Perspectives
on current developments

The Poor Man's Voucher?

Federal aid for the schooling of poor children —Title I aid, in educationist parlance—has been called the centerpiece of the Great Society education programs. Now proposals are circulating on Capitol Hill to make it the centerpiece of a policy of family choice in education—by "voucherizing" the program and letting poor children take the money with them to any public or private school they wish.

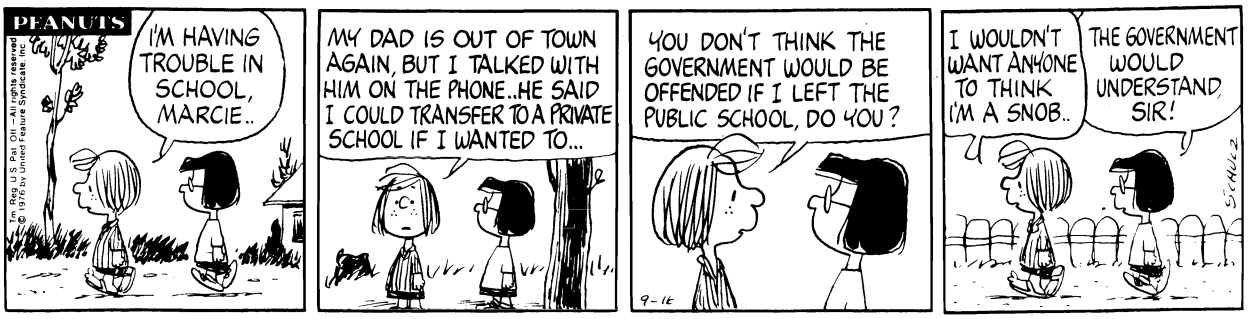
Title I puts up the money for school districts with high concentrations of poor children to hire experts and paraprofessionals for "compensatory" education, including testing, and other services to poorer students. In theory, at least, it attends to poor children not because they are poor but because poverty is a convenient proxy for low educational achievement; in practice, however, the program's supporters have rebuffed efforts to target the money specifically to low achievers. School officials frequently complain that the grant bureaucracy is not only cumbersome but also encourages them to segregate poor students from their classmates in order to ensure that no Title I funds are spent on the latter. Still, Congress has been unwilling to fold the program into a block grant, fearing that under that approach funds would be divided among schools without regard to need.

At around $3 billion a year, Title I is larger than all the other federal elementary and secondary school aid programs put together. According to a Department of Education study, no less than 16 million disadvantaged children, nearly one-third of all those of school age, are eligible for Title I services. Only 11 million of them live in eligible *areas*, however, and of these only about 5 million actually receive services. Private and parochial school students make up 3.5 percent of this sum, much less than would be their share if the money were allocated evenly among the poorest children. It is not difficult to see why: the federally financed services may not be dispensed in parochial school buildings, although students can sometimes hike over to the local public school to get them. (Another part of Title I pays for services to children in institutions and foster homes; it is thought less likely to be voucherized.)

Turning grants into vouchers would seem logical for an administration that already favors tuition tax credits as a step toward family choice in education. At the same time, it would face down three of the main arguments against tax credits: it would have no effect on the federal budget, would specifically help the poor, and would encourage integration and diversity in private schools.

"Mini-vouchers," as transferable Title I grants are sometimes called, were first proposed in detailed form by Berkeley law professor Stephen Sugarman in 1977. There has been little direct experience with them: the federally sponsored voucher experiment at Alum Rock, California, included a variant of the idea, but ended before any conclusive results emerged (although teachers reportedly "beat the bushes" to find poor children to enroll). Higher education, of course, has long operated on a voucher-like basis, and several federal programs specifically help with the college training of the disadvantaged.

The plan's most egalitarian feature—that it treats all poor children alike, no matter where they live or go to school—is also its greatest hurdle in implementation. Under the current arrangement, the federal government spends an average of $600 in aid on behalf of 5 million poor children, and nothing at all on behalf of another 11 million. Thus under a voucher plan, either additional billions would have to be spent bringing every school up to the highest current subsidy level per student, or eligibility would have to be tightened so as to restrict aid to the poorest families, or subsidies



would have to be set at a lower level of $200 or so a student. Either of the last two courses would cut the amount now given to some schools.

Proponents of the scheme are thinking of sidestepping such issues by letting each state decide how to divvy up the voucher money within its boundaries. At its most gradualist, this approach would even let states distribute Title I money in its current form instead of as vouchers. (States that kept the current Title I distribution would presumably also keep the regulations that go along with it.) This alternative would, however, risk allowing fifty state bureaucracies to displace the present federal one.

One even milder approach that has occasionally been suggested is to replace the present complex funding formulas with "capitation" grants, giving a certain sum to each school district for each poor student enrolled there. Unlike the voucher plan, this proposal would do little to advance the cause of family choice, since students would still not be free to take the money wherever they chose. But it would assure every poor student—so long as he went to a public school—a subsidy of similar size, and it would implicitly proclaim that the government was interested in supporting students rather than school administrations. Perhaps for these very reasons, local officials have never appeared enthusiastic about the idea, despite the seeming advantage of being able to dispose of the grants in any way they wish.

It will be interesting to see how the opponents of tuition tax credits react to the idea of a voucher only for the poor. It stands their usual argument on its head. Will they now warn that student flight by the newly empowered poor will lead to a "two-class" school system, with poor children enjoying their private school preserve while the public schools become a "dumping ground" for the middle class?

When Patients Know What's Good for Them

Can patients know too much for their own good? That seems to be the issue in the controversy over the Food and Drug Administration's proposed rule on patient package inserts. The FDA is seeking to require drug makers to provide detailed data, for inclusion along with each prescription, describing to consumers the effect and proper usage of the drugs they take. The agency itself would prepare a model insert for each drug. Until now such directions for use have been required only for over-the-counter drugs and a few "elective" prescription drugs, such as oral contraceptives and estrogens. Not too long ago, in fact, makers of most prescription drugs risked charges of mislabeling if they furnished such information directly to consumers.

Initially the FDA wanted a highly ambitious scheme covering more than 300 drugs. But after criticism from President Carter's regulatory review panel, it settled on a three-year pilot program covering only ten frequently prescribed drugs that have serious side effects, drug interaction problems, or complicated dosage instructions. The ten drugs include varieties of tranquilizers and painkillers, cholesterol-lowering drugs, and drugs to combat irregular heartbeat, ulcers, loss of skin color, epilepsy, high blood pressure, and nausea in pregnancy.

The rule was adopted late last year, but the incoming Reagan administration's regula-

tory task force held it up before it could go into effect and targeted it for review. A number of organizations led by the Health Research Group filed suit against the delay on April 8, charging that failure to provide package inserts to consumers constituted mislabeling. A federal court recently dismissed the case in order to give the FDA six months to review the program, after which the court may reopen the case. This will put the review of the rule on a faster track than other rules targeted by the task force.

The goal of the package insert rule, as of most information-based regulation, is not merely to disseminate information to consumers but to change their behavior. In theory, better information can help consumers avoid three major problems with drug use:

- *Patient noncompliance.* In some drug regimens, the dose must be continued after all symptoms have disappeared; in others a missed dose must be made up in a particular manner. Many drugs are incompatible with certain foods, with alcohol, with sunbathing, or with driving a car. Patients who have clearly written dosage instructions are more likely to comply with proper procedure. They may also avoid addiction and overdose problems.
- *Adverse side effects.* Some serious side effects start with mild symptoms, such as a rash, that the patient is likely to ignore. Drug information can alert patients to the importance of these symptoms.
- *Contraindications.* Some symptoms or conditions that make the use of a drug unwise or unsafe are more easily or more quickly identified by patients than by physicians. This is particularly true in the case of prolonged therapy, where the patient may develop the condition long after the drug is prescribed. If, for example, a drug should not be used in the first trimester of pregnancy, written advice to that effect contained in the drug package might prevent harmful use before a treating physician could do so.

According to some estimates, patient noncompliance costs $2 billion a year in added medical bills, and adverse reactions cost $156 million to $520 million a year. The agency also asserts that these problems account for a significant share of the lost workdays associated with acute conditions, which cost $9.1 billion a year. Against this are the measure's direct costs, estimated at $21 to $80 million a year—not large for a major regulatory program. Why, then, has this one run into such strong opposition, not only from drug manufacturers, but also most pharmacists and many doctors? Why has it made the Commerce Department's twenty-most-burdensome-regulations list?

The critics fear the rule for the same reason that a burgeoning "informed consent," or "patients' rights," movement favors it: because it will tend to encourage patients to take the curative process into their own hands, rather than trust in their physicians. The resulting change in the doctor-patient relationship, with its consequences for both patient health and the nature of the medical profession, is an indirect effect of sufficient magnitude to swamp the direct benefits and costs of the rule.

Both supporters and opponents agree that consumers are likely to ask their doctors more questions about drug therapy after reading the inserts. The extra time taken to answer questions raised by the inserts is not costless; it is now used to treat other patients. Critics worry that physicians will wind up correcting unnecessary misunderstandings, allaying fears of serious but rare side effects, cajoling needlessly frightened patients into continuing valuable drug therapy, and trying to distinguish the symptoms that some patients will develop from real contraindications or side effects.

It should be noted that a provision of the regulation gives doctors the right to request that the insert be omitted from a particular patient's prescription. Even with this safety clause, however, it is not clear that package inserts would reduce the medical cost figures cited by the FDA. If consumers are to benefit, they must read, understand, and retain the information, and then act appropriately, sometimes after quite a bit of time has elapsed. At each step along the way, fewer and fewer consumers can be expected to participate. Moreover, some adverse reactions have quick and irreversible onsets which cannot be minimized by consumer vigilance. And encouraging patients to take a more active and critical attitude toward their therapy may increase noncompliance by those who are frightened by the inserts' warnings or simply feel that they know better than anyone else what is good for them.

A few retail pharmacists support the rule, hoping to move the practice of retail pharmacy

In Brief-

The Metamorphosis of Martyred Mice. *The Journal of Irreproducible Results,* a scientific humor magazine, offers the following definition: "The mouse is an animal which, when killed in sufficient numbers under carefully controlled conditions, will produce a Ph.D. thesis." Or, they might have added, a regulation.

Missing: Two Million Handicapped Kids. The General Accounting Office has declared no less than 2 million handicapped children to be missing and unaccounted for—and the Department of Education is giving out big rewards for apprehending them. The department's Office of Special Education has estimated that over 6 million children, about one-eighth of all children of school age, are handicapped and therefore entitled to federally funded services. State education officials, however, have only been able to round up about 4 million, despite repeated exhortations from Washington to do better.

Contrary to what one might expect, the handicapped students found so far are not spread at all evenly across the country. Some states put twice as many of their pupils in the handicapped category as do others. GAO also found that some states have stretched eligibility rules to boost their "childcounts" (as they are infelicitously called), mindful of the $240 average annual bounty that the federal government is willing to pay for each child.

Why is there so much uncertainty as to who is handicapped and who is not? GAO notes that a large chunk of the handicapped estimate consists of very young children with speech disabilities, often minor ("e.g., they said 'wabbit' instead of 'rabbit' "), which tend to disappear in the course of a few years. Nearly all the rest are in the highly elastic categories "emotionally disturbed," "learning disabled," and mentally retarded. Blind and deaf children make up less than 1 percent apiece of the total.

We Owe It to Ourselves. In the days before Reaganomics—indeed before Nixonomics and even Trumanomics—the FDR braintrusters were wont to belittle the dangers of a large national debt by noting that, after all, we owe it to ourselves. That insight has found new application in an entirely unexpected context: pay raises for members of Congress.

By law, every four years the President proposes changes in basic salaries for high-level government executives, federal judges, and members of Congress. Either house of Congress can veto his proposal, but until 1977 neither one was obliged to vote on the matter. Thus Congress could snag itself a pay raise without so much as a vote in either house—a nice example of the dangers of the legislative veto device. When, in January 1977, Congress got a 30 percent raise by this look-ma-no-hands method, the public outcry was so great that the law was amended to require an official floor vote.

But while Congress could no longer raise its base pay without standing up to be counted, it could still pick up handsome cost-of-living increases incognito. Under a 1975 law, the pay of members of Congress, along with top federal executives and judges, was required to be increased annually by the same percentage as the average cost-of-living raise given to regular federal workers under another statute. That latter raise may take effect without a congressional vote (the legislative veto gimmick again), and even when a vote occurs it does not present the appearance, though it has the reality, of Congress's raising its own pay.

Until recently, there was only one hitch in this eminently satisfactory arrangement: even though, once cost-of-living raises were given to regular federal workers, the raises for Congress were automatic, money still had to be appropriated to *pay* them. Some curmudgeons would use annual appropriations bills as vehicles for forcing a floor vote on the congressional pay issue, and when forced to declare themselves, their colleagues would reject or reduce the hike.

That problem has now been solved. A provision of the continuing appropriations legislation for 1982, signed by the President on October 1, enacts a permanent appropriation, beginning in fiscal

toward a "European" model—with the family pharmacist, rather than the physician, acting as the major adviser on drug use. But most oppose it—and not necessarily because they expect to spend a lot of money storing the inserts and disseminating them to consumers. Quite the opposite. Since it is less costly to insert package inserts by machine in a factory than by hand in a pharmacy, the cost advantage will shift in favor of unit-of-use packaging, which would allow drugs prescribed in standard doses to be dispensed by less highly trained personnel. Thus the program may hasten the demise of retail pharmacy as a professional practice.

Doctors and pharmacists are not, of course, the only sources of knowledge for consumers at present. Information similar to that in package inserts is currently available in book form, as small compendiums written for the lay population and widely available at low cost. But consumers make little use of these volumes. One reason is that since a drug is frequently marketed under several brand names, a com-

1983, for the annual congressional pay increases "required" by the 1975 act. It was, after all, only fair —indeed, a matter of entitlement, as Rep. Whitten put it in the brief House discussion (it would go too far to call it a debate): "Well, the law . . . provides the increased pay. We in the Congress have just failed to appropriate for it. . . . It is my opinion, having read some of the cases having to do with entitlements, that . . . it must be paid. It is my judgment that in a class action suit, members of Congress could sue and a judgment would be rendered."

One would have thought that such a fine ethical and juridical sense of entitlement would have extended as well to federal executive officers and judges, who are entitled to annual cost-of-living pay raises under the very same 1975 act. Not so, however. *Their* appropriations will continue to be made annually. They, unlike the members of Congress, do not owe it to themselves.

Non-Carcinogen of the Month. The *Washington Monthly* reports that boxes of D-Con brand rat poison boast in large letters: "An exclusive blend of all-natural ingredients." No Delaney Clause problems for them.

Floaters' Rights. From progressive California, home of tenant's rights, comes word that a new front has been opened in the unceasing struggle against landlord exploitation. According to the *Wall Street Journal*, the Waterbed Manufacturers Association of Los Angeles has begun a crusade to prohibit landlords from dictating what kind of furniture tenants can have. The furniture in question? Waterbeds, of course—banned by five out of six landlords because of fears that the beds will spring a leak or fall through the floor.

The waterbed makers have appealed to legislators in California and elsewhere to outlaw this discrimination, and they report that the initial response looks "very good." "Anybody who discriminates against furniture is unfair," proclaims the association's president. "Such discrimination probably is unconstitutional and it constitutes cruel and inhuman treatment."

Whales Escape White House Oversight. The executive branch has been mildly opposed to writing into law the "regulatory impact analysis" (RIA) procedures now contained in Executive Order 12291. There are understandable reasons for its opposition. It wants to retain the flexibility to make its own changes in the future. It also fears that any changes added in the legislative process will be for the worse, and that legislation will open the door to judicial review of regulatory analysis.

A bill signed by the President October 9 suggests another good reason: What the Congress giveth, the Congress taketh away. Public Law 97-58, which alters the administration of the Marine Mammal Protection Act of 1972, includes a clause exempting rulemakings conducted under its provisions from the application of E.O. 12291. As Reagan noted when he signed the bill, that provision may interfere with powers conferred on the President not by Congress but by the Constitution itself. To some degree, at least, the President must be able to establish internal procedures—whether Congress approves or not—necessary for the performance of his duty to "take care that the laws are faithfully executed."

In this instance, the congressional exclusion of RIA procedures seems to have been based on motives congenial to Reagan administration deregulatory policies. (The rulemakings in question could adopt existing state restrictions, instead of promulgating new federal restrictions.) In the future, however, it is infinitely more likely that such provisions will result from attempts by congressional committees to insulate their pet programs from White House oversight. Congressional deregulators should have known better than to establish a precedent as troublesome as this one—especially since the executive order already permits OMB to waive those provisions of the order that might deter deregulation. The experience suggests that the President might want to leave his executive order on the books even should it be enacted word for word into statutory law; in one important respect, namely destructibility by legislative action, a statute is more fragile than an executive order based on the President's constitutional powers.

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plete compendium may be confusing to lay readers, most of whom use only a few prescription drugs. Worse, drug information must be frequently updated. Overall, however, the likeliest explanation is that consumers typically believe that their physicians will provide them with all necessary information.

What about manufacturers? In other markets, producers usually disclose negative information to their customers for fear of court liability. In the case of prescription drugs, statutes and case law do force them to disclose information about the drug's proper use—but to the prescribing physician, not the patient. Injured patients have successfully sued when, as in the case of thalidomide, the drug was not safe and effective in its intended use, or when, as in the case of chloromycetin, the drug manufacturer failed to provide the physician with sufficient information. In fact, until the FDA's relatively recent imposition of package insert requirements for certain elective drugs, prescription drug manufacturers not only had no duty to disclose information to patients under

the Food, Drug, and Cosmetic Act of 1938, but actually were thought to risk charges of mislabeling if they did so—because drug information was viewed as inherently too complex for patients to understand. Thus, government policy has swung in two generations from a virtual right of self-medication before 1938, to a highly paternalistic system thereafter, and now, if the new rule survives the review process, to a hybrid position.

Saving the Cities . . .

The search for new victims of oppression to protect and defend is, for most fans of activist government, a never-ending one. Never, however, had they picked a more unlikely target for their solicitude than when, as part of the Carter administration's "urban policy," they rushed to the aid of downtown business interests.

The Community Conservation Guidelines, issued by the White House in November 1979, attempted to shelter central business districts from the effects of competition by requiring review of any federal actions that might promote the flight of business to the suburbs. The rules were quietly dropped this past June, only a year and a half later, by the Reagan White House.

Why any policy would be needed to help downtown business might well seem a mystery. Main street businessmen have long been portrayed, in American literature and journalism, as among the chief nodes of local power. Recently, however, a specter has been haunting them—the specter of shopping malls.

Shopping malls are so ubiquitous nowadays that it is easy to forget what a recent invention they are. It has been only twenty-five years since the first "modern" enclosed mall, Southdale Shopping Center, opened near Minneapolis. The success of the malls is only partly due to the national love of the automobile and to physical advantages like climate control. "Little at the shopping centers is left to chance," writes University of Chicago historian Neil Harris. "Along with Disneyland, they were early experimenters in the separation of pedestrian and vehicular movement and the isolation of service activities from customers." They also pioneered innovative approaches to traffic congestion, lighting, and security.

One prime reason for their success is that they compete just as directly with local government as they do with downtown business. Nearly every tax-paid public servant one is likely to encounter while shopping downtown, from the street sweeper to the cop on the beat, is replaced in a mall by a private employee. Malls achieve the goals of zoning and city planning (uniform architectural style, traffic control, efficient use of space, the exclusion of unwanted activities) within a wholly voluntary setting. By contrast, City Hall increasingly is deeply involved in the newer downtown developments, providing tax-free financing and using condemnation powers to assemble small land parcels. Thus it should come as no surprise that the most vociferous supporters of the community conservation guidelines were not the downtown merchants (who often have branches in the malls anyway) but the downtown governments.

Obviously, it would be possible to review only a small proportion of all federal actions for "urban impact." The Carter administration's response to this problem was simple: agencies were required to review an action only if the chief elected official of the affected city so requested. Needless to say, suburban officials, some of whose constituents had moved to escape big-city government in the first place, found that feature somewhat irksome. Many of them were already complaining that they had little control over federal projects within their boundaries; now it appeared that federal officials were going to hand some of that control, not back to them, but to the mayor of the nearby Gotham.

One announced reason for the policy was to compensate the cities for the federal subsidies already being provided for suburban development. But it is doubtful that even public works construction programs favor the suburbs (to say nothing of income transfer and social service programs, which surely subsidize the cities). Highway construction is paid for mostly by suburban drivers through the gasoline tax, while urban public transit gets large federal subsidies. Grants from the Economic Development Administration and Farmers Home Administration finance some suburban projects but, overall, they tilt toward ur-

ban and rural recipients. The vast array of mortgage subsidies and tax preferences for housing apply to owner-occupied units everywhere, including urban condominiums. All of these policies probably do encourage overuse of land, but blocking large-scale shopping projects might worsen this problem if, as developers predict, the alternative is a proliferation of small-scale stores and centers. Malls use less parking space than dispersed stores of similar capacity.

The Carter administration action followed a number of local battles between city governments and mall developers. The governor of Massachusetts had threatened to deny state highway access to any shopping mall competing with a city-backed development planned for the city of Pittsfield. A land use commission in Vermont had denied a permit to a development it said would take business away from downtown Burlington. Over in Canada, the provinces of Ontario, Nova Scotia, and Saskatchewan had all enacted "Main Street" laws, with similar purpose. Such local efforts tend to founder, however, because of the underlying economic trends. In Pittsfield, for example, the officially sponsored project was abandoned in the face of traffic worries and retailer indifference, despite a promised federal Urban Development Action Grant of $14.2 million. Moreover, the local efforts have been left on legally shaky ground by various court rulings that zoning cannot be used to curb competition.

The resort to federal guidelines, however, likewise had little visible effect. The Transportation Department did deny funds for an interstate highway bypass around Dayton and put severe restrictions on the last link of a beltway around Richmond, in order to make it more difficult for drivers to avoid the center city. But few if any proposed malls were canceled because of federal pressure.

The tentativeness of these and other moves toward federal control of land use probably reflects public resistance to the idea of a government policy determining where people should live, work, and shop. When the Boston city government decided to require its employees to live in the city, opponents of the requirement—recalling "forced busing"—came up with another pithy phrase: "forced living," they called it. "Forced shopping" is probably no more popular.

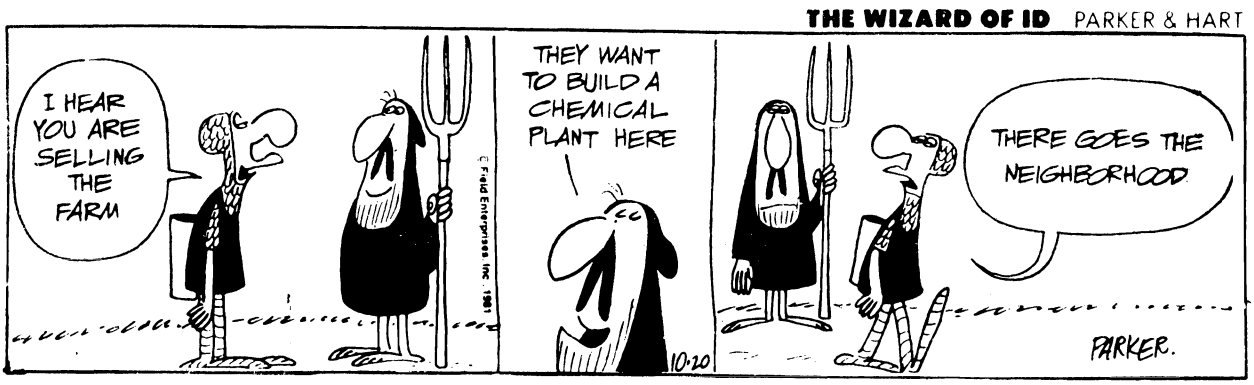
A certain cynical theory would have it that social trends never come to the attention of the government until they are past their peak. With regard to the present issue, the state of affairs in retail trade lends some credence to that theory. The trend toward suburban malls seems to be slowing down, most cities of any size already having been "malled out," in the developers' inelegant phrase. Meanwhile, downtowns are reviving nicely in some of the oldest cities—Boston, Philadelphia, Baltimore—led not by general retail trade but by specialties like tourism, art, entertainment, and the professions, and by stores catering to newly renovated inner-city neighborhoods.

. . . and Saving the Country

Even as the Reagan administration dismantles one government policy aimed at slowing suburban growth, it is busy erecting another—an "agricultural lands protection policy." This policy was part of the omnibus farm bill passed by the Senate September 18 with administration support and awaiting House action as of this writing. Like the guidelines on saving the cities, it provides for review of federal actions that might abet "unnecessary" sprawl—this time, actions that would encourage the conversion of farmland to other uses.

Just as the suburbs draw people and businesses from the city, so they draw land and greenery from the countryside. From 1967 through 1975, 675,000 acres of cropland were converted each year to nonagricultural purposes. This trend, like so many others, would have dire consequences if it continued indefinitely: there were only 415 million acres of cropland in 1977, and by about the year 2600, we would have paved (or at least sodded) over every last one of them, right down to the last beanstalk.

For the moment, however, there would seem to be little cause for alarm. The price of farm products has risen less rapidly than other prices since 1890, and only half as fast as consumer income. The actual amount of cropland harvested has been rising, not falling, going from 289 million acres in 1972 to 353 million acres in 1980. (The cropland total of 415 million acres includes fallow land, land on which crops



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have failed, and so forth.) Another 125 million acres are considered to have high or medium cropland potential. More land was newly brought under cultivation in the past decade than was lost to development, even while the suburbs were growing at a rapid clip. In fact, the suburbs could continue to grow at their current rate for more than a century before the last of this remaining potential cropland would be brought into production. Only then would the total farmland in use have to begin dropping. And long before then, of course, everyone in the nation would have moved to the suburbs.

Figures like these make a "farmland crisis" appear rather remote. Yet farmland preservation has become one of the hottest conservation issues, at both the federal and local level. Most states now give farms preferential property and estate tax treatment in order to discourage development. Four northeastern states and several local governments use state money to purchase development rights to farmland. Exclusive agricultural zoning is becoming more common. The cause is one that greatly attracts many local interests—no-growthers, new suburbanites who want to slam the door behind them, self-sufficiency buffs who fret that Massachusetts does not produce enough food for its own needs, and traditional politicos who cannot have overlooked the pork-barrel possibilities of discretionary subsidies and variances. Farmers themselves are more ambivalent. While flattered by the notion that farming is an especially virtuous activity, most do not care to lose their right to dispose of their land however they see fit.

Much of the impetus for federal action has come from the National Agricultural Lands Study, sponsored by the Department of Agriculture and the Council on Environmental Quality and released in January 1981. As an exercise in government planning, the study closely resembles the medical manpower study reviewed in these pages earlier this year (William S. Comanor, "Health Manpower and Government Planning: A Review of the GMENAC Report," *Regulation*, May/June 1981). Both reports projected current trends in supply and demand forward to future decades, with virtual disregard of the primary mechanism that alters (and equilibrates) supply and demand in our economic system: prices. Predictably, both reports found that major imbalances would arise, and went on to explain how government could set things right.

In the case of the farmland study, the most striking extrapolation was that of demand. Demand for gasohol, the study predicted, will require 15 to 23 million acres of corn by 1990; agricultural exports, which already account for one of every three acres harvested in this country, will nearly triple by the year 2000. Since the authors did not forecast large gains in yields per acre, they had to conclude that huge new amounts of cropland will be needed by 1999—between 77 and 113 million more acres, depending on crop yield assumptions.

Now *there* is a crisis! The latter figure would nearly exhaust the remaining potential cropland, and twenty years is a short time in which to bring every last scrap of arable land into production. If 113 million more acres of cropland must be found in a hurry, we may need much more than a new federal review mechanism: we may need to plant the nation's golf courses with sorghum and convert the President's Rose Garden to a pumpkin patch.

Fortunately, such drastic measures are unnecessary. If demand turns out to be as strong

as the study projects, crop prices will rise, making it profitable to farm a given plot more intensively, lowering demand from all sources, and encouraging foreign countries to produce more. A massive increase in farm demand would also slow down farmland conversion, needless to say, since land prices would rise. But whatever the projections, the land lost to development would amount to no more than small change—less than might be lost to gasohol production alone.

That there is no farmland "crisis" does not necessarily mean that there are no unnatural pressures for development. When suburbanites move into a farming area, they often object to pesticide spraying, roaming animals, and farm sounds and smells in general, and then file suits or demand zoning changes to get their way. Local property taxes may also encourage conversion. And federal farm subsidies that encourage farmers to keep land in crops may or may not be outweighed by the range of federal and local subsidies for land development in general.

But a review process for farmland conversion can only indirectly combat the problem of development subsidies. It may well prevent some unwise government projects. The projects that are built anyway, however, will tend to be more costly—as the government reroutes highways, for example, to zigzag through swamps, up and down steep hillsides and across rocky fields in order to avoid Sunnybrook Farm. Meanwhile, instead of being "pulled" to stay in the cities, would-be suburbanites will be "pushed" to stay off the farm. Deregulation marches on.

Ford Motor Co. v. FTC: No Rule without a Rulemaking?

There is new reason to believe that some federal appellate judges fail to read *Regulation* closely. No sooner had it been pointed out in the pages of this magazine (Antonin Scalia, "Making Law without Making Rules," *Regulation*, July/August 1981) that, by and large, the law permits federal agencies to establish law and policy through case-by-case adjudication instead of rulemaking, than the U.S. Court of Appeals for the Ninth Circuit published its opinion in *Ford Motor Co.* v. *FTC*, saying that, by and large, the law does not permit federal agencies to establish law and policy through case-by-case adjudication instead of rulemaking.

Ten other federal agencies have joined in an *amicus* brief in support of the Federal Trade Commission's petition for rehearing in the case. As well they should. If the *Ford Motor* opinion stands, it will be a landmark decision in federal administrative law and a major barrier to agency action.

The case involved an FTC proceeding against Ford Motor Co., Ford Credit Co., and Francis Ford, Inc., an Oregon Ford dealership, complaining of the dealer's repossession practices. When repossessing a car, Francis Ford credited a debtor only with the car's wholesale value, keeping for itself any surplus over that price obtained in the resale. The FTC asserted that this policy, which was standard for the industry, constituted an unfair trade practice. Ford Motor and Ford Credit settled with the commission, but the feisty Oregon dealership contested the action. It lost. The commission issued a cease-and-desist order directing Francis Ford to end the practice. Francis Ford appealed to the courts, and won.

As the Ninth Circuit described the case, "the narrow issue . . . is whether the F.T.C. should have proceeded by rulemaking . . . rather than by adjudication." The Supreme Court has never found that to be needed; indeed, all three of its cases addressing the issue have affirmed the authority of agencies to select, within very broad limits, whichever form of proceeding they deem best for announcing new principles of law and policy. The famous *Chenery II* decision (1947) permitted the Securities and Exchange Commission to disapprove a reorganization of a utility company on the basis of a newly framed general prohibition of insider trading during the reorganization period. In *NLRB* v. *Wyman-Gordon* (1969) the Court allowed the labor board, in an adjudication concerning a union election, to establish and enforce a new requirement that the employer provide the union with employee names and addresses. And in *NLRB* v. *Bell Aerospace Co.* (1974) the Court held that the labor board could, in an adjudicative union certification proceeding, reverse its long-standing position

that company "buyers" were "managerial employees."

In these cases the Court made it clear that the choice between rulemaking and adjudication as a way of making policy "lies primarily in the informed discretion of the administrative agency." The cases do suggest, however, that such discretion may be so abused as to warrant judicial reversal—for example, if persons suffer substantial adverse consequences from relying on prior agency policy or if fines or damages are imposed. Neither of these specifically mentioned factors was involved in the *Ford Motor* case: penalties would apply only for future violations of the cease-and-desist order, and there was no prior statement of FTC policy on which the affected industry had relied.

The Ninth Circuit, however, rested its decision on a new ground. "Ultimately," it said, "we are persuaded to set aside this order because the rule of the case made below will have general application. It will not apply just to Francis Ford." That is, on its face, an astounding holding. As the Supreme Court said in *Chenery,* an agency may use a "particular proceeding for announcing and applying a new standard of conduct." And as it said in *Wyman-Gordon* and reaffirmed in *Bell Aerospace,* "adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies," and "generally provide a guide to action that the agency may be expected to take in future cases."

Aha! Perhaps *that* is what makes the *Ford Motor* case different! The FTC categorically declared that its holding would be binding on future cases—not just a "guide to action that the agency may be expected to take" or a precedent "subject to the qualified role of *stare decisis* in the administrative process," as *Wyman-Gordon* put it. Indeed, the FTC appended to its order against Francis Ford a "Synopsis of Determinations" that even read like a rule—with the apparent purpose, as the court noted, of advising other automobile dealerships of their new obligations. Is this the crucial distinction, then—that when an agency phrases its adjudication-formulated policy too categorically it becomes invalid?

Rather a precious distinction, certainly, exalting form over substance to a degree that is rare even in that world of form, the law. Moreover, such a prescription of proper adjudicatory form is hard to square with the Supreme Court's estimation that its own adjudications represent "the supreme law of the land." But finally and most conclusively, if the agency did exaggerate the categorically binding effect of its adjudication, it was clearly invited to do so by Congress.

Before 1973, the commission could impose a penalty for an unfair or deceptive trade practice only when, after it had adjudged the respondent guilty of the practice and issued a cease-and-desist order, the respondent failed to comply. One of the major features of the Magnuson-Moss Act of 1973 was its provision that if the commission determines in a cease-and-desist proceeding that "any act or practice is unfair and deceptive," it can thereafter impose a civil penalty upon *any* person (not just the one subject to the cease-and-desist order) engaging in "such act or practice" with "actual knowledge" that it is unfair or deceptive and unlawful. The obvious and well-known purpose of the provision was to enable the commission to impose penalties for the violation of general rules announced in adjudication. Which explains, of course, the "Synopsis of Determinations" appended to the commission's *Ford Motor* decision: it was to provide future violators with such "actual knowledge."

In other words, if there were ever a case in which Congress did *not* expect the agency to act through rulemaking, *Ford Motor* was it. The Magnuson-Moss provision described above necessarily *assumes* that the agency will pronounce in individual adjudications principles that "have general application." Yet it is precisely this which the Ninth Circuit says violates the law. Nor is it possible to explain the decision on the grounds that some constitutional prohibition against rulemaking-through-adjudication overcomes the evident congressional intent. It is hard to believe that the distinction between making a policy decision absolutely binding (if that is what the FTC sought to do), and making it binding only insofar as justified by the "qualified role of *stare decisis,*" is a distinction to be found in the Constitution. But even if it is, it is hard to see how the respondents in *Ford Motor* could benefit from it. If indeed it is unconstitutional to bind B on the basis of a principle enunciated in earlier litiga-

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physician influence on reimbursement policy should cause allowances to move toward the middle of the fee distribution.

The allowances set by individual plans are ordinarily well above the median charge. But this is due to the demands of the subscribers themselves, Lynk argues. Subscribers who demand comprehensive medical coverage want it to cover almost any physician's charge fully. A majority of physicians, however, would profit from tighter limits. Thus physician influence on a plan should reduce the size of its allowance, not raise it, if Lynk's theory is corect.

Lynk tests the latter hypothesis with three sets of data on Blue Shield reimbursements in 1977. One concerns payments for forty-five medical procedures under a Blue Shield policy available to federal employees throughout the United States. Another is a survey of twenty medical procedures under sixty plans. The third is a survey carried out by the General Accounting Office of reimbursement limits for seventeen procedures. The physician percentage of each plan's board of directors and the percentage of directors who must be approved by medical societies serve as Lynk's measures of doctor influence.

In every instance, Lynk finds, greater doctor influence is associated with lower allowances and lower actual payments. This effect was more pronounced when doctors themselves sat on the boards than when medical societies nominated representatives. Lynk also found that the Blue Shield plans with more doctors on their boards—despite their lower reimbursements—were more successful at getting local doctors to participate. Here, too, direct physician membership had stronger effects than did medical society nomination.

Regulators have directed their attention at the presumed conflict between doctors' and patients' interests, Lynk says. In this instance, however, competition within a group—doctors—appears to be at least as important in determining rates as conflict between groups—doctors and subscribers. If Lynk is correct, efforts to purge doctor influence from the plans may be of little use in lowering health costs.

[EDITOR'S NOTE: *On April 27 the Federal Trade Commission decided not to proceed with a rule on physician participation on Blue Shield boards.*]

No Rule without a Rulemaking?

(*Continued from page 14*)

tion with A, then surely the person who may complain of such unconstitutionality is only B. A has no gripe; he has had his day in court! And Francis Ford, in this case, is A.

There is, however, one basis upon which the Ninth Circuit's holding, though not its reasoning, could be affirmed. A distinctive feature of the case (which the court alluded to, but expressly disclaimed as the basis for its decision) was that, while the adjudication was in progress, a rulemaking was pending on a closely allied subject—*deficiencies* (as opposed to surpluses) in repossession cases. One might well argue that it is irrational, and therefore an abuse of discretion, for an agency to believe that the one problem best lends itself to adjudicatory, and the other to rulemaking, disposition. There would remain, of course, the problem of whether it was the decision to go with rulemaking or the decision to go with adjudication that was bad—but that could be resolved by the presumption in favor of rulemaking established by *Chenery*. ("The function of filling in the interstices of the [Public Utilities Holding Company] Act should be performed, as much as possible, through [the] quasi-legislative promulgation of rules to be applied in the future.") It is by no means certain, however, that even this argument will suffice to keep Francis Ford's chestnuts out of the fire. The agency did in fact offer a plausible reason for treating deficiencies in a rulemaking and surpluses in an adjudication. In its view the "unfairness" of the existing practices was clearer in the latter case (indeed, it thought those procedures actually violated state law). In such circumstances it chose to proceed by adjudication because that would force blameworthy companies to disgorge past profits, while rulemaking would be purely prospective.

Even if the decision in favor of Francis Ford is upheld on account of the parallel rulemaking, the principle thus established would hardly be applicable to many cases in the future. The depressing or encouraging reality is that the reasons for and against the use of adjudication instead of rulemaking are so diverse, so unquantifiable, and so dependent on the facts of the particular case, that the courts are most unlikely to police the selection.