Readings

of particular interest

Early Retirement for Buses?

"Capital-Biased Subsidies, Bureaucratic Monitoring, and Bus Scrapping" by Mark W. Frankena (Federal Trade Commission, Bureau of Economics working paper no. 83), April 1983.

The U.S. government and several Canadian provincial governments offer subsidies to local transit agencies that buy buses and subway cars. These subsidies are larger than the subsidies that go toward the actual cost of operating the vehicles—which (economists have suggested) gives the programs something of a "capital bias" toward overinvestment in equipment by local transit agencies. Governments in both countries, recognizing this bias, have put "strings" on their grants to discourage such overinvestment. Mark Frankena, an economist at the University of Western Ontario, studied the subsidies given to city transit systems in Ontario; the empirical data he found supports the hypothesis that the programs encourage inefficient overinvestment and that the "strings" have been of little use in remedying the problem.

In the absence of subsidies, an aging bus will theoretically be scrapped at the economically optimal moment. That will be the point at which the combined costs of maintaining it and of forgoing the qualitative benefit of modernization begin to outweigh the cost of buying a replacement. Capital subsidies lower the latter expense to the city but not the two former expenses; thus, Frankena suggests, they will lead local officials to retire old buses and buy new ones sooner and more often than is economically justified.

Earlier models of bus replacement decisions have suggested that the inefficiency may be of a significant magnitude. A 1980 study by R. F. Armour analyzed the effect of an 80 percent federal capital subsidy on the age at which buses would be replaced in Seattle, Washington. Armour's model found that the optimal economic replacement age for buses under Seattle conditions ranged from 20.5 to 26 years, but predicted that under federal subsidies the transit agency would find it profitable to retire buses at between 8.5 and 10 years of age. Armour did not, however, test these conclusions empirically.

Governments have not been unaware of the potential for distortion inherent in these subsidy programs. Often, in fact, they have added command-and-control regulations to the programs in an attempt to ensure that no bus is scrapped before its time. Both U.S. and Canadian officials claim that they will withhold funds for new purchases if municipalities try to retire existing buses before they reach the end of their "expected" life, which is about fifteen years. Some officials insist that these controls have prevented any actual premature scrapping of buses. Although "there may be a *perceived* bias in favor of capital replacement as opposed to maintenance," the Ontario transport minister has claimed, "there's no indication the *perceived* bias has influenced replace-repair decisions."

Frankena points out that merely installing controls to deter bus scrapping will not necessarily solve the inefficiency problem. For one thing, the process of control itself involves administrative costs that would be unnecessary under a neutral subsidy program. Furthermore, the prevailing regulations allow authorities to scrap buses more than fifteen years old even though it is sometimes inefficient for them to do so. Finally, the author suggests, cities may find ways to evade the controls, either by scrapping an old bus at one time and buying a new bus at another, or by taking buses out of service but not formally scrapping them until they reach the age of fifteen.

To test this hypothesis, Frankena constructed an econometric model of the Ontario urban transit systems' decisions to scrap

buses, using data from 1963 to 1981. After controlling for ten variables, he found that the capital bias of the subsidies caused Ontario buses to be retired earlier than they should have been. He also tried to determine whether or not the Ontario regulations have succeeded in lessening the chances that a bus will be scrapped prematurely. He concluded that the official claims of success were not borne out by the available evidence: "bureaucratic monitoring procedures did not prevent an increase in the scrapping probability even for buses under fifteen years old."

Frankena notes that his study did not find as great an inefficiency as the theoretical models had predicted, even allowing for the fact that the Ontario subsidies had less of a capital bias than the U.S. subsidies studied earlier. He believes, however, that both the new and the old studies show that capital-biased subsidies create significant unnecessary costs compared with more neutral subsidy schemes.

Truth-in-Simplification

"A Survey of the Mortgage Banking Industry Concerning Costs and Benefits of Regulations" by Louis Harris and Associates (John M. Boyle, project director), September 1982, 95 pp.

In 1968 Congress passed the Consumer Credit Protection Act, Title I of which is known familiarly as the "Truth-in-Lending" law. The law requires lenders to tell potential borrowers the total finance charge, total payments, and annual interest rate on their loans. The power to implement the statute was given to the Federal Reserve Board, which drew up a set of specific guidelines known as Regulation Z. This Louis Harris survey of mortgage lenders, commissioned by the Joint Economic Committee of Congress, suggests that small lenders spend disproportionately more to comply with the act, and that a congressional effort to streamline the law three years ago may have backfired.

During the 1970s the Truth-in-Lending law was frequently criticized as confusing and difficult to comply with. Enforcement agencies reported that less than 20 percent of banks were in full compliance. By 1980 the Fed had published more than 1,500 interpretations of Regulation Z, and litigants had filed more than 13,000 lawsuits involving the law's provisions. Congress responded to the complaints in that year by passing the Truth-in-Lending Simplification and Reform Act, and the Fed in turn formulated a revised version of Regulation Z based on the 1980 act. The revised disclosure rules became mandatory in October 1982.

At the JEC's request, the Federal Trade Commission (which enforces the law among non-deposit-taking lenders) asked Louis Harris and Associates to conduct a survey to determine how much both the old and the new Regulation Z have cost the mortgage banking industry. Mortgage bankers were the second largest source of residential mortgage money in 1980, accounting for some $33 billion in loans. (Among the other lenders covered by the Truth-in-Lending law are commercial banks, savings and loans, and credit unions.)

The surveyors queried 201 company members of the Mortgage Bankers Association of America. As in Harris's previous study of the impact of regulation on medical device makers (see Readings, *Regulation*, March/April 1983), regulatory costs apparently fell disproportionately on smaller firms. The largest firms said in 1980 they spent $0.23 to comply with Regulation Z for every thousand dollars in new loans they made. The smallest companies said they spent $0.67 per thousand, nearly three times as much. Projecting the sample to the whole industry, Harris estimated that the total costs of compliance amounted to $11.9 million in 1980 and $13.2 million in 1981. The bankers surveyed said that the biggest costs imposed by Regulation Z have consisted of training personnel (24 percent), explaining the annual percentage rate to consumers (22 percent), and obtaining legal advice or printing forms and pamphlets (14 percent each).

Slightly more than one-third of the firms said they began converting to the simplified regulations by mid-1982. These companies reported that their cost of compliance jumped by 45 percent in that year. Among the costs they encountered to implement the switch were printing (30 percent), computers and employee training (27 percent each), the hiring of new employees (24 percent), and new equipment (19 percent). The average firm said it took 270 labor-hours to convert to the revised regulation. Again extrapolating the fig-

ures to the entire mortgage banking industry, Harris concludes that just the process of converting to the revised rules would cost $8.8 million—around three-quarters of the annual cost of the old regulations.

Although the mortgage lenders were among the intended beneficiaries of simplification, they are not favorably impressed with the results. Of those who had begun conversion, only 8 percent reported that the new law had reduced or eliminated any of their ongoing costs, and 39 percent reported that the revised regulations actually inflicted some new ongoing costs. Harris observes that the benefits of the revision may "become more evident as time goes on. However, at the present time the costs of conversion . . . seem more salient to the industry than the hoped-for cost savings."

Harris also asked the mortgage lenders what they would do in the absence of a Truth-in-Lending law. Among the items they said they would no longer routinely disclose were annual percentage rates (56 percent of respondents), the finance charge (42 percent), the total payments (44 percent), and the amount financed (47 percent). Some also said they think various aspects of the law are counterproductive for consumers, especially the annual percentage rate, which some mortgage bankers said could be "genuinely deceptive" when applied to increasingly popular forms of "creative financing."

On the Road to Private "Infrastructure"

Roads and the Private Sector, edited by Eamonn Butler, and *Private Road Ahead: Ways of Providing Better Roads Sooner* by Gabriel Roth and Eamonn Butler (London: Adam Smith Institute, 1982), 103 pp. and 32 pp.

Although road users pay for roads through gasoline and other taxes, governments decide how and when to build new roads based on what can amount to essentially political grounds. As a result "those who would like to 'buy' more or better roads . . . have no way to make their desires felt, except through a very inadequate political process," writes Eamonn Butler, director of the Adam Smith Institute, in his foreword to *Roads and the Private Sector*, an anthology of essays on privatizing roads. "Their preparedness to pay is never called upon, so it never attracts new investment where it is needed economically," Butler says. "Heavily congested roads are 'rationed' by overcrowding."

Butler and Roth, in a shorter work that summarizes the essays, argue that the British government has failed to spend as much on "infrastructure," especially inter-city roads, as would be economically justified. "Capital items have fallen from 22 percent of general government expenditure in 1970 to only 10-1/2 percent in 1980." Unwilling to curb growing transfer payments to individuals, London has repeatedly cut road expansion and maintenance funding instead, the authors argue. Although completing various road-building projects would save British shippers an estimated $2.2 billion a year, the government has shelved the projects for lack of money.

The costs of an inadequate road system, they maintain, go beyond added travel time for freight shippers and motorists. The failure to build beltways and bypasses to replace routes through cities makes traffic less safe and worsens such environmental problems as urban noise and the transport of hazardous materials; stop-and-go traffic is also bad for energy efficiency.

In 1982 various companies in the British road-building industry offered to form a private consortium to finance the building of inter-city roads. The consortium would get its investment back over a stated period, such as twenty years, in accord with a formula based in part on the traffic volume achieved on the new roads. At the end of the period, the consortium would hand the ownership and operation of the road over to the government.

The government's transport ministry reacted with cautious enthusiasm to the road-builders' proposal. It issued a discussion paper exploring the financial terms under which such a scheme might proceed, but asserted that it wanted to keep full rights to select the routes and design the highways. It also made clear that it would require the eventual reversion of the roads to government ownership and operation, as the consortium had suggested.

These two works, both published by the Adam Smith Institute in London, analyze some

proposals for private sector involvement in roads. The most modest of the proposals examined would merely alter the way the government borrows long-term funds under its current road-building system. More ambitious schemes would assign more of the risk for the roads' eventual success (as measured by the volume of traffic) to the private companies that build the roads—conceivably all the way up to allowing the companies to own the roads outright and charge tolls or other fees to pay for them. Private toll roads were once common, and some are still being built, among them the privately financed French motorway L'Autoroute de L'Est.

The more ambitious plans for private involvement in road operation raise some added questions: Could private owners design roads to their own standards? Could they lawfully exclude certain classes of vehicle, such as heavy-axle trucks, or certain classes of driver, such as habitual alcoholics? Would they be free to change the rates they charge without applying to the government for permission? And would the level of spending on maintenance be specified by government or left to the company's incentive to attract business? Only some of these questions are answered in the Adam Smith Institute books.

David Howell, minister of transport in the Thatcher government, contributes some moderately skeptical views in an introduction to the anthology of essays. "Once a road is built, governments will not let it 'fail,'" he writes. "So roads are inherently governmental. In France, for example, where companies provide and finance roads by tolls the state has had to intervene to support a private sector company whose motorway had insufficient traffic to finance its capital debts."

Providers of private roads, so long as they relied on direct user charges, would face unequal competition from the "free" roads financed through the gas tax and license fees. This inequality is economically wasteful, since it means that traffic that logically should take the private road will be diverted to inferior "free" routes. Gabriel Roth, a Washington, D.C., specialist in transport economics, suggests equalizing the competition by diverting some gas tax receipts to the private road suppliers, based on their recorded traffic counts—in a sort of analogy to an educational voucher system.

The technological means may soon be at hand to charge drivers directly for the use of roads through methods more flexible than tolls. The Port Authority of New York and New Jersey has studied electronic pricing systems in which automobiles would be equipped with devices carrying a unique electronic "signature" for each vehicle; sensors implanted in the roadway would monitor each car's use of roads or bridges and bill the owners periodically, much as telephone use is billed to callers today. The advantage of electronic metering is that it is a pricing system "which does not involve the use of coins, does not require vehicles to stop, does not require the delineation of rigid boundaries, and which could be applied simultaneously to new high capacity roads and to old congested ones." It would not, however, resolve the inequality of competition between public and private road systems, unless the public systems moved to replace their gasoline taxes with electronic fees. [EDITOR'S NOTE: *Hong Kong has announced plans to introduce a system of electronic road pricing for some of its congested roads. At first, six thousand government automobiles will participate; if the program works well, it will eventually be extended to all automobiles in the colony.*]

Showdown in Solano County

Dow vs. California: A Turning Point in the Envirobusiness Struggle by Christopher J. Duerksen (Conservation Foundation, 1982).

In 1977, after two years of struggling with California's regulators, the Dow Chemical Company abandoned plans to build a huge $500 million petrochemical complex near San Francisco. According to Christopher Duerksen, the case marked the end of the "halcyon days" of the environmental movement; never again would its values be accepted uncritically, without scrutiny of their effects on the economy and on employment. Duerksen, a lawyer with the Washington-based Conservation Foundation, directed its four-year project on how environmental laws affect plant siting decisions and how government agencies and companies can improve the way facilities are regulated and built.

Dow unveiled plans for the facility in 1975. It was intended to process the relatively cheap and plentiful Alaskan oil that was then coming into production. By saving the $56 million a year that it had been costing Dow to ship such products as styrene and ethylene from its Texas plants to the West Coast, Dow hoped to cut costs and thus capture a bigger share of the West Coast market. The plant was to employ 1,000 laborers during construction and 800 permanent workers when it opened in 1982.

There were several compelling reasons for Dow to choose the particular site it did, in a sparsely populated but growing area between San Francisco and Sacramento. The site was one of the last port locations on the West Coast deep enough to handle large oil tankers. It was also near one of Dow's existing facilities, which meant that key personnel were close at hand. The county government, furthermore, avidly supported the plan, hoping to bring in jobs and property tax revenues. (Unemployment reached 9.4 percent in California during the 1974–76 recession.)

Dow advanced rapidly through the local regulatory process. The state required an environmental impact report separate from and stronger than the federal one, but the local authorities approved it in record time. By then, however, environmentalists, mostly from nearby Berkeley and San Francisco, had begun to organize against the project. The project adjoined a marsh that served as a principal feeding and wintering ground for about a million migratory birds on the Pacific Flyway. There were a number of other serious problems in the eyes of opponents, the author says, "but secondary growth—the new county residents and houses they would require, local government services, and downstream industries—that Dow might induce probably bothered the San Francisco-Berkeley contingent as much as anything." They filed suit, claiming (among other things) that the impact statement had not considered all alternative locations where the environmental damage might be less severe. The California law, unlike the federal one, requires that projects relocate in less sensitive areas unless there is some good reason not to. The suit also contended—correctly in the author's view—that Dow had not sought an amendment to the local land use plan required by state law.

Another concern was farmland preservation. The property was protected by an agricultural land preservation contract with the local government which Dow was seeking to have canceled. The state Department of Agriculture had no role in granting permits for the project, but one of its staffers involved in farmland preservation efforts flagged the case for the state attorney general's office, which began to prod other agencies. Before long several agencies that had previously signaled their approval showed signs of changing their minds and began asking for more information. "We had a running joke about almost having an underground government," a leader of the environmentalists told Duerksen, "because so many of our people were on state phone lines or knew state people. It really helped on the phone bills and getting [hold] of state people." According to Governor Jerry Brown's policy director, the lawyer assigned to the Dow case in the attorney general's office "was, behind the scenes, involved in the Sierra Club lawsuit . . . at least informally."

Governor Brown tried to speed up matters by scheduling consolidated hearings meant to resolve the remaining questions about the project. Dow wanted this hearing to be reserved for sworn testimony by experts, but the governor's policy director said it had to be open to the public. As the policy director told Duerksen: "It was every bit as zany and dramatic as you imagine. My first premonition of trouble came when I heard the sound of tom-toms coming from the corridor outside the hearing room." The Indian presence also included the chanting of a medicine man named Moose Camp. Another speaker proceeded to declare, as Duerksen puts it, "his friendship with the mockingbirds and blackbirds." Worse yet, from Dow's perspective, a state official ruled that the hearings' contents had to be incorporated as a supplement into the previously approved environmental impact report, which meant that all the issues raised at the hearing would have to be addressed.

Dow suffered an even more damaging setback not long thereafter from the autonomous regional air quality board responsible for enforcing local and state laws on factory emissions. The board turned down Dow's application for air pollution permits for the first plant it wanted to build on the site. The reason was

not that the plant was not as clean as possible —Duerksen says everybody recognized that "the plant would be squeaky clean when compared with older styrene facilities in other states." Rather, it was that so long as the local air still fell short of federal standards—even for one day a year—it was illegal under the board's EPA-approved rules to allow any "significant" new pollution sources to be built. And anything that could be measured was "significant," under the air quality board's own interpretation. Dow claimed that the styrene plant's emissions would be undetectable at the plant's boundary line, but the board ruled that this made no difference: within the plant gates, both particulate and organic emissions would be about five times the detectable thresholds. Dow offered to clean up its other local plant so as to prevent overall pollution from rising, but that too was impermissible under the existing law.

Finally, in January 1977, Dow announced that it was abandoning the project. An executive said later: "With no positive results to show after spending two and a half years and $4.5 million to get four permits out of sixty-five, I had to cut my losses." The company sharply criticized the agencies and environmentalists for their allegedly obstructionist tactics. Dow had built up a reputation over the years as an environmentally conscious firm, Duerksen says, which made the impact of its public complaints that much greater. At any rate, the reaction in the state was swift. Business and labor leaders reacted with outrage, and the state government and the environmentalists were put on the defensive. In Washington the Environmental Protection Agency, which had already come under great pressure to allow at least some industrial growth in "noncompliance" areas, soon agreed to let companies build new plants if they found ways of achieving offsetting reductions in existing facilities.

Duerksen believes the Dow dispute holds important lessons, if only because it is bound to be repeated in the future. He opposes weakening environmental standards themselves, but favors "quiet" reforms to streamline the permit process, such as state "industrial escort services" that would help companies find out which permits they need from which agencies at what times. He says states might also offer to help industry avoid picking sensitive sites that are likely to arouse opposition.

He also says industry should pay more attention to its environmental impact in general, and, more specifically, should make its project planning more open to the public, involve environmental specialists at an earlier stage in the process, and vest clear authority in a single project manager. Mediation of environmental disputes, he says, may provide a more promising framework for eventual cooperation than judicial review.

Untamed Regulators of the North

Regulatory Reform in Canada by W. T. Stanbury and Fred Thompson (Institute for Research on Public Policy, Montreal, 1982), 139 pp.

Regulatory reform has been studied extensively in Canada, but little has come of it, according to W. T. Stanbury of the University of British Columbia and Fred Thompson of Columbia University in New York. Between 1979 and 1981 the Economic Council of Canada published some sixty studies on regulatory subjects ranging from taxicabs to fisheries. Although the Ottawa government had itself commissioned many of the reports, it greeted them with little enthusiasm, and there has been "almost no change in federal or provincial regulatory regimes" attributable to the reform efforts, Stanbury and Thompson say. Both authors were formerly with the Economic Council, which is itself a quasi-independent arm of the Ottawa government.

In the Canadian system, the decisions of regulatory agencies can be appealed to the full cabinet. (There have been unsuccessful proposals to replace this system with one of periodic policy directives from the cabinet, or at least to open the cabinet review process to public scrutiny.) The Treasury Board, which oversees Canadian regulatory reform, adopted a directive in 1978 requiring socioeconomic impact analyses for all major new regulations in the areas of health, safety, and "fairness." ("In the first three years of operation," however, "only three SEIAs were published. . . .") Parliament considered a bill in 1979 to require environmental impact analyses as well, but did not pass it. The Treasury Board created an Office of the Co-ordinator for Regulatory Reform in

1980, but according to the authors it has not pushed the agencies very hard. "If a strong minister wishes to do nothing to reform his regulatory domain, he will get no 'flak' from the OCRR and the president of the Treasury Board."

As for particular industries, the authors say, the few steps toward liberalization that have been taken have been reluctant, compelled largely by technological change and by competitive pressures south of the border. Throughout the postwar years "Canada regulated airlines even more stringently than did the United States," and despite some loosening of control starting in the mid-1970s there has been no wholesale deregulation. Government-owned Air Canada has been subjected to the same laws as its private competitors, and the private carrier CP Air has been allowed to compete with Air Canada on transcontinental routes. Discount fares and charter flights have been liberalized somewhat, but strict entry controls and required rate filing persist. Moreover, the minister of transport offered a proposal in August 1981 that would have re-regulated the industry intensively. Although a parliamentary committee rejected the scheme, it also rejected full deregulation.

Banking laws were amended in 1967 and 1980, and many of the changes were liberalizations; for example, Canadians may now start a new bank without an act of Parliament and may convert other kinds of financial organizations into banks. "The rules governing foreign banks have been greatly relaxed"; on the other hand, such banks must now keep domestic reserves, and all of them combined are limited to an aggregate of 8 percent of total banking assets—in one of a very large number of Canadian laws promoting "sovereignty, cultural identity, and national unity objectives."

Telecommunications regulation in Canada, as in the United States, has been enmeshed in running controversies over "terminal attachment" and "system interconnection," or, put more simply, over what sort of equipment consumers and independent companies can attach to phone company lines in order to enhance or bypass phone company service. In this country, the 1968 *Carterfone* decision established that consumers had wide rights to hook up their own equipment, but "it was not until 1980 that anything comparable was possible in Canada." In 1979 and 1980, the Canadian Radio and Telecommunications Commission handed down rulings liberalizing system interconnections.

More typical of the general interventionist drift, the authors say, was the National Energy Program announced in 1980, perhaps the most comprehensive attempt at government planning since World War II. It includes great expansions in public ownership, regulation of energy companies, subsidies, and so forth.

There has been some talk of regulatory reform at the provincial level. The Ontario government proposed a vague "deregulation" program in early 1978, and followed it up with a concrete proposal to eliminate forty-six agencies of hundreds reviewed. A provincial committee set up to examine regulation of the professions in Ontario recommended in 1980 that the province let professionals incorporate, allow lawyers to advertise fees in the print media, and provide that all future claims for licensure be reviewed by cabinet committee, among other things. As of April 1982 the provincial government had not acted on these suggestions.

Legitimacy through Bargaining?

"Negotiating Regulations: A Cure for Malaise" by Philip J. Harter, in *Georgetown Law Journal*, volume 71, no. 1 (October 1982), pp. 1-118.

The Administrative Procedure Act of 1946 imposes relatively few requirements on agency rulemaking. An agency that wants to develop a rule need only consult with the public, draft a proposal, receive comments, and publish the rule with a brief explanation.

According to Washington attorney Philip Harter, this minimal set of procedures is satisfactory for regulations that enjoy clear "political legitimacy," either because the public trusts the neutral expertise of the agency staff or because there is a broad public consensus on what the agency is supposed to regulate and how. But with the enormous growth in regulatory activity since the APA was passed, Harter says, agencies have come to promulgate more and more regulations that have no such legitimacy —either because the factual predicates of the rules are enormously complex and controversial or because there is no consensus on the

agency's mission. In an effort to restore political legitimacy to their regulatory actions, the agencies were freed to use a new set of procedures, the so-called hybrid rulemaking process, which is now the dominant way of developing regulations.

According to Harter, the political theory that underlies the hybrid rulemaking process holds that an agency should follow procedures designed to ensure that it reaches a rational result based on the material in its record and that all parties should have a right to present the agency with facts and arguments for inclusion in that record. Under this theory, participants try to influence the agency's range of discretion by controlling the material that gets into the rulemaking record.

The problem with this theory, Harter says, is that most of the new sort of regulatory questions have no single, rational, value-free solution: they call for the kind of political choice among competing values that formerly took place in, and gained legitimacy from, bargaining processes in representative legislative bodies. Lacking the legitimacy that comes from elections, and having lost the old legitimacy that came from "rational" handling of objective problems, the current rulemaking process manages to dissatisfy virtually all its participants. This dissatisfaction is what has become known as the "malaise of administrative law."

One often-discussed way to imitate the legislative process would be to have agencies develop regulations by negotiation, as frequently occurs in Western Europe. Harter warns against what he calls the "hot tub" theory of negotiation—the notion that parties will reach an amicable agreement simply because they agree to attend negotiation sessions that are labeled nonadversarial. He observes that negotiating is only a way of channeling conflict, not a substitute for conflict, and that it will not work in all situations. Nonetheless, he says, there are conditions under which negotiation may be suitable.

One way to discover some of these conditions is to examine instances where policy is negotiated now. State and local governments, for example, use a great many technical "consensus standards" as the basis for such regulations as electrical and building codes. Very few original regulations are developed in this way at the federal level, but negotiation does play an important role at later stages: many lawsuits challenging rules are settled by agreement of the parties, as are consent decrees in suits against the government and, increasingly, environmental controversies.

Some fairly uniform principles can be drawn from the various instances, Harter says. For one thing, the number of interests represented in the negotiations at any one time must not exceed fifteen or so. The key interests must be homogeneous enough that particular spokesmen can represent their points of view adequately. The issues to be resolved must be mature and ripe for decision, and their resolution must not require any party to compromise a fundamental "article of faith." The outcome of the proceeding should truly be in doubt; the various parties should possess "countervailing power" to check each other's actions, so that no one interest can dominate. Some decision or other should be inevitable within the relatively near future, so that no one can hope to gain by repeated delay. The agency itself must be represented in the discussions by a senior staffer; even more crucial, it must be willing to abide by the result of the negotiations.

Harter proposes a plan under which an independent third party, chosen by the agency, would be empowered to do two things: first, decide which interests were heavily enough affected to be represented at the table and, second, mediate and manage negotiations. The negotiating group could jointly conduct any factual research that might be needed to help develop a consensus on a proposed rule—consensus meaning, in this context, that each overall interest (which would not necessarily include each subgroup) would concur in the final result. Thus none of the interests would have to fear that the others would combine against it. If the group succeeded in agreeing on a compromise plan, the relevant agency would then, unless it had some good reason not to do so, publish the plan as a notice of proposed rulemaking. At this stage there should be few surprises, Harter says, because the interested parties would perforce be familiar with the details of the rule and its development. [EDITOR'S NOTE: *The Administrative Conference of the United States has adopted a recommendation based on this proposal and several agencies are experimenting with it.*]