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The Deregulation Debate

WILLIAM K. JONES*

The most pervasive issue in the burgeoning deregulation controversy is the question of who has the burden of proof and how is that burden to be discharged? In one way or another, this question is addressed in each of the papers presented.

Critics of a regulatory program are likely to point to various costs and burdens associated with the program, to failure of the program to meet public expectations, and to anticipated benefits to be derived either by eliminating the program or by revising it in major respects.

Defenders of a regulatory program are likely to claim various benefits associated with the program and to describe costs, burdens, and failures, to the extent they are conceded, as inevitable aspects of the activity being regulated or as reasonable charges for the regulatory benefits allegedly conferred. Most importantly, the defenders of regulation will dispute the validity of the asserted benefits of deregulation by describing them as "unproven" and "speculative."

Ideally, some type of controlled experiment should be employed to resolve at least some of the disputed issues. But such experimentation rarely is practicable. Moreover, even where diverse regulatory regimes are applicable to the same industry in different areas, the attempt to make comparisons often is beset with difficulties presented by variables other than the difference between regulatory programs involved.

In the face of uncertainty, the defenders of the status quo normally carry the day, and most proposals for deregulation or major regulatory reform fail because the proponents are unable to make a convincing case that the change sought will provide more benefits than burdens. This kind of negative reaction is likely to continue unless something can be done to shift the burden of proof, at least in part.

The starting point is a recognition that specific regulatory controls, of the type here under discussion, represent an exceptional rather than a normal means of ordering economic activity in our society. It seems reasonable, therefore, to inquire why a particular activity requires spe-

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cial regulatory treatment. The burden should be on the defenders of the regulatory program to advance its rationale, in both historical and contemporary terms. Emphasis should be placed on three elements:

(1) The justifying rationale must rest on some aspect of the activity which *distinguishes* that activity from those which are not similarly regulated. Thus, it should not suffice to urge that lower prices, greater safety, or more assured supply is needed, unless some showing is made that the regulated activity would present special problems in these respects in the absence of regulation.

(2) The form of regulation adopted must be *related* to the distinct deficiency identified by the proponents of regulatory controls. Thus, deficiencies in the availability of information may make mandatory disclosures or quality standards appropriate, but comprehensive economic regulation probably could not be justified on this basis.

(3) The benefits to be derived from the regulatory scheme must be *public* benefits. Higher prices or lower prices are not in themselves either good or bad. The question is what is their impact on society generally. The desire of motorists for low-price gasoline and the desire of truckers for high-level rates are both understandable. But neither represents a benefit to the public which justifies regulatory intervention unless something more is involved than robbing Peter to pay Paul.

This does not appear to be an unreasonable initial burden to place on the proponents of regulation. As a former regulator, it is a burden that I would be prepared to assume. And it is one which sets the proper frame of reference for ensuing deliberations. In some instances, regulatory regimes would have great difficulty passing muster under this initial scrutiny: trucking and airlines seem the most notable in this category. In other cases, I would expect this initial burden to be carried to an extent that would require a response from the critics of regulation.

In addition to seeking to negate showings made by the regulatory proponents under the initial issues (distinctiveness, relatedness, and public purpose), the critics should assume the burden of proof on a number of additional issues:

(1) that the benefits sought to be achieved by the regulatory program have not been achieved, or have not been achieved in significant measure;

(2) that the costs of the regulatory program, both direct and indirect, are excessive in relation to the benefits achieved (if any); and

(3) that some alternative arrangement (including complete deregulation) would achieve a better relation of costs and benefits.

As indicated at the outset, this is a difficult burden to sustain. But there are regulated activities in which the benefits and burdens are so disparate that critics of the regulatory process may be expected to fare reasonably well. I have in mind such enterprises as railroads and natural gas production.

This leaves some activities in which the evidence probably will be close and where regulatory controls will be maintained while the debate continues. Conventional public utility regulation of monopoly enterprises is hardly an unmitigated success. But neither does it reveal evidence of chronic failure. More importantly, the alternatives advanced all pose problems of their own, and some appear to be wholly impracticable.

Broadcast regulation raises issues that are probably distinct from those of other regulatory regimes because of substantial discrepancies in individual normative judgments and the lack of any clear consensus on what is desirable and what is undesirable. But even here there are better and worse ways of doing things, and the pressure for change (in the direction of less regulatory control for the most part) may well be successful. I have in mind developments in the area of cable television, pay television, and possible separation of some program responsibilities from the networks.

I conclude by expressing agreement with those who observe that deregulation is not inevitably the correct answer. I also join in the familiar theme that such regulatory activities as are retained can, and should, be made to function more effectively. Without going into detail on this final point, I would emphasize four essentials: (a) clear legislative direction as to the regulatory purpose to be achieved; (b) adequate resources (particularly personnel) to achieve that purpose; (c) substantial flexibility in the mode of implementing the regulatory program; and (d) qualified individuals in charge of the program, who can grasp both the nature of the problems presented and the soundness of available solutions—including the wisdom of reducing regulation in appropriate circumstances.