# Perspectives
## on current developments

### Revision without Revolution in Carcinogen Policy

On May 22, 1984, the Office of Science and Technology Policy released a sixty-seven-page draft of a report intended as a "framework for regulatory agencies in assessing cancer risks from chemicals." After public comments come in, a final version is to be published this fall. The draft emphasizes that it is intended not to "formulate policy" but to "articulate a view of carcinogenesis that scientists generally hold in common" and to "clearly distinguish" between "statements of what is generally accepted as fact" and "judgmental (science policy) decisions on unresolved issues."

No one can fault an effort to lay out clearly for regulators what scientists know about carcinogens. And this report presents a much less tendentious and more balanced discussion of the disputed scientific issues than the carcinogen policy unveiled by the Occupational Safety and Health Administration in 1980 (discussed in these pages, March/April 1980).

One topic will serve for all as manifesting this improvement, namely, the vexed question of the use of massive doses in animal cancer testing. The OSHA policy recognized no such thing as an overdose. That is, it considered substances to be carcinogens if they led to an increase in tumors at any dose level, including one where toxic effects were unmistakably evident. Moreover, it specifically ruled out the possibility that such a verdict could be legally challenged on the ground that overdose-related side effects (such as the debilitated health of the animals) might have raised the tumor incidence. The new paper, by contrast, recognizes this possibility:

> [H]igh doses may themselves produce altered physiologic conditions which can qualitatively affect the induction of malignant tumors. Normal physiology, homeostasis and detoxification or repair mechanisms may be overwhelmed and cancer, which otherwise might not have occurred, is induced or promoted. [If so,] a toxic response at [the highest] dose may not be indicative of effects at low exposure levels.

OSTP's report still favors using test doses far above human exposure levels in order to overcome the "inherent insensitivity" of animal tests. However, it specifically endorses setting maximum dose levels in the light of pharmacological data to guard against disproportionate build-ups of the chemical or its metabolites within the test animal. That is to say, a serious effort should be made not to induce cancer by overloading or poisoning the mice. Long-suffering regulatory critics will find these words as refreshing as a cooling stream after a long trek through the desert.

Still, a close reading of the new document reveals that it has not succeeded in its professed goal of distinguishing science from "science policy." Instead, it contains instance after instance where policy masquerades as science.

Consider three examples. The first is the question that underlies all use of animal tests in regulation, namely, how well do animal tests predict human risk? One would have hoped for a thorough review of the record of animal tests in making valid human predictions. The report's discussion of this crucial question, however, largely consists of the following assertion: "But a finding of carcinogenicity in rodents is proof that the chemical is carcinogenic in a mammalian species. This must be taken as strong evidence that the chemical can be a carcinogen in man. . . ." Thus, instead of proving that animal tests are good predictors, the paper simply gives its rationale for assuming that they are. Elsewhere, the paper informs us that "this principle has been accepted by all health and regulatory agencies"—which begs the question entirely, since the point of the pa-

per is to establish government-wide principles and, where necessary, to change principles that were accepted by agencies as a policy, not scientific, decision.

What *is* the scientific evidence on this point? It is thin, and hence can be summarized briefly. Hundreds of chemicals have by now been found to be carcinogens in animal tests, but epidemiological evidence in humans is available for only a fraction of them. Only a small number of these—somewhere between ten and twenty (depending on which authority one reads)—are also positive in humans. Thus, among the hundreds of animal carcinogens, fewer than two dozen have been confirmed to be human carcinogens as well. That is not a very large sample on which to base a generalization.

Of more importance is the question whether there are any confirmed cases where positive animal findings have *falsely* predicted human cancer risk. There are not. But this is a trivial consequence of the fact that there is no way to discover such cases even if they exist. The reason is that human epidemiology studies are statistically too insensitive to distinguish a substance that is not a human carcinogen at all from one that is merely quite weak, causing only one cancer in 10,000 subjects or one in 1 million. Thus, even though there are instances where the epidemiological evidence suggests that an animal carcinogen is not a human carcinogen—as in the cases of saccharin, DDT, and hair dyes—we cannot know this for sure.

How about negative animal results? Could one at least rely on thorough, well-conducted animal tests to establish that a substance does not cause cancer? Even this type of prediction, as it happens, is soft. It is, to be sure, a staple of the regulatory defense of animal tests that, as the new report says, "known human carcinogens, with the single exception of arsenic, are carcinogenic in appropriately conducted studies in some animal system." That might make it sound as if false negatives in animal test results are rare. The catch is that the report is including in its generalization a multitude of animal test designs, some of which—such as skin painting, injection, or intrabronchial implantation—are not normally carried out for regulatory approvals. Were these nonstandard tests excluded, the false negative rate might be higher. Thus the truly useful questions the report could have asked are these: How many false negatives are there if the only evidence available is that of standard test designs of the type and on the species of animals generally used for regulatory purposes? And can a chemical that comes out negative in those tests be considered safe for humans? The new report, unfortunately, is absolutely silent about these important questions, even though they, unlike the question of false positives, can in principle be answered on the basis of currently available data.

Thus, with regard to both positive and negative outcomes, the belief among regulatory agencies that animal tests predict well for humans is based on policy judgments, not strictly scientific ones. OSTP's new report is remiss in not making this explicit and in not discussing the evidence, such as it is, that supports this belief.

Policy can also be discerned to be cloaking itself in science in some of the report's recommendations on how animal tests should be designed and interpreted. Early on, the report expresses a pious wish that guidelines for long-term tests "should be designed to achieve an appropriate balance between the two essential characteristics of a biological assay: [a]dequate . . . sensitivity (a low false negative rate) and adequate . . . specificity (a low false positive rate)." Unfortunately, that praiseworthy intention cannot be carried out with respect to human cancer prediction. Regulators cannot alter their animal testing techniques to lower the frequency of erroneous predictions of risk to humans because, as discussed above, one cannot identify when those predictions are wrong. Instead, regulators (and the new report) fill the void of scientific knowledge with a policy value—that of "prudence." The most "prudent" course, naturally, is the one most likely to yield a positive outcome, and thus avoid false negative errors. This amounts to the principle of banning ten innocent chemicals rather than letting a guilty one go free.

Such prudence is rather different from achieving an "appropriate balance" between false negatives and positives, but this policy choice nonetheless underlies many of the report's recommendations. For instance, the report suggests that benign tumors should often be counted in with malignant ones for statistical analysis, which means that benign tumors can supply the margin of difference in de-

termining whether a substance is judged a carcinogen. It also recommends calling a substance a carcinogen even if it does not raise the incidence of tumors but merely speeds up the appearance of spontaneous tumors that would have arisen anyway. The report explicitly endorses defining the term carcinogen "in a broad sense" in an effort to be prudent.

The problem with this is that the central issue in regulatory decision making lies in deciding which risks matter; the report never discusses what happens when the strong signals of powerful carcinogens are lumped in with and swamped by all sorts of weak and feeble effects. Thus the decision to treat carcinogens "in a broad sense" is likely to undercut the effort to treat them in a serious sense.

Policy is also smuggled into the report's discussion of a third area—the controversy over whether there is a threshold dose level below which a chemical has no carcinogenic effects. The report rejects thresholds and endorses the Delaney "no safe dose" approach to low doses. It cites the differences in individual sensitivity among a human population of normal genetic diversity, arguing that one could never rule out the possibility that someone, somewhere, might be sensitive to any exposure, however low. Also, given the limited size of animal tests, some rare adverse effects might always go undetected. Finally, the report notes the possibility that one carcinogen might interact with others to produce cancer even when consumed at a level that, when tested alone, produces no evident effect. For these reasons, no truly safe threshold dose for an entire population could ever be demonstrated experimentally.

These considerations sound like scientific ones, but they conceal a prior policy judgment. Why? Because only carcinogens are treated in this way: ordinary toxins (such as table salt) have long been regulated on the basis of pragmatically established "safe" dose levels, below which the risk to the public is believed to be insignificant. These are determined by first identifying "no observed effect levels" on the basis of routine animal tests and then adding a safety factor for extrapolating to humans. Clearly this method of setting levels cannot prove that the risk to the public is perfectly zero; rare sensitivities and interactions could always occur. Also, there are no obvious differences between carcinogens and toxins in the shape of experimentally observed dose-response curves. Both typically look "threshold-like"; that is, they show upward curvature at high dose levels and are, as scientists put it, consistent with being flat at sufficiently low doses.

Why, then, treat carcinogens so very differently from toxins by insisting on a "no safe dose" policy? The main argument given runs as follows. If a carcinogen is of the type that acts by damaging the DNA of body cells, there is some probability, however small, that a single molecule of it will induce a cancerous cell that could eventually grow to kill the host. Single molecules of toxins, on the other hand, cannot kill. But this distinction is seriously muddled precisely by the policy of defining the term carcinogen "in a broad sense," that is to include substances that merely shorten latency, induce benign tumors, or "promote" already existing tumors. These substances do not necessarily act at the DNA level; as the report observes, certain benign tumors do not result from any heritable, irreversible genetic change and are fully reversible after their stimulus is removed. Nor is there the slightest reason for thinking that single molecules of mere "promoters" or "latency shorteners" are capable of producing cancer; they behave much more like ordinary toxins, which are satisfactorily regulated on the basis of threshold assumptions.

Despite some modifications, then, the main lines of thinking on the cancer issue remain much the same under the Reagan administration as under its predecessors. The report's view of carcinogenic risk mixes science and policy, and seems to be based less on a scientific attempt to gauge the likeliest actual level of risk than on a political desire to be "prudent" by adopting worst-case estimates.

## Truth-in-Hospitalization

Should the public have legal access to data on the track records of its local hospitals? That is the hub of a controversy now raging at the Department of Health and Human Services. On April 16, 1984, HHS proposed new regulations that would require Peer Review Organizations (PROs) to disclose extensive data on individual hospitals on such sensitive matters as how often each hospital conducts a type of operation,

how many patients survive those operations, how long those patients remain in the hospital, and what the hospital charges for its services. HHS also requested public comments on whether to allow disclosure of the track records of individual *physicians* as well—although it said it views the argument for confidentiality as more compelling in that case than in the case of hospitals.

Congress created the predecessor of the PRO program in 1972. PROs are review bodies selected by and under contract to HHS and run by local doctors. Their main function is to review the services financed by Medicare (and, at the states' option, Medicaid). The purpose is to determine whether hospitals' and doctors' services are medically necessary and of acceptable professional quality. Under the program, HHS selects a PRO for each state by competitive bidding.

To conduct their review, PROs gather information from patient records and from records processed by claims payers such as Blue Cross. Using this information, the review bodies come up with profiles of hospitals, accounting for patient diagnosis, length of stay, services rendered, discharge status of patients, and readmission rates. PROs also compile physician profiles and general indicators of hospital quality such as infection rates. The PRO can then take action against providers that it believes have rendered unnecessary or low-quality service. Major employer groups, which are also seeking to control health costs, are likewise contracting with PROs for similar data, in hopes of steering employees toward the more efficient providers while ensuring that the quality of care does not suffer as costs are held down.

Individual patients who want to find out these things, however, remain somewhat in the dark. They can try to obtain information from PROs, but are often unsuccessful. Some PROs do not want to release information for fear of endangering the cooperation of hospitals and doctors in the peer review process. The proposed regulations would clarify and enforce an existing policy that requires PROs to disclose some data on individual hospitals to the public.

Disclosure advocates, who include consumer groups and employer groups, argue that such information could make a real difference for patients who now rely on at best anecdotal information before scheduling, for example, major surgery. Researchers have shown that hospitals that perform a lot of open heart surgery have a higher success rate than those that seldom perform it. They also maintain that disseminating information would strengthen competition on the basis of quality by intensifying oversight by payers and recipients of care and peer pressure from other health care providers —for example, pressure by doctors on the hospitals with which they affiliate. In New England, after studies were released showing tremendous variations in per capita rates of elective surgery, hospitals developed review procedures that resulted in significant reductions in the rate of elective surgery, reducing the cost and risk to patients of unnecessary surgery.

Several states, including Maryland and New York, have already been making some information available to patients since the mid-1970s. The public users have been primarily researchers and health planners, although the Health Research Group, a Nader organization, has assembled a consumer guide on Maryland hospitals' mortality rates associated with given procedures.

Hospital and doctor groups view the proposed disclosures as gross intrusions into the confidentiality of medical practice. They point out that hospital statistics can be seriously misleading. Hospitals that operate burn centers, for example, are likely to report higher infection rates. Likewise, a hospital that begins a program to take in emergency patients by helicopter may find its mortality rate climbing as it takes in more serious cases. Mortality rates for particular diagnoses may even double.

Raw statistics on physician track records would also be likely to mislead. A surgeon may be saddled with a high mortality rate simply from specializing in patients with complications. Moreover, even the best medical decisions are no guarantor of a good outcome.

If patients should start to scrutinize these indices, physicians might tend to work more and more "by the book," with little variation from the peer norm, in almost every aspect of medical practice from diagnosis to therapy. Standardization could replace the kind of experimentation that leads to medical advancement. Some physicians and hospitals may shun high-risk patients for fear of skewing their averages, or even refuse to perform the riskiest procedures altogether.

Disclosure proponents are confident that these difficulties can be avoided by adjusting the raw statistics to sift out the variable factors and indicate the relevant quality differences. They note that such techniques of adjustment can be sharpened using Medicare's new basis for hospital reimbursement ("diagnosis-related groups") which attempts to account for variations in patient health status and other variables. Whatever the eventual sophistication of such techniques, however, they are still in their infancy—which does not help HHS much in its immediate regulatory decision.

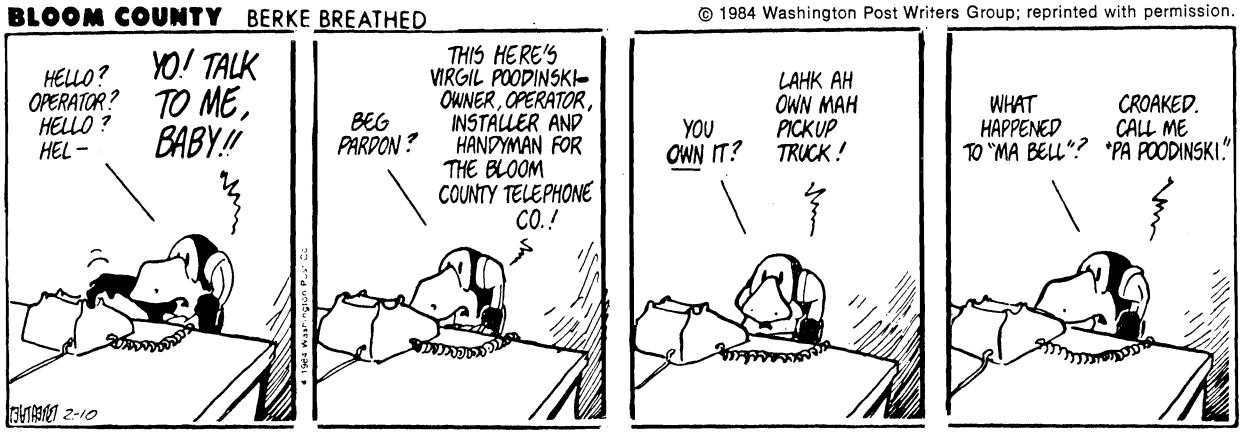
## Sorry, Wrong Company? Competition in Pay Phones

Competition is coming to one of the humbler corners of the telecommunications network—the common coin-operated public phone. The $1.2 billion-a-year market for pay phones has always been a legal monopoly of local phone companies. That is now changing. In the latest of a series of deregulatory moves, the Federal Communications Commission voted on June 15 to allow private parties the option of installing their own pay phones rather than renting from the local telephone company. In the same month, anticipating the FCC action, Minnesota became the first state to give businesses (though not individuals) this option.

Contrary to what you might expect, pay phone competition is not just another by-product of the AT&T breakup. It owes as much to advances in telephone technology as to the trend toward deregulation. Until recently the only type of coin telephones available depended on the phone company's resources in several ways. Pay callers could speak to an operator at the telephone company's central office. Special equipment in the central office conducted electrical exchanges with the phone terminal to verify initial coin deposits, ring little chimes to signify that a coin had been inserted, return the coins after a busy signal or no answer, and trigger messages announcing rates and charges to the telephone user. Coin phones also depended on special metered lines to tell how long a call was taking. When the FCC decided back in 1975 to let customers hook up their own free-standing telecommunications equipment into the nationwide network, it did not include coin phones among the permissible equipment, since they were not free-standing.

Now, however, computer technology has created "smart" pay phones. These phones can perform all the same functions as the conventional pay phone, but using conventional telephone lines, and without contact with a central office or the assistance of an operator. These telephones are also self-contained: all the circuitry required to accept the coin, time the call, and so forth is contained in the telephone itself. Several manufacturers of such phones have sprung up in the past couple of years. The new FCC order essentially permits individuals and businesses to connect these self-contained phones to regular telephone circuits for interstate calling.

Local phone companies mostly opposed deregulation. Needless to say, they did not want to lose their monopoly, and warned that they might have to raise other rates to make up the lost revenues from coin service. But they also charged that some private owners might choose to buy antisocial telephone designs: phones



without the initial dial tone that grants coinless access to 911 emergency calling, or phones that do not accommodate the hard-of-hearing.

These concerns may have led the FCC to drop its initial plan, which was to preempt state regulation in order to ensure full deregulation of pay phones. Instead, it decided to let individual states come up with the rules, if any, and the rates under which these private pay phones will operate for use in local intrastate service. It is possible that some state might attempt to ban private pay phones by limiting their use with local service or by setting prohibitive rates, but the FCC could be expected at some point to override such attempts by declaring them inconsistent with the federal regulatory scheme. Thus some degree of nationwide deregulation is assured.

State regulators will soon have a lot of issues to settle. Local phone companies may seek to convince state regulators that they should receive some portion of the revenues that the private pay phones generate. That is what happened in Minnesota. The Minnesota commission requires businesses that buy their own coin phones to pay the telephone company $55.70 to $80.90 a month, depending on their locations, for the use of a special telephone line. They keep the revenue from the first 200 telephone calls a month and pay Northwestern Bell from five to ten cents per call thereafter, depending on the volume of calls. Assuming 300 calls a month at 25 cents apiece, that adds up to not much better than a break-even proposition—and of course the business is responsible for its own repairs. Still, this leaves businesses better off than they have been. In the past, Minnesota businesses that wanted a coin telephone had to pay the phone company for the privilege, at rates of between $32.90 and $76.10 a month per line, depending on their location. Moreover, they could not keep any of the revenue generated. (In some other states, the host business could keep a share of receipts.)

Another sticky issue for state public utility commissions will be whether to allow the prin-


*"Then she began picking on the long-distance phone company I chose."*

Drawing by Modell; © 1984 The New Yorker Magazine, Inc.

ciple behind private pay phones—that firms should be allowed to "resell" local phone service—to spread further. Up to now telephone company tariffs have prohibited all businesses except for hotels, motels, and hospitals from reselling local service. On the other hand, resale of interstate long-distance service, which has been authorized federally, is now a big business.

Legalized resale at the state level may seriously cut into phone company revenues. Local phone companies provide much of their local service on a flat-rate basis, that is, not varying with usage. If firms are allowed to buy flat-rate service and resell the time on it to residential and business users, thus concentrating usage of the line, it will tend to become impossible to maintain the flat-rate fee. Minnesota resolved this issue by limiting resale to business lines that provide "measured" (metered) service. Other jurisdictions are likely to adopt the same approach, at least until residential metering becomes widespread.

A proliferation of private-party coin phones should have a number of effects. One is a great increase in the variety of phones. Phones might be specialized for calling across the city, across the state, or across the country, and could be structured to accept almost any credit card, not just the phone company's. Some would, others would not allow callers to talk to an operator. Another effect should be some degree of price competition, especially since local telephone companies can continue to erect both the old and the new type of pay phones on their own account. As pay phones become more numerous in stores and restaurants, however, they might become less numerous on the street—unless regulators decide to permit private pay phones in public areas such as airports and street corners.

## Race, Ratchets, Redistricting, and the Voting Rights Act

By now everyone knows the story of how the original color-blind intentions of the civil rights acts were gradually turned into the color-conscious policies of busing, quotas, and affirmative action. Less well known—but illustrated in three cases pending before the Supreme Court—is the extent to which the purpose of the Voting Rights Act of 1965 has been transformed in much the same way.

Before the Voting Rights Act was passed, southern governments used a variety of procedural devices and pretexts to prevent black citizens from voting. (In one oft-told story, local officials gave black applicants a "literacy test" by handing them a Chinese newspaper to read.) These barriers began falling to court challenges in the 1950s and 1960s. As soon as one barrier was struck down, however, the local authorities could erect a different one—and there was an almost infinite variety for them to choose from. Polling places could be switched at the last minute. Applicants for registration could be required to obtain character references from already registered voters, nearly all of whom were white. The boundaries of whole cities could be gerrymandered to exclude those blacks who did manage to register. It looked as if southern governments might succeed indefinitely in keeping one step ahead of the courts—and keeping blacks out of the voting booths.

Congress responded to this problem with section 5, the "pre-clearance" provision of the Voting Rights Act. That section requires most southern governments (and a few other jurisdictions around the country) to obtain the approval of the Justice Department or a three-judge panel of the federal district court in Washington before making any change that affects election procedures. The local government must prove that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

The provision seemed to work as intended, and southern blacks began registering in large numbers. But then the focus of voting rights cases began to shift away from the question of whether minorities were free to vote, and toward the question of whether their votes were being "diluted." This dilution could take many forms. For example, a city might dilute the clout of a growing minority population by annexing an all-white suburb. It could gerrymander its city council map to split up a minority neighborhood among several districts, or abolish districting entirely in favor of at-large elections.

The Supreme Court interpreted the act to prohibit any electoral change that caused "retrogression" in minority impact on govern-

ing bodies. The Justice Department proceeded to approve such changes only when the local government agreed to take other steps to increase the likelihood that minorities would be elected to office. If a city wanted to annex a suburb, it might be required to drop its at-large system of city council elections.

This emphasis on combating dilution had several problematic consequences. In the first place, there were plenty of nonracial reasons why cities might annex suburbs, employ at-large voting systems, or adopt this or that redistricting scheme. Under the law's effects test, none of these reasons could be considered relevant. Second, the ban on retrogression created a ratchet whose eventual end-state was a goal Congress had never endorsed: proportional representation by race.

Finally, the penalty for a local government's nonconformity sometimes fell on the wrong party, namely the voters. When the Justice Department refused to approve a redistricting plan, the result was often to delay or even abolish the elections in question. Richmond, Virginia, saw its city council elections delayed for five years in this way. New York City delayed council elections by a year, and Georgia held up congressional elections by a month. The law not only wound up suspending the process of local democracy it was intended to protect, but even gave local officials a perverse incentive to remain intransigent.

Until quite recently, these problems were mostly confined to southern jurisdictions. The only way the Justice Department or private civil rights plaintiffs could change the structure of other local governments was by going to court and getting them declared unconstitutional. Such challenges were often attempted during the 1970s, even outside the South, but their success was spotty at best. Some courts found a disparate *effect* to be sufficient in cases of prolonged, complete exclusion of minorities from elective office. Others refused to step in without a showing of discriminatory *intent.*

The Supreme Court was given many opportunities to formulate a theory on vote dilution, but for years it remained coy. Only once, in the Texas case of *White* v. *Regester* (1973), did the Court strike down a scheme on grounds of illicit vote dilution. It did not, however, specify whether its objection hinged on discriminatory intent or disparate effect. Finally, in the 1980 case of *City of Mobile* v. *Bolden,* the Court began to clarify its position. A district court had ordered the city of Mobile, Alabama, to switch from a commission form of government, elected at-large, to a mayor-council form, with nine council members elected from wards drawn so as to provide approximately proportional representation for blacks. A plurality of four Supreme Court justices reversed the lower court decision on the ground that the plaintiffs had not proven discriminatory intent, which was the standard, they held, that applied under both the Constitution and section 2 of the Voting Rights Act. Two other justices concurred on different grounds.

Despite the split in the Court majority, it was clear enough that something close to a discriminatory intent standard was emerging. Civil rights advocates therefore turned to Congress, which was preparing to extend the preclearance provisions of the act, to overturn the *Mobile* decision, and to go much further. The House of Representatives passed a bill adding to section 2 of the act—a section applying to all local governments—language that, as the committee report made plain, was intended to incorporate the standard that the Justice Department had long used to force progress toward de facto proportional representation in the South.

This change extended the impact of the law immensely. It meant that the Justice Department could sue under its own expansive standard to overturn existing structures, not just new ones, throughout the entire nation, not just the South. It also meant that private parties could sue to overturn a plan under the more ambitious standard whether or not the department had approved it. In an eerie pre-echo of the later *Grove City* maneuvering, proponents billed the change as a minor technical correction of the Supreme Court's misinterpretation in the *Mobile* case.

The Reagan administration and some senators were convinced that the House bill went too far. The eventual result was a compromise among the Senate, House, and President. The compromise bill kept the provisions extending scrutiny to existing procedures nationwide, but revamped the standard of proof by codifying language from the Supreme Court's confused opinion in *White* v. *Regester.* The civil rights plaintiffs described this language as an effects

test, and their critics in Congress as an intent test. The bill also provided that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

Ironically, the week that the compromise was signed into law, the Supreme Court clarified its earlier ruling to show that *White* v. *Regester* indeed incorporated an intent test (in a case in which it held that the plaintiffs had met that standard). This has not forestalled a wave of litigation under the new 1982 provisions. In perhaps the best-known case, Jesse Jackson has sued to overturn the system of runoff primaries used in many southern states; the voting rights section of Justice unsuccessfully asked its superiors to support him. Nor has it forestalled the lower courts from adopting an effects rather than an intent test, by relying on statements by civil rights advocates in Congress that they intended their codification of *White* v. *Regester* to be applied as an effects test, regardless of how the Supreme Court thereafter might explain its own decision.

The statutory disclaimer of proportional representation has also been thoroughly reasoned away by the courts, as congressional critics had warned. Judge John Minor Wisdom of the Fifth Circuit Court of Appeals has said in the 1984 case of *U.S.* v. *Marengo County Commission* that the disclaimer means only that the mere absence of elected minority officials is not *by itself* enough to trigger a violation of the act. Such an absence is ordinarily sufficient, however, he said, when combined with racially polarized voting. Since polarized voting unfortunately occurs in nearly every jurisdiction in the country—even where local officials try valiantly to discourage it—the absence of minority representation is indeed illegal.

Judge Wisdom indicates that a court may correct such an absence by imposing gerrymandered single-member districts or by other measures:

> Alternatively, all nine members could be elected at-large, but each voter could be given the right to vote for only five candidates, thus insuring that minority political interests have a chance to elect members of the board. Other alternatives are cumulative voting and transferable preferential voting.

These sorts of electoral systems are used in such countries as Ireland and Australia, and they have a name—proportional representation. It is exactly what Congress and the Justice Department have long purported to disclaim.

Three redistricting cases, from North Carolina, Mississippi, and Texas, are now before the Supreme Court on appeal. The North Carolina case illustrates one of the problems with the current state of the law, which is that the interests of minorities are not always monolithic. A number of blacks who had actually been elected to the state legislature sought to testify that the state's scheme of multi-member districts worked to the benefit of black voters. The lower court refused to accord any weight to their testimony, however, pointing out that the civil rights attorneys had already been certified as the sole legitimate spokesmen for the class of North Carolina black voters.

In the Mississippi case, the state legislature had come up with a plan to create two congressional districts with a black minority of 40 percent. The Justice Department disapproved this plan, and a federal court then created a district with a black majority of 53 percent. Too many blacks either stayed home or voted across racial lines, however, because the district elected a white candidate in 1982. The plaintiffs went back to court in 1983, and this time the court raised the black population in the district to 58 percent, which may be enough to do the trick.

Such decisions imply that where not enough members of a protected group choose to register or vote, or where division within the group enables members of the local minority to slip into office, the courts will pack enough members of the group into the district to make the result certain. The Seventh Circuit Court of Appeals has made this line of reasoning explicit in a case involving the Chicago city council (an example of the new nationwide scope of the act). The court found that minorities are entitled to districts in which they form "an effective majority," in the judge's words, which means "a majority of the population substantial enough to allow group choice to be effective." The court indicated that in some cases even 65 percent might not be enough.

Exactly the opposite result, however, was reached in the pending Texas case. The legisla-

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ture had divided part of Dallas into two congressional districts, each with a black population of 40 percent, thus securing the seats of two incumbent white liberal Democrats. Blacks, supported by Republicans, took the plan to court, seeking the creation of one overwhelmingly black district and one overwhelmingly white district. The district court refused to alter the lines, however, because the incumbent members of Congress, in the court's words, had "strong records of support for the concerns of black voters." Adopting the plaintiff's scheme would presumably result in retrogression to a state where only one of the two members possessed such a record.

This solicitude for nonminority candidates believed sympathetic to minorities cropped up in another recent case. In mid-1983 the Justice Department had vetoed the creation of a new school district in Madison and Ridgeland, Mississippi, two fast-growing suburban towns outside Jackson. After their initial plan was rejected, the local authorities in Ridgeland passed a law providing that one of three appointive slots on the new board would automatically go to a black. The Justice Department apparently balked, because after lengthy negotiations the authorities modified their submission, saying they would guarantee the slot not to a black, but to a person who is "representative of minority interests." This formulation won approval in the summer of 1984.

The principle behind this line of rulings is that the act requires the election or appointment of, not minority candidates, but candidates who hold views that are presumed to be congenial to minorities. Rather than a racial test for office, this establishes what amounts to an ideological test.

That raises an interesting problem. The black plaintiffs in the Mississippi case want a firm rule of law entitling them to a 65 percent majority wherever it is possible to draw such districts. Yet this standard would undoubtedly endanger the seats of liberal white candidates around the country. The drive for proportional representation, in other words, conflicts with the drive toward judicial and executive promotion of candidates deemed racially progressive.

It is worth noting, by the way, that the same sorts of boundary lines that are disfavored by the courts in legislative districting cases are strongly encouraged in school districting cases. In school cases, minorities are supposed to be spread around perfectly evenly among districts; in legislative cases, they are supposed to be segregated as effectively as possible. Whether pie wedges are mandatory and concentric circles prohibited, or the reverse, depends simply on whether the projected activity is voting or schooling.

There is still a chance for the Court to pull back from this abyss. The simplest thing it could do is hold that Congress codified the *White* v. *Regester* intent test in 1982. More ambitiously, it could get the courts and the Justice Department out of the business of gerrymandering entirely. One way to do this would be to hold officials to a standard of color-blindness. If a legislature has enacted a racial gerrymander, one answer is not to impose a judi-mander in the opposite direction, but to construct a scheme which does not take race into account. That is not all that hard to do. Judge John F. Grady, of the Northern District of Illinois, dissenting in another Chicago case, has set out a plausible standard for remedial action:

> The relief I would grant would be a map drawn according to the traditional neutral criteria, without regard to what I believe is the constitutionally impermissible consideration of race or ethnic character. Such a map would consist of compact and contiguous districts, drawn with due regard to the one-person-one-vote requirement as well as natural political boundaries . . . [W]hatever the bloc voting effect of a colorblind map might be, it would be unintended. That, in my view, is the only way the Constitution permits. There is no way to draw racially conscious lines that will be "neutral."

In upholding the constitutionality of the original Voting Rights Act of 1965, the Supreme Court described the practice of racial gerrymandering as unconstitutional. If it still upholds that principle today, it will steer the Voting Rights Act away from the foggy banks of "group choice" and back toward its original purpose of guaranteeing that individuals are free to register and vote as they wish.