Readings of particular interest

Final Senate Report on Regulation

U.S. Senate, *Study on Federal Regulation:* Volume 6, *Framework for Regulation* (Committee on Governmental Affairs, December 1978), 305 pp.; Appendix, 839 pp.

This sixth volume of the Senate Governmental Affairs Committee's study on regulation—prepared by economists Leonard Weiss of the University of Wisconsin and Michael Klass of the Federal Trade Commission—presents a framework for evaluating federal regulation. It finds some traditional justifications for regulation to be generally persuasive (natural monopoly conditions, overuse of natural resources, externalities, and inadequate information); and it finds others to be generally unpersuasive, except possibly in the short term (destructive competition, steeply rising prices, promotion of key industries, and protection of established rights). The authors distinguish between market failure rationales and social or "non-efficiency" rationales, accepting few of the latter as plausible grounds for regulation.

The economic impact of regulation is divided into direct costs—federal budgetary expenditures, costs of dealing with the federal agencies, compliance costs—and "indirect or unintended costs" (both general and industry-specific). Indirect cost impacts may be seen in excessive capital investment, excess capacity induced by artificially high prices, constraints on peak-load pricing, regulatory impediments to technological change, and decreased competition. The general inflationary effects of regulation-induced price increases are seen as a result of other costs and not as an independent category. The report suggests that such price increases may not take account of the benefits of some regulations. Various estimates of regulatory costs and benefits are discussed, and it is noted that these estimates frequently diverge too widely to be really helpful. Moreover, the costs of much economic regulation are substantial, while the benefits (particularly as estimated by the ICC) are often nonexistent or ill-defined.

In the chapter on "regulatory options for reform" the authors consider reduced or increased economic regulation, franchise bidding (as for radio stations), nationalization, and (very briefly) federal chartering. The chapter on "incentives versus standards" (almost a third of the book) examines the range of government incentives—for example, direct subsidies, tax preferences, user charges, and standard-setting—and includes discussions of effluent charges and marketable pollution rights. The authors generally prefer market-like solutions to command-and-control regulation and note that incentive mechanisms can be useful even in the safety and health areas. They also note that when the standards approach is considered necessary, compliance costs can be lowered and innovation encouraged by setting standards for performance rather than requiring design features. In discussing the transitional problems of deregulating or changing from one kind of regulation to another the report suggests, based on the CAB example in particular, that these problems may not materialize.

The general summary—besides applying the framework developed in the volume to the specific problem of hospital cost containment—offers some suggestions for determining when regulation is and is not justified. The conclusion is that natural monopoly conditions, "control of external effects," imperfect information, and the desire to prevent the excessive use of natural resources remain valid grounds for regulation or some form of government intervention, although the present means of control are not necessarily the most appropriate. Other justifications do not remain valid.

The volume's overall conclusion, presented in the introduction to the study, is that "much

of federal regulation is justified." However, there is room for real improvement, particularly in economic regulation and also, though to a lesser extent, in health, safety, and environmental regulation. The larger purpose of the study is to "provide the substantive foundations for meaningful and beneficial regulatory reform."

"Hybrid Rulemaking" at the FTC

Report on Trade Regulation Rulemaking Procedures of the Federal Trade Commission, Part I, by Barry B. Boyer, Michael W. Bowers, Helene Toiv, Daniel J. Edelman, Bliss C. Cartwright, Carol J. DeVita, and Jamie M. Bennett (May 1979) (available from the Administrative Conference of the United States), Executive Summary, 45 pp.

The rapid expansion of agency rulemaking powers in recent years has given rise to a corresponding concern in Congress for developing ways to control bureaucratic lawmaking. The legislative veto, regulatory analyses, increased opportunities for public participation, and more intensive judicial review have all been advocated as methods of controlling administrative discretion. One of the major targets for these regulatory reform efforts has been the Federal Trade Commission, with its broad powers to prohibit "unfair or deceptive practices affecting commerce."

When Congress confirmed the FTC's power to issue consumer protection rules in 1974, it opted for a system of procedural restraints to limit the agency's discretion. Now, a study commissioned by the Administrative Conference of the United States and conducted by Barry Boyer of the Buffalo Law School indicates that this approach is not working.

The theory of the statute was to give interested persons the right to challenge the factual basis of a proposed rule in detail through cross-examination and written rebuttal submissions. The Administrative Conference report, which is the first half of a two-part study scheduled to be completed next year, identifies several reasons why this "hybrid rulemaking" process has failed to live up to the expectations of its draftsmen: Interested persons often found it difficult, if not impossible, to learn what the factual basis of a proposed rule really was. After the Magnuson-Moss Act was passed, the FTC launched a wave of ambitious rules designed to restructure trade practices in significant segments of the economy. Many of these rules were based on theories of "unfairness" that were poorly defined and poorly understood, even within the FTC; often, nobody was really sure what had to be proved, by whom, and on what kind of evidence. The confusion was compounded by gargantuan rulemaking records running into the hundreds of thousands of pages. This massive flow of paper overwhelmed the FTC's record-keeping system and frustrated users' attempts to track down key documents.

By limiting cross-examination at the hearings to the crucial facts in dispute, the statute tried to strike a balance between fairness to the regulated and administrative efficiency. Yet, according to the Administrative Conference study, this compromise attempt also was a failure. The FTC found the statutory language difficult to interpret and quickly gave up the effort to restrict questioning to key factual issues. Industry representatives, consumer groups, and FTC staff members were allocated blocks of time and given free rein to question witnesses on any topic they wished. Hundreds of witnesses testified in some of the rulemaking hearings and virtually all of them were subjected to lengthy questioning—including cross-examination on such topics as whether they believed in freedom of choice. The records grew even larger, and legal fees approached the half-million dollar mark for some industry groups resisting the rules.

Boyer and his research staff reserve final judgment on the FTC's hybrid rulemaking procedures until the completion of the second phase of their study—which will cover post-hearing procedures.

Framework for Reform

"Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform" by Stephen Breyer, in *Harvard Law Review*, vol. 92 (January 1979), pp. 547-609.

Many of the proposals for reform of regulation would not significantly change the "effect of the regulation on the regulated industries," writes Stephen Breyer of Harvard Law School. By de-

veloping a framework for analyzing economic regulation, he hopes this article will aid policymakers in fashioning proposals for substantive change and in identifying those regulatory areas particularly in need of reform. The three parts of his analytic framework are market defects that provoke regulation, forms of classical regulation and their problems, and alternative methods that could be more successful than the classical forms. To illustrate the framework, Breyer discusses deregulation of the airlines, regulation of natural gas, pollution control, and the introduction of competition in the long-line telecommunications markets.

Too many arguments made in favor of government regulation assume that it is, at least in principle, "a perfect solution to any perceived problem with the unregulated marketplace." Breyer stresses the typical defects in the regulatory solution and outlines ways to correct the mismatches between the problem that provoked government intervention and the present form of regulation. His analysis focuses on the arguments used to justify regulation, not the conditions that cause it. He assumes an unregulated marketplace to be the norm, an assumption supported by "the intrinsic advantages offered by a well-functioning competitive marketplace." He also assumes that regulation is justified only if it achieves, without disproportionate costs, objectives that reasonable observers would regard as being in the public interest.

The predominant justification for government regulation of the economy has been classical market failure. After describing traditional regulatory responses to this failure, the author suggests alternatives that are, in his opinion, better matches for particular problems. For a natural monopoly (typified by some aspects of the telecommunications industry), he advises cost-of-service ratemaking; for "windfall profits" (as, recently, with natural gas), he finds taxes or deregulation preferable to traditional price and entry regulation; and for "spillovers" (pollution is one example), he recommends taxes, market-based incentives, and bargaining rather than standard-setting. In the case of "excessive competition" (for example, predatory pricing), he would deregulate and resort to antitrust enforcement to police prohibited practices. And where the problem is inadequate information, the use of disclosure regulation is to be preferred.

Breyer recommends that regulatory reform be pursued in three steps: (1) identify a situation where regulation is causing serious harm and where less restrictive alternatives could achieve the desired objectives, (2) produce a detailed empirical study of the regulated industry, and (3) assemble the necessary political support. The airline industry case is examined to illustrate the approach. The author notes that the congressional hearings on airline deregulation were particularly important because they provoked government agencies to focus on the problem and on a suitable policy, because they provided data for a comprehensive factual report that withstood attack, and because they attracted media attention and thus generated public support.

Breyer concludes that Congress can be effective in bringing about substantial reform. But there must be an intellectual framework for identifying a suitable candidate and for conducting a detailed investigation. Ultimately, reform requires "abandoning the simplistic view" that imperfect markets always justify governmental regulation.

Watching Out for "Immoral" Advertising

"The FTC Tantrum against Children's Television" by Christopher C. DeMuth, in *The American Spectator*, vol. 12 (April 1979), pp. 18-24.

The Federal Trade Commission is currently conducting a rulemaking proceeding based on a staff report that advocates a federal ban on all television advertising directed at children under eight. In this article, Christopher DeMuth of Harvard's Kennedy School of Government explores "how the FTC proposal fit[s] into the general trend of increasing government control of the economic life of the nation."

DeMuth concludes that regulatory programs today not only serve the traditional purpose of correcting for market imperfections but also interdict certain markets altogether in order to promote social or moral values. Often, debates about "market efficiency" cloak serious arguments about which *values* government will encourage or restrain.

The Federal Trade Commission Act of 1914 required the FTC to monitor and control eco-

nomic effects and, in addition, to prevent "unfair methods of competition"—a vague statutory standard which, the author says, permitted the agency "to devote its energies not to antitrust matters, but to policing 'deceptive' advertising." In 1938, Congress ratified this practice by amending the act to prohibit "unfair or deceptive acts or practices" as well as unfair competition.

The rationale for regulating advertising truthfulness is that the buyer should be protected from misinformation or unequal information and that this protection would promote efficient markets. But, DeMuth asserts, the FTC's practice has fallen short of the theory: (1) Many of the commission's decisions have had the "baldly anti-competitive" effect of protecting established firms from new ones that are making "aggressive but essentially truthful" comparisons of their products with those of older firms. (2) The commission has pursued cases involving "hard-core" fraudulence where criminal penalties seem more in order than the FTC's mild administrative sanctions. (3) The commission has pursued frivolous cases, such as the challenge to Rapid Shave for its use of a mock-up to illustrate the shaving of sandpaper, a visual metaphor that communicated its message efficiently and entertainingly.

In the children's advertising case, the FTC claims that advertising directed at children under eight is inherently deceptive, because the child consumer does not understand that the advertising is designed to sell products and is therefore necessarily deceived. This "market failure" argument, DeMuth maintains, masks the FTC's true motive—eradication of what Chairman Michael Pertschuk calls an "immoral" commercial activity.

To account for the degree to which both liberals and conservatives accept government regulation to promote moral values in this case, DeMuth notes a shift from concern for market efficiency to interest in collective social manip-

The Richmond News Leader; © 1978 by Chicago Tribune.

"Say, kids, speaking of stuff that's bad for you..."

ulation. This bias, he says, is obviously not peculiar to those who gather at the FTC, or to those of similar anti-commercial bent who conduct the activities of other agencies. Ironically, even the most prosperous come to feel a radical discomfort with the free competitive economy. In the children's advertising case, this resentment of "other people's liberties"—in particular, the assertion of individual self-interest—has found a "target of opportunity" for its struggle against the "sweaty reality of the market."

DeMuth urges opponents of the advertising ban to assert the direct value to children of the free market, in which toymakers and advertisers enhance opportunities for play and in which parental authority is strengthened as it assumes responsibility for guiding children to appropriate choices.

Market and Non-market Failure

"A Theory of Non-market Failures" by Charles Wolf, Jr., in *The Public Interest*, Spring 1979, pp. 114-133.

Charles Wolf of The Rand Corporation undertakes to remedy the lack of a coherent, articulate theory of "non-market failure" to counterbalance the long-standing and powerful theory of "market failure" that has been so influential in extending regulation. By non-market, Wolf means activities undertaken by governments and other institutions with revenues derived from non-price sources. His purpose is to "facilitate comparisons between the inevitable shortcomings of the market and the no-less-inevitable shortcomings of non-market efforts to remedy them."

Market failures, defined as departures from efficiency or distributional equity, take one of four forms: (1) externalities or spillover effects, which can be negative, like noise or chemical pollution, or positive, like the social benefits of education; (2) increasing returns, which can occur in market situations where a single dominant producer with declining marginal costs has little incentive to increase output and lower prices; (3) market imperfections, that is, situations in which the real market differs notably from the theoretical expectations of perfect markets because, for example, consumers do not have access to adequate information; and (4) distributional inequities, which are not market failures in the technical sense but which are considered the key issue by many (although measurements of the success of the market are not normally concerned with distributional equity).

Wolf points out that non-market solutions have their own reasons for failure, reasons that are different from, but comparable to, those associated with market failure. Although non-market failure can be conceptualized using conventional market-failure principles, "distinctive supply and demand characteristics differentiate non-market outputs from market outputs." For example, it is extremely difficult to define the "products" of non-market activities; and because these products are often so hard to measure, there is a tendency to define them in terms of what produces them—their inputs. Other characteristics of non-market situations—the absence of consumer market behavior, as well as the lack of competition and of a profit maximization motive—add to the difficulty of "evaluating the performance of non-market production."

How do non-market solutions fail? Wolf identifies a system of "private goals" he calls "internalities," which are standards within non-market organizations that guide personnel and agencies and that are the criteria they use for evaluating their own performance. Internalities affect the success or failure of non-market activities just as externalities affect the success or failure of market activities, and each causes differences between actual outcomes and socially desirable outcomes. The author lists budget growth, technological advance, and information acquisition and control as three internalities. Although these are also associated to some extent with market activity, Wolf explains, price competition and intra-firm managerial competition limit the "role of cost-inflating internalities in the market." Non-market activities also tend toward failure in the form of "technically inefficient production and rising and redundant costs" as a result of the bureaucratic push to increase staff and output in the absence of a profit maximization constraint. Moreover, non-market solutions, like those produced in the market, frequently have unintended side effects: Wolf gives the example of a 1973 U.S. embargo on Japanese soybeans that adversely af-

fected negotiations over military bases in Japan.

Non-market activities can themselves produce distributional inequities, but often in the form of influence and power instead of income or wealth (as in the market). An abuse arising from this kind of inequity is corrupt practices, which, he asserts, are common in the administration of import quotas or welfare programs. Another distributional inequity, one which involves income, is overcompensation of particular groups in a position to realize special advantages from policy measures that increase the demand for their services—defense and education being cases in point.

Wolf concludes by observing that a theory of non-market failure will help to "consider explicitly whether intervention is desirable at all, in light of prospects for non-market failure." And if intervention is found to be justified, the theory will suggest what might go wrong and thus make it possible to design better policy.

Federalism and Antitrust Enforcement

"State Action as a Shield and a Sword in a Medical-Services Antitrust Context: *Parker* v. *Brown* in a Constitutional Perspective" by James F. Blumstein and Terry Calvani, in *Duke Law Journal*, vol. 1978 (May 1978), pp. 389-441.

In this article, James Blumstein and Terry Calvani of Vanderbilt Law School reconsider the Supreme Court's decision in *Parker* v. *Brown* (1943) and propose a way of accommodating "the competing federal antitrust interests and state autonomy interests." In *Parker*, the Supreme Court held that the Sherman Act did not apply to state action because a federal statute will not be interpreted to nullify a state's authority over its officers and agents, without expressed congressional intent to achieve that result. Blumstein and Calvani point out that, when the Sherman Act was passed in 1890, the concept of "interstate commerce" to which it applied was a very narrow one, and the leading constitutional theory regarded interstate commerce and intrastate commerce as mutually exclusive preserves of federal and state regulatory authority. Hence, conflict between the substance of federal and state regulation was relatively rare. With the expansion in the accepted reach of the federal interstate commerce power, and with the acknowledgment of concurrent federal and state jurisdiction over many aspects of interstate commerce, the potential for such conflict has greatly increased and the significance of the *Parker* exception to the preemptive effect of the Sherman Act has become substantial.

Blumstein and Calvani treat the *Parker* decision as an implicit application of the eleventh amendment, which restricts suits against a state in federal court. The eleventh amendment approach helps explain why the governmental character of an antitrust defendant may determine whether liability exists. The authors also consider the reserved powers clause of the tenth amendment—as recently interpreted by the Supreme Court in *National League of Cities* v. *Usery* (1976)—to be another important basis for the exemption of state activity from federal antitrust challenges. They then summarize the dimensions of the state action exemption today: (1) an attribute of state sovereignty must be involved, (2) the state activity must be an essential governmental function, and (3) that state function must be impaired. Blumstein and Calvani conclude that *Parker* and subsequent cases do indeed insulate certain state activity from federal antitrust laws. (See "Antitrust Comes to City Hall," Joe Sims, page 35.)

But, the authors note, even when state action itself is immune, the effect of state action may be to render private conduct violative of federal antitrust law, by conferring on private entities market power that would not otherwise exist. Applying this reasoning to the medical services area, the authors assert the invalidity of tying arrangements under which patients cannot purchase any hospital service unless they agree to purchase all other medical services that they need from the same hospital. Section 1 of the Sherman Act has been held to render unlawful tying arrangements in which the tying product has "some advantage not shared by competitors." In the medical services area, the authors assert, that requisite market advantage has been conferred by state action—which, though it is itself exempt, does not immunize the private effects which it produces. The authors refer specifically to so-called certificate of need legislation, which seeks to avoid overcapacity by restricting the ability of

some hospitals to acquire certain equipment and to provide certain services. Those hospitals favored with certification are given the market power to tie use of the certified equipment or services to the purchase of other services which are competitively offered. According to the authors, *Parker* v. *Brown* would not insulate these private actions, even though the state certification scheme itself is immune.

Blumstein and Calvani's analysis suggests that the import of the Court's decisions in this area of state-assisted private action is that "federal interests prevail over state regulatory policies except where an essential state governmental function is established which cannot be performed by less anticompetitive means." They argue that their interpretation represents a proper accommodation of competing interests and a manageable standard for approaching the question of anticompetitive state conduct.

Broadcasting and the "Unfairness Doctrine"

The Fairness Doctrine and the Media by Steven J. Simmons (Berkeley, Calif.: University of California Press, 1978), 250 pp.

Steven Simmons, now with the White House Domestic Policy Staff, recounts the legislative, judicial, and administrative history of that aspect of communications law known as the fairness doctrine. He cites case law and legislative history as a basis for his unconventional conclusion that the doctrine emerged in the *early* years of broadcasting. Further, he offers a critique of the doctrine and recommendations for major changes in the law.

Administered by the Federal Communications Commission, the fairness doctrine developed from the rationale that the "public interest" required a substantial and balanced presentation of political and social issues over the airwaves, a scarce public resource. According to the author, the doctrine requires that broadcast licensees not only ensure fairness by providing "an opportunity for the presentation of contrasting points of view" (the "balance" requirement), but also that they "devote a reasonable percentage of . . . broadcast time to coverage of political issues." Simmons believes these admirable objectives have not been adequately realized because of underregulation of coverage and overregulation of balance.

First, the requirement for coverage of public issues has been so cautiously administered, Simmons reports, that until 1975 the FCC had found not a single licensee in default of its responsibility. To prevent the dual problems of licensee avoidance of public affairs programming on the one hand and First Amendment abuse by government intervention in programming on the other, the author recommends that the 1934 Communications Act be revised to require (1) that a relatively high percentage of programming be devoted to news and public affairs, but (2) that content and format be left to the discretion of broadcast journalists, with the sole caveat that the licensee ascertain and consider community needs.

Second, the "balance" requirement has been actively enforced, but in ways that have failed to ensure true program balance, while inhibiting broadcasters from attempting more than minimal public affairs programming. Take, for example, the personal attack and political editorial rules, which require on-air responses if the licensee attacks an individual or a group or endorses one candidate to the exclusion of others in a political editorial. Broadcasters must make intricate judgments as to what programming is subject to these rules, and what is necessary to provide the required "balance" with respect to the nature of the response, the identity of the spokesman, and the format, frequency, and scheduling of the response. The licensee is in constant jeopardy of the time-consuming and expensive litigation that ensues upon a complaint, even though complainants are rarely successful. (In its decisions as to what constitutes balanced programming, the FCC relies extensively on the "reasonable, good-faith judgment of the individual licensee.")

Simmons argues that all balance requirements (except for responses to explicit broadcast editorials) could be dropped from the fairness doctrine with no loss of listeners' rights to be informed of varied viewpoints. There are more than four radio and television outlets nationwide for every newspaper, so why, he asks, cannot political expression vary from station to station, as it does from newspaper to newspaper, rather than within each station? Moreover, Simmons observes, airwave scarcity is giving

way, as it should, to the technology of abundance (through developments like cable TV), so that the fairness doctrine will ultimately become irrelevant to its original purposes. An abundance of communication outlets is, in the long run, a far better way to reconcile media access demands with broadcasters' First Amendment rights than government intervention in an individual station's daily programming.

Mandating Standards

Economic Effects of Government-Mandated Costs, edited by Robert F. Lanzillotti (Gainesville, Florida: University Presses of Florida, 1978), 222 pp.

This book is composed of papers and comments presented at a 1977 University of Florida seminar on government-mandated costs. The editor, Robert Lanzillotti (of the university's Public Policy Research Center) points out that, in spite of growing concern for government regulation of business, there has been an increase in government controls over the "private and traditionally non-regulated sector," essentially through mandated standards.

In discussing government-mandated inflation, Murray Weidenbaum of Washington University (St. Louis) outlines ways of looking at the microeconomic consequences of regulatory programs so as to reconcile the goals of specific programs with national objectives. He describes alternatives to regulation, including voluntary codes of behavior and taxes on pollution, but does not think that eliminating regulation in safety, ecology, and related areas is a "realistic alternative in view of the nation's long-term social goals." A companion paper by Roger Noll of the California Institute of Technology considers the reasons why standards rather than incentives are chosen as a means of achieving social goals. His conclusion: it is not so much a question of principle as of practicality.

Nina Cornell of the Council of Economic Advisers contributes a brief talk arguing that the standard-setting approach, when used alone, is ineffective for achieving safety goals. John Morrall III of the Council on Wage and Price Stability maintains that "benefit-cost analysis . . . should be a major consideration in standard setting"—even for OSHA (an agency that refuses to use cost-benefit analysis), because opposition to its standards is "directly proportional to the potential costs of compliance."

Jacqueline Karnell Corn and Morton Corn of the University of Pittsburgh review the history of mandating standards and regulations affecting human health and put U.S. policies into this historical context. They see OSHA as the end product of sixty years of agitation to achieve a "safe hazard-free workplace" and as embodying a change from the view that injury is the responsibility of the employee.

Milton Kafoglis, now of Emory University, considers the impact of the technological (or standards) approach on small business. Although the data are insufficient for firm conclusions, the indications are that the regulatory process "favors large business" and that performance standards would be better than design standards for reducing the bias.

Ray Gamse of the Environmental Protection Agency evaluates the economic effects of the EPA's program, finding that there is ample information on costs ($259 billion for 1975–84, according to one estimate) and very little information on benefits. One reason for the latter is the difficulty of converting environmental benefits into dollars and cents. In the last paper, Thomas R. Saving of Texas A&M University discusses the regulation of the quality of products and of working conditions. He argues that the premises giving rise to this regulation rarely justify the imposition of standards, and demonstrates, using marginal analysis, that there are genuine losses in social welfare from a standard-setting approach.

Costs of Regulating Hospitals

Cost of Regulation: Report of the Task Force on Regulation (Albany, N.Y.: Hospital Association of New York State, 1978), 83 pp.

According to the Hospital Association of New York State, this study is the "most comprehensive" of its kind "ever undertaken." Questionnaires pinpointing thirty-four areas of hospital operations were distributed to 285 acute-care institutions in New York state. Of this number, a total of 148 (or 52 percent) responded—"a high rate given the complexity of the survey instrument. . . ." The overall purpose

of the survey was to examine regulatory costs in New York's hospital industry for the year 1976. In describing the study, the report notes that it was necessarily state-specific because regulatory requirements differ from state to state—with New York having one of the most highly regulated hospital industries in the country. Moreover, as the report stresses, the need for regulation in an "industry so vested with the public interest" was assumed.

Several limitations to the study are set forth for the reader. Perhaps most important is the fact that the category of costs producing the largest figures, "service-related activities required by regulation," includes all activities necessary to comply with legal requirements, without distinguishing those activities that would normally be performed in keeping with good hospital practice. Other limitations are the possibility that some respondents misunderstood some questions, the possibility that anti-regulatory bias led some respondents to overstate regulatory burdens, and the need for caution in applying findings to other states.

Notable among the study's findings are the following:

(1) 25 percent of hospital costs in the state are a result of meeting government regulatory requirements;

(2) almost 24 percent of all hospital manhours are devoted to regulatory matters;

(3) registered nurses spend 25 percent of their time on regulatory matters;

(4) the cost to New York hospitals and the patients they serve is over $1.1 billion a year;

(5) the administration, personnel, social services, and utilization review departments each spend over 50 percent of their budgets on meeting regulatory requirements.

The study found no significant difference in these costs in different parts of New York state or in institutions of different sizes.

"Forms and reports" turned out to be the second largest category of hospital regulatory costs and the one where changes "will have the largest savings impact." In 1976, respondent hospitals spent a total of 700,000 compliance hours on completing forms and reports, much of it done by supervisory staff. Many regulations (including required forms and reports) were said to be conflicting, overlapping, and unrelated to effective health-care delivery.

Antitrust Comes to City Hall
(Continued from page 41)

Finally, of course, it remains to be seen what actions that might be challenged will ultimately be held to create liability. The antitrust laws incorporate what is known as a "rule of reason" against which particular restraints are measured; this standard gives the Sherman Act "both flexibility and definition" (*United States* v. *National Society of Professional Engineers*, 1978). Under a rule of reason analysis, the particular restraint is evaluated "by analyzing facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Thus, a restraint imposed in the context of a governmental regulatory scheme would be scrutinized within that context and with some deference to the legitimate functions of the governmental entity.

The Shape of Things to Come

In sum, antitrust and competition policy—long familiar concepts to federal regulators—must now become familiar to state and local agencies as well. The current uncertainty merely emphasizes the urgency with which state and local government agencies and officials ought to be examining the regulations and rules for which they are responsible. This new problem will make their life more difficult, but in the end may also help make their decisions better focused and more apt to be in the public interest.

In sum, antitrust and competition policy—long familiar concepts to federal regulators—must now become familiar to state and local agencies as well.

The story is told of the trade association representatives who approached a state governor several decades ago, seeking status as a licensed profession. When the governor asked whether the step they sought would be to their advantage or that of the public, they answered "a little of each." From now on, state and local government officials will have to weigh the "little of each" carefully to see where the balance really lies. It will not be easy. The law schools are very happy. ■