Course readings in legislative theory

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Early on in decision-making about legislation, law-makers must make a preliminary decision about the appropriate implementation institution. They must do so because the sorts of behavior that legislation can induce depend upon the sorts of conformity-inducing measures available. That, in turn, depends upon the implementing institution that the law-makers can utilize. That preliminary decision necessarily precedes detailed investigations of the capacity of the particular institutions involved. After making those detailed investigations, of course the law-maker may change her mind about the appropriate implementing institution. We here discuss only the general factors that a law-maker ought to have in mind in making that first, preliminary decision. In general, what constitute the advantages and disadvantages of the various sorts of implementing institutions? (As stated above, in this section we limit our attention to privatization, and to public corporations.)

1. PRIVATIZATION

a. The Many Shapes of Privatization

E. S. Savas\(^1\) developed a list of devices by which government can transfer to private enterprise services and tasks in the past usually performed by government. He first distinguished between private goods, collective goods, common-pool goods, and toll goods.

\(\Omega\) Private goods constitute goods from which a supplier can exclude an individual prospective purchaser -- for example, the ordinary goods that one purchases in a store.

\(\Omega\) Compare that, for example, with a collective goods, for example, a lighthouse. Even if the lighthouse keeper would do so, she could hardly deny the use of his lighthouse's services to a particular ship, without denying it to all other ships. A program on cable TV constitutes a private good; a program on broadcast television constitutes a collective good.

\(\Omega\) Toll goods constitute a form of collective good for which the public owner can charge a toll for use. Central Park in New York City began as a toll good: To enter it, one had to pay a fee.

\(^1\)Privatizing the Public Sector: How to Shrink Government (1982)
It has since become a collective good, for anybody may use it without paying. In most U.S. cities, householders had to pay a fee for the assistance of a fire brigade (a toll good); now, it has become a collective good. Sewer service, cable TV and electric power all fall in this category.

Ω **Common-pool goods** include such goods as fish in the sea, minerals in the seabed, or air. They exist in a form available to all, but when an individual reduces a fish or some minerals to possession, or compresses some air in a flask, it becomes a private good (because the owner can exclude another from sharing or possessing the good).

Self-evidently, very few goods fall clearly and unambiguously into any of these four categories. (A taxicab, for example, has some of the qualities both of a private good and a common-pool good).

Savas argues that with respect of private, toll, and common-pool goods (that is, all but collective goods), government’s appropriate role consists only regulation. "In effect, such regulation is a collective good created to assure satisfactory supplies of these three kinds of goods." With respect of collective goods, however, collective action becomes necessary to pay for the goods and thus make sure that they remain available. He states that "government can be viewed as nothing more than an instrument for making and enforcing decisions about collective goods." ³(emphasis in original).

He identifies nine structural arrangements by which government can meet its obligation to assure the supply of collective goods (including regulating other sorts of goods):

1. Government services (government supplies a service through its own employees. Example: a city which collects rubbish through its own Collection Department).

2. Intergovernmental agreement (government contracts with another governmental unit to supply the service. Example: a country school district contracts for its high school students to attend high school in a nearby city).

²(Note that Savas limits government’s responsibility to supply, not to distribution. Why? - ed.)
³. P.55
3. Contract, or purchase of service (government contracts out a service to a private contractor or a government corporation. Example: a municipality that contracts with a private firm to perform rubbish removal services).

4. Franchise (government awards an exclusive franchise to a single firm to supply a particular service, usually for toll goods. Example: public utilities).

5. Grant (government grants a subsidy--either directly, or by way of a tax deduction or remission--to a manufacturer whose product it wishes to foster, usually for toll goods and private goods. Example: a subsidy to the private housing industry to foster low-cost housing).

6. Voucher (government grants a subsidy to a consumer, and permits her to spend that subsidy for the specified goods in the marketplace. Example: food stamps.)

7. Free market (government ensures the satisfactory working of the free market. Example: government requires householders to have their refuse collected twice a week, but otherwise provides no service or regulations for the refuse-collection industry).

8. Voluntary service (government provides a framework within which private voluntary collective efforts can operate. Example: government provides regulations within which a voluntary fire department functions.)

9. Self-service (government provides regulations which permit self-service. Example: government provides the standards for, but otherwise permits, parents to teach their children at home.)

Note that laws frequently combine these methods in a single system. For example, even in the self-service category, government service supplies the regulations and supports required. Sevas supplies a summary table of these devices advantages and disadvantages:
1. Savas's argument rests upon the claim that something inherent in the sorts of goods involved (private, collective, toll or common-pool) makes them more or less adaptable to market or regulatory control. Do you agree? Consider, for example, what Savas calls "private" goods. These he claims mark themselves for market treatment because a supplier can exclude an individual prospective purchaser. He asserts without argument that with respect to these (as with all but collective goods) government's only appropriate role consists of regulation (the regulations constitute a collective good). Do you agree? For example, the defense industry produces all sorts of goods that Savas would denote as "private". As such, Savas would argue that Government's only appropriate role consists of regulating the industry. Until fairly recently, of course, government produced many of these defence goods in its own arsenals. Was that necessarily a mistake? (How would you investigate that issue?) For most of these goods, government constitutes the only purchaser. Professor Howard Melman has argued that one can conceive the entire defense industry as a giant corporate conglomerate with the Pentagon providing centralized direction and control. Because the Pentagon believes that the industry as a whole is essential to national defence, it holds dear the industry's health and happiness.
In the event, it parcels out defense contracts so as to keep up the industry's health. As most readers of the daily press now know, that has led to some rather unusual prices that the Pentagon paid (remember the $900 toilet seat?). In what sense does the power of the defence contractors to exclude a purchaser make these "private" goods (and hence beyond Government's purview except for regulations) -- when the only possible purchaser constitutes Government? Can you think of any other situations that call Savas's thesis into question?

2. Consider the table that concludes the material from Savas. Do you agree that government service always handles poorly the specified service? Can you think of any service that Government handles well? (Have you ever visited a national park, and thought it well managed? How well do you think the government manages the national weather service? Or consider the Coast and Geodetic Survey: Have you ever used any of its maps? Did they seem accurate and relatively inexpensive? Or nautical charts? Or the coastal network of lighthouses and buoys? Or the LORAN navigational network? Is it true that government service never permits consumer choice? Or achieves economies of scale? Does Savas's table reflect his value choices? For example, Savas includes in the scale of characteristics of his nine institutional arrangements "limits size of government". He does not include as a characteristic, "reflects existing allocations of power and wealth", although that of course constitutes a notable characteristic of a market institutional arrangement, but not so notably of government arrangements. (For market solutions, in effect we vote with dollars; the person with the most dollars has that much greater an advantage; in government solutions, we vote one man one vote. ) Whatever one thinks of market versus governmental institutional arrangements, ought we to bias our investigation by the vocabulary we adopt for analysis?
b. A Case Study: Protecting Worker's Health and Safety

In 1970, Congress enacted the Occupational Health and Safety Act (OSHA). After World War II until the middle 1960s, industrial accident and health injury rates declined fairly steadily. After that, they rose dramatically. By 1969, injury in manufacturing had a higher rate of incidence than any time since 1951. The solution seemed obvious: legislation. OSHA had broad support, from labor unions to the Chamber of Commerce. Congress enacted it by near unanimity.

Congress wrote an act clearly intended as prohibitory.

The purpose of the act was to assure safe and healthful working conditions for working men and women." The secretary of labor was directed to promulgate workplace standards that attain "the highest degree of health and safety protection for the employee." Employers were required to furnish their employees' jobs that are "free from recognized hazards that are causing or likely to cause death or serious physical harm."

The only exception to this generally prohibitory posture concerned standards related to toxic substances, which are supposed to "assure, the the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." . . . . [I]t seems to be the position of the courts and OSHA that Congress intended to reduce injuries and illnesses to the technically feasible minimum, subject only to the economic constraint that an entire industry not be threatened with extinction.2

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1 Drawn from Smith, Protecting Workers' Health and Safety, in Poole (ed.), Instead of Regulation 311 (1982)
2 Id. at 313.
OSHA became the most controversial of government's regulatory commissions. Unions complained of its slowness in promulgating new standards. Employers complained of the scope and complexity of its regulations, and that they disregarded the practical constraints of cost.

What went wrong furnishes us with two important lessons on government regulation. First, centrally set standards are an inflexible, inefficient tool for promoting social welfare -- and they are difficult to enforce. Second, programs designed to solve social problems should be based on a thorough understand of what the problems are.

With respect to our author's first "important lesson", OSHA had four principal drawbacks. First, they apply to physical, not behavioral, hazards in the workplace. Second, "government standard-setters are bureaucrats who are far removed from the dynamics of the workplace. Third, design standards promulgated in Washington could hardly fit the particular requirements of workplaces scattered across the face of our large country. (The author concedes that performance standards -- for example, limiting the maximum number of asbestos fibers permitted in a cubic foot of air -- do not necessarily suffer that disability). Finally, OSHA cannot possibly enforce its 4000-odd separate standards.

With respect to the author's second "important lesson", OSHA dealt with the wrong problem. The correct problem concerns this proposition: "At some point, more safety and health may simply not be worth the costs."

The author suggested an alternative solution to the problem of occupational health and safety.

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3 Ibid.

4 [By this, the author apparently means that worker inattention, carelessness and disregard of rules no doubt cause many workplace accidents. Ever since the first state Factory Acts in the nineteenth century, employers have made the same compliant about industrial health and safety legislation. Is it a relevant complaint?-- ed.]
Safety without Regulation?

The least-restrictive way to achieve the socially optimal level of safety and health—if it would work—would be through an unregulated market. How it would work is suggested in the fable. Employers, knowing how much safety costs, can offer employees dangerous jobs at high wages or relatively safe jobs at lower wages. If, for example, a certain hazard could be eliminated at a per-worker cost of $10 per week, an employer would be equally willing to offer relatively safe jobs at $150 per week or pay workers $160 a week and not eliminate the hazard. Since employers’ technologies vary, employees could expect to find a fairly wide range of wage-danger offers in the labor market.

Faced with an array of offers, employees must choose between more wages or more safety. Each must decide, for example, if he or she should accept more danger and earn $10 more per week or give up $10 in wages and “consume” more safety. An employee who decides on the latter course has just purchased safety from his or her employer—and has obviously done so with the conviction that it is worth it. People who do not value the reduction in risk very highly will choose to accept the higher wage.

The end result would be that people who do not value additional safety very highly relative to additional income—whether because they are poor, have high pain thresholds, or just do not care—would choose more wages over more safety. They would go to work for employers who find it expensive to eliminate hazards and are thus anxious to find workers who will accept higher wages in lieu of more safety. Those who value additional safety highly would tend to take jobs in plants where safety is relatively cheap to ensure—thus working for employers who are seeking people who want to pay for (in the form of a lower wage) what they can easily offer: more safety.

Assuming for a moment that this system of unregulated markets can actually work, its benefits for society are fairly evident. Safety is offered for sale by employers, and employees can purchase it by accepting lower wages. Competition among employers for workers guarantees that the price (wage differential) is equal to the actual cost of providing safety. If safety cost $10 per week and employees bought it for $15 (by accepting a $5 lower wage), the excess profits would attract other employers to the market. They would compete for workers and bid wages up and the price of safety down, to the $10 level.

Thus, safety would be offered at a price equal to its cost of production (the value of the resources in their alternative use). Employees would be free to choose the level of safety at which their net benefits were greatest. By analyzing a range of offers, they could compare the added costs and benefits of going from a job with one level of safety to a job with another level. The level of safety produced, then, would be determined by the private calculations of benefits compared to costs conducted by the consumers of safety (that is, workers). Occupational safety would be bought and sold on the same basis as most other goods.

What conditions must exist in order to translate this seeming fantasy into reality? First, employees—or at least some significant number of them—must be well informed about the dangers they face and their monetary and psychic consequences in various jobs. If they are uninformed or believe it can’t happen to them, or even if they overestimate the risk of work, they will not be able to calculate successfully the benefits or costs of increased or decreased safety.
Second, the labor market needs to be competitive enough so that employees do have choice and can avoid risks they wish to avoid. That is, employees must be able to buy the amount of health and safety they desire.

Third, those who make safety and health decisions must bear all the costs and reap all the returns consequent to their decision. If there are costs to society that they do not bear, or savings (benefits) they do not capture, then clearly their decisions will misallocate resources, failing to provide the level of safety desired by individual workers at the prevailing price. The way in which employees—the ones who bear most of the financial and psychic losses of injury—transfer their costs of injuries to employers is through wage differentials associated with safety. If these wage differentials reflect the financial and psychological losses due to physical harm, then employers receive the correct signals and will be induced to make the right decisions (from a social perspective). If not, employers cannot and will not make the correct decisions without some form of intervention.

Information

In thinking about the operation of the market for occupational safety and health, the issue of information is fundamental. Do workers have, or can they acquire, accurate information about job dangers? This is where safety must be distinguished from health.

Injuries are obvious—the cause is usually clear, and the effects are usually well known. Injuries are easy to observe and are thus simple to keep track of. If job applicants do not seek out or cannot evaluate safety statistics reported by a firm, they can observe experience over time and thus collect the information themselves. If they observe injuries occurring more frequently than they had expected, they will quit and try again to purchase the level of safety they desire. Acquiring information in the area of safety is thus not a significant problem. In fact, the one study that has matched workers' perceptions of injury risk with the actual risk they face has found a strong, positive correlation between the two.

With respect to the dangers of occupationally related disease, however, the story is very different. Many diseases have gestation periods of twenty years or more, so that when they occur no one is sure of the cause. Did a cancer victim contract the disease because he smoked, lived in New Jersey, or worked at a chemical plant? To make matters worse, there are so many chemical substances in the workplace that it is extremely difficult to tell which ones are linked to specific diseases. Thus, acquiring information on health risks is an enormous problem for workers and occupational-health specialists alike. Further, the information that does exist is likely to be piecemeal, conflicting, and of dubious validity.

The vinyl chloride data are rather imprecise—and so are the data on just about every other occupational health hazard. It is extremely difficult for researchers—and certainly ordinary workers—to pin down either the existence of a health hazard or the maximum level of exposure with worker protection.
In sum, the information workers have, or can acquire, about workplace safety is likely to be as good as it is on any other important aspect of employment (promotion possibilities, job stability, management policies, and the like). Information with regard to safety should not be an impediment to the functioning of an unregulated market. Information about health risks, however, is both hard to acquire and difficult for a lay person to evaluate when it does exist. In this area, then, there is a serious impediment to the smooth functioning of the marketplace—a problem that anyone wishing to improve the operation of the market for health and safety must address.

Worker Choice

For an unregulated labor market to solve the safety problem, workers must have not only information but choice in the selection of jobs. If workers do face severely limited choices, there is no assurance that they can purchase the level of safety and health they desire.

Fortunately, the high degree of employee turnover in the U.S. economy indicates a substantial amount of job choice. It not only offers some direct evidence of the exercise of choice, but it also implies widespread availability of jobs. Workers who vacate jobs create openings for others, and the greater the rate of job turnover, the greater is the selection of jobs from which a worker who is in the market can choose.

Statistics indicate that employee turnover in the United States is rather high—high enough, in fact, that in many industries it is regarded as a problem. The reported quit rate in manufacturing (which is probably an underestimate) is normally between 1 and 2 percent per month—or about 12 to 24 percent per year. With job openings resulting from workers quitting and from general business expansion, manufacturing businesses newly hire 3 percent of their employees each month. Turnover is so great, in fact, that only 25 percent of U.S. workers have held their current jobs for more than 10 years. The median length of job tenure is 3.6 years, meaning that half of all workers have been on their current jobs less than three and one-half years.

Another way of understanding the amount of choice workers have in the job market is to look at job mobility over time. Suppose we focus on male, blue-collar operatives (semiskilled workers)—a group most people think faces the greatest health and safety risks in the workplace. If we were to follow a group of operatives in 1965 for the next five years, we would find that, among those who were over age 25 in 1965, 21 percent were working in completely different occupations by 1970. They were skilled workers, office workers, or possibly held unskilled jobs—but the point is that they had experienced a major occupational change in that five-year period. Many more, of course, changed their jobs or their place of employment. It is thus difficult to conclude that workers typically lack job choice. Their information on health may be limited, but their ability to select among jobs is reasonably great.
If workers have information and choice, there will be a market for job safety and health; that is, employees will be able to buy and employers will be able to sell safety and health through a positive wage-risk relationship. If employers adopt technologies that involve higher risk of harm to workers, they will be penalized by having to bear their own direct costs of that harm (lost production, machine damage, and so forth) plus the cost of higher wages to workers. Conversely, if they take steps to reduce risk, they can avoid some wage costs. Thus, they must pay the price of increases in risk and receive a savings if they reduce risk. If the prices they pay reflect the full social cost associated with increased risk, and the prices they receive represent the full social savings associated with risk reduction, then the unregulated market will lead to an optimal allocation of resources to occupational safety and health.

There are impediments to the correct pricing of goods and services, however, and they generally fall into three categories. First, a market for a certain good (clean air, for example) may be so costly to use that it simply does not exist. It is not now feasible for the residents around a plant to buy clean air from a steel producer, because it is not clear who owns the air. Further, it would be very costly for homeowners and the producer to bargain individually over compensation. No such problems exist in the close, clear-cut relationship between employer and employee.

Second, prices do not reflect social costs if there are monopolies or monopsonies present. Monopolies, for example, tend to sell their output at a price greater than the opportunity cost of production—thereby making excess profits. There is no reason to believe that safety and health are produced or consumed under monopoly conditions.

Third, government itself can create situations in which the costs employers bear are not equal to real social costs. Unfortunately, an excellent example of this problem occurs in the job-safety market. Workers' compensation laws hold employers financially liable for all workplace injuries to employees—a liability they can insure against. Employees receive reimbursement for medical costs and most of lost wages associated with injury. To the extent that they receive compensation, they have less incentive to seek higher wages from employers when injury rates rise. It is the insurance company that must transfer injury costs to the employer, and this is where the problem lies. For all but the very largest plants, the insurance premium is not completely based on the plant's injury experience. Premiums are largely based on industry-wide injury experience, so that, if a plant spends money and achieves a reduction in injury rates that saves $6,000 per year in medical costs and lost time, its insurance premiums would not go down by as much as $6,000. The firm does not receive the full benefits of its safety program and thus does not have the proper incentive to increase safety. In short, the workers' compensation program creates a situation whereby employers buy safety at the wrong price. The market operates, but it sends out incorrect signals.
Does the Market Work?

If workers have information and choice, we should observe that they purchase job safety. That is, wages in dangerous jobs ought to be higher than they are in safe jobs for workers who are otherwise comparable. Several research studies in recent years have sought to test this proposition in the context of occupational injuries; data on the dangers posed by health hazards are too limited to permit tests with respect to these hazards. Generally, the results support the notion that the market works well enough that safety can be purchased by workers.

The most consistent and credible results pertain to the relationship between wages and the risk of on-the-job, traumatic death. There have been nine studies on this topic, eight from the United States and one from England, all using different data. All but one of these studies finds a positive and statistically significant relationship between wages and the risk of death, holding other worker characteristics constant. Further, all the significant relationships are large enough to be credible.

The losses associated with death are so large that one would expect workers to be willing to pay a great deal to reduce the risk of death. If the estimates indicated that workers were paying very little to reduce the risk of their death, the results would be suspect. However, the estimates to date are of credible size. The only problem is that the estimates fall into two ranges that differ from each other by a factor of ten.

By one group of estimates, workers are able and willing to purchase a one-in-one-thousand reduction in the yearly risk of death for $200 to $300 per year. (That is, if employers undertook measures to reduce the yearly death rate from four in 1,000 to three in 1,000, yearly wages could be reduced by $200 to $300 per worker.) If a plant had 1,000 workers, each willing to pay $250 for a one-in-one thousand reduction in the death rate, all workers in the aggregate would be willing to pay $250,000 for measures that would save one life. This figure is roughly equal to the discounted earnings losses of someone killed in mid-career. The other group of studies came up with an estimate of the price of safety that is ten times higher than the foregoing results. One can argue that these results are credible too, because surely the losses associated with death are greater than lost earnings. Unfortunately, it is impossible to say which group of results is more credible. However, it can be concluded that a market for job safety apparently exists and works, at least roughly, as we would expect it to.

The existence of a positive relationship between wages and the risk of nonfatal injury has not been found consistently. A likely reason for this lies with workers’ compensation, which reimburses injured workers for all their medical costs and some lost wages. The uncompensated losses for the typical nonfatal injury are thus relatively small, implying that workers will not seek very much in the way of higher wages when nonfatal injury rates rise. (Although it is possible to compensate the heirs of a deceased worker, it is impossible to compensate a worker for his own death; thus, a rise in fatal injuries would trigger responses by workers that would result in increased wages.)

The arguments and evidence presented here suggest that a market for job safety probably does exist—and that this market functions, on the whole, as it should. The major impediment to an optimal functioning of this market probably lies with incomplete experience rating for workers’ compensation insurance.
The problem of identifying occupational health hazards, however, is so difficult that a lack of information in this market probably inhibits the achievement of an optimal allocation of resources. Even if he had access to all the research reports, the ordinary worker would be unable to form a competent judgment about the risks he faces. This creates special problems of information with respect to health hazards.

Are there nongovernmental ways in which market defects in the safety and health areas can be remedied? How might the market be made to work better? First, methods by which the safety market could be improved will be explored, and then the problems in the market for occupational health will be addressed.

Improving the Market for Safety

The most obvious cause of market failure in the safety area is workers' compensation insurance. Specifically, providing insurance benefits to injured workers in a system that does not fully experience-rate employer insurance premiums creates an improper set of incentives for employers to reduce injuries. This problem, in fact, pervades any kind of liability-insurance scheme. If the costs of the liable party are borne in part by another party who is not directly affected by the accident, then the insurance scheme serves to reduce incentives to take precautions against the accident.

The only way in which liability insurance can provide the proper incentives is if it is fully experienced-rated. The costs of injury would thus not be shifted to other employers; rather, the insurance system would merely serve to distribute each employer's injury liabilities—which obviously fluctuate yearly because of the random nature of accidents—evenly over time. Fully experience-rated insurance is thus the exact equivalent of self-insurance. Both self-insurance and full experience rating exist presently, but only for the largest firms.

The problem with extending experience rating to medium-sized and smaller firms is that yearly fluctuations in the injury rate become larger as plant size diminishes. This makes it difficult for insurance companies to determine just what a plant’s long-run average injury rate is. They could do so if they had a long history of experience and if hazard levels remained constant, but plants come and go, and technological change guarantees that workplace risks change over time as well. Thus, extending experience rating to smaller plants would increase the yearly variations in insurance premiums paid by these companies. Since one purpose of insurance is to smooth out costs—to purchase certainty in an uncertain world—we could expect significant opposition from client companies to greater experience rating. It should be noted, however, that it is technically feasible for insurance companies to increase their degree of experience rating. Indeed, a proposal to extend such rating was made in 1972 by the National Commission on State Workmen's Compensation Laws.

An alternative to extending merit rating—one that would accomplish some of the same objectives but would limit the yearly variability in company costs to some extent—would be to create workers' compensation insurance policies with deductible clauses. In other words, the current notion of employer liability for all accident costs could be maintained, but without allowing employers to insure against the first X dollars of cost. Insurance
against their liability to compensate workers would thus be in the nature of insuring against catastrophic loss rather than all loss. This is a common mechanism used in medical and automobile insurance to retain the incentives of the insured to take due care.

From the standpoint of inducing more precaution on the part of employers, a deductible arrangement makes most sense (1) when most accidents are minor and (2) when employers cannot know in advance whether their added precautions will prevent a serious or a minor accident. If employers are not allowed to insure against minor accidents, if minor accidents are relatively numerous, and if precautionary measures cannot be directed only at avoiding minor accidents, then the added incentives for care will result in a reduction of serious injuries as well as minor ones. Since serious injuries are the most costly, it is imperative that incentives to reduce them are not too severely affected by their continued insurance coverage.

Fortunately, it would appear that the configuration of injuries meets these criteria very well. First, most injuries for which workers' compensation is paid are minor. In New York, for example, 60 percent of all compensable cases are for temporary injuries, which average about $500 in compensation per case. The remaining 40 percent are mainly for permanent impairment, involving compensation that is six or seven times higher per case, on average. In all, the 60 percent of all cases involving minor injury constitutes only 15 percent of total compensation payments. Thus, making workers' compensation insurance cover only catastrophic cases (for example, over $500) would still permit coverage of 85 to 90 percent of employers' total dollar liabilities. However, a $500 deductible would also mean that employers would end up paying the full injury costs in over half the cases of injury occurring in their plant.

If these increased incentives were limited only to minor accidents, the benefits would be small. Fortunately, there is a fair amount of evidence indicating that employers can control the probability of an injury better than the severity. A handrail can prevent someone from falling down some stairs, but whether that prevents a bruised knee, a sprained ankle, or a broken back is largely a matter of luck. Since, before an injury occurs, the employer knows that only half of all accidents will be covered, and since he cannot pinpoint his efforts to reducing only minor injuries, the only way he can reduce injury-related losses is to take steps that reduce the likelihood of all injuries.

A deductible arrangement would thus yield greater incentives to reduce all types of injuries merely by removing insurance coverage from the numerous minor accidents. If the deductible were around $500, 85 to 90 percent of total liabilities would still be covered by insurance. Catastrophic losses would be insured, and the $500 of employer losses per injury would not be large enough to threaten the viability of even small
employers. Further, insurance-premium costs would decline overall by about 10 percent, to reflect the reduced liabilities of the insurance companies. To the extent that the new workers’ compensation insurance policies are not experience-rated, some imperfections in price incentives would remain. However, a deductible would go a long way toward improving the functioning of the market for occupational safety.

**Improving the Market for Health**

The problem that most likely blocks an optimal allocation of resources to the abatement of health hazards by an unregulated market is one of information. At the heart of this problem are the long gestation periods of most chronic diseases and the resulting uncertainty of cause and effect. This uncertainty not only causes obvious technical problems for medical researchers but also reduces the incentives for employers to acquire information and take precautions. It is so difficult to identify when a worker starts to become ill and to associate the illness with a specific hazard that few workers ever receive workers’ compensation for disease. The availability of benefits to workers under the Social Security Disability Insurance program does offer benefits to some who contract chronic diseases, but this program is financed generally and does not offer incentives for any one employer to abate health hazards.

Any program to make the market for occupational health work better must deal first with the issue of incentives. Employers must have the proper incentives to research or support research on health hazards and to communicate the findings to employees.

**Changed Liability Rules**

As in the job-safety market, workers’ compensation may be the major impediment to the market solution in the area of occupational health. Under workers’ compensation, an employee is barred from suing his employer to recover the costs of an injury or disease contracted as a result of the employment relationship. This limit to the employers’ financial responsibility was the *quid pro quo* for obtaining their agreement to the concept of workers’ compensation back around 1910. As a result, employees are able to sue their employers for damages beyond workers’ compensation only in a few states—and only if the employer can be shown to have failed willfully to take precautions. Since so few cases of disease typically can be demonstrated to be occupationally related, since workers’ compensation benefits do not include pain and suffering, and since employees are generally
uninformed about health hazards, employers simply do not have any incentive to consider worker health seriously.

One way to provide these incentives to employers is by changing workers' compensation legislation to permit employees to sue their employers on the common-law basis of negligence. This change has been suggested recently by other analysts of occupational safety and health as a way of providing the necessary incentives to employers.11 Faced with the possibility of large lawsuits as pain and suffering are compensable under tort law, employers presumably would begin to count worker health costs in the profit calculus.

If such a change were to be made in workers' compensation law, it would have to be designed with the problem of incentives centrally in focus. The major reason for proposing such a change is not to compensate diseased workers; as we will see, liability suits do this very poorly. Rather, the entire purpose of permitting employee suits is to provide the proper market incentives for employers to undertake more rigorous programs of disease prevention.

Size of Awards

It is likely that a relatively small portion of occupational-disease cases would or could be successfully adjudicated. The difficulties in proving cause and effect would remain, and employers could hardly be held negligent if they neither knew nor could have been expected to know the cause and effect relationship. It would be difficult and therefore expensive for employees to bring a successful case against an employer, and this cost would deter them from seeking a court award in most cases.

Because the probability that all cases of provable employer negligence will be litigated is very small, the penalties for negligent behavior must be very large in order to make the expected costs of such behavior commensurate with the consequences to employees. In other words, because not every case of disease will be litigated, awards in cases that are successfully litigated must exceed the costs suffered by the plaintiff in question in order for the negligent employer to bear all the costs of his behavior. Thus, in addition to medical costs, lost income, and pain and suffering costs, court awards should allow for the assessment of punitive damages.

These punitive damages need not be paid to the plaintiff; indeed, if they were large enough, they could cause employees to become careless about their health or induce them to file frivolous suits on the slim chance that they could win. These damages could just as well be paid into a fund to support research on safety and health. What is important is that the expected costs of negligence by employers be roughly equal to the costs that fall on their employees.
Standards for Judging Negligence

Under the suggested change in liability rules, an employer would be held liable for damages if it could be shown that he disregarded required precautions. Critical to the success of this change, then, are the requirements placed on employers. These requirements must provide the proper incentives to adopt preventive measures; they must be both reasonable and effective. As such, they should incorporate several aspects, including monitoring of employee health, research into health hazards, and dissemination of health-hazard information.

Many diseases, if detected early, can be reversed when the employee is removed from contact with the toxic substance. Further, any successful research program on human health hazards will have to be based on large bodies of data, gathered over time, on the exposures of employees to various agents and the pathological changes that occur in exposed workers. Therefore, it is highly desirable for any changes in liability rules to encourage the monitoring of employee health on a regular basis.

One requirement of the prudent employer should thus be to provide employees with periodic health checkups. These need not be very expensive; many diseases can be detected by urine and blood tests. However, the employee should be offered an opportunity to take the tests and should be informed of the results...

Making the support of research a defense against negligence would encourage employers who believe lawsuits are possible to voluntarily sponsor and aid the work of private research institutes. The level of effort these institutes would be required to produce would have to be defined by case law; obviously, such effort must be a good-faith attempt to solve the problems. How the institutes allocate costs among their sponsors could safely be left to them.

Incentives for employers truthfully to communicate information about known or suspected health hazards must also exist. Obviously, negligence could be inferred in a situation in which the employer deliberately withheld or misrepresented information; in fact, such an intentional act would probably constitute gross negligence. The proposed change in liability rules should thus encourage this type of behavior.

However, because the problems are so complex and usually involve small probabilities of very painful events occurring many years in the future, there must be incentives for employers to inform employees effectively. Two defenses against negligence come to mind. First, the establishment of joint worker-management safety and health committees should be a defense against a charge of negligence. These committees should meet regularly to discuss known or suspected health problems and their solutions. They should issue reports to workers, on a periodic basis, wherein minority opinions can be expressed. The reports should, of course, be in language workers can understand, because their purpose would be to enable workers to evaluate for themselves the extent of danger to which they are willing to be exposed. Such committees should also be involved in periodic measuring of dust or emissions levels in the plant. Second, efforts to indicate, with signs, those areas of a plant containing known or suspected health hazards should also be a defense against a charge of negligence. This activity is nothing more than a truth-in-labeling requirement.
By changing workers' compensation laws that currently prohibit employees from suing their employers for negligence, the effectiveness of the marketplace in providing occupational health can be enhanced. These laws should be changed to allow such suits only in cases of disease. Employers should be allowed to defend against a charge of negligence by demonstrating (1) that they made diagnostic tests and their results available to employees; (2) that they offered substantial help in placing workers with symptoms of disease in nonhazardous jobs; (3) that they supported scientific research on health hazards, both financially and through data sharing; and (4) that they attempted to communicate the presence of known and suspected hazards to employees through worker-management health committees and prominently displayed warnings.

This relatively simple change in liability rules which would make tort remedies available to employees in cases of disease, should not be oversold. The basic problems of unknown cause-and-effect relationships still remain and would continue to cloud the assignment of fault and the findings of negligence in most cases. However, employers who did not engage in the activities allowed as a defense would be taking a chance on being held liable for large damages. The chance may be small, but, with large awards, it would be a chance not worth taking in many cases. Thus, using the proper incentives from common law should help the private market to overcome, at least partially, the information problems inherent in the area of occupational health and to arrive at a more optimal allocation of resources.

Why Rely on the Market?

The Occupational Safety and Health Act has become highly controversial because it failed to identify correctly the nation's safety and health problem and created an inflexible and inefficient mechanism for achieving its goals. Rather than acknowledging that the safety and health problem is one of determining optimal levels through balancing costs and benefits, the act's framers chose to adopt the lofty but impractical goal of reducing injuries and illnesses to their technologically minimum level—ignoring cost considerations almost entirely. Combined with a reliance on standards too numerous to comprehend and too limited in scope to be very effective, this approach almost guarantees disappointed expectations and rancorous debates on policy issues.

There have been three sources of response to the charge that OSHA imposes costs on the economy that are unmatched by benefits. The administrative response has been to eliminate about 930 safety standards deemed by OSHA to be unneeded or unrelated to job safety. These standards, revoked in the fall of 1978, were all part of the standards adopted by OSHA from safety practices recommended by such voluntary organizations as the American National Standards Institute and the National Fire Protection Association.

The major legislative response to the economic problem caused by OSHA has been a proposal by several liberal senators—including a coauthor of the Occupational Safety and Health Act—to exempt safe workplaces from OSHA inspections. The legislation, introduced in December 1979, is intended to make OSHA's efforts more cost-effective by leaving nonhazardous businesses alone and concentrating enforcement efforts on the hazardous places. If adopted, this legislation would exempt from inspection any employer with no job-related deaths and with nonfatal lost-workday injuries of under 2 to 3 percent (depending on firm size). The proposal's authors estimate that this exemption would be obtained by 90 percent of all employers. This legislation would thus extend to all businesses the principle of exemptions for nonhazardous plants applied to small businesses (ten or fewer employers) by a law passed earlier in 1979.
The most important judicial response to the problem of balancing costs and benefits has been the Supreme Court ruling in July 1980 that OSHA's benzene standard be voided. Although only one of the five concurring justices agreed with the lower-court ruling that OSHA was required to weigh both the costs and the benefits of its standards, the majority did agree that OSHA could not mandate a reduction of benzene exposure limits from ten parts per million of air to one part per million without demonstrating that exposures of ten parts per million cause cancer. OSHA had evidence that very high exposure levels caused cancer, but the Court argued, in effect, that OSHA must show that changes in its standards have at least some benefits before they can be validly promulgated. The Court has also agreed to hear other cases involving benefits and costs of OSHA standards.

Although all these responses can be considered a step in the right direction, they all leave the basic structure of the national job-safety and health program unchanged. There are still centrally set and bureaucratically administered standards that, by their very nature, cannot be the least-cost way of achieving more safety and health in every plant to which they apply. There are still only machine-oriented incentives for more safety—a very limited approach, indeed, to the goal of reducing injuries. There are still long delays in combatting new safety and health hazards through a cumbersome standard-setting process. And there are still inspectors trying to enforce regulations that are much too massive for total comprehension by any human. Despite reforms, the Occupational Safety and Health Act approach to the safety and health problem continues to be inefficient. It could be completely scrapped and replaced by a more flexible set of general incentives that would be much more cost-effective.

The most flexible method of achieving the necessary balancing of costs and benefits of occupational safety and health—if it functions properly—is the unregulated labor market. When employees are well informed and have several alternative wage-danger offers from which to choose—and when employers are made to bear all the costs of added danger and receive all the benefits of reduced danger—the unregulated labor market can be counted on to allocate resources optimally. If these conditions are not present, what legal and other changes can achieve optimality while exploiting the strengths of the market?

There is a substantial body of evidence indicating that the market for job safety does exist and that it functions about as it should. Although information and choice are not significant impediments to proper market operation, the lack of widespread experience rating in the setting of workers' compensation premiums probably is such an impediment. One remedy for this problem would be to extend experience rating to a much larger set of firms. Should this prove technologically or politically infeasible, an alternative solution would be to rewrite workers' compensation policies to incorporate a deductible feature. Forcing employers to pay, for example, the first $500 of an injury would make them bear the full costs of an injury in the majority of cases; yet, because employers cannot pinpoint injury-prevention activities on just the uninsured minor injuries, all types of injuries would be reduced by the greater prevention activities.

Although much less is known about the market for occupational health, it is unlikely that this market functions very effectively. Gestation periods are so long that cause and effect are blurred, reducing incentives to undertake costly precautions. A solution that is designed to stimulate the production of disease-related research and provide incentives for employers to devote more resources to prevention is suggested. This proposal involves holding employers liable under tort law for employee illnesses contracted on the job, but allows them certain defenses designed to improve employee information and mobility.
The proposals to improve the functioning of the safety and health markets are directed toward market defects that probably tend to induce too little prevention. As such, the proposals would tend to stimulate the production of more safety and health on the job. However, the production decisions would be made in the marketplace and would thus take reasonably unfettered account of worker preferences and considerations of real social cost. They would remedy market defects without abandoning the marketplace as a tool for discovering worker preferences and finding resource allocations that are socially efficient.

Notes

11. These studies are summarized in Smith, "Compensating Wage Differentials."


16. For a summary to these studies, see Smith, "Compensating Wage Differentials," pp. 339-352.


22. Charges are often made that employers seek to mislead or misinform their employees. See, for example, Paul Brodeur, *Expendable Americans* (New York: Viking Press, 1974).

NOTES

1. The author states that OSHA's difficulties teaches "an important lesson" -- that "centrally set standards are an inflexible, inefficient tool for social welfare" and "difficult to enforce". He might have stated that as an heuristic (e.g., "centrally set standards run the danger of becoming inflexible and difficult to enforce"). Our author does not do that, but states his conclusion as a law good in all times and places. As a methodological problem, could a single case study establish the "law" that our author proposes? Can you think of a case where centrally set standards did not become "inflexible" or "inefficient" tools of social welfare? (Do you really want to travel on aircraft the standards of whose performance varies from place to place?) What other considerations besides flexibility and efficiency might a lawmaker take into account in deciding whether to decentralize standards? (For many years, in effect we let local communities set their own standards for school desegregation. That system no doubt seemed "flexible" and easy to enforce. Did that make it desirable?)

2. The author says that some workers will trade off danger for higher wages -- "whether because they are poor, have high pain thresholds, or just do not care". He goes on to say that, assuming that system will work, "its benefits for society are fairly evident". Can you think of any disadvantages to that system?

3. The author discusses what he perceives as the advantages of a market system for industrial health and safety, that is, efficiency. He does not discuss the costs of a market system. What costs do you perceive in that system?

4. In this country, workmens' compensation laws arose in the decade or two just before and after World War I. They arose because existing law concerning employer liability for industrial accidents seemed woefully deficient in at least four dimensions. First, the common law doctrine of common employment insulated an employer from torts of her employee committed against a fellow-employee. In most cases of negligent injury committed in the course of her employment by an employee against a third person, the respondeat superior doctrine made the employer liable. The common employment doctrine constituted a major exception to respondeat
superior. If the person injured by the employee also served as an employee of the same employer, the employer had no liability; respondeat superior did not apply. (A railroad employee injured because a conductor negligently gave the start signal to an engineer while the employee was coupling cars, for example, had no cause of action against the railroad company. He had one against the conductor, but the conductor likely had the best defence of all: no assets). Second, the doctrine of assumption of risk frequently gave the employer a defence. In many hazardous situations, the employee had to undertake the risk, or lose the job. By undertaking the risk, however, the employee gave the employer a defence. Third, the doctrine of contributory negligence had much the same consequence as assumption of risk. Finally, fourth, the courts came to measure negligence by the standard of the common practice of employers in the same industry. That plainly delivered the task of defining the standards of safety to the very group with the largest interest in having low standards.

Workmens' compensation developed as the consequence of a complex set of processes. For three generations, working people and their trade unions had agitated for laws to ensure higher levels of industrial safety. They made some advances, but mainly no more than incremental ones. As the result of agitation by an economics professor with an interest in law, Professor John. R. Commons of the University of Wisconsin, not only trade unionists but employers and their organizations began to see industrial accident and disease not as a function of individual negligence, but a consequence of the system of production. (Wisconsin became the first state in this country to adopt a workmens' compensation scheme.) Rather than imposing its cost upon the individual supposedly at fault, all of us ought to share the costs of industrial accident and disease. The price of the goods produced, therefore, ought to reflect its true cost.

Following earlier examples in Europe, Commons proposed that employers pay for industrial accident insurance, and include the cost of the premiums in the price of goods sold. That way, rather than unloading that cost on the particular individuals characterised as negligent, all of us come to share the cost of industrial accident and disease. At the same time, he urged that the law award an employee injured in the course of employment a fair recompense for the accident -- that is, for medical costs, wages unearned, and a lump sum for permanent disfigurement or impairment. (Note that this list omitted any recompense for pain and suffering, or punitive
damages. (In the same way, in recent years, we have come to regard automobile accidents as inevitable consequences of a motorized civilization. Instead of unloading the cost of motor vehicle accidents on those considered negligent, many states have moved to no-fault insurance schemes.)

In our principal article, the author suggests that in lieu of the workmen's compensation system, we return to the common law system. Unless changed by the legislature, that means returning to the four employer defenses briefly outlined above. Does the author address that problem? That is to say, does it suffice to argue that we ought to return to common law rules of negligence without specifying those rules, and considering their adequacy to protect the interests involved?

5. Consider the encapsulated history mentioned in the last problem. What constitutes the proper place for historical considerations in justifying a proposed change in the law? Where would you fit it into the First Cut Agenda?
2. GOVERNMENT CORPORATIONS AND AUTHORITIES

NOTE

1. History. From early times, both the English and the several United States governments created specialized authorities to deal with particular problems. In England, for example,

"There have long existed numerous organs exercising official or governmental functions, which possess varying degrees of independence from the executive and are distinguishable from the government departments under direct control of the Ministers of the Crown [for example, the Medical Research Council, the British Council, and organs sometimes all but integrated into a Ministry, such as the Prison Commissioners]. An essential feature of all these bodies is that they were created in order to undertake specialized tasks free from direct executive control of Ministers, although often subject to their influence on matters of policy."¹

In this country, at least since 1904, when the federal government acquired the Panama Railroad Company, both federal and state governments have made increasing use of public corporations to carry out specific tasks. Like their Panamanian progenitor, some have engaged in a function that government in this country does not frequently perform, that is, direct productive activity (AMTRAK, COMSAT, TVA, the Export-Import Bank). In other cases public corporations took over functions that government frequently performed, but which required some sort of agency cutting across the boundary lines of governmental units (The Massachusetts Bay Transport Authority, or the Triborough Bridge Authority). Frequently, governments created them as a device to raise funds by bonds, taking advantage of the low interest rates made available to state and municipal governments by municipal bonds' interest immunity from federal income taxation (housing authorities, state development corporations). Sometimes public corporations arose to insulate particular functions from "politics". For

example, a state university may have many of the characteristics of public corporations: an independent board of trustees, freedom from state civil service personnel rules, relatively independent financing (in California, the state constitution requires that a fixed percentage of the State's income go to the University).

In this country today, public corporations must number in the thousands. This generation has produced more of them by far than all the preceding generations. In many Third World countries public corporations employ more people than the civil service (for example, South Africa), and sometimes more than all private employers combined. (In Indonesia, the huge public corporation that produced oil became strong enough to challenge government itself, even to the point of pitched fighting). In socialist countries, of course, something analogous to the public corporation becomes necessary as the typical form of publicly-owned units of production. (The public corporation's current vigor in Britain began with the Labor Party's victory in 1946. There, it became the vehicle for the nationalization of the railroads, shipbuilding, and steel.)

2. Why public corporations? Self-evidently, public corporations arose as an alternative to lodging the activity involved in a governmental department (rarely would the activity entrusted to a public corporation lend itself to judicial implementation). Sometimes, the public corporation came into being because the activity involved transcended local government units (the MBTA). Sometimes they arose to take advantage of bonding and fund-raising capacity -- often to transcend local debt limits (State development corporations). Most frequently, however, drafters invoked the public corporation as implementing agency because the activity involved seemed closer to traditional business than traditional governmental pursuits. (The post office remained a governmental department from the earliest times until very recently, when the example of private carriers like United Parcel led to the post office's reincarnation as a public corporation). Our

2 Tilden, Problems underlying the Control of the Public Authority/Corporation, Portia L. J. 85 (19 )
3 The material following is drawn from H. Seidman, The Theory of the Autonomous Public Corporation: A Critical Reappraisal, 12 Public Admin. Rev. 89 (1952)
mythologies tell us that in business, the corporate form has proven wildly successful as a mode of governance of the business organization. When government undertook productive activities, it seemed logical to harness that form to governmental purposes.

3. Creation, form, powers. 5

State legislatures may create authorities by either of two general methods: 6 (1) a special act by which the powers and duties of a particular authority are specifically enumerated, 7 and (2) a general enabling act by which either the local governing body of the county or municipality 8 or the local electorate 9 has the power to create the authority. Although the specific powers and characteristics of authorities differ widely from state to state and even within the same state, some generalizations as to powers and organizational structure can be made. 10

An authority is granted a number of corporate attributes and powers to carry out its purposes. Typical among these are perpetual corporate existence, use of a corporate seal, power to execute contracts, capacity to sue and be sued, authority to purchase and hold title to real and personal property, and power to employ and manage its personnel. 11 Also, authorities which manage revenue-producing projects may be given the power to set user rates and charges. 12 These corporate powers, guaranteeing an independent authority, are believed to be necessary if the authority is to avoid being a purely governmental entity without managerial independence. 13

In addition, certain governmental powers, such as the power to exercise eminent domain, 16 to issue subpoenas, 17 and to provide police protection, 18 may be granted if they are necessary for the accomplishment of the authority's stated objectives. If such governmental powers are not expressly given, they may be implied through a "necessary and proper" clause in the legislation which created the authority 19 or the authority may be authorized to contract with governments to exercise such powers on the authority's behalf. 20

Within its corporate structure, the authority is managed by a board of commissioners or directors who are elected 21 or, in the case of the more important authorities, appointed by elected officials such as the governor 22 or local governing body. 23 Most directors receive little or no compensation 24 and are generally middle-class businessmen or professionals. 25

5. Id. at 682-684.
4. Autonomous unit or governmental instrument? Some writers have argued that a government corporation ought to have absolute autonomy, that is, the right to manage its own affairs. That theory rests upon the notion that only so will the corporation achieve efficiency. Only if corporate managers profit-maximize can the corporation achieve the business-like purposes for which government purportedly created them. In that view, every time a government official gives a corporation a direction to do something that marginal utility would not drive it to do absent the instruction, the corporation must engage in inefficient behavior. In that view, the independent board of directors becomes the very badge of a proper public corporation, for they symbolize the corporation's independence of public direction and control. In opposition, Harold Seidman argued:

"Government corporations are organized to achieve a public purpose authorised by law. This fact is often forgotten. So far as purpose is concerned, a corporation cannot be distinguished from any other government agency. This view has been vigorously stated by the United States Supreme Court in the case of Cherry Cotton Mills v. U.S. (327 U.S. 536) when it held that the fact "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by the government to accomplish purely governmental purposes." He continued: "The objective to be sought is not freedom from all governmental regulations and controls, but freedom from those which are unsuitable for a business operation and stifle operations."  

5. Control Devices. Tilden wrote that

6 Dimock, Government Corporations: A Focus of Policy and Administration. I.
43 The American Political Science Review 913 (1949)
7 Seidman, supra n. 2, at 93.
8 Ibid.
"The number, size and economic power of these new corporate bodies cannot be exaggerated. Within the limits of their assigned function, a select group of men enjoy virtually independent control of large facilities yielding annual revenues which are often in excess of those of individual states. 9

How ought government exercise control over that power? Their power and its special limits usually derives from the constituting statute. The drafter can therefore defines precisely the institutional relationships between political authorities and the corporation. In Britain, drafters have frequently used a vague formula, requiring the corporation's directors to abide by the Minister's "directions of a general nature", in effect prohibiting the Minister from giving detailed, day-to-day directions. (To put it mildly, the line between those two has frequently seemed blurred).

In this country, drafters have used many different forms. One frequently used device consists of an advisory commission, which on some issues the Directors of the public corporation must consult,10 whose advice on some cases the governors must respect, and who in still other instances may hold a veto power over Board action.11 The composition of the advisory commission frequently aims at representing the relevant constituencies. On the Postal Rate Commission, for example, four members represent major postal users, while only three represent the public.12 On the MBTA Advisory Board sit all city managers, mayors and chairmen of board

9 In early 1960s, the Port of New York Authority had investments in excess of one billion dollars, and a gross annual revenue in excess of a hundred million dollars. That exceeded the 1964 income of the three states with the lowest incomes (Vermont, Nevada and Delaware). Tilden, supra n. 2, at 87.
10 See, e.g., 39 U.S.C.A. §3661 (Postal Service may set rates, but only after receiving recommendation of the Postal Rate Commission).
11 See, e.g., Mass. Gen. Stats. c. 161A § 3(k) (Advisory Board for Massachusetts Bay Transit Authority has veto over proposed construction, extension, modification or improvement of transportation facilities within MBTA area).
12 39 USCA §3601.
of selectmen in the MBTA area. Other control powers lie in the power of the purse, stipulation of procedures, and so forth.

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A Public Corporation Model for Federal Forest Land Management


Congress has had numerous opportunities in recent years to reconsider present institutional arrangements under which the federal forest lands, including the national forests, are owned and managed. For example, Congress might have decided to terminate the experiment in public land management, which began in 1891 when Congress gave the President authority to set apart certain public lands as forest reservations, and to sell the forests to private parties or to transfer them to the states. Congress, however, took the opposite approach not only once, but twice. First, in the National Forest Management Act of 1976, Congress gave the National Forest System statutory status by amending the Forest and Rangeland Renewable Resources Planning Act of 1974. Congress stated that:

[n]otwithstanding the provisions of the Act of June 4, 1897... no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to the Act of March 3, 1891... or any act supplementary to and amendatory thereof, shall be returned to the public domain except by an act of Congress.

Second, in the same year, 1976, the Federal Land Policy and Management Act extended permanent federal ownership and management to all federal lands, except where disposal in a specific instance serves the national interest.

These expressions of congressional decision regarding the status of entry on to public lands, however, far from resolve the issue of disposal versus retention of public lands. Doubtless the debate will continue just as it has for the past 200 years. Disposal or substantial transfer of forest land to states likely will not enjoy much political favor. The whole history of public land policy reflects incremental adjustments and changes of policies which determine the way the land is managed and the methods

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14 See below, Chapt. XI, these readings.
to provide private access to such resources as timber, grass, water and wilderness. At least by most observers, permanent federal ownership is anticipated.

Still, new institutional structures for managing the public lands development and evaluation. An example is the suggestion for the lease of public land with a pullback arrangement. Under such a policy, a person or group could apply for a long-term lease on a tract of federal land another person or group, however, could apply to pull back a part of the lease area if it meets the same terms applicable to the original applicant. Parties with competing interests in the same tracts of land therefore would be forced to bargain directly with each other in gaining exclusive rights to the use of the land for a specific period of years, rather than each attempting to exert the greatest influence on a government agency.

A PUBLIC CORPORATION MODEL

In this article, yet another alternative will be outlined: the establishment of independent public forest corporations (PFC) to manage federal forest land resources. A PFC would function similarly to those public corporations which now manage public communications, transportation and electrical power generation facilities. Each national forest, for example, could be chartered to operate as a wholly governmentally-owned autonomous corporation with a board of directors and administrative officers.

7. Federal government ownership and control of public corporations varies from that of government ownership to full government ownership:
   a. The Communications Satellite Corporation (ComSat) was established by an Act of Congress, 76 Stat. 423 (1962), which authorized incorporation under the District of Columbia Business Corporation Act, 29 D.C. CODE ANN., §§ 29-201 to 379 (1981), as a private corporation, but specified that 50% of its stock was reserved for purchase by designated communications common carriers, 47 U.S.C. § 734(b) (1982), in order to regulate the corporation by controlling its structure. See generally, Levin, Ownership and Control of Communications Satellites, 113 U. Pa. L. Rev. 315-57 (1965).
   b. The National Railroad Passenger Corporation (Amtrak) receives investment aid from the federal government as well as from private stockholders, 45 U.S.C. §§ 652 to 658 (1982). A majority of the board of directors are appointed by the President, and the board reserves common stock for railroad companies, which can buy from stockholders who do not control railroads. 45 U.S.C. § 544(a) (1982).
   c. The Tennessee Valley Authority (TVA), a wholly government-owned corporation, is also authorized by its congressional charter, 16 U.S.C. § 831 (1976), to engage in a range of economic development and demonstration activities, which have included wildlife habitat and recreation area development and management. See generally, Wirtz, The Legal Framework of the Tennessee Valley Authority, 43 Tenn. L. Rev. 612 (1976).
PFC would have legal independence, and a right to establish its own policies, financial management, pricing policies, and resource output goals in response to the demand for its services and costs of producing them. Operations would be self-financed through sales of products, services, and land-use leases. Investment capital would be obtained, as in the case of private corporations, by the sale of securities and by retained earnings. Services trained by federal government corporations have adequate profit margins or markets, but which yield significant public benefits, could be assured through contractual arrangements in such agencies of federal or state governments, or non-government organizations, pay the PFC for specified kinds and quantities of such services.

To assure some reasonable degree of uniformity in corporate structure, operating policies, financial management, pricing policies, and resource output goals in response to the demand for its services and costs of producing them. Operations would be self-financed through sales of products, services, and land-use leases. Investment capital would be obtained, as in the case of private corporations, by the sale of securities and by retained earnings. Services yielded by federal government corporations have adequate profit margins or markets, but which yield significant public benefits, could be assured through contractual arrangements in such agencies of federal or state governments, or non-government organizations, pay the PFC for specified kinds and quantities of such services.

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The role, competence, and accountability of board members, and thus in large measure the effectiveness of the corporation, will relate to whether they are full-time or part-time and requirements background and experience. These and related factors should receive careful consideration in relation of corporate charters. See generally Schwartz, Governmentally Appointed Directors in Private Corporation—The Communications Satellite Act of 1962, 79 Harv. L. Rev. 350 (1966); See, Personal Liability of Directors of Federal Government Corporations, 30 Case W. Res. L. Rev. 73 (1980).

If the right to enter into contracts, standing to sue and be sued, and top management exempt from civil service regulations. A separate legal identity is common for government corporations. On, supra note 9, at 33-34.

Such independence from the regular governmental budgetary process is a well-established practice for federal government corporations, but monitoring by the Bureau of the Budget, GAO, or Congress is required under the Government Corporations Control Act. See supra note 8 and accompanying text.

Government corporations financed at least in part by the sale of shares to the public or to preferred investors, can raise investment capital by issuing common and preferred stock. See supra note 10.

The wholly government-owned example here, however, would be limited to the issue of tax-exempt interest payments. Decisions to issue bonds and the timing of issue are made by the board of directors, but the form, denomination, maturities, and rates must be approved by the Treasury Department. Although such bonds resemble moral obligation bonds, "the federal government is generally considered ultimately responsible for the obligations of the federal corporations." Walsh, supra, note 12, at 34-36, Chart 2.1.

Other sources of investment capital for federal government corporations have included public revolving funds (appropriations to which sometimes are not included in U.S. budget, e.g., Federal Crop Insurance Corporation, Inter-American Foundation, Overseas Private Investment Corporation, etc.; government-guaranteed loans (U.S. Railway Association); low-interest revenue loans (Conrail, Panama Canal Company); U.S. Treasury credit subsidies (St. Lawrence Seaway Corporation, Pennsylvania Avenue Development Corporation, etc.); and direct congressional appropriations. See generally Walsh, supra, note 12, at 34-36, Chart 2.1.

The alternative forms of organization to this model of separate National Forest Corporations run by a national regulatory board, would include: (a) separate forest-level corporations which each operate their own policies; or (b) a single national forest management corporation with forest-level regional units or wholly-owned subsidiaries. Amtrak has a wholly-owned subsidiary called the initial Commuter Services Corporation, authorized by Congress in 1981. 45 U.S.C. §§ 581-590.
fixed terms of office by the President, with advice and consent of the Senate, would include persons from the business community and various user groups. The board would set minimum profit and performance standards and seek to impose the minimum necessary constraints on corporate flexibility. The Public Corporations Board also would hear and address grievances regarding unfair competition with the private sector or unfair treatment of particular user groups.

Congressional charters to operate a tract of federal land as a public corporation could initially be made for specific periods of time, e.g., ten years to fifteen years. During that period of time, the corporation would have to demonstrate its ability to meet minimum profit and performance standards. If the PFC failed to meet the standards, a corporation could be merged with a more efficient unit, or dissolved. The land would be returned to a federal agency charged with custodial management if the corporation succeeded and met the profit and performance standards. A charter could be renewed indefinitely.

THE PRESENT SYSTEM

Before addressing the advantages and disadvantages of the public corporation model, a brief review of the present institutional arrangement under which the federal lands are managed is appropriate. The characteristics of current federal land management follow:

1. The federal government has retained ownership of the land but private parties may make use of the land under terms established by law or regulation.
2. The administration and management of the federal lands is a multi-tiered, highly centralized bureaucratic organization of professional land managers and political policymakers.
3. A complex, continuous planning and resource allocation process characterizes the administration and management of federal lands. The lower level units, such as national forests, establish ranges.

15. Interest groups with representation specified on the board would include: federal; state government; local communities; timber industry; other business groups; and others. In establishing criteria for board membership, most of the effects of board composition in note 9, supra, should also be considered.
16. The Public Corporations Board would seek to assure overall corporate management consistent with government participation. Minimum rates of return on new capital investment would be set by the bond market, and the board would set a minimum overall average return. Rather than seek only to maximize profits, however, once corporate returns are at the minimum, management decisions would consider a set of wider social considerations policies set by the Public Corporations Board.
17. See supra note 8 and accompanying text.
18. Through its capacity to enter into contracts as a corporate entity, the corporation to manage private land intermingled with national forest land, at negotiated terms could exceed the minimum rate of return on corporate resources.
feasible outputs based on land capability, which are passed upward through regional or state offices to the national level. The political policy makers at the national level then establish goals and formulate aggregate budgetary needs for congressional and presidential approval. Resource output targets and budgets are then disaggregated downward to regions and to the forests. Although depicted here as a sequential process, in practice the fiscal and resource management of federal lands is reiterative and simultaneous. Negotiation occurs among the several levels in an effort to identify programs that are technically feasible, socially acceptable, and consistent with congressional and executive priorities.

4. Resource planning at the forest level is distinctly separated from budgetary planning at the national level. Congress controls the purse strings, including the level of new capital investment, while the managing agency determines the resource outputs and land uses.

5. Financial and economic efficiency play only a minor role in resource allocation decisions characterized by multi-objective management. Although assets worth many millions of dollars are involved, balance sheets which report the economic health of the federal land operation are not maintained. As a result, it is impossible to assess the degree to which the federal land management is being subsidized or yielding a net gain to society.

6. The professional resource managers of federal lands, such as foresters, range ecologists, and hydrologists, are moved from one location to another and from one kind of responsibility to another as they progress in their careers. Field level personnel rarely remain in one forest for more than three or four years. As a result, continuity in programs and results of experience must be passed on through regulations, manuals, and plans.

The federal forest lands cannot be efficiently managed under the type of hierarchical structure which now exists. The complex exchange of information between levels, the difficulty of establishing output goals in the absence of an agreed-upon objective and measure of performance, the geographically diverse nature of federal forest land management, and surmountable obstacles to efficient management. Simply said, the system is too large, too diversified, too complex to be fully understood and managed by any single authority. The establishment of each forest as an independent public corporation would simplify the management structure and promote greater efficiency, control, and accountability.

DEVELOPMENT OF THE PUBLIC CORPORATION

The U.S. industrial boom of the 1870s, described as the era of the corporate revolution, was characterized by a transition from an agricultural to an industrial economy and the rapid growth of businesses which
took advantage of the limited liability and pooled investment opportunities offered by the corporate structure. Throughout the period, however, few government enterprises in existence were organized, financed, controlled like other government departments or bureaus, ignored flexibility of the private corporate structure.

By World War I, certain types of the growing number of public enterprises were recognized as having distinguishing characteristics which clearly set them apart from typical government programs:

1. the government [was] dealing with the public as a businessman, rather than a sovereign; 2. users, rather than the general taxpayer [were] to pay for the cost of goods and services; (3) expenditures necessarily fluctuated with consumer demand and could not be predicted accurately or realistically kept within annual limitations; (4) expenditures to meet increased demand should not have in the long run, increase[d] the net outlay from the treasury; and (5) operations [were] being conducted within areas in which there [were] well established commercial trade practices.

It was evident that the operating and financial requirements of such enterprises were incompatible with the existing administrative and financial structure of regular government agencies which included annual appropriations, very detailed procedural regulations, and complex approval processes.

In response, theorists developed the concept of the autonomous government corporation as an alternative form of organizing public enterprises. They visualized Congress acting as a holding corporation for a series of distinct subsidiary public corporations, each with legal, administrative, and financial autonomy. Few traces remain of the first public-owned government corporations established during World War I. The New Deal/World War II era brought a second wave of public corporation establishment. The confusing array of governmental relationships and the occasional abuse of public corporations, however, created with the need to bring operations of public corporations into harmony with related actions of the government, and to hold public corporations accountable for their acts.

19. Seidman, supra note 8, at 89.
21. Id. at 183-84.
25. The Government Corporation, supra note 20, at 85.
The objective sought through establishing public corporations was not freedom from all governmental controls, but freedom from governmental sanctions unsuited to a business operation which stifle efficient operations. The Government Corporation Control Act of 1945 granted the government corporation freedom from the strict bureaucracy. This law used the method of establishing such enterprises to an Act of Congress provided for business-like budget, audit, other financial controls, and operating procedures. During the post-World War II era, extremes of corporate autonomy continued to be attacked by the Hoover Commission, as well as by those wary of the expanding role of government. Thus, Europe gained substantial experience and developed a literature on corporation economics and strategy. Few new federal government corporations were established in the United States until the 1960s. Since then, several new public corporations have been established at the federal level as well as many others at the interstate, regional, and local level throughout the country. A 1978 Twentieth Century Fund study of these corporations concluded that, despite a number of improvements that could be made, “stable and talented executive leadership, internal emphasis on management improvement, performance incentives, and decentralized operations are the important characteristics of public corporation administration that stand out in contrast with general government and contribute significantly to the effectiveness of public corporation operations.” It appears then that an appropriate balance is being found between corporate autonomy and government control.

The public corporation has thus become “one of the few popularly acceptable forms for American government to engage in economic activity.” Public corporations, under the policy guidance of the government, “provide a relatively independent base of operations for entrepreneurs in the public sector, providing managers with administrative power that is greater than that usually found within the regular hierarchies of bureaus of government.”

Because they are widely regarded as business rather than as political enterprises, public corporations have enjoyed support from groups in nearly all positions on the political spectrum... Not even the severe critics of specific public corporations have been willing to recommend that they be dismantled and their operations turned over to regular government agencies.

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3 Sedman, supra note 8, at 94.
5 See supra note 12.
7 Id. at 336.
The idea of a public corporation to manage forest land is not new. A study team recommended the establishment of public corporations to function as the Forest Management agencies which would be authorized to lease industrial privately owned forest land. Subsequently, the concept carried a step further by a proposal to form public corporations to jointly manage federal land and adjoining leased private land specified forest management regions. The present proposal is a refinement on these earlier ideas.

AN ILLUSTRATION

To illustrate how a system for independent public corporations would work, consider the National Forest System. Under the proposal National Forest would become an independent public corporation operating under federal charter, which gives it legal authority to manage federal land in much the same manner that other federal corporations manage communications, transportation, or electrical facilities. The charter would give the corporation the right to establish own production goals, land uses, management intensities, and techniques, arrangements, within the general policy constraints set by the Public Corporations Board. For example, in the case of timber resources, the corporation would be free to harvest standing timber on a schedule of its own choosing, and to decide whether to sell standing timber or use it. Similarly, the corporation would decide on how much and where to engage in such forest management practices as planting, thinning, and forest protection, subject only to constraints on its capacity to raise necessary capital funds. The corporation would also have the leeway to enter into contractual agreements, including legal standing to sue, and thus have freedom to lease private land intermingled with national forest land, if mutually agreeable terms could be negotiated.

To assure economic efficiency in making such decisions, the Public Corporations Board would establish a minimum nominal percentage rate of return, perhaps eight percent, to be earned on average by each corporation. This rate of return might vary and depend on the economic benefits of TVA. See supra note 7.

36. With general policy regulation by the Public Corporations Board. See supra note 8.
37. See supra note 7.
38. See supra note 7. TVA would be the closest precedent available but without the economic development goals of TVA. See Wirtz, supra note 7.
39. See supra notes 10, 11, and 18 and accompanying text.
40. See supra note 16 and accompanying text.
annual productivity of the land base. It might be higher, for example, for a corporation operating on high site lands on the Pacific Coast than one operating in the Intermountain Region. To assure that timber productivity is not liquidated, the corporation’s charter would stipulate that it maintain sufficient growing stock to utilize at least seventy-five percent of the potential site productivity.

The corporation would decide the level and mix of multiple uses of the forest, such as grazing and outdoor recreation, and the fees, if any, to charge for these services. Such decisions presumably would be made with an eye to financial feasibility, i.e., the capacity of revenues to cover costs and provide some minimum rate of return on invested capital, without engaging in unfair competition with private enterprise through use of monopoly power or tax advantages. Extensive types of outdoor recreation, however, would be continued for the sake of good public relations and because the cost of providing such services would be less than the costs of preventing such activities from occurring.

If public corporations were established, the management of wilderness areas now included in the National Wilderness Preservation System could be arranged in several alternative ways:

1. The corporation would be required to continue to administer wilderness units pursuant to the Wilderness Act. The corporation would also be permitted to (a) levy fees to cover the direct costs of management; or (b) enter into specific agreement whereby the federal government would provide funding on a cost-plus basis; or (c) use funds from a revolving fund for wilderness management which is replenished from a set percentage of corporate profits.

2. The corporation would be authorized to lease the management of the area to a wilderness or outdoor recreation group which would be responsible for paying all management costs.

3. Wilderness units would be transferred to the National Park Service.

Obviously, a profit-oriented public corporation would not have incentive to provide the level and kind of nonmarket services that the public expects to receive from a federal agency whose decisions are not influenced by the competitive marketplace. Access to recreation, wilderness, or preservation of unique landscapes or ecological communities are examples of public services that often are considered difficult or impossible to supply in the private economy. One approach to assuring that

\[ \sqrt{111-40} \]
these services are provided, if judged to be necessary in the public interest, is to have appropriate state or federal agencies or private conservation groups enter into contractual agreements under which the public corporation is paid to provide specific services or to designate a particular fee for a particular use. For this to work, those who would have such services provided must be willing to pay a price sufficient to induce the corporation to give up the net returns associated with the alternate use. Such contractual arrangement would: (a) allow decisions about the type and amount of taxpayers' subsidization to remain in the political arena; (b) provide politicians with accounting data on the opportunity costs of such services and (c) provide an opportunity for people with a high willingness to pay for such services to organize and contract for the provision of the services.

One funding source option would be for a designated percentage of net corporate profits to be deposited into a wilderness management fund. Such a fund could be managed at either the forest or the national level, and the percentage of profits payable into the fund would be designated by the Public Corporations Board. This would give wilderness advocates an interest in the economic success of the corporation, and would provide a funding source for wilderness management which would be buffered somewhat against the year-to-year fluctuations of congressional appropriations. This separate accounting would allow Congress to monitor expenditures from the fund as an indicator of the cost of preservation and the financial impact of expansion or contraction of wilderness and preservation areas.

Each corporation would be required to organize a system for reporting revenues, costs, capital investments and recovery, profits, and the measures of financial health normally required of any private corporation. Corporations would be subject to audit by the General Accounting Office, and would make an annual submission to Congress. But rather than being dependent on the Congress for annual appropriations for investments and operations, the corporation would finance its own operations from the sale of services, retained earnings, recovery of costs from old investments, and issue of securities such as tax-free bonds. The corporation might also be given access to public enterprise revolving funds, guaranteed or low interest loans, or credit subsidies from the federal government.

43. See supra note 8 and accompanying text.
44. While individual government corporations are usually allowed to organize their own investments and management systems, the Government Corporations Control Act, supra note 44, subject the corporations, whether wholly or partially government-owned, to be subjected to audit at least once every 3 years, and to make specified annual reports to Congress. The Tennessee Valley Authority was specifically exempted from some provisions, such as the ability of GAO to audit expenditures, so there is precedent for modifying these relationships and specifications in legislation, but it has rarely been done.
45. See supra note 12 and accompanying text.
While the financial objective of the corporation would not necessarily be to maximize profit, there would be a requirement to manage corporate assets so as to earn at least a public utility level rate-of-return on the land resources under its control. This performance standard would take the form of an annual rent on land and timber resources to be paid into the federal treasury each year.

A major issue involves the disposition of net income from public corporation operations, and transition from the present policy of sharing gross revenues with local governments. Under this proposal, income would be split four ways: (a) an amount equal to eight percent of the market value of land and timber is paid to the federal government as an annual rent; (b) a specified fixed percentage, paid into a revolving fund to support wilderness management and/or wildland research; (c) an amount not to exceed fifty percent of the balance to be earmarked for investments; and (d) remaining income to be distributed to local governments under policies established by the Public Corporations Board. Under this arrangement, sums paid to local government probably would decline, because the amount would be based on a floating percentage of net income rather than on a percentage share of gross revenue. As an offset, public corporations could make payments to local governments in lieu of local property taxes. The sharing formula could be implemented so that, in the transition period, revenues from the public corporation gradually decrease (or increase) to the amount that would be obtained under the income distribution-plus-payment in lieu of property taxes.

Actions of PFCs would be subject to environmental impact statements (EIS) but there would be no requirement that they prepare comprehensive land management plans, with the accompanying EIS, as under the present arrangement. Certain actions which are part of long-term programs, such as timber harvests or sales, however, could be subject to grammatic environmental impact statements. Clean air and water.

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* See supra note 13 and accompanying text.
* See supra note 16 and accompanying text.
* This might ease some of the important opposition to the proposal, since it would give these groups a more secure source of funding than year-to-year appropriations, and would give those groups a vested interest in making the corporation a profitable operation. At least the research group could find a precedent in the research and development work performed under TVA funding.
* Artz, supra note 7.
* Similar payments are made by TVA to local governments. WALSH, supra note 12, and Wirtz, supra note 7.
endangered species.\textsuperscript{53} and wild rivers\textsuperscript{54} legislation would also continue to be applicable.

**ADVANTAGES**

The primary advantage of a PFC approach to federal land management lies in the potential for achieving greater efficiency in the utilization of the land, capital, and labor. Greater efficiency could result from an incentive to carefully balance benefits against costs in making production and land use decisions. Activities which do not pay their way, including the cost of capital, would not normally be undertaken, unless an outside agency or private organization intervenes with proposals to finance such activity. The decentralization of the decisionmaking and planning structure to single, independent, relatively small-sized units,\textsuperscript{55} moreover, can be more responsive to change in public demand for its outputs than present bureaucratic structure.\textsuperscript{56} Finally, the capacity to raise any amount of capital necessary to invest in projects and programs yielding returns at or greater than the cost of the same funds will also aid greater efficiency and productivity.\textsuperscript{57}

A second advantage stems from the potential stabilization of the personnel involved in managing federal lands. While there undoubtedly would be movement of individuals from one PFC to another in response to opportunities for advancement to higher paying positions, turnover would not be as high as under present federal personnel policies and probably a whole lot lower. A positive program of advancement, including flexible job classifications, professional training, and above all, encouraging outside bids with higher salary, would enable a PFC to develop a more stable force of field technicians, professional staff, and executive level managers. Greater continuity in management direction, development,

\textsuperscript{55} "The outstanding characteristic of autonomy is the possibility of flexible, directed operation within a broad field of responsibility and authority without detailed prescription laid down in advance or currently by the executive or legislative branches of government." Duffus, *The Place of the Government Corporation in the Public Utility Industry*, 22 J. Econ. 29-32 (1949).
\textsuperscript{56} Although no one is claiming it to be an inherent property of government corporations, it has been observed that autonomous corporations do tend to become conservative and resistant to change as they mature in their corporate life cycle, although perhaps not reaching the extreme of some government agencies. WALSH, supra note 12; SHEPHERD, *Public Enterprise: Economic Analysis of Theory and Practice* (1976); Hobbs, *supra* note 9.
\textsuperscript{57} Without government subsidy, the minimum rate of return for capital investment would correspond to the interest rate payable on bonds or loans. Some observers have noted that bonds or low-interest loans have a tendency, however, to depress the cost of capital to an unacceptable low level, thereby encouraging overcapitalization. See WALSH, supra note 12, and SHEPHERD, supra note 56.
greater in-house expertise on how the resource base is responding to management inputs, and continuous in-house accountability for the results of decisions would result from implementation of the PFC. Top-level management of a PFC would serve at the pleasure of the board of directors and all employees would be exempt from normal civil service regulations. In order for a PFC to attract Forest Service personnel, however, there would have to be some type of security, at least for levels GS-15 and below, comparable to their present civil service status.

A third advantage is that federal land management would become less vulnerable to the politics of special interest groups and more responsive to the dollar votes of consumers in the marketplace. This stems from the decentralization of decisionmaking and control; the substitution of financial performance standards for political direction from Congress and the administrative hierarchy; and the opportunities any interest group has to secure access to services by buying them direct from the corporation or leasing lands.

**DISADVANTAGES**

The drawbacks to a PFC system with strong emphasis on economic efficiency involve two types of consideration: (1) the usual objections to using economic efficiency criteria as a basis for public land management; and (2) shortcomings of the specific proposal outlined here. All the alleged shortcomings of economic efficiency attributed to private enterprise in management of forest resources need not be repeated here. Arguments against using economic efficiency as a basis for public land management center on notions that resources will be destroyed, or at best seriously impaired, by basing decisions on profit criteria; that the needs of future generations will be ignored; and that nonmarket values are not adequately applied. Yet, all these things have also been said about present federal management. Thus, it is not necessarily the case that a PFC approach would be less effective in securing these public benefits than the present system. Indeed, the various elements of the proposal are designed to ensure that these ends are reached and that at the same time greater efficiency is also achieved.

As for the proposal itself, several disadvantages, or drawbacks, can be identified:

1. A national policy could not be affected readily through a series of independent PFC because these would be free to pursue their own production policies subject to whatever incentives the federal government might provide through financing or other arrangements. The President, for example, could not raise or decrease the level of timber harvest by executive order.
2. There would be no necessary uniformity in the kinds of land-management policies followed by the various corporations, compared to the present situation where, at least in theory, each National Forest operates under similar direction and standards. Of course, substantial public interest in having uniformity on some particular policies of practice could be mandated by the Public Forest Corporation Board. Beyond that, each PFC would be encouraged to go its own way as part of deliberate policy to encourage flexibility and innovation responding to public wants.

3. While in theory a PFC would be free of the financial constraints imposed by Congress or the President, its capacity to raise funds at costs equal to or less than the comparatively low rates of return historically associated with the federal lands may, in fact, be severely limited, particularly if interest rates remain at the relatively high levels of recent years. Put another way, if forced to fund federal land management by private borrowing, less money, rather than more, may be available for operations and new investments. As a result, output and productivity may decline.

In response, a new economic era for the federal lands is in progress and many lines of investment that previously were submarginal have become supramarginal. Moreover, if a large private corporation can make investments in growing forests, a large public corporation, particularly one which can issue tax-free bonds and which is not subjected to corporate taxes, should have even greater incentive. This ability to raise inexpensive capital has led some government corporations to over-invest in capital improvements, and to emphasize corporate activities favoring bond-market investors. Care must be taken to ensure that the government corporation, buffered from politics by autonomy and from the market's financial advantages, does not get too caught up in its own internal politics or the preferences of investment bankers.

A TEST

A system of public forest corporations, operating under the supervision of a Public Forest Corporations Board, is one of several alternatives to the present method for managing the federal lands. Obviously many details need to be developed before the proposal can be fully evaluated. The intent of this article is to stimulate serious study of a promising way of achieving more effective management of federal lands.

As a way of testing the proposal, consideration could be given to designating a portion of the federal lands, maybe twenty-five percent.

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58. Virtually all public corporations are exempt from normal corporation taxes. See note 12.
59. Id.
including national forests, for management by public corporations. These federal lands could be selected to represent a range of ecological and economic conditions. An experiment would then be conducted in which performance of the public corporations is compared to the performance of a comparable federal agency operation. Performance would be measured in terms of such variables as costs of operation, net revenues, rate of return on investment, changes in productivity of the land base, environmental protection, differences in the multiple-use mix, levels of investment, and public attitudes. The experiment would yield valuable information about the comparative performance of alternative institutional arrangements for managing the federal lands, and would also provide an element of competition in federal land management that does not now exist. The PFCs would be eager to prove their merit (providing proper incentives are instilled) and, correspondingly, the federal agency units would be eager to prove their superiority. Because lack of competition is a well known cause of economic inefficiency, a more varied, less centralized and monopolistic style of management might lead to innovations that would otherwise not be realized.

NOTES

1. Critique the proposal. Does the author persuade you that we should give over management of the national forests by a bureaucratically organized agency in favor of individual public corporations? Why or why not?

2. State briefly the elements about which you would want to do research in order to draft a bill creating the sort of corporation Teeguarden and Thomas propose. Do they give you much help about the particular matters you must consider?

3. Compare and contrast the proposal we earlier considered to privatize the forests (supra, p. III-30) with this one. To choose between privatized administration, a series of public corporations, and reforming the existing bureaucracy, what research would you want to undertake?

4. On behalf of the public corporation, some claim that it eliminates bureaucracy. Does it?
3. OLD OR NEW IMPLEMENTING INSTITUTION

As we have seen, having determined the behavior generally desired, the designer of legislation must consider the appropriate implementing institution. Having determined to place it in a governmental institution (that is, not to privatize the implementation), the drafter must decide whether to utilize an existing institution, or to create a new one. This section rehearses the general considerations that might affect that choice, and illustrates the problem with a case study.

SEIDMAN, DRAFTING FOR THE RULE OF LAW¹

Here I consider only adjudicating and administrating. A few general considerations arise in choosing between courts, Ministry, tribunal and parastatal: First, procedures; second, personnel; and third, cost.

1. PROCEDURES

The general model earlier put forward of a decision-making structure argues that its input, feedback and conversion processes

¹ Unpublished MS., 1985
limit the range of potential outputs. One consideration in choosing a particular organization as the locus of the decisions lies in the sorts of procedures they have and their appropriateness to the decisions at hand. For example, the High Court in most countries epitomizes the slow, formal court with quite rigid procedural and evidential rules that constitutes our stereotype of a court. For some sorts of decisions, that formal and rigid procedure has real value - major criminal or private civil cases, for example, where the parties have a great deal at stake and that involve complicated factual issues. For other sorts of issues - for example, processing claims for pensions - to use those complex procedures seems daft. In deciding whether to put the decisions involved in a particular scheme in High Court, the drafter must consider the procedural demands of the cases likely to arise under this bill, and the existing procedures of the High Court.

Existing institutions have existing procedures. Generally, one must take them as they presently exist. If the drafter lodges a set of issues in the magistrate's court, he takes that court as he finds it, with its procedures and (as we shall discuss) its personnel. If he lodges it with an existing tribunal - say an Administrative Court - he takes the tribunal as it is, warts and all. If he lodges the matter with a Ministry official, he must accept the lack of formal procedures, the inevitable tendency to secrecy and probably a tendency to procrastination. Only if he
creates specific procedures for the Ministry can he avoid using
the ones presently existing - for example, by creating a
requirement of notice and formal hearing.

If the drafter believes that he needs an institution with its
own procedures appropriate for the subject-matter, to solve the
problem usually he must create a new organization. For
adjudicating and some kinds of administering, a tribunal will
usually seem desirable; for administering, a public corporation.

Historically, legislation has created tribunals in large part in
order to develop specific procedures, either to make court
procedures less formal, (for example, a Workmen's Compensation
tribunal or a Small Claims court), or to judicialize
administration (for example, a Labor court or a Water Resources
Board).

2. PERSONNEL

Existing tribunals come complete with their present personnel.
Whatever their perfections and imperfections, they will decide the
cases that arise. To place disputes arising out of a new law
seeking affirmative action in favor of women in courts whose
judges are all relatively antique males, probably dooms the new
laws to a wooden and unimaginative set of decisions. To create a
new administrative tribunal for a new law gives the government
whose policy produced the new Act a chance to appoint
decision-makers who will seek creative ways to advance the law's
purposes. Similarly, a law may demand a special expertise. To
lodge decisions about genetic experimentation and engineering with an ordinary court probably imposes too heavy a burden of technical knowledge on generalist judges.

3. COST

Creating a new parastatal or tribunal to decide the expected range of decisions arising under new legislation always imposes new out-of-pocket costs. A new tribunal requires staff, buildings, vehicles, stationery, equipment. By contrast, putting a set of decisions in an existing organization, for example, the Ministry or the courts, seems cost-free. The judge already receives his salary; so does the under-secretary who will actually make the decision in the Ministry. In the usual perception, the problem becomes balancing a cost-free exercise bound by existing procedures and personnel against the desirability of shaping procedures and recruiting personnel specifically for the purposes of the new law, but with high out-of-pocket costs.

That perception errs. Wherever lodged, decision-making uses personnel and physical resources. For that, somebody must pay. Adding additional causes of actions to a court's jurisdiction in time generates an increased caseload for that court. The docket grows, and the delay between docketing a case and trial lengthens. Bureaucrats notoriously lag behind in their work. To add to their burden an additional increment under a new law imposes additional delays upon the bureaucracy's clients. These delays constitute additional costs, although usually government
does not pay out-of-pocket for them. In deciding to place a set of decisions in an existing organization, these hidden costs imposed upon the clients must enter the reckoning.

In general, therefore, the choice between an existing and a new organization for implementing a proposed law requires considering the sorts of procedures desirable for the range of decisions anticipated, and the appropriateness of existing institutions as opposed to generating a new institution specifically to deal with the new legislation; the problem of personnel; and finally, the question of costs. I turn next to the specific problems involved in selecting an appropriate forum for adjudicating.
A CASE STUDY
AMENDING THE COAL MINING HEALTH AND SAFETY ACT, 1969

In 1975, the Congress amended the Coal Mining Health and Safety Act, supra, VII-2. We reproduce here only those amendments relevant to the sections quoted above, Sec. 802(a) defines "Secretary" to mean the Secretary of Labor or his delegate.

§ 812. Inspections, investigations, and recordkeeping
(a) Purposes: advance notice; frequency; guidelines; right of access

[Not changed in ways relevant to our discussion]

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§ 814. Citations and orders
(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(b) Follow-up inspections: findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

* * * *

VIII-52
(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall issue such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of the section to be withdrawn from, to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence of any such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no such violations. Following an inspection of such mine which discloses no such violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e) Pattern of violations; abatement; termination of pattern

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence of any such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards which could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(1) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

§ 815. Procedure for enforcement

(a) Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) Failure of operator to correct violation; notification; contest; temporary relief

(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency.
(B) In determining whether to propose a penalty to be assessed under section §20(b) of this title, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section §11 of this title together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if—

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

* * *
(d) Contest proceedings; hearing; findings of fact; affirmation, modification, or vacatur of citation, order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this title, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this title, any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this title, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this title, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section), and thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 814 of this title.

§ 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record, as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence as taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

§ 817. Procedures to counteract dangerous conditions

(a) Withdrawal orders

If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(a) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 814 of this title or the proposing of a penalty under section 820 of this title.
§ 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

(f) False statements, representations, or certifications

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(g) Violation by miners of safety standards relating to smoking

Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

(h) Equipment falsely represented as complying with statute, specification, or regulations

Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (f) of this section.

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

(j) Payment of penalties; interest

Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

(k) Compromise, mitigation, and settlement of penalty

No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

* * *
§ 823. Federal Mine Safety and Health Review Commission

(a) Establishment; membership; chairman

The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms; personnel; administrative law judges

* * *

(d) Proceedings before administrative law judges; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceeding. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(i) If any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall be limited to any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(ii) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issues of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

* * *
The original statute, supra p. VII-2, defined "Secretary" to mean the Secretary of the Interior. The amendment defined it to mean the Secretary of Labor. In 1969, the Department of the Interior already had in place a Bureau of Mines, established in 1910. It took over basic administration of the 1969 Act. The Senate Report on the 1977 amendment (U. S. Code Congressional and Admin. News (1977) 3401, 3405) stated:

BACKGROUND

Currently, the protection of safety and health of our nation's miners is provided by two separate statutes: the Metal Act and the Coal Act. The Coal Act is considerably more comprehensive in scope and reach than is the Metal Act. First, the Coal Act deals with matters of miners' health and safety, while the Metal Act deals primarily with miner safety. The Coal Act provides for civil penalties for violations of the Act's standards, while the Metal Act does not. The Coal Act provides for a considerably more complex and definitive set of standards with which an operator must comply, and all standards under the Coal Act are mandatory. Standards under the Metal Act are not generally as comprehensive and are often "advisory standards," failure to comply with which would not place the mine operator in violation of the Act. Enforcement is considerably more thorough under the Coal Act than the Metal Act.

Enforcement of both laws is the responsibility of the United States Department of the Interior and is currently the function of the Mining Enforcement and Safety Administration (MESA) of the Department. MESA is under the administrative control of an Administrator, appointed by the President with the advice and consent of the Senate. While this responsibility was originally assigned to the Bureau of Mines, reaction to the Buffalo Creek, Sunshine and Blacksville disasters, and Congressional pressure to more mining safety and health enforcement responsibilities out of the Interior Department, led the Interior Department, in 1973, to establish MESA as an independent agency within the Department of the Interior. The Bureau of Mines still retains certain responsibilities for mine safety research under section 501 of the Coal Act and section 6(a) of the Metal Act; and a separate budget account number is maintained for this purpose.

The history of the Interior Department's enforcement of these laws, either by the Bureau of Mines or by MESA, demonstrated a basic conflict in the missions of the Department. In past years, the Department has pursued the goal of maximizing production in the extractive industries, which was not wholly compatible with the need to interrupt production which is the necessary adjunct of the enforcement scheme under the Metal and Coal Acts; even though, in the Committee's view, over the long-run, improved health and safety promotes greater productivity through reduction of "down-time" and improved employee morale. In addition, lowered workers' compensation premiums which should result from improved safety and health, can be expected to lower production costs. On the other hand, no conflict could exist if the responsibility for enforcing and administering the mine safety and health laws was assigned to the Department of Labor since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions.
Administration

The bill creates a new Assistant Secretary of Labor for Mine Safety and Health, to provide specialized treatment and enforcement of the mine safety and health amendments.

A separate enforcement structure with separate attention to mine safety and health problems is mandated by the very high fatality and injury rates for the industry. At the same time, issues which have arisen in the past because of overlapping jurisdiction between Interior and Labor, particularly in the area of milling of minerals, will be easier to resolve with the establishment of this new Assistant Secretary.

Because of the increased enforcement and administrative responsibilities under the bill, including increased inspection, enforcement, legal services, and administrative responsibilities, it is anticipated that additional resources may be needed by the Department for personnel and support services. Such resources can be provided through the normal appropriation process as becomes necessary.

The Mine Safety and Health Review Commission

The bill provides a right to contest orders and proposed penalties before the Commission.

The Committee realizes that alternatives to the establishment of a new independent reviewing body exist. For example, under the present Coal Act, review of contested matters is an internal function of the Secretary of the Interior who has established a Board of Mine Operations Appeals to separate his prosecutorial and investigative functions from his adjudicatory functions.

The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.

The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.
Senator Hatch filed a minority report:

There has been no case made as to why MSA should be transferred to DOL and there are several reasons related to its own track record why the Labor Department should not be entrusted with additional responsibilities in this important area. For example, the Labor Department has frequently lamented over what it sees as an imbalance in distribution of Federal funds for worker safety and health. Accordingly, if MESA is transferred to Labor, mine safety programs could face reductions so that MESA funds could be shifted to safety programs in other industrial sectors. In my view, it would be very unwise to divert funds from MESA programs in order to provide coverage in more populous but less dangerous industries. S. 717 does not provide adequate safeguards to preclude such an occurrence.

Furthermore, as we all know, DOL has taken much criticism for the poor administration of its OSHA programs. And yet, many of those same critics feel that this very important responsibility for mine safety enforcement should be transferred from the department that has effectively administered such programs to another whose record of inefficient management has been widely noted.

There is no historical indication that a super-bureaucracy of health and safety better insures enforcement of regulations. A historical record of 60 years under DOL indicates that mine safety has consistently improved, even though no Federal mine safety law existed for many of those years. Also, since the creation of MESA in 1973, there have been no mine disasters in metal/nonmetal industry. Consequently, I am inalterably opposed to S. 717 because it provides that DOL, inefficient as it is in its own sphere, should be entrusted with the highly specialized responsibilities of mine safety and health enforcement.

NOTE

To assign the new Act to the Department of Labor to administer required the Department to undertake a completely new sort of activity, and therefore to create new institutions to do that task. If you had then served as staff director to the Senate Human Resources Committee (to whom the Bill was referred), what research would you require of your staff?
THE NORTH CAROLINA MOUNTAIN RIDGE ACT
[P. VIII-78]

I. Difficulty: High rises on mountain ridges.
   A. NB excepts radio towers, electric lines, etc -- why?

II. Explanations:
   A. Non-legal: Plainly, economic interest dominates here, and no rule prevents.
   B. Legal: No law prevents, and what the law does not prohibit it permits.

III. Solution:
   A. As addressed to role-occupants.
      1. Rule:
         a. Permits counties or cities to adopt local ordinance pursuant to §113A-208 [not printed in text]. That required a local ordinance that permitted a high rise on a mountain ridge if it met sewerage and water supply requirements, and gave "adequate consideration to protecting the natural beauty of the mountainsm, as determined by the local governing body."
(1) i.e.: The ordinance would prohibit developers from building high rises on ridges except strictly by permit.

b. Also permitted counties and cities to opt out entirely by a referendum (113A-214)

c. Principal rule (the fallback position): Prohibits building on ridges at all.

2. Opportunity and capacity of developers to obey: obviously present.

3. Communication of law: Nothing in statute, but probably not a problem.

4. Interest of developers:

   a. Very high to build.

   b. Tempered by threats of lawsuits if violative of statute.

   c. Roundabout sanctions very strong: The chances of not getting sewer, water etc. would make building chancey, and very difficult to get financing. [That is, probably unnecessary ever to call on courts!]

5. Process: nil

6. Ideology: Probably contra, but subordinate to interest.

B. Implementing agencies: County legislative bodies, if under Ordinance.
1. Rule: Gives great discretion ("adequate consideration to protecting natural beauty of the mountains..." §113A-208(b)(4)).

2. Opportunity to enforce: present.

3. Capacity to enforce: Probably pretty slim.
   
a. Likely not to have much staff to enforce, especially re: aesthetics.

b. County Commissioners likely not much as aesthetes

c. Process of City Councils etc. not well adapted for semi-adjudicative issues like issuance of a permit. That is bound to become a political act, and very subject to pressure and corruption.

   (1) Input-output analysis will make this clear: Who supplies inputs? What are conversion processes?

4. Interest: Probably more in getting increased tax revenues than in protecting the scenery.

5. Process -- ?

6. Ideology: Unlikely councillors elected on basis of conservation of mountain views.

C. Implementation: Courts.
1. Obviously a combined reactive and proactive system, since both citizens and officials can bring actions.

2. Subject to all the problems of courts as implementers.
ARTICLE 14.

Mountain Ridge Protection.

§ 113A-205. Short title.
This Article shall be known as the Mountain Ridge Protection Act of 1983. (1983, c. 676, s. 1.)

Editor's Note. — Session Laws 1983, on ratification. The act was ratified July 4, 1983, makes this Article effective 5, 1983.

Within the meaning of this Article:
(1) The word "person" includes any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, interstate body, the State of North Carolina and its agencies and political subdivisions, or other legal entity.

(2) A person, as defined in this section, doing business or maintaining an office within a county is a resident of the county.

(3) "Tall buildings or structures" include any building, structure or unit within a multiunit building with a vertical height of more than 40 feet measured from the top of the foundation of said building, structure or unit and the uppermost point of said building, structure or unit; provided, however, that where such foundation measured from the natural finished grade of the crest or the natural finished grade of the high side of the slope of a ridge exceeds 3 feet, then such measurement in excess of 3 feet shall be included in the 40-foot limitation described herein; provided, further, that no such building, structure or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet. "Tall buildings or structures" do not include:

a. Water, radio, telephone or television towers or any equipment for the transmission of electricity or communications or both.

b. Structures of a relatively slender nature and minor vertical projections of a parent building, including chimneys, flagpoles, flues, spires, steeples, belfries, cupolas, antennas, poles, wires, or windmills.

c. Buildings and structures designated as National Historic Sites on the National Archives Registry.

(4) "Construction" includes reconstruction, alteration, or expansion.

(5) "Ridge" means the elongated crest or series of crests at the apex or uppermost point of intersection between two opposite slopes or sides of a mountain, and includes all land within 100 feet below the elevation of any portion of such line or surface along the crest.
§ 113A-207. Legislative findings.

The construction of tall or major buildings and structures on the ridges and higher elevations of North Carolina's mountains in an inappropriate or badly designed manner can cause unusual problems and hazards to the residents of and to visitors to the mountains. Supplying water to, and disposing of the sewage from, buildings at high elevations with significant numbers of residents may infringe on the ground water rights and endanger the health of those persons living at lower elevations. Providing fire protection may be difficult given the lack of water supply and pressure and the possibility that fire will be fanned by high winds. Extremes of weather can endanger buildings, structures, vehicles, and persons. Tall or major buildings and structures located on ridges are a hazard to air navigation and persons on the ground and detract from the natural beauty of the mountains. (1983, c. 676, s. 1.)

§ 113A-209. Certain buildings prohibited.

(a) This section applies beginning January 1, 1984, in any county or city that has failed to adopt a ridge protection ordinance pursuant to G.S. 113A-208 by January 1, 1984.

(b) No county or city may authorize the construction of, and no person may construct, a tall building or structure on any protected mountain ridge.

(c) No county or city may authorize the providing of the following utility services to any building or structure constructed in violation of subsection (b) of this section: electricity, telephone, gas, water, sewer, or septic system. (1983, c. 676, s. 1.)
§ 113A-208. Regulation of mountain ridge construction by counties and cities.

(a) Any county or city may adopt, effective not later than January 1, 1984, and may enforce an ordinance that regulates the construction of tall buildings or structures on protected mountain ridges by any person. The ordinance may provide for the issuance of permits to construct tall buildings on protected mountain ridges, the conditioning of such permits, and the denial of permits for such construction. Any ordinance adopted hereunder shall be based upon studies of the mountain ridges within the county, a statement of objectives to be sought by the ordinance, and plans for achieving these objectives. Any such county ordinance shall apply countywide except as otherwise provided in G.S. 160A-360, and any such city ordinance shall apply citywide, to construction of tall buildings on protected mountain ridges within the city or county, as the case may be.

(b) Under the ordinance, permits shall be denied if a permit application (and shall be revoked if a project) fails to provide for:
   (1) Sewering that meets the requirements of a public wastewater disposal system that it discharges into, or that is part of a separate system that meets applicable State and federal standards;
   (2) A water supply system that is adequate for fire protection, drinking water and other projected system needs; that meets the requirements of any public water supply system that it interconnects with; and that meets any applicable State standards, requirements and approvals;
   (3) Compliance with applicable State and local sedimentation control regulations and requirements; and
   (4) Adequate consideration to protecting the natural beauty of the mountains, as determined by the local governing body.

(c) Permits may be conditioned to insure proper operation, to avoid or mitigate any of the problems or hazards recited in the findings of G.S. 113A-207, to protect natural areas or the public health, and to prevent badly designed, unsafe or inappropriate construction.

(e) Determinations by the county or city governing board of heights or elevations under this Article shall be conclusive in the absence of fraud. Any county or city that adopts a ridge ordinance under the authority of this section or other authority shall send a copy of the ordinance to the Secretary of Natural Resources and Community Development.

(f) Any county or city that adopts an ordinance pursuant to this section must hold a public hearing before adopting the ordinance upon the question of adopting the ordinance or of allowing the construction of tall buildings on protected mountain ridges to be governed by G.S. 113A-209. The public hearing required by this section shall be held upon at least 10 days' notice in a newspaper of general circulation in the unit adopting the ordinance. Testimony at the hearing shall be recorded and any and all exhibits shall be preserved within the custody of the governing body. The testimony and evidence shall be made available for inspection and scrutiny by any person.

(g) Any resident of a county or city that adopted an ordinance pursuant to this section, or of an adjoining county, may bring a civil action against the ordinance-adopting unit, contesting the ordinance as not meeting the requirements of this section. If the ordinance is found not to meet all of the requirements of this section, the county or city shall be enjoined from enforcing the ordinance and the provisions of G.S. 113A-209 shall apply. Nothing in this Article authorizes the State of North Carolina or any of its agencies to bring a civil action to contest an ordinance, or for a violation of this Article or of an ordinance adopted pursuant to this Article. (1983, c. 676, s. 1.)
113A-211. Enforcement and penalties.

(a) Violations of this Article shall be subject to the same criminal sanctions, civil penalties and equitable remedies as violations of county ordinances under G.S. 153A-123.

(b) Any person injured by a violation of this Article or any person who resides in the county in which the violation occurred may bring an action against the person alleged to be in violation. The action may seek:

(1) Injunctive relief; or

(2) An order enforcing the provision violated; or

(3) Damages caused by the violation; or

(4) Both damages and injunctive relief; or

(5) Both damages and an enforcement order; or

(6) Both an enforcement order and injunctive relief.

Actual damages as found by the court or jury in suits brought under this subsection are five hundred dollars ($500.00) or less, the plaintiff shall be awarded double the amount of actual damages; if the amount of actual damages as found by the court or jury is greater than five hundred dollars ($500.00), the plaintiff shall receive damages in the amount so found. Injunctive relief or an enforcement order under this subsection may be based upon a threatened injury, an actual injury, or both.

Civil actions under this subsection shall be brought in the General Court of Justice of the county in which the alleged violation occurred. The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation, including reasonable attorney and expert-witness fees, to any party, whenever it determines that such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security, the amount of such bond or security to be determined by the court. Nothing in this section shall restrict any right which any person or class of persons may have under the common law or under any statute to seek injunctive or other relief.

(c) Within the meaning of this section, violations of this Article include violations of local ordinances adopted pursuant to G.S. 113A-208. (1983, c. 676, s. 1.)

§ 113A-212. Assistance to counties and cities under ridge law.

(a) The Secretary of Natural Resources and Community Development shall provide assistance upon request to the counties and cities in carrying out their functions pursuant to this Article, such as by providing model studies, plans, and ordinances for their consideration.

(b) The Secretary of Natural Resources and Community Development shall identify the protected mountain ridge crests in each county by showing them on a map or drawing, describing them in a document, or any combination thereof. Such maps, drawings, or documents shall identify the protected mountain ridges as defined in G.S. 113A-206 and such other mountain ridges as any county may request, and shall specify those protected mountain ridges that serve as all or part of the boundary line between two counties. By November 1, 1983, the map, drawing, or document tentatively identifying the protected mountain ridge crests of each county shall be filed with the board of county commissioners and with the city governing body of each city that requests it. By January 1, 1984, the map, drawing, or document identifying the protected mountain ridge crests shall be permanently filed by the Secretary with the register of deeds in the county where the land lies, and made available for inspection at the Secretary's office in Raleigh. Copies of the maps, drawings, or documents certified by the register of deeds shall be admitted in evidence in all courts and shall have the same force and effect as would the original.

(c) Determinations by the Secretary of elevations under this section shall be conclusive in the absence of fraud. (1983, c. 676, s. 1.)

* * *
There is a trend toward increased government involvement in land use controls across the United States. In North Carolina, this is most recently evidenced by the passage of the Mountain Ridge Protection Act of 1983\(^1\) intended to protect residents and visitors from hazards caused by poorly designed tall structures on mountain ridges.

* * *

The Bill

The Mountain Ridge Protection Act was enacted into law on July 5, 1983, following an earlier 45-0 vote by the North Carolina Senate. The heart of the statute is contained in Sections 113A-209, as follows: "no county or city may authorize the construction of, and no person may construct, a tall building or structure on any protected mountain ridge ...

Tall buildings or structures, by statutory definition, include:

Any building, structure or unit within a multiunit building with a vertical height of more than 40 feet measured from the top of the foundation of said building, structure or unit; provided, however, that where such foundation measured from the natural finished grade of the high side of the slope of a ridge exceeds 3 feet, then such measurement in excess of 3 feet shall be


Protected mountain ridges, by statutory definition, include "all mountain ridges whose elevation is 3000 feet above sea level and whose elevation is 500 or more feet above the elevation of an adjacent valley floor; provided, however, that a county may elect to eliminate the requirement for an elevation of 3000 feet ...". Legislative findings included in the bill discuss the problem areas associated with mountain-ridge construction and maintenance of buildings in excess of forty feet in height. Anticipated difficulties included inadequate fire protection methods, insufficient water supply and pressure, sewage runoff and contamination of adjacent lands, high winds or other extremes of weather, navigational hazards, and destruction of natural beauty of the environment. Additional unforeseen problems caused by tall building construction were also possible.

The foregoing provisions of the statute became effective January 1, 1984, affecting thirty-five counties in North Carolina.

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\[\textit{VIII-p}1\]
The Project

The development and subsequent passage of a ridge-protection law came about largely due to a particular real estate venture on a mountain top in Avery County. Located in the Appalachian region of northwestern North Carolina, Avery County attracts numerous visitors annually to area resorts nestled in the Blue Ridge Mountains. One such development, known as SugarTop Resort Condominiums, became the focus of considerable controversy.

Plans for the development of SugarTop were originally designed to be a five-story, terraced, modular building constructed of wood and steel, located on top of Little Sugar Mountain in Avery County. Until that time, no structure of any great size had been constructed on the summit of a prominent ridge in North Carolina. U.S. Capital Corporation, the developer of the project, received many preconstruction sales inquiries and very little public opposition at the inception of the project.

* * *

Public Dissension

Beginning in late 1982, statewide editorials, television commentaries, and letters-to-the-editor penned by disgruntled local residents and area visitors vocalized dissension against the SugarTop high-rise project, proclaiming it the “Godzilla” of Little Sugar. Other reactions to the intrusive rectangular structure included such terms as “monstrosity,” “abomination,” and “desecration” of the mountain region. Hugh Morton, prominent resident and spokesman for Western North Carolina Tomorrow, a bipartisan planning committee for seventeen mountain counties, indicated that his organization would investigate the possibility of promulgating laws to prohibit high-rise development on mountain ridges. A December 2, 1982, Charlotte Observer editorial covering the controversy stated, “Like the rivers and the seashore, the mountains need protection in the name of all the people. Their natural beauty shouldn’t be compromised to suit a temporary landowner: it should be preserved as a natural resource for the pleasure and inspiration of future generations.”

Subsequently, publicized articles acknowledged that SugarTop construction would not be stopped and proclaimed the necessity of enacting legislation to prevent future desecration of mountain ridges.

* * *

Analysis of the Outcome

The period involved from the arousal of public sentiment to passage of the state bill was approximately seven months. The period involved from the introduction of S. 188 to passage of the compromise bill, was less than four months. At such an accelerated pace, was the proper action taken? That is, was the issue of mountain-ridge protection comprehensively examined and dealt with in an objective manner? Expeditious handling of a problem does not necessarily provide an effective solution. Passage of the Mountain Ridge Protection Act of 1983 provides an illustrative case in point.
Noted weaknesses in the statute include the following areas:

First and foremost, it fails to provide an overall plan for mountain-area development. That is, it contains no guidelines for positive development schemes that would be compatible with the environment of a mountain region. These guidelines would include road design, building and layout specifications, density restrictions, use restrictions, and horizontal as well as vertical height constraints. Moreover, the statute is too narrow with its exclusive application to tall buildings on mountain ridges. The same problems of high winds and fire protection difficulties would be encountered with tall buildings in mountain valleys or "short" buildings on protected ridges.

* * *

Third, the statute adds to the work load of the Department of Natural Resources and Community Development by assigning it the responsibility of identifying, mapping, and recording all protected ridges within the state, as well as providing model studies of mountain ridges, plans, and examples of permit ordinances for local adoption. One need only review the expense, time delay, and difficulties encountered by the federal government with its development of flood plain maps to imagine effective state implementation of a ridge-map system by January 1, 1984. A resource inventory of this magnitude cannot be performed effectively in such a brief time frame.

Fourth, specific structures exempted from coverage under the statute are those most often damaging to the esthetics of mountain environment. These include water, radio, telephone or television towers, other equipment for the transmission of electricity or communications, chimneys, flagpoles, flues, spires, steeples, bellfries, cupolas, antennas, poles, wires, windmills, and structures designated as natural historic sites. Notably not exempt are state buildings, such as the high-rise dormitories at some mountain universities, although none are currently located on ridgecrests.

Recommendations and Conclusions

As drafted, land use controls defined by the Mountain Ridge Protection Act of 1983 can only be marginally effective at best. Local officials correctly forecasted the statute to become diluted legislation with more loopholes than enforcement powers. Ostensibly, the purpose of land use controls is to protect the health, welfare, and safety of the people—primarily the surrounding land owners. Commissioners in Watauga and Avery Counties, some of the few who enacted local measures governing ridge protection, may be penalized by the new law because to retain local control they must restudy the ridge-protection issues and devise an acceptable permit system for ridge construction. The simplicity of the existing Watauga County ridge ordinance is superior to the inevitably cumbersome permit system required by state law. Granted, local ordinances may suffer from some of the same defects previously discussed with the Mountain Ridge Protection Act, but on a much smaller scale. To effectively handle the statewide problems of mountain-ridge development, it is imperative that comprehensive
and uniform legislation be developed at the state level. The Mountain Ridge Protection Act of 1983 fails to meet these needs.

It might be worth querying further whether the natural order of things would, in time, obviate the need for any ridge-law protection either at the state or local levels. In an unrestricted economy, the highest and best use of land will cause property to develop into that which produces the greatest value. Sold-out units at SugarTop do not automatically indicate economic profit. The design, architectural, and engineering problems encountered with ridge-top building by these developers may well cause them or the investors who purchased individual units, to lose money. Moreover, public dissension associated with creation of the SugarTop “Godzilla” may well have depleted the market for high-rise mountain ridge condominiums. In any event, statewide legislation in the form of the Mountain Ridge Protection Act of 1983 will not be as effective in controlling ridge development as it was intended to be.