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EFFICIENCY, LIBERTY AND EQUALITY: THREE ETHICAL JUSTIFICATIONS FOR REGULATORY REFORM*

By BRUCE CHAPMAN** and JOHN QUINN***

I. INTRODUCTION

In their February 1978 communiqué to the Economic Council of Canada, the First Ministers of Canada called for a reduction in the burden of government regulation on the private sector.1 As is the case with any prescriptive statement, this call for regulatory reform reflects a number of underlying normative concerns. It is the purpose of this paper to subject some of these concerns to closer scrutiny.

The kinds of activities that the government has chosen to regulate vary a great deal. Thus, it seems reasonable to suggest that the call for regulatory reform should amount to quite different kinds of prescriptions depending upon whether we are talking about monopoly pricing, broadcasting, environmental pollution, dangerous consumer products or an unsafe workplace. Each of these areas will raise, or at least should emphasize, quite different issues; also, any discussion of the values inherent in regulatory reform must recognize that not all values are equally important in all areas. Although the primary purpose of this article is to identify and criticize in a general way some of the leading normative concerns that animate current proposals for regulatory change, a secondary purpose is to suggest some of the areas in which the values being analysed are particularly relevant.

The call for regulatory reform is supported by essentially three kinds of arguments.2 First, there is the general claim that most regulation has been dominated by redistributive concerns, and that existing policies should be reoriented towards the pursuit of economic efficiency. Second, libertarians argue that some forms of regulation unjustly restrain the exercise of individual freedoms. Third, there is the political concern that regulatory processes suffer from systemic imbalances in the representation of affected interests and that institutional reforms are necessary to correct these biases.

In this article, it is argued, first, that the efficiency argument for regulatory change is logically inconsistent because it incorporates a measure of

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1 See Economic Council of Canada, Responsible Regulation (Ottawa: Min. of Supply and Services Canada, 1979) at xii.
2 See id. at 27-30 for a statement of each of these three kinds of arguments.
value that does not promote its stated goal. Second, it is argued that the libertarian argument for regulatory reform is seriously inadequate because it fails to articulate a conception of the good that is necessary for identifying the particular forms of liberty that it seeks to protect. Third, it is argued that the "imbalanced representation" argument, while advancing an attractive conception of political equality, provides only partial and uncertain support for the particular institutional reforms that have been proposed. It is argued that the uncertain basis for these reforms is attributable to an exclusively result- or output-oriented conception of political equality.

II. THE GOAL OF EFFICIENCY

Some of the more vocal proponents of regulatory reform are economists.\(^3\) For the economist, the paramount normative concern is economic efficiency. In his book *Economic Analysis of Law*, Posner argues that efficiency "means exploiting economic resources in such a way that 'value'-human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized."\(^4\) It is worth emphasizing that this definition of efficiency has three distinct elements. First, the measure of human satisfaction or welfare is to be found in a consumer’s willingness to pay. Second, this particular measure of satisfaction is to be aggregated across individuals. Third, this aggregation of satisfactions is to be maximized.

In the following discussion, it is argued, first, that consumer willingness to pay has no interpersonal significance as a measure of human satisfaction and, if this measure is used, it is by no means clear that any meaningful notion of aggregate human satisfaction will end up being maximized. That is, it is not clear that economic resources will be exploited to achieve Posner’s concept of efficiency. Moreover, it shall be suggested that even if compensation for any given transfer of resources is actually paid (so that all Kaldor-Hicks efficient transfers are also Pareto efficient ones),\(^5\) there is no guarantee that the transfer in question will increase human satisfaction in any way. It shall also be shown that even for some strictly Pareto efficient reallocations, it can be demonstrated that a necessary component of the reallocation is a welfare-reducing exchange. Second, it shall be argued that even if the willing-

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5 Under the Kaldor-Hicks definition of efficiency, a reallocation of resources is efficient if it *enables* the gainers to compensate the losers after the reallocation, whether or not they actually do so. A reallocation is only Pareto-efficient if the compensation is *actually* paid so that there really are no losers at all, only net gainers. For a good discussion, see Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law* (1980), 68 Cal. L. Rev. at 221. Posner has admitted that his normative criterion for law and regulation (which he calls "wealth maximization") is equivalent to Kaldor-Hicks efficiency. See Posner, *The Value of Wealth: A Comment on Dworkin and Kronman* (1980), 9 J. Leg. Studies 243 at 243-44.
ness-to-pay criterion were an accurate measure of human satisfaction, the claim that this criterion of value should be aggregated across individuals requires some kind of independent ethical justification. In the third part of the argument, one such independent ethical justification for efficiency that has recently been advanced by Posner shall be considered and it will be argued that it is not applicable in the context of regulatory reform.

A. Willingness to Pay

The following example illustrates that the willingness-to-pay criterion is inherently ambiguous as a measure of aggregate human satisfaction. Suppose that a factory is polluting the air in a neighbourhood and as a result ten surrounding homeowners are suffering damage to their persons and property. To ensure that this particular use of the neighbourhood air is the most valuable one, the local authority decides to hold an auction for the rights to the air. Because their aggregate willingness to pay exceeds that of the factory owner, the homeowners gain the right to clean air. For Posner, this allocation of the right is value maximizing. But is it really? When the factory owner stops bidding for the right to use the air, all that he reveals is the fact that he has other uses for his money which he values more highly than the right to use the air. Note that this comparison of value is intrapersonal, not interpersonal; that is, only one person’s evaluations of alternative states of affairs are being compared. The factory owner’s failure to increase his bid tells us absolutely nothing about the value that he puts on the right to air relative to the homeowners’ evaluation of that same right. Yet this is precisely the value comparison Posner needs to conclude that an interpersonal transfer of the right is value maximizing.

Some numbers added to the example should help to make the point. Suppose that bids in the auction have reached $900. The factory owner must decide whether to raise his bid to $1000 to secure the right to use the air. But $1000 is the price of another good X, which the factory owner wants very much to buy or to invest in. So the factory owner refuses to raise his bid, reasoning: “If I am going to spend $1000, I might as well spend it on X.” Now consider the homeowners. Suppose that the total cost to them of relocating their homes is $1000, but the move would not secure them as nice a neighbourhood; they reason—“It’s worth $1000 to remain here, although for much more than that we might as well move elsewhere.” The homeowners bid $1000 to stay and win the auction. Now consider the following table of welfare payoffs for the various possible social states.

Note that the change from social state (1), the status quo, to social state (2), is a change recommended by the auction and willingness-to-pay criterion, since both the factory owner and the homeowners prefer state (5) to state (4). As the table indicates, however, such a change would reduce total welfare, something which is equally true for any other change from the status quo except the change to social state (3)—a change the willingness-to-pay criterion would never recommend. It seems clear then that the auction does not result in a welfare maximizing reallocation.

It is important to emphasize that the point being made is different from
TABLE I

<table>
<thead>
<tr>
<th>Possible Social States</th>
<th>UTILES*</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Status Quo (both factory owner and homeowners stay in neighbourhood)</td>
<td>Factory Owner 50</td>
</tr>
<tr>
<td>(2) Factory Shuts Down; Homeowners Stay (no money changes hands)</td>
<td>40</td>
</tr>
<tr>
<td>(3) Factory Stays Open; Homeowners Move (no money changes hands)</td>
<td>50</td>
</tr>
<tr>
<td>(4) Factory Stays Open; Homeowners Move (factory owner pays $1000 to auctioneer)**</td>
<td>35</td>
</tr>
<tr>
<td>(5) Factory Shuts Down; Homeowners Stay (homeowners pay $1000 to auctioneer)**</td>
<td>40</td>
</tr>
</tbody>
</table>

*Interpersonally comparable units of welfare or satisfaction. The numbers chosen reflect the assumption that the factory owner has greater opportunities for spending his money elsewhere than do the homeowners, something that gives him a higher marginal utility for money. Compare, for example, the factory owner’s utility difference between (3) and (4) with the homeowners’ utility difference between (2) and (5).

**Bringing in the auctioneer introduces another party whose welfare should figure in our table. However, to focus the example on just the factory owner and homeowners, it is assumed that the welfare that accrues as a result of the auctioneer receiving $1000 is exactly equal to the welfare that is lost by the persons who would have benefited but for the transfer of $1000 to the auctioneer.

another form of criticism of the willingness-to-pay criterion, which derives from a concern for distributive justice. Kronman, for example, has argued that Posner’s efficiency principle “necessarily favours those who already have money, or the resources with which to earn it, and are therefore able to pay more than others to have a new legal rule defined in the way that is favourable to them.” Thus, the principle “gives an additional advantage to those who are already advantaged, and this quite rightly strikes us as unfair.”6 This

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6 Kronman, Wealth Maximization as a Normative Principle (1980), 9 J. Leg. Studies 227 at 240. Kronman’s use of the word “fair” suggests that he is mostly concerned about an issue of distributive justice, viz. the absolute level of welfare or satisfaction that some individuals might reach as compared to others if their claims on resources are limited by their willingness (as constrained by their ability) to pay. As indicated in the text, our point is quite different: even a wealthy individual with a great ability to pay may not be willing to pay for some good because he would rather spend his money elsewhere. Nevertheless, the amount of satisfaction he gets out of the good in question may exceed the amount enjoyed by the individual whose willingness to pay is highest. Thus, to reallocate goods on the basis of willingness to pay may lead to losses in total satisfaction. One might think that the satisfaction of the wealthy individual in this case should be discounted because he has already reached a high level of satisfaction overall; but that is Kronman’s point, not ours. For some theoretical discussion of the important difference between making interpersonal comparisons of levels as opposed to quantities of satisfaction, see Sen, Rawls versus Bentham: An Axiomatic Examination of the Pure Distribution Problem (1974), 4 Theory and Decision 301.
The distributive fairness argument depends upon the fact that some people are poor, that is, they have limited funds. Our argument, on the other hand, depends only on the more general fact that any one person's funds are finite, something which is common to rich and poor alike. Finite funds, or budget constraints, force a person to make choices as to how he will spend his money. But these choices reveal only how much that person is willing to pay for one good as opposed to another; they have no interpersonal significance whatsoever and so do not permit us to conclude that any interpersonal transfer of a good maximizes aggregate human satisfaction. As the auction example indicates, although it is true that the factory owner's choice shows that he himself prefers some other good (like a factory at site B) to the right to use the air at site A, it may nevertheless also be true that he values the right to use the air at A more highly than do the homeowners.

It is worth noting that nothing in the example turns upon the fact that the right is allocated by way of an auction rather than by way of a bargain. Although it is true that under a bargain, unlike an auction, the losers receive compensation, the fact remains that the payment of compensation shows only that those compensated value the money (or, more precisely, what goods the money buys for them elsewhere) more highly than the good they decide to give up in the bargain. Again, nothing in the bargained transfer of the right permits any conclusion about an interpersonal comparison of value.7 A mutually beneficial exchange will serve to increase (but not necessarily maximize) overall satisfaction; this is so because, with compensation, both parties will be better off. However, if compensation is not actually paid, it cannot be assumed that overall satisfaction has even increased, since without an interpersonal comparison there is no certainty that the uncompensated loss of the losing party does not exceed the gain to the person or persons

7 Contrast Posner, supra note 4, at 11: "Where resources are shifted pursuant to a voluntary transaction we can be reasonably confident that the shift involves a net increase in efficiency. The transaction would not have occurred if both parties had not expected it to make them better off. This implies that the resources transferred are more valuable in their new owner's hands." [Emphasis added.] But the implications of a voluntary transfer are nothing of the kind, at least if "more valuable" is thought to have anything to do with "more satisfaction" as Posner's definition of efficiency suggests. The "net increase in efficiency" to which Posner refers comes from our knowing that all parties to a voluntary transaction are better off, not from the fact that the resource in question is more valuable in its new owner's hands. (It may not be.)

The failure to appreciate this difference may also help to explain why some economists believe that actual compensation is not required for Kaldor-Hicks improvements. (For discussion of this, see Keenan, Value Maximization and Welfare Theory (1981), 10 J. Leg. Studies 409 at 411.) These economists may think that the basis for the improvement is in the transfer of the good X to someone who values it more highly, but this is wrong. The source of the improvement is really in the fact that if gainers do compensate losers, everyone will be better off (or at least no one will be worse off), something which is quite consistent with the gainers (as purchasers) actually getting less satisfaction out of the good X than do the losers (as sellers). Needless to say, if compensation is not actually paid, then not everyone is better off and it is quite possible (e.g., under the Kaldor-Hicks or wealth maximization criterion) that the only thing that will be achieved is that goods will end up where they are less highly valued (i.e., where they give less satisfaction).
whose willingness to pay is highest.\textsuperscript{8} Despite the introduction of compensation, an interpersonal comparison of this (or any) kind remains unattained; it is only known that the person compensated is now in a position to buy a good which he values more highly than the one he has given up.

Before leaving the discussion of the willingness-to-pay criterion, it is worth noting that even strictly Pareto efficient reallocations may involve reductions in total welfare or satisfaction. This claim may appear puzzling since by definition strictly Pareto efficient reallocations are ones in which no individual is made worse off (and someone is made better off). Where, then, is there any possibility for a reduction in total welfare? The answer lies in appreciating that in markets based on money exchange rather than barter, individuals are giving up goods in exchange for a currency which has no intrinsic value. Their motivation for the exchange is to be found in what the money will buy for them elsewhere, that is, in its instrumental value. Thus, markets based on money exchange actually involve a sequence of Pareto non-comparable exchanges (exchanges in which one individual is made better off and another worse off) leading only eventually to a Pareto superior allocation (one in which no individual is worse off than he started and someone is better off). This sequence of exchanges, however, is as likely as not to involve reductions in total welfare.

To demonstrate this, suppose that there are three individuals, Tom, Dick and Harry, and three goods, A, B and C, in society. Let the following matrix represent the preference orderings of the three individuals over the three goods. The individuals' respective initial endowments are indicated by a circle around the relevant good.

<table>
<thead>
<tr>
<th></th>
<th>Tom</th>
<th>Dick</th>
<th>Harry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most Preferred</td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>Least Preferred</td>
<td>C</td>
<td>A</td>
<td>A</td>
</tr>
</tbody>
</table>

Thus, for example, Tom prefers A to B to C and begins by owning B.

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\textsuperscript{8} Posner has explicitly recognized this possibility in his more recent work. See, e.g., Posner, \textit{The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication} (1980), 8 Hofstra L. Rev. 487 at 491:

The disutility to the losers from the move may exceed the utility to the winners, even though, by the assumption that only pecuniary externalities are involved, the total wealth of the people affected by, but not party to, the transaction is unchanged, so that the transaction is wealth maximizing [i.e., Kaldor-Hicks efficient].

The mention of so-called pecuniary externalities is interesting here. Pecuniary externalities are third party effects which work through the market. For example, if Jones goes out of business because Smith offers a better price to consumers, then Jones's loss is a pecuniary externality. The economist, however, is not concerned about such losses because it is Kaldor-Hicks efficient (although obviously not Pareto efficient) for them to occur. Those who lose out in competitive pricing simply reveal a willingness to pay (in terms of a willingness to reduce prices) which is lower than those who win. Again, however, the losses may well exceed the gains in terms of human satisfaction, as Posner himself admits.
Clearly, there is a possible reallocation of these three goods among the three individuals which is Pareto superior to the given endowment. The difficulty is how to reach this reallocation by way of bilateral exchange. Tom, who has B, wants A; but Harry, who owns A, wants C and not B. A bilateral exchange between these two is not mutually profitable. The same holds true for possible exchanges between Tom and Dick or Dick and Harry.

Suppose, however, that money is introduced into this society and that it is given to Tom. Tom will buy A from Harry with this money and Harry will accept it in the hope that he will be able to use it to buy C from Dick. Dick will in turn accept the money from Harry since the money will enable him to buy B from Tom. Thus, the money will eventually find its way back to Tom and along the way help to effect the Pareto superior reallocation of the goods.

Although this example is highly stylized for the sake of exposition, it does capture how markets based on money exchange actually work. Strictly speaking, unless money has some intrinsic value, no single exchange is Pareto superior even though all affected individuals might agree to it; only a sequence of Pareto non-comparable exchanges effects the Pareto superior result. Suppose, however, that Tom values good B more highly than Dick does; then the transfer of B from Tom to Dick, which is the last transfer described above and which might as easily have described a bargain between the factory owner and a group of surrounding homeowners, involves a reduction in total welfare. Note that each and every bilateral exchange is needed to achieve the Pareto superior reallocation. Thus, it can be said that the essential steps in even strictly Pareto superior reallocations of resources in markets based on money exchange are as likely as not to involve reductions in total welfare. Willingness to pay, therefore, seems to provide a poor basis for measuring increases in total human satisfaction.

B. Aggregation

There is a further difficulty with efficiency as a goal of regulatory reform. Even if it were accepted that willingness to pay is an appropriate measure of human satisfaction, it might still be asked whether the notion of aggregating welfare across individuals has any ethical significance. After all, no individual enjoys an aggregate of welfare.

Consider again the factory example. Suppose that as a result of the assignment to the ten homeowners of the right to use the air, the sole owner of the factory loses fifty units of welfare. Assume that each of the ten homeowners gains ten units. Although the aggregation of welfare gains to the homeowners suggests this assignment of the right has effected a good result, the factory owner experiences a welfare loss five times greater than the gain received by any single homeowner. This welfare loss, unlike the aggregate of welfare gains to the homeowners, is a loss actually experienced by some individual. Thus, if one is concerned about welfare because it is something that is experienced by individuals, it can be argued that to minimize welfare
losses, the right to use the air should have been assigned to the factory owner.9

The point can be reinforced by way of a useful analogy. Suppose that your car needs repair and you must choose between two garages. In the first garage there are ten mechanics each of whom has one year's experience; in the second there are two mechanics, each with four years' experience. Which garage has more experience working on cars? Do you care that the total experience in the first garage is ten years as opposed to only eight in the second? After all, no individual mechanic in the first garage actually has that larger total of ten years' experience. Surely meaningful experience must be the experience of some individual.

The same principle seems to hold for welfare or satisfaction; since welfare is also ultimately experienced by individuals, the importance of an aggregate of welfare, which no one individual enjoys, is difficult to appreciate.10 The point is not to suggest that, as a rule, entitlements should always be assigned to that individual with the largest welfare stake in the resolution of social conflict. Rather, it is to argue that a rule such as Posner's, which assigns entitlements according to aggregates of welfare, regardless of the numbers of individuals over which the aggregate is distributed, requires some kind of independent ethical justification. The next section of the paper considers one such justification.

9 For some suggestion that this is the only sensible way to proceed, at least if one is ultimately only concerned about individual welfare or satisfaction, see Taurek, Should the Numbers Count? (1977), 6 Phil. & Pub. Aff. 293; and Brook and Schwimmer, On Adding the Good (1981), 7 Soc. Theory & Prac. 325. See also Hart, Between Utility and Rights (1979), 79 Colum. L. Rev. 828 at 830-31:

The collective sum of different persons' pleasures, or the net balance of total happiness of different persons (supposing it makes sense to talk of adding them) is not in itself a pleasure or happiness which anybody experiences. Society is not an individual experiencing the aggregate collected pleasures or pains of its members; no person experiences such an aggregate.

10 Someone may object that to interpret welfare as something "experienced" by individuals, like pleasure or pain, is to interpret it too narrowly or even, perhaps, wrongly. An alternative view of welfare is one that conceives of it as a kind of success in the fulfillment of individual preferences, goals or ambitions, whether or not that success is accompanied by any kind of conscious experience. Thus, on the latter view, an individual's preference can be satisfied or frustrated after the individual's death, even though the individual obviously cannot then experience any satisfaction or frustration. None of this need affect, however, the essential point being made in the text against the aggregation of preferences or welfare. The fact remains that even for posthumous benefits (which no individual may enjoy, but which may represent the satisfaction of past preferences) there is an ethically significant difference between satisfying a single individual's intense preference and satisfying a number of individuals' less intense preferences which when aggregated together add up to an intensity (which has significance for no one) equal to that of the single individual. This, however, is a difference which aggregative theories of welfare, be they of the "conscious state" or "preference fulfillment" kind, tend to ignore. For a good discussion of these two kinds of welfare theory, see Dworkin, What is Equality? Part 1: Equality of Welfare (1981), 10 Phil. & Pub. Aff. 185.
C. Consent

Thus far it has been shown that the efficiency argument for regulatory reform is defective in two distinct ways. The first difficulty is that it seeks to maximize a measure of satisfaction—willingness to pay—which lacks any interpersonal significance and therefore cannot justify any interpersonal transfer of entitlements.11 The second difficulty is that it seeks to maximize an aggregate of human satisfaction, a goal that, it is argued, is of dubious intrinsic value. In a recent article, nonetheless, Posner has argued that the pursuit of efficiency can be justified on the quite independent basis that, as a matter of descriptive fact, individuals would consent to it.12 This section of the article will consider whether this consensual justification for efficiency has any real force in the context of regulatory reform.

The essential feature of the consensual justification of efficiency is the claim that under efficient rules, society will have greater wealth and, as a result, each and every individual can expect to have a greater share. It is this prospect of a greater share which secures everyone’s consent to, and hence legitimizes, the pursuit of efficiency. It is not necessary, however, that this sharing out of the increased wealth take place every time a wealth maximizing decision is made; the costs of administering such a finely tuned scheme of profit sharing are likely to be prohibitive. Rather, it is enough if each and every individual believes that, over the long run, wealth maximization can be expected ex ante to work to his advantage. For this expected long-run gain, an individual will be prepared to tolerate the prospect of an occasional short-run loss.

Posner recognizes that not all wealth maximizing decisions will have this nice long-run distributive effect which secures the easy co-operation of all affected individuals. For example, he supposes that a shift from a progressive to a proportionate income tax might well be wealth maximizing or efficient, but since this shift will probably make some taxpayers worse off in both the long and short run, those taxpayers will resist the change and this resistance may well frustrate the wealth maximizing decision.13 Thus, efficient changes in the tax law, Posner claims, cannot be justified on consensual grounds. On the other hand, Posner argues, the usual common law concerns that govern the acquisition and transfer of property rights, the making and enforcement of contracts, and the determination of liability for accidents, can be expected ex ante to work to everyone’s advantage over time; thus Posner claims that here there will be strong legitimizing support for the common law rules to be efficient.14

The question for present purposes is whether regulatory laws should be expected to fit Posner’s tax law or common law model, that is, whether one

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13 *Id.* at 499-500.
14 *Id.* at 502-506.
should observe rules supporting the systematic redistribution of wealth or rules supporting efficiency or wealth maximization. Most of the scholarship on the distributive consequences of regulation, including Posner's own work on the subject, shows, or at least strongly suggests, that existing regulatory policies generate systematic wealth transfers.¹⁶ Any reform programme aimed at enhancing the efficiency of regulation, such as the promotion of marginal cost pricing rules for energy or telephone service, would impose substantial wealth losses on some interest groups. Those groups, the current beneficiaries of inefficient regulation, would perceive ex ante a relatively high probability of a net loss under a regulatory regime designed to secure efficiency. Thus, these groups would not consent to efficient regulatory policies and so the consent argument for efficiency fails.¹⁶

III. THE LIBERTARIAN CRITIQUE

Posner's "consent" rationale for the efficiency norm suggests another kind of ethical issue in regulatory reform. It is sometimes argued that regulation unjustly restricts the exercise of individual freedoms and that the state has no business interfering with free, capitalist acts between consenting adults.¹⁷ In this section of the article, this libertarian concern is subjected to closer scrutiny. In particular it is suggested, first, that the libertarian has paid insufficient attention to the relative worth of exercising different kinds of individual freedoms and that this oversight has serious implications for his arguments in the context of regulatory reform. Second, it is argued that there is a crucial difference, even within the libertarian's own theory, between the regulation of free contract and the regulation of harmful activities. While the libertarian objects to the former more than he does the latter, his objections seem to be inconsistent with his constant denial that individuals have any positive rights, that is to say, rights (independent of contract) to the positive performance of another individual's services. Third, it is suggested that the return any individual earns on his own services or property is very much the product of his society's investments and background institutions. Thus, it is plausible to argue that some forms of regulation are not so much a kind of government "taking", as some libertarians suggest, but rather are a means of calling in the social debt that private individuals owe to others.

A. The Worth of Individual Autonomy

It is important to emphasize the difference between the libertarian's and the economist's view of regulatory reform. Usually, the policy prescriptions of the two tend to move in tandem, each emphasizing the virtues of free market decision making; this obscures the fact that the underlying philosophical rationale is really quite different in the two cases.

¹⁰ Of course, if the ex ante choice was made in some kind of Rawlsian "original position" then the ex post losses may not be so easily predicted ex ante. But Posner is explicit in his rejection of Rawls's approach. See Posner, supra note 8, at 427-99.
¹⁷ This phrase is borrowed from Nozick, Anarchy State and Utopia (Oxford: Basil Blackwell, 1974) at 163.
Consider an example from what is often referred to as the "older" form of regulation, the regulation of monopoly. What concerns economists about monopoly pricing is that it is inefficient, and, in particular, that output is restricted to keep prices high. The economist *qua* economist is *not* concerned about issues of distributive justice, for example, consumers having to pay monopoly prices rather than lower competitive ones. Price gouging is tolerable and may even be efficient so long as the monopolist is a perfect price discriminator.\(^{18}\) In the economist's view, what is to be deplored in monopoly is that some people are not being gouged at all, that there are potential consumers who are willing to pay for a good that could be produced at a cost lower than the amount they are willing to pay and yet the goods sufficient to meet this demand are not being produced. Such a state of affairs is inefficient. The economist, therefore, condemns the monopolist for a kind of inaction, in particular, a failure to produce up to the competitive level of output.\(^{19}\)

The libertarian's approach to monopoly is very different. For him, the only justification for state action is the protection of individual rights, particularly negative rights, that is, rights against interference from others so long as one's activities are not themselves harmful.\(^{20}\) Thus, so long as Jones can carry on without interfering with Smith, Jones can do as he likes, free of regulation. If Smith wants Jones to do more, or to do things differently, then he must contract with Jones for that performance at mutually agreed-upon terms. For the libertarian, to fail to appreciate that individual rights are only rights against interference from others is to fail to understand the important common law difference between tort and contract, a difference which depends on the importance of individual liberty.\(^{21}\)

The libertarian view has significant implications for monopoly. Since the monopolist's failure to produce up to a competitive level of output is only a kind of inaction it cannot, as such, amount to actual interference with the activities of others. The libertarian reasons, for example, that if no one's rights are violated when a telephone company chooses not to provide any phones at all, then those same rights can hardly be said to be violated when that company chooses instead to provide them only to those consumers who

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18 When the monopolist is a perfect price discriminator, the marginal revenue curve collapses into the market demand curve. Thus, when the monopolist produces up to the point where marginal revenue equals marginal cost to maximize profits, he also produces up to the point where marginal cost is equal to the price, an efficient result.


are willing to pay some high monopoly price.\textsuperscript{22} In neither case is the telephone company interfering with another person's rights. Thus, unlike the economist, the libertarian may have little or no reason to argue for the regulation of monopolies, at least if he restricts his view to the consumer's side of the bargain.\textsuperscript{23}

The libertarian might, however, still worry that if a monopolist protects his market position by actively preventing others from competing as producers then this would amount to interference with their liberties. On this view, the focus of concern shifts from the potential consumer to the potential producer. The libertarian argues that a monopolist has no right to exclude other potential competitors from the market. To the extent that this happens, either privately or with the support of regulatory agencies (for example, through unjustified quality controls) the libertarian may see the need for regulation of business practices.

The libertarian concern about the monopolist's power to exclude competition raises interesting questions about the precise nature of the libertarian critique of regulation. After all, the institution of private property incorporates the right to exclude others without their consent;\textsuperscript{24} Proudhon even went so far as to say that property is theft. Yet the protection of private property seems to be basic to the libertarian view. To be concerned on the one hand that monopolists not be allowed the right to exclude competitors, but on the other hand that property be private would seem to require a theory to distinguish the relative importance of the right to exclude in the latter case.

Presumably, such a theory would argue that the institution of private property is important to the meaningful exercise of individual autonomy in a way that monopoly trade practices are not.\textsuperscript{25} But it seems likely that a theory of this kind would also serve to support the regulation of some kinds of property rights more than others. Such an idea is not new. The \textit{Ontario Human Rights Code},\textsuperscript{26} for example, allows a householder to refuse to employ a domestic servant because of his antipathy to the race, colour or creed of a person seeking such employment,\textsuperscript{27} although it would be illegal under the

\textsuperscript{22} See, e.g., Pilon, \textit{supra} note 20, at 1291: "If B has a perfect right to make no offer—and of course he does—then he has a right to make the offer that A accepts," and at 1341: "If private property means anything it means the right to dispose of or exchange that property in any way that does not violate the rights of others. Charging 'exorbitant prices' (in order to garner 'unconscionable profits') hardly violates rights. Better that no offer be made at all (which the owner has a perfect right to do)?"

\textsuperscript{23} See id., at 1342-43.

\textsuperscript{24} Economists have recognized that the institution of private property is a legally condoned form of barrier to entry. See Demsetz, \textit{Barriers to Entry} (1982), 72 Am. Econ. Rev. 47 at 49.

\textsuperscript{25} For some discussion to this effect, see Scanlon, \textit{Nozick on Rights, Liberty and Property} (1976), 6 Phil. & Pub. Aff. 3 at 18; and Becker, \textit{Property Rights} (Boston: Routledge and Kegan Paul, 1977) at 86.

\textsuperscript{26} R.S.O. 1980, c. 340.

\textsuperscript{27} Id., s. 4(8).
A libertarian might suggest that the *Ontario Human Rights Code* has no business preventing even the latter form of discrimination (since, again, to refuse to hire someone for any reason cannot amount to interference with that person's rights), but if he does so he must explain why the power to exclude an aspiring black domestic from one's own home does not amount to interference with that person's freedom. The libertarian's quandary is simply this: either he refuses to judge the relative importance of various liberties, in which case the exclusivity of private property is no more privileged than that of monopoly; or he does make such judgments, in which case he is open to the claim that some liberties, even if they do not cause harm, may have to give way to other liberties which are more important.

The importance of this point for regulation can perhaps be most easily appreciated if one considers the kind of libertarian argument Pilon has used against employment regulation. Pilon asks us to contemplate how outrageous such regulation would be if it were applied equally as much to employees as it currently is to employers:

We would surely think it an outrageous affront to privacy and to the right to freedom of association if the government said to the employee (employer) that he need not work (be in business) but that if he does hold himself out as seeking work (if he does seek employees), only certain reasons will justify his rejection of an offer (application), this in order to insure the right of employers (employees) to equal opportunity. Yet the inequality indicated by the parenthetical substitutions here is precisely what we are imposing upon the employer. When we add the burden of affirmatively seeking employees of certain kinds—imagine if the employee were required to affirmatively seek employers of certain kinds—the inequality of treatment becomes ineluctable.

The thrust of Pilon's argument is that the employer and the employee simply represent two sides of the same contract and if it is an outrage to regulate one side, the employee, it is equally outrageous to regulate the other, the employer. But the argument progresses too quickly. The affront to our moral sensibilities in the regulation of an employee may derive from the fact that the freedom to sell one's labour is important in a way that freedom to sell capital is not. Certainly such an idea is supported by the fact that the law of contract is reluctant to command the remedy of specific performance for


It states, in terms, that it does not interfere with free expression of opinion on any subject. It does not prevent a householder from refusing to employ a domestic servant because of his antipathy to the race, colour or creed of a person seeking such employment. Similarly, it does not prevent the owner of a house containing dwelling units which are not self-contained from refusing to lease such accommodation to anyone.

29 Pilon, *supra* note 20, at 1331 would exemplify such a libertarian.

30 For an alternative version of a libertarian quandary, see Steiner, *A Libertarian Quandary* (1980), 90 Ethics 257.

breach of contracts for personal services. The point is not that it must be true that the employee’s freedoms are more important than the employer’s and so should be less subject to regulation. Rather, the point is that they might be and Pilon does not seem even to consider the possibility. Yet considerations of this kind, which serve to rank the importance of individual freedoms, are important even for the libertarian who wants to protect the sanctity of private property.

B. The Role of the State

Libertarians claim that not only should the state not prohibit or interfere with an individual’s private activities if they pose no threat of harm to others, but also that the state should not meddle with an individual’s freedom of contract. There is, however, a difficulty for the libertarian who makes the latter claim. What the libertarian really calls for here is the enforcement by the state of freely negotiated contracts. This amounts to a call for positive performance on the part of the state, but given the libertarian’s general reluctance to entertain any notion of positive rights (as opposed to mere negative rights against interference from others), one might well ask what the grounds are for this particular claim. Is it not open for the state, as a third party, to suggest that, although it will not prohibit private parties from freely engaging in certain kinds of transactions so long as they do not harm others, it nevertheless will impose certain terms on those transactions if the private parties demand access to the judicial system to have them enforced? The use of certain legal facilities, backed up by the power of the state, need not be free. It seems plausible to suggest that access to these facilities is a


33 Cf. Narveson, Gewirth’s Reason and Morality—A Study in the Hazards of Universalizability in Ethics (1980), 19 Dialogue 651 at 667: “[W]e can distinguish between on the one hand the (negative) right to do this and that, and on the other hand, the positive right to have other people help enforce this negative right when it is threatened.”

Nozick, supra note 17, at 110-13, presents an argument for the individual’s positive right to free law enforcement. Nozick’s argument is that individuals cannot be allowed to have their own private protection agencies (e.g., courts) because if such agencies are unreliable or unfair in securing this protection for someone, they may well endanger others. For Nozick, only one dominant protection agency (the minimal state) should be allowed so that this risk can be avoided. But since ex ante an individual will not actually have caused any harm to anyone, this individual has been unjustly deprived of his natural right to enforce his own claim within a private protection agency. The free services of the dominant protection agency or state, therefore, are due him as compensation for this loss of freedom, and are not to be considered as any kind of concession to positive rights. This argument, however, is not available to the libertarian for justifying free access to the state’s power to enforce contracts. Unlike the case of protection against accidental harms, in the case of contractual enforcement the parties are already negotiating terms. Thus, they can decide between themselves whose private enforcement agency should have jurisdiction over the contract (just as private parties to an international contract now decide which country’s legal jurisdiction should apply) and who should pay for the costs of that enforcement. Thus, they have no obvious claim to the free and unconditional enforcement of their contract by some third party.
privilege, not a right, and may bring with it certain obligations, in particular, the obligations represented by regulatory constraints.

The point can be more easily appreciated if one considers a slightly different situation. Currently, corporations enjoy the privilege of limited liability whereby shareholders' liability for corporate debts or torts is limited to the amount of their investment. In exchange for this privilege (which is one not all private entities enjoy) the corporation may incur certain social obligations, such as having to use a policy of affirmative action or to locate in economically depressed areas. Only by choosing not to enjoy the legal privilege can the corporation avoid the social obligation. The same general principle would seem to hold for cases of legal enforcement of contracts; only if private institutions or individuals agree to their contracts being enforced on certain terms (for example, that the contracts should not be contrary to public policy) can those institutions claim that the powers of state ought to be used to enforce those contracts. Indeed, the principle is simply the libertarian's in reverse: if the state or a third party would not be violating any negative rights if it chose not to enforce contracts at all, then surely it cannot be said to be violating those same rights if it chooses only to enforce them on very particular terms.  

The discussion of the relative worth of individual liberties is relevant here. The libertarian moves quickly from the premise that Jones is under no obligation to do business at all to the conclusion that Jones must, therefore, be under an obligation to do business on any particular terms (so long as he does not actually harm others). If Jones violates no rights in the first instance, how can he be violating them in the second? This rhetorical question, however, ignores precisely what is important in the exercise of individual liberty. We may be reluctant to require Jones to enter into business; such an obligation would represent too much of a restriction on his autonomy. But once he has freely chosen to engage in business, we may require that he conduct that business on certain terms. A liberty that, for example, allows Jones to hire whomever he wants is a liberty different in kind and importance from a liberty that allows him not to make any hirings at all. What may outweigh the former and justify regulation in that case, need not outweigh the latter. Thus one may not, as the libertarian is wont to do, infer from the absence of regulation in the latter case that there should be no regulation in the former. There is no inconsistency between, on the one hand, the state choosing not to prohibit some activity (or inactivity) at all and, on the other hand, the state choosing to deal with the activity only on certain terms. The inconsistency is only apparent, not real, and it arises out of a failure to assess the

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34 Cf. Pilon, supra note 20, at 1340: "[I]f no one has a right to force an association of any kind upon another, then there can hardly be a right to force any particular terms of association." It can be noted that Pilon rejects the idea that the privilege of limited liability can be used to generate social obligations for corporations. This is because the privilege itself is unjustified: private actors, whether or not they are incorporated, should be legally liable to the full extent of the harms they cause. A "contract" between the state and corporations should not affect the interests of third parties (e.g., potential tort victims) without the latter's consent.
worth of liberty, something even the libertarian cannot afford to do if he genuinely wishes to protect individual rights.

C. The Individual As Social Product

In Section II B of this article the efficiency theorist was implicitly accused of not taking individuals seriously enough since he chooses to aggregate measures of satisfaction across individuals. It was observed that no individual actually enjoys an aggregate of utility, welfare or satisfaction, and thus if the efficiency theorist is genuinely concerned about what individuals enjoy, then perhaps he should prescribe regulatory policies that lead to the maximum possible individual satisfaction rather than some maximum total of such satisfactions. To prescribe the latter over the former is to lose sight of the essential fact of separation between individuals.

If the efficiency theorist puts too little emphasis on the separation between individuals, the libertarian probably emphasizes it too much. For the libertarian, individuals are beings who come to the social bargaining table with their interests and capabilities already well formed. Nozick, for example, deems it appropriate to approach the problem of what interpersonal obligations might arise out of social co-operation by considering first the case of a number of Robinson Crusoes, each living alone on a separate island, suddenly discovering and communicating with one another. Nozick uses this case of isolated individuals to go on to conclude that society is entitled to redistribute only the gains from trade that are produced over and above what individuals can get for themselves without trade (or co-operation in production). Initial endowments, or what is secured in free exchange of those endowments, are simply not available for any just redistribution.\(^3\)

Arrow has suggested that there is a strong similarity between Nozick's libertarian conception of justice and the economist's definition of the core of an economy.\(^4\) Formally, the core is that set of resource allocations \(C\) which satisfy the property that for no alternative allocation \(X\) is there a coalition of (one or many) individuals who can achieve \(X\) with their own resources such that every member of the coalition is better off than they are in \(C\). Nozick restricts the domain of justice to \(C\), since to redistribute resources outside of \(C\) is to make some individual worse off than he otherwise could be by way of independent action, and that is unjustified. If one assumes that there are neither technological externalities nor non-convexities (for example, increasing returns to scale) in the economy, then, if the number of individuals is large, the core shrinks to the single equilibrium point of perfect competition.\(^5\) If, as Arrow suggests, Nozick is right about justice, there would be no problem of justice remaining!

The difficulty is in believing that individuals owe so little to society for what their initial endowments are and how much they are worth. For one

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3\(^6\) Nozick, *supra* note 17, at 183-89.
5\(^7\) See Arrow and Hahn, *General Competitive Analysis* (Edinburgh: Oliver and Boyd, 1971) Ch. 8.
Robinson Crusoe even to enjoy conversation with another requires that the two share a language and a set of concepts in common. The interdependencies in modern society are, of course, much more developed. In another discussion, Arrow has asked whether we can so easily distinguish between the capacities which somehow define the private person and those which are the result of the external actions of society. A man may see well because his vision is intrinsically good or because he has glasses. Is the vision more peculiarly his in one case than in the other? True, he may have paid for the glasses in the second case, but the price he will have paid will reflect the economies of individual specialization, something which is only possible given society's commitment to market exchange. People can only afford to specialize and so develop their different talents in a society in which those talents are complementary to one another. Outside such a society, their natural assets, or their abilities to cultivate them, are much less valuable. Thus, the owners of these assets do not have a private use of them which is considerable. Regulation, therefore, is much less easily construed as a public taking of what is private than libertarians would have us think. In some deep sense, the core of our economy is really very large.

IV. THE POLITICAL CRITIQUE: BIASED REPRESENTATION

A third argument for regulatory reform derives from a political concern that many regulatory policies and decisions seem to reflect a bias or inequality in the relative influence exerted by competing interest groups. Many students of administrative regulation have observed that electoral and other political factors often play a decisive role in regulatory policy-making. Trebilcock and others have recently argued that the appropriate institutional response to the problem of unequal regulatory influence is to subsidize the representation of politically disadvantaged groups in regulatory proceedings. In this section of the article, some general arguments will be developed about the ethical implications of the Trebilcock proposal. First, the positive economic theory of political motivation that gives rise to the problem of inequality in political influence will be clarified and it will be argued that there is at least one outcome-oriented conception of political equality that might lead a political community to endorse regulatory institutions that permit unequal representation. Second, it will be argued that the precise nature of the normative concern underlying the proposal for subsidized representation is unclear from Trebilcock's analysis. Trebilcock purports to justify subsidies in terms

39 This point is well made by Arrow, supra note 36. See also Kearl, Do Entitlements Imply That Taxation Is Theft? (1977), 7 Phil. & Pub. Aff. 74.
of an exclusively outcome-oriented theory of the role of representation but his arguments fail to support his claim that subsidized representation will be an effective solution to the problem of unequal influence in regulation. Finally, it will be suggested that any general programme of regulatory reform which relies on subsidized representation as its preferred instrument can only be justified by resort to some process-oriented conception of the value of representation in regulation.

A. The Positive Theory of Regulation

The positive economic theory of regulatory decision-making derives from the general theory of public choice. Public choice theorists view the regulatory process as a market in which politicians and regulators, as suppliers of policies, and voters, as demanders of policies, enter into exchange relations to maximize private utility functions. Under this regulatory process, favourable policies elicit electoral and other forms of political support. Those groups of voters with the highest effective demand are predicted on this theory to secure the greatest quantum of favourable regulation. It is usually argued that the effectiveness of voter demand is determined by two variables: voter group size, which determines the group's costs of political organization and representation, and the group's *per capita* stakes or expected payoffs from favourable policies. Public choice theory's general prediction is that small groups of voters with low organization costs and potentially large *per capita* gains from favourable regulatory decisions will become disproportionately influential in the regulatory process. Groups with relatively few members are said to have low costs of organization and representation for two reasons. First, small groups can more cheaply monitor and exclude free riders; second, small groups enjoy cost advantages in keeping their members informed about the consequences of regulations and in mobilizing their members for co-ordinated political action, including representation before regulatory agencies. Large *per capita* gains are said to provide the incentive for overcoming these costs.

There is, however, a difficulty with the public choice theorist's argument that there is an inherent bias in regulation if the benefits from concerted regulatory participation are viewed as public goods by interest group members. The benefits from a favourable regulatory decision will constitute a public good when the following five conditions are satisfied. First, contribution or co-operative action by some but not all members of the group is sufficient to secure the benefits of favourable regulation for all members. Second, if a favourable regulatory decision is obtained, its benefits will be available to all members, even to those who failed to contribute or co-operate. Third, there is no practical or cost-effective way to exclude those who fail to contribute from enjoying the benefits. Fourth, each member's contribution to the group effort is a cost borne by that member. Finally, the value of what each member would gain from a favourable decision outweighs his share

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42 For a comprehensive survey of the literature, see Mueller, *Public Choice* (New York: Cambridge Univ. Press, 1979) Pt. I.
of the group's cost of securing it. When these five conditions are present, the group's ability to secure favourable regulatory policies will be subverted by the free-rider problem. Each rational member of the group will reason that, regardless of whether he contributes or not, either enough people will contribute to secure a favourable decision or they will not. In other words, his decision to contribute or otherwise participate in the regulatory process does not affect the probability that a beneficial decision will be secured and, since his contribution or participation will entail a cost which he must bear, he would behave irrationally if he did not free ride. The free-rider problem, therefore, would seem to afflict all interest groups of at least non-negligible size (for example, over fifty members).

The free-rider hypothesis is important because it suggests that the size of an interest group's per capita stakes will have little or no influence on the group's effective demand for favourable policies. The free-rider hypothesis predicts that, regardless of the size of his potential per capita gain, each and every group member will prefer to secure those gains without incurring any costs of participation. In the case of relatively large groups, members will be much more likely to choose the free-rider strategy, even where the potential per capita gains are large. This suggests that public choice theory should identify the members of small groups as the primary beneficiaries of biased representation in regulatory decision-making regardless of the size of per capita gains.

This point is a significant one because if those excluded are the members of large groups with either large or small per capita stakes, the precise nature of the normative concern animating Trebilcock's proposal for subsidized representation is ambiguous. In particular, it is not clear whether affirmative action is required on behalf of those who are excluded from the regulatory process because there are large numbers of them or, alternatively, because at least in some cases each may have much at stake. In the next section, the normative significance of this distinction between size of stakes and numbers of individuals is discussed, but first the description of public choice theory must be completed by examining its standard explanation of how large groups are helped to overcome the free-rider problem through efforts on the supply side of the political market.

According to public choice theory, politicians and regulators are in the business of providing favourable policies to interest groups in exchange for their political support. In order to discover which policies are favoured by which groups, the politician or regulator has a general entrepreneurial interest in ensuring that interest groups who may be affected by his policies or decisions are well organized and represented. In other words, politicians and regulators secure private goods in the form of political support, power and prestige by helping large groups overcome their free-rider problems. For

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43 For a lucid analysis of the public goods problem in political behaviour, see Buchanan, Revolutionary Motivation and Rationality (1979), 9 Phil. & Pub. Aff. 59 at 62-65.
example, laws governing the incorporation and internal decision-making procedures of business firms have the general consequence of centralizing authority in a small group, the board of directors, which can effectively organize demand.\textsuperscript{44} Labour legislation strikes at the free-rider problem in the same way. Moreover, public choice theory predicts that politicians, as rational maximizers of their political support, will concentrate their efforts to facilitate group co-ordination on large groups whose members possess relatively large \textit{per capita} stakes. This is likely for two reasons. First, a large group with large \textit{per capita} stakes represents a larger source of potential support (for example, campaign contributions) than a group of identical size whose members possess small \textit{per capita} stakes. Second, a group member with large \textit{per capita} stakes is much more likely to come forward and seek favourable policies from the politician once the free-rider problem has been overcome and the costs of group co-ordination have been evenly distributed across all individuals in the group. There is always the chance that an individual with small \textit{per capita} stakes, even when he faces a fair distribution of the costs of group co-ordination, might reason that the benefits of a favourable policy do not outweigh those costs.

Thus, public choice theory should predict that politicians will try to assist large groups in surmounting the free-rider problem and that this aid will be skewed in the direction of groups with large \textit{per capita} stakes. To the extent that this theory is correct, large groups with large \textit{per capita} stakes should already possess adequate representation in the regulatory process and should be enjoying regulatory policies which are favourable to them. It is concluded, therefore, that the Trebilcock proposal for a subsidy to disadvantaged interest groups is primarily a response to the fact that large numbers of people, each with little at stake, are likely to be under-represented in the determination of regulatory policies. In the next section, the particular conception of political equality that animates this subsidy proposal will be examined. It will be suggested that an alternative, and perhaps equally appealing, conception of political equality is available, which not only fails to provide ethical support for the proposed subsidy, but may even militate against it.

\section*{B. Two Kinds of Political Equality}

Consider two possible ways in which persons might be accorded equal treatment. First, there is formal or "lot-regarding" equality, a principle of distribution that requires that each person receive identical treatment; second, there is proportional or "person-regarding" equality, that requires that each person's treatment be calibrated according to some individuated characteristic such as his particular needs or stakes. For example, under formal equality, a platoon commander might give each soldier in his platoon boots of identical size. On the other hand, a platoon commander concerned with proportional

equality would provide boots to each soldier according to the size of each soldier's feet.\textsuperscript{45}

A political community confronts the same basic choice as the platoon commander when it decides how influence over outcomes, or political decisiveness, is to be allocated among its members. On the one hand, a community can pursue formal equality by designing its political institutions to provide an equal quantum of real influence over decisions to each member, for example, one person—one vote. On the other hand, it can provide for proportional equality by arranging its institutions so that each member receives a share of influence according to his stake in a political issue.

An individual's influence over political outcomes need not be direct. In large democracies individuals can only exercise influence on outcomes through representatives. Nevertheless, the above two conceptions of political equality are relevant to the amount of representation allocated to each individual. For example, the ideal of representation by population is usually thought to promote formal rather than proportional equality.\textsuperscript{46}

In Trebilcock's economic model of regulatory politics, representation seems to influence regulatory outcomes through its effect on the amount of information available to both politicians and voters. Democratic polities that must contend with technocratic, economic and social complexity, require specialized political intermediaries who both educate potential constituents, and communicate their constituents' preferences to politicians and regulators. The intensity of representation in regulation influences outcomes because it determines how much voters know about their respective stakes in proposed policies, and how much politicians know about voters' perceptions of their stakes. For the politician or regulator, the intensity of a group's representation serves as a signal of the group's willingness to provide political support or mount opposition.

If regulatory representation is viewed primarily as a signalling process, it would seem that the Trebilcock proposal is more responsive to formal than proportional equality. This is because, as was argued in the last section, the Trebilcock subsidy is aimed at increasing the intensity of representation for large groups whose members possess small per capita stakes in a regulatory decision. If large per capita stakes generally provide sufficient incentives on the supply side to overcome the organizational disadvantages of large group size, then what Trebilcock describes as a "bias" in the existing regulatory process would seem to promote a greater degree of proportional equality in regulation. In other words, current arrangements for representation in regulation, which seem to permit individuals with high stakes greater relative influence over outcomes, may actually be preferred if one subscribes to a

\textsuperscript{45} The terms "lot-regarding equality" and "person-regarding equality", and the platoon commander example, are taken from a recent paper by Rae, \textit{Two Contradictory Ideas of Equality} (1981), 91 Ethics 451 at 452-53.

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political ethic of proportional equality. Trebilcock’s analysis fails to provide any ethical justification for affirmative action to lessen the organizational disadvantages attributable to small per capita stakes. If the political efficacy of regulation depends exclusively on citizen preferences over outcomes, it is unclear why the relative regulatory influence of citizens with large per capita stakes—more intense preferences—should be reduced. Consider the regulation of occupational risks in a particular industry. Why should the consumers of the industry’s product, who must pay a higher price because of safety regulations, have an influence on the regulatory decision formally equal to that of the affected employees? It is arguable that the employees, who have a greater stake in the regulatory decision, should have more influence in choosing the regulatory outcome than the consumers.47

In fairness to Trebilcock, it could be maintained that his proposal is compatible with either conception of political equality. This is because representation can be viewed as involving more than a signal to politicians and regulators; it is also an educative process through which citizens obtain information about the probable consequences of proposed regulations. A regulatory process consciously designed to assign influence in proportion to the relative size of individual stakes would still benefit from the production of more information to assist voters in assessing their respective stakes in proposed policies. But if Trebilcock’s proposed subsidy is intended to overcome the disadvantage of voter ignorance, his reform programme raises an additional problem. Public choice theory suggests that subsidized representation is unlikely to substantially reduce voters’ ignorance of their stakes in regulatory outcomes. In the final section of the article this additional difficulty with Trebilcock’s proposal is outlined, and we conclude that any general programme of subsidized representation must derive its justification from some non-economic view of political motivation. It will be argued that subsidized representation emerges as an attractive reform strategy only if the institutional designer believes that representation promotes ethical objectives that are separate and distinct from any purely outcome-oriented ethical concern for either formal or proportional equality in regulation.

47 It can be argued that the employees’ interest in workplace safety might be better protected through the creation of some enforceable legal right, that is, some claim to a minimum level of occupational safety. Yet the ethical attraction of judicially enforceable rights, as opposed to decision-making procedures, which provide differential patterns of influence over outcomes, is unclear. The proponent of the rights strategy must advance some justification for preferring it over alternative arrangements that promote proportional equality. Ackerman has argued that the choice between these competing strategies is situationally problematic:

[The point of the following survey is that all these strategies have weaknesses as well as strengths, and that statesmen who make a fetish of some particular strategic formula risk failure at the times of greatest crisis. Rather than mistaking a particular strategy for a final solution to the problem of tyranny, we must keep our eyes on the ultimate objective, which is to take those concrete steps that will deepen the institutional foundations of the ongoing dialogue that constitutes the liberal state.]

C. Subsidized Representation—A Prescription in Search of a Theory?

Will subsidized representation for large groups effectively counteract the general problem of a voter's ignorance about his personal stakes in regulatory policies? Trebilcock has proposed the provision of a partial tax credit of seventy-five percent for contributions up to some maximum to "public interest" (that is, large group) representatives. This specific proposal seems unlikely to overcome the problem of voter ignorance for two reasons. The first difficulty with the scheme is the partial nature of the tax credit. According to public choice theory, it would be irrational for a member of a large group to make any personal contribution to the representation of group interests. Thus, a subsidy in the form of a partial tax credit, which depends for its effectiveness on a substantial number of individuals offering personal contributions, seems doomed to failure by the continuing incentive to free ride. One obvious method of overcoming this deficiency in the partial credit scheme is to make the tax credit independent of personal contributions. This modified version of Trebilcock's proposal would allow individual taxpayers to allocate some independently determined tax credit (for example, $100.00) to any combination of public interest representatives listed on the annual tax return.

A more fundamental deficiency in the tax credit scheme is that it seems unlikely to overcome an additional problem of political motivation that is often discussed in public choice theory. This is the problem of "rational ignorance". Since any individual's share of influence over a regulatory outcome is negligible in situations where there are large numbers of individuals involved, that individual has little or no incentive to become informed about the nature or importance of his personal interest in regulatory decisions. Trebilcock's tax credit scheme allows individual taxpayers to identify the public interest representatives who will be the beneficiaries of their subsidized contributions. These representatives, who are assumed to seek maximum contributions, have a strong incentive to inform taxpayers about regulatory policies and how those policies may affect the taxpayers' interests. This competition for constituents will cause more information about regulation to be produced; but will the taxpayers have any incentive to listen to the information supplied by prospective representatives? The theory of rational ignorance suggests that taxpayers will not have any incentive to take this information seriously because each will reason that regardless of any investment that he makes in assimilating the information, his contribution still has only a negligible influence on the resolution of regulatory issues which affect his interests. Moreover, once the prospective representative realizes that his messages are being ignored, he too will have little or no incentive to take his role as an information provider seriously. Representatives will be likely to trivialize complex regulatory issues by stressing their emotive or symbolic aspects or by publicizing simplistic one-sided analyses. Furthermore, the theory of ra-

tional ignorance has implications for the performance of the representative's signalling function. Politicians and regulators will receive more information about voter preferences, but the representative will have no incentive to represent accurately the views of contributors since contributors will rationally choose to remain uninformed about the effectiveness of his advocacy of their interests in the regulatory process.

The discussion here suggests that the regulatory reformer who prescribes subsidized representation must advance some normative justification that does not depend on an exclusively economic theory of political motivation. If the real content of political motivation is entirely subsumed within the concept of rationality implicit in public choice theory, no citizen who shares some perceived interest with a large number of his fellows will attempt to comprehend regulatory issues or try to ensure that his views are accurately represented in regulatory proceedings. Institutional reforms designed to increase political equality must be grounded in a more comprehensive behavioural theory, a theory which explains why individuals ascribe some intrinsic value to participation in political discussion, even when those discussions take place between individuals who have negligible influence over the outcome of collective choice processes. Without such a theory, there is no reason to believe that the subsidy proposal will improve the political efficacy of regulation.

V. CONCLUSION

The main purpose of this article has been to criticize the coherence and completeness of the three principal arguments currently advanced on behalf of regulatory reform. A difficulty that arises for an article of this kind is that it may be misconstrued as an affirmative defence of the regulatory status quo. But the status quo stands as much in need of ethical justification as any proposed reform. While the article does not attempt to provide an alternative normative framework for justifying either regulatory change or maintenance of the status quo, it should clarify some of the ethical issues for those who are willing to undertake these more constructive tasks.