

**“THE DECISION-MAKER” AND LIMITS ON NEGATIVE FIAT:
AN UNFINISHED JOURNEY**

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Those of us who have watched Michael Korcok's work on opportunity costs and counterplans develop over the past couple of years have awaited the newest version with considerable excitement. The argument that the theory of opportunity costs provides required theoretical underpinning for intuitively attractive limits on negative fiat is a giant step forward in modern debate theory. Were Korcok not so careful to ground his argument in the venerable early writings on the subject, it would be tempting to say that it is the first truly new idea in the field in at least a decade. He is the first to carefully examine the economic theory of opportunity costs and fit the logic developed in that discipline to academic debate. Not only profound, the central insight is simple enough to make it into some debates, and to slowly but surely gain a degree of acceptance among the judging community.

As with any new theory, there are ambiguities about the exact meaning of some of the terminology, and vagaries in some of the corners and interstices. It seems to me that the time has come to consolidate this gain, and to further elaborate the theory, giving some clear answers to the hard practical questions that confront debaters and judges. Perhaps I am simply impatient. I “got in on the ground floor,” as I was privileged to read early versions of the argument, hot off Michael's computer. I have had the time to reflect on the opportunity cost model and to appreciate its power as a limit on negative fiat, but at the same time I have been left wondering about some of the ambiguities, and was hoping that this later work would clear things up. Alas, I finished reading “The Decision-Maker” and was left a bit disappointed. While the theory is restated clearly and persuasively, it fails to add much specificity to prior work, and in at least one critical passage it introduces troubling new uncertainties.

This essay shall proceed in three parts. First, I shall discuss what I see as a conceptual problem with the transposition of the theory of opportunity costs from its economic roots to the analysis of political actors. Second, I shall examine the indeterminacy of Korcok's theory, looking closely at his concept of the “appropriate decision-maker.” We shall see that

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rather than dissolving the question of negative fiat, Korcok's theory so far only answers that perplexing question with a riddle. Third, I shall undertake a brief outline of the possible answers to the question of which decision-makers are “appropriate,” and even begin the debate on my favorite suggestions.

“The Decision-maker”: A Simplistic Model?

The theory of opportunity costs has its origins in economic theory. The latter is primarily interested in analyzing the decisions of individual firms, workers, or consumers in the marketplace. While its power in those contexts is unquestioned, transposing this theory and applying it to *politicians* may be problematic. Two assumptions about economic actors seem controversial in the context of the policy decisions confronted by debaters. The economic actors are conceived as being substantially *unified*, as if one person or closely knit group makes each choice, and they are assumed to act substantially *independently*, so that they need not consult others before taking action. Most of the decision-makers who make the kinds of decisions evaluated by policy debaters live in a very different world. Political decision-makers seldom consist of one person. While the President and some administrators are obvious exceptions, the general situation is that *groups make most decisions*. The paradigmatic cases are appellate courts and legislatures. In each case, a number of individual decision-makers deliberate and debate and compromise and each member has a vote at the end of the process. The decision they make is a group decision.

This introduces a number of complications. Voters who wish to cast their votes rationally must sometimes vote strategically. They may make trades. They compromise. Most important for our purposes, *rational voters are sometimes forced to vote for a plan they would actually prefer to reject in favor of some competitive alternative*. The alternative they prefer may be unacceptable to the majority, and thus effectively unavailable to the single voter/decision-maker.

Furthermore, economic actors are generally independent, in the sense that they need not ask for the cooperation of other actors in making their decisions. In contrast, the system of American government features broadly *shared powers*. That is, generally several parts of the government participate in policy changes. The paradigmatic example is legislation, which typically requires at minimum the involvement of the Senate, the House of Representatives, and the President. Furthermore, the process of drafting the legislation is

frequently heavily influenced by various parts of the executive branch, and well as interest groups outside government altogether.

Obviously, these different institutional actors face different sets of alternatives, and thus different opportunity costs. Yet, the debate may ask that the overall soundness of their *collective* decision be evaluated. How can these various opportunity costs be somehow consolidated or aggregated? More germane to the discussion of negative fiat, is it acceptable for the teams in the debate to try to focus the discussion precisely on which combinations and permutations of decision-makers would be best in some context?

The following counterplans, all of which have had their days of success on the college debate circuit, are examples of negative teams' ability to exploit the fact that affirmative fiat is generally exercised over a broad array of governmental actors, almost all of which are themselves collections of decision-makers:

- The "veto counterplan:" the negative urges legislation similar to the affirmative, but passed over a veto;
- The "9-0 counterplan" and the "5-4 counterplan:" teams argue what Supreme Court vote would be best;
- The "executive order with joint congressional resolution of support counterplan;"
- The "call the plan something different, so it goes through different committees in Congress counterplan."

The strategy in each case is to focus the debate on which permutation or combination of agents or parts of agents would be the best way to pass the plan. The advantages are typically political, and not much related to the affirmative case, or the topic.

An adequate account of negative fiat must deal with such hard cases. I continue to think that opportunity cost contains the makings of such an account. However, the problems of collective and dependent decisions require that the theory be more complex than that outlined by Korcok. They call into question the entire enterprise of transposing a theory elaborated in the context of economic markets into the sphere of public policy decision-making.

The Indeterminacy of Korcok's Limit on Negative Fiat

What I call the "central insight" of Korcok's work in this area may be restated thus: Opportunity cost provides the only satisfactory logical foundation for counterplans, and this same opportunity cost theory only makes sense if the plan and the counterplan are choices

which might plausibly be put to a single actor. From this premise, it is easy to deduce that there is some limit on negative fiat. There must be at least some actor or decision-maker with the power or authority to do both the counterplan and plan, so that the choice of one may properly be said to incur the opportunity cost of forgoing the other.

This formulation, and Korcok himself, leaves open the question of exactly what the content of the limitation on negative counterplans might be. This is neither a profound observation, nor a very controversial one:

This solution is incomplete in the sense that it does not particularize the scope of negative fiat for all debates: it does not imply that the scope of negative fiat is constituted by the scope of the authority of the federal government, the affirmative plan's actor, the resolitional agent, nor any other particular decision-maker. The logical force of the arguments presented below extends only to this solution and does not go so far as to particularize the appropriate decision-maker. Likewise, adequate grounding in considerations of decision-making processes extends this far and no farther. (60)

Perhaps my expectations were unreasonably high, but I was left seriously discomfited by this announcement. For those of us who are primarily interested in the subject at hand in so far as it helps us coach and judge debates, the main objective is to find a theory that clearly divides the acceptable uses of negative fiat from the unacceptable. A bit of elegance, some lofty footnotes, a couple of nice analogies are all very nice, but what we really want to understand is where the line is and how to explain why the line is where it is without any heavy intellectual lifting or long unfamiliar words. Opportunity cost theory seems to have the power to guide that process, at least to some degree, and yet here its author is telling us that there can be no "particularized" answer.

To put the matter bluntly and concretely, if the topic calls for action by the federal government and the affirmative plan is a piece of legislation, Korcok offers us no clear list of the acceptable negative agents. No clear list? No list at all! And is there a definition, operational or otherwise, of exactly what agents would be acceptable? Again, the answer is no. We are given only a single phrase, a talisman: "the appropriate decision-maker."

To call this formulation indeterminate is to understate the matter. A simple truth about the nature of American government at the end of the twentieth century is that there are a multiplicity of altogether "appropriate" and "normal" and constitutionally valid ways to go about implementing changes in public policy. Furthermore, these varied and complex

mechanisms of policy change are frequently controlled by multiple decision-makers – the aforementioned example of federal legislation is the most obvious one, where the Senate and House and President are always required to participate, and extensive involvement by the Cabinet and other executive agencies is commonplace. In such a context, what is appropriate and what is not?

I suggest three specific difficulties with the “appropriate” formulation. First, it is undefined, without clear content. Second, the way in which the affirmative plan limits negative options is unspecified. Third, the complexities of decision-making discussed in the previous section radically and unpredictably undercut the usefulness of the theory even in what seem to be the easiest cases.

First, the lack of a precise definition is clear. There is no discussion of options for a definition. Does “appropriate” mean “legal?” Does it include anything which would be constitutional, anything that would be possible, even if unconstitutional, anything that would be “usual” or “normal?” Might it mean what is the “most likely” method of adoption?

Moreover, it is also unclear exactly what it is that the possible agent of negative fiat must be able to do appropriately. Must the actor be able to do *precisely the affirmative plan*? Or will it be sufficient if the alternative agent could implement the ideas and general policies advocated by the affirmative? This will be a matter of considerable importance, as it would be possible for the affirmative to shape the alternatives it advocates in such a way as to limit the range of negative actors. For example, suppose a plan which specified that, “The Consumer Product Safety Commission shall, under authority granted to it by section 703A of the Consumer Product Safety Act of 1981, adopt a regulation” Since only the CPSC can possibly take action under the law that authorizes the CPSC to act, the scope of negative fiat will depend to a considerable degree on the answer to the above question.

Korcok does suggest three ways we might give content to the concept of an appropriate decision-maker: debate about it, agree that the agent of the resolution is appropriate, or specify negative ground when writing topics. The third of these is interesting: Is it being urged as an alternative to the other two? If so, which single agent might get to choose it over the other two? The point is that those of us trying to be better debate judges need to take the topics as we find them.

Debating about which actors might be thought appropriate seems unrewarding. “Appropriateness” is not defined and there are no standards for evaluating the argument. Would judges be guided by the sorts of *ad hoc* fairness concerns that Korcok rejects as

unprincipled and divorced from any theory of the counterplan? Would the debates resemble the mindless disputes about what constitutes “normal means” which are all too often a feature of fiat debates? Korcok certainly gives us no idea of what we might be hearing in these debates.

The second option is that we might all agree that the appropriate agent is the agent specified in the resolution. In addition to the fact that this was the Walter Ulrich solution discussed and rejected by nearly everyone, including Korcok, there are a number of problems with this idea. Most obviously, some topics do not include specified actors. There is no rule that the actor must be specified. More importantly, the actor is usually not specified, but sort of generally limited. This is the case when the topic says that the U. S. Federal Government should do something. As explained above, it is possible to accomplish federal policy change in myriad ways, and the combinations and permutations of actors who might “appropriately” be involved is almost endless. To allow the negative to choose any such permutation of actors and actions is to impose very little if any real limits on negative fiat, at least not beyond the exclusion of international actors.

We are told that, “The incompleteness of the solution presented here is a *feature, not a bug*” (60). I am not so sure I can tell the difference. To say that the question of the acceptable scope of negative fiat is thus “dissolved,” seems to me quite overstated. It is rather as if that question were answered by nothing more than a riddle: What are the limits on negative fiat? Why, “appropriate limits,” of course.

The second specific difficulty with Korcok’s “appropriate decision-maker” is that he gives no explicit consideration as to whether the choices made in writing the affirmative plan do or do not control, or at least influence, the range of negative fiat. If the affirmative manages to avoid exercising fiat over some part of the government, is it off-limits to the negative? Or will it be enough for the negative to suggest that there are some hypothetical actors, not called upon by the affirmative plan to make any decisions, who might have the opportunity to make a similar choice. Note that the very logic of Korcok’s essay dictates that these other actors can never confront an identical choice, since “‘Who decides?’ matters” (49).

An example may prove helpful. On a topic calling for a federal program to enhance worker safety, suppose that an affirmative proposes what is basically a regulatory change, perhaps a job safety rule. Suppose further that the affirmative urges that this regulatory change be carried out based on a new legislative mandate. Does this mean that only

legislation may be proposed as a counterplan? That hardly seems to fit Korcok's formulation – he focuses more on the actors than the actions. Presumably, this means that the affirmative has exercised fiat over the Senate, the House of Representatives, and the President, so (presumably again, for none of this is spelled out) it would be legitimate for the negative to exercise fiat over any one of those agents, most importantly, the President. An executive order directing the Department of Labor to make the necessary regulatory change would seem a valid counterplan. But suppose that the affirmative spelled out a possible implementation mechanism devoid of Presidential involvement, or indeed of any exercise of fiat over any part of the executive branch whatsoever, (this is not as far fetched as one might suspect since the mere phrase at the start of the plan, "Congress will enact legislation . . .," should suffice to limit the reach of affirmative fiat.) Two-thirds of each house of Congress can enact legislation without the President. The affirmative might even specify that no further input from the executive branch would be required to draft the necessary legislation. If the affirmative can avoid any exercise of fiat over the executive branch of government, does this in any way limit the range of acceptable negative fiat? Does the executive order counterplan lose its legitimacy? I gather that Korcok is not yet ready to answer these questions.

The third and final difficulty is that, while one might at least hope that some gross limits would be clear, even these may be problematic. The interdependent nature of most governmental power discussed in the previous section, combined with the undefined relationship of negative ground to affirmative plan content outlined in the previous paragraph, render the opportunity cost model unreliable even in the most obvious examples. Korcok specifically mentions his belief that fiat of state governmental action would be rendered non-germane to a topic and case about federal action. However, even this may be premature. Consider a topic where the affirmative is allowed to make any change in federal government policy (not merely legislation.) The affirmative may advocate legislation as the most obvious way to change federal policy. But surely this is not the only option for such modification. On matters of sufficient weight, the states have the power to change federal policy through a process of amending the constitution. Furthermore, the several states have the power to change federal law through a process of making (with the consent of Congress) interstate compacts. If the states are an "appropriate" instrument of federal policy change, why are they not fair ground for counterplans?

Specifications of Acceptable Counterplans in an Opportunity Cost Framework

If, as seems likely, topics will continue to specify agents of adoption of broad and indeterminate scope (e.g., "the federal government") without attempting to specify in any way what negative ground is acceptable, then a theory which tries to limit negative fiat based on the principles of opportunity costs has three obvious options. First, it may take the agent of action in the resolution as its limit. This limit may not be trivial in practice, as it will perhaps eliminate international fiat (although this is not much help on domestic topics), but it lacks the power to meaningfully focus debate beyond that rather crude limit.

Second, the negative might be allowed to use any agent of action which might plausibly be asked to choose between the plan and the counterplan. Under this rule, as long as the negative could find any actor who might realistically be put to the choice of doing the plan or the counterplan, even if the affirmative would never suggest that the plan would be done by that actor, the counterplan is legitimate. This rule would have very little more power than the first option, as both are constrained by the aforementioned diversity of governmental policy change.

The third option is to limit negative fiat to precisely the agents of action over which the affirmative team chooses to exercise fiat in its plan. Thus, if the affirmative plan is a piece of legislation, passed in the ordinary way, then at a minimum the negative might reach the President or either house of Congress. If, on the other hand, the affirmative exercised fiat only over the director of the Office of Management and Budget, the negative would be similarly constrained.

This third option has much to recommend it. It is determinate. Which agents are included may easily be ascertained, in cross-examination if necessary. Affirmative moderation in plan drafting is encouraged, so as to minimize negative counterplan ground. Most importantly, this rule seems to perfectly fit the logic of the central insight. If the debate critic is to endorse or refuse to endorse a hypothetical action by some real world decision-maker, then the alternatives faced by that precise decision-maker are the important comparisons. The alternatives faced by an approximately similar decision-maker, or by some hypothetically "appropriate" decision-maker, are obviously far less germane.

Why is Korcok reluctant to go so far in specifying the limits of negative fiat? I am quite uncertain. It does seem to me that there are some problems. The most important is that there will be an incentive for affirmatives to limit their use of fiat to agents who can do very little other than the plan. Consider the job safety topic again. Suppose that the affirmative

exercises fiat only over the director of the Occupational Safety and Health Administration. This means that the negative's counterplan ground will be similarly restrained. However, this restraint will prevent the negative from exploring alternative, non-regulatory approaches, which might involve tax incentives, demonstration projects funded by the Department of Labor, rules for all federal contractors, etc. All of these actions require the participation of Congress or the President or other executive agencies. Since OSHA only has the authority to regulate, the only alternative that can be considered is regulation. This seems an unfortunate loss of focus on an important issue.

The 1998-99 CEDA/NDT topic provided an interesting illustration. A number of teams looked at sports franchise ownership as an example of race discrimination, and proposed extension of Title VII of the Civil Rights Act of 1964 and subsequent Equal Employment Opportunity Commission jurisdiction to cover this matter. While I am sure that the issue of discrimination in this area is an important one, the idea that an agency charged with regulating *employment discrimination* would be best suited to monitor multi-million dollar business deals is . . . silly. Negative teams who were prepared to argue that the Federal Trade Commission or some other agency would be better suited to the task had a great strategy. However, suppose that the topic had not been so fortunately worded, and that affirmatives running this case could have exercised fiat only over the EEOC. Since the latter agency can only regulate employment discrimination, that is the only alternative that could be considered.

Furthermore, the affirmative seems to give up very little by deploying such a strategy: the negative's loss of counterplan ground does not seem to carry any offsetting disadvantage to the affirmative. Presumably this would make the strategy very popular, and affirmative cases dealing with matters of regulatory minutiae might become far more common than we wish. The effect upon affirmative case choice may render this solution far too restrictive, far too easily manipulated to affirmative advantage, for it to be workable. On the other hand, the problem may not be fatal, as it will be more theoretical than real when the wording of the topic requires action at the highest levels of government (the fact that the 1998-99 topic required "legislation" did quite nicely). However, there are likely more such conundrums hidden within the opportunity cost model of counterplans. The time has come to seek them out and to begin to struggle with them. Hopefully, this forum is a start.

REBUTTAL

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The logic of deliberation about whether a proposed course of action should be undertaken constrains the set of acceptable competitive alternatives to those which the decision-maker choosing whether to adopt that course of action has authority. Each of us understands that simple truth, both in our personal and pure agency capacities. The President has never decided to veto a bill before him because "the fifty states, acting in concert, could undertake this action" and you have never decided not to purchase an automobile because "my neighbor could purchase it for me." The situation is little different for columnists, pundits, and analysts commenting on public policy. Despite a wealth of opinion on the matter, none have argued that NATO should cease its air campaign against Yugoslavia because Slobodan Milosevic could, despite evidence that he would not, decide to immediately and voluntarily cease his campaign of ethnic cleansing against the Kosovars. And not even Geraldo Rivera suggested that the Congress should stop impeachment proceedings because William Clinton could choose to resign instead. But this simple piece of decision-making logic has not managed to find its way into academic debate about public policy. Missteps in thinking about negative fiat have meant that each time we have come close to grasping this component of the logic of decision-making, we have instead erred.

Please consider two examples in light of the responses. In the first example, the affirmative plan has the Security Council of the United Nations sanction Yugoslavia for its actions in Kosovo. If our general solution to fiat questions limits fiat to domestic public actors, then the most promising counterplans, Security Council actions such as approval of pending peace proposals, would be disallowed. Similarly, extending fiat to all domestic public actors enables potentially competitive alternative actions such as a decision by the Governors Bush to send the state police of Texas and Florida to Kosovo. The logic of decision-making becomes even less recognizable if our solution to fiat questions is an elimination of fiat limitations. Alternatives such as a unilateral decision by Milosevic to comply with the Rambouillet accords, the mass resignations of the Serbian military leaders,

¹ I wish to extend my gratitude to Dallas, Gina, John, and Brian for their thoughtful comments. Their responses are wide-ranging, to be sure, but they also offer a depth of consideration rarely encountered. It sure feels like I'm giving a 1AR to an excellent negative block.