THE CONSTITUTIONAL CHAOS OF INDUSTRIAL POLICY

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Introduction

As its contemporary advocates employ the term, "industrial policy" imports a peculiar form of governmental intervention in the evolutionary process of the market economy.[1] In its turn, governmental intervention implies legislative statutes, executive orders, administrative rules and regulations, and judicial decisions—which themselves always at least potentially involve, at some stage, considerations of constitutional law. Therefore, judging the appropriateness of any industrial policy requires recourse, not simply to economics, but also to the Constitution.

This article catalogues the major types of industrial policy being promoted today and critically assesses them from the perspective of constitutional law.

A Typology of Contemporary Industrial Policy Proposals

Most of the contemporary proposals for industrial policy that raise significant constitutional issues share certain common features. First, the proposals generally recommend formation of boards, councils, or other official or quasi-official groups representing or subject to the influence of the dominant power blocs of the American "new class": namely (i) politicians and bureaucrats, (ii) businessmen, (iii) leaders of organized labor, (iv) academic and "public-interest" gurus, and (v) doyens of the financial establishment. Second, the proposals enable

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Cato Journal, Vol. 4, No. 2 (Fall 1984).

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[1]In principle, the government's adoption of a strict laissez-faire approach would constitute an industrial policy. But no significant support for such an approach exists among those generally treated as spokesmen for industrial policy.

these boards to monitor the performance of the national and regional economies; to collect, analyze, and interpret data thereon; to prepare reports and recommendations for Congress, the president, and administrative agencies regarding what the boards perceive as needs and priorities in the areas of industrial revitalization and innovation; and generally to create an official forum in which spokesmen for the new class can identify purported industrial problems, develop plans for governmental solutions of these problems, and promote a political consensus—or at least arrange political action—in support of implementation of their plans. In some instances the proposals go further, delegating direct authority to the boards themselves to elaborate and implement rules with the force of law. Third, the proposals empower the boards, directly or indirectly through the intermediation of an industrial bank or similar institution, to grant favored private parties subsidies or guaranteed loans financed by taxation, monetary expansion, or the diversion of private pension fund monies from other investments.

The Anti-Market and Elitist Attitudes of Industrial Policy Proponents

Even the most cursory study of the major contemporary proposals for industrial policy exposes a fundamentally anti-market (or anti-individual freedom) and elitist (or undemocratic) strain permeating them. This is hardly accidental, but instead accurately reflects the near-universal attitudes of their most influential proponents. Although the motivations of those advocating, or even taking, governmental action is but rarely and then only with great difficulty of use in constitutional analysis,[2] consideration of these attitudes can illuminate some of the legal issues lurking not far below the surface of today's demands for industrial policy.

The anti-market bias of the exponents of industrial policy reveals itself most strikingly in their view that all economic choice and action in modern society is in fact, and of its very nature must be, political or at least subject to political constraints without logical limit. In economic terms this thesis denigrates market freedom as a myth. In political terms it denies the existence of any individual rights to economic independence that government lacks plenary discretion to qualify, alter, or abolish altogether. And in constitutional terms, it

[2]Generally legislators' motives are irrelevant to the validity of legislation: For example, Communist Party USA v. Subversive Activities Control Board, 367 U.S. 1, 87 (1961); Mulford v. Smith, 307 U.S. 38, 48 & n.19 (1939). See, however, United States v. Constantine, 296 U.S. 287, 296 (1935); Henneford v. Silas Mason Co., Inc., 300 U.S. 577, 586 (1937).

dissents from the teaching that "[t]he very purpose" of the supreme law is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . may not be submitted to vote; they depend on the outcome of no elections."[3]

For example, Robert Reich supposes that the "enduring myth of the unmanaged market" has

> sidetracked Americans into endless debate over the relative merits of two highly artificial concepts: the "free market" and "national planning."... Either way, government will be actively involved. And though the form of government involvement may be different, the fact of its involvement will be nothing new....
>
> [O]ur mythic assumptions lag behind our political reality: Every major industry in America is deeply involved with and dependent on government.... *No sharp distinction can validly be drawn between private and public sectors within this or any other advanced industrialized country;* the economic effects of public policies and corporate decisions are completely intertwined.[4]

Because, claims Reich, "any important economic choice is by nature political,"[5] it is not "possible *not* to have an industrial policy."[6] At one stroke, then, Reich obliterates individual freedom—in the sense of an identifiable area of human action not subject to public control—as a meaningful political-economic category. What logically remains thereafter of such constitutional injunctions as that "private property

[3]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). Of course, in the true spirit of the F.D. Roosevelt era, the Barnette Court tempered this principled statement with the weaseling qualification that

> [t]hese principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. [Ibid., at 639-40]

The qualification is feckless, however, in so far as "economic affairs" implicate, as they self-evidently do, the "liberty" and "property" that the Constitution protects *in haec verba*. See Vieira, "Rights and the United States Constitution: The Declension from Natural Law to Legal Positivism," *Georgia Law Review* 13 (Summer 1979): 1447,1489–90.

[4]Robert B. Reich, *The Next American Frontier* (New York: Basic Books, 1983), at 232–33; emphasis supplied.

[5]Ibid, at 273.

[6]Reich, "An Industrial Policy of the Right," *The Public Interest* 73 (Fall 1983): 7.

[shall not be] taken for public use without just compensation"[7] in a society where a "sharp distinction . . . between public and private sectors" is not "vali[d]," Reich leaves unexplicated. The obvious conclusion, however, is that *no* constitutional rights defining a "free market" survive Reich's asserted demolition of that "enduring myth."

The elitist prejudices of the exponents of industrial policy appear most insistently in their complaint that the failure of American political institutions to generate a comprehensive industrial policy demonstrates the incompetence of those institutions and the need to replace them with new governmental structures designed to circumvent the myriad checks and balances of democratic politics in order to impose such a policy on an otherwise unwilling nation. For example, Robert Reich criticizes "all participants in American enterprise" for "hav[ing] taken advantage of opportunities to increase their own economic security at the expense of others." Accordingly, he believes that

> the United States needs a political forum capable of generating large-scale compromise and adaptation—a national bargaining arena for allocating the burdens and benefits of major adjustment strategies. Such an arena would enable the nation to achieve a broad-based consensus about adjustment. It would enable government, business, and labor to fashion explicit agreements to restructure American industry. . . .
>
> Adjustment cannot proceed without mechanisms for explicit bargaining among economic groups and without institutions with the authority to monitor and guarantee the consensus.[8]

Obviously, Reich considers Congress and the courts incompetent to function as the "national bargaining arena" he hypothesizes. Perhaps this is because, for him, *too many* of the "participants in American enterprise" have the political influence, or valid legal claims, to obtain legislation or judicial rulings that favor their interests. For, as Reich emphasizes, access to the new "political forum capable of generating large-scale [economic] compromise and adaptation" must be limited to representatives of government, business, and labor, with the latter two no doubt structured in the "hierarchial mass organizations" he admits "have never found much support" in the "highly contentious," "disorder[ed]," and "opportunis[tic]" political system that heretofore has refused to produce a coherent industrial policy.[9]

[7]U.S. Const., amend. V.

[8]Reich, "The Next American Frontier," *The Atlantic Monthly* 251 (April 1983): 106–8.

[9]Ibid., at 108.

Reich's vision of industrial policy includes recognition of economic-cum-political groups representing "business" and "labor"; the creation of "mechanisms for explicit bargaining among [these] groups" on the future of American industry; and the empowerment of new political "institutions with the authority to . . . guarantee the consensus"—that is, to enforce the groups' agreements against dissenters, including those who might seek redress in "the cloakrooms of Congress . . . and the courtrooms of every judicial district." Even Reich dimly senses that this substitution of rigidly organized, governmentally sponsored economic-cum-political collectivities for individuals and ad hoc voluntary groups as the basic units of political action in the industrial sphere is inconsistent with the Constitution's requirement that all citizens enjoy formal equality of legal opportunity to influence the governmental decision-making process.[10] Yet he implicitly dismisses the significance of this inconsistency by dogmatically asserting that "mounting pressures . . . *inevitably* are reshaping our governing institutions—consolidating authority over the economy, and *forcing* a closer strategic link between business and government."[11]

Thus the exponents of industrial policy neatly finesse the two major constitutional problems arising from their proposals. That industrial policy collides with principles of individual freedom is merely an apparent problem, they contend, because the free market is largely mythical in any event. And that industrial policy offends traditional ideas of political equality is merely a temporary inconvenience, they explain, because inexorable events will shortly render both those ideas, and the institutions embodying them, obsolete relics of an irretrievable past.

The Fascistic Propensity of Industrial Policy Proposals

The anti-market and elitist attitudes of the advocates of industrial policy crystallize in the fundamentally corporativistic—or, more bluntly put, *fascistic*—structure that permeates the most important contemporary proposals for such a policy: namely, *the tripartite board*, composed of carefully chosen representatives of business, labor, and

[10]Praising "the comprehensive bargaining arena in which West Germany's structural policy is formulated—where industry, labor, finance, and government leaders thrash out workable agreements on wage rates, selective credit policies, and adjustment," Reich nonetheless eschews the German system as "an appropriate model" for the United States. For, he admits, "[t]he relative ease with which a consensus about structural policy has been achieved" in Germany may be a product more of its "recently totalitarian" history than of "institutional design." Ibid., at 107.

[11]Reich, *ante* note 6, at 17; emphasis supplied.

government who cooperate to identify and solve what they perceive as problems in the productive economy. Some of the plans go further, creating *multipartite boards*, consisting of representatives of business, labor, government, and other special-interest constituencies of the new class, such as academicians, "public-interest" gurus, and financiers. But the basic thrust is more or less identical: Government grants to selected private economic power blocs some measure of legal authority to influence the political decision-making process above and beyond what citizens in general enjoy, or delegates to those blocs an actual share in the authority to enact or enforce laws, rules, and regulations of an admittedly legislative, executive, or administrative character.

The proponents of industrial policy of course also promote more traditional, albeit wide-ranging, schemes for redistribution of wealth. At the expense of taxpayers, they recommend massive new expenditures of the national government to subsidize research and development for favored industries and for industrial education and retraining, unemployment compensation, and health care and disability benefits for employees. At the expense of consumers, the advocates of industrial policy prescribe protection of domestic industries from low-cost, high-quality foreign competition. And at the expense of investors, they demand restrictions on the closure of unprofitable industrial plants in depressed regions of the country. But, in the newest schemes of industrial policy, even these tired redistributionist panaceas appear in distinctly fascistic garb.

Some proposals encourage the extension to employees of the syndicalistic right to participate in undoubtedly managerial decisions, including capital investment, reinvestment, divestiture, and relocation. Other proposals offer the guild-socialistic alternative of governmental subsidies to enable organized employees to purchase and operate plants that investors intend to close because of unprofitability. Still other proposals envision the erection of industrial banks, along the lines of the defunct Reconstruction Finance Corporation, to grant favored industries governmentally guaranteed, low-interest loans or to channel to those industries monies invested by private pension plans in the banks' governmentally guaranteed industrial-redevelopment bonds or other securities. As with the tripartite or multipartite boards, these industrial banks are to consist of representatives of the major power blocs of the new class, especially financiers and bankers, who will direct the future industrial evolution of the country through the grant or denial of governmentally supplied or guaranteed capital.

For a rather comprehensive example, arguing that "[i]ndustrial policy is an idea whose time is coming in America," a group called the Project on Industrial Policy and Democracy "outline[s] some of the major components of a national industrial policy":

> *A National Investment Bank* . . . would make loans or investments. . . . *A National Planning Board* . . . would develop an overall coordinated plan for the U.S. economy. . . . [T]his planning . . . board would also direct the lending activities of the [re-industrialization] bank.
>
> *Industrial sector and regional committees*, composed of representatives of business, labor[,] government and the public, play a major role. . . .
>
> *Local content legislation* . . .[;] legislation to control *plant closings* and to encourage worker ownership and participation in industry; new *trade laws* to help U.S. firms compete on an equal basis with foreign firms; special aid for basic *research* and *new technologies;* new *education, training, and retraining programs* to make sure that we have the skilled workers that we need. . . .[12]

Specifically advocating syndicalistic "co-determination," the project also supposes that

> [w]orker participation and worker ownership are ideas whose time has come in America. . . . An effective industrial policy will . . . giv[e] priority for contracts and technical and financial assistance to companies which are willing to become more democratic.[13]

And the project candidly admits that its overall goal, a goal not uncommon to proponents of industrial policy, is to "develop an economic plan based on both national and local community needs." Thus,

> [t]he President and Congress should together develop a four year plan for achieving full employment, price stability and real income growth. . . . The plan should be based on the needs of the national economy, but it should also be the result of a bottom-up process of local, community and state planning, by which citizens determine the needs of their communities for jobs, capital investment, training, and industrial development.[14]

A student of 20th-century history might well wonder whether this program for industrial policy originated in the contemporary United States or, perhaps, in fascistic Italy. Certainly a student of constitutional law would immediately question how the government could

[12]Project on Industrial Policy and Democracy, *Our Jobs Our Future: Questions for the Candidates about America's Industry and Economy*, Washington, D.C., 1984, at 4.
[13]Ibid., at 19.
[14]Ibid., at 11.

plan the entire national economy; that is, how the government could seize from the owners control over the countless decisions as to the industrial uses of private property, without eradicating the very notion of such property from the Constitution altogether. After all, "while property may be regulated [by the government] to a certain extent, if regulation goes too far it will be recognized [by the courts] as a taking."[15] And the encumbrance on industry of presidential and congressional "four year plan[s]," together with an additional "bottom-up process of local, community and state planning," would arguably implicate such pervasive governmental control as to eradicate any semblance of continuing private ownership, other than in a merely titular sense.

Prescriptive and Consultative Proposals for Industrial Policy

Although structurally similar, contemporary proposals for industrial policy do differ in emphasis in a constitutionally consequential manner. One major set of proposals delegates to the multipartite boards an actual prescriptive quasi-governmental authority to promulgate rules and regulations for industry subject only to legislative disapproval or modification, whereas the other major set of proposals establishes the boards as consultative bodies only, with the national government required to hear, but free not to adopt, the boards' recommendations.

In one influential example of a strongly prescriptive industrial policy, the AFL-CIO advocates "a new kind of social contract" among business, labor, and government that would significantly transmogrify American institutions.[16] Congress, the AFL-CIO demands, must create a

> tripartite National Industrial Policy Board (NIPB) with representatives of labor, business and the government. . . .
>
> Established by congressional mandate and delegation of authority, the [NIPB] would . . . strengthen both emerging and established industries through . . . an industrial development bank [similar to the Reconstruction Finance Corporation (RFC) of the 1930s and 1940s] which would make and guarantee loans to finance approved reindustrialization projects . . . targeting special assistance to promote industry and regional development goals . . .[, and] undertaking broad-ranging analyses and developing specific recommendations toward further changes in law and policy. . . .
>
> Industry and area reindustrialization proposals would be developed by individual tripartite committees, based on their members'

[15]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[16]"Rebuilding America: A National Industrial Policy," *The AFL-CIO American Federationist* 90 (22 October 1983): 1.

> thorough knowledge of circumstances in each region and industrial sector. . . .
> . . . Forwarded to the Congress for in-depth dialogue with appropriate committees, the [NIPB's] development plan would stand, subject to full congressional action. . . .
> The criteria applied by the NIPB in evaluating proposed industry or area plans or loan proposals should go beyond the limited balance sheet of private profitability. . . .[17]

Several aspects of the AFL-CIO's proposal for an industrial policy are noteworthy. First, the tripartite national and regional boards would enjoy a "delegation of authority" from Congress—that is, a "mandate" to function as quasi-legislative bodies. Yet the boards would consist primarily of business and labor representatives from *private* economic power blocs, representatives no doubt carefully selected to promote the interests of businessmen and union leaders favorable to the anti-market goals of the new class.

Second, reflecting its "delegation of authority" and quasi-autonomy, the national tripartite board's "development plan [will] stand, subject to full congressional action." Thus whatever deal or arrangement the representatives of business and labor concoct with the governmental members of the board would automatically have the force of law or administrative regulation, unless Congress specifically overrides it by statute.

Third, the board would not be limited by such rational market criteria as profitability, but could "attun[e]" itself to "the long-term development and welfare of the nation" without regard to, and measured by some standard other than, profit.

Fourth, the board would withhold funds or other aid from companies that refused to engage in whatever the board deemed "productive" and "responsible" actions (presumably without regard to profit), thereby enabling the board to exercise pervasive socioeconomic direction and control over the recipients of its largesse. A not surprising example of what the AFL-CIO considers "responsible" corporate behavior is its recommendation that employers "acknowledge the rights of workers to join together in democratic labor unions and refrain from campaigns to destroy unions." Under the present national labor laws, of course, employers must already "acknowledge" the rights of their employees to form and join, *or not to form and join,* labor unions.[18] What the AFL-CIO demands is that employers *affirmatively promote* unionization, in direct contradiction of the statutory

[17]Ibid., at 3–4.

[18]National Labor Relations Act § 7, 29 U.S.C. § 157.

policy of employer neutrality that the labor laws now mandate,[19] and in derogation of employees' constitutional freedom of nonassociation underlying that policy.

Fifth and last, by selling its governmentally guaranteed obligations to employee pension funds, the new RFC could divert the funds' immense financial resources from market to non- or anti-market uses, later reimbursing the funds' beneficiaries for any losses through taxation or increases in the supply of Federal Reserve System fiat currency.[20]

A prime example of a consultative industrial policy is the proposed Industrial Competitiveness Act, introduced by Representative John J. LaFalce.[21] Although not entirely unwelcomed by organized labor,[22] the Industrial Competitiveness Act avoids direct delegation of quasi-legislative authority to the multipartite board it creates, giving some force to the quotation by LaFalce of Lester Thurow's denial that such a purely advisory board is fascistic:

> Technically, corporativism exists when public powers are delegated to private decision makers. . . .
>
> In this sense, industrial policies are not corporativism. For all public decision-making powers will remain with the democratically elected officials who now make them and all private decision-making powers will rest with the private decision makers who now make them. Neither side can force the other to make decisions that they do not want to make. As a result, industrial policies are neither centralized government planning nor private corporativism.
>
> With industrial policies, private and public decision makers get together to see if they can exchange information and coordinate actions so that each makes better decisions than if their decisions are made in isolation.[23]

Specifically, the Industrial Competitiveness Act establishes a Council on Industrial Competitiveness as an "independent agency" in the executive branch of the national government,[24] with the duties

[19]National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3).

[20]Not accidentally in the context of its explicitly anti-market proposals, the AFL-CIO decries "restrictive monetary policies." "Rebuilding America: A National Industrial Policy," *ante* note 15, at 3.

[21]H.R. 4360, 98th Cong., 2d Sess. Similar bills include H.R. 5827, 98th Cong., 2d Sess. and H.R. 5828, 98th Cong., 2d Sess.

[22]AFL-CIO member International Association of Machinists (IAM) concedes that "H.R. 4360 isn't all the IAM has proposed . . . , but it has enough of those features to make it a good bill to start with." "An Open Letter to Congress: Dear Representative. . . ," *The Machinist* 39 (May 1984): 2.

[23]Thurow, "The Case for Industrial Policies," quoted in *Congressional Record* (17 May 1984), at E2254.

[24]H.R. 4360, 98th Cong., 2d Sess., § 101.

inter alia to "collect and analyze . . . data"; "monitor the changing nature of the United States industrial economy"; "prepare and publish reports containing the recommendations of the Council with respect to industrial development priorities"; "create a forum . . . where national leaders . . . will . . . identify national economic problems . . . [,] develop recommendations to address such problems . . . [, and] create a broad consensus in support of such recommendations"; "establish industry subcouncils . . . to develop similar long-term strategies for sectors of the economy"; "provide policy recommendations and guidance to the Congress, the President, and the Federal departments and agencies"; "provide guidance and recommend lending priorities for the Bank for Industrial Competitiveness [created by the act]"; and "stimulate and promote employee ownership" of industrial firms.[25]

The council consists of sixteen members, appointed by the president with the advice and consent of the Senate and removable only for malfeasance in office. Four of them "shall be heads of Federal departments or agencies, Members of Congress, or representatives of State or local governments"; four of them "shall be national leaders with experience and background in business"; four of them "shall be national leaders with experience and background in the labor community"; and four of them "shall be selected from the academic community or have been active in public interest activities".[26]

In fulfillment of its statutory duties, the council may hold hearings, take testimony, and receive evidence; secure necessary information "directly from any department or agency of the United States"; establish "industry subcouncils of public and private leaders representing the major economic interests affected by sectoral policies"; "continuously monitor . . . the effect of imports on all major United States industries"; "annually prepare and transmit to the President, to each House of the Congress, and to the Bank for Industrial Competitiveness a report setting forth . . . the major industrial development priorities of the United States . . . [,] the policies needed to meet such priorities . . . [,] a summary of existing Government policies affecting industries . . . [, and] any recommendations of the Council for . . . legislative or administrative actions, or actions by the Bank for Industrial Competitiveness"; and "consult" with appropriate committees of both Houses of Congress, whereupon "each such committee shall submit to its respective House a report setting forth the views and

[25]Ibid., § 102.
[26]Ibid., § 103.

recommendations of such committee with respect to the report of the Council".[27]

Although the act does not directly delegate quasi-legislative authority to the council, it does provide selected representatives of the new class with an officially sanctioned—and, from a merely practical perspective, politically powerful—platform from which to propagandize the country, and particularly the president and the Congress, on the "national economic problems" the new class imagines exist and the "solutions" to those problems that it deems necessary. Indeed, the act explicitly defines the purpose of the council as being to set up "a forum or forums" in which the representatives of the business and labor elites, together with sympathetic politicians and academicians, will actually "*create* a broad consensus in support of [their] recommendations." And the very nature of the act indicates that this "consensus" will be anything but market-oriented. After all, no group in society has a stronger interest in the efficiency of American industry than consumers. Yet the act nominates no consumer representatives to the council, except insofar as members with so-called public-interest backgrounds may adventitiously have personal pro-consumer attitudes. Moreover, although the vast majority of employees in American industry are not members of unions, the act's jargonistic reference to the "labor community" suggests that the "labor" spokesmen will likely represent *organized* labor only.[28] In short, the act is designed precisely to give official force and practical weight to one side in the political debate on governmental regulation of industry, by appointing the spokesmen of that side as "public" officials impressed with the authority to use the resources of the national government to influence Congress to enact interventionistic legislation.

Thus, although not as blatant as the AFL-CIO's proposal, the act nevertheless embodies in important degree the distinctly fascistic formal organization of political influence according to representation by interest group or class—and then limits that representation to certain politically select classes. Under the concept of freedom of petition in the First Amendment to the Constitution, however, all individuals and voluntary groups have *legal equality of opportunity* to request governmental action on their behalf; but no individual or

[27]Ibid., §§ 105–7.

[28]Other bills implementing industrial policy are more candid: For example, H.R. 5827, 98th Cong., 2d Sess., § 5(a)(2)(B)(i) (two members of proposed "National Industrial Revitalization Board" must be, "on the date of their appointment, officials of national or international labor unions"); H.R. 5828, 98th Cong., 2d Sess., § 5(a)(1)(c) (four members of proposed "National Commission on Industrial Policy" must be "officials of national or international labor unions").

group is legally entitled to discriminatory governmental aid in promoting his or its interests in the political arena.[29] So even the merely consultative nature of the multipartite board in this proposal raises a serious constitutional problem.

The Industrial Competitiveness Act also establishes a "Bank for Industrial Competitiveness." The bank consists of twelve directors, one from each of the categories of members of the council, and eight appointed by the president with the advice and consent of the Senate from among "individuals who have substantial experience and expertise in the fields of business investment, industrial development, or public or private finance."[30] The act empowers the bank to extend financial assistance for industrial "revitalization," by making loans, guaranteeing loans, and purchasing capital stock of applicants for its aid. However, the bank may provide such assistance only if the applicant "submits a written request . . . accompanied by a plan which, in the judgment of the Bank . . . explains the need for such assistance" and inter alia "includes details concerning . . . production, distribution, and sales plans." Moreover, the bank may grant "[n]o assistance . . . for projects whose primary purpose is to facilitate or impede the relocation of industrial or commercial plants from one area to another."[31] On similar terms, the bank may provide financial assistance for industrial "innovation."[32]

The act further authorizes the bank to guarantee loans "backed by the full faith and credit of the United States," and to issue its own bonds "guarantee[d] . . . with the full faith and credit of the United States."[33] In addition, "the bank shall endeavor, to the maximum extent possible . . . to guarantee loans from [private] pension funds to industry," and "to sell [its] bonds . . . to [private] pension funds."[34]

Distinguishably from the council, then, the bank has explicit power itself to intervene in the national economy through its highly selective financial operations, and to direct or control the recipients of its aid in an essentially unlimited manner.[35] The bank thus amounts to

[29]See E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government form Compulsory Public-Sector Collective Bargaining* (Arlington, Va.: Foundation for the Advancement of the Public Trust, 1980), at 49–50.

[30]H.R. 4360, 98th Cong., 2d Sess., § 202.

[31]Ibid., § 205.

[32]Ibid., § 206.

[33]Ibid., §§ 207(f)(1) and 208 (1)(2)(A).

[34]Ibid., §§ 207(f)(2) and 208(1)(3).

[35]The act broadly licenses the bank to "establish, from time to time, such additional standards and conditions for eligibility for financial assistance . . . as the [bank] deems appropriate." Ibid., § 205(e).

a massive "slush fund," underwritten by "the full faith and credit of the United States," with which representatives of the new class may promote and manipulate the industries they identify as needing "revitalization" or promising "innovation," according to whatever economic, social, political, or ideological criteria those representatives deign to employ. Moreover, the act implicitly contemplates that the financial assistance it authorizes will amount to subsidization, rather than prudent investment (in the traditional market sense); for otherwise it would be unnecessary for the bank to guarantee loans from private pension funds to selected industries, or to sell those funds the bank's own, governmentally guaranteed bonds.[36] To be sure, the act mandates that there be "reasonable assurance of repayment of any loan or loan guarantee" the bank extends.[37] But what is "reasonable"to the bank obviously need not correspond to a *market* rate, expectancy, or security of return on a loan; for if the market would float the loan, the bank's financial intervention would be unnecessary.

Revealingly, too, the act explicitly disables the bank from promoting market forces as far as geographical transfers of capital are involved, by outlawing assistance "for projects whose primary purpose is to facilitate or impede the relocation of . . . plants from one area to another."[38] In as much as private projects designed to "impede . . . relocation" of the recipients' own plants are difficult to imagine, this provision evidently reduces to an attempt to stifle interstate industrial commerce, arguably in contravention of the Commerce Clause of the Constitution.[39]

The Political-Economic Motivations Behind Demands for Industrial Policy

The manifestly anti-market and elitist attitudes of proponents of industrial policy, and the strongly fascistic character of what they propose, expose their practical political-economic motivations. The special-interest groups that constitute the new class—businessmen

[36]Pension fund fiduciaries who risked the funds' monies on the type of "revitalization" and "innovation" loans the act contemplates would be engaging in so-called social investing, which is now illegal under the Employee Retirement Income Security Act. See Vieira, " 'Social Investing': Its Character, Causes, Consequences, and Legality under the Employee Retirement Income Security Act of 1974," A study prepared for the Labor Management Services Administration, U. S. Department of Labor, February 1983.

[37]H.R. 4360, 98th Cong., 2d Sess., §§ 205(d)(4), 206(d)(4).

[38]Ibid., §§ 205(h)(2), 206(h)(2).

[39]U.S. Const., art. I, § 8, cl. 3.

greedy for governmental protection and subsidization; officials of organized labor intent on safeguarding the gains of restrictionistic unionism against the corroding effects of competitive domestic and international labor markets; politicians and bureaucrats eager to secure electoral support and to expand their fiefdoms of power; academicians and "public-interest" gurus hostile to the market and committed to its replacement by "planning" agencies through which they can enforce their own ideas of the "social good" on the reluctant masses—do not need such special mechanisms as multipartite boards to attempt to influence the national government in ways favorable to the substantive goals of industrial policy. All special-interest groups, including the constituents of the new class, already can participate with formal equality of legal opportunity in partisan politics, lobbying, propaganda and agitation, political litigation, and the organization of political coalitions to promote their pet projects. To the new class, however, the formal equality of legal opportunity to petition government traditional in the United States is not enough. For, under these circumstances, the power blocs of the new class have demonstrably failed to arrange for legislation installing the complex of interventions necessary for the coherent industrial policy favorable to their interests.

Formal equality of legal opportunity to petition government has led, in the event, to actual inequality of practical effect—simply because other groups, exercising their own legal privileges to petition the government, have bested, or at least thwarted, the new class in political maneuvering. In recent years, even the dullest segments of the community have begun to realize that much deceptively mislabeled "public-interest" legislation is in reality the means for special-interest-group predation of society. Old apologies for interference with the market have increasingly been debunked, not only in academic circles but even in the mass media. And the opponents of interventionism have effectively organized themselves, through political action committees and other devices, to win electoral contests and lobbying battles. To forestall further defeats in the arena of democratic politics, the new class now proposes, under the guise of industrial policy, simply to circumvent democracy to the maximum degree possible—either through prescriptive multipartite boards, which themselves will exercise quasi-governmental power; or through consultative multipartite boards, which will enjoy special access to, and influence over, elected and appointed legislative, executive, and administrative officials. At base, industrial policy seeks to replace the constitutional principle of formal equality of legal opportunity for all individuals and groups to petition government with the

fascistic principle of formal inequality of political privileges for the special benefit of elite economic and social power blocs.

The immediate goals of the new class are self-evident. First, industrial policy seeks to reduce public visibility of the new class's influence on the national government or (insofar as its visibility cannot be obscured) to give that influence the veneer of "official" respectability by channeling it through a multipartite board nominated by the president and confirmed by the Senate.[40] Second, industrial policy seeks to preempt the formation of politically powerful antagonists of the new class by permanently ensconcing its representatives as the only members of the new multipartite board empowered to direct the course of political discussion on economic intervention, even to "creat[ing] a broad consensus in support of [its] recommendations" throughout government and elsewhere. Third, industrial policy seeks to enable the new class to stop, or at least to retard, the eroding effect of market forces on the economic bastions of monopoly and restrictionism, particularly in aid of the labor unions comprising the AFL-CIO. Fourth, industrial policy seeks to reward anti-market actions by business and labor, or at least to render them less costly, thereby creating a system of governmentally subsidized anti-market incentives in an attempt to counteract the market's otherwise relentless punishment of producers that fail to serve the consumers diligently. Fifth, industrial policy seeks to plunder private labor-management pension funds by diverting their assets to anti- or non-market uses, thereby compelling the market to finance its own destruction.[41] And sixth, industrial policy seeks to erect a governmentally sponsored platform for incessant anti-market propaganda, in the hope of intellectually and politically legitimizing once again, by filtration through the new layer of bureaucratic mumbo jumbo the multipartite board will excogitate, the shopworn precepts of interventionism that America has already examined, found wanting, and begun decisively to repudiate at the polls.

The long-term goals of the new class are also readily apparent. First, industrial policy will provide a training ground for generations of fascistic "planners" and an experimental laboratory for their "plans,"

[40]A not unlikely model here, of course, is the Federal Reserve System, which the great majority of Americans misperceives as a purely governmental agency when, in reality, it is a largely private, corporative-state banking cartel. See E. Vieira, Jr., *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* (Old Greenwich, Conn.: Devin-Adair, 1983), at 346–55.

[41]This aspect of industrial policy already has a separate existence, albeit approximately the same constituency, under the label "social investing." See Vieira, *ante* note 36.

involuntarily subsidized by the victims of those plans through taxation or monetary expansion. And second, industrial policy will provide a foundation, or "first step," for more ambitious programs designed, not simply to revitalize declining American industries or to stimulate innovation, but instead to manipulate the entire productive economy in accordance with the new class's social agenda.

A Political-Economic Critique of Industrial Policy Proposals

That contemporary proposals for industrial policy complexly admix economic and political elements complicates constitutional analysis, because the Supreme Court's principles for reviewing the legality of legislative enactments differ radically depending on whether the legislation *sub judice* is predominantly "economic" or "political" in nature (as the Court understands the latter terms). For this reason careful consideration of both the economic and political ramifications of industrial policy is appropriate.

The Absence of a Sound Economic Basis Subtending Industrial Policy Proposals

According to the Supreme Court's present view, Congress may enact any legislation in the economic area that has a so-called rational basis: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests on some rational basis within the knowledge and experience of the legislators."[42] And typically, supposed "market failures" provide the context for such legislation: "[R]egulation is within [the government's] power whenever any combination of circumstances seriously curtails the regulative forces of competition, so that buyers and sellers are placed at such a disadvantage . . . that [the] legislature might reasonably anticipate serious consequences to the community as a whole."[43] Of course, the court's rational-basis test lacks constitutional cogency in many respects.[44] But, at the very least, it does require those supporting a

[42]United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[43]Ribnik v. McBride, 277 U.S. 350, 360 (1928) (Stone, J., dissenting). The essence of Justice Stone's dissent in Ribnik was later adopted as majority doctrine by the Court in such cases as Ferguson v. Skrupa, 372 U.S. 726 (1963), and Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[44]See Vieira, *ante* note 3, at 1480–94; Gulf, C. & S. F. Ry. v. Ellis, 165 U.S. 150, 154 (1897); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 401–02 (1937) (Sutherland, J., dissenting).

piece of economic legislation to present a prima facie defense of the enactment's real and substantial relation in reason to a legitimate public purpose.[45] And this, even a cursory analysis indicates, the proponents of industrial policy would be hard-pressed to do.

Even if its advocates honestly, albeit naively, believe that industrial policy can somehow perfect market mechanisms (or at a minimum mitigate market failures), and therefore aim at a public purpose legitimate under the Commerce Clause of the Constitution,[46] their proposals nevertheless lack a real and substantial rational relation to that goal. For industrial policy by and large addresses economic problems caused by, or arising out of, the incoherence and perniciousness of already existing governmental intervention, not imperfections or failures of the market.[47]

The fundamental difficulty with industrial policy traces to the faulty contemporary political-economic teaching of welfare-state advocates that government can and should reduce the economic and social instability and insecurity attendant on market change, while at the same time promoting (if not actually guaranteeing) a continual rise in living standards. Inherent in this notion is the inescapable contradiction that increases in living standards necessarily imply constant economic change, in terms of new technologies, products, services, and markets, and that economic progress of this kind inexorably imposes instability and insecurity on those whose incomes and social positions derive from or depend upon old technologies, products, services, and markets. The welfare state's prescription for intervention is thus schizophrenic: On the one hand it demands that government attenuate the inevitable effects of all economic change; and on the other hand it demands that government accelerate at least some of the major changes that produce these effects. Obviously, then, the rationality of an industrial policy that aims at simultaneously revitalizing segments of industry that market changes are causing to contract, and promoting innovation in other segments from which the market withholds capital because the alleged innovations are economically unsound, is open to serious question.

Similarly, the oft-articulated criticism by exponents of industrial policy that the profitability of many modern industries relates less to

[45]Compare Railroad Retirement Board v. Alton R. R., 295 U.S. 330, 347–48 n.5 (1935), and Nebbia v. New York, 291 U.S. 502, 525 (1934), with Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 274 (1936).

[46]U.S. Const., art. I, § 8, cl. 3.

[47]If, on the other hand, the true purpose of industrial policy were selectively to enforce protectionism on behalf of politically influential industries or regions, its constitutional illegitimacy would be nakedly apparent.

successful competition in the market place than to skillful maneuvering in the political arena, and that therefore increased political intervention through multipartite boards and other devices is justifiable, also fails the test of rationality. The national government's policies regarding taxation, spending, and regulation, together with the entire present-day system of political favoritism that pervades Washington, D.C., create numerous incentives and disincentives to which business, organized labor, and other special-interest groups have favorably adapted, usually at the expense of society as a whole. For that reason, exponents of industrial policy are descriptively correct in noting that distinctions between governmental and market activity have increasingly blurred in recent years. They are not, however, analytically or prescriptively correct in attributing this state of affairs to a failure of the market, or in promoting further governmental intervention to palliate the effects of earlier political errors. To the contrary: If contemporary political entrepreneurship is a problem precisely because of governmental overinvolvement in the economy, and if some new governmental agency (or semi-private multipartite board or bank) with enlarged authority to commandeer part of the nation's capital to aid some industries and regions at the expense of others would likely become the immediate target, and perhaps captive, of special-interest-group politicking, then industrial policy as now formulated is manifestly counterproductive. Self-evidently, if a legitimate public purpose behind industrial policy were to depoliticize the economy in favor of efficiency, the creation of some new quasi-governmental entity with the at-least-implicit mandate of directing capital into non- or anti-market uses in order to serve various parochial political constituencies would lack a real and substantial relation in reason to that purpose.

Their critics should not lightly assume the good faith of proponents of industrial policy, however. Revealingly, although they evince supposed concern for mitigating market failures, advocates of industrial policy reject numerous market solutions to contemporary economic problems, such as monetary reform, to return the country to the silver- and gold-based standard that both the Constitution and sound economic policy require; labor-law reform, to eradicate the noxious principles of exclusive representation and compulsory collective bargaining that enable unions to exercise restrictionistic powers over the labor market; tax reform, in the direction of a flat-rate or other tax less damaging to capital formation and economic incentives than the present graduated income tax; and educational reform, to break the stranglehold of the public schools (and such public school unions as the National Education Association) over intellectual development

of the nation's youth. And their argument that the free market is, in any event, largely a myth belies any real concern on their part for the market—or its corollary, economic freedom.

This, of course, raises a serious analytical problem, in that constitutional regulation through economic legislation presupposes the existence of two separate spheres of activity, private and public: (i) the market, in which individuals and voluntary groups autonomously order their interrelations through the legal principles of property and contract, and (ii) the political process, through which decisions are reached, and coercively enforced, on issues irresolvable by application of the latter principles.[48] If the free market is a myth, though, then so ex necessitate are its major legal attributes, property and contract; such constitutional precepts as that "[n]o person shall . . . be deprived of . . . liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation"[49] become meaningless; and government has totalitarian authority. Obviously, if one major purpose of the Constitution—therefore, a compelling duty of government—is to protect individuals' liberty and property, then an industrial policy that for all practical purposes presupposes the nonexistence of those legal categories cannot be rationally related to a legitimate governmental end.

Conversely, even if one assumes arguendo that the proponents of industrial policy honestly intend it to enhance the operation of the market, in the sense of having significantly positive effects on the development and implementation of business strategies without coercive bureaucratic planning, industrial policy nevertheless stumbles at the threshhold of economic rationality because the intention is incapable of implementation. This is true for the following five reasons.

First, the proponents of industrial policy simply disregard the paradoxical constraint that the information critically necessary to any economically rational industrial policy is available only through the operation of the unfettered market itself. For that reason, insofar as industrial policy truly attempts to enhance the market through the use of market-derived information only, it is supererogatory; and insofar as industrial policy attempts to change the market "for the better" through the use of nonmarket (that is, overtly political)

[48]In constitutional terms, commerce (or economic activity) is not and cannot be politics (or governmental activity). See National League of Cities v. Usery, 426 U.S. 833 (1976), and especially the penetrating brief *amicus curiae* filed therein by Professor Sylvester Petro on behalf of the Public Service Research Council.

[49]*U.S. Const., amend.* V.

information, or by selectively disregarding market-derived information (according to political criteria of choice), it amounts to a form of coercive central planning inconsistent with liberty and property. In short, if industrial policy were economically rational, it would be unnecessary; and if it were economically nonrational, it would therefore be arguably unconstitutional on that ground alone.

Moreover, on the purely practical level of information retrieval, industrial policy faces numerous problems. For an industrial policy based on the dissemination of information to be successful, some agency must gather data that the business managers who make key strategic decisions in the market can and will actually trust and use, because those data accurately and objectively derive from and reflect the market rather than constituting propaganda tailored to serve the parochial economic ends of narrow special-interest groups, or mis- or dis-information designed to advance some group's non- or anti-market political and ideological goals. Yet no substantial evidence in the literature favorable to industrial policy demonstrates that the government, or some quasi-governmental multipartite board, *can* develop real, *market-based* information that is not already available to managers of business, labor leaders, academicians, or others. In the first place, a great deal of the most important information about business opportunities and strategies is proprietary in nature and therefore immune from discovery by any noncoercive governmental agency. Furthermore, much of the available information most crucial to managerial decision making travels through highly specialized, informal, and often exclusive networks of personal contacts that outsiders do not have access to or the expertise to evaluate. In other cases, typical major corporations and unions already devote sizeable resources to gathering, sifting, analyzing, evaluating, testing, and circulating information—leaving little for a new governmental agency to contribute. Indeed, what passes for information in encomia of industrial policy is in most instances pure hindsight. And certainly no governmental agency can provide information about the intrinsically unknowable future events on which entrepreneurs must speculate in the market.

In sum, information that can aid market processes is only partly public, necessarily complex, highly specialized, and largely judgmental in character. On the one hand, if a governmental board solicited private companies and unions to provide the raw data for industrial policy, it would simply invite the presentation of self-serving propaganda and the withholding of what the respondents considered strategically important to themselves. Thus, the government's information would amount merely to commonly available data, perhaps

purposefully doctored at the sources, the accuracy of which its recipients would strongly tend to doubt and discount ab initio. On the other hand, if a governmental board developed its supposed data from non-market sources, the resulting information, by hypothesis, would be largely political in nature—along the lines of the empty exhortation "This course of action is in the public interest!" Thus, the government's information would amount merely to ideological propaganda, which intelligent businessmen would obviously disregard completely.

Second, the structure of incentives the advocates of industrial policy propose to create is nonrational in the context of a market economy. In general, the proponents of industrial policy argue that groups suffering the detriments of economic change should receive compensation from the beneficiaries of that change. Specifically, to prevent an uneconomic plant from closing, they say, the government should subsidize its operation; or, if closure is unavoidable, the government should retrain, relocate, or otherwise aid displaced employees. Economic guarantees of this sort, however, will merely encourage businessmen to ignore production costs and union leaders to demand exorbitant wage rates, in the anticipation that the government will coerce other innocent groups to share in the economic risks of such irresponsible behavior. Thus, industrial policy of this kind will simply reward failure, waste, and greed by externalizing their costs, in effect establishing a pernicious system of redistribution of wealth based on economic *dis*service to the community.

Third, the very argument that certain types of industrial revitalization and innovation need governmental coercion to obtain sufficient financial backing evidences the inefficiency that industrial policy will predictably promote. For example, in the type of industrial bank to be established under the Industrial Competitiveness Act, loans and loan guarantees will be made, not by market entrepreneurs risking their own capital, but by political appointees playing with the taxpayers' monies. Under the terms of that act, any loan or loan guarantee must show a "reasonable assurance of repayment." But what the bank considers reasonable will doubtlessly turn on political, not market, criteria. After all, borrowers will need the bank's services only to the extent that the market considers them credit risks or foresees that their projects will be unprofitable. Thus, by hypothesis the bank will divert capital from productive to relatively unproductive employments; and its investments will therefore necessarily be *unsound*, according to any rational market criteria, in comparison to the competing investments the market would have made in the absence of the bank's intervention. Moreover, the diversion of

capital—especially the hundreds of billions of dollars in private pension fund accounts—from market investments directed by the demands of consumers to industrial bank investments directed by the commands of multipartite boards representing narrow special-interest groups and intellectuals antagonistic to the market will convert the American economy pro rata to a planned system of production, with all the deleterious consequences for rational economic calculation that that change entails.

Fourth, a fundamental premise of contemporary industrial policy is that various groups in society—in particular, unionized wage earners—have "economic rights" that the government must protect against erosive market change by forcing other groups—such as employers, shareholders, pension fund beneficiaries, or taxpayers—to subsidize those wage earners' continued employment, income, or other benefits. For example, numerous proposals for industrial policy embody restrictions on the mobility of productive capital, through limitations on the closure of uneconomic plants or on the transfer of capital assets from one region of the country to another. At base, the doctrine of economic rights implicit in industrial policy rests on the Marxian notion that the interests of employees inexorably and irreconcilably conflict with the interests of employers (or investors), and adopts the welfare state prescription of politicization of the relationship between employees and employers in favor of the former and at the expense of the latter.[50] However, besides being morally reprehensible,[51] this class-conflict thesis is economically incoherent, there being an intense and mutually beneficial community of interests between employees and employers in the market system of production. How the market process of cooperative effort among productive groups can be improved by imposing on it programs derived from the nonrational, anti-market mythology of inescapable, fatal antagonism among those groups, the advocates of industrial policy do not explain.

Fifth and last, of little value are the promises of some proponents of industrial policy that the multipartite boards and banks they advocate will not engage in coercive quasi-governmental planning, at the expense of market rationality. An underlying assumption of the multipartite-board strategy is that such a forum will facilitate understanding and generate consensus on socially acceptable and economically effective measures to advance American industry. This further assumes

[50]As used herein the term "welfare state" imports a corporativistic democracy in which unions and their intellectual allies exercise political dominance.

[51]See Encyclical Letter of Pope John Paul II, "On Human Work" ("Laborem Exercens"), pt. IV, § 20.

the existence of barriers to effective communication and cooperation among the major parties to key economic decisions—barriers governmentally sponsored discussions among selected representatives of some businesses, organized labor, academia, "public interest" groups, and the financial elite supposedly can overcome. Yet no one has made clear why the mere governmental sponsorship of such discussions among an elite coterie of politically influential individuals will encourage agreement on issues that the great mass of economic actors in the market presumably already knows divide them, and already has every economic incentive to resolve. High-level governmental groups organized to coordinate economic policy are not novel in this country, after all. Under President Nixon, there was the Council on International Economic Policy; under President Ford, the Economic Planning Board; and under President Carter, the Economic Planning Group. None of these, however, was effective—or, at least, as effective as the advocates of industrial policy say is necessary or possible. Why? No doubt because each of them lacked the political authority to coordinate its policies effectively, through governmental *coercion* as well as rhetoric.

If the government is "weak," then, in the sense that it lacks the political authority or will to impose a truly stringent program on reluctant employers or unions, industrial policy will probably amount to little more than a device through which pliant politicians and greedy businessmen and union leaders conspire to advance their short-term institutional interests—most likely through one or another form of protectionism. Conversely, if the government is "strong," in the sense that it seizes the political initiative to enforce consensus among even strenuously objecting employers and unions, industrial policy could achieve major changes in the direction of the American economy—but only towards non- or anti-market goals. Thus, if industrial policy is more or less rational, in that it merely serves as a forum for the exchange of economic data that participants in the market are free to accept or reject, it will be ineffective from the perspective of its advocates. And if it is effective from their perspective, industrial policy will be economically nonrational, because it will substitute for the voluntary decisions of market participants the imposed decisions of politicians, *fonctionnaires*, or quasi-bureaucratic representatives of the new class.

The Presence of Serious Political Objections to Industrial Policy

Even if contemporary proposals for industrial policy were to suffer less than they do from economic nonrationality, they would

nevertheless be seriously objectionable on political grounds. This is of great constitutional consequence, in as much as the Supreme Court regularly accords far greater protection to individual rights it considers "political" than to rights it can dismiss as merely "economic."[52] Even the most cursory analysis demonstrates that, as their own advocates structure them, the mechanisms for formulating industrial policy are inconsistent with the traditional American system of constitutional checks and balances and inimical to political equality among all citizens.

All major proposals for industrial policy advocate creation of an independent multipartite board located within the executive branch of the national government and possessed of either prescriptive or consultative authority vis-à-vis not only other administrative agencies but Congress as well. However, if such a board is to exercise true independence, and avoid functioning merely as an arena in which special-interest groups maneuver in mere preparation for lobbying Congress itself to take the decisive steps involved in implementing industrial policy, then the board must be largely immune from routine congressional oversight of and intervention in its operations. That is, for industrial policy to function in the dynamic and coherent fashion its exponents envision, Congress must effectively suspend its routine legislative authority over the economic issues that policy involves and more or less delegate broad discretion and freedom of action to the members of the multipartite board. Indeed, explicit in the AFL-CIO's version of industrial policy is the requirement that the decisions of the board automatically have the force of law *unless Congress affirmatively overrides them.*[53]

None of today's important proposals for industrial policy specifically empowers the president to direct, or even directly to participate in, the policymaking process, except initially by appointing the members of the multipartite board. But the authors of these proposals will doubtlessly soon realize that the appearance of democratic legitimacy for their creations demands such a role for the president, as the one coordinate branch of the national government elected by all the people of the United States. A restructuring of the multipartite boards to bring them under the immediate control of the president, however, would not obviate the problem of constitutional checks and balances inherent in industrial policy. For, by constitutional hypothesis, the president is a *coordinate* branch of the national government, *co-equal*

[52]See the seminal statement of this dichotomy in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[53]See *ante,* note 17 and accompanying text.

to Congress and to a great degree independent of control by that body.[54] So, under such an amended proposal, Congress would delegate to another branch of the national government powers the Constitution explicitly grants to it alone, under circumstances in which it could not control the exercise of those powers without actually rescinding its delegation of them.[55]

Conversely, under the more blatantly elitist proposals for industrial policy currently extant, a different (but no less egregious) problem of checks and balances exists. For, whatever the strict independence of the multipartite board, that board must exercise *some* quasi-governmental power, or enjoy *some* unique privilege to influence Congress or other arms of the national government, if its existence is to have any practical meaning whatsoever. And whatever its powers or privileges, that board overwhelmingly consists of individuals who, although perhaps capable of being labeled "public officials" because of the mechanism of their appointments, nevertheless remain private parties in contemplation of law, precisely because they are selected on the basis of their connection with, and for the explicit purpose of representing, the major private subgroups of the new class.

The theoretical possibility of legal challenges to the misuse of the multipartite board's powers or privileges, or to the president as leader of or participant in the operations of such a board, provides no realistic means to mitigate constitutional problems through judicial oversight of the day-to-day operations of the board, either, for three reasons. (i) The courts will likely shun any involvement in the complex of economic-cum-political issues by denying litigants standing to prosecute civil actions.[56] (ii) The courts will be particularly chary of interfering in the exercise of presidential authority.[57] And (iii) at most the courts will fashion but a grudging remedy applicable only to egregiously lawless conduct.[58]

[54]See Town of South Ottawa v. Perkins, 94 U.S. 260, 268 (1876) (defining "coordinate" branch of government as "one [that] has no power to enforce its decision upon the other ['coordinate' branch]").

[55]Of course, such an attempted unfettered delegation of legislative authority to the executive branch would be unconstitutional. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–42 (1935).

[56]For a similar result in the case of the analogous Federal Reserve System, see Raichle v. Federal Reserve Bank of New York, 34 F.2d 910 (2d Cir. 1929).

[57]See, for example, Mississippi v. Johnson, 71 U.S. (4 Wall.), 475, 498–99, 501 (1866); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127–28 (1940).

[58]For example, something akin to the so-called duty of fair representation in labor law, which protects employees against improper representation by unions only when the unions' conduct is palpably "arbitrary," "malicious," or "in bad faith." See Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944).

In sum, contemporary proposals for industrial policy raise serious checks-and-balances issues in that, insofar as they are effective, they withdraw from Congress some portion of its constitutional authority.

Contemporary proposals for industrial policy also threaten seriously to infringe on political equality for the peculiar benefit of the new class. Advocates of industrial policy argue that implementation of such a policy is necessary to overcome, through democratic discussion and action, the economic and social shortsightedness of entrepreneurs whose lust for profits causes them to ignore the human effects of plant closures, unemployment, the loss of welfare services through shrinking tax bases, and so on. That industrial policy might be democratic is, however, constitutionally irrelevant. For the Constitution sanctions no doctrine of unlimited majority rule, whatever the composition of the majority. Rather, it conditions the exercise of all govermental authority on the recognition and protection of fundamental individual freedoms, in effect permanently withdrawing the subject matters of those freedoms from the vicissitudes of political controversy, be it in the electoral process, in the legislature, or in a multipartite industrial policy board.[59] Moreover, the ostensibly democratic nature of industrial policy is also economically irrelevant. For in a rational economy, the preferences of individual consumers, rather than those of a political elite, allocate resources and distribute income. Consumer sovereignty alone is economic democracy.

Furthermore, completely unrealistic is the notion that contemporary proposals for industrial policy are democratic in the meaningful sense that they involve large numbers of citizens actively participating in discussions concerning the economic direction their society should take. Because each of the many decisions involved in formulating a comprehensive industrial policy will have but a limited effect on the average citizen, and because expenditures of time on numerous other personal matters will be more profitable to him than studying the issues arising in the industrial policy debate, the average individual will remain rationally ignorant of the whole affair. Conversely, firms, unions, or public-interest groups that face significant economic or political gains or losses from one or another decision of the multipartite industrial policy board will intensely seek to involve themselves in the board's actions. Indeed, the very structure universally advanced for such a board—with private-sector representatives

[59]For example, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943); Gordon v. Lance, 403 U.S. 1, 6 (1971); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736–37 (1964); see Kingsley International Pictures Corp. v. Regents of New York University, 360 U.S. 684, 689 (1959); State v. Nemaha County, 7 Kan. 549, 555 (1871) (Brewer, J., dissenting).

of business, organized labor, academia, the public-interest area, and the financial community, *but no representatives of the consumers generally, or of any other explicitly* pro-*market group*—evidences the proponents' intent that the board function as an exclusive forum for a selected range of speakers, rather than as an economic town meeting arguably open to all and sundry within the community.

Of course, the practical reality is that American firms and unions are already highly organized on an industry-by-industry basis to engage in political action through electoral support of candidates, lobbying, and wide-ranging propaganda—and therefore, as a matter of fact, already exercise significantly more political influence over governmental policies in the economic arena than do other, less-organized groups of citizens. However, the present state of political organization by firms, unions, and public-interest groups does not involve their representatives—*and their representatives alone*—in a *governmentally sponsored* forum where their views on economic policy—*and their views alone*—receive amplification in the national political debate *as a matter of law;* or, even worse, where the consensus of their views alone enjoys the force of law directly.

As currently structured, then, the proposed mechanism for deciding the nation's industrial policy is not at all democratic, but instead is palpably elitist. Each and every major scheme for a multipartite industrial policy board carefully excludes the public as a whole, or even the public specifically concerned with particular industries, from direct representation on or participation in the board as a legal right. Conversely, each and every major scheme explicitly includes representatives of the new class. Thus, vis-à-vis the general public, the proposals create for the benefit of the new class a legal inequality of opportunity to attempt to influence the political system. Moreover, in as much as the representatives of each subgroup of the new class are political appointees, they will predictably come from the most politically influential segments of the subgroups they ostensibly represent. Thus, vis-à-vis the minority or anti-establishment segments of those subgroups, the proposals create a further legal inequality of opportunity to exert political influence for the benefit of majority or establishment segments. In short, the multipartite industrial policy board will serve as a forum for political influence-peddling closed to everyone except the carefully culled mouthpieces of big business, powerful unions, fashionable academic circles, trendy public interest constituencies, and the financial elite of New York City and kindred metropolitan centers.

The political purpose of this exclusive forum is also clear: namely, the creation of an extra-constitutional institution for the limitless

transmutation of property rights within American industry. A "symptom of America's political failure," industrial policy guru Robert Reich claims,

> is reliance on courts . . . to allocate the burdens and benefits of economic change. . . . But the courts are ill-equipped to settle such issues. These controversies are . . . political contests among whole segments of the population. Their resolution depends less on . . . fact or . . . law than . . . on widespread public discussion, negotiation, and consensus. . . . Law can resolve conflicts only through reference to shared principles. . . . Where legal controversy comes to be viewed as a mechanistic and arbitrary device . . . , law comes to be regarded with cynicism.[60]

To Reich, American society lacks "shared [legal] principles" concerning "the burdens and benefits of economic change." But in legal terms those burdens and benefits involve rights (or absences of right) to property. So, Reich is actually arguing that American society lacks "shared [legal] principles" regarding property; that in "controversies" over these burdens and benefits no rationally determinable legal rights are actually involved, only "mechanistic and arbitrary" allocations of the results of economic change; and that therefore economic change must realistically be perceived as a never-ending series of "political contests" to be settled by ad hoc and virtually ruleless "negotiation" and "consensus." How a consensus on distributions of economic burdens and benefits will emerge among people who lack "shared principles" regarding property Reich leaves unexplicated. What he does teach is that pervasive political redistribution is a basic premise of industrial policy. In the deliberations of the multipartite board, the mere legality of preexisting property rights will be no argument against a proposal for "allocat[ion]" of the burdens and benefits of change to suit the ephemeral fancies of the representatives of the new class. Bluntly put, the multipartite board will do what courts are "ill-equipped" to accomplish: dispense altogether with considerations of property law (including ex necessitate the relevant mandates of the Constitution's Due Process Clause[61]), and treat property as a purely political category.

In sum, the advocates of industrial policy propose nothing less than that an elite clique of representatives of the new class be ensconced in a special political forum in which they can negotiate among themselves how to redistribute other people's property

[60]Reich, *ante* note 4, at 271–72.

[61]U.S. Const. amend. V provides in pertinent part that "No person shall be . . . deprived of . . . property, without due process of law."

throughout American industry and then either impose their consensus directly on society or launch a campaign of governmentally sponsored lobbying and political propaganda to foist their designs on the Congress and the American populus.

A Constitutional Critique of Industrial Policy Proposals

Although numerous aspects of contemporary proposals for industrial policy raise constitutional issues, a sufficient critique can focus on two basic concepts: namely, (i) that the national government should grant certain elite power blocs within the new class a special political forum through which to influence economic regulation by means of lobbying and propaganda (the multipartite board), and (ii) that the government should finance with taxpayers' monies non- or anti-market "investments" congenial to the social, economic, or political ideology of the new class (through an industrial bank).

The Absence of a Constitutional Basis for Public Subsidization of Industrial Policy

The second of these concepts perhaps most starkly reveals the unconstitutionally plunderous nature of industrial policy. For such schemes as the Bank for Industrial Competitiveness proposed in the Industrial Competitiveness Act amount to little more than a raid on the Treasury for the special benefit of particular businesses, unions, or geographical regions of the country that the country as a whole, through the market mechanism of rational cost accounting, has determined are insufficiently productive to warrant new or continued infusions of capital, but that the new class desires to subsidize anyway in defiance of the market. No sound constitutional basis exists, however, for such diversions of taxpayers' monies to private purposes.

Article I, section 8, clause 1 of the Constitution grants Congress "Power to lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare of the United States." On its face, then, this clause denies the legitimacy of governmental support, directly or indirectly tax financed, for revitalization or innovation of particular private industries that the market mechanism of capital allocation—the one objective means for ascertaining the "*general* Welfare" in an economically meaningful sense—deems unworthy of investment. Indeed, the collection of monies intended for such a use is not by definition constitutional "taxation" at all, but simple spoliation, in as much as a "tax . . . signifies an exaction for the support of the Government. The word has never been thought to connote the

expropriation of money from one group for the benefit of another."[62] To the contrary:

> To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the form of law and is called taxation. . . .
>
> [T]here can be no lawful tax which is not laid for a public purpose.[63]

Thus, in as much as contemporary proposals for industrial policy clearly aim at subsidization of particular businesses, they are invalid for want of a public purpose. And they would be no less unconstitutional if ostensibly directed at supporting particular local regions, or states, rather than private parties.[64]

Of course, that the question of the public purpose of taxation is a justiciable one,[65] that the courts may disregard purported congressional "findings" on the subject and investigate the matter independently,[66] and that in a "plain case" they may "se[t] aside the conclusion of Congress,[67] does not necessarily augur judicial invalidation of industrial policy. For the courts also afford Congress wide discretion in the premises,[68] and have evidenced reluctance to confer standing on either private individuals or states to challenge Congress' policies in the areas of taxation and spending.[69] Which emphasizes the need for a market-oriented president to take decisive action on constitutional grounds to thwart the installation of national industrial policy at the very onset.[70]

Article I, section 8, clause 3 of the Constitution grants Congress the power "To regulate Commerce . . . among the several States."

[62]United States v. Butler, 297 U.S. 1, 61 (1936).

[63]Citizens' Savings & Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 664 (1875). *Accord*, Cole v. City of La Grange, 113 U.S. 1, 6–7 (1885); City of Parkersburg v. Brown, 106 U.S. 487, 500–01 (1882); Jones v. City of Portland, 245 U.S. 217, 221 (1917). See also Missouri Pacific Railway v. Nebraska, 164 U.S. 403, 416–17 (1896); Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 77–80 (1937).

[64]See United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950); Cincinnati Soap Co. v. United States, 301 U.S. 308, 317 (1937).

[65]See Milheim v. Moffat Tunnel District, 262 U.S. 710, 717 (1923); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 705–06 (1923).

[66]A. L. A Schechter Poultry Corp. v. United States, 295 U.S. 495, 538 (1935); Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–49 (1924); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226–27 (1908).

[67]Cincinnati Soap Co. v. United States, 301 U.S. 308, 313 (1937).

[68]For example, Helvering v. Davis, 301 U.S. 619, 640–41 (1937).

[69]Frothingham v. Mellon, 262 U.S. 447, 486–88 (1923); Massachusetts v. Mellon, 262 U.S. 447, 482–86 (1923). But see Flast v. Cohen, 392 U.S. 83, 102–05 (1968).

[70]See Vieira, *ante* note 40, at 379–91.

On its face, too, this clause denies the legitimacy of governmental intervention aimed at securing profits for or subsidizing losses of particular private businesses. "Commerce," after all, exhibits two essential features: (i) *consensual* activity among investors, producers, and consumers, and (ii) terms of trade determined by considerations of profit *and loss*. Therefore, if the government guarantees an industry's profitability by coercing investors, producers, and consumers in their roles as taxpayers to support that industry financially, it is self-evidently not regulating "commerce" but *replacing* it with a species of "lemon socialism" or "lemon fascism."

Moreover, the purpose of the Constitution's Commerce Clause is to preserve a national "common market," free from interference designed to privilege local interests economically at the expense of the country as a whole.[71] Industrial policy, however, is fundamentally at odds with this purpose, aiming instead precisely at the creation of numerous governmentally financed economic privileges for particular private businesses, industries, unions, or geographical regions that disserve the national economic welfare. Where individual states have attempted to thwart the constitutional command of a national common market through local industrial policies, the courts have never hesitated to declare such protectionism invalid. Even under the purported exigency of economic distress,[72] no state may "place itself in a position of economic isolation" from the rest of the country;[73] attempt to "suppress," "mitigate," "neutralize," or "protect its own citizens" from the consequences of economic competition from other states;[74] or command that "business operations . . . be performed [there] that could more efficiently be performed elsewhere."[75] Rather, such interference with the free flow of commerce throughout the country is unconstitutional per se.[76] Why the same rule should not apply to Congress where its industrial policy specifically aims at the selfsame ends for the benefit of certain states (or worse, private parties) and to the detriment of the country as a whole is difficult to fathom.

The states, after all, lost their original authority to intervene in interstate markets when the Constitution granted the commerce power

[71]Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977).

[72]Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522–23 (1935).

[73]Ibid., at 527.

[74]Ibid., at 521–22, 525–26; Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43–44 (1980).

[75]Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).

[76]Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36–37 (1980); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 & n.15 (1981).

to Congress.[77] But the power Congress enjoys in that regard is one to regulate commerce "among the several States" taken as a collectivity—implying with no little clarity that the ambit of congressional authority excludes protectionist legislation designed to favor one, or a group, of states at other states' expense.[78] Industrial policy, though, seeks to place favored states (or industries therein) in positions of economic isolation, to suppress competition (especially in interstate markets for labor and capital), and to impede business mobility generally for the purpose of protecting citizens in one region from the socially progressive effects of national market forces. If even a majority of states lacks constitutional license to take such action independently, their claimed ability to do so through a majority of the members of Congress—where their candidly avowed purpose is to defeat the very end of the Commerce Clause—lacks a logical basis.

Under any provision of the Constitution, legislation must exhibit a rational basis to survive judicial review. The purpose of industrial policy is to give economic advantages to persons engaged in certain businesses—in particular, protection from competition for capital, labor services, and other factors of production. Furthermore, these advantages are to accrue only on a discriminatory basis—specifically, according to the determination of a multipartite board or bank composed of representatives of the new class that the favored businesses will engage in the kinds of revitalization or innovation that the board or bank, not the public expressing its preferences through the market, deems acceptable. Governmental favoritism of this sort, however, is arbitrary and unreasonable on its face, violating the fundamental constitutional rule of equal protection of the law.[79]

Finally, Congress cannot obviate these serious constitutional objections to industrial policy by arranging for subsidization of the new class's favored industries with monies from private union-management pension funds. Instead, such subsidization would itself raise grave constitutional problems under the First Amendment.

Monies contributed to the employer-employee pension funds subject to the Employee Retirement Income Security Act[80] are, economically speaking, the deferred wages of employees, which have been coercively diverted from the employees' take-home pay under the

[77]Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35–36 (1980).

[78]On the use of the term "the several States" to refer to *all* the States, see U.S. Const., art. II, § 2; art. IV, § 2. See also U.S. Const., art. VI, cl. 3.

[79]Compare Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 273–74 (1936), with Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954), Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937), and Currin v. Wallace, 306 U.S. 1, 13–14 (1939).

[80]29 U.S.C. §§ 1001–1461.

aegis of collective-bargaining agreements negotiated between employers and unions. As interpreted by the courts, the national labor laws do not permit employers, unions, or employers acting in concert with unions through collective bargaining to divert any monies from dissenting employees' incomes to political or ideological causes that those employees oppose.[81] And if the labor laws did not embody this prohibition themselves, the Constitution would impose it, perforce the First Amendment guarantees of freedom of speech, assembly, petition, and association.[82]

No one can dispute that the investments of the typical industrial bank contemplated by the advocates of industrial policy will amount to what is euphemistically labeled "social investing": that is, combining a market investment with the support of some non- or anti-market political or ideological goal, notwithstanding the risk of financial loss.[83] Therefore, private pension fund fiduciaries who invest in bonds or other obligations of such an industrial bank will thereby be engaging in social investing. To be sure, the Industrial Competitiveness Act requires that any revitalization or innovation loan the bank extends or guarantees have a "reasonable" expectancy of return and ultimately be supported by the "full faith and credit" of the national government—which argues for the financial security of any pension fund investment in the bank's own paper. Even if it exists, however, this financial security is legally irrelevant. For, through the bank's loans, the pension fund's investments in the bank will necessarily amount to a loan of employees' monies for the political and ideological purposes of the new class, purposes which (in the vast majority of cases) are unknown to the employees, and probably would be opposed by many of them if they were aware of what was going on.

Certainly, it is too late to argue that it would be legal for employers and unions to agree through collective bargaining to withhold a percentage of employees' take-home pay and contribute it to some industrial revitalization or innovation that they deemed socially valuable, on the promise that the employers and unions, later on, would repay the forced loan with adequate interest.[84] Why it would be any less illegal for employers and unions, in league with pension fund fiduciaries and the managers of an industrial bank, to achieve the same end by an economically identical operation labeled "investment" is difficult to see. Thus, whether an industrial bank obtains its

[81]Ellis v. Railway Clerks, 104 S. Ct. 1883 (1984).

[82]Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

[83]See Vieira, *ante* note 36, at 1–7.

[84]Ellis v. Railway Clerks, 104 S. Ct. 1883, 1889-90 (1984).

capital from the taxpayers or from private pension funds, its operations raise serious constitutional problems.

The Absence of a Constitutional Basis for Enhancing the Political Influence of the New Class

The constitutionally novel aspect of contemporary proposals for industrial policy lies, not in their reliance on taxpayers' (or even pension funds') monies to subsidize non- or anti-market activity, but instead in their advocacy of multipartite boards composed of representatives of the major power blocs of the new class and licensed to exert strong political influence on Congress at the public's expense in support of the new class's socioeconomic agenda. Under the Industrial Competitiveness Act, for instance, the members of the multipartite board and bank consist of one public group, "heads of Federal departments or agencies, Members of Congress, or representatives of State or local governments," and four private groups, including "national leaders with experience and background in business"; "national leaders with experience and background in the labor community"; persons "from the academic community or . . . active in public interest activities"; and individuals "who have substantial experience and expertise in the fields of business investment, industrial development, or public or private finance."[85] Little cynicism is necessary to anticipate that only people who enthusiastically embrace the interventionistic premises of the act will be selected to fill these positions: businessmen in favor of governmental bail-outs, such as Lee Iacocca; labor leaders from the AFL-CIO; academicians such as Robert Reich and Lester Thurow; and financial experts such as Felix Rohatyn. In any event, the vast majority of the members of the board and bank will represent, *and be chosen precisely because it represents,* certain private economic and political special-interest groups. Other private special-interest groups—such as consumers, nonunion employees, small businesses not organized in mammoth trade associations, rigorous free-market economists, and so on—will receive *no* representation at all, notwithstanding their equal interest in influencing the direction of industrial policy in this country.

Moreover, under the Industrial Competitiveness Act, the multipartite board will be empowered to create a forum, open to the representatives of the new class but closed to everyone else, in which to "identify national economic problems"; "develop recommendations to address such problems"; "create a broad consensus in support of such recommendations"; "provide policy recommendations

[85]H.R. 4360, 98th Cong., 2d Sess., §§ 103(a), 202(b).

and guidance to the Congress, the President, and the Federal departments and agencies"; and "consult with" appropriate committees of Congress concerning its recommendations.[86] And the congressional committees will be *required* to submit to Congress "report[s] setting forth the views and recommendations of such committee[s] with respect to the report of the [board]."[87]

Thus, overall, the act provides the new class with its own governmentally sponsored and taxpayer-subsidized platform from which to launch a campaign of lobbying and political propaganda to which Congress, in particular, will be compelled by law to pay attention. The act thus creates a dichotomy of legal opportunity to exert political influence between the specially privileged representatives of the new class on the one hand and everyone else on the other. Furthermore, it creates this dichotomy with relation to the singularly divisive political issue of industrial policy, affording one side in the debate an ability to promote its position denied to the other.

On its face, then, the multipartite-board approach offends the First Amendment's guarantee of free speech, because it involves the government in enhancing the political speech of one group in order to attenuate the relative voices of others; and it distorts the government's decision-making processes in order to benefit one group at everyone else's expense.[88] Indeed, the offense is patent, in light of the unequivocal precept that "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."[89]

In a series of cases involving the right to vote, the Supreme Court has ruled without exception or qualification that political discrimination is unconstitutional, even if it arguably promotes or defeats "good" or "bad" political views; balances political power among competing interest groups; encourages "political stability"; solves "practical [political] problems"; aids or hinders particular economic, social, or other nonpolitical interests; recognizes the "special pecuniary or other interest" of some group in a governmental decision; takes employment status into account; or even satisfies the demands

[86]Ibid., §§ 102(4, 6), 107(c)(2).

[87]Ibid., § 107(c)(2).

[88]See, mutatis mutandis, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790–92 (1978); Washington v. Seattle School District No. 1, 102 S. Ct. 3187, 3193–95 (1982).

[89]City of Madison, Joint School District No. 8 v. WERC, 429 U.S. 167, 175–76 (1976) (footnote omitted).

of majorities.[90] No rational basis exists for relaxing this fundamental tenet of democratic government simply because lobbying and propagandizing, but not voting, are involved; for lobbying and propagandizing are as much important political activities as exercising the franchise.[91] No rational basis exists for disregarding the rule simply because the political-economic interests of the new class are at stake; for the First Amendment—or the Constitution as a whole—extends no special privileges or protections to any special-interest group.[92] And no rational basis exists for relaxing the constitutional guarantee simply because the discriminatory political privileges relate solely to the issue of industrial policy; for the First Amendment recognizes no hierarchy of protection for different types of speech,[93] or based on the content thereof.[94]

In short, the constitutionally sufficient rejoinder to the demand for a multipartite board to generate industrial policy is that

> government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored . . . views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.[95]

A fortiori, a multipartite board with prescriptive, as well as merely consultative or advisory, authority would also be unconstitutional.[96]

[90]Cipriano v. City of Houma, 395 U.S. 701, 704–06 (1969); Carrington v. Rash, 380 U.S. 89, 93–94 (1965); Davis v. Mann, 377 U.S. 678, 691–92 (1964); Gray v. Saunders, 372 U.S. 368, 379–80 (1963); Williams v. Rhodes, 393 U.S. 23, 31–32 (1968); Kirkpatrick v. Priesler, 394 U.S. 526, 533 (1969); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736–37, 738 & n.31 (1964); City of Phoenix v. Kolodziejski, 399 U.S. 204, 208–10 (1970); Evans v. Cornman, 398 U.S. 419, 422–26 (1970); Kramer v. Union Free School District, 395 U.S. 621, 630–33 (1969); Harper v. Board of Elections, 383 U.S. 663, 666 (1966).

[91]See Vieira, "Are Public-Sector Unions Special Interest Political Parties?", *DePaul L. Rev.* 27 (1978): 293, 332–44.

[92]For example, labor unions are entitled to no special constitutional status as against any other group. Smith v. Local 1315, Highway Employees, 441 U.S. 463, 464–65 (1979); Carey v. Brown, 447 U.S. 455, 466–67 (1980); Chicago Police Department v. Mosley, 408 U.S. 92, 100–02 (1972); Thomas v. Collins, 323 U.S. 516, 538 (1945). See also City of Charlotte v. Local 660, Firefighters, 426 U.S. 283, 286 (1976); Coppage v. Kansas, 236 U.S. 1, 16–17 (1915).

[93]For example, Stanley v. Georgia, 394 U.S. 557, 565–66 (1969); Winters v. City of New York, 333 U.S. 507, 510 (1948); Lehman v. City of Shaker Heights, 418 U.S. 298, 318–20 (1974) (Brennan, J., dissenting).

[94]For example, Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964); NAACP v. Button, 371 U.S. 415, 445 (1963).

[95]Chicago Police Department v. Mosley, 408 U.S. 92, 96 (1972).

[96]See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

Conclusion

At base, contemporary proposals for industrial policy are an attempt to circumvent the strictures of the Constitution regarding inter alia the expenditure of taxpayers' monies, regulation of interstate commerce, and political equality. Thus, besides being economically unsound, industrial policy is also illegal. Such demerits, however, have not always been sufficient to thwart the enactment of other governmental programs in the past or to guarantee their invalidation by the courts. One thing is clear, though: If Congress enacts an industrial policy bill of the sort now proposed, and the Supreme Court sustains its constitutionality, that event will mark a radical departure from traditional constitutional principles of republican government and toward outright fascism.