Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

The Economics of Civil Rights Litigation

TO THE EDITOR:

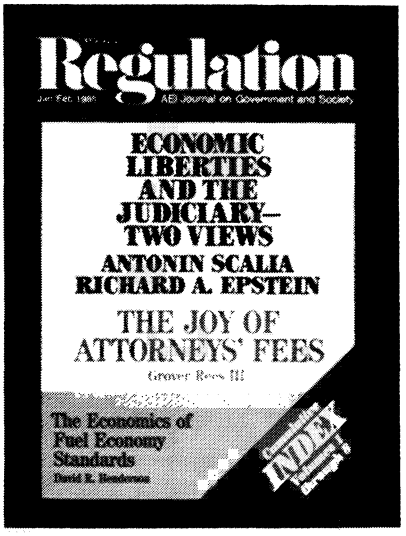
Instead of confining himself to criticizing particular instances of attorneys' fees awards, Grover Rees ("The Joy of Attorneys' Fees: Foul Play in 'Public Interest' Litigation," *Regulation,* January/February 1985) flails away at almost all of them. Unfortunately, he does so on the basis of assertion, not evidence.

Rees writes that civil rights groups "need to win only a few suits in order to initiate many new ones." Now, aside from the fact that many such suits are lost, not all winning substantive lawsuits lead to fee awards from which new suits can be financed. Under the 1976 statute that Rees discusses, an award of attorneys' fees is by no means a sure thing. Extended litigation over attorneys' fees occurs not only because losing defendants are resistant but also because judges are reluctant to dispense what the statute allows.

Thus it is fanciful for Rees to suggest that litigation budgets "will expand geometrically" as the proceeds from attorneys' fees multiply. Take the NAACP Legal Defense Fund, Inc. (LDF), the model for "public interest" litigating entities. Over the last several years the fund has received an average of $1 million in attorneys' fees per year, toward a total annual budget of approximately $6 million. The amount has varied both up and down, certainly not demonstrating a geometric increase; the same is true for other organizations' litigation budgets.

Perhaps individual rights litigation has become "a big business." Yet the LDF and the American Civil Liberties Union have only a minuscule number of staff attorneys compared with even moderate-sized law firms engaged in corporate practice; *pro bono* work by "cooperating attorneys" expands the litigation resources of the rights groups but does not alter the basic comparison.

Under the "American Rule," which makes each side pay its own costs, the citizen seeking judicial protection against being discriminated against by government on the basis of, say, race not only has to pay attorneys' fees but also has to pay taxes to that same government



(which had already levied taxes to carry out the discriminatory program) to cover its own legal defense expenses. Nor is there any disincentive to prevent the government from appealing endlessly in the face of clear, negative judicial determinations.

Two other points: First, *perhaps* a case civil rights groups win in the Supreme Court "has usually [been] won for good" because government lawyers "will generally advise their clients to comply . . . rather than relitigate." But the federal government does have a policy of relitigating issues, either to force conflicts between judicial circuits or to postpone the very likely or inevitable outcome. The government also follows a policy of "nonacquiescence" that allows it to ignore adverse decisions even within the same circuit.

Second, it is unfortunate that Rees fails to call attention to the recent development of the State and Local Legal Center, created to provide state and local governments with expert assistance in filing and arguing cases in the Supreme Court, thus helping them to coordinate their strategy. This unit's presence is already thought to have made a difference in the quality of state and local governments' presentations there.

Stephen L. Wasby,
State University of New York at Albany

TO THE EDITOR:

A remark by Grover Rees is too absurd to let escape unanswered. Alluding to the fact that federal statutes require governmental bodies that lose civil rights suits to pay the attorneys' fees of the parties that win, Rees writes: "The lawyer who pursues a career in civil rights litigation is in effect a uniquely unaccountable employee of the taxpayers, paid not to advance his benefactors' objectives but to defeat them."

The taxpayers' objective, as Rees fails to recognize, is enforcement of the civil rights laws; otherwise the taxpayers, through their elected representatives, would not have enacted them. The court that orders the government to pay a fee award is just as much a representative of the taxpayers as is the agency that violates a civil rights law. The latter, in fact, when it violates a civil rights law, acts outside the authority granted it by the taxpayers and therefore should not be viewed as their representative at all. The taxpayers have agreed to pay for the agency's wrongdoing because of *respondeat superior* (the employer's liability for the acts of its employees), not because the agency has carried out their objectives.

Henry Cohen,
Columbia, Maryland

GROVER REES responds:

Insofar as Stephen Wasby's criticism of my article on attorneys' fees boils down to the observation that it was a critique rather than an

empirical survey, he is correct. Between raw statistics and flailing assertions one can seek the middle ground of analysis, and I am sorry that Wasby believes my attempt to have been unsuccessful. He seems mainly to disagree with what I concluded from two propositions I had not thought to be in dispute: (1) By paying their staff attorneys substantially less per hour than the typical attorneys' fee award, organizations can secure funds for investment in further litigation; and (2) since the development of legal doctrines is partly a function of litigation pressure, each round of "public interest" litigation tends to create new markets for further litigation to expand its frontiers. That such expansion will be geometric rather than arithmetic is a statement about the nature of the relationship between each round and the next, not about the size of the budget at any time.

Nor did I mean to imply that organizations bringing fee-generating lawsuits were somehow prevented from raising money from other sources. On this point, however, Wasby's anecdote about the NAACP Legal Defense Fund is perhaps less helpful than the illustrations on which I based my discussion. Not only is the Legal Defense Fund an unusually appealing public interest group with a correspondingly greater potential for private fund-raising than other groups; it also has directed a large part of its efforts in recent years to *pro bono* criminal defense work, which unlike other public interest litigation is never lucrative.

Henry Cohen takes issue with my characterization of career public interest lawyers as unaccountable to the taxpayers. His theory is that the taxpayers have authorized the courts to define the contours of individual rights, so that when a lawyer persuades a court that the government has violated such a right the lawyer has vindicated rather than defeated the taxpayers' most important objectives. Accountability, however, is like most things a matter of degree. There is a lot to be said for a system in which judges with life tenure impose limits on democracy—even when these limits have more to do with the judges' own ideas about the changing needs and values of society than with the ideas of those who enacted the provisions being interpreted. As I pointed out in my article, there are even things to be said for rewarding the attorneys who persuade the judges to overturn decisions generated by the democratic process. But that these attorneys, relative to other public policy makers, are accountable to the taxpayers is not one of those things.

An Overhaul for Corporate-Takeover Laws?

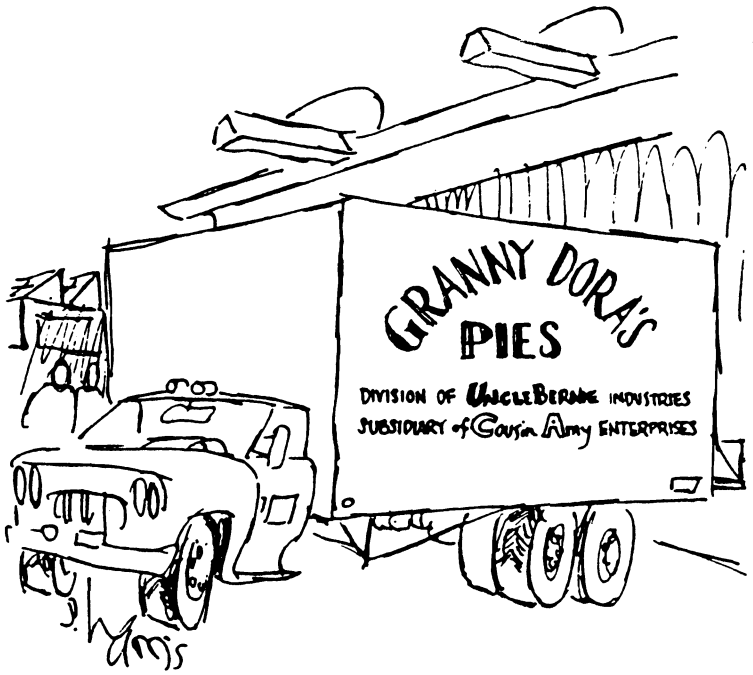
TO THE EDITOR:

Your Perspectives piece "A Truce in the Takeover Wars" (*Regulation*, March/April 1985) provides an excellent overview of the ongoing debate on corporate takeovers and acquisitions. In contrast to the past, when arguments revolved around whether mergers are good or bad, the debate today seems primarily concerned with the tactics used by the participants in takeover battles. But since the discussion concentrates on fairness to one party or another without any attention to the cumulative effect on stockholders in general, larger and more important concerns are lost.

Probably the most troublesome aspect of the current takeover debate is the failure to recognize that such activity occurs in a market of its own—a market for corporate control. It is not surprising that regulation, which can have undesirable effects in other markets, has exhibited similar effects in this market. The current system of regulation favors incumbent managements over outsiders in several ways. For example, as your article notes, the Williams Act imposes delays that make takeovers more risky and more costly. Once a tender offer has been made, the law tries to extract the maximum gains for shareholders of the target firm. There is almost no concern on the part of regulators about how this affects the incentive to make bids in the first place. As a number of scholars have pointed out, target shareholders lose out if the law requires bidding premiums high enough to scare off would-be acquirers.

The problems that are occurring today with hostile takeovers are largely a result of existing excessive, complicated, and imbalanced regulation. Yet the proposals now emanating from the SEC and Congress call for even more elaborate regulatory controls and thus even higher costs. The answer is not to tinker with the system, but to give it a complete overhaul.

The key to real reform is to discard the assumption that there is one desirable method by which takeover contests should proceed. In an open market, corporations would adopt a variety of takeover provisions just as they currently offer investors a variety of financial instruments. Some firms would leave themselves open to possible takeover, others would discourage them. But the ultimate judge of the relative merits of these structures



would be the market itself as reflected in the relative stock prices of different firms. This market-oriented approach would transfer decisions on corporate governance from the halls of Congress and the hearing rooms of the SEC to the financial and capital markets, or in other words to shareholders themselves. What is good for shareholders should be decided by them in the open marketplace, not by government officials.

This solution would not leave risk-averse small investors out in the cold. Investors who want to share equally with others in any takeover gains could buy stock in corporations with appropriate charter provisions, while other investors could make different choices. The important point is that competition can offer a greater array of choices for both corporations and investors to satisfy different needs. There is no need for government to continue to dictate how the takeover process should proceed, or to favor one party over another.

Robert Zwirb,
Federal Trade Commission

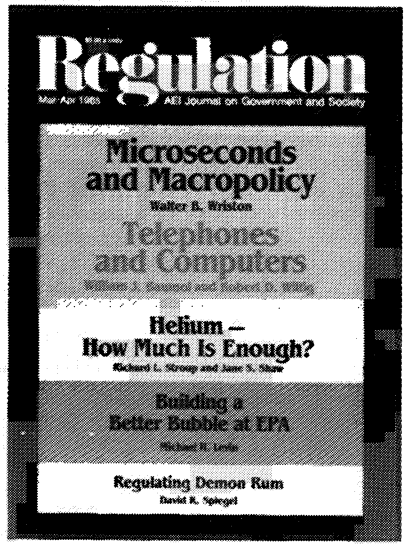
Technological Advance and Government Resistance

TO THE EDITOR:

Walter Wriston makes several enlightening points about technology and society ("Microseconds and Macropolicy," *Regulation,* March/April 1985). Two of these points are of special interest to me, one historical and one contemporary.

Under the impact of their cherished conventionalities, historians give more coverage to kings, popes, and generals than to the great technologists of the past. As Wriston says, "Every great technological revolution in history has made the ruling class nervous." Karl Marx said the same thing—his basic theory of history is not so much economic as technological—and had his theory not been encumbered by dubious metaphysics and pathological revolutionism he would be honored today by scholars *outside* the Soviet Union. Unfortunately, the bias of Western scholars and intellectuals against technology has been evident from the time Goldsmith lamented the departure of villagers to the city and Carlyle roared out against "mechanism." Had we better understood the import of earlier efflorescences of technology, we might be better prepared for the current revolution in information technology.

The second point that I found extremely sharp and timely lies in Wriston's brief but eloquent observation on the fate of AT&T—and of the American nation. "We all watched"—he might have added "in horror"—"as a federal judge, doubtless doing his best, oversaw the breakup of the finest telephone system in the world, and designed a new one in his courtroom, with no apparent concern for America's defense capability or our position in the world." Bravo. I remember thinking at the time, and with awareness of what was happening also to IBM in a federal courtroom, that Henry VIII would have been proud to have our Antitrust Division and federal judiciary to help him with the monasteries. The guiding philosophy of both seems to be that



of the yahoo populists at the turn of the century: "When you see something big, bust it or nationalize it." I suppose we can feel grateful that AT&T was merely busted.

I do not care whether the next Supreme Court appointee is male or female, black or white, pro or con on abortion and school prayer. I want only that, for once in our history, a top-level scientist rather than yet another lawyer is appointed. Maybe a small beginning could then be made in the painful education required for the world of what Wriston calls microseconds and macropolitics. In the meantime maybe Antitrust and Judge Greene would go to work for us on the Department of Defense.

Robert Nisbet,
American Enterprise Institute,
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