Readings of particular interest

Has Deconcentration Policy Worked?

"Causes of Increased Competition in the U.S. Economy, 1939-1980" by William G. Shepherd, in *Review of Economics and Statistics*, November 1982, pp. 613-626.

In this study William Shepherd of the University of Michigan examines the degree of concentration in U.S. industry in three years: 1939, 1958, and 1980. He concludes that the U.S. economy has become far more competitive in the last two decades than is yet recognized and argues that antitrust, foreign trade, and deregulation have been largely responsible for the change.

Shepherd assigned each market to one of four categories for each of the three years, depending on whether it was characterized by (1) *pure monopoly* (as were most utilities), (2) *domination by one firm* (as were such industries as canned soup and local newspapers in most towns, where one firm had a market share of more than 50 percent), (3) *tight oligopoly* (where a few leading firms held most of the market), or (4) *effective competition* (including the remaining possibilities, ranging from "loose" oligopoly to pure competition). In making these assignments Shepherd took into account an industry's observed behavior as well as its structure.

Earlier comprehensive studies of trends in concentration covered data only up to 1958. These studies generally found that about half of the economy was highly competitive, while the rest operated under various degrees of oligopoly or monopoly. Shepherd found a massive trend since the 1950s toward greater competition—far more so, he says, than economists, the press, or business itself have yet realized, and enough to alter the nature of the economic system. Effectively competitive markets now account for over 75 percent of production, up from 56 percent in 1958. Meanwhile the share held by pure monopolies has fallen from 6 to just 2 percent. Dominant firms preside over only another 3 percent of the economy, down from 5 percent. Tight oligopolies have dropped from about 36 to 18 percent of total output.

The broad rise in competition has affected every sector of the economy, the author says. Since 1939 the share of effectively competitive output has risen from 9 to 39 percent in transport and utilities, 54 to 78 percent in services, 52 to 68 percent in manufacturing, and so on down the line. Only in agriculture was there a drop in the competitive share, and there only from 92 to 86 percent.

Nobody can know the precise reasons why concentration has declined, Shepherd says: one possibility is that economies of scale in many industries have receded since 1960 because of the spread of small-scale technologies. Large firms also seem to have lost ground in such traditional industries as meatpacking and steel.

Three other likely reasons for the rise in competition, Shepherd says, are import competition, deregulation, and antitrust enforcement. One or more of these three causes played a major role in around three-quarters of the industries with rising competition, he says. Sometimes the causes intertwined, as when the deregulation of an industry was spurred by antitrust officials.

New import competition since 1958 affected about one-fifth of the industries in which competition increased. Steel, automobiles, and office copiers were the leading industries in this category. Deregulation has affected seven large industries, accounting for one-third of the output of the more competitive sector: airlines, telephone equipment, banking, brokerages, railroads, trucking, and long-distance telephone service. Antitrust has been important in at least twenty large markets, making up 40 percent of the rising-competition markets. Among the twenty industries are aluminum, metal cans,

electrical equipment, photographic supplies, banking, broadcasting, and auto rental.

Shepherd notes that the influence of antitrust enforcement extends far beyond the classic federal case that is litigated to a conclusion. It includes negotiations, official threats of legal action, interventions by antitrust agencies in regulatory cases, and private and state-level antitrust suits. Of course, a single landmark antitrust case can set a precedent that affects hundreds of other companies. He also notes that antitrust pressure was a factor in all of the major cases of deregulation in the 1970s, from airline rates to brokers' fees.

Thus Shepherd believes his estimate of 40 percent to be, if anything, an understatement. In effect, he implies, antitrust has been a mainspring of the rising competitiveness of American industry.

EPA and Auto Emissions: No More Gains to Exhaust?

The Regulation of Air Pollutant Emissions from Motor Vehicles by Lawrence J. White (American Enterprise Institute, 1982), 110 pp.

Environmental Protection Agency regulation of auto emissions has cut air pollution significantly, but at a substantial cost, according to Lawrence J. White, professor of economics at the New York University Graduate School of Business Administration. The program could be revised, White says, to achieve virtually the same social benefits at far lower social costs.

The author begins by reminding the reader that auto pollution is a problem of negative externalities; at its heart is the absence of easily enforced property rights in air. The externalities problem means that a case can be made for corrective government action. Whether that action does in fact succeed in improving the allocation of resources—whether imperfect governments can improve on imperfect markets—is the empirical question that White's monograph attempts to answer.

Efforts to control automotive pollution have a relatively brief history. Even in California, where public concern about auto emissions arose as early as the late 1940s, the state government did not begin a regulatory program until the mid-1960s. The federal government followed suit a few years later. The turning point came with the Clean Air Act Amendments of 1970, which mandated very strict controls by the 1975 model year. The standards were designed to be "technology forcing": automakers would have to develop new technology to meet the deadlines. When the companies later proved unable to do so, Congress and the agency hastily arranged a costly series of last-minute postponements.

Only new vehicles are subject to federal regulation, and the agency determines compliance largely by testing sample vehicles before assembly-line production begins. Once the cars are in the hands of drivers, there are no further direct federal controls; a few states and localities require inspection and maintenance of pollution control systems, under EPA prodding, but these programs are not closely linked to the federal new-car program.

Since the emissions control systems can and do deteriorate in the hands of vehicle owners, one cannot simply assume that the original design specifications are met in actual use. White investigates this question by examining a sample of over 9,000 emissions tests conducted by EPA on cars of varying models and vintages in actual use. Using an econometric model that controls for other characteristics of the vehicles that might affect their emissions, he finds that (1) the standards have reduced pollutant emissions substantially below what they would have been if there had been no program, but (2) the reductions are not as great as the standards had promised, because of the deterioration in use.

Translating these emissions reductions into improvements in air quality and, further, into the ultimate benefits of the program—improved health, visibility, and crop yields—is more difficult. White argues that improvements have taken place in these areas, although their magnitude is very hard to quantify. He also points out that of the four pollutants covered by the program (hydrocarbons, carbon monoxide, nitrous oxides, and particulates) only one, particulates (including airborne lead), appears to pose a significant health risk at prevailing concentrations now or in the near future.

What about costs? White measures four types of cost: vehicle hardware, maintenance,

the added cost of unleaded gasoline, and reduced fuel economy. (A fifth unmeasured cost, as he acknowledges, is reduced driver satisfaction with vehicle performance.) In the early years of the program, he finds, the costs calculated over the lifetime of a car were quite modest. They jumped temporarily in 1973 and 1974, fell back from 1975 to 1979 (at which point they ranged from $640 to $700 in 1981 dollars), and then jumped again in the early 1980s. By 1981, he estimates, the lifetime costs amounted to more than $1,400 per car. Adding in similar estimates for trucks, he projects that by the mid-1980s the continuing overall cost of the scheduled standards is likely to be more than $20 billion a year—nothing to sniff at even in a $3 trillion economy.

The author's rough cost-benefit comparisons suggest that the program was worthwhile through 1979 (except for the 1973–74 interlude), but that the tighter 1980 and 1981 standards achieve only modest additional reductions in emissions at very high additional costs and fail the cost-benefit test. A cost-effectiveness (as opposed to cost-benefit) analysis reaches the same conclusions with what White says is more certainty. In 1979 it would have cost more to reduce levels of the relevant pollutants by tightening controls on stationary sources, such as chemical factories or petroleum refineries, than by tightening auto controls. In 1980 and 1981, however, the situation was reversed: society could have achieved the same benefit at a lower cost by easing the scheduled auto standards and reducing emissions from stationary sources to compensate for the difference.

White says the design of the program also adds needlessly to the costs of control. Nationwide standards are not needed when a given pollutant reaches serious levels in only a few localities. Placing all responsibility for emissions control on automakers and none on drivers is also costly, he says.

White argues that effluent fees—the economists' perennial favorite way of dealing with externalities—would be both practicable and superior to the current program. In the meantime, he proposes more modest changes: a rollback of the auto standards to 1979 levels (which would preserve very large reductions from uncontrolled emission levels), with comparable adjustments in truck and bus standards; full "fleet averaging," including banking and trading of reductions in emissions below the legal standards; "nonconformance penalties" to replace the current "comply or shut down" ultimatums; regional standards of differing stringency; and care in proceeding with local inspection and maintenance programs.

"The program has been part of the Clean Air Act, which, at least since 1970, has held that clean air is an absolute good and that the costs and incentives involved in achieving this goal generally do not matter," White concludes. "In a world of limited resources, this view cannot be the basis for sensible public policy."

Government Largesse and Constitutional Values

"Liberty and Property: The Problem of Government Benefits" by Stephen F. Williams, in *Journal of Legal Studies*, vol. 12, no. 1 (January 1983), pp. 3-40.

Under the Constitution, neither the federal government nor any state may deprive anyone of "life, liberty or property without due process of law." Until 1970 the words "liberty" and "property" were understood to carry their conventional, historical meanings: "liberty" meant freedom from such government interference as imprisonment or censorship, and "property" referred to historic common law rights of ownership in land or personal property. Benefits that the government gratuitously confers on citizens (government jobs, public education, housing, welfare) were not included in either category. Courts normally refrained from interfering with legislators' judgments on how administrators should make the decision to grant or withdraw these benefits.

Beginning in 1970, however, the Supreme Court changed all that. After some false starts, it adopted the view that due process rules would apply to the withdrawal or denial of government benefits whenever the governing statute curbs the discretion of the executive branch—for example, when it provides that a particular type of employee may be discharged only "for cause." Since statutes rarely give an agency untrammeled discretion, the upshot is that the courts have acquired the right to prescribe pro-

cedures for most decisions on the dispensing of government benefits—the right to oversee most of the activities of "the positive state." Rights to government benefits are now often termed "the new property," after the title of a landmark article on the subject by Charles Reich. Stephen Williams, professor of law at the University of Colorado, here takes issue with the theoretical foundations of the "new property" doctrine.

The Court has defended that doctrine on the grounds that laws limiting administrative discretion lead the beneficiary to develop a "reliance interest" in the benefit, close enough to reliance on conventional property rights to warrant treating the two in the same way. The flaw in this theory, Williams says, is that at the same time the legislature often prescribed the procedures for deciding whether to grant or withdraw a benefit, and the beneficiary can legitimately rely only on the observance of those procedures, whether or not they include the full panoply of due process protections. Williams says beneficiaries should not cite a legislature's intention to grant a benefit while ignoring the same legislature's intent as to how the rights to that benefit are to be determined; as Justice Rehnquist said, they should have to "take the bitter with the sweet." For judges to insist on adding procedural niceties does not protect the beneficiary's reasonable expectations, but adds to them, Williams asserts.

Reich had argued that government benefits could not be distinguished from classical property rights on the ground that the former "came from the state," since, he said, the latter do too. Williams argues that although in a positivist sense classical property interests are legal rights only to the extent that the state protects them, Reich's thesis blurs a crucial distinction. People's claim to the wealth that they have created through production and exchange, unlike their claim to "new property," typically arises out of their personal exertions, Williams says. Thus they advance the framers' intent to leave enough individuals self-reliant to form a bulwark against the encroachment of government power. The "new property" theory disregards this special claim of historic liberty and property and thus, in Williams's view, is antithetical to the framers' fundamental intent.

Williams goes on to develop an alternative theory that could serve to justify some judicial protections for private interests in government benefits. Some benefits are in fact just a part of a more complex series of transactions in which government impinges upon the classical rights to liberty and property. State subsidies to public schools, for example, are not just subsidies: they limit the competitive survivability of private schools and force parents of private school students to pay twice for schooling—once as taxpayers and once as consumers of private education. When a state expels a student from school, the resulting injury to the parent and student arises in part from the state's use of its coercive tax powers against property. Where the plight of an individual whose benefits have been withdrawn can be traced to such a governmental restriction on classical property or liberty, Williams argues, it may be appropriate for courts to monitor the procedures for granting or withdrawing the benefit.

Even if a court is right to cross this threshold and review the procedures, Williams suggests, it owes a high degree of deference to the legislatively prescribed procedures. Judges are not, after all, schoolmasters—nor are they experts in the many other fields that it might be proper for them to monitor under this theory.

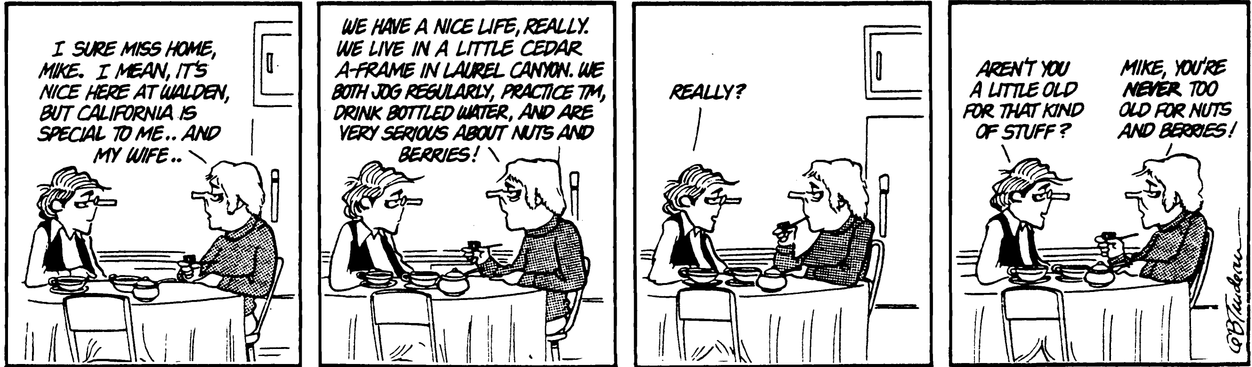
Tucker contra Sierra

Progress and Privilege: America in the Age of Environmentalism by William Tucker (Anchor Press/Doubleday, 1982), 315 pp.

What is the environmental movement, and why did it arise so quickly in the 1970s? Is it new to history or the continuation of earlier strains of thought? Does it reflect the interests of humanity as a whole or of some smaller group?

William Tucker poses these questions in this philosophical and sociological analysis of environmentalism. His answer is that the movement is essentially aristocratic in its roots and derives from the land- and nature-based ethic that has been championed by upper classes throughout history. Large landowners and titled aristocracies, Tucker claims, have usually held a set of ideals that stresses "stewardship" and the husbanding of existing resources over exploration and discovery. This view favors handicrafts over mass production and

DOONESBURY by G. B. Trudeau



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the inheritance ethic over the business ethic. It romanticizes country life and self-sufficiency, but nonetheless disdains the "pioneer" mentality that seeks to conquer nature rather than coexist with it. It despises "crass materialism" and "gadgetry," and is skeptical that technological change and economic expansion will really improve the "quality of life."

Why would such traditional aristocratic and conservative values revive in America in the 1970s? Tucker's thesis is that these values serve the interests of the well-educated upper middle class, a sector of society based less on industrial production than on the emerging strength of the universities and government bureaucracies. By the 1970s that class found itself securely nestled in the suburbs, with no particular prospect of improving its relative status through further economic expansion. Indeed, it viewed such expansion as something of a competitive threat. Distaste for "ticky-tacky" subdivisions and shopping centers merged imperceptibly into distaste for the lower-middle-class people who were to live and shop in them.

Earlier, this segment of the upper middle class had sponsored the interests of the poor. But as that political crusade became less romantic, it switched its attention to the issues in its own backyard—among other things, to industries that often disfigured the neighborhood and depressed property values. (Tucker says one extensive poll showed support for environmentalism peaking at the $30,000–70,000 income range.) Although the movement has presented its values as a "liberal" program, Tucker argues, it is really "the conservatism of the liberals," a kind of "suburban agrarianism."

In translating these values into a program, he says, environmentalism has easily wedded itself to modern regulatory practice, not only because that practice provides tools for blocking economic growth but because the upper middle class is at home amid paperwork and public hearings. Both the regulator and the environmentalist operate under a rule of what could be called procedural conservatism: any irrevocable change should be presumed hazardous unless proved otherwise in advance.

Environmentalism is often seen as the continuation of the Conservation Movement and Theodore Roosevelt's "New Nationalism." But Tucker distinguishes "conservation" from "preservation." Conservationists try to use regulation to achieve the proper schedule of exploitation; preservationists seek to prevent exploitation entirely. The "sustained yield" policy for timber cutting in national forests is an example of conservation; proposals to ban logging in those forests are examples of preservation.

The supposed special antagonism between preservationism and big business is overdrawn, Tucker maintains. Small-scale prospectors, ranchers, and farmers tend to be the first intruders onto virgin soil, and among the worst offenders from an ecological point of view. (When Basque immigrants introduced sheep herds into the Sierras, John Muir, founder of the Sierra Club, said that "moneychangers have entered the temple" and called the animals "hooved locusts.") Large timber companies also tend to be more environmentally responsible than small, Tucker says, perhaps because of their longer investment horizon and greater profitability. In practice, he says, the burden of environmental regulation falls disproportionately on smaller firms, causing economic stagnation and a fall-off in innovation. Theodore Roosevelt, for his part, held that big business and government should enter a sort of partner-

ship with each other and thought that small businesses had very little role to play in the American economy.

Turning to specific issues, Tucker examines several main currents in environmental thought. He argues that fears of a population explosion and resulting famine were wildly exaggerated in the 1960s and 1970s, and stood in direct contradiction to general scientific opinion about world population trends. Other chapters deal with such issues as wilderness, ecological balance, endangered species, and the Club of Rome's extrapolations of global environmental trends. Tucker also relates the history of opposition to genetic engineering in order to illustrate the environmental movement's conservative stance on technology.

Regulation of Medical Equipment: The First Six Years

"A Study of the Regulatory Impact of the Medical Device Amendments: A Survey of Medical Device Manufacturers" by Louis Harris and Associates (John M. Boyle, project director), July 1982, 8 pp.

This survey, conducted for the Food and Drug Administration, examines how regulation has affected a relatively young and innovative group of companies: the makers of medical devices. It finds that the monetary costs of complying with regulation, though not negligible, may be less important than the nonmonetary costs.

The FDA hired the firm of Louis Harris and Associates to ask manufacturers about their experiences before and since the Medical Device Amendments of 1976. (These amendments brought under regulation for the first time the instruments and equipment used in the diagnosis, treatment, prevention and cure of disease—devices ranging from heart pacemakers to tongue depressors.) Harris conducted interviews with senior company officials at 516 places of business and 29 company headquarters. About one-third of the establishments surveyed had entered the field after the 1976 law was enacted.

The median manufacturer grew somewhat in size during the 1970s, with the median number of employees rising from 31 in 1972 to 43 in 1980. Firms with fewer than ten employees said that they added an average of 0.27 new employees each to their work force as a direct result of the new regulations. The equivalent numbers were 0.95 for firms with 10 to 49 employees, 3.35 (50 to 499), and 8.62 (500 or more). The new equipment needed to comply with regulations cost an average of $10,500 (for firms with fewer than ten employees), $19,100 (10 to 49), $34,600 (50 to 499), and $303,800 (500 or more). Both figures indicate that there may be some economies of scale in compliance. Moreover, Harris suggests that smaller establishments are more likely than larger establishments to have problems understanding what the regulations mean (see below).

Projecting the sample to the industry as a whole, Harris estimates that the industry added approximately 6,400 employees to its payroll as a direct result of regulation. Assuming that the average annual labor cost per employee is $22,275, the total annual cost for added personnel comes out at nearly $143 million. Similar projections indicate that the total cost of the new equipment and facilities that the industry bought to comply with the regulations was around $131 million.

Forty-two percent of the manufacturers say they have found the cost of compliance to be a major problem, but other regulatory difficulties seem equally important to them: understanding how to comply with the law (45 percent), knowing whether specific regulations apply to their products (42 percent), and finding executive time to deal with regulatory matters (42 percent). Overall, nearly half the manufacturers (46 percent) report that coping with federal regulation has been a major problem, and 21 percent say it is their single most serious business problem at the moment. Asked what was the single most serious problem they encounter with FDA regulation, almost as many respondents named understanding how to comply as named the cost of compliance. Only 22 percent of the manufacturers think they fully understand what the regulations mean as they apply to their own establishments.

One FDA innovation that has been well received by business is its creation of an Office of Small Manufacturers Assistance. Over three-quarters (76 percent) of the manufacturers have heard of OSMA, and almost half of that number have contacted it. The smallest establishments (fewer than ten employees) also are

more likely to consult the OSMA newsletter as a source of information on FDA regulations (22 percent) than the *Federal Register* (9 percent).

There are several regulatory areas that most manufacturers say have not affected their operations at all, including rules on registration (51 percent), product listing (55 percent), product classification (51 percent), labeling requirements (54 percent), and premarket approval (58 percent). The guidance provided by FDA's Good Manufacturing Practice rules may actually help some businesses in their operations: 26 percent of the manufacturers report that these rules have been of some use, and 17 percent believe they have been more of a help than a burden.

The SEC in Dubious Battle

"Assault on the First Amendment: The SEC's War on Newsletters" by Michael McMenamin and William Gorenc, Jr., in *Reason*, January 1983, pp. 23-28.

Since the early 1960s the Securities and Exchange Commission has waged a running battle to regulate the publishers of financial advisory newsletters. Cleveland attorneys Michael McMenamin and William Gorenc, Jr., charge that the commission's campaign has infringed the publishers' First Amendment rights.

The commission's regulatory authority derives from the Investment Advisors Act of 1940, a law that the authors say was primarily intended to regulate people who handle the money of others. The law also, however, applies to anyone who gives investment advice "either directly or through publications or writings." With an eye on the First Amendment, Congress exempted from this coverage "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."

The SEC acknowledges that such periodicals as the *Wall Street Journal*, *Fortune*, and *Forbes* are "bona fide" and have "regular and general circulation," thus escaping regulation, but it argues that financial newsletters are not and do not. It therefore requires the publishers of newsletters, under threat of felony penalties, to comply with certain "registration requirements," which McMenamin and Gorenc say amounts to requiring a license to print. Once a newsletter publisher registers with the SEC, it is subject to a variety of regulatory obligations that can include forced disclosure of its subscriber lists, restrictions on its capital structure, and even interference with its content.

In actual litigation, the authors say, the SEC has not enjoyed much success in getting courts to agree with this claim of authority. The only time a court ruled on the issue of whether a financial publication must register as an investment advisor, the commission lost. That case involved the *Wall Street Transcript*, a weekly tabloid newspaper published by Richard A. Holman, sold to 8,000 mail subscribers and a few newsstand buyers, and consisting mostly of reprinted material. In 1965 the SEC revoked Holman's registration as a securities broker-dealer because of complaints unrelated to his publication of the *Transcript*. Two years later, without any complaint of wrongdoing, the commission launched a major investigation of the newspaper and subpoenaed what McMenamin and Gorenc say was virtually all its records. The commission said the subpoenaed evidence was needed to help it determine whether or not the *Transcript* was a bona fide financial newspaper and thus exempt from its registration requirement.

Holman charged harassment and asked a federal district court to quash the subpoena on First Amendment grounds. The court did so and also summarily held the *Transcript* to be a "bona fide newspaper." An appeals court reversed, however, ruling that the SEC should have been allowed to subpoena evidence to make an initial determination on investment advisor status, although that determination would still be subject to court review on statutory or constitutional grounds. It remanded the case to the district court for further proceedings, predicting that the SEC would be "fully aware of the importance of First Amendment considerations." In 1978, a decade after its first ruling, the district court once again held the *Transcript* to be a bona fide newspaper and thus exempt from registration under the act. The SEC did not appeal this second defeat.

The next major case, in 1981, involved one of the registered newsletters, *Smart Money*, a publication aimed at potential investors in "small, emerging growth companies." *Smart*

Money had carried two articles on Entertainment Systems, Inc., before a public offering of stock in connection with which Entertainment allegedly violated the securities laws. The commission said its interest was "piqued" and subpoenaed a large number of documents from *Smart Money*'s publisher, including the names and addresses of its 9,000 subscribers—in order, it said, to ascertain whether the articles had led investors to purchase Entertainment stock. The publisher refused to release the subscriber list, and instead proposed to let SEC staff examine the list for the limited purpose of determining who among the subscribers had bought Entertainment stock (the commission already knew the names of all the buyers). The SEC rejected this offer out of hand. In fact, even after it settled the suit against Entertainment by consent decree in the fall of 1982, it continued to demand *Smart Money*'s subscriber list—but lost in court because it did not give its reasons for doing so. One possible reason the commission was so adamant, the authors maintain, is that it wanted to challenge a suggestion by the appellate court in the *Wall Street Transcript* case that the act did not give it the authority to cast a "dragnet . . . for lists of all subscribers" which the court said would, to change metaphors, "go to the jugular of . . . a publishing firm."

The "dragnet" is not the only weapon in the SEC arsenal. "The SEC regularly conducts unannounced examinations of registered brokers and investment advisors—including financial newsletters—both on-site and by phone, to determine their financial status," the authors say. "Consistent with the SEC's fiction that newsletters are investment advisors," its examiners "apply to the newsletters (many of which are small operations run out of the publishers' homes) the same standards that the SEC has established to ensure the solvency of investment advisors and brokers who actually have custody of clients' funds." In 1975 the commission sought to bar the Phillips Publishing Company from publishing its *Retirement Letter*, an investment-advice newsletter, unless it agreed to tell the subscribers that it was "insolvent." The reason is that Phillips's liquid assets did not cover the full cost of meeting unfilled subscriptions. A judge threw out the complaint, saying that on the evidence Phillips was not insolvent but was "merely following the widely-adopted financing practices employed in the contemporary publishing industry."

Moreover, the commission says, a subscription to a financial newsletter is an "investment advisory contract" that cannot be "assigned" without the subscriber's consent. As a result, a newsletter publishing company cannot be sold without the consent of each subscriber, nor even pledge its stock as collateral for a bank loan, since such a pledge would represent a potential assignment.

The commission's interests extend to the newsletter's editorial and advertising content. One controversy arose after the newsletter *Money Fund Safety Ratings* gave the John Hancock Cash Management Trust a "BBB" rating based in part on the latter's secretive portfolio policies. (The publication explained that money funds that do not publicize their portfolios "should be avoided by cautious investors.") Hancock's lawyers complained, and an SEC staff attorney advised the newsletter that it was "improper" for it "to provide a low rating rather than to state that it has insufficient information available upon which to base a rating." Other SEC regulations prohibit newsletters from advertising their track record of former profitable recommendations or publishing "testimonials" from grateful subscribers.

The authors say that most newsletter publishers usually acquiesce to the SEC's regulatory demands instead of fighting, if only because the cost of defending in such litigation is high and most newsletters are small-time operations. "Ordinarily," they add, "one would not expect that people were in any particular need of 'protection' from those who want to offer for sale their opinions on the merits of various investments." Of course, they say, the commission has every right to punish those who engage in securities fraud, whether they are publishers or not—but licensing newsletters is an unacceptable form of prior restraint. [EDITORS' NOTE: *On February 1, a U.S. district court in New York turned down an SEC request to enjoin a man convicted of several financial misdeeds from publishing newsletters. "The Advisers Act, reasonably construed to avoid an impermissible encroachment on first amendment freedoms . . . does not authorize such prior restraint," the court said.*]