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# Currents

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## In This Issue

Attempts by the new Republican-controlled House of Representatives to reform the regulatory process have been stalled in the Republican-controlled Senate—by a state of mind more than an alliance between status quo Democrats and Republicans. Yet the fight over the future of federal regulation continues. Many members of Congress battle to change specific regulations. And the current system's supporters are busy devising rhetorical as well as political defenses.

This issue of *Regulation* contributes the following to the struggle:

• **Joshua Stein:**  
“Building a Better Bureaucrat”

In the face of assaults from reformers, defenders of a command-and-control federal regulatory system are resorting to an innovative strategy: they loudly criticize the current system, but offer reforms that keep the system's fundamentals intact. President Clinton quotes with favor Philip K. Howard's book *The Death of Common Sense* to demonstrate that he too is concerned about regulations and open to reinventing them.

In a double review of Howard's book and Supreme Court Justice Stephen Breyer's *Breaking the Vicious Circle*, Joshua Stein gives the authors mixed grades. Stein admires Howard's anecdotal assaults on regulatory overkill. An example is New York City bureaucrats stopping Mother Teresa's religious order from opening a homeless shelter because it could not afford a \$100,000 elevator, required by building codes but not necessary for the residents. Howard would give bureaucrats more flexibility to override such regulations.

But Stein asks, if such building-code provisions have little to do with public safety, why does Howard not support their repeal? And if

they are crucial for safety, why would Howard allow bureaucrats to override them?

Breyer offers a more analytical critique of the current system. But Stein points out that Breyer's solution, empowering super-bureaucrats to oversee the system, fails to recognize the inherent limits and inefficiencies of bureaucracies. Stein makes good use of the insights in Ludwig von Mises' *Bureaucracy* in his analysis.

As a bonus, Stein offers a template to help the reader predict how new regulations will develop and grow. The senior editor of this magazine advises the reader to have fun.

• **Stan Liebowitz and Stephen E. Margolis:**  
“Policy and Path Dependence:  
From QWERTY to Windows 95”

One avant-garde excuse for retaining federal powers to intervene in the economy is that certain technologies that get on the market first might not be the best, but they will, the argument goes, have such a lead over latecomers that better products and approaches will never have a chance. Now, many might think immediately of VHS beating out first-on-the-market Beta VCRs, the latter being considered superior in quality. But in Washington's attention-deficit discussions, a more focused analysis is often required.

The order of letters on a typewriter keyboard, known as “QWERTY” after the first six letters—the keyboard arrangement being tapped by my fingertips at this very moment—is said by regulation's supporters to be inferior to another system, called Dvorak, that was not able to break into the market. The QWERTY example is used by those who would put restrictions on, for example, Microsoft's Windows 95 software, which supposedly gives it too great a lead over competitors. (Never mind that IBM personal computers with Microsoft software beat first-in, and in many ways superior, Apple down to a 15 percent share of the market.)

Stan Liebowitz and Stephen E. Margolis show that the typewriter example is, in fact, just plain wrong. No tests ever established Dvorak's superiority. No copy of a Navy study sometimes quoted in support of Dvorak's superiority can even be found. But what is known is that the study was done under the supervision of August Dvorak, the system's inventor and hardly an impartial judge. Finally, the authors provide evidence to suggest that the QWERTY keyboard is less stressful on the hands than alternative arrangements.

• **W. Kip Viscusi:**  
**"Secondhand Smoke:  
 Facts and Fantasy"**

President Clinton and Food and Drug Administration (FDA) commissioner David Kessler have launched a new campaign against cigarettes, attempting to appropriate more power for unelected bureaucrats and shred the Constitution's First Amendment in the process. No doubt the corridors of power and the airwaves will be fouled by secondhand arguments about cancer and heart disease risks from secondhand smoke, called "environmental tobacco smoke" (ETS) by the illuminati.

But in his article, Kip Viscusi shows that while ETS might be a nuisance, there is little good science that suggests it represents a significant risk. Of 11 studies used in the Environmental Protection Agency's (EPA) assessment of workplace lung cancer risks from ETS, only one suggests such a risk with a strong confidence level. All of the studies were of household environments that had longer durations and greater concentrations of ETS exposure than occur in workplaces.

Viscusi points out that the one study the EPA could find that suggested a link between ETS and heart disease was replete with caveats by its author concerning its "unfortunate level of uncertainty." But lack of data did not keep the EPA and other government agencies from making up numbers concerning hypothetical deaths from ETS. Viscusi clears the air surrounding these noxious numbers.

• **Kenneth Chilton and Christopher Boerner:**  
**"Health and Smog: No Cause for Alarm"**

Another smoke screen is put up by those who

would take draconian measures to reduce the ozone in cities to a level considered to provide an "adequate margin of safety" against "any adverse health effects." Kenneth Chilton and Christopher Boerner review medical results of the effects of different ozone levels on individuals. They also make the important distinction between short-term and long-term exposure, and thus short-term lung irritation and long-term, serious problems.

They find that under the current standards, there should be "little or no discernable symptoms for the vast majority of people." But that does not stop EPA bureaucrats from seeking perfection without regard to costs or adverse effects. Chilton and Boerner show that "the costs of attempting to meet a new or additional standard and the value of the health benefits to be gained are unknown." They quote former EPA official Dr. Milton Russell on the current Clean Air Act: "It is almost as if a cancer were equivalent to a cold."

• **James Bovard:**  
**"The 1995 Farm Bill Follies"**

Every five years or so the federal government draws up a new farm bill. Unfortunately, each normally renews a system that guarantees floor prices for farmers, pays farmers to idle land, and pays them to export commodities that they cannot otherwise sell overseas.

In his article, James Bovard points out that the 1990 farm bill had by 1995 cost taxpayers at least a cumulative \$56 billion. Like past farm bills, it exceeded the projected cost, in this case by \$14 billion. The 36 million acres being idled under the Conservation Reserve Program keep America's output down, which perhaps is a reason why the American farmer's share of the world wheat market has dropped from 51 percent in 1981 to only 32 percent today.

Bovard says that "there is no good reason to postpone the abolition of farm subsidies." And that is why the editors in the last issue of *Regulation* picked agriculture as one of the 12 priority targets for action over the next two years.

• **Michael Markels Jr.:**  
**"Fishing For Markets: Regulation and Ocean Farming"**

We round out this issue with a discussion of

another form of farming: farming the ocean. Michael Markels Jr. discusses a plan to fertilize the Gulf Stream to increase the production of fish along the Atlantic seaboard by some 2,000 times. Another potential benefit of such a project would be that more fertile oceans would remove massive quantities of carbon dioxide gas, often linked to environmental problems, from the Earth's atmosphere.

As difficult to overcome as the technical problems are the regulatory ones. The ocean is generally treated as a commons, and, as with every commons, there is little incentive to make long-term investments to improve output and every incentive to get what one can before others do. Markels reflects on what sort of changes might be needed to make it possible for aquatic entrepreneurs to make the oceans bloom.

*Edward L. Hudgins*

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## Is Regulatory Reform Dead? Should Anyone Care?

For the moment, a bill that would reform the principles and processes of federal regulation is stalled in the Senate. The bill, cosponsored by Senate majority leader Robert Dole (R-Kan.) and Sen. Bennett Johnson (D-La.), would require most federal agencies to conduct benefit-cost analyses and risk assessments before issuing rules with an annual cost of \$100 million or more and would make several major changes in the Administrative Procedure Act. (A somewhat stronger bill passed the House in March.) Even after a series of major concessions, however, three attempts to invoke cloture to permit a vote on the Dole-Johnson bill did not receive the necessary 60 votes. Opponents raised new demands after each concession, leading Dole to question whether they were bargaining in good faith. In the end, the opposing Democrats objected to the repeal of the Delaney Clause (which bans even trace quantities of carcinogens in prepared food), revisions to the rules for listing airborne toxins, and allowing industry personnel to participate in the peer-review process and to petition agencies to review existing regulations. The bill may be revived this fall, but only if Dole can win two more votes for cloture without major new con-

cessions.

How important is it to revive the Dole-Johnson bill? What issues are at stake? The major shared objectives of the original Dole bill and the parallel House bill are the following:

- To provide general guidance to federal agencies on the criteria for making rules within their specific areas of regulatory authority.
- To allow private individuals and firms to petition agencies to review rules to determine whether they meet those criteria.
- To subject the agencies to judicial review to assure that they follow the criteria and processes in the bill.

The House bill, in addition, would establish a regulatory freeze retroactive to November 20, 1994. That would permit a review of all regulations issued since that date by the criteria in the new omnibus bill. The Senate bill, in contrast, provides general authority for Congress to veto any final regulation within 60 days after it is issued.

## Problems

The problem is that the latest version of the Dole-Johnson bill includes so many concessions that its effectiveness as a discipline on federal regulation may be minimal:

- An agency need only show that the benefits of a rule "justify" its costs. This is a *much* weaker standard than the maximum net benefit standard in the current executive order. An agency may waive even this weak standard in "an emergency or health or safety threat that is likely to result in significant harm to the public or natural resources."
- An agency may reject a petition to revise or repeal an existing regulation if it has already been included in the agency's rule review schedule. This provision appears to allow agencies up to 14 years to review a regulation.
- An agency's benefit-cost and risk analyses are part of the record subject to judicial review as to whether the agency acted in an arbitrary or capricious manner. The potential for judicial review, however, is limited by two conditions: (1) judges do not have the relevant skills to accept the role of evaluating the quality of such analyses, and (2) they will probably limit themselves to determining whether the agency followed the required procedural steps in issuing a final rule. In any case, the benefit-cost standard is so weak

and the loophole so large that very few regulations would be set aside by the review. On net, I suggest, the Republicans would place too much of a burden on the courts as instruments to discipline excess regulation.

### Alternatives

For decades, the concern about excess regulation has led to the search for some "silver bullet" that would stop bad rules. Every president since Nixon has issued an executive order requiring a benefit-cost analysis of major rules. Congress has approved a Paperwork Reduction Act and a Regulatory Flexibility Act, and the Senate once passed a bill similar to the Dole bill without a dissenting vote. But the costs of federal regulation continue to increase, especially for the newer forms of social regulation of health, safety, and the environment. Reviving and approving the Dole-Johnson bill may be valuable, even at the expense of more paperwork and more litigation. My judgment, however, is that there is no "silver bullet," no Comprehensive Regulatory Reform Act that is either necessary or sufficient to discipline federal regulation.

Fortunately, there are several alternatives that are likely to be more effective than new regulatory principles and process legislation. Most important, Congress itself should exercise more care in approving substantive regulatory legislation and in reviewing the rules issued under this authority.

First, there is no substitute for writing clearer guidance in the substantive regulatory legislation. Legislators should expect agencies to use any discretion to serve their own agendas. Moreover, in some cases whole bodies of regulation have been created with almost no statutory authority. The Endangered Species Act of 1973, for example, does not provide any direct authority to regulate habitat; the authority for such regulation, as was recently reaffirmed by the Supreme Court in the *Sweet Home* case, rests on the possibility that some uses of the habitat may harm an endangered species. Similarly, the Clean Water Act amendments of 1977 do not provide any direct authority to regulate wetlands; the only reference to wetlands is in a section that authorizes state governments to administer their own permit systems other than those affecting navigable waters and "wetlands adjacent thereto."

Careful drafting of the substantive legislation is a more effective restraint on agency discretion than a general exhortation to maximize net benefits,

although this approach requires more investment by members of Congress in the details of the substantive legislation. Moreover, as the habitat and wetlands regulations illustrate, it can be important to mark the borders of authority by defining the types of regulation not authorized by the statute.

Second, Congress should greatly restrict the authority of agencies to make law. After a brief preamble, the Constitution begins with the phrase "All legislative Powers herein granted shall be vested in a Congress." For six decades, however, Congress has delegated most rulemaking to agencies, subject only to the general authority in the substantive legislation. That has permitted members of Congress to vote for vague but popular legislation, such as the Americans with Disabilities Act, and then to deny any responsibility for the rules written under the authority of such statutes.

Congress should follow its own instincts and withdraw the undue delegation of rulemaking authority to the agencies. In March the Senate passed the Nickles-Reid bill without a dissenting vote, a bill that would give Congress 45 days to veto a final rule before it is implemented. Approval of that limited measure by the House could be the most important regulatory legislation this year. This approach, moreover, would be substantially strengthened if Congress had to vote to approve each final rule, rather than refrain from exercising a veto. This would restore "All legislative Powers" to Congress, leaving the agencies the authority to draft and enforce rules, but not to make them. The authority to approve final rules would also give Congress much more leverage to elicit the types of information and analyses relevant to its decision. Congress would occasionally pass bad rules, as it now passes bad laws, but it would no longer have the opportunity to deny any responsibility for the proliferation of bad rules. Informed, competitive politics is likely to be a more effective discipline on federal regulation than better analyses and judicial review.

William A. Niskanen

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## We Told You So

With extravagant claims and great fanfare, the acid-rain pollution-trading system was installed with the 1990 Clean Air Act Amendments. This whiz-bang system was going to save hundreds of

millions of dollars each year, according to promoters like Daniel Dudek of the Environmental Defense Fund and Robert Hahn, a former member of the staff of the President's Council of Economic Advisers.

A funny thing happened on the way to the bank. The system got mugged by a forgotten lesson tendered by Nobel laureate Ronald Coase. On June 5, 1995 the *New York Times* reported that "five years after the system was passed into law, trading in pollution rights is slow, and the price for the right to put a ton of acid-rain pollutants into the atmosphere, which had started low, has collapsed." The reason for this fiasco, according to the *New York Times*, is that if a utility buys allowances and the price goes down, the losses will be borne by shareholders. But if the price goes up, the regulators are likely to force the savings to be passed on to ratepayers. "Faced with risking a loss to shareholders and no possibility of benefit, many [utilities] have apparently decided not to bother."

While that may come as a shock to the *New York Times*, it will not surprise the readers of *Regulation*, who were warned in the Fall 1991 issue. It was pointed out then that the sulfur dioxide allowances were denied property-rights status (notwithstanding the understanding by the *New York Times* to the contrary). Moreover, the utilities were warned that the government would not be responsible for alterations to the trading system or for eliminating the system entirely. It was the government's way of finessing the Fifth Amendment to the Constitution, which prohibits taking of property without compensation.

Put yourself in the place of the electric utility's management. You can either install the abatement equipment to meet your sulfur dioxide emission target, or take a gamble and buy allowances. The first choice is routinely approved by state regulatory commissions because it is a direct cost of complying with environmental requirements. The second choice is much riskier. If the utility climbs out on the allowance limb, and the EPA then saws it off, the utility cannot claim that it was not warned. Indeed, the public utility commission will, in all likelihood, point out in the prudence review that the utility was explicitly notified in the 1990 Clean Air Act Amendments of the danger, and ignoring that threat was per se imprudent.

It turns out that a similar result is being

observed in California's South Coast Air Basin. Trading there is also light and the typical price for smog credits is actually zero, according to the March 10 report on Regional Clean Air Incentives Market (RECLAIM) trading by the South Coast Air Quality Management District. The trouble with the RECLAIM system is that it also denies property-rights status to the trading credits and reserves the right to alter the system or to eliminate it entirely.

It was in 1960 that Ronald Coase wrote his seminal article on "The Problem of Social Cost" in the *Journal of Law and Economics*. He pointed out then that the definition and enforcement of property rights are crucial in dealing with environmental problems. That lesson has apparently been lost on the designers of government trading programs. But ignoring good advice is what government does best, or at least most frequently. In retrospect, why should anyone have expected the U.S. Congress or the South Coast Air Quality Management District to understand markets any better than the Kremlin?

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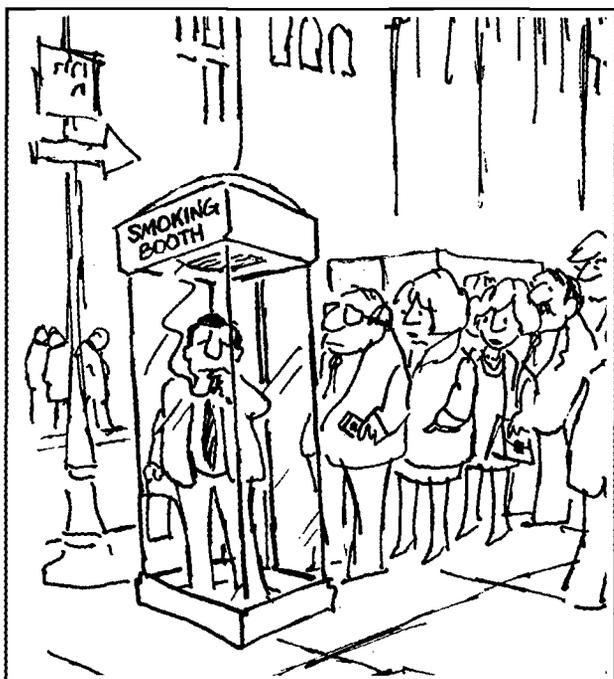
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## The Politicized Science of Tobacco Policy

As the smoking debate heats up in Washington, it is worth examining the highly politicized nature of government science and the degree to which the search for scientific truth has been replaced by the search for political ammunition.

The Environmental Protection Agency's (EPA) 1993 report, "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders," which classified environmental tobacco smoke (ETS) as a Group A human carcinogen, was carefully orchestrated. The report was constructed in the manner of a prosecutor building a case: conclusions were arrived at first, followed by a scurry to provide the "evidence."

Since the studies on environmental tobacco smoke did not provide sufficient evidence of a link to cancer, the Science Advisory Board (SAB) panelists told the EPA to put more emphasis on *active* smoking studies. They recommended that



the EPA try to show that ETS is chemically similar to the mainstream smoke that active smokers inhale. That way, the EPA could argue that if active smoking causes lung cancer, and ETS and mainstream smoke are chemically similar, then it is "plausible" that ETS causes lung cancer in nonsmokers. Dr. Morton Lippman, chairman of the SAB panel, stressed the importance of the "plausibility" argument when he admitted that without it, the "less than conclusive nature of any individual epidemiologic study makes the overall thing look weaker."

The EPA followed instructions. It added two new chapters to its revised draft: Chapter 3, about the alleged chemical similarities between mainstream smoke and ETS, and Chapter 4, about active smoking. The EPA then concluded the following: "The conclusive evidence of the dose-related lung carcinogenicity of MS [mainstream smoke] in active smokers (Chapter 4), coupled with information on the chemical similarities of MS and ETS and evidence of ETS uptake in nonsmokers (Chapter 3), is *sufficient by itself* to establish ETS as a known human lung carcinogen, or 'Group A' carcinogen under U.S. EPA's carcinogen classification system." (Revised Draft, 1992, pp. 1-2) (emphasis added)

There are at least three problems with this conclusion:

1. The EPA's own guidelines say that a Group A

classification is made only when there is "sufficient evidence from epidemiologic studies to support a causal association between exposure to the agents and cancer." In the case of ETS, sufficient evidence does not exist. Dr. Lippmann admitted that "the epidemiological [support] is not as clearly convincing as one would hope." Dr. Lippmann's word choice is interesting; why would one "hope" to prove that ETS causes cancer?

2. Apparently, the authors of the above "conclusion" had themselves not even read the newly inserted Chapter 3, upon which their conclusion was supposedly based.

3. When the SAB panelists met with the authors of the EPA's revised report on July 21-22, 1992, they determined that Chapter 3, written by Dr. Brian Leaderer, did not do the trick—it did not, in fact, show a chemical similarity between mainstream smoke and ETS. The doggedly determined SAB panel instructed Dr. Leaderer to rewrite his chapter, and to do it in such a way as to bolster the predetermined "conclusions." Dr. Leaderer, thus instructed in what the SAB panel would like to see, apparently decided he would be happy to find it. Meanwhile, the panel accepted and approved the new, revised draft.

What follows are verbatim excerpts from the meeting of July 21-22, which I attended. With the exception of Dr. Leaderer, the speakers are SAB panelists (All emphases added).

**Dr. Joan Daisy:** "I found Chapter 3 to be something of a disappointment. . . . More critical in this chapter is that there are data presented, and a major theme of this chapter is the chemical similarities of ETS—actually sidestream smoke—and mainstream smoke, and I do not think they adequately support the conclusion that the two are chemically similar. I mean, they may be chemically similar; I think there are other reasons for thinking they're chemically similar, but the data that are in there, speaking as a chemist, they simply don't make the case. . . . It simply is not correct scientifically to say that it has been shown that they're chemically similar. And I think that while maybe you'd like to sweep it under the table, there is some evidence that there are dietary exposures to nicotine, and that would influence the cotinine levels." (Why would an objective scientist want to sweep something under the table?)

**Dr. Kathy Hammond:** "I think, again, that this chapter reflects what I mentioned yesterday

about the problems of different authors of different chapters not being fully seen together. . . . Overall, the rest of the document relies on this chapter predominately for that, to present the similarities of mainstream and environmental tobacco smoke. And so that leads to some problems that have been mentioned earlier. So, I think that the estimation of exposure has been done in a very interesting way, and there's been a lot done there. But I think the smaller emphasis *will have to be expanded to support the rest of the document.*"

**Dr. Joan Daisy:** "My comment is that the data in that chapter simply do not demonstrate scientifically that [MS and ETS] are similar. There simply are not enough data. *And I agree with you that you're not going to have that data, and even if you did, you'd have to decide on criteria for what constitutes similarity and what does not constitute similarity.*"

Finally, after a lengthy discussion:

**Dr. Morton Lippmann (chairman of the SAB):** "Dr. Leaderer, you've been dumped on a fair amount. We'll come back and get you, but we also need to recognize that we're looking at a first draft on this chapter, as compared to a second draft. So whereas the other chapters have cleaned up a bit of the initial problems that one has, we are looking this time at the first effort. It's also, I think, clear to me that perhaps the charge to you in preparing this may have been less than ideal in that the critical dependency of discussions in other chapters on this may not have been apparent to you, and you may not have anticipated the uses to which this chapter would be put in the rest of the document."

**Dr. Michael Lebowitz:** "Well, I was going to say that based on what I know of the high quality of Dr. Leaderer's work, that I had to assume that he didn't have enough time to put into the chapter."

**Dr. Paul Liroy:** ". . . try to link your information more closely to Chapters 4 and 5. Not force it, but where there are plausible arguments, link it; and where there are inconsistencies or confusion, at least provide that as a degree of uncertainty that one has to deal with when one tries to establish a causal response or quasi-causal response of total response between exposure and some kind of effect." (*"Tries to" establish a causal response?*)

**Dr. Brian Leaderer:** "I'd like to say a word now, and then probably we'll have more to say after the

break. I gave final exams in one of my classes this May, and one of the students came back with the question and didn't do well at all. He had said to me, 'Well, I answered the question.' And I said to him, 'No, you didn't.' And he said, 'Yes, I did.' And I know how that student feels. . . . Now, the chapter was written in isolation, in ignorance of the other chapters. I can honestly say I have not read the other chapters because I've just received this copy. . . . And I appreciate, believe it or not, the comments received here. It gives me a sense of direction in terms of what you would like to see. Some of the comments I agree with; some of the comments I do not agree with. . . . I will very carefully take your suggestions and look at it again and talk to my colleagues at EPA to see how we might restructure things to provide better integration with this exposure chapter with the other chapters and provide you with the information that you deem necessary."

**Dr. Morton Lippmann:** "Clearly, at least, there needs to be more cross-referencing in Chapter 3 that this will be discussed further here or there, or whatever, and vice-versa. And there are some inconsistencies noted which were inevitable. *In fact, this author didn't know what was in the other section, and probably vice-versa.*"

**Dr. Brian Leaderer:** "What I would ask is that the guidance that the [SAB] Committee gives me be as specific as possible so that I might, in going back and revising this chapter, come out the second time with something that's more functional in terms of the structure of the document overall. It's my understanding from what I heard here this morning and talking to people at breaks that the basic conclusions of the chapter are not a problem. It's a question of the material brought together, and how it was brought together and used, that could be strengthened. That is, more support for the conclusions and some identification of where the weaknesses might be. But that there is not—at least, I didn't sense any idea that the general conclusions of the chapter were a problem. Is that fair?"

**Dr. Morton Lippmann:** "Well, of course, we can't tell you what the conclusions are when you expand your discussion and come to other conclusions. But clearly, this chapter is not there for stand-alone purposes, but to provide a firm underpinning for what other chapters conclude. . . . and I think the more important thing is to look at it as a basis on which the final conclusions from the other chapters are based."

**Dr. Brian Leaderer:** ". . . I do look forward to receiving detailed comments that will guide me

in the right direction.”

The following are conclusions stated in the EPA's revised draft—before Dr. Leaderer was asked by the SAB to *rewrite* Chapter 3 in such a manner as to substantiate the conclusions already arrived at (all emphases added).

**Chapter 1, Revised Draft:** “The conclusive evidence of the dose-related lung carcinogenicity of MS in active smokers (*Chapter 4*), coupled with information on the chemical similarities of MS and ETS and evidence of ETS uptake in nonsmokers (*Chapter 3*), is sufficient by itself to establish ETS as a known human lung carcinogen, or ‘Group A’ carcinogen.” (pp. 1-2)

**Chapter 2, Revised Draft:** “The chemical similarity between MS and ETS and the measurable uptake of ETS constituents by nonsmokers (*Chapter 3*), as well as the causal dose-related association between tobacco smoke and lung cancer in humans . . . (*Chapter 4*), clearly establishes the biological plausibility that ETS is also a human lung carcinogen. In fact, this evidence is sufficient in its own right to establish weight-of-evidence for ETS as a Group A (known human) carcinogen under EPA Guidelines.” (pp. 2-8, 2-9)

**Chapter 4, Revised Draft:** “Therefore under the EPA carcinogen classification system, MS would be a Group A (known human) carcinogen, and, due to the similarity in chemical composition between MS and ETS and the known human exposure to ETS (*Chapter 3*), ETS would also be classified as a known human carcinogen.” (pp. 4-10)

**Chapter 5, Revised Draft:** “Based on the assessment of all the evidence considered in *Chapters 3, 4, and 5* of this report and in accordance with the EPA Guidelines and the causality criteria above for the interpretation of human data, this report concludes that ETS is a Group A human carcinogen, the EPA classification ‘used only when there is sufficient evidence from epidemiologic studies to support a causal association between exposure to the agents and cancer’ (U.S. EPA, 1986a).” (pp. 5-43)

Changes made in Chapter 3, following Dr. Leaderer's rewrite, are quite striking (all emphases added).

#### **Example Number 1**

**Original (Revised Draft):** “Comparisons of cotinine levels in smokers and ETS-exposed nonsmokers have led to estimates that nonsmokers receive from 0.1 percent to 0.7 percent of the

dose of nicotine of an average smoker. The dose of active agents may be quite different (e.g., nonsmokers may receive 10 percent to 20 percent of the dose of 4-ABP that smokers inhale). *These estimates, however, are based on a number of assumptions that may not hold.*” (Revised draft, pp. 3-22)

**Rewrite (Final Report):** “For example, while comparisons of cotinine levels in smokers and nonsmokers have led to estimates that ETS-exposed nonsmokers receive from 0.1 to 0.7 percent of the dose of nicotine of an average smoker, ETS-exposed nonsmokers may receive 10-20 percent of the dose of 4-ABP that smokers inhale.” (Final report, pp. 3-52, 53) (Omitted: “These estimates, however, are based on a number of assumptions that may not hold.”)

#### **Example Number 2**

**Original (Revised Draft):** “Environmental tobacco smoke represents an important source of indoor air contaminants. The available data suggest that exposure to ETS is widespread with a wide range of exposure levels.” (Revised draft, pp. 3-23)

**Rewrite (Final Report):** “In summary, ETS represents an important source of *toxic and carcinogenic* indoor air contaminants. The available data suggest that exposure to ETS is widespread, with a wide range of exposure levels.” (Final report, pp. 3-53) (Added: “toxic and carcinogenic”)

#### **Example Number 3**

**Original (Revised Draft):** “It is important to note, however, that although the SS emissions are higher than MS emissions for many compounds, the dilution rate into the environment of SS is rapid, *thus substantially lowering actual exposure concentrations of the contaminants.* In cases where the SS emissions or exhaled MS emissions are in direct proximity to a nonsmoker (e.g., an infant held by a smoking mother or father), the nonsmoker's exposure to ETS contaminants will be high.” (Revised draft, pp. 3-4)

**Rewrite (Final Report):** “Sidestream emissions, while enriched in several notable air contaminants, are quickly diluted into the environment where ETS exposures take place. Air sampling conducted in a variety of indoor environments has shown that nonsmoker exposure to ETS-related toxic and carcinogenic substances will occur in indoor spaces where there is smoking occupancy. Individuals close to smokers (e.g., an infant in a smoking parent's arms) may be directly exposed to the plumes of SS or

exhaled MS, and thus be more heavily exposed than indoor measurements from stationary air monitors might indicate." (Final report, pp. 3-51, 52) (This appears to be a revision of Leaderer's original statements, with the following words omitted: "thus substantially lowering actual exposure concentrations of the contaminants.")

The report that emerged from the arm-twisting session of July 1993 was the opening signal for a pro-regulatory drumbeat that has led to restrictions on public smoking throughout the United States. But as the record shows, the conclusions of that report were heavily influenced by political concerns. Faced with another example of policy driving science, Americans can be forgiven for wondering if "government science" is an oxymoron.

*Martha Perske*

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## Should Freeloading Be Considered Theft?

The entertainment and information services industry would have you believe that freeloading is, by definition, theft of services; but that is simply not so. Treated below are three common domains wherein service providers press their ill-founded claims.

### Pay Television

Over 100,000 American homes are equipped with special antennae, decoders, converters, and other electronic gadgets capable of receiving signals from pay television satellites or earthbound microwave transmitters.

Faced with such a large number of potential clients who prefer to freeload, the pay television industry is fighting back. Arguing that the unauthorized reception of television signals is a violation of property rights, the industry convinced the Federal Communications Commission (FCC) to prohibit such reception. The U.S. Court of Appeals for the Ninth Circuit has upheld the FCC's ruling, thus stamping into law the common notion that freeloaders are "pirates of the air" or "basement thieves."

Looking at the matter on its face, there is ample reason to be suspicious. First, federal courts have

not shown overmuch concern for the property rights of corporations, preferring instead long and learned disquisitions on "the public good" and the exact meaning of a "taking." As for the regulatory agencies, they have been downright hostile to the very concept of private property—the idea that ownership implies control. Second, since there is no greater protection of personal liberty than the rights of private property, an abridgment of liberty in the name of property rights should automatically be suspect.

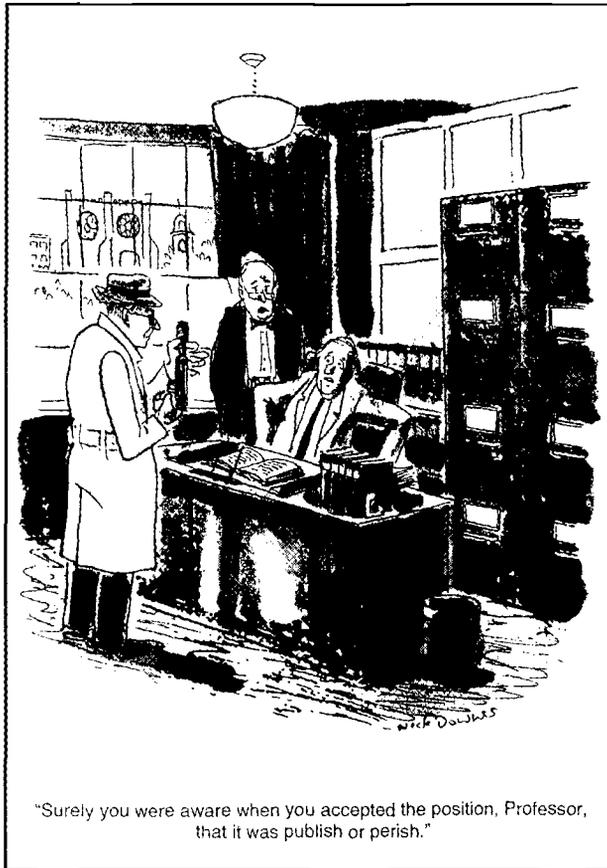
Examining the matter in greater detail, it is clear that broadcast frequencies, commonly referred to as "airwaves," are real property. Like other real property, they are properly acquired by appropriation followed by continuous possession and use, not by government distribution.

Now, real property cannot be stolen, but it can be illegally occupied. This is known as trespass, the prevention of which is properly a function of government, part of its mandate to secure our rights.

In considering how one illegally occupies a broadcast frequency, we must distinguish between transmission and reception. When one transmits on another's frequency, he is indeed a broadcast pirate, for he illegally occupies that which belongs to another. It makes no difference that the offender may broadcast from his basement: is the man who launches a missile into his neighbor's yard any less guilty because he owns the launch pad?

When one receives another's transmission in the privacy of his home, however, he neither damages nor occupies the broadcaster's real property, nor does he violate anyone's rights. If the broadcaster chooses to dump what economists refer to as positive externalities, such as the entertainment emanating from his airwaves, on another's private property, the property owner is free to take advantage of it. One must distinguish between the airwaves, the real property that the broadcaster owns, and the programming, the positive externalities that the freeloader enjoys—despite the fact that the latter originate from the former.

Philosopher Robert Nozick makes a similar point in his landmark *Anarchy, State and Utopia* in disputing the idea that all positive behavior towards an individual requires reciprocation or compensation, even when the positive behavior is voluntary and the individual has not agreed to pay for it in any way, shape, or form. The core of



the idea is that all freeloading is theft, an idea that can easily be adapted to justify all manner of illiberal state endeavors. Nozick asks whether a man who throws books into my yard from his can demand payment.

Although some may believe that airwaves and programming are somehow different from yards and books, in practice we are quite ready to grant the similarity. Is there anyone who would claim that a CB-radio buff who demands payment after being entertaining for a bit is entitled to use the coercive apparatus of the state to exact it? Pay television companies differ from the CB user only in that they entertain professionally, at considerable expense, and for their livelihood. But the issue cannot hinge on the greater extent of the freeloading; if one is not theft, then neither is the other.

If anything, entertainment and airwaves present an even weaker case for mandatory compensation than the likes of books and yards. Consider the case of a man's apples falling off his tree into his neighbor's yard. Leaving aside the separate questions of whether such placement (of the tree and/or the apples) can be enjoined or whether rent (compensa-

tion for the negative externalities) can be exacted, the man is entitled to the return of his apples. He has lost personal property that can be restored to him. But programs dissipate as they are viewed, and at the show's end the broadcaster has whatever he had before. Put plainly, there is neither anything to return nor anything that was lost. Only when lost income is a result of some rights-violating activity is compensation in order. Lost income alone cannot form the basis of a claim for compensation.

At the heart of the confusion lie several mistaken analogies. First, there is the sentiment expressed by assistant FCC counsel Norman Blumenthal: "It's like sneaking into a movie theater." Not at all. Rather, it is like viewing a drive-in movie from your living-room window or watching your neighbor's Fourth of July fireworks display from the comfort of your backyard hammock. In each case, you receive benefits without payment, but also without fault, for to be at fault you must affirmatively violate someone's domain by aggression, intimidation, deception, or the like. In none of the cases discussed here, however, does any such rights-violating activity occur.

Now, there *is* a parallel to the movie-house sneak: someone who attaches a feed to a cable company's line. That I do not defend, for the connection illegally occupies part of the cable. This is *taking* rather than being *given* and demonstrates that it is possible to be a bona fide thief in reception as well as in transmission.

Second, and quite similar, is the notion that the case that unauthorized reception is theft rests on the ease with which that sort of freeloading can be perpetrated. Again, that is not so. I do not plead the liberal notion that "if you leave the door open, you invite theft," but rather the libertarian notion that not all freeloading is theft. If one were to enter an unguarded home, he would illegally occupy another's real property and would indeed be guilty of trespass. That is precisely why the relative ease of basement transmission on owned frequencies is no defense. As we have shown, however, the case with reception is different: here, the "home" has not been entered at all, and no trespass has occurred.

But the notion persists that airwaves are somehow different than other real properties. Let us return to the case of the fireworks display. Is there any philosophical difference between a visible air display dumped on you and an invisible electromagnetic-wave display that carries the programming you capture on your screen? The

necessary use of complex receiving equipment in the latter case is surely philosophically irrelevant. If the house were some distance away from the drive-in and you watched with a telescope, would you then be a thief or "movie pirate"? Do burglars' tools make the burglary?

By broadening the rights of pay television companies, the FCC weakens the individual's right to use his own property in entirely permissible ways. Such is always the case when new "rights" are granted by the state. Why should we expect airwaves to be any different?

That having been said, we should note that service providers with built-in positive externalities such as those discussed above are not, by any means, defenseless. The drive-in can erect a wall, the next-door neighbor can make his display contingent on his neighbor's contribution, and the pay television companies can and are building increasingly sophisticated and impenetrable electronic "fences."

Should broadcasters shield their transmissions? Morally, the question has no answer: they have the right to do so or not to do so, as they choose. Financially, they should do so if and only if the added cost of the protective equipment and protocols used in both transmission and reception will lose them fewer subscribers than they will gain by welcoming some erstwhile freeloaders into their custom. Moral considerations arise only if there is a fiduciary trust, as in a publicly owned corporation. If the market dictates, however, that the shielding is not worth the costs, no one should expect the state to shoulder it. The state already undertakes a multitude of unproductive activities. Why add another?

### **Library Privileges**

It is common for library cards to be issued "subject to the rules and regulations of the library," with "abuse of library privileges" punishable by penalties ranging from forfeiture of privileges, through civil actions, to criminal sanctions. But what constitutes abuse? If one takes the position of libraries, abuse is any violation of those rules and regulations subject to which privileges were issued. One's liberty to use a library or any other public facility ends where it collides with the similar liberties of others: traffic lights are not natural-rights violations. But what about when the restrictions placed on library use are not of that sort, but are arbitrary and capricious? Well,

if the library is private and the prospective patron consents to the restrictions, there is nothing more to be said. But that is the key here: consent. Thus, it is necessary that we understand what makes for consent.

Consider a typical library with a patrons' group that charges a flat fee per annum for the use of its collections, the typical patron who has voluntarily paid the fee in consequence of which he has acquired a card which will admit him into the library building, and the typical rule (possibly in large type on the back of the card) that the card and the privileges it confers are "nontransferable." Clearly, the library has the right to prevent trespass on its property and the use of its facilities by those who have not paid for such use. But what about someone who has paid his dues but who decides that his research can best be performed by someone else and lends that person his card for that purpose? It seems unquestionable to me that the patron has done no wrong: Any proscribed freeloading is done by his researcher, not by him.

But the library may argue that the patron has agreed not to lend out his card. It may say as much right on the back of the card, perhaps in these very words: "Use of this card constitutes consent to the rules and regulations of the library." Does saying make it so? What is it about use of a service or entry into a building that makes for consent to every rule the service-provider or building owner might promulgate? Why should what might be called the "presumed consent" standard replace the time-honored standard of "informed consent?" And as for information, well, yes, the patron may know the rules and regulations of the library, including the rule about nontransferability of privileges (usually even this is false), but if the old phrase "with my knowledge and consent" is to have meaning, it must be that knowledge per se does not make for consent. Does anybody believe that a pass that reads "Use of this pass for admission into this club constitutes consent to sexual activity with any club member" used informedly (if ill-advisedly) by a club patron actually does confer such consent?

But what, the library might respond, of the application for privileges, with the signature of the patron expressly consenting to the rules and regulations of the library? A signed consent form, after all, does constitute consent in the eyes of the law, always or almost always, and properly

so. Indeed, were this not so, it would become impossible to give consent. Use of a card may not mean "yes," but surely, if anything means "yes," "yes" means "yes."

But even in the minority of cases where there is such an application on file, the question of consent is by no means joined in the case of the freeloader. For who is it who has signed the application, the patron or his researcher? The researcher has consented only to the terms of the patron, not the terms of the library. So we are back to the use of the card again, application notwithstanding. It would seem that the researcher, at least, is a trespasser, and he has violated the library's domain by deceiving the doorman with a card that does not belong to him. The question of consent is still not joined, however, despite what the library might have you believe. The card is in the possession of the researcher by the voluntary loan of the patron, and whether or not the patron, who is not freeloading, has agreed not to make the loan, the researcher, who *is* freeloading, has certainly never agreed not to take the loan. The card is valid and is in the possession of someone who has agreed to nothing whatsoever, so once more we are back to our original question.

The question is finally joined only if the card is issued to the patron *therein named*, and the researcher uses the card to gain entry into the library. But although the question is now indeed joined, it is not as easily answered as the library would have it. One means of violating another's domain is deception, but what does it take to make deceit? To make for consent, it takes at least an implication; it would seem reasonable that to find someone guilty of bypassing another's consent (in this case, the library's) by deception also requires an implication: not an inference on the part of the library, but an implication on the part of the prospective user of its collections. When he flashes the card, does the researcher imply that he is the named person, or does he merely imply that the rights of entry and usage have been purchased by the card's power? The question turns on whose responsibility it is to certify the validity of the card: the presenter or the presented. If the former, the presentation is deception by implication and the presenter, a trespasser. If the latter, the presentation triggers an inference when it should trigger an inquiry. Not an investigation, mind you; a simple "Are you Mr. Smith?" will do.

While there is no universal answer to the question of whether library freeloading is theft, the norms in the United States in the late 20th century are such that transfer of the stated-to-be nontransferable is so prevalent and so prevalently tolerated because so largely benign (few would claim that anyone, let alone everyone, has a natural right to use someone else's library, but one could do worse than spend time in libraries), that given current cultural practices, it seems clear that the responsibility rests squarely with the doorman. The Duke of Milan believed it wrong, we are told in *Measure for Measure*, to enforce what had been ignored; and though Angelo was given a commission to end what had been tolerated, that was *a* commission and for that matter, *his* commission—his duty, not that of the populace.

Arguments based on implication and inference and other subtle cultural artifacts are rarely conclusive to those not predisposed to accept them, but it is fair to ask of society—and certainly fair to demand of the state—that the benefit of any remaining doubt—and, in the case of the state, the presumption of innocence—be granted to the man accused of doing wrong. The researcher surely ought not to be required to prove himself innocent of trespass, nor the patron of breach of contract.

As was the case with pay television companies, libraries are by no means defenseless when it comes to freeloading: A simple photo ID, costing half a dollar, ends the problem. With a solution that simple, thoughts of actions brought for breach of contract or prosecutions made for criminal trespass seem faintly ridiculous.

### Computer Resources

Increasingly, today's entertainment and information services are transmitted electronically and emanate from servers on which computer databases (scholarly resources such as those of OCLC [Online Computer Library Center], for example) or computer programs (games, for example) are resident. Can the intermediation of the computer possibly matter? Insofar as we are concerned with issues of consent and deception—and it is not at all obvious what consenting to or deceiving a machine means vis-à-vis the men behind the machines—it might indeed matter. Furthermore, in the cases of pay television and libraries, freeloading was discussed partly in

terms of communication within a culture: not only is communication with machines different in kind from communication with people, but communication with machines may involve different cultural norms.

Can a machine give consent for a person? As certainly as does the buzzer I activate to unlock the front door when someone rings the bell. But what if a machine does so on its own? My answering machine once gave its "consent" to a collect call, but there was no argument with the carrier when I explained that my answering machine does not answer for me, even though, obviously, it does just that—up to a point. But what if the machine gives its consent neither on my order nor on its own, but under my general—in other words, programmed—instructions.

Can a machine be deceived? As certainly as high school hackers exist. Now, what if one responds to a machine protocol with a valid user ID and password that are not his, but were voluntarily given by someone who paid his access fee? Not a problem, so long as the reasoning above is accepted. But the hard case is when the machine continues with "Are you the authorized user? Type 'yes' to continue."

Does electronic communication take place in a different culture? As certainly as the etiquette for e-mail differs from that of the printed word. But the hard case is where there is no normative culture—as on the Internet, where trying to divine whether "pressing any key to continue" constitutes an implication or an inference of something just stated by the machine is an utterly hopeless enterprise one would undertake only if well financed by, say, the National Endowment for the Humanities.

The predominance of hard cases in the domain of computer resources suggests that computer-based service-providers would be likely—more likely than other providers in the entertainment and information services industry—to prevent freeloading. And, indeed, that turns out to be the case. "Pay-per-view" is not the norm, and few libraries charge anything beyond access fees, except for special services. Computer-based services, on the other hand, are almost always made available with a pricing structure that is heavily weighted toward usage fees. Naturally, usage fees preclude freeloading, thus avoiding the problem that this essay treats.

My sympathies are surely clear. I reject the notion that we are all sinners when it comes to freeloading—without accepting either the illusion that it does not go on everywhere everyday

(it does) or the pretense that everything goes (it does not). As with all moral questions, the issue of freeloading is fully subject to searching philosophical analysis. To that analysis I hope to have made a thoughtful contribution. And to those freeloaders who do it right, I hope that I may have imparted a measure of peace of mind.

*Joseph S. Fulda*

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## Affirmative Action or Equal Opportunity?

Always at his best when playing the Supreme Empathizer, President Clinton said a few months ago that he feels the pain of white men. "Psychologically, it's a difficult time for a lot of white males," said the president.

"The Small Business Administration under my administration," boasted the president on a different day, "increased loans to minorities by over two-thirds, to women by over 80 percent, but did not increase loans to white men." The Small Business Administration authorized Asian-Indians for a special slice of federal largess through contract set-asides in 1982. Sri Lankans were added in 1988, Indonesians and Tongans in 1989, followed by Hasidic Jews. The jobless white males in Pittsburgh's rusted river valleys are still waiting.

### Group Focus

Clinton appointee Mary Francis Berry, head of the U.S. Civil Rights Commission, explains that "civil rights laws were not passed to give civil rights to all Americans"—only to "disfavored groups," such as "blacks, Hispanics, and women."

The problem with the government's group focus is that the son of a poor, white, West Virginia coal miner is categorized as more privileged than the daughter of a Manhattan surgeon. That is because it is "pay-back time" in America, according to columnist Tom Wicker—time for white males to take a seat at the rear of the bus, even if their great-grandfathers never set eyes on a cotton plantation. The last of us, collectively defined, shall be first, according to the diversity experts in central planning. The individual counts for nothing.

"We want black businessmen to scream enough to let angry white males understand that we've done something for them," a White House official was quoted in the *New York Times* at the beginning of the Clinton administration's review of affirmative action.

President Clinton, who only a few years ago was looking for a Cabinet that "looked like America," now defends the concept of affirmative action but wants to "mend it." Programs should not last forever, he says, and no one who is not qualified should be hired. Preferences to correct past injustices are good, states the president, but quotas and reverse discrimination should be illegal. The lawyers will be busy defining the difference between preferences and reverse discrimination.

Early on, the Clinton administration declared that "a white male will not be considered for attorney general." In "An Open Letter to My Fellow Democrats," *New York Post* columnist Jack Newfield wrote that this exclusion "immediately insulted and alienated millions of young, white workers, and they never came back. No wonder 62 percent of white males voted Republican in November."

With some 70 percent of the nation's population now legally advantaged as "disadvantaged," eligible for federal contracts and affirmative action benefits, the federal planners have institutionalized racism, sexism, and groupthink on a grand scale. "White males are the only growth area for the modern victim movement," says John Leo, a contributing editor at *U.S. News and World Report*. "Everybody else is already covered."

### **Categorization on Campus**

Writing in the *Chronicle of Higher Education*, Billie Wright Dziech, an English professor at the University of Cincinnati, takes Leo's suggestion seriously. Colleges, says Dziech, "have the responsibility to determine whether white men, like women and members of minority groups, require some special support services." With inclusive victimhood, everyone on campus can be entitled to special compassion and programs. "White male students are acutely aware that their institutions have demonstrated little interest in them as a group," says Dziech, "and this is clearly a source of frustration affecting their behavior and attitudes after they leave academe."

"If existing institutional grievance procedures do not adequately respond to white men who complain about sexual harassment or racial discrimination, we must devise procedures that do," recommends Dziech. "We need to talk about how white men are viewed today and about how both men and women have been burdened by stereotypes."

At Stanford University, they are less sure about expanding group consciousness and victimhood to everyone. Charles Curran, 25 percent Irish and majoring in economics and African studies, proposed the formation of an Irish-American students association. Jim Hammel, 25 percent Irish, 50 percent Mexican, and a co-organizer with Curran, says, "We have more in common with black Americans than with the English."

Stanford sponsors five graduation theme banquets: Native American, Latino, Catholic, Asian-American, and African-American. After \$100,000 in tuition payments, perhaps Hammel and Curran feel that their parents should not have to settle for a Chinese stir fry when what they would really like is some tasty ham and cabbage and a bit of Irish dancing. An editorial in the *Stanford Daily* states that an Irish student group would set a "dangerous precedent."

Though Italian-Americans have been granted special victim status at the City University of New York, California State University has refused to accept funds from the Sons of Italy for scholarships for needy Italian students. Hardship is defined only collectively at Cal State, and Italians are not one of the three recognized victim groups.

The notion that individuals regularly transcend the accidents of birth is politically incorrect in much of academe. The University of Texas Law School lowers standards for African-Americans and Hispanics. "I've never understood why Hispanic liberals, so sensitive to slights from the racist right," says Hispanic columnist Roger Hernandez, "don't also take offense at the patronizing racists of the left who say that being Hispanic makes you an idiot." "Why should a man named Hernandez," he asks, "be able to pass a police sergeant's test with a lower score than a white man named Henderson?" Coca-Cola chairman Roberto Goizueta, says Hernandez, qualifies for affirmative action programs that are denied to poor whites. "Why should the likes of Michael Jordan, Bill Cosby, Oprah Winfrey, and

Marge Schott," asks Bruce Fein in *USA Today*, "qualify for special treatment by the government?"

### Bean-Counting Bureaucrats

In Pasadena, California, Armenian-Americans are a protected class, favored with city contracts. Folks of "Appalachian regional origin" go to the front of the line in Cincinnati, and Portuguese immigrants are official victims in Massachusetts. Japanese- and Chinese-Americans, groups with above-average SATs and incomes, are designated as "disadvantaged" in Colorado.

Opposing rollbacks in set-asides and group preferences, Jesse Jackson states: "We have died too young, bled too profusely, been to too many funerals of young mothers, to go back now." A white male veteran of the Vietnam War could say the same words about being excluded from consideration for a government forestry job. "Only unqualified applicants will be considered," stated a help-wanted ad from the U.S. Forest Service. Women filled 179 of the 184 job openings. Someone in central planning must have determined that there were too many white males in America's woods.

The civil-rights bureaucrats have assumed that statistical disparities between groups in incomes, occupations, work discipline, or graduation rates are the result of discrimination, and that such disparities can and should be eliminated through goals, timetables, fines, subsidies, quotas, and lawsuits.

"In the future," states a Defense Department memo, "special permission will be required for the promotion of all white men without disabilities." At the Justice Department, workplace discipline cannot "be initiated against any group of employees at a statistically significant higher rate than any other group." The Energy Department reserved 65 percent of the spaces in its Senior Executive Service Candidate Development Program for women and minorities.

One wonders why the central planners at the Equal Employment Opportunity Commission (EEOC) never got around to mandating that at least 90 percent of male decorators be practicing heterosexuals, or that professional basketball teams be 51 percent female, 80 percent white, and 25 percent vertically challenged. Cambodians own 80 percent of the doughnut shops in California. Should the EEOC force them

to franchise their shops to African-Americans and European-Americans?

We have travelled a long way from the original intent of the 1964 Civil Rights Act that created the EEOC. Section 703(j) of that act states: "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance." Section 703(a) forbids employers to "limit, segregate, or classify" employees based on their "race, color, religion, sex, or national origin."

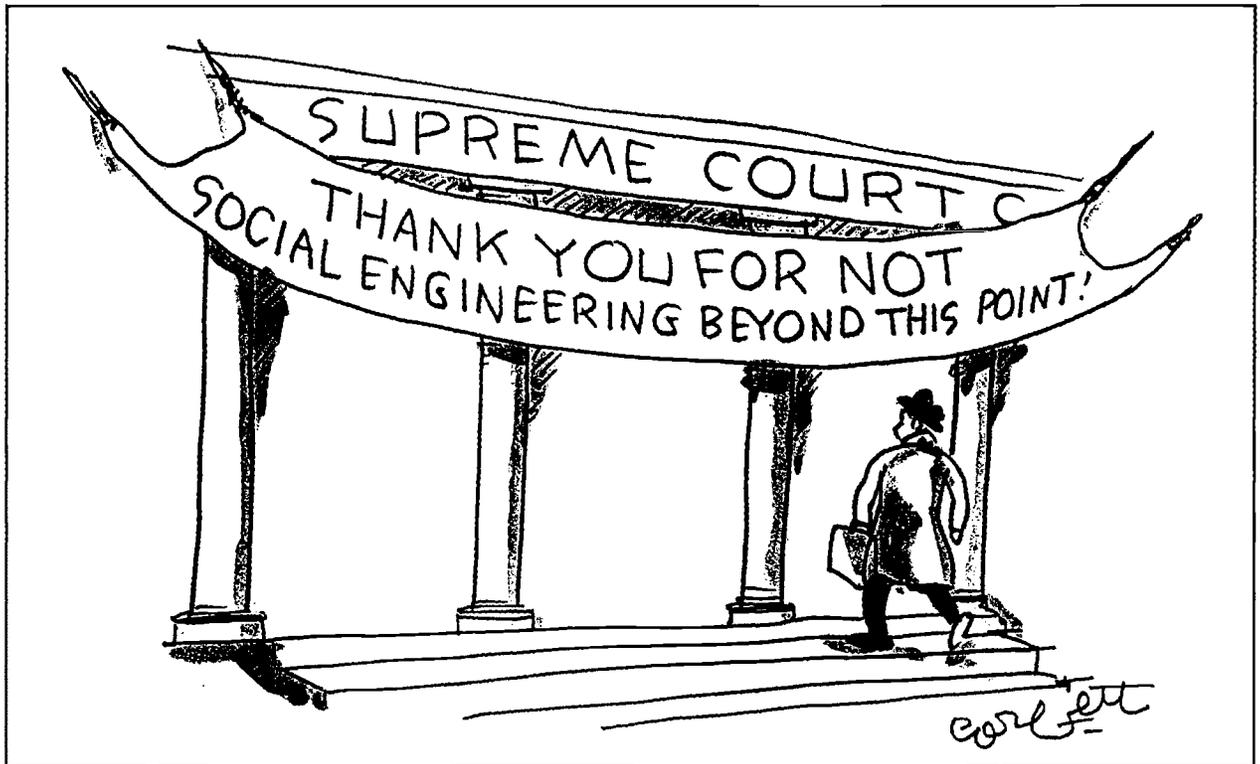
Sen. Hubert Humphrey, a chief author of the 1964 Civil Rights Act, promised to "eat [his] hat" if the law would result in hiring or promoting by group quotas. A colorblind society, less race- and gender-conscious, was the goal—not today's government-mandated group spoils system. The law mirrored Rev. Martin Luther King Jr.'s vision of a society in which children will be judged on the content of their character and not the color of their skin.

Instead, by 1976 a federal judge ordered that 42 percent of all new police and fire department employees in Chicago had to be minorities. A court in Pittsburgh ruled that every other new police officer had to be female or black. In 1991 the California legislature passed a bill, vetoed by the governor, mandating that group graduation rates at all public universities had to match the group graduation rates at California's high schools.

Deval Patrick, the Clinton administration's assistant attorney general for civil rights, ordered Fullerton, California, which has less than a 2 percent African-American population, to have a "black applicant pool" of 9 percent, along with a program to hire minorities who felt discouraged from applying, or applied and were rejected for fire or police positions since 1985, with awards of 10 years back pay for those who allegedly experienced past discrimination.

"There is no gentle way of putting this, but 18- to 45-year-old white males are one ticked-off group," writes Bob Grossfield, head of the Arizona Democratic Leadership Council. "These men believe that every other segment of America has someone standing up for them. They believe, rightly or wrongly, that everyone else has a higher priority while they're left behind paying for it all."

An ABC News poll shows that 81 percent of white males oppose employment preferences for women and minorities. A *Newsweek* survey



reports that only 14 percent of whites support racial preferences in hiring or college admissions. The California Civil Rights Initiative that bans group preferences in government contracting and education has the support of 59 percent of women and 42 percent of African-Americans, according to a recent Field Institute survey.

"Ordinary Americans are tired of being sacrificed on the altar so liberals can preen themselves on their 'compassion' toward whatever special group has been made into a sacred cow," writes Thomas Sowell. People of all sorts, he says, "have been verbally transformed into 'victims' of 'society' with special privileges created in the name of equal rights." We should be more, Sowell states, than "animals lining up for a place at the public trough."

Last year, the federal government allocated \$10 billion in contracts under set-aside programs for companies owned by women and minorities. Reflecting the shifts in public opinion, the Supreme Court now takes a dim view of such group preferences and entitlements. The Constitution, says Supreme Court Justice Sandra Day O'Connor, protects "persons, not groups." Justice Antonin Scalia states that "under our Constitution, there can be no such thing as a creditor or a debtor race." "Government cannot make us equal," says Justice

Clarence Thomas. "Affirmative action programs stamp minorities with a badge of inferiority" no matter how competent they are or how hard they work. The beneficiaries of special treatment, says Justice Thomas, too often "develop dependencies or adopt an attitude that they are entitled to preferences."

### The Way Forward

A rollback of affirmative action by the courts, politicians, and public opinion, however, does not leave the nation at a dead end in terms of economic fairness and group equity. Instead, it can open the roads that lead to the real causes of inequality. In the black community, progress in lowering the high dropout rates in schools and raising the proportion of intact families would produce more upward mobility than all of the government's affirmative action programs combined. The out-of-wedlock birthrate today among African-Americans is 68 percent, up from 26 percent in 1965. Children from single-parent families are nearly twice as likely to be expelled from school and 40 percent more likely to repeat a grade. The National Assessment Governing Board reports that 54 percent of black high school seniors have "below basic" reading skills.

The collapse of families and education in the African-American community is a larger obstacle than discrimination in the battle against poverty.

For black Americans who stick with school and marriage, the story is not one of hopelessness and bigotry. "For nearly 20 years, young blacks who manage to stay married have had family incomes almost identical to those of young white couples," reports Jared Taylor in *Paved with Good Intentions*. Harvard economist Richard Freeman states: "By the 1970s, young black male college graduates attained rough income parity with young white graduates." Joseph Conti reports in *Profiles of a New Black Vanguard* that "black college-educated females currently earn 125 percent of what white college-educated females earn."

The most effective policy the government can pursue to promote economic equity and upward mobility is to provide incentives for growth in the private sector. Discrimination shrinks in a full-employment economy. Affirmative action programs were in place during both the Carter and Reagan terms, but it was the difference in economic policies and growth during those two administrations that had the greatest impact on the economic success of disadvantaged groups. The real median income of black families increased 17 percent during the Reagan administration, after falling 10 percent in the Carter years. By the end of Reagan's two terms, female entrepreneurs employed more people than all of the *Fortune* 500 companies combined. For the vast majority of those firms, federal set-asides and contract preferences had nothing to do with

their business.

The unprecedented 91 months of growth in the 1980s produced 18 million new jobs, pulled 4 million people out of poverty, increased women's earnings 8 percent faster than men's, and doubled the number of black families earning over \$50,000 in real terms. From 1981 to 1987, the number of black-owned businesses increased from 300,000 to 425,000. The Federal Reserve reports a 24 percent real increase in wealth among white families from 1983 to 1989. The increase in real wealth, adjusted for inflation, for African-American families and Hispanic families in the same period was 35 percent and 54 percent, respectively.

"Our 1960s success in making demands on government has led us to the mistaken assumption that government can give us what we need for the next major push toward equality," says African-American columnist William Raspberry in the *Washington Post*. "Unfortunately, that period taught us to see in civil rights terms things that might more properly be addressed in terms of enterprise and exertion rather than in terms of equitable distribution. The emphasis ought to be on finding ways to get more of us into business and thereby creating the jobs we need."

The overregulation of both the economy and compassion has produced the unintended consequences of slow growth, less equity, and a heightening of group resentments. It is time for some deregulation.

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