Perspectives
on current developments

Generic Drug Equivalents: Opening Pandora's Rx

The Federal Trade Commission has designed a model uniform drug substitution bill and is urging all state legislatures to put it into law. The bill's proponents claim it will substantially reduce the costs and increase the range of choice for purchasers of drugs. Ironically, though, this consumerist legislation turns out to illustrate another favorite theme of "public interest" activists—the difficulty of weighing costs and benefits in government regulation. For the actual potential of the measure remains shrouded in uncertainties.

Under the bill, a pharmacist would be allowed to substitute a non-brand-name drug identified by its "generic" name—say, propoxyphene—for a prescribed brand-name equivalent—in this case, Darvon. Substitution would be authorized in all cases where the prescribing physician did not specify on the prescription that the brand-name formulation was "medically necessary" (or some equivalent phrase). To encourage pharmacists to make substitutions, the bill would immunize those who did so from additional legal liability should the generic drugs produce ill effects. And it would require the state to maintain an approved list of drug formulations (like that currently in the works at the Food and Drug Administration) that would instruct pharmacists on acceptable "equivalences" between brand-name and generic drugs.

If the FTC bill were to be adopted in all fifty states, it would displace a variety of substitution laws, currently operating in forty states—few of them as strong as the FTC's proposal. There is considerable dispute about what experience with these state laws should lead us to expect from widespread adoption of the FTC's bill. No one denies that brand-name drugs are generally more expensive than their generic equivalents. But there is much disagreement about how large the price differential really is on the average—and, of course, much disagreement about the quality of research involved in the conflicting estimates.

Still more disagreement derives from uncertainties about how physicians and pharmacists would respond under the new system. Those who expect the bill to produce a substantial shift toward generic purchases assume that the physician will rarely insist on the brand-name product. They speculate, for example, that physicians often prescribe brand names because those names are drummed into them by drug company drummers (so the physician remembers "Darvon" but not "propoxyphene"). On this point, the FTC grants that most doctors consciously choose brand-name products because they place greater confidence in a particular manufacturer or variant of the drug; but it argues that even these doctors will rarely cite the brand-name version as "medically necessary" (a term which, to many doctors, apparently implies that a particular remedy is absolutely indispensable).

If the frequency of both responses is disputed, however, so is the response to be expected of pharmacists confronted with a brand-name prescription marked only with a deferential "recommended" (or no annotation at all). Other things being equal, economic incentives would seem to encourage pharmacists to provide the generic equivalent in these situations —because, according to drug manufacturers, the average retail mark-up is generally higher on less expensive than on more expensive drugs. But there are so many complex variables in the retail pharmacy business that other things are rarely equal.

Moreover, some significant issues of health policy are still in dispute. First, establishing "equivalence" is by no means a straightforward laboratory operation, for there are several differing standards of equivalence, each with its own operational uncertainties. There is "bio-

equivalence"—defined as equivalent bioavailability—with bioavailability meaning the rate and extent of absorption of the dosage form of the drug into the relevant part of the patient's system. There is also "therapeutic equivalence" —defined as having the same effect on the patient. Drugs that are bioequivalent are not always therapeutically equivalent, though. Some clearly are not, but the drug companies differ with the FDA on their number and importance.

Second, the major pharmaceutical companies warn that they may have to cut back on new drug research if their profits on brand-name drugs begin to falter. They claim that, if research and development costs are taken into account, they actually lose money on most new drugs during the period of patent protection. If the new products lose market share to generic competitors once the patents run out, the companies may never be able to recoup their initial development costs. Brand-name sales may thus be vital to keep pharmaceutical R&D afloat and so to keep new drugs coming on stream at the present rate. The FTC does seem to be acknowledging this problem when it suggests that the companies might be given longer-lived patents on new drugs to compensate them for the initial research investment. But congressional action would be necessary to extend patent lives, and the drug companies fear it will never occur.

Of course, one may question whether reduced R&D investments would really lessen the quality of pharmaceutical research or whether fewer new drugs would really affect the prospects for improving medical treatment. The truth is that no one can say for sure. Our ignorance on these points suggests a final question: with the many uncertainties about the likely effects of generic drug substitution, should we really be eager to see the present pattern of state-by-state experiment displaced by a uniform national policy?

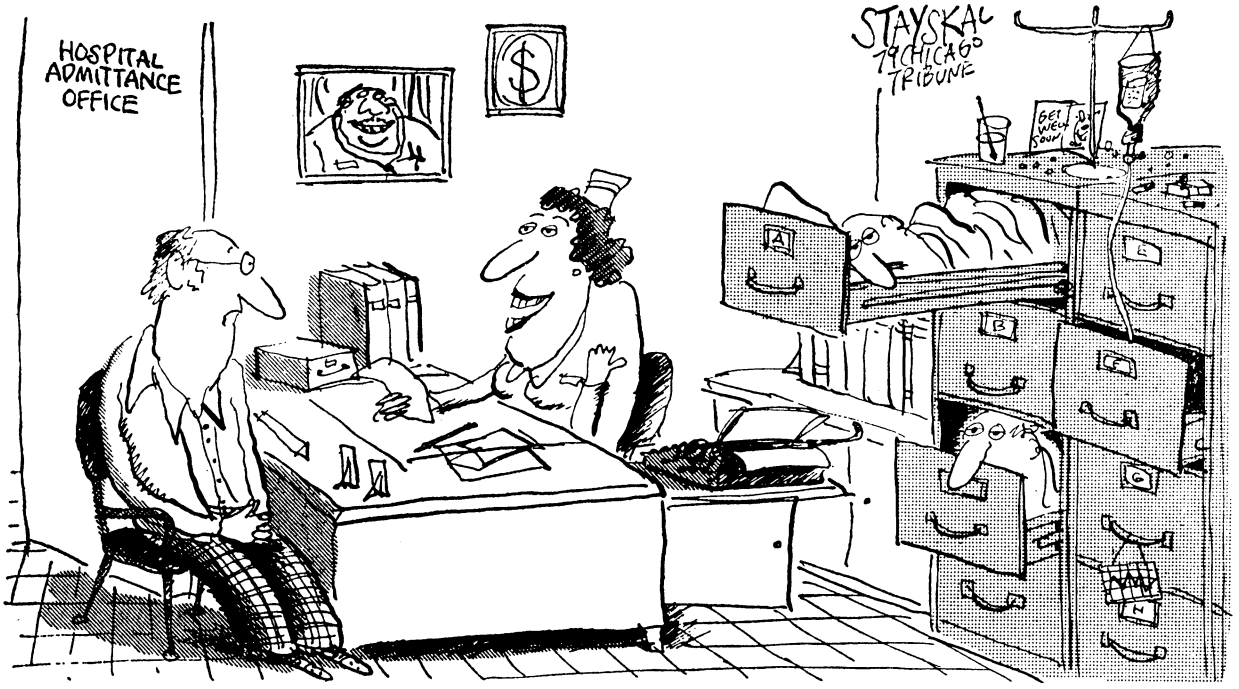
Curing Hospital Costs by Decree

According to HEW Secretary Joseph Califano, the Carter administration's hospital cost containment bill (S. 570 and H.R. 2626) is a litmus test for views on inflation. Any member of Congress who does not support the bill, the secretary says, is not serious about fighting inflation. Not everyone would agree.

The last congressional debate about rising hospital costs actually revealed many points of factual and philosophical disagreement. Some members argued that Congress should do nothing but support "The Voluntary Effort," a cost control organized by hospital, physician, and insurer groups. Its proponents claim that, through exhortation and peer pressure, the program cut the rate of increase in total hospital expenditures by two percentage points in 1978 and will do the same in 1979. Other members of Congress supported the Carter administration's proposal for a 9 percent cap on the rate of increase in the revenues of individual hospitals and a $2.5 billion cap on total hospital capital expenditures. Still a third group scorned both of these approaches, saying that enhanced price competition among medical providers and insurers would be the best cost control.

In late 1978, the Senate adopted a compromise between the first two approaches that would have given The Voluntary Effort an opportunity to meet its goals, while providing standby controls to go into effect automatically should that program fall short. Though the bill died in the House of Representatives, its compromise forms the heart of the Carter administration's latest cost-control proposal, but with two major changes. One is that the administration's new bill provides many more exceptions and exemptions. Under last year's compromise, the standby mandatory controls, once triggered, would have covered almost all hospitals (the main exemption being hospitals covered by mandatory state programs that were holding expenditure increases to a specified rate). The new bill expands exemptions to the point where HEW now estimates that only half the nation's 6,000 community hospitals would ever be covered by the mandatory controls. The second major change is the wide discretionary authority that the administration's bill would vest in the secretary of health, education, and welfare over important aspects of the program. Both changes, it is said, will make the regulation more flexible and thus more equitable.

Needless to say, hospital administrators and doctors are not mollified by these concessions and many regard them as cause for alarm. The new bill's greater complexity is viewed as evidence that HEW expects the controls to last for a long time; and the broad discretion granted to Secretary Califano, who is



"Would you like a single room for $362 a day, a double room for $235, or file drawer B for $117?"

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regarded as stridently anti-industry, increases the industry's fears. Still, the principal criticisms advanced by the American Hospital Association and the Federation of American Hospitals, the main industry lobbying groups, are those pressed against last year's proposal:

—the bill regulates hospitals, when in fact physicians make most of the important decisions affecting health care;

—the bill pegs revenue limits to a hospital's revenues in a past year, thus rewarding wasteful hospitals and punishing efficient ones; and

—the bill encourages hospitals to break away from The Voluntary Effort in order to pad their revenue base in anticipation of controls.

The third force in the debate, composed of advocates of increased price competition in medical and insurance markets, concurs in most of the arguments about the distortions the proposed regulation would bring. Even so, its spokesmen present their own catalogue of complaints about both the administration's bill and the stranglehold of the hospital, medical, and insurer establishments on the health-care marketplace. One of their most important criticisms is that the bill perpetuates the myth that federal health policy is basically sound and that greedy hospitals, doctors, and insurers are the only culprits. Market advocates argue that, while health-care providers and insurers have not always welcomed new and more efficient ways of providing health care, government promotion of inefficient types of insurance coverage (through Medicare and Medicaid, tax subsidies for employment-based insurance, and handicapping of alternative methods for delivering and paying for medical care) has abetted the industry's recalcitrance. The government, they charge, now appears to realize the folly of many of its health policies but refuses to change them to permit a smoothly and efficiently functioning private market. Instead it attempts to offset their worst effects through regulation—and when regulatory quick-fixes do not operate as intended, it reaches for broader and more arbitrary controls. The new hospital cost-containment proposal is, according to these analysts, merely the next notch upward in this process of "escalating arbitrariness."

The market advocates also object to the administration's proposal—as well as the rhetoric surrounding it—because it reaffirms the notion that the government should take primary responsibility for controlling health-care costs. In their view, this notion, combined with government policies like those noted above, has

encouraged private-sector reticence about entering the "treacherous no-man's land of cost containment" (as Professor Clark C. Havighurst has called it). Why should employers, unions, and insurers (or, for that matter, small groups of physicians and hospitals) take innovative steps to make medical decisions more cost-conscious—and risk provoking the wrath of the health industry establishment in the process—when the government threatens follow-up actions that might deny the innovators their just reward?

Despite the appeals of Secretary Califano, the real issues in this debate go far beyond the immediate concerns of the administration's present anti-inflation program.

New Tack for Antitrust

There has been an unusual number of major antitrust bills thrown into the congressional hopper this year, but none more controversial than the "Small and Independent Business Protection Act of 1979." This proposal, sponsored by Senator Edward Kennedy, would essentially forbid all mergers among very large corporations, even mergers that could be shown to have a beneficial effect on competition.

It is a good bet that any legislation with the word "protection" in the title is not based on economic notions of efficiency. In the context of economic regulation, the word "protection," like the word "fair," tends to conflict with ordinary notions of free enterprise. Fair trade laws, codes of fair competition, protectionist tariffs —all these are designed to restrict independent economic initiatives. And the proposed Small and Independent Business Protection Act is designed not to prevent mergers that would harm competition, but instead, as Michael Pertschuk of the Federal Trade Commission put it, to impose a "Jeffersonian preference for dispersed power" on the economy. The bill is based on something "different from the traditional antitrust rationale," says David Boies, Senator Kennedy's chief antitrust staffer.

Until recently, the most commonly articulated populist concern was industry concentration—the domination of particular industries by a small number of large companies. This is bad, they said, because it encourages "oligopoly pricing," or "price leadership," or "administered pricing"—the notion being, whatever the label, that concentrated industries are less competitive than more atomistic industries.

In part, these arguments were possible because there was relatively little economic literature on the effects of concentration. That was soon remedied, however, as concentration and its impact became an extremely popular subject of economic inquiry in the late 1960s and early 1970s. The results of the inquiry were startling: not only is concentration much lower than was generally perceived (once investigation came to focus on revelant markets rather than on largely irrelevant "industries"), but it is not even certain that more concentration means less competition. Some studies, in fact, showed that prices rise less rapidly in concentrated industries, and others showed that prices may actually decline as industries become more concentrated. Some economists went so far as to assert that in certain industries high concentration is desirable.

With the dissemination of such studies, much of the steam went out of the "break 'em up" school of antitrust populism. There are still efforts to attack existing market structure ("shared monoply" and "no-fault monopoly" are two of the concepts in current use), but these seem unlikely to be significant in the long run. By now, most of the energy that used to go into attacking concentration has been switched to conglomerate mergers. And this time the advocates of new legislation generally disclaim *any* reliance on economics. To be sure, they talk about "aggregate concentration," by which they mean the portion of U.S. corporate assets held by the 100 or 200 or 500 largest corporations. But this is a concept with no economic significance since it tells nothing about structure or performance in any particular market.

Instead of talking about breaking up companies or restructuring whole industries—threats that can unnerve even those who sympathize with the populist suspicion of size—the goal now is a rule against "giant" mergers. This seems to be much easier to accept, and the downside risks seem much smaller. Thus, in this new debate, the proponents of new legislation appear to have gotten off to an early lead. And the proponents have another advantage. This year, for a change, the two major powers in antitrust are united. In recent years, the Justice Department's Antitrust Division refused

to support legislative proposals that could not be justified on a purely economic basis. Today, however, Assistant Attorney General John Shenefield strongly supports conglomerate merger legislation, as does FTC's Pertschuk.

There are some significant differences between the various proposals, however. Kennedy's bill would prohibit mergers (1) between all companies with assets or annual sales of $2 billion each, (2) between companies with assets or sales over $350 million unless they could show that the transaction would have the "preponderant effect of substantially enhancing competition" or "would result in substantial efficiencies," and (3) between one company with over $350 million in assets or sales and another with 20 percent or more of any market having at least $100 million in annual sales. These prohibitions could be avoided only if the larger party to the merger divested one or more "viable business units" equal in total size to the smaller party within one year before or after the merger.

The Justice Department's proposal would apply only to companies with at least $100 million in sales or assets. A merger between such companies that resulted in combined assets or sales of $2 billion or more would be allowed only after proof that it would yield "significant competitive benefits." The same standard would apply to companies with at least $1 billion in sales or assets that attempted to acquire a company with annual sales over $100 million and representing 20 percent or more of a concentrated market (that is, a market where four leading firms had 75 percent).

The FTC's proposal would prohibit mergers where the total assets or sales of the resulting company exceeded $2 billion. As in the Kennedy proposal, mergers would be permitted only if the acquiring company spun off a subsidiary equal to the size of the acquired company before the merger. As in the Justice Department's proposal, the ban would apply only to acquisitions of companies of over $100 million. The unique feature of the FTC proposal is that the numbers would be adjusted automatically each year to keep up with inflation.

Despite these differences, there is a clear consensus among the most important antitrust policy-makers that *some* such legislation is needed. This unusually broad agreement may make a telling difference in the congressional debates. But the common premise of all these proposals is sufficiently dubious that a vigorous debate cannot be unwelcome.

What Happened to Bakke?

When the Supreme Court upheld Allan Bakke's reverse discrimination claim against the University of California at Davis last June, many civil rights leaders warned that the decision could threaten operations of the various civil rights programs of the federal government. Almost a year later, however, it is difficult to find evidence that the Court's decision has seriously affected the procedures or attitudes of federal officials responsible for civil rights enforcement. Indeed, if *Bakke* has had any noticeable effect, it has been to encourage official approval of racial quotas.

HEW's Office for Civil Rights administers the programs most directly connected with the immediate legal issues in *Bakke.* OCR is responsible for enforcing, among other things, Title VI of the 1964 Civil Rights Act, which forbids recipients of federal funding to discriminate on the basis of race, color, or national origin. Since the University of California is a major recipient of federal education grants, Allan Bakke's claim that the medical school at Davis had discriminated against him on the basis of his race fell squarely within OCR's jurisdiction. And Bakke did, in fact, begin his long legal battle by initiating a complaint with OCR's San Francisco Regional Office. When officials there were slow to move beyond preliminary inquiries, however, he took his plea to the federal courts. OCR, which had no announced policy on the sort of special minority admissions quotas contested by Bakke, thereupon dropped his case. And, although OCR has issued numerous guidelines and policy statements over the years to clarify Title VI requirements, it took no stand on the broader issues raised by *Bakke*—even as the case went on to become a national sensation.

Thus when the issue finally reached the Supreme Court, neither the four justices who thought Title VI barred racial admissions quotas, nor the four who maintained it did not, could refer to HEW standards to support their interpretation—though it is the usual judicial practice to give great weight to administrative

In Brief–

No Saving on Checking. Last November, in an important regulatory shift, the Federal Reserve Board authorized banks to offer automatic transfer of funds between savings and checking accounts, effectively allowing consumers to earn interest on checking accounts (see *Regulation*, July/August 1978). By the beginning of April, consumers had placed more than $6.26 billion in such automatic transfer accounts, at some 351 different banks around the country now offering this service. But the U.S. Court of Appeals for the District of Columbia held on April 20 that the Federal Reserve did not have the authority to make such a sweeping change in banking regulations under existing law. The court delayed the effect of its decision until next January, however, giving Congress time to save the new approach if it chooses to. Bills for that purpose have already been submitted in the House of Representatives.

Keeping Up Appearances. The *Federal Register* announced on April 3 that it will henceforth be printed in a larger typeface so that new federal regulations can be read more easily. But what will this do to all those quick calculations of regulatory output based on the number of pages in the *Federal Register* each year? No problem. The *Federal Register* also announced that it will carry more lines on each page so that the larger typeface will not add more pages. Of course, this means that federal regulations will now be creeping into previously open spaces—not for the first time, to be sure.

Reversing Freedom of Information. On April 18 the Supreme Court held in *Chrysler* v. *Brown* that the Freedom of Information Act could not be used to *prevent* federal agencies from disclosing sensitive information. The act requires federal officials to respond to information requests from members of the public, except in specified circumstances. The exception for "trade secrets" and "confidential or privileged" commercial information has been successfully relied on by business firms in a number of so-called reverse Freedom-of-Information Act suits—that is, suits seeking to enjoin agencies from releasing sensitive information about a firm's activities.

But in *Chrysler* the Court held that the exemptions merely authorize withholding without requiring it and therefore afford no basis for suits of this kind. The ultimate significance of this ruling is uncertain, however, for the Court simultaneously ruled that businesses could move to contest disclosures for violating a nineteenth-century law against disclosure of trade secrets, whose protections, it suggested, might be fully as broad as the relevant discretionary withholding provision in the Freedom of Information Act. Public interest lawyers—including those who provoked this round of litigation by seeking Chrysler's minority employment figures from federal civil rights officials—have expressed concern that the case may end up posing significant problems for their investigative activity in the future. But the Court's opinion in *Chrysler* does not yet provide much certainty anywhere in this troubled area.

Bureaucratic Paw-Dragging. There are many sides to the problem of controlling information flows in the federal bureaucracy. Officials at the Federal Aviation Administration recently testified before a congressional appropriations subcommittee about a particularly exasperating aspect of the problem. The FAA, it seems, has been pursuing the possibility of using gerbils to sniff out tiny or remote corners of aircraft for terrorist bomb plants. Experiments have confirmed that the gerbils do indeed have a keen enough scent to detect explosive devices. But FAA officials report enormous difficulty in getting the gerbils to announce their discoveries to the human agents standing by. But the effort is continuing. "Down the road is the stage two gerbil, the attack gerbil," FAA Administrator Langhorne Bond assured the astonished congressmen. He did acknowledge, however, that "more work is needed for the attack gerbil and also credibility is a problem."

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interpretations of statutory requirements. The reluctance of top HEW officials to commit the agency to a clear view on admissions quotas has also prevented OCR from clarifying the rather confusing divisions in *Bakke*. There has been no new policy statement on admissions quotas or racial preference in admissions from HEW in the year since *Bakke*, and while OCR says it will routinely investigate "reverse discrimination" complaints brought to it, officials there claim to have no record of the number of such complaints received in the past year or how they have been handled. What is certain is that no reverse discrimination claim has reached the formal enforcement proceedings before an HEW administrative law judge.

The Justice Department, on the other hand, though almost equally reluctant to clarify its views on reverse discrimination while *Bakke* was before the Supreme Court, has moved in the last few months to more unambiguous support of racial quotas. The *amicus* brief submitted by the Justice Department in *Bakke* last spring argued that both Title VI and the U.S. Constitution would permit federally assisted institutions to exercise racial preference on be-

half of historically disadvantaged minorities (even where the institution did not itself have a history of racial discrimination) but could not be interpreted to authorize explicit racial quotas (except as a remedy for proven past discrimination by a particular institution). But the brief also insisted that there was insufficient evidence to determine whether the minority admissions program at the Davis medical school (which Bakke had complained against) really constituted a quota. Although that claim was rejected by all nine members of the Court, the Justice Department has taken courage from the willingness of four justices to endorse the Davis quotas, as such. In the reverse discrimination suit of *Weber* v. *Kaiser Aluminum,* now pending before the Supreme Court, the department has submitted an *amicus* brief arguing that Title VII of the 1964 Civil Rights Act (a ban on discrimination in private employment) should not prevent Kaiser from imposing racial quotas on the selection of employees for a special training program at one of its plants in Louisiana. The brief notes that the Kaiser plant in question had been charged with discrimination by different employees on several occasions and, though none of these claims was ever upheld in court, argues that this gave the company enough justification for the adoption of a quota scheme to achieve better racial balance in higher-level jobs. Though courts have occasionally ordered racial quotas to remedy cases of proven discrimination, the Justice Department's *Weber* brief seems to allow employers an extraordinary degree of latitude in deciding when racial quotas may be justified in their operations and how far they may be applied. At all events, since the Justice Department has not yet initiated or intervened in a reverse discrimination suit on the side of the complainants and has issued no policy guidelines to guide the enforcement operations of other civil rights agencies, it remains to be seen where and when it might try to draw the line on quotas to protect white males from "reverse discrimination."

The Equal Employment Opportunity Commission, an independent agency, has taken perhaps the most activist approach to the reverse discrimination problem. Some months before the Supreme Court handed down its decision in *Bakke,* EEOC issued proposed policy guidelines explicitly designed to protect employers wishing to undertake affirmative action programs from reverse discrimination suits. EEOC's authority derives from Title VII of the 1964 Civil Rights Act, section 713(b)(1) of which provides that any employer whose practices have been sanctioned by EEOC policy interpretations cannot be held liable for penalty payments (including back pay) even if a court subsequently finds the employer's behavior—and the EEOC interpretations sanctioning it—contrary to law. EEOC's original statement therefore went to great lengths to assure employers that the commission would not regard "reasonable" affirmative action measures as violating Title VII's prohibition on race discrimination in employment.

Although EEOC acknowledged that it had received many letters criticizing this approach as inconsistent with the result in *Bakke,* it nonetheless issued substantially the same guidelines in final form last January. The guidelines do not cite even one example of an affirmative action effort that might go too far to qualify as "reasonable" or that might be considered unlawful reverse discrimination. And requests for clarification have been politely refused on the grounds that the commission does not want to respond to hypothetical situations. The nearest EEOC officials would come to defining "unreasonable" actions was to state that employers might be held in violation of Title VII if they adopted racial quotas without first conducting a "self-analysis" to determine whether there was an actual need to correct an "underrepresentation" of minorities. But the commission would not say how the "underrepresentation" is to be judged (in proportion to the size of the minority population in the country? in the surrounding labor market? in the available labor force with necessary skills? in the available labor force without necessary skills but potentially trainable?).

Like HEW, the commission maintains it will routinely investigate all reverse discrimination complaints that it receives, but it has no record of the number of such complaints actually received over the past year or of how many it has settled. And so far it has not released details of even a single case where its investigations disclosed unlawful reverse discrimination.

The issue of reverse discrimination, to be sure, engages moral dilemmas and legal complexities that the Supreme Court's fragmented

judgments in *Bakke* certainly could not lay to rest at one stroke. But the civil rights authorities in the executive branch—whose strong support for affirmative action programs did so much to fuel the reverse discrimination controversy in the first place—have certainly not taken the lead in resolving these questions.

Untying Cable Knots

The Federal Communications Commission voted on April 25 to accept the report of its Cable Bureau staff that argues for lifting present limitations on "distant signal" importation and several other major restrictions on the development of cable television. If—as expected—the commission eventually adopts these changes now put forward for public comment, the event will mark another milestone in the effort to cut back unnecessary federal regulation. But before this particular regulatory enterprise comes to a close, its central lessons ought to be noted well: the cable experience has been a particularly vivid illustration of the degree to which regulation begets regulation and it also suggests that the ultimate cause of overregulation is, quite simply, congressional neglect.

For many years now, visionaries—and not so visionaries—have been predicting that the city of the future will be the "wired city," in which everything from entertainment to newspapers, from banking to shopping services, will be made instantly available to homes and offices through electronic hook-ups. Even the less sanguine have seen in cable television the best hope of increasing the diversity and quality of television programming.

Technology has dramatically reduced the cost of obtaining diverse programming. Satellite distribution of television signals has become so cheap that some stations have rented satellite transponders and offered their signals nationwide. There is no technological limit to the number of channels cable can carry—twenty-four is common. But its greatest advantage may be economic rather than technological.

As has often been observed, the product of over-the-air television is not news, information, or entertainment programming, but viewers: regular commercial broadcasters quite literally sell viewers to advertisers. Since viewers go for only a few pennies a head, it is obvious that over-the-air television productions of any magnitude require massive audiences. And delivering massive audiences requires "mass taste" programming—which is to say, something we all might agree on as our third choice. Cable television, though, can be financed by direct per-channel or per-program viewer charges. Where a pay cable system of this kind sells programs to viewers instead of viewers to advertisers, higher fees can enable the cable subscribers to indulge their much more diverse "first choice" tastes—from opera to soccer to extremely *outré* political commentators.

The acorn from which this oak is expected to grow was originally called CATV—for community antenna television. In areas where hilly terrain, high-rise construction, or moderate distance from TV broadcasting stations made over-the-air reception difficult, CATV wired homes to a high common antenna. As long as this was the only function that cable served, it was not opposed (and was indeed desired) by television broadcasters, and the FCC declined to assert any jurisdiction.

Wires that were already in place, though, could be used to carry other material beyond that received through the antenna. In the 1960s, cable systems in fact began to penetrate major broadcasting markets by offering signals from distant markets through microwave relay. Later they began to originate their own programming (most often sports events or feature films). Community television became cable television and suddenly began to arouse concern among over-the-air broadcasters. Instead of swelling their local audiences, cable threatened to fragment them.

There was in all this, no doubt, an element of unfairness, both to the broadcasters and to the producers and actors who sold the broadcaster their shows. For the courts held that the mere retransmission of an over-the-air signal, even via microwave, did not constitute a "performance" under the Copyright Act, and thus imposed no liability for royalty payments. The cable systems were permitted, in effect, to sell the broadcasters' product without paying for it.

Enter the FCC. By this time, cable television was playing havoc with the FCC's allocation of channel assignments, which were

calculated to ensure adequate profit for all licensees. Three-station markets had become nine- and ten-station markets and broadcasters feared that their profits would decline accordingly. Claiming that this new medium, over which it had no explicit statutory jurisdiction, was seriously impinging upon its authorized regulation of the broadcasting medium, the FCC asserted regulatory jurisdiction and was initially sustained in this by the courts.

In fairness to the FCC, it must be acknowledged that its regulatory intervention did not occur until after the Congress had displayed its unwillingness to take any action against the chaos that was developing, even with respect to the stark issue of copyright protection. In 1976, modest (and probably inadequate) copyright protection was finally enacted. But as to all the other regulatory incidents of this radical new technology, Congress has provided no legislative guidance beyond the substantially unamended 1934 Communications Act, which does not even mention television, much less cable, because they did not exist in 1934.

In any case, once the FCC intervened, it did so with a vengeance. It not only regulated that aspect of cable competition with broadcasting that consisted of re-use of the broadcasters' own signals (placing restrictions upon the number and content of "distant signals" that could be carried); but it regulated other aspects of competition as well, mandating the carriage of all local broadcasting signals and (in order to prevent the "siphoning off" of desirable "free television" fare) prohibiting cable systems from charging viewer fees for certain sports events and feature films. And it even went beyond this, to impose restrictions that bore little relation to the already questionable jurisdictional basis of competitive impact. Cable systems were subjected (1) to such FCC content regulation as the Fairness Doctrine and the federal prohibition of obscene material; (2) to a requirement that they engage to a significant extent in locally oriented original programming; (3) to an obligation of making one channel available to the public on a first-come, first-served basis—without charge except recovery of production costs for live studio presentations exceeding five minutes; and, of course, (4) to FCC record-keeping requirements.

It was a massive regulation of a new and tremendously promising industry—premised, it seemed, simply on the reflex assumption that since cable began its life by carrying broadcast signals, it should live and die under broadcasting regulation. Critics were less upset that this occurred than that it occurred by decree of the FCC, with the Congress entirely content to say neither yea nor nay to what was happening. It is an experience that ought to be borne in mind when assessing current regulatory reform proposals, which proceed on the convenient assumption that the principal need is procedural or structural innovation within the agencies rather than congressional attention to the substance of regulatory programs.

In any event, all of this regulatory improvisation finally became too much for the courts. In 1977, the Supreme Court struck down the FCC's "pay cable restrictions" in a decision which implied that some of the other restrictions might be invalid as well (see *Regulation*, July/August 1977). That alone may have sufficed to liberate the full potential of pay cable to offer a far wider range of programs by selling programs to viewers rather than viewers to advertisers. Now, spurred on, one suspects, as much by the legal uncertainties resulting from the Court's opinion as by the current vogue for deregulation, the FCC staff has proposed that the commission remove all restrictions on distant signal importation. It sounds like a good idea.

But getting the FCC out from where it does not belong is only half a solution; the other half is getting the Congress back where it belongs. The patchwork copyright protection with respect to distant signals provided in 1976 assumed a regime of FCC limitation. It is arguable that, in an open market, it would result in the impoverishment of the creative talent on which the quality of the entertainment system ultimately depends. The Commerce Department's National Telecommunications Information Agency has asserted that copyright revision is a sine qua non of cable deregulation. Whether or not that is so, it is certain that congressional consideration of this and other fundamental issues regarding cable is long overdue. It would be well to lay some solid foundations—secure against even the encroachments of the FCC—in what appears to be an era of regulatory moderation.