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REGULATION was first published in July 1977 "because the extension of regulation is piecemeal, the sources and targets diverse, the language complex and often opaque, and the volume overwhelming." REGULATION is devoted to analyzing the implications of government regulatory policy and the effects on our public and private endeavors.

For the Record

Pinpointing the Polluters

GEORGE M. GRAY'S ARTICLE, "MEASURE Risk, Not Just Emissions" (*Regulation*, Vol. 22, No. 4), offers a sensible and useful reform of the Environmental Protection Agency's Toxics Release Inventory (TRI). However, another shortcoming of TRI deserves attention: the restriction of TRI reports to emissions by business firms.

Government agencies, notably installations of the Departments of Defense and Energy, are among the biggest polluters in the nation. The current procedure reinforces the popular—but inaccurate—notion of equating pollution exclusively with private business.

In the spirit of the 1986 law establishing the TRI process, the community has a right to know the various sources of pollution. It is time that the public knew about polluters among government agencies and also in the nonprofit sector.

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Another Look at Mortgage Discrimination

I HAVE TWO CRITICISMS OF THE VERY interesting article by Stanley Longhofer and Stephen Peters, "Why Is Mortgage Discrimination Illegal?" (*Regulation*, Vol. 22, No. 4).

SEEING DISCRIMINATION WHERE IT DOES NOT EXIST

Despite the authors' protestations to the contrary, it is not all that difficult to figure out what kind of discrimination the federal civil right statutes forbid. It is treating an individual differently because of his race—no more and no less. The authors are correct to say that there may be situations in which that kind of discrimination is rare and other situations in which it is common. It may be irrational in some contexts and rational in others. And certainly we can argue about whether the benefits of banning such discrimination still outweigh the costs, or if they ever did. But what the law proscribes is clear. If you treat people differently because of skin color, you are discriminating because of race, and it doesn't matter whether you do so consciously or unconsciously, with a flinty eye on the bottom line, or with hot-headed bigotry.

Conversely, if you do not act because of race—if you act pursuant to neutrally framed and neutrally intended criteria—it does not matter how many African Americans are turned down for loans or how many whites are accepted. I know that the bureaucrats and many courts believe that practices with a "disparate impact" but no "disparate treatment" can violate the statutes, but they are wrong and the Supreme Court has yet to rule on the point.

PUTTING WRONG-HEADED OPTIONS ON THE TABLE

It would be silly to suggest, as the authors do, that a way to ensure that the law is fulfilled might be to require that lenders discriminate in favor of certain groups. True, policymakers may have been concerned that dis-

We welcome notes about current regulatory topics, letters that challenge or expand upon material we have published, and replies from authors. The writer's name, affiliation, address, and telephone number should be included. We cannot publish all the letters we receive, and we may reject any letter at our discretion. We may edit letters for length, clarity, and conformity to our editorial style.

parate treatment—however motivated—would result in “a significant segment of the population [being] excluded from equal participation in the benefits of society,” to quote the authors. But it was only where exclusion resulted from racial discrimination that the framers of the laws wanted to intervene—not where lending decisions were made for nonracial reasons. It would be the sheerest folly to suggest that institutionalized racial discrimination is consistent with either the letter or the spirit of the law.

The framers’ intent aside, it would be highly objectionable, as a matter of both law and policy, to have a legal scheme that allowed or encouraged discrimination against some while forbidding it against others. Such a scheme would “deny…the equal protection of the laws” required by the Fourteenth Amendment. I cannot imagine how such a scheme could positively affect race relations or the integration and acceptance of African Americans by lenders.

The authors stop (barely) short of advocating quotas and other forms of reverse discrimination. But they go out of their way to put such options on the table, stating their belief that the options “should be discussed openly, as viable alternatives to present policy.” They are wrong to do so.

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Get Rid of Those Divisive Boxes

In “Why is Mortgage Discrimination Illegal?” (*Regulation*, Vol. 22, No. 4), Stanley Longhofer and Stephen Peters describe the debate that has surrounded the federal fair-lending laws over the last ten years. The latest installment in that debate involves a proposal by the Federal Reserve to alter regulations that prohibit banks from considering race and gender in evaluating loan applications.

The Fed’s Modest Proposal

The regulations that implement the Equal Credit Opportunity Act currently prohibit banks from collecting data on race and gender, for most loans. The Fed proposes to remove that prohibition and to give the Department of Justice (DOJ) access to the race data that banks collect. The Fed notes that DOJ believes “that the ability to obtain and analyze data about race and ethnicity…would aid fair lending enforcement.”

Now the Department of Justice wants to compel banks to gather the data DOJ would use in its pursuit of disparate-impact suits.

The American Bankers Association argues that “the proposal is focused, not on giving tools to banks to help them identify and correct illegal discrimination, but on giving agencies and the Department of Justice enforcement tools … Otherwise the [Fed] would apply the self-testing privilege.” The self-testing privilege gives banks an incentive to identify regulatory violations without having to fear prosecution. If a bank analyzes its lending patterns, identifies a problem, and proceeds to solve it, government agencies cannot obtain the pertinent data “in any examination or investigation.”

The Fed’s proposal states explicitly that the new data on race and gender “do not qualify for the [self-testing] privilege.” It seems unlikely that banks would voluntarily collect potentially self-incriminating data.

Disparate Impact and the Law

DOJ enforces federal fair-lending laws using two conceptions of discrimination: disparate treatment and disparate impact. Disparate treatment is what most people think of as “discrimination”: the intentional application of different standards to different people because of their race, gender, or ethnicity. Disparate impact occurs if a bank’s lending practices result in loan-approval rates for minorities that are significantly lower than loan-approval rates for whites, regardless of the bank’s intentions.

In a disparate-impact suit, DOJ must first establish that a bank policy or procedure disproportionately excludes minority applicants. The defendant bank must then prove that its policy is “justified by ‘business necessity’.” If the defendant cannot show a “clear rationale” for the policy, or if the policy is there merely to save money, the bank will be found guilty, even though it did not intend to discriminate. But even if a bank establishes a clear rationale, it may still be found guilty if DOJ can show that an “approximately equally effective [alternative] is available that would cause a less-severe impact.” Now DOJ wants to compel banks to gather the data to assist the department in pursuing these suits.

DOJ has pursued many novel applications of the concept of disparate impact, but during the Reagan and Bush administrations DOJ never applied the concept under the nation’s fair-lending laws. In a 1995 letter to the banking community, however, DOJ stated that it would begin to pursue disparate-impact suits under the fair-lending laws. Now, DOJ wants to compel banks to gather the data DOJ would use in its pursuit.

A Better Way to Enforce the Law

Even if one admits that disparate impact suits are appropriate, DOJ has other ways to collect the data it needs for those suits. DOJ can subpoena records from a bank suspected of racial discrimination, then hire a research firm to determine the race of mortgage-loan applicants. The research firm might even gather evidence from the alleged victims to substantiate DOJ’s suspicions about the bank’s lending practices.

This alternative would save money for consumers by averting the costly retooling of forms and databases. For example, SunTrusts—which has total assets of more than $90 billion and operates twenty-six commercial banks—estimates that it would have to spend $2.75 million to set up the necessary data-collection system and $500,000 a year to maintain the system. A California bank with $10 billion in assets estimates that collecting the data would require an initial investment of $2.19 million and annual outlays of $944,000. Banks would not absorb such costs; they would pass them to consumers in the form of higher loan-processing fees.

A BEACON FOR OTHERS TO FOLLOW

Many Americans hold the Federal Reserve—and Chairman Greenspan—in high regard. One presidential candidate even joked that he would keep Mr. Greenspan at the Fed's helm even if he were to die in office.

Given its visibility and influence, the Fed should be a beacon of racial hope. As we enter the twenty-first century, the Fed has the opportunity to show that racial classifications are not the solution to the problem of discrimination—that America can and must eliminate the race boxes that distort and divide us. Chairman Greenspan, get rid of those divisive boxes.

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Another Route to Regulatory Reform

In "The Role of Economic Analysis in Regulatory Reform" (*Regulation*, Vol. 22, No. 2), Randall Lutter makes the case for the creation of a federal office dedicated to the independent replication of regulatory agencies' economic analyses.

Although no one who is interested in limiting the size and scope of the federal government can welcome the establishment of yet another Washington agency, Mr. Lutter is quite right in seeing that as preferable to the current situation. As long as it is up to the agencies themselves to determine whether the benefits of their proposed regulations will exceed the costs of those regulations, the results of agencies' analyses will be completely predictable.

As welcome as independent economic analysis would be, however, it would be of limited usefulness if federal agencies persist in misusing science to fit preconceived regulatory agendas. EPA, for example, has a vested interest in the outcome of its risk assessments. The temptation to tweak the science for the sake of expanding the agency's regulatory writ has shown itself to be irresistible in cases ranging from dioxin to chloroform to particulate matter.

> The temptation to tweak science for the sake of expanding EPA's regulatory writ has shown itself irresistable

What is to be done? Risk assessments should be taken out EPA's hands and turned over to an independent organization with no ties whatever to the agency. Such a move would entail abolishing EPA's Office of Research and Development and transferring its functions to a new federal entity. The nucleus for such an organization—which should be a laboratory and not a bureaucracy—is already present in the many highly qualified scientists in EPA research labs around the country. No longer at risk of having the results of their research undermined by agenda-driven regulatory actions at EPA's Washington headquarters, those scientists could make the products of their labor available to state environmental agencies and the general public.

No one should be naïve enough to believe that political considerations will be banned forever from regulatory decisionmaking. But by coupling independent economic analysis with independent scientific research, the crass politicization so evident today can become a thing of the past.

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