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## **246 Glorious Cheeses or the Impact of Environmental Regulation on Small and Emerging Business Essay**

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246 GLORIOUS CHEESES OR THE IMPACT OF ENVIRONMENTAL  
REGULATION ON SMALL AND EMERGING BUSINESS

by  
David Schoenbrod\*

*The Environmental Protection Agency (EPA) oversees a “top-down” approach to environmental protection in which appointed officials in Washington, D.C. impose detailed requirements on a diverse nation. This largely unaccountable, highly centralized mode of lawmaking does not necessarily produce better environmental quality than would a more accountable and decentralized alternative. It does, however, disproportionately harm small and emerging businesses because it produces an inefficient mix of emission limits, subjects sources to superfluous bureaucratic procedures, and discriminates against new sources. Large corporations have adapted to the top down approach and even benefit from it because they can pass its costs along to consumers and are protected from competition. In contrast, small and emerging businesses lack the infrastructure to cope with the bureaucratic complexity and find it harder to start up the new sources that they need to compete. The costs of EPA’s heavy hand thus fall not on entrenched corporate interests but rather on those who dream of growing their own businesses and ordinary citizens.*

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## I. INTRODUCTION

It is pleasant to contemplate delicious foods, but not the cost of environmental protection.

I conjure up the food in the form of glorious cheese to induce you, the reader, to consider those depressing costs of environmental regulation; but, I will get to the cheese in the end.

Most Americans think environmental regulators should disregard cost in protecting health from pollution.<sup>1</sup> Many people apparently think that bringing up the costs of environmental protection is a ploy to get them to sacrifice their own health to line the pocket of someone else, with that someone else being a corporate fat cat. The Administrator of the Environmental Protection Agency (EPA), Carol Browner, played to such sentiment when she stated, "If the day comes when we find ourselves subjecting the health protections of our children and our most vulnerable citizens to the outcome of cost-benefit analysis—literally putting a price on their heads—we will have dishonored our past and devalued our future."<sup>2</sup>

Those who urge considering cost in environmental regulation present choice targets for such demagoguery. The most publicized studies of the economic impact of environmental regulations focus on the total cost of protection rather than the marginal cost of incremental increases in the degree of protection.<sup>3</sup> Opponents of regulation present the costs this way to make them look large. This tactic is self-defeating because the implicit message is that saving the costs requires ending all protection from the threat. Proponents of regulation, such as EPA, have their own reason to focus on total costs rather than marginal costs.<sup>4</sup> Each additional increment of environmental protection tends to cost more and bring less benefit. By comparing the total costs and benefits of environmental protection, not the marginal costs and benefits, EPA conflates the huge benefits and small costs of the first steps to improve environmental quality with the smaller benefits and larger costs of the later steps. It thereby frames the issue as: "Do you support EPA or would you rather have no protection from pollution?"

Because it is crazy to talk of getting rid of the environmental protection, this Essay will not discuss the total impact of environmental protec-

<sup>1</sup> The Gallup Organization, *Gallup Poll News Service* (April 3-9, 2000), at <http://www.gallup.com//poll/surveys/2000/topline000403/q15t19.asp>.

<sup>2</sup> Carol M. Browner, Remarks to the National Press Club (October 3, 2000), <http://www.epa.gov/otaq/speeches/cmbpr103.pdf>.

<sup>3</sup> See, e.g., Michael Hazilla & Raymond J. Kopp, *Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis*, 98 J. POL. ECON. 853 (1990).

<sup>4</sup> EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970 TO 1990 (1997), <http://www.epa.gov/airprog/oar/sect812/copy.html>.

tion on small and emerging business. It will instead compare the impact of the present system of EPA protection with that of another way to protect public health and the environment.

There is a better way. Most environmental problems are local or regional and should be handled by local or state government. Most questions of environmental regulation cannot be resolved solely by science, but ride in the end on judgments of policy. The responsibility for those policy choices should rest squarely on the shoulders of the elected policy makers in elected legislatures and not be fobbed off on bureaucrats. In brief, environmental policy should not come from the top down with EPA on top, but should come from the people up with the people's desire for sensible health protection filtered through elected legislators, mainly at the state and local level.

My aim is not to scuttle environmental protection through a change in process. The Environmental Protection Agency is only a brand name for one way to deliver environmental quality. In fact, most progress on environmental protection has come from other institutions. Looking back over the long haul of air pollution control, the United States has made steady progress from 1900 to the present, and there is no discernible acceleration in the rate of progress around 1970 when EPA took over.<sup>5</sup> Moreover, the most dramatic improvements after 1970 at the national level came from rules of conduct enacted by Congress, not from regulations promulgated by EPA.<sup>6</sup>

It is true that the states were far from perfect environmental guardians before 1970, but the federal government was also often a stinker. Thinking back to the early 1970s, the federal government was—to the alarm of environmentalists—channeling streams into concrete gutters, developing the fast breeder reactor, carelessly granting leases for off-shore oil drilling, mismanaging national forests, over grazing national lands, failing to curb the use of DDT, and more.

The point is not that EPA has chosen to push regulation to the point where the costs are excessive in relation to the benefits, although that is true in many instances.<sup>7</sup> In other instances, EPA has failed for long periods of time to regulate pollution of great public concern. EPA was woe-

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<sup>5</sup> INDUR M. GOKLANY, *CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION* 125-27 (1999).

<sup>6</sup> David Schoenbrod, Remarks to the Board of Trustees of the National Resources Defense Council (Mar. 12, 1997), in 20 *CARDOZO L. REV.* 767, 768 (1999).

<sup>7</sup> ROBERT W. GRANDALL, *CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR* 50 (1983) (reviewing Hahn's work at the Brookings-AEI center). A stunning example is Dr. Lois Gold's work showing that EPA's pesticide regulations are premised on the assumption that people take in thousands of times, or even hundreds of thousands of times, more pesticides than the FDA finds in the food available at the supermarket. Mainstream scientists like Dr. Gold find that synthetic pesticides account for less than 1% of human cancers. Dr. Gold also points out that food we eat contains approximately two thousand times more natural pesticides than synthetic and that natural ones appear to be no less carcinogenic. *See*

fully slow in dealing with lead in gasoline, carcinogenic air pollution, and interstate pollution. The point is that EPA is the wrong institution to impose environmental regulations on the nation. One reason for this is that the way EPA goes about its job unnecessarily inflates the costs for everyone, especially small and emerging business.

This proposal for devolution and non-delegation is highly controversial and raises many questions. I have dealt with such questions in previous publications<sup>8</sup> and will deal with them comprehensively in a book in progress.<sup>9</sup> Instead of retracing that ground, this Essay will argue that the present top-down approach to environmental protection harms small and emerging business.

Part II of this Essay characterizes the present top-down approach to environmental policy making. Part III identifies the superfluous burdens that this approach imposes on small and emerging business. Part IV discusses EPA's reaction to complaints about these burdens. Part V tries to imagine what the world would look like without these burdens. Part VI shows that the trade-off is not between our health and the wealth of corporate fat cats, but between EPA's power and our ability to pursue happiness.

## II. THE TOP-DOWN APPROACH

The Clean Air Act exemplifies the top-down approach.<sup>10</sup> In 1970, the Act mandated that EPA protect the health of all Americans from all harmful pollutants by the end of the 1970s regardless of the cost.<sup>11</sup> The goal of protecting health from pollution without regard to cost, as attractive as it may sound, is only an ideal until there are laws requiring persons to reduce pollution to the required extent. Except for the very important law requiring auto manufacturers to build cleaner cars, Congress did not enact the rules of private conduct, such as emission limits on specific kinds of plants, needed to achieve its goal in the Clean Air Act. That job was left to EPA and the states, which were to be under EPA's thumb. Thus, Congress enacted not laws, but an ideal.

In legislating by ideal, Congress does only half the job of making law; it creates rights without imposing corresponding duties. It does the popular part of lawmaking and shuns the unpopular part. The "lawmakers" in Congress further distanced themselves from responsibilities by authorizing the lawmakers at EPA to couch their requirements as unfunded mandates that the states must implement. As a result, unelected officials at the

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STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 23 (1993).

<sup>8</sup> See, e.g., SCHOENBROD, *TIME*, *supra* note \*; Schoenbrod, *supra* note 6; DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* chs. 4, 9 (1993).

<sup>9</sup> DAVID SCHOENBROD, *THIS EARTH, OUR REPUBLIC* (forthcoming 2003).

<sup>10</sup> 42 U.S.C. §§ 7401-7671q (1994 & Supp. IV 1998).

<sup>11</sup> *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980).

EPA in Washington, D.C., are empowered to impose their vision of good laws on society.

It is a mistake to think Congress could do a better job by legislating ideals instead of rules of conduct. In legislating ideals, Congress disengages itself from the interests that must give way if the ideals are to be realized. Legislators cannot know whether they really believe in achieving their loudly proclaimed ideals until they face up to those interests. It turned out that achieving the ideal of the 1970 Clean Air Act would have required taking most of the cars off the road in Los Angeles and halting construction of new factories in many areas with high unemployment. No one in public office was willing to defend such measures.

It is no good trying to excuse this legislative idealism on the basis that there is time enough for Congress to face the hard choices after the ideal is enacted. Statutes that launch regulatory ideals, such as the right to clean air, are not trial balloons. With regulatory ideals, like entitlements, people come to depend upon what Congress has seemingly given them. Once we get something from government, it feels like a right. We fight to keep those rights even if we would not have missed getting them in the first place. Besides, repealing an enacted ideal requires going through the Constitution's legislative process. The House, the Senate, and the president were each given a say in enacting statutes so that government would not act rashly. By legislating ideals, Congress blunts the procedural checks on acting rashly. Yet when rash action does result, those checks come into full play to impede new legislation to temper it. In addition, once Congress legislates a new ideal, a subgovernment—an agency and symbiotic interest groups—grows up around the ideal to defend it.

The Clean Air Act is a case in point. In 1977, Congress amended the Act to avoid those consequences that caused visible distress to large numbers of voters, including turning Los Angeles into a pedestrian mall. However, Congress left in place both the ideal of healthy air regardless of cost and the politically convenient device of empowering EPA to make up the rules that the Agency believed were necessary to achieve that ideal.<sup>12</sup> As a practical matter, this has meant that Congress will not interfere so long as EPA does not cause highly visible harm to large numbers of voters. EPA is thus free to frustrate small and emerging business so long as it is done piecemeal.

The Clean Air Act, and the many statutes modeled on it, allow EPA to run major segments of civil society on quasi-military lines through a chain of command that runs from Congress down through the Agency to states and ultimately the regulated entities.<sup>13</sup> The result is a relentlessly

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<sup>12</sup> The 1977 amendments to the Clean Air Act avoided the most dire consequences by extending the deadline for achieving the primary ambient air quality standards. 42 U.S.C. § 7410 (1994).

<sup>13</sup> See, e.g., *id.* §§ 7408-7410, 7501-7515.

detailed system of control. Instead of limiting total emissions from each plant, the regulatory system frequently places a separate emission limit on every one of the many smokestacks, pipes, and vents coming out of the typical plant. The system specifies outlet-by-outlet emissions limits while also mandating the techniques used to achieve, monitor, and report those limits.<sup>14</sup> All this must be pinned down in a permit to be secured by a business before going into operation.<sup>15</sup> To get the permit, a source must pay a tax sufficient to keep the regulators in business.<sup>16</sup> Also, if the source needs to change what it produces or how it operates, which can happen every few weeks in this computer age, the source must first secure an amended permit.<sup>17</sup> This can take months or years. Any pollution source that deviates from this detailed system of control commits an offense punishable by civil sanctions and, in many cases also by criminal sanctions, even if no harm was done.<sup>18</sup>

This system contrasts sharply with how our legal system traditionally discouraged antisocial activity. As a rough generality, if you acted wrongly but caused no harm, you paid token damages or nothing at all. No harm, no foul. If you did wrongly cause damage, you paid for it but were not punished unless you did something society judged awful. Because only awful conduct was deemed criminal, ignorance of the law was no defense—you should have known better. Such an approach would not work for many modern environmental problems because it is hard for judges to place a dollar value on the harm done by most pollutants. Even so, the intrusive system of control that we now have would be unnecessary but for the idea that the regulators in Washington, D.C., must control everything.

Without remote control from Washington, we could dispense with the flood of regulations flowing down the federal chain of command. States and cities, if left to their own devices, would not adopt such a compulsive style of environmental regulation—one in which EPA officials seem to be trying to make rules in Washington for every possible contingency that might arise across the land. State and local officials would be more prone to assess particular problems as they arise and decide what should be done, just as sensible human beings handle issues that arise in their personal lives. Local officials, working with the plant operators and neighbors of a pollution source, could craft solutions that make sense in the context of the specific problem. That is impossible when all solutions must hew to federal rules.

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<sup>14</sup> *Id.* §§ 7661-7661c.

<sup>15</sup> *Id.* § 7661a(a).

<sup>16</sup> *Id.* § 7661a(b)(3).

<sup>17</sup> *Id.* § 7661b.

<sup>18</sup> *Id.* § 7413(b), (c).

### III. THREE COSTS

The top-down system of environmental protection increases the cost of regulation in three ways: by choosing inefficient ways to reduce pollution, by increasing the burden of dealing with environmental regulators, and by imposing higher burdens on new competitors.

#### A. *The Cost of an Inefficient Mix of Emission Limits*

The top-down approach is inefficient because it takes the authority to decide how to protect the environment away from those with the most local knowledge. Economic theory teaches that local knowledge is essential to efficiency. Experience teaches the same lesson. Witness the disaster of central planning in the Soviet Union. Yet, according to Professor Richard Stewart, a former trustee of the Environmental Defense Fund, the EPA system "has grown to the point where it amounts to nothing less than a massive effort at Soviet-style planning of the economy to achieve environmental goals."<sup>19</sup>

There is no reason to think that such centralized planning should work any better in running the American environment than in running the Soviet economy. Professors Henry N. Butler and Jonathan R. Macey speak for many liberal and conservative scholars in concluding that the "command-and-control regulatory strategy . . . has not set intelligent priorities, . . . has squandered resources devoted to environmental quality, . . . has discouraged environmentally superior technologies, and . . . has imposed unnecessary penalties on innovation and investment."<sup>20</sup> No wonder. People sitting in Washington, D.C., are trying to choreograph all of the environmentally-related activities in the United States in the face of wide disparities in local conditions and ceaseless changes in our understanding of pollution dangers and pollution-control technology.

Moreover, our centralized planners, unlike their Soviet counterparts, have to brook the interference of members of Congress doing casework for constituents and contributors and the intervention of federal judges. As Stewart puts it, the federal chain of command is a self-contradictory attempt at central planning through litigation.<sup>21</sup>

Scholars holding diverse political perspectives have suggested pollution taxes, emissions trading, greater reliance on the common law, and other radical alternatives to Washington's command-and-control approach. Others, such as former EPA Administrator William Ruckelshaus, have criticized the federal government's practice of imposing separate regulatory schemes for air pollution, water pollution, and other types

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<sup>19</sup> Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153, 154 (1988).

<sup>20</sup> HENRY N. BUTLER & JONATHAN R. MACEY, *USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY I* (1996).

<sup>21</sup> Stewart, *supra* note 19, at 153-62.



of pollution.<sup>22</sup> They suggest, instead, that plants be looked at holistically in order to produce better overall environmental quality at lower costs. Such innovation is practically impossible without local control.

The potential savings from local flexibility are immense. Amoco and EPA jointly studied the operation of one refinery to determine the consequences of allowing more flexibility.<sup>23</sup> The study found that the refinery could achieve "about 97 percent of the release reductions that regulatory and statutory programs require . . . for about 25 percent of today's costs for these programs."<sup>24</sup> These huge savings came from the refinery operators being freed from regulatory restrictions on *how* they reduced total emissions. Similarly, many systematic academic studies suggest that more market-oriented approaches could produce the same environmental quality now being achieved at only one-quarter of the present cost.<sup>25</sup>

Savings three-quarters of pollution control costs to get the same pollution control result would make a huge difference because we now spend \$1,850 per household per year on the capital and operating costs of pollution control equipment.<sup>26</sup>

Why is it that market-based approaches can produce such huge savings? Instead of regulators telling sources how to reduce emissions by assigning unalterable emission limits to each smokestack at a factory and specifying in pollution permits the means to control emissions at each smokestack, regulators could allow sources to pick the best way of reducing overall emissions at each factory. The sources, rather than the regulators, have the most local knowledge about the best way to reduce total emissions from their plants and the financial incentive to use that knowledge to pick the most efficient means to comply. It was this type of flexibility that allowed Amoco to save so much money at its refinery.<sup>27</sup>

Moreover, instead of regulators assigning unalterable emission limits to each source, regulators could allow sources to trade emission rights among themselves. Sources also have a strong financial incentive to trade so that pollution reduction would be done by the sources that could do it with the least expense. Again, the sources, rather than the regulators, have the most local knowledge about the cheapest way to reduce total emissions from all plants in the area.

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<sup>22</sup> Barry G. Rabe, *An Empirical Examination of Innovations in Integrated Environmental Management: The Case of the Great Lakes Basin*, 56 PUB. ADMIN. REV. 372, 372-81 (1996).

<sup>23</sup> HOWARD KLEE, JR. & MAHESH PODAR, AMOCO/USEPA POLLUTION PREVENTION PROJECT: EXECUTIVE SUMMARY 1 (rev. ed., 1992).

<sup>24</sup> *Id.* at v.

<sup>25</sup> See, e.g., TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 362-63 (5th ed. 2000).

<sup>26</sup> See EPA, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 2-1 (1991) (cost estimates); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 tbls. 17, 65 (115th ed. 1995) (population and household estimates).

<sup>27</sup> KLEE & PODAR, *supra* note 23, at 11.

Going from the top-down to the bottom-up approach to environmental protection is not the same as adopting a market-based approach that could cut pollution control costs by three-quarters. Some states and localities might still use command-and-control regulation. Even so, command-and-control regulation at the state and local level is likely to be more efficient than the federally mandated version because the states and municipalities have more local knowledge and would have the freedom to adapt regulations to local conditions.

More fundamentally, states and localities have every reason to explore flexible alternatives to command-and-control regulation because they feel the pressure to find efficient means to accommodate environmental and economic concerns. In contrast, EPA inevitably resists flexible approaches in order to maintain its own power. States are more open to real experimentation, and it makes more sense to experiment one state at a time. State and local environmental agencies continue to develop innovative approaches to every type of pollution problem despite federal mandates consuming such a large proportion of their energy and resources. The drive exists at the state and local level for the same reason that states and localities spearheaded environmental improvement before 1970—officials closest to the citizens who experience the pollution and to the facilities that are regulated are most aware of need to find sensible solutions. These innovations have largely gone unrecognized because, until recently, the state and local agencies lacked any collective apparatus for publicizing their accomplishments. Now, however, the fledgling Environmental Council of the States, an association of state environmental commissioners, is beginning to get the story out.<sup>28</sup> In contrast, EPA spends heavily on self-promotion.

### *B. The Cost of Red Tape*

The \$1,850 annual per household pollution control spending figure accounts only for the cost of buying and operating pollution control equipment. It does not account for other burdens of environmental regulation. One such burden is that sources must go through complex bureaucratic procedures.

To get some feel for the scope of the bureaucratic complexity, it is useful to consider the quantity of words that flows down the chain of command. At the top is a thick volume of statutes in fine print. As the cascade flows by EPA, it spreads to fill a two-foot shelf of volumes of agency regulations. The EPA regulations are so lengthy partly because those who write them respond more to pressures from within the Agency to enlarge and protect its power than to the public's need for clear, concise rules. The problem is not that EPA is over solicitous of the environment; it is that EPA is over solicitous of itself. So, the regulations construe

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<sup>28</sup> See, e.g., Env'tl. Council of States, Innovative Ideas, at <http://www.sso.org/ecos/publications/innovate.htm> (last visited Mar. 10, 2001).

the Agency's power as broadly as possible and then respond to the obvious instances of overreaching by providing a slew of narrowly defined exceptions. Thus, under a statute regulating the handling of hazardous wastes, the Agency takes seventeen pages to define the term "hazardous waste."<sup>29</sup> The definition reads as if it were written by Monty Python's John Cleese.

As the cascade of words goes by the lower reaches of EPA, it spreads out still further in the form of EPA "guidance" documents—one can see why guidance is necessary. One subset of the guidance documents for one of the dozens of federal statutes, Superfund,<sup>30</sup> fills thirteen loose-leaf notebooks. There are probably twice as many guidance documents for that particular statute, but no one knows for sure because the agency itself has been unable to assemble a complete collection.

As the paper flood reaches the states, it spreads still further in the form of state legislation and state regulations, all of which must take the form mandated by federal instructions. The cascade keeps spreading. The states must submit plans to EPA to show that the federal instructions will be implemented. The plans are not usually documents in the ordinary sense of the word; they are often filing cabinets full of submissions from the state to EPA officials. Finally, state and local governments and pollution sources must submit reports to EPA to show that the federal instructions were carried out.

A single federal regulation that occupies only a few pages in EPA regulations that occupy two feet of shelf space may reflect years of administrative and judicial proceedings involving the labor of hundreds of employees of federal agencies and contractors. Hundreds or thousands of employees of state and local government and businesses are also necessarily involved. These are predominantly employees of large, established businesses. Small and emerging businesses generally cannot afford to be involved or even to support trade associations able to represent them adequately in most regulatory proceedings that have an impact on them. Small and emerging businesses are under-represented and under-informed and, thus, at an aggravated risk of making investments that will get them into trouble with the regulators. Moreover, once promulgated, the regulations set in motion requirements for paperwork that, in itself, does nothing to clean the environment.

Big corporations can live with government by ideal. In truth, they often come to like it. They can cope with its complications because they have in-house staffs and outside lawyers, often hired away from public interest groups and EPA. These specialists know that their livelihoods come from their knowledge of the fine print in the chain of command. Of course, the corporations must pay for these specialists and for the pol-

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<sup>29</sup> 42 U.S.C. § 6903(5) (1994), 40 C.F.R. §§ 261.30–.38 (2000).

<sup>30</sup> 42 U.S.C. §§ 9601–75 (1994 & Supp. IV 1998).

lution control itself. However, because all large competitors bear a similar burden, the costs can be passed along to consumers.

The compulsive system of crime and punishment is more of a problem for state and local governments, farmers, and small and emerging businesses. Homeowners or other property owners with, for example, wetlands, asbestos, lead paint, or radon problems, are also harmed. Unlike large corporations, these people are not well equipped to deal with highly complex regulatory requirements.

A small and emerging business operating one modest plant must often decode almost as much regulatory complexity as a large corporation running twenty large plants. In many smaller businesses, the challenge of dealing with the bureaucracy falls upon the owner-operator. It is not that the owner-operator understands the regulations; he or she simply does not know enough to tell a subordinate how to deal with the problem.

The pollution control costs made unnecessarily high by EPA's top-down approach harm small businesses disproportionately. By comparing the impact of environmental regulation on industries with large pollution abatement costs and small pollution abatement costs, Peter Pashigian found: "compliance with environmental laws . . . has placed a greater burden on small than on large plants. Small plants have found it more difficult to compete and survive with larger plants under environmental regulation. . . . [T]he evidence suggest that environmental regulation not only terminated but reversed the erosion of the larger plants' market share due to the entry and success of small plants."<sup>31</sup>

Before 1970, progress was being made on pollution with far less paperwork. Although the paperwork is itself a vast waste of human time and talent, its greatest importance is as a marker of something more subtle: the loss of flexibility that comes from trying to run society on military lines.

No major facility can hope to avoid violating such a compulsive system of legally binding requirements. As a recently published environmental law treatise acknowledges, "[I]t is virtually impossible for a major company (or government facility) to be in complete compliance with all regulatory requirements. [And yet] virtually every instance of noncompliance can be readily translated into a [criminal] violation."<sup>32</sup> Some environmental crimes do not require EPA to show intent, but only that some regulatory obligation was not fulfilled. Government now uses the criminal law, civil penalties, and other sanctions to punish much conduct that is neither harmful nor intentional and that ordinary people would not think reprehensible. Since violators are susceptible to fines of up to \$25,000 per day for each violation, and because one course of conduct

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<sup>31</sup> Peter Pashigian, *The Effect of Environmental Regulation on Plant Size and Factor Shares*, 27 J.L. & ECON. 1, 25-26 (1984).

<sup>32</sup> CHRISTOPHER HARRIS ET AL., ENVIRONMENTAL CRIMES 1-8 (1992).

can often lead to multiple violations,<sup>33</sup> EPA can send them bills for huge sums. Even if the conduct is harmless and unintentional, the pressure on the innocent to settle is enormous. EPA thus ends up with the power of life and death over many small and emerging businesses. Even if this discretion is abused only rarely by EPA, the very existence of their looming, opaque power chills those who would start or enlarge a business.

Small and emerging businesses would find it easier to understand regulatory requirements under a system that was not nationally controlled. Freed from strictures designed to force them to hew to the national system, state and local governments could adopt simpler programs with less onerous paperwork requirements. The county or local level official in charge of implementing such programs would probably understand the full range of regulatory requirements. In contrast, under the present system, a small business that calls EPA with a question is likely to reach someone thousands of miles away who, in trying to divine an answer, is also overwhelmed by the flood of information on EPA's website.

### *C. The Cost of Stricter Controls on New Sources*

Emerging businesses face an additional problem: EPA usually puts tougher pollution control requirements on new sources. This means that emerging businesses that want to enter a new market face an additional barrier to entry, the preferential treatment of established firms. No wonder that, when EPA announces new regulatory initiatives, the share prices of regulated firms often go up.<sup>34</sup>

It is also no wonder that national environmental regulation tilts the playing field in favor of existing sources of pollution. Large national corporations and large unions can pay the day-to-day attention to regulatory politics needed to extract the deals that entrench their positions. Regardless of their other disagreements, one thing they can agree upon is to suppress competition.

There is a less sinister explanation for tougher controls on new plants: it costs less to equip a new plant to meet any given pollution standard than it does to retrofit an old plant to do the same. Therefore, it is argued that new plants should be made as clean as they reasonably can be. This however, could be done without stacking the deck against new plants. Pollution limits could be set somewhere between those currently imposed on new and existing sources, and existing sources could be allowed to buy excess pollution rights from the new sources that can more than meet the emission limits. The counter-argument to this is that buying pollution rights would cut into profits and wages at existing plants, perhaps even making them uneconomical. Even if this is true, at

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<sup>33</sup> 42 U.S.C. § 7413(b) (1994).

<sup>34</sup> BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES 66, 70-71 (1997).

least now we know what we are talking about: protecting existing plants from competition.

One might think that EPA would also argue that it is wrong to allow for the buying and selling of pollution rights. But, no, the Clean Air Act actually mandates such buying and selling, with the requirement that new entrants not only meet tougher standards than existing sources, but also that they buy pollution rights for whatever little they do emit from existing firms.<sup>35</sup> That is suppression of competition with a vengeance.

Protectionist regulation is not the exclusive province of national regulatory agencies. State and local legislatures engage in it, too. Nonetheless, the danger is much greater when the regulation is done nationally. An existing firm may well get regulation in its own state to protect it from competition in that state, but it is far less likely to get regulations in other states to protect it everywhere.

Nationally applicable new source requirements were mandated in the Clean Air Act in order to suppress interstate competition. The primary support for the provisions of the Clean Air Act imposing tougher national emission limits on new sources came from rust-belt legislators responding to constituents who wanted to make it difficult for local firms to relocate to other states.<sup>36</sup> Analyses of the overall voting behavior of these legislators suggest that their motivation was to protect constituents from economic loss, not to protect the environment from pollution.<sup>37</sup>

#### IV. EPA'S REACTION

EPA feels compelled by public resentment of its heavy hand to claim that it favors experiments and flexibility. EPA Administrator Carol Browner's list of "Recent EPA Accomplishments" was headed by items claiming to ease regulatory burdens.<sup>38</sup> She claimed that the Agency cut fifteen million hours of required paperwork for business and communities at the beginning of 1995 and would cut another eight million hours by the end of 1996. According to Browner's account, the majority of the eliminated requirements were unnecessary. There is no explanation of why the Agency imposed unnecessary requirements in the first place or how many hours of paperwork are still required.

Browner also pointed to Project XL, the Common Sense Initiative, and the Environmental Leadership Program as evidence of greater EPA innovation and flexibility. These programs promise that EPA will give businesses and communities flexibility in how they meet environmental

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<sup>35</sup> 42 U.S.C. §§ 7503(c), 7651b(e).

<sup>36</sup> Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 460 (1989).

<sup>37</sup> See *id.* at 460-61.

<sup>38</sup> Carol A. Browner, Recent EPA Accomplishments, August 15, 1997, at <http://www.epa.gov/epahome/accomp.htm> (on file with author).

requirements if they can show they will use the flexibility to improve performance beyond existing standards. These programs let EPA embrace all the right buzzwords yet retain control.

EPA does not make these programs widely available, and according to a report from the National Academy of Public Administration, the paperwork requirements to qualify are so cumbersome that few businesses or communities find them worthwhile.<sup>39</sup> Commissioner Peder Larson of the Minnesota Pollution Control Board said that EPA makes the bureaucratic obstacles to get into these special projects so large that corporations generally get involved "only because the chief executive officer is personally interested, not because there is any payoff for their bottom line."<sup>40</sup>

In short, EPA is out to co-opt the flexibility issue rather than give up any real power. The Agency's true intent became apparent after state commissioners seized upon the 1996 election promises of President Clinton and Vice President Gore to let states and businesses find smarter, cheaper ways of protecting the environment. Prior to the election, the commissioners got the blessings of Administrator Browner to negotiate with EPA staff to "reinvent government." Four months of hard bargaining produced a sixteen-page agreement allowing the states to deviate from rigid federal requirements if and only if EPA agreed that such innovations would save money and not harm environmental quality.<sup>41</sup>

Suddenly, after the election, in February 1997, the EPA official in charge of the talks killed the deal. In a "Dear Reinvention Ombudspersons" letter, Deputy Administrator Fred Hansen wrote that the states would be allowed to try "minor, and I stress minor, changes."<sup>42</sup> Moreover, EPA would get to decide how the states' savings would be spent. This last demand took real gall because it makes clear that EPA's true objective was to maintain its share of power over the national economy rather than to enforce environmental standards. The next day, the commissioners fired back a letter about "damaged trust" and "gross error."<sup>43</sup>

Why did EPA insult the state agencies? It had good reason to fear that the states would succeed. The philosophy of reinventing government, if taken seriously, is that those closer to a problem can better solve

<sup>39</sup> NAT'L ACAD. OF PUB. ADMIN., *RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION: AN AGENDA FOR CONGRESS, EPA, & THE STATES* 35 (1997).

<sup>40</sup> Interview with Peder Larson, Commissioner, Minnesota Pollution Control Board (Sept. 18, 1997).

<sup>41</sup> ENVTL. PROT. AGENCY AND SEC'Y OF STATE, *JOINT EPA/STATE AGREEMENT TO PURSUE REGULATORY INNOVATION* (Feb. 12, 1997) (manuscript on file with author).

<sup>42</sup> Letter from Fred Hansen, Deputy Administrator, EPA, to Reinvention Ombudspersons (Feb. 1997) (on file with author).

<sup>43</sup> Letter from the Environmental Council of the States to Carol Browner, Administrator, and Fred Hansen, Deputy Administrator, EPA (Feb. 26, 1997) (on file with author). The letter was signed by the president of the Environmental Council of the States, Georgia Commissioner Harold Reheis, and the environmental commissioners of New Jersey, New Hampshire, Illinois, Minnesota, and Arkansas.

it. Given the opportunity, the states might well reduce environmental costs without sacrificing environmental quality. Freed from the national chain of command, states and cities would have the freedom to adopt local measures to meet local environmental protection needs with sensitivity to the constraints felt by local sources.

## V. WHAT THE WORLD WOULD LOOK LIKE WITHOUT THESE COSTS

What is the collective price we pay for EPA's heavy hand? Anecdotes provide no enduring answer because every anecdote is only an invitation for an equal and opposite anecdote. Nor does trying to accumulate all the anecdotes into statistics prove very convincing, save to the already convinced. The loss presented as a large number proceeded by a dollar sign is merely an intangible abstraction. It is not as if people think that they had something and it was taken away. The loss does not seem real because people have no picture of what they were supposed to have lost. With no clear image of the loss, people revert to the default assumption that talk of such numbers, however astronomical, is just another form of the sucker proposition, "Let's trade your health to make me money."

One way to enable people to imagine how they personally could benefit from a different approach to pollution control would be to ask them to consider whether they would be worse off today if the Federal Communications Commission (FCC) had never relinquished its top-down control of telecommunications.

FCC once insisted, as EPA now does, that everything in its domain proceed according to its detailed rules. It required, as EPA still does, that no change take place except with its prior approval. FCC was once welcomed by established corporations, as EPA is now, as a means of protection from competition by small and emerging business.<sup>44</sup>

One of the chief beneficiaries of that protection in telecommunications was the old Bell telephone system in which, under one corporate umbrella, the Baby Bells provided local service, AT&T provided long distance service, Western Electric manufactured telecommunications equipment, and Bell Labs developed new technology. This telecommunications giant benefited from FCC regulation in many ways, including enjoying a government imposed monopoly in long distance service.<sup>45</sup> FCC opened that market to competition only in the 1960s and then very slowly.<sup>46</sup> Most people in the 1960s could not have imagined that phone calls across the country would ever be as cheap as they are today. Consider the loss to society, to the ability of people to associate with each other over long distances, if FCC had kept the AT&T monopoly in place.

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<sup>44</sup> PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 26, 30 (1997).

<sup>45</sup> *Id.* at 36.

<sup>46</sup> *Id.* at 80.



FCC not only protected the long distance monopoly, it also tightly controlled what equipment could be attached to the telecommunications network. Today, consumers have a wide choice of telephones, answering machines, faxes, modem-equipped computers, and other devices that they can attach to their telephone jacks. Most people are too young to remember the time when there was no choice. FCC forbade customers attaching anything to the telephone system that did not have the commission's prior approval. That prior approval was not freely given and, in any event, was slow to come. As Peter Huber writes,

[I]n 1954 the FCC invoked the full majesty and authority of the federal government to block sales of the Hush-A-Phone. It was a small metal cup sold by a tiny independent company. The cup attached to the mouthpiece of a telephone, providing a bit of privacy and quiet in a crowded office. The FCC said it was a "foreign attachment," a competing network that was attempting to interconnect with Bell. And competition was illegal.<sup>47</sup>

As a federal court held in 1956, there was, of course, no good reason why customers should not use Hush-A-Phone if they wished.<sup>48</sup> The point is not that Hush-A-Phone got its way in the end, but that it took nine years for it to do so—seven years before FCC and two years before the court.<sup>49</sup> The delay, cost, and uncertainty of the administrative process discouraged people with ideas for new and better telecommunications equipment from even trying to put them into practice. FCC's insistence that it be the gatekeeper to decide what could be attached to the phone network denied choice to consumers and denied opportunity for small and emerging business.

The public harm was small in Hush-A-Phone's case, but far larger in others. FCC's ban on foreign attachments to telephone company lines applied first and foremost to telephone handsets. In most of the country, consumers had to rent their telephones from the Bell system at exorbitant rates. For many decades, the choice of color was limited: black or black. If one wanted a long cord between the mouthpiece and the base, it had to be rented from AT&T at a price that made it a luxury even among the well-to-do. In the 1950s, in what was at the time a giant concession to consumer choice, Ma Bell introduced a choice of colors, and for big spenders, the Princess telephone. FCC finally allowed customers to install their own telephones in 1975.<sup>50</sup> If FCC had relented in 1956 when it first considered the issue, rather than almost twenty years later, customers would have saved \$3 billion.<sup>51</sup>

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<sup>47</sup> *Id.* at xiv.

<sup>48</sup> *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

<sup>49</sup> HUBER, *supra* note 44, at 38 (reporting that the commission process took seven years).

<sup>50</sup> *Id.* at 79.

<sup>51</sup> *Id.*

That was real money back then, but this loss is trivial next to what we would have lost had FCC regulated the Internet, as it could have.<sup>52</sup> Fortunately, FCC bowed out and let the Internet go its largely unregulated way. The Internet depends critically on attaching foreign devices, such as modem-equipped computers and servers, to the telecommunications network. If the Internet had been subject to FCC's molasses-slow approval process, where approval of Hush-A-Phones took nine years and the consumer choice of telephones almost twenty years, the dramatic growth of the Internet would have been impossible. For the Internet, twenty weeks is a long time, twenty months is the long term, and twenty years is an eternity. The Internet's genius is in having no one genius. Anyone, including a cash poor teenager, has an opportunity to offer new and better ways of doing things on the Internet. No prior approval is required from FCC or any other gatekeeper. Such opportunity for inventiveness would be impossible if FCC had exercised its regulatory prerogatives.

Everyone knows, and an FCC study now acknowledges, that FCC's top-down approach would have stunted the Internet revolution.<sup>53</sup> But, because FCC relinquished its gatekeeper prerogatives, the United States leads the Internet revolution.

Whether FCC bowed out of regulating the Internet voluntarily, or as quickly and completely as it should, is beside the point for the purpose of pointing out that there is much to be lost by EPA's failing to give up its top-down approach. Just as continued control by FCC would have stunted the Internet, EPA's maintaining of its superfluous power stunts improvements in the huge range of activities under EPA's thumb. Instead of running all pollution control the EPA way, state and local governments would be free to craft local solutions to local problems. Good ideas tried out in one place could be adopted in other areas. Instead of requiring every source to obtain a permit and meet emission limits issued under EPA's aegis, states would be free to adopt market based pollution control schemes in which the needed pollution reduction could be achieved at the points where it could be done most economically. Small and emerging businesses would have a fairer chance to compete instead of being squelched by EPA's bias in favor of established polluters and by the barriers to entry created by EPA's paperwork requirements.

EPA protests that states and sources can deviate from generally applicable rules, *if* they get prior approval. However, EPA doles out slack retail and begrudgingly. As it has made all too clear, EPA is open only to "minor, and I stress minor, changes."<sup>54</sup> EPA staffers are fundamentally hostile to giving up control, as found by the National Academy of Public

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<sup>52</sup> JASON OXMAN, OFFICE OF PLANS AND POLICY, WORKING PAPER NO. 31, FED. COMMUNICATIONS COMM'N, THE FCC AND THE UNREGULATION OF THE INTERNET 16 (1999).

<sup>53</sup> *Id.* at 18.

<sup>54</sup> Letter from Fred Hansen, *supra* note 42.

Administration.<sup>55</sup> States and pollution sources looking for leeway from EPA are fundamentally in the same position as Hush-A-Phone was in 1947—they will have to wait a long time for the Agency to say, “You may take one baby step.”

There are, of course, differences as well as similarities between the hegemony of EPA and that of FCC. One difference is that the pace of progress in pollution control technology is not apt to be as explosive as that in telecommunications technology. It was because of that explosive pace that FCC had to let go. EPA can and is holding on with all its might. Another difference is that FCC stymied one kind of technology, telecommunications, while EPA control stymies innovations in almost every goods-producing sector of the economy. While FCC’s control would have stunted an explosive innovation in one sector, EPA’s control pervasively stunts innovation.

## VI. “OUR JOY,” NOT “THEIR COST”

The weight of EPA’s unnecessarily heavy hand falls primarily on us and our joy rather than on corporate fat cats and their purses. Although the direct costs of EPA’s requirements fall in the first instance on existing firms, those who pay the price in the end are primarily ordinary people. For example, auto buyers, not auto manufacturers, pay most of the cost of emissions controls on new cars.<sup>56</sup> More generally, ordinary people pay for most of the direct costs of environmental pollution control by way of higher prices for goods, higher taxes, and less pay. To the extent that the direct costs of pollution control are reflected in the bottom lines of corporations, most of us are adversely affected anyway because so many of us now own shares of corporate stock, directly or through various pension plans.

As the analogy between EPA and FCC helps to illustrate, even more important than the direct costs of EPA regulations are the indirect costs that stifle innovation, principally by small and emerging business. If FCC had been able to maintain its power to stop innovations in telecommunications except when previously approved by regulators in Washington, D.C., we would have no Internet nor all the things the Internet brings us, from email to dot-coms. The monetary loss would have been immense. The market value of only one such company, Red Hat, was \$8 billion one month after going public.<sup>57</sup> Add quite a few zeroes to that number to get a sense of what investors made from all Internet companies. The huge sum that investors have made, even after the market plunge, is a proxy for the value that the Internet provides to everyone, value that would have been lost if FCC had remained in charge.

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<sup>55</sup> Nat’l Acad. of Pub. Admin., *supra* note 39, at 35.

<sup>56</sup> RANDALL, *supra* note 7, at 20.

<sup>57</sup> RANDALL E. STROSS, E-BOYS 289 (2000).

These facts provide a perspective to understand the true dimension of the indirect costs of environmental regulation. The \$1,850 per household paid annually to buy and operate pollution control equipment reflects only the direct costs of pollution control and does not include the indirect costs of having to deal with the bureaucracy and the discrimination against new sources. By stifling innovation, the Clean Air Act and the Clean Water Act have had, according to Michael Hazilla and Raymond Kopp, a large and accumulating impact on national income—a two percent loss in annual income by 1981 and six percent loss by 1990.<sup>58</sup> Because EPA's control continues to hamper innovation, these losses will continue to grow at a compound rate. Extrapolating these compounding losses to the present would produce a loss amounting to more than a ten percent reduction in annual income. This estimate accounts for only the two most important environmental statutes. There are dozens more.

The comparison between pollution control and telecommunications regulation also helps to illustrate that the loss from EPA's heavy hand falls primarily on ordinary people rather than on corporate fat cats. The great bulk of the newly minted Internet millionaires—from geeks with vision to clerical employees who happened to be in the right place at the right time—did not start as fat cats. Most would say all the more power to these new millionaires because they did not make their money by taking things from us, but rather by offering us things that we wanted. Similarly, the small and emerging businesses squelched by EPA's top-down control could have provided opportunity and fortune to many more people with great ideas or simple good luck.

The comparison between pollution control and telecommunications regulation further demonstrates that the primary loss is not dollars. For consumers, the dollars are surrogates for things that facilitate the pursuit of happiness in their own way: a wider choice of goods, services, and information, as well as time-savings and increased flexibility in how they live their lives. For those who make their living via the Internet, their opportunities bring not just money, but also an outlet for their talents and sociability. Unnecessarily restrictive government regulation, whether in telecommunications or pollution control, restricts opportunities for small and emerging business.

Some people questing for these opportunities decide to proceed anyway, albeit illegally. They become new recruits to the underground economy. Others do not go underground, but cut corners and are left worrying about getting caught. Most, however, stay where they are, cogs in large organizations. The large organizations provide the capacity to deal with the government-imposed complication, but at the price of doing things the organization's way. Small and emerging businesses are right to see EPA as their enemy.

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<sup>58</sup> Michael Hazilla & Raymond J. Kopp, *Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis*, 98 J. POL. ECON. 853, 867 (1990).

I do not want to exaggerate. Plainly, small businesses do continue to flourish. But the drag on individual initiative and creativity is real. When innovators from the private or public sectors explain their success in finding new or better ways to provide people with what they want, the stories they tell often show that it was tougher jumping through the regulatory hoops than coming up with or implementing the idea itself. The untold stories are those of the innovations that died because getting the permits was just too expensive, time-consuming, or discouraging. It is a sign of the times that the artists Christo and Jeanne-Claude, whose projects include wrapping public monuments in gossamer fabrics, make their years-long efforts to get the necessary permits part of the work of art.<sup>59</sup> In art, as in life, government is a drag on individual creativity.

When the state throttles individual initiative, we lose something even more precious than money and what it can buy. We lose society. Marvin Devino, my nearest neighbor in upstate New York, fixes the tractors and trucks of local farmers and loggers not just for money, but also for company. When he complained of being too busy, I told him, as I had learned as a good intellectual, that he might be able to work less and earn more by raising his prices. His reply: "But then I wouldn't get to see my friends."

Legislation by ideal implemented by top-down control is puritanical. It upholds virtue in the sense of pious adherence to notions of purity, but destroys virtue in the sense of using our personal powers to express ourselves to the fullest. And it does so relentlessly. As the philosopher C. S. Lewis wrote,

Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometime sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. Their very kindness stings with intolerable insult. To be "cured" against one's will and cured of a state we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals.<sup>60</sup>

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<sup>59</sup> Peter Blank, *Christo and Jeanne-Claude*, Stanford Presidential Lectures & Symposia in Humanities & Arts, at <http://prelectur.stanford.edu/lecturers/christo/index.html> (last visited Mar. 10, 2001).

<sup>60</sup> C.S. LEWIS, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 287, 292 (Walter Hooper ed., 1970).

## VII. CONCLUSION

“Comment voulez-vous gouverner un pays qui a deux cent quarente-six variétés de fromage?” [How would you wish to govern a country with two hundred forty-six varieties of cheese.]<sup>61</sup>

The cheeses to which President Charles de Gaulle referred were not the rubbery blobs extruded in lactofactories, but creamy glories molded by artisans in 246 French communities. With the freedom to make their cheeses their own way, these artisans found self-expression, self-esteem, and, no doubt, on occasion, joy. The opposition of such artisans to detailed directives from on high symbolized for de Gaulle grass roots resistance to the drive of elite French officials in Paris to run the country neatly and from the top down.

The Environmental Protection Agency has subjected the United States to a regime of pollution control that is as neat and top-down as it can make it. Along the way, we have lost opportunities for the self-expression, self-esteem, and joy symbolized by the 246 glorious cheeses. These losses are real, even though there is no hard number to attach to them. The federal government maintains no network to monitor opportunity for the self-expression, self-esteem, and joy. No doubt it would if some federal agency had a mandate and a budget to achieve an ambient standard for the pursuit of happiness.<sup>62</sup> Such a mandate is less conceivable than a *dictat* putting a health warning on creamy cheeses.

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<sup>61</sup> ERNEST MIGNON, *LES MOTS DU GÉNÉRAL* 57 (Librairie Arthème Fayard, 1962) (quoting French President Charles de Gaulle).

<sup>62</sup> EPA and other federal agencies are, however, mandated by the Regulatory Flexibility Act (RFA), to assess the impact of their regulations on small businesses. 5 U.S.C. §§ 601, 603(a), 604(a)(5) (1994). In the course of promulgating stricter national ambient air quality standards for ozone and particulate matter, EPA began to produce such an assessment but then abandoned the project claiming that its regulation “would not have a significant economic impact on small entities within the meaning of the RFA.” National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,702 (July 18, 1997); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,887 (July 18, 1997). The regulations would, of course, have a big impact on all business, big and small. EPA’s excuse was legalistic: its ambient standards would not directly regulate any business, but rather would force states to regulate business and so did not have an economic impact within the meaning of the RFA. Although the agency was correct that it was not itself regulating small business, and the Court of Appeals so held, EPA was requiring that small businesses be regulated more strictly. See *Am. Trucking Ass’n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev’d on other grounds*, *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001). EPA could, moreover, say a good bit about the impact on small businesses. EPA knew enough about how much more strictly businesses would be regulated and the shape of that regulation to produce a multi-volume cost-benefit analysis of the standards. See EPA, *REGULATORY IMPACT ANALYSES FOR THE PARTICULATE MATTER AND OZONE AND NATIONAL AMBIENT AIR QUALITY STANDARDS AND PROPOSED REGIONAL HAZE RULE* (1999), <http://www.epa.gov/ttn/oarpg/naaqsf/ria.html>.

