POLICY REPORT

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Voluntary Arbitration

By Kathleen and Guy Curtis

"Greater than the tread of mighty armies is an idea whose time has come"
Victor Hugo

Paradoxically, arbitration is both an ancient remedy and a radically new matrix for settling disputes.[1] Until recently, arbitration as an alternative to resolving disagreements has been politely ignored by lawyers and judges anxious to preserve their jurisdiction.

In April of this year, the chief lawyer in the United States, David R. Brink, president of the American Bar Association, finally voiced the gut feeling of thousands of businessmen that "something" is missing in our legal system, that is — "a way to resolve disputes that are not suited to the judicial process or that cannot bear the costs and delays of traditional justice."[2]

Such costs and delays in our traditional justice system escalated unbelievably over the past decade. Even in rural Nebraska courtroom justice engulfs the average client, where it takes three to five years to terminate a civil case. In most metropolitan areas, after looking at the court dockets, the court customer is apt to eschew litigation altogether. Even leaders of the protectively licensed legal profession now call for extra-legal solutions such as arbitration and small claims courts. This would have been unthinkable a few years ago. Because of the clogging of the courts and waiting in line for years to finish a job that should require only several weeks or months, lawyers and judges are not as fearful of competition from the spontaneous market system of arbitration. This change in attitude is reflected by the fact that there are now 42 states that have enacted uniform arbitration laws.[3] An example of the changed climate of opinion of the Bar is the following comment by a private attorney extolling the 1975 Colorado Uniform Arbitration Act: "Arbitration is now favored in Colorado. It is a radical new policy which requires that courts try mightily to stay clear of disputes."[4]

"Even leaders of the protectively licensed legal profession now call for extra-legal solutions such as arbitration and small claims courts."

How To Use Arbitration

The nexus of modern arbitration use is the *Uniform Arbitration Act,* which provides for enforcement and coverage of any controversy, existing or future, contrary to the old arbitration statutes.[5] All that is required by the Act is that the agreement to arbitration be in writing. Voluntary arbitration is based on consent and cannot extend to issues not agreed upon. Thus the Uniform Act satisfies all of the criteria of a model arbitration law: It validates consensual agreements to arbitration for both existing and future disputes, eliminates technical obstacles, and promotes prompt resolution and enforcement of the award. It also makes clear that courts should not supersede the function of the arbitrator as to the merits of the controversy and should limit their involvement to enforcing the arbitration agreement or award. Under the Act the usual rules of evidence and procedure do not apply. Arbitration awards are attuned to the "law of the shop," rather than to legal points. No stenographic report or transcript is required. The parties themselves may choose the arbitrator, who does not have to be a licensed attorney or licensed anything. The clause or provision in a contract does not have to be complicated. Stripped of legal cant, it may be worded as simply as the following in order to be enforceable under the Act:

> Any dispute arising under this contract shall be arbitrated before a neutral arbitrator. In such event, the parties shall promptly agree upon an arbitrator. If they cannot agree, either may request a panel from the American Arbitration Association. The parties shall alternately strike names with the last remaining person being designated as the arbitrator. The determination of who shall first strike shall be by lot. All fees and expenses shall be shared equally and the arbitrator's award shall be final and binding on the parties.[6]

Versatility of Arbitration

The following case is only one example of the type of dispute tailor-made for voluntary arbitration.

Mr. Jones, after finally finding a job, buys a used car because it is the only way he can get to his new job at an outlying factory. The car quickly breaks down. The dealer claims that any prob-

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EDITORIAL

The Revival of Protectionism

Whatever one thinks of his political views, former Vice President Walter Mondale has always cultivated an image of a calm, reflective statesman. While one might disagree with him, he never seemed to be a rabble-rousing politician. Apparently, however, Mondale has decided that calm reflection is not sufficient for these turbulent times in which we live.

Japanese cars really get Mondale's dander up. "We've been running up the white flag, when we should be running up the American flag . . . . What do we want our kids to do? Sweep up around Japanese computers?," he cries.

Warming to his subject, the distinguished ex-senator declares, "We have got to get tough — and I mean *really tough!* — with nations that use our markets but deny us their markets! And I'll tell you today that if you try to sell an American car in Japan, you better have the United States Army with you when they land on the docks." One wonders if Mondale has hired John Connally as an adviser.

Despite his best efforts, Mondale will have his work cut out for him in getting the protectionist vote in the 1984 presidential primaries. Edward Kennedy says, "We must insist that other nations stop dumping their products at subsidized prices and driving American companies out of business." Senators Gary Hart, John Glenn, Ernest Hollings, and Alan Cranston have joined Kennedy in sponsoring protectionist legislation.

But Democrats are not alone in the return to protectionism. Republican Sen. John Danforth reluctantly acknowledged last year his sponsorship of several protectionist measures. "I keep telling myself I believe in the free market, I don't believe in bailouts. But I keep voting for them." *Conservative Digest* headlines "How We Let Our Businesses Get Shafted Overseas." Even free marketeer Lew Lehrman, in the waning days of his bid for the New York governorship, was heard to denounce "vicious Japanese and Canadian exporters."

The Reagan administration's record is far from perfect as well. While the administration did decide to open the American economy to an invasion of inexpensive foreign shoes, it placed restrictions on sugar imports and negotiated "temporary, voluntary" quotas on Japanese autos. Trade Representative William Brock has recently called for extending the temporary agreement. Just before election day, President Reagan told a campaign rally that the United States would provide $1.5 billion in credit subsidies to assist agricultural exports. The next day he told another campaign audience that the administration had negotiated a "voluntary" quota on European steel imports, in order to counter the Europeans' sneaky habit of subsidizing their exports.

The rhetoric of international trade probably encourages protectionist attitudes. Politicians — as well as business and labor leaders — use terms like "dumping," "invasion," "war," "ruthless." It certainly sounds like something that calls for a tough American defense. But what do these terms mean? They mean that someone is selling Americans things they want at prices they choose to pay. The protectionist responses mean forbidding Americans to buy what they want, or forcing them to pay more for it.

Protectionism cannot create jobs. It cannot help the American economy. In the long run (not very long at that) free trade creates more jobs than it eliminates and gives us all a higher standard of living. One of the most fundamental concepts of economics is the division of labor. Every individual specializes in producing goods or services where he has a comparative advantage. By extension, every nation (which is just a name for many individuals) should produce those goods and services at which its people have a comparative advantage.

When we buy goods from companies in other countries, we pay for them with dollars. Eventually people in those countries will have to use their dollars to buy American products. Otherwise, we will have gotten our Japanese semiconductors and European steel for the price of green paper. It is silly to try to "increase" exports. As Milton Friedman succinctly explains, imports are what we want; exports are the price we must pay for them.

Some jobs, of course, will be eliminated as Americans choose to buy foreign products. The American automobile industry may never return to its former size; perhaps our steel industry is also overbuilt. But there are other industries where we will produce the goods and services that will pay for our imported cars and steel. What are those industries? Perhaps computers, perhaps entertainment, perhaps medical technology. Only competition in a free international economy can lead us to find those areas in which we have a comparative advantage.

The political problem with free trade is like that with other economic processes. It is easy to identify the businesses that have failed and the jobs that have been lost because of imports. It is less easy to identify the consumers who pay more for protected goods or the jobs that are never created in industries that could have used American capital more efficiently. The beneficiaries of protectionism, therefore, are visible and organized; the victims are invisible even to themselves.

As protectionist sentiment spreads across the political spectrum, those who understand free trade should be concerned. The last thing an already beleaguered economy needs is a fresh dose of controls on consumers and producers. ■

Voluntary Arbitration (Cont. from p. 1)

lems with the car were caused by Jones. Jones withholds the next installment on the car and the dealer attempts repossession. Because Jones cannot go to work, he is laid off and his paycheck is withheld. He cannot now pay the rent and is threatened with eviction. Jones cannot afford the time and expense of attacking his multiple problems with the car dealer, his employer, and his landlord through the courts.[7]

Litigation by state courts would be extremely slow and costly. Voluntary arbitration, on the other hand, offers a speedy, binding resolution through a decision made by a neutral party who possesses expert knowledge in the technical area in dispute.

Insurance companies already use arbitration to adjust claims among themselves, without the use of courts. Auto accident cases make up a large portion of court workloads. Typically, accident victims prefer the courts, hoping for sympathetic jurors who will render an emotionally motivated verdict to the victim for pain and suffering. But he might draw miserly jurors who are not trained to understand loss of earnings and other complex issues of damages and liability and would be unsympathetic to unconscionable demands. Even if a victim gets a huge verdict, he may wait years before the trial and appeal is over, and the legal and other costs may squeeze out half of the award.[8] A panel of professional arbitrators would be far better qualified to hear, analyze, and evaluate technical evidence than an amateur jury system of "ignorance times twelve." The Accident Claims Tribunal Division of the American Arbitration Association handles cases of this nature in four to eight weeks.[9]

Arbitrators serve as impartial "judges" to privately settle disputes between labor and management. In fact, even the U.S. government has waived its right to the use of its courts when it has referred certain labor disputes between the Postal Corporation and its employees to the private American Arbitration Association for resolution.[10] The number of cases submitted to arbitration has increased fourfold in the last 15 years.[11] The advantages of arbitration are endorsed by public policy.[12]

Small businessmen should find the arbitration remedy particularly attractive. The costs of settling a dispute using court litigation may far exceed the amount of the award. A survey of small businesses in Nebraska shows a surprising 21% of Nebraska businessmen who have at some time been involved in some form of arbitration. Fifty-five percent of urban respondents to the survey and 32% of rural respondents were aware of the availability of the arbitration remedy.[13]

Voluntary arbitration has a rich tradition in the commercial arena. In the Middle Ages, merchants took disputes to a private, extra-legal forum, the Fair Court of St. Ives, which delivered timely settlements to merchants who met in the marketplace and were likely to be there for only a certain period of time. Despite the fact that the Fair Court's decisions weren't enforceable by the sheriff, businessmen used the extra-legal forum extensively. Both parties agreed to abide by the decision of the arbitrator before they submitted the dispute to the Fair Court. A party who broke the agreement couldn't be sent to jail, but neither could he expect to stay in business long.[14] Today the courts do enforce decisions by arbitrators. In most states, the courts will not reverse an arbitrator for mistakes in fact or law. A court's inquiry into the arbitrator's decision is limited to questions of misconduct or violations of basic due process.

Private arbitration gained momentum at the time of the American Civil War due to disruptions of cotton deliveries to England. The overload of cotton contract claims in the courts caused Liverpool merchants, who handled the bulk of the cotton trade, to form the Liverpool Cotton Association and to agree to insert arbitration clauses in all their contracts. Soon the Corn Trade Association and General Brokers Association followed suit.[15] In recent years, arbitration

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In This Issue

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has been adopted in such areas as community disputes and patient complaints in hospitals.

Recent uses of arbitration in the commercial area include:

—contractor-architect-owner contracts
—no-fault and other insurance claims
—partnership agreements
—disputes between brokers or broker-customer disputes
—disputes between realtors
—condominium and time-sharing agreements
—homeowner warranties

Other types of commercial disputes that lend themselves to arbitration include:

—breach of contract cases
—landlord-tenant disputes
—franchisor-franchisee disputes
—collection matters
—consumer complaint disputes
—corporate dissolution disputes

The use of voluntary arbitration should be considered in non-commercial areas as well, such as the following:

—domestic cases, on the issue of division of property
—condemnation cases, on the issue of value
—wills and estate cases involving multiple parties or questions of valuation
—attorney-client disputes
—trademark infringements[16]

Advantages of Voluntary Arbitration

Perhaps the most appealing aspect of voluntary arbitration is that it allows individual sovereignty. Individuals, with subjective valuations and desires, set up the arbitration procedure according to their perceptions of the best way to solve the dispute. Statutory law governing procedure or evidence may not be conducive to solving the particular dispute at hand. Arbitration lets the parties to the dispute demonstrate their preferences when they agree upon an arbitrator and when they draft procedural rules tailored to fit the conflict. The inflexible nature of state courts deprives the individual of sovereignty. Once the individual determines to go through the litigation process, he has very little decision-making power left. He is circumscribed by the formal rules of evidence and procedure as well as the particular court and judge that may happen to qualify jurisdictionally.

The Uniform Arbitration Act's enforcement of agreements to future arbitration facilitates business planning. The precedent that individual arbitration settlements could set would enhance coordination of businessmen's actions. In the arbitration agreement, parties may set out an appeal structure, although usually the initial arbitrator's decision is final. Contrast this with the uncertainties and costs facing a party who achieves a judgment from a county court that remains frozen pending multiple appellate reviews.

"In the arbitration field, the price system allocates resources. A legislatively created judicial system does not work under such supply-and-demand principles."

The current predicament of the courts is partially due to the method of resource allocation used for the judicial system. The number of judicial personnel is determined by legislation which designates judicial districts and the number of judges and administrators for each district. In the arbitration field, the price system allocates resources. As parties increasingly turn to the arbitration remedy, the supply of arbitrators will increase accordingly. For example, if arbitration was used extensively in Detroit to settle labor disputes and then the auto industry in that area collapses, it would reduce demand for labor arbitration. Resources previously allocated to labor arbitration in Detroit will shift elsewhere. A legislatively created judicial system does not work under such supply-and-demand principles.

Court costs are set by legislatures. This system is subject to no internal or external competition, and parties must litigate in the specific court that has jurisdiction. The state judicial system and the American Bar Association's licensing of lawyers creates a monopoly on dispute resolution. Arbitration, though, is subject to beneficial action from the inside; i.e., arbitrators compete with other arbitrators, as well as the courts.

Long, drawn-out litigation embitters and polarizes disputants. Arbitration offers a more congenial means of settlement when both parties desire resolution but cannot come to agreement on their own. Labor arbitration is a good example of a case where both labor and management desire a solution that will enhance their working relationship rather than destroy it. If parties know that any dispute will be arbitrated, they will be encouraged to resolve grievances before they reach arbitration.

Arbitration is designed to take advantage of specialized knowledge. Suppose we are faced with a conflict over a bridge construction contract. The judicial system is designed so that engineers must articulate technical information for the judge and jury. Although lawyers may perform a useful function when they extract from technical information the pertinent points for litigation, it's easy to imagine that technical subtleties crucial to the dispute may be lost as the information passes through the legal system. If the parties agree to submit the bridge dispute to arbitration, they may choose an arbitrator who has engineering knowledge as well as a good reputation for impartial judgment.

Repeated reference has been made to the time-saving advantage of arbitration. Since time is a valuable good, people demand compensation for having to forgo immediate satisfaction. The interest rate compensates individuals for sacrificing present consumption for future

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Milking The Public — 1982

by Michael McMenamin

Last winter it seemed a safe enough observation that the dairy lobby was the biggest loser when the Agriculture and Food Act of 1981 was approved late in December. For the first time since the farm subsidy program began in the 1940s, milk price supports were severed from any connection with "parity," i.e., the index for determining price supports based on the relationship of farm prices to prices of non-agricultural goods and services during the pre-World War I period from 1910 to 1914. Instead, the 1981 Farm Bill provided for a series of modest fixed price support increases during each of the next three marketing years that were unrelated to parity.

Legislative victories, however, frequently have a way of turning to ashes in the victor's mouth. The Reagan administration discovered this anew in May when it admitted that despite its successful efforts in the 1981 Farm Bill to keep dairy price support levels from rising, the continuing production of dairy products for 1982 was expected to cost the government a record high $1.94 billion. Or as Agriculture Secretary John Block put it, American taxpayers were being charged at the rate of $250,000 an hour to pay for surplus dairy products that American consumers were willing to purchase voluntarily. As a consequence, Block asked Congress to give him the authority to reduce dairy price supports in 1982 from the current level of $13.10 per hundred pounds (cwt.) to as low as $12.00 per cwt.

Will taxpayers benefit in any substantial way from Reagan's newest proposal to reduce dairy price supports? Will reducing price supports actually save the government money? Not necessarily. Certainly the government will spend less with price supports at $12.00 per cwt. than it would at $13.10 or higher. But whether it spends more on price supports in 1983 than it does in 1982 is still an open question. USDA estimates show that a $12.00 per cwt. price support level could save the government as much as a billion dollars in fiscal '83. But similar USDA expenditure estimates in February, based on current price support levels, were some $400 million too optimistic by May. Any group making a $400 million mistake in only four months should not find a $1 billion error over a 12-month period beyond its capacity.

The reasons why USDA makes such mistakes in forecasting are not difficult to understand. America is blessed with enormously efficient and productive dairy farmers who respond with alacrity to the incentives offered by their government. Consider the following reaction of a dairy farmer in early 1981, quoted in *Barron's,* when asked how he would respond to a dairy price support reduction:

> Oh, we would just increase our output to lower our unit cost and to keep up our money flow. Everything we buy will not go down, so we have to have more revenue if we're going to continue. Your marginal producers may get out, but your professionals, your good operators, will just increase milk output.

With attitudes like this endemic among dairy farmers, no "reform" of present government policies will solve the problem of overproduction. In fact, it's going to get worse. Milk production increased by 4 billion pounds in 1981. Per-cow production is rapidly approaching 1,000 pounds per month, 2½ times as much milk as cows produced 30 years ago.

No combination of dairy farmer self-restraint and government subsidy is going to stop these trends. Unfortunately, no one in official Washington is looking out for consumers on a systematic basis. Not only do price supports cost taxpayers money, but so do federal milk marketing orders. Under these "orders," the USDA conspires openly with huge regional dairy farmer cooperatives — some of them in the Fortune 500 — to fix by law excessively high minimum prices which processors must pay dairy farmers for their raw milk.

There is a certain element of "Catch-22" about the entire federal milk system: Heads, the dairy lobby wins; tails, consumers and taxpayers lose. Whatever milk consumers refuse to buy in supermarkets because of high prices, the government — at taxpayer expense — will buy.

The dairy lobby, led by the National Milk Producers Federation, wants to save the price support program and milk marketing orders and dump the surplus on the world market at prices far below those in this country.

The Reagan administration's only concern is the high cost to the government of dairy price supports. This is not an unpraiseworthy attitude but ignores the major transfer effects on consumers of the milk marketing orders and the monopoly power of the giant dairy farmer cooperatives protected by the orders.

The plain truth is that the giant dairy cooperatives in this country do not need dairy price supports or the cartel-like protection of federal milk marketing orders to survive. It is nothing more than an elaborate form of welfare. And with ever more productive cows, the dairy surplus is not going to be eliminated even with the cuts in price supports proposed by the Reagan administration. What must be done is to return dairy farming to a free market — cut off all price supports and at the same time abolish the federal marketing orders. It is the only solution that gives consumers the benefit of competitive prices and eliminates the burden on the taxpayers. ■

Michael McMenamin, a Cleveland attorney, is the co-author of *Milking the Public: Political Scandals of the Dairy Lobby From LBJ to Jimmy Carter.* This article is based on a study published by the Cato Institute.

Radio Spectrum Allocation: Government or Free Market

Every month the Cato Institute sponsors a Policy Forum at its Washington headquarters, where distinguished analysts present their findings to an audience drawn from government, the public policy community, and the media. A recent Forum featured Cato associate policy analyst Milton Mueller, author of a Cato study entitled "Property Rights in Radio Communication: The Key to the Reform of Telecommunications Regulation." Mueller is currently working on a book on telecommunications regulation. Commenting on Mueller's talk was Samuel Simon, executive director of The Telecommunications Research and Action Center (formerly the National Citizens Committee for Broadcasting).

Milton Mueller: The topic of spectrum allocation is an extremely complicated and many-faceted one. I'm going to focus on the impact of radio communications regulation on freedom of speech.

In 1964 a Pennsylvania radio station, WGCB, broadcast a 15-minute diatribe by the Rev. Billy James Hargis. The object of Hargis' wrath was a book by Fred Cook, the journalist, called *Goldwater: Extremist on the Right*. Cook was taken to task by Hargis for a number of things, among them being a Communist. And when Cook was denied the opportunity to reply, the FCC ruled that WGCB had violated the fairness doctrine. Red Lion Broadcasting, which owned WGCB, decided to fight the case on First Amendment grounds, and they took it all the way to the Supreme Court. In 1969 the Court issued a landmark opinion which I would like to quote at length for you because it bears directly on the question of spectrum allocation. The Court said:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses, but there are only 10 frequencies to allocate, all of them may have the same right to a license, but if there is to be any effective communication by radio, only a few can be licensed, and the rest must be barred from the airwaves.

The Court concluded that:

> Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.

This decision makes it very clear that there is a tension, if not a contradiction, between the First Amendment as it applies to print and the FCC's power to allocate and license radio frequency spectrum users. In fact, when the First Amendment was written it was intended to prohibit any licensing or prior restraint upon the press. But this form of prior restraint or licensing is literally built into our system of frequency allocation.

A Cato Institute Policy Forum

One of the primary opponents of First Amendment parity between telecommunications and print today is Ralph Nader. He argues against it on these grounds:

> The difference between TV stations and newspapers is elementary. You or I or anybody else can get together and buy a newspaper — even if it's just a mimeograph machine in a basement — but we can't get together and put up a transmitter and start broadcasting. When somebody sets up a newspaper, it's theirs. The readers don't have a property right in a newspaper, but the public airwaves began in the public domain. A certain portion is given to the licensee to use for private profit. He becomes the trustee for a public property right.

Now, while Nader and I have our disagreements over policy, I think the point he makes here has some validity. What he's saying is that First Amendment rights, as we understand them, are dependent upon a certain kind of political economy, a certain legal and regulatory system. He's saying before you can have First Amendment rights as the press has, you have to have a certain kind of market economy in which there is open entry, in which people can set up a transmitter and start to broadcast, and there are private property rights once you have this kind of a system. In other words, you control the channel and you have the right to determine what goes into it.

Now, this is a very crucial point, as we'll see later. The broadcasting industry, advocates of deregulation, to my surprise seem to accept the scheme of licensing. What they want is the deregulation of that licensing. They want to remove the obligations that go along with that license. In other words, they want the privilege without the obligations. They tend to deny that the airwaves are public property, but they don't claim them as private property.

What I'm going to do here today is stake out a third position. I'm going to challenge the assumption that scarcity in radio necessarily means that FCC licensing and allocation is needed. I think that there is an alternative — a workable, technically feasible alternative to FCC licensing and allocation — and that is a system of freely transferable property rights in radio communication. Such a system would put radio communication on the same First Amendment basis as print, it would make radio as inexpensive and as accessible to the public as print, and it would be more efficient and pro-competitive than the present system.

Let's start with the inherent problems with the present system. In 1926, as hundreds of radio stations were set up in the wake of a court decision, the problem facing regulators was one of allocating or rationing scarcity. The Radio Act of 1912 had established no mechanism for doing so. Without a kind of rationing principle, chaos developed in radio. But this shouldn't surprise us. Certainly chaos in land use would develop if people simultaneously tried to use the same acre of land for cattle grazing, highway construction, or housing. So government stepped in as the allocator of scarcity, but such scarcity does not necessarily mean that the government has to be the allocator. As the analogy to land suggests, another way of handling the problem of scarcity is to define exclusive rights which are owned by particular people, allow them to exchange these rights, and a price system develops. This means that the price rations the scarcity of radio channels.

At the time radio was so poorly understood and so new that it was not clear how to define a system of private, freely transferable rights in radio.

Partly because of this misconception and partly for other reasons, the FCC in 1926 established a purely administrative system of allocation. The problem with this system — and it's a very serious problem — is that once you remove it from any kind of market, in other words, once all the decisions are made by a government bureaucracy, you have no price system. You do not have the trading of these rights to channels going back and forth, and therefore you have no idea how scarce they are — no way to quantify how much they cost to use. And without a price system you simply don't know how to use the spectrum most efficiently.

Without prices what you get is a very slow, a very politicized, and very costly legal and administrative process. A study by the National Telecommunications and Information Administration estimated that a typical comparative hearing, which is a process by which people try to get channels from the FCC, can take one or two years and cost between $100,000 and $200,000.

The other factor which is becoming very significant as new service is made possible by new technology under the market is the fact that the allocations are very arbitrary. Let me give you a specific example. There is a new and very important service called the Digital Electronic Message Service. The FCC has just authorized, I believe, seven licensees to provide this service. They allocated seven channels to it. Now, the question is, why seven? There were people excluded from this. Why wasn't it 10? Why wasn't it 15? Why wasn't it 20? How do they know how many DEMS channels we need. Well, the answer is they don't know. They guess. And by guessing they set an absolute limit on the number of people who can enter that market, and thereby they restrict competition in that market.

This leads to my next point about the present system. It is very anti-competitive. To get new channels, to enter the market in any particular service, requires an enormous investment of time and money. The burden of proof is always on the newcomer. It can take five to 10 years. And every step of the way you have to fight the incumbents in the industry.

With this in mind you might say that there is some justice in the Naderite view of channels as a privilege under the present regulatory system. But it seems to me that the answer is not to increase regulation of the industry but to remove the privilege. We can do that by creating a system of property rights in radio transmission. I recognize that I don't really have time to go into the complexity of replacing the FCC with a frequency coordination-based system. I do believe, however, that it can replace the present system, that you can create property rights based on a transmitter's location and inputs, that you can eliminate all service allocation, that you can eliminate all licensing criteria other than interference, and you can eliminate all restrictions on the sale or transfer of channels — the only requirement being that people register their inputs when they're going to set them up so that information can be used for frequency coordination.

Now, let's look at the political dimension of frequency coordination. Obviously, it gives transmitters a property right over their channels. In other words, they would have absolute control over what information goes over that channel. At the same time it does that, it subjects them to open entry, just as in print. So you set up the same kind of political economy essentially that you have governing print, and I believe that the same First Amendment rights should therefore apply. It allows service allocations to evolve as needed rather than relying completely on the arbitrary FCC decisions. This is pro-competitive because it means that the use of the spectrum can shift as a market demand for various telecommunications services shifts.

What we're dealing with is something very close to the Nader prerequisite, that First Amendment rights in telecommunication are dependent on open entry and the existence of freely transferable private property rights. I think that this kind of system is not only more efficient, but I think we have to recognize that in a society that is rapidly becoming very dependent on its telecommunications services, that freedom of information and decentralization of power in this vital area is a policy must — something we have to do as soon as we can.

Sam Simon: I would like to compliment Milton on the thoughtfulness of his work. I've always believed that those who advocated market systems for the allocation of frequencies are much more intellectually honest in their use of the term "deregulation" than those who would simply grant the licenses that are now out there in perpetuity to those who happen to hold them.

I'm a lawyer by training, so to a large

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Policy Forum (Cont. from p. 7)

extent my comments will focus on the legal and constitutional ramifications of the system proposed. I think Milton seems to have left the consumer, the receiver or the audience, out of his analysis. Actually, the issue of the consumer's interest appears to be addressed only in the last paragraph of the last appendix of the paper. And perhaps symbolically that's indicative of where the market system proposal might leave the interest of the consumer. The issue of how the consumer ends up is addressed this way: "The question that remains is whether the choices of receiver owners will directly affect the property structure of radio or whether the transmitter owners or central authority will make these decisions for them." Indeed, that is the question, and I find it difficult to accept a proposal for a market system of privatized telecommunications in the U.S. that fails to address the issue of its impact on the end user.

I also think the analysis fails to address some basic policy questions inherent in the proposal. First and foremost, it is essential to realize that we are concerned here not with just any product, such as widgets or tires or file cabinets or bathroom fixtures. The product in question is speech and press. The Constitution in the First and the Fourteenth Amendment provides that state, local, and federal governments may not abridge those freedoms. The First Amendment talks about speakers and listeners and says that there is a constitutionally protected right to receive information as well as a constitutional guarantee to speak, and, I would say, speak electronically. There is not, by the way — it goes without saying — any constitutional guarantee to the right to own property in the United States, other than the right perhaps to bear arms. The Fifth Amendment merely provides that the government cannot take property without due process of law. So it may be permissible to set up a system of exchanging land and turn that over to private market, and that system does not raise constitutional issues.

The First Amendment right to speech flows to individuals, and I think this is important. Each individual fares equally — you, me, all of us — under the First Amendment. Indeed, the essential dilemma I find in the current government scheme of regulation of radio is basically the question that was raised by Milton: Under what authority does the government license speech at all? I would find a system of governmentally imposed so-called private property rights in electronic speech to be no less offensive to the First Amendment than the existing licensing scheme.

The legal history of the First Amendment in broadcasting has resulted in a perhaps burdensome but rationalized system of balancing the First Amendment rights of the public both to speak and receive information. And, God forbid, I'm not defending the current FCC or past ones. And it may not be the most rationally administered system in the country, and I share the concerns about delaying implementation of new technologies, but these criticisms do not solve the problem of the First Amendment, which is that if an electronic press were to be treated equally with print and voice speech, then any person in the country would — with some minor exceptions — have a co-extensive right to use the electronic medium to speak electronically. In press, for example, the government may not decide that there will be only one printing press at a particular spot in a particular city with a particular distribution system. Yet it seems to me that is what it is essentially doing with a market system as proposed by Milton Mueller.

The Constitution, Congress, and the courts have recognized that there are very limited broadcast opportunities. Congress chose to resolve the conflict between the Constitution and the need to assure that the spectrum was usable by adopting a licensing scheme. That scheme appoints licensees as users of that spectrum and as trustees of the right to broadcast. Their obligation is to represent the communication interest of all other members of their geographic area or community of broadcast who are denied by the government through licensing, or would be through a governmentally established market system, to speak electronically. Thus, the obligations imposed upon broadcasters today, such as to ascertain community needs, fairness, and equal time (despite their administrative inconvenience) are concessions to the First Amendment rights of the audience and the viewer to speak. A trustee is someone who in effect replaces my right to be there talking.

One should not minimize the significance of the rights of the listeners and the viewers under the First Amendment to have access to diverse and antagonistic sources of information and data. The Supreme Court has repeatedly held that such a right exists.

I submit, moreover, that any system of allocation of channels or frequencies or whatever we want to call them, transmitters, must under the Constitution be accomplished in a fashion and a way that is most calculated to protect the interests of all Americans in a diverse and democratic communications system. The real issue then which has not been addressed, it seems to me, is whether a market system would result in a communications system that is democratic and diverse in nature. The question of the impact of the proposed property system on First Amendment values and issues is not addressed.

I am willing to say that in some instances a market system might be compatible with the First Amendment values of diversity of speech and of access to the medium by speaker and listener. But I am unwilling to turn the entire system over to a market approach such as proposed by Mr. Mueller and to see what happens. The paper stresses repeatedly that we cannot hypothesize without actually letting the market work its will and see what happens.

Justice Frankfurter said, "If the government's got to choose who's going to have the right to speak, then it has the obligation, in effect, to exercise due process."

It is clear that the regulatory framework of communications systems has to be addressed, and I think has to be ultimately changed in some fashion. And I would say that those changes have to be in the interest of the people, of the individuals — you and me — who the First Amendment says have the right to speak and to receive.

Milton Mueller: I'm not clear after hearing that exactly why Sam Simon believes that newspapers should be allowed to put anything they want into their news format. I don't believe that anything he said establishes any difference between the political economy of newspapers, the rights of the readers of newspapers vs. the rights of the receivers of broadcast transmissions. If we believe that the public has a stake in major diverse sources of information, why can't this be used as an argument for diversifying the ownership of newspapers by, for example, breaking up the *New York Times* or forcing the *Washington Post* to sell space in its editorial pages to the highest bidder. I really think that this is an essential point, because I think that if there is one thing that history has taught us it is that freedom coupled with a market system in press is better — unquestionably better — than a state-regulated press. It doesn't matter whether you're talking about it from the perspective of the owner of the press or from the perspective of the reader of the press, there is no question that you assure people's rights to diverse sources of information, you create more diversity, and you have a freer and more democratic system if you have a free market and absolute prohibition of any government intervention in the press. That's what we're trying to achieve with respect to radio communication. ■

How Bureaucracy Hurts the Environment

Bureaucracy Versus Environment: The Environmental Costs of Bureaucratic Governance, *edited by John Baden and Richard L. Stroup. The University of Michigan Press, Ann Arbor, 1981. 238 pp. $10.00.*

The 15 contributors to this volume have an important message. They are convinced that both environmental and economic costs of bureaucratic management of natural resources are too high, and unnecessarily so. The main reason is institutional: Authority is given to those who do not bear responsibility for the consequences of their actions.

A classic case is the set of specific numerical emission standards for automobiles in the Clean Air Act Amendments of 1970. The U.S. Congress arrived at these standards without much scientific basis, without technical analysis, and certainly without any consideration of costs and benefits. Only three years later did Sen. Muskie ask the National Academy of Sciences to conduct a cost-benefit analysis. The NAS results were presented in a fashion that seemed to support the action of Congress; yet the statutory emissions standards yield a marginal cost well beyond their marginal benefit. The excessively severe standards had a major impact on Detroit during the 1970s, and very likely damaged, perhaps irreversibly, the competitive standing of the American automobile industry, a major segment of the U.S. economy. The bureaucrats responsible were completely buffered from any consequences of the exercise of their authority.

Some did speak out. In March 1973, the late Sen. Philip Hart called for a reexamination of environmental standards and for proper cost-benefit analysis. He said, "If it can be credibly said . . . that we have caused the expenditure of billions to no purpose or to questionable purposes, the clean air cause will be dealt a blow from which it will be difficult to recover." We can now see that his prediction was correct. In fact, the whole cause of environmental protection may be set back because of unreasonable or unworkable programs of the last decade. Yet rational and quantitative methods for environmental decision-making still seem to be a long way off. Why is that?

Policy Report Reviews

The book examines the causes and remedies for this situation, giving examples from various natural resource topics, ranging from over-grazing on Indian reservations to wasteful timber management and natural gas policy. The latter subject nicely illustrates the perverseness of irrational governmental actions: (1) the regulation of the price of natural gas over the years has produced a predictable result: A gas shortage was created in the early '70s because of overconsumption and lack of incentives for production; (2) the remedy was perceived to be synthetic gas from coal, an uneconomical process helped along by government subsidies for synfuels; (3) the system of regulation of gas pipelines, which sets profits on the basis of invested capital, encourages them to build synthetic gas plants rather than buy cheaper natural gas; (4) the higher-cost syngas is permitted to be "rolled in" with the price-controlled natural gas. Final result: The taxpayer-consumer pays the bill, and the environment suffers.

The editors and contributor M. Bruce Johnson make the following points:

1. Bureaucrats have their own incentives. While they may appear to be more concerned about the public good than (profit-making) corporate executives, they value their salaries and perks, the status of their agencies, and the discretionary budgets they control. Congressmen and senators also like to be re-

(Cont. on p. 10)

Policy Report Reviews (Cont. from p. 9)

elected.

2. The public treasury is considered by them as a common-pool resource.

3. The rewards of giving benefits to small, politically influential groups are great, while the costs are spread over a vast and largely disinterested mass of taxpayers, thus making uneconomical projects possible.

One should add perhaps that cost-benefit analysis is not a very popular subject in Washington since it limits the political choices available to bureaucrats.

—S. Fred Singer
University of Virginia and Heritage Foundation

Energy Prices and Public Policy, *A Statement by the Research and Policy Committee of the Committee for Economic Development and The Conservation Foundation. July 1982. 89 pp. $9.50/$7.50.*

This report is the product of an unusual combination: the Committee for Economic Development, an organization of business leaders, and The Conservation Foundation, a leading environmentalist group. The writers state, "We favor increased reliance on the market system in pricing energy so that production, consumption, and conservation decisions can reflect real costs." Even though the stance for free enterprise is not very firm, it is no doubt significant that business people and environmentalists are finally collaborating to extol deregulation.

The policy statement rebuts the two most common arguments for controlling energy prices — protecting low-income consumers and fighting inflation — and concludes that energy policy is an inappropriate means for achieving either goal. Also, it suggests ways to bring electricity and natural gas pricing more into the market realm. Finally, a market-oriented strategy for coping with oil emergencies is offered.

Hardly being thoroughly free market, it is recommended that to alleviate the disproportionate burden on the poor of higher energy costs (which is the expected initial reaction to deregulation), they "receive adequate welfare increases to help compensate them."

The study argues that price controls do not curtail inflation because lower prices artificially stimulate consumption, while discouraging production and conservation. Besides, there is an inevitable need to increase the controlled prices because without market-evolved, energy-producing industries responsive to natural variations in price, there is an ever-present threat of shortage.

Energy Prices and Public Policy advocates phasing in market pricing in electricity, beginning by replacing rates based on average historical costs with actual, up-to-date replacement costs. General deregulation is "a long-term goal." In natural gas pricing, widespread, immediate deregulation is endorsed. Although an initial hike in prices would occur, the authors argue that allowing the economy to adjust is more desirable than postponing the problem.

The failure of the authors to understand the free market is apparent in the booklet's recommended measures for oil emergencies. The reduced supply of imported oil should be allocated to domestic refiners by a government auction of import licenses. It is also proposed that gasoline prices be permitted to rise to the market levels, taxes on windfall profits be levied, and then a partial rebate to the public be conducted.

While the report by no means qualifies as a free-market approach to energy policy, it is an important step to that end and an interesting example of the points of agreement between environmentalists, business, and free-market advocates.

Brookings Papers on Economic Activity, *No. 1, edited by William C. Brainard and George L. Perry. Brookings Institution, Washington, D.C., 1982. 271 pp. $9.00.*

The latest edition of the well-known *Brookings Papers on Economic Activity* is a compilation of papers presented at this year's conference of the Brookings Panel on Economic Activity. Included are three articles on the gold standard, countercyclical investment policy in Sweden, and the econometric models used to assess Reagan administration policies. There are also reports on the significance of recent wage concessions, the costs of reducing inflation, and general issues in monetary policy. In general, these pieces are written from a modern liberal Keynesian point of view. The gold standard is criticized in the opening essay, while government manipulation of monetary and fiscal policy is advocated in many of the other essays. The articles on econometric models and Swedish countercyclical investment policies deserve strong praise.

Perhaps the most interesting article is Richard Cooper's "The Gold Standard: Historical Facts and Future Prospects." If nothing else, it is a useful compendium of the different arguments against a gold standard. Most notable is Cooper's critique of "gold standard" plans that do not involve dollar-gold convertibility. Cooper rightfully points out that such plans are not a gold standard at all and will do little good and possibly much harm. Cooper's essay also contains an intelligent discussion of some of the problems involved in making the transition to convertibility. The main problem is setting a proper gold-dollar peg that will not upset financial markets in the wrong direction.

Mergers in Perspective, *by Yale Brozen. American Enterprise Institute, Washington, D.C., 1982. 88 pp. $14.95/$6.95.*

Brozen's critique of merger policy and court decisions points out that the main goal of legislation has been to maintain output levels. The Sherman Act (1890) and the amended Clayton Act (1950) seek to curtail mergers resulting in diminished output and higher prices. Yet neither conglomerates nor vertical mergers, common victims of these laws, decrease the number of firms competing with one another, so only horizontal mergers properly fall under these strictures. If economies of scale come with a larger firm size, the conglomeration and vertical integration can exploit these advantages without increasing market shares of the industry.

Brozen says, "No blanket policy fits the varied circumstances of different markets, different technologies, different supplies of inputs, or differing levels and types of managerial competence." Small firms may be most efficient in some industries. If mergers occur in those industries, free competition will shortly deconcentrate the industry and preserve the more efficient smaller units. However, if mergers persist in a free market, this indicates that large firms are more suited to the industry and are therefore desirable. These variations in markets yield government blanket policies counterproductive. Should the government break up the larger firms, economies of scale will be lost and average costs will be greater. To maintain profit margins, higher prices must be set, which are exactly counter to the original goals of regulation. Brozen provides fine examples of cases where efficiency was best achieved by larger firms.

Mergers in Perspective protests that the evolution of court decisions has led to a tendency to condemn merging activity simply on the grounds of bigness. If the courts were to keep the initial goals in mind and incorporate economics into their understanding of the issues, they would more readily conclude that freedom of enterprise should prevail.

The Case for Gold: *A Minority Report of the U.S. Gold Commission, by Ron Paul and Lewis Lehrman. Cato Institute, Washington, D.C. 1982. 227 pp. $8.95.*

For the first time in over 100 years, an official government body met in 1981 to consider the role of gold in the U.S. monetary system. This book contains a minority report written by two members of that commission — Rep. Ron Paul (R-Tex.), one of the staunchest advocates of the gold standard in Congress, and businessman-scholar Lewis Lehrman, recently the Republican nominee for governor of New York.

The bulk of the book is a detailed history of money and banking in the United States dealing with everything from the Revolutionary War "continentals" to the crisis of the 1970s.

The authors conclude their historical review with the lesson that only the gold standard has provided long-term price stability. Our post-1941 experience with fiat currency, they argue, is dramatic proof of the need for a gold standard.

Going beyond the case for gold itself, the authors argue for a free market in money issuance with no legal tender laws or government-issued currency. They present historical evidence that such systems have worked well in the past.

The authors attempt to refute five common objections to the gold standard: (1) There isn't enough gold; (2) The Soviet Union and South Africa would be able to manipulate a gold standard; (3) The gold standard causes panics and crashes; (4) The gold standard causes inflation; and (5) Gold is subject to undesirable speculative influences. They offer both economic theory and solid data in answering these objections.

After reviewing the arguments in favor of a gold standard, the report turns to a discussion of the transition to monetary freedom, setting out the specific laws that would have to be changed in order to achieve a free-market gold standard. The authors also examine the effects of the transition on real estate, agriculture, heavy industry, small business, exports and banking. ■

Voluntary Arbitration (Cont. from p. 4)

consumption. Litigation makes people wait longer for satisfaction and without the requisite compensation for the valuable time elapsed. If court litigation offered better resolution of disputes than arbitration, perhaps the extra time involved would be worth it. As we have seen, however, arbitration is designed to meet the special requirements of a particular case, thereby offering a better resolution — otherwise no person would voluntarily opt out of the state system.

Arbitration is a valuable market forum controllable by the parties themselves. It is a voluntary ordering of disputes which should be promoted. ■

[1]The earliest state arbitration statutes were patterned after the English Act of 1698. Richard E. Lerner, *New York Law Journal*, July 9, 1981.

[2]David R. Brink, "Improving Our Justice System Through Alternatives," *American Bar Association Journal*, April 1982, p.384. Chief Justice Burger in his annual state of the judiciary address in 1981 also gave strong impetus to arbitration as a means of resolving disputes.

[3]The Uniform Arbitration Act. The text of the Uniform Act was adopted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association, and has been reprinted by the American Arbitration Association, 140 West 51st St., N.Y., N.Y. 10020. 42 states plus Washington, D.C. and Puerto Rico have enacted arbitration laws similar to the Uniform Act:

[4]William C. Brauer, III, "Arbitration in Colorado," *Colorado Lawyer*, April 1976, p.493.

[5]There would, of course, still be the market remedy of ostracism as a lever of enforcement. The party refusing to go along with the arbitration would be "blacklisted." Morris and Linda Tannehill, *The Market for Liberty* (published by the authors, 1970), p. 65.

[6]Brauer, p.486.

[7]Brink.

[8]William C. Wooldridge, *Uncle Sam, The Monopoly Man* (New Rochelle, N.Y.: Arlington House, 1970), p.107.

[9]Ibid., p.103.

[10]Ibid., p.102.

[11]J. Joseph Loewenberg, *American Arbitration Journal* 37 (March 1982): 50.

[12]Ibid., p.50, citing *United Steelworkers* v. *American Manufacture Co.*, 363 U.S. 565 (1960); *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[13]Frank S. Forbes, "The Arbitration of Small Business Disputes: The Potential for Nebraska," *Arbitration Journal* 35 (March 1980): 21.

[14]Wooldridge, pp.94-96.

[15]Ibid., p.99.

[16]Harry N. MacLean, "Voluntary Arbitration as an Alternative," *Colorado Lawyer*, June 1981, pp.1308-9.

"To be governed . . ."

It's not big government, it's just services

As unemployment climbs throughout the country, metropolitan Washington, with a jobless rate of 6 percent, demonstrates once again the strength of a service economy over one with an industrial base.

—*Washington Post,* Oct. 9, 1982

The real issue

When asked what type of navy he would like to see in the future [Virginia Democratic congressional candidate John] McGlennon said, "I don't care what kind of ships they build, just as long as they're built in Newport News."

—*Washington Times,* Oct. 14, 1982

The frontier spirit

President Reagan's son, Ronald, temporarily laid off by the Joffrey Ballet, is collecting New York state unemployment checks and has refused help from his parents . . . .

[White House spokesman Larry Speakes] said the Reagans offered their help to the president's son, but he declined. "He apparently wants to make it on his own and the Reagans respect that."

—*Washington Times,* Oct. 15, 1982

The first lady said she was not surprised when young Reagan was laid off last month by the Joffrey Ballet because she knew that most ballet companies have a month's layoff . . . .

"I was very proud of him. We offered to help him and he said no — 'No, I don't want your money. I'm going to do what everybody else does in the company.' "

—*Washington Post,* Oct. 29, 1982

The national security pork barrel

The Senate Appropriations Committee, while claiming to be looking for fat in President Reagan's defense budget, last week ordered the Pentagon to revamp a rocket production program so some of the work could go to a company in Louisiana.

The shift was made for political reasons, not military. The Army says the change could waste $100 million.

In the House, the chairman of the Appropriations subcommittee on defense is demanding that the Navy buy a radar from a contractor in his district.

The Navy says this would waste $2 billion.

—*Washington Post,* Sept. 26, 1982

Just like economists

On Sept. 20, you published a news article with the headline "Unusually Cold Winter is Forecast by Analysts."

As a meteorologist and practicing scientist, I speak for most meterologists when I ask, why do you and other newspapers continue to write up these silly long-range forecasts and present them to the public year after year with a total disregard for the track records of these predictors? The more outlandish the forecast, the more publicity the forecaster seems to get.

I realize that the statement "There is no scientifically proven way to forecast the weather beyond 10 days" does not make good copy. Unfortunately, however, it is the truth.

—Joel N. Myers, president, Accu-Weather, Inc., in a letter to the *New York Times,* Oct. 18, 1982

The courage to smash your competitors

Give San Francisco-based Potlatch Corp. points for guts.

Much of the nation's timber industry supports a bill to help companies reduce possible losses from having to cut high-priced timber on federal government lands.

But Potlatch, a large operator in Idaho, several areas of the South, and Minnesota, is actively lobbying against the bill in Washington . . . .

Many small companies might fail without aid, but Potlatch thinks big companies with federal timber contracts would survive.

—*Washington Times,* Nov. 2, 1982

Surprise

More people were working for the federal government in July than when Ronald Reagan — who pledged to cut the size of the bureaucracy — became president in January 1981.

—*USA Today,* Oct. 15, 1982

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