial of a merger application - is suggested rather than required, and has, in fact, rarely been imposed.

This is a far cry from the stereotype of regulation as nitpicking, intrusive, or heavy-handed. Nevertheless, the CRA machinery has had a profound impact on banks and communities, leading to an estimated \$7 trillion in additional lending. The laws have succeeded because the loans, by and large, have succeeded. Bankers may start out cooperating largely in order to stay out of trouble with advocates and regulators. Having begun the process out of concern for their reputations, though, many bankers gradually discover

a better reason for taking CRA seriously: in the process of complying with the law, lenders have discovered a vast pool of responsible, credit-worthy families and businesses in communities that used to be ignored as a matter of course.

### **POSTSCRIPT: SCAPEGOATING REGULATION**

During the mortgage meltdown of 2007-08, free-market conservatives took aim at the Community Reinvestment Act. The way they told the story, lenders had lowered standards in order to curry favor with advocacy groups and their congressional allies. Although many pundits and politicians took up this line of argument, it gained little support from bankers and bank regulators. They knew better.

CRA lending had surged in the mid- and late 1990s. The boom in subprime and other tricky and high-priced mortgages came later, and it was driven by the rise of a new and effectively unregulated network of mortgage specialty companies. These “nonbank lenders,” as they came to be known, made their money up front, in the form of fees and commissions, and generally sold off their loans as soon as possible, turning them (with Wall Street’s help) into complex securities to be marketed around the world. From a financial standpoint, it was of little concern to the lenders whether a loan got repaid or not.

As the market heated up, major banks formed subsidiaries to grab a piece of the action. Like the nonbank lenders, these spinoff operations rarely held onto their loans. Although nominally subject to CRA, they faced little or no government supervision in practice. In fact, it was the absence of oversight that allowed them to get away with the various dodgy lending practices that led to the meltdown.

Even in the darkest hours of the subprime lending tragedy, though, CRA loans continued to perform well – and for good reason. Most such loans were conventional fixed-rate mortgages made (as the language of the statute required) “consistent with safety and soundness principles.” After the meltdown, the Federal Reserve Bank of San Francisco ran a comparison study of CRA-covered and exempt home-purchase loans made in California between January 2004 and December 2006. The bank concluded that “loans made by lenders regulated under the CRA were significantly less likely to go into foreclosure.”<sup>81</sup>

## 9. ACID RAIN

# Cap and Trade

In 1960, a University of Chicago law professor, Ronald H. Coase, published an influential paper on the problem of negative externalities – the costs that businesses offload onto the rest of us. Rather than dictate a particular remedy, society might get better results, Coase suggested, by using market mechanisms to induce companies to find their own answers.

Six years later, addressing a conference on air pollution in Washington, D.C., a University of Wisconsin graduate student named Thomas Crocker expanded on Coase's idea. Why not set an overall limit for a given form of pollution and create a system of permits, Crocker proposed, allowing companies to buy, sell, or trade the right to pollute.

In 1977 Congress incorporated such a provision into the Clean Air Act (CAA). Under that law, a company could continue to operate an old, high-polluting facility, if it “offset” the impact by opening a new, low-polluting facility at the same time. More than another decade passed, however, before Washington took the next step, establishing a full-fledged system of emissions trading. That happened in the early 1990s, as the federal government began to address the long-neglected problem of acid rain.<sup>82</sup>



### STEPPING UP TO THE PLATE

Coal-fired power plants had been emitting high levels of sulfur dioxide ( $\text{SO}_2$ ) as well as various nitrogen oxides ( $\text{NO}_x$ ) for decades. When  $\text{SO}_2$  and  $\text{NO}_x$  react with hydrogen and oxygen in the atmosphere, they form acids. Acid deposits – some wet (acidic rain, snow, mist, and fog) and some dry (acidic compounds falling to earth as fine particulates) – were slowly killing the lakes, streams, and soils of the Eastern United States.

Such deposits occur naturally, through volcanic activity and biological processes in oceans and wetlands. But humankind was creating a far bigger hazard through emissions from electricity generation; and people were suffering from (as well as causing) the problem. Exposure to acidic particulates and gases could lead to a variety of chronic and potentially lethal health problems, including bronchitis, asthma, and cardiac and respiratory disease.

By the end of the 1980s, studies conducted during the Administration of President Ronald Reagan left little doubt about the seriousness of the acid-rain problem. Reagan's successor, George H. W. Bush, agreed that something had to be done. Since Bush and his economic advisers shared some of the Reagan administration's hostility to “command and control” regulation, however, they decided on a “cap and trade” approach. Liberal economists supported it too, though some objected to the generous concessions given to the biggest polluters.

The cap was a limit on total emissions allowed: in a set of 1990 amendments to the Clean Air Act, Congress called for a 50-percent reduction in  $\text{SO}_2$  emissions over the next 20 years. The trade part was a provision allowing power companies and others to trade a fixed number of emission allowances, or

permits to pollute, on a securities-style exchange. Plants would initially receive allowances through a grandfather-right system, and have the option of using them, selling them, or buying more allowances. It was an arrangement designed to encourage innovation: facilities that came up with cost-effective ways to reduce emissions would be able to expand or sell some of their allowances to other facilities. The net result, in theory, would be a reduction in overall emissions, at the least possible total cost.

The reporter Kevin Drum spelled out the logic in the March-April 2009 issue of *Mother Jones*: “Suppose you have two plants, and the first one is able to eliminate one ton of pollutants at a cost of \$10,000,” Drum wrote. “The second plant, perhaps because it uses a different fuel or new boiler technology, can do the same for only \$4000. Under command and control, if you required them to remove one ton each, the cost would total \$14,000.

“But what if all you mandated was that two tons of pollutants be removed overall (the cap part) and allowed the plants to work out how to do it? Naturally, the first plant would just pay the second plant \$4000 to remove an extra ton of pollutants from its emissions (the trade part). At first this seems suspect: The first plant is being allowed to merrily pollute away. But you’ve removed two tons of pollutants, and since it was done more cheaply - for \$8000 instead of \$14,000 - you can afford to ratchet down the cap. You can require that three tons of pollutants be eliminated overall, and since this still costs only \$12,000, everyone comes out ahead. The public gets cleaner air, and the plants save money.”<sup>83</sup>

The concept of emissions trading was widely characterized by skeptics as “a license to pollute.” Over time, however, many critics came to acknowledge the effectiveness and appreciate the logic of the program. In fact, results came faster and less expensively than almost anyone had expected. By the end of 2002, SO<sub>2</sub> emissions had fallen 41 percent from their 1980 levels, dropping 9 percent in the two previous years alone. In 2003, the Congressional Budget Office estimated the benefits to human health at over \$70 billion annually; overall benefits had exceeded costs, according to the CBO’s calculations, by a factor of 40 to 1.<sup>84</sup>

## POSTSCRIPT: INTO THE GREENHOUSE

Acid rain remains a severe problem. That will continue to be true until most of America’s energy comes from non-polluting sources. Nevertheless, the idea of cap and trade has been validated. The European Union (EU), partly inspired by the U.S.’s success against acid rain, has adopted a similar approach to the problem of global warming caused by Greenhouse Gas (GHG) emissions. In the northeastern U.S., ten states have come together behind a Regional Greenhouse Gas Initiative (RGGI) that relies on the same basic strategy. In 2009, the House of Representatives passed a bill to establish a nationwide cap and trade program, setting a total limit on GHG emissions and ratcheting it down over time.

GHG emissions pose an exponentially greater challenge. Some have proposed a variation of the idea known as cap and dividend: permits would be auctioned off with the revenues distributed to the public (as Alaska’s Permanent Fund does with oil revenues) or used to invest in clean-energy technology – or both. Others, including Thomas Crocker, who originated the idea of cap-and-trade, favor a carbon tax; either way, the system could be designed to insulate low- and middle-income Americans from the impact of higher prices (for gasoline, heating fuel, and a host of consumer products and packaging, among other things). The cap and dividend model would underscore the idea of the sky as something that belongs to all of us, rather than just to the corporate interests that have done the most to exploit it for profit.<sup>85</sup>

Coming up with an effective and equitable (to say nothing of politically acceptable) mechanism will not be easy. Based on this country’s experience with acid rain, however, we know that cap and trade (or cap and dividend) does not have to be a cop-out. Market-based solutions can work.

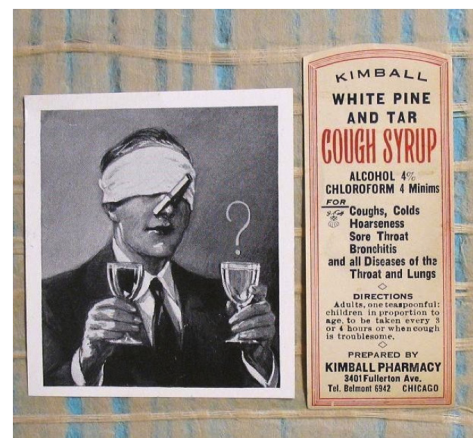


## 10. PRE-TESTING OF DRUGS

# The Citizen-Soldiers of the FDA

A month after going to work for the Food and Drug Administration, Dr. Frances Kelsey received her first assignment. She would review the safety of a sedative new to the United States but already in wide use across Western Europe. It was called thalidomide.

The Merrell Company, which had purchased the American rights to the drug from its German developer, was counting on swift approval. That was evidently also the expectation of the FDA officials who handed the case to the newly-hired Dr. Kelsey in September 1960. Hailed as a minor miracle drug – a sedative reputed to be as effective as barbiturates but without their mood-depressing side effects – thalidomide had been available in West Germany for three years, quickly becoming that country's third most popular nonprescription medicine. In Sweden, it was known as the “babysitter drug” for its ability to calm infants and children, giving their mothers a bit of peace in the process.<sup>86</sup>



What Drugstores Used to Sell

As Dr. Kelsey began to study the record, however, she was troubled by what she found. U.S. law by now required drugs to be pre-tested for safety. What Merrell had done in the name of testing (sending its salespeople around to physicians' offices with samples and talking points) looked more like marketing to her. Trained as a pharmacologist at the University of Chicago, Dr. Kelsey was struck by the absence of supporting data or any indication of serious scientific study. One of the most enthusiastic physicians in Merrell's network of safety-testers acknowledged that his patient testimony had been gathered largely in casual conversations over lunch or by phone, or, he added, “it may have been when we played golf.”<sup>87</sup>

### DODGING A BULLET

Investigating further, Dr. Kelsey came across stories of patients who had experienced dizziness, trembling, and a form of nerve damage known as peripheral neuropathy – despite Merrell's assertion that Thalidomide had no side effects worth worrying about. Her concerns were aggravated by the company's plans to promote the drug as a remedy for nausea (or “morning sickness”) in pregnant women. Dr. Kelsey wondered if thalidomide would penetrate the placental wall of a fetus. The company could not say; it had not taken the trouble to find out.

Under federal law at the time, the FDA had 60 days to review an application; if it didn't act within that period, the company could go ahead and put its product on the market. Twice, the agency turned Merrell down while Dr. Kelsey continued to investigate. Finally, after nearly six months of back and forth, she reached her verdict. With the support of her superiors, she told the company that it would be “highly inexcusable” to approve a product with such uncertain benefits and such large risks.

Merrell fired back with all guns. Accusing Dr. Kelsey of nitpicking, company executives tried to go around her back, sending doctors who supposedly had “experience” with the drug to talk to FDA higher-ups and plead for a reversal. The company maintained its lobbying offensive and posture of indignation almost right up until the day in November 1961 when German newspapers finally reported the truth that Merrell had helped sweep under the rug.

Thalidomide was already associated with dozens - ultimately it would be thousands - of birth deformities. Across Europe, northern Africa, and Australia, women who had taken the drug were giving birth to babies with missing arms and legs, or, in some cases, with hands or feet that sprang directly from the trunk of the body. By the time public health officials added up all the reports, it was one of the great medical tragedies of the era, with an estimated 12,000 cases in 44 countries. Only 17 of those cases, however, had occurred in the U.S.<sup>88</sup>

## FLAGSHIP OF HEALTH AND SAFETY REGULATION

It is rare that we can point to a single regulator or decision with so much impact. But Dr. Kelsey wasn’t operating in a vacuum. The FDA is the oldest of federal consumer protection agencies, with a tradition of integrity and dedication that goes back to its founding director, Harvey Washington Wiley, a public-spirited chemist who was one of the heroes of the progressive movement. A century ago, under Wiley’s leadership, the agents of what was called the Bureau of Chemistry (and was originally part of the Department of Agriculture) went after companies that were putting decomposed, mold-ridden tomatoes into bottled ketchup or scavenging city streets for dead carriage horses that could be processed and sold as beef.<sup>89</sup>

In 1937, the Food and Drug Administration (it had been renamed seven years earlier) faced one of its greatest crises - the marketing by a Tennessee company of a liquid version of one of the new sulfa miracle drugs. Searching for a solvent that would yield an agreeable taste, the company’s chief scientist settled on diethyl glycol, a little-known chemical that would later become a staple ingredient of antifreeze and be known as deadly. Without any safety testing, the company had shipped thousands of bottles of its “elixir sulfanimide” to pharmacists across the country.

A week later, a Tulsa, Oklahoma, physician sent a horrified telegram to the headquarters of the American Medical Association. Six of his patients had died in agonizing pain after taking the medicine. The number of fatalities quickly passed the 100 mark; most of the victims were children being treated for strep throat. The death toll would have climbed far higher had it not been for an extraordinary dragnet mounted by the FDA. Despite uncertain legal authority (and steady resistance from the manufacturer), the FDA mobilized its full complement of 239 inspectors in a round-the-clock, military-style mission to contact physicians and drugstores. In the end, they were able to remove more than 90 percent of the remaining supply from the market.<sup>90</sup>

## BEFORE AND AFTER

The elixir sulfanimide case led to passage of the Pure Food, Drug and Cosmetics Act of 1938, which laid down the pre-testing requirement. It was an imperfect measure, leaving too much control in the hands of drug makers. By empowering the FDA to say no when it found something badly wrong, however, the 1938 law put the U.S. well ahead of most countries.

Stalidon, promoted as a remedy for boils, killed more than a hundred patients in a small French town in 1954. In the 1960s, isoproterenol inhalers led to the deaths of some 3,500 asthmatic children in England and Wales. Aminorex, an appetite suppressant, caused severe pulmonary hypertension, leading to more than two dozen fatalities in several European countries. The FDA had rejected all these medications for sale in the United States.<sup>91</sup>

The thalidomide case inspired Congress to pass the so-called Kefauver Act, a set of amendments that called for scientific rigor in testing and required drug makers to prove the effectiveness as well as the safety of their products. The Kefauver Act, signed into law in 1962, propelled the FDA into a new role as developer of standards for clinical trials, making decisions about proper dosage levels, record-keeping requirements, control groups, and how much animal testing to do (and what kind) before it was safe to use human subjects.

Over the decades, FDA oversight has had a dramatic effect on the pharmaceutical world. Before the Pure Food, Drug, and Cosmetics Act, this was an industry dominated by concoction makers and hucksters. Almost any mixture could be offered for sale, and almost any claim could be made. Listerine, for example, was no mere mouthwash; the label touted it as a cure for tuberculosis. A product known as Crazy Water Crystals (which turned out to cause ruptured appendices) claimed the ability to bring people back to life after all other treatments had failed. It “pulled me out of the grave,” one grateful customer declared in a testimonial.<sup>92</sup> Most drug companies busied themselves in combining and recombining a tiny number of ingredients with proven therapeutic powers, often adding caffeine, alcohol or morphine to the mix without saying so. (It was illegal to misrepresent the contents of a drug, not to conceal them.)

After the pre-testing requirement took effect, drug makers began to have labs, scientists, and a real interest in understanding the effects of their products. Today, the World Health Organization lists some 500 useful medical compounds.<sup>93</sup> That, too, is part of the heritage of safety regulation, both in the U.S. and in other countries that, after experiencing the downside of a looser approach, have decided to follow our lead.

### POSTSCRIPT: A SENSE OF MISSION

The modern pharmaceutical industry is dominated by multi-billion-dollar corporations whose fortunes continually hang on the latest blockbuster drug. As the stakes rise, so does the impatience of those seeking the official go-ahead.

In the late 1980s and early '90s, the FDA's critics complained of a pattern of supposedly unwarranted delays in evaluating valuable medicines. Despite scarce evidence, politicians and pundits took up the “drug lag” cry, and FDA leaders vowed to speed up the process. Among the eventual results were Vioxx and Avandia, two runaway successes that turned out to have been approved on the basis of studies too small to reveal a key side effect they had in common: an unusually high incidence of heart attacks and strokes.

Between 88,000 and 139,000 have suffered a heart attack or stroke as a result of taking Vioxx to deal with the pain of arthritis and other ailments. No one has yet calculated the toll among the diabetics who have used Avandia to control their blood sugar. (Had people known, they might have chosen alternatives without those risks but with similar benefits.)<sup>94</sup>

Dr. David Graham, an associate director in the FDA's Office of Drug Safety, spoke out publicly in 2005 to say that politically appointed superiors had tried to suppress his warnings about Vioxx. More recently, Dr. Graham has testified about his unsuccessful efforts, along with several colleagues, to have Avandia removed from the market in 2007. In January 2009, a group of nine FDA scientists signed a broad letter of protest. The agency's work, they wrote, had “been corrupted and distorted by current FDA managers.” The letter went on to describe “an atmosphere... in which the honest employee fears the dishonest employee, and not the other way around.”

Seizing on these cases, some critics have characterized the FDA as a failed agency, irretrievably “captured” by the industries it was supposed to oversee. But a more heartening conclusion can be drawn. Dr. Graham's testimony and the scientists' letter depicted an agency in need of new leadership and a reassertion of its founding purpose. At the same time, their willingness to speak out reflected an enduring culture of pride and commitment. More than a century after its founding, the FDA continues to attract people who are seeking a chance to serve the public good and will not settle for less.

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