

The Microgovernment Monster

“Tunnel Vision” by Jonathan Rauch, in *National Journal* (Sept. 19, 1998), 1501 M St. N.W., Washington, D.C. 20005.

America knows all about government regulation, of course, but never before has it had to cope with anything this insidious, this intrusive, this irrational, wails Rauch, a *National Journal* senior writer. He calls it “microgovernment”—and he wants it tamed.

Unlike traditional regulation, carried out by “big, clunky agencies issuing one-size-fits-all rules aimed at making people better off, on average,” microgovernment “comes as a steady drizzle of court decisions, seeping through the pores of civic life,” he writes. Its basic premise: that every individual American is entitled to a safe, clean, and, above all, fair personal environment.

Microgovernment is the force behind such causes célèbre as a federal judge’s 1998 decree that a golfer with a circulatory disorder has a right, under the Americans with Disabilities Act, to play the PGA Tour using a golf cart, while his competitors must tire themselves out walking, and the \$2.7 million punitive judgment (later reduced to \$480,000) against McDonald’s won by a grandmother who was hospitalized after spilling hot coffee on herself. “America must be the only country in the world where juries regulate the temperature of coffee,” observes Rauch.

America had two earlier great waves of regulation, Rauch writes: the economic regulation that began early in this century and lasted through the New Deal, and the “social” regulation of pollution and work-

place safety that blossomed in the 1960s and 1970s. But the current wave, he contends, is “fundamentally different”: more intrusive, less rational, and less accountable.

“For government, policing jokes at work, or ordering colleges to set up as many press interviews for female athletes as for males, or fining the producers of *Melrose Place* \$5 million for refusing to allow a pregnant actress to play a bikini-clad seductress, represents a higher and stranger order of intrusiveness,” Rauch maintains, than when, say, the Environmental Protection Agency requires steel makers to put scrubbers on their smokestacks.

Regulating through the courts has become, in effect, “Washington’s default mode,” he contends. “Why bother with a new bureaucracy to regulate health maintenance organizations, when you can just pass a ‘patients’ bill of rights,’ meaning (in some versions) regulating HMOs through private litigation? No need to hire bureaucrats, make painful political choices or spend taxpayers’ money; regulation by lawsuit is self-financing and self-propelled.” As Pietro S. Nivola, a political scientist at the Brookings Institution, told Rauch: “It’s really a shift to off-budget governance.”

“The trouble,” adds Rauch, “is that it is off-accountability, too.” There is no city hall to fight, no bureaucrat to confront, no national forum in which microgovernmental policy is discussed. And, given the ad hoc nature of court rulings and responses to them, no way even of telling whether microgovernmental regulation works.



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