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HARVARD JOURNAL ON LEGISLATION

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FOREWORD
REFLECTIONS ON CONGRESSIONAL POWER

REPRESENTATIVE JOHN B. ANDERSON*
AND
MICHAEL F. MACLEOD**

The last few years in American history have seen a variety of challenges to the political structure of the United States. In the wake of Watergate, several scholars have indeed argued that the federal balance has undergone a dramatic shift towards increased Congressional power.

In this Foreword, however, Congressman Anderson and Mr. MacLeod dispute the charge. Focusing on the use of the legislative veto, they argue that such ad hoc *measures are "like the Emperor's new clothes." While purporting to give substantive control to Congress, they represent "illusory" and not actual Congressional gains. According to the authors, the 1980's will require a new perspective on Congressional responsibilities: Congress must reassess its strength in order to fulfill its role as a formulator of national policies.*

In 1973, noted historian and political commentator Arthur M. Schlesinger, Jr., remarked upon the existence of a widely-held, contemporary view of presidential power "so spacious and peremptory as to imply a radical transformation of the traditional polity."[1] Since World War II, he observed, "the constitutional Presidency . . . [had] become the imperial Presidency and threaten[ed] to be the revolutionary Presidency."[2] At the time, Mr. Schlesinger was hardly alone in sounding the tocsin.

Over half a decade has now passed since those and other warnings were made about the distribution of power among the branches of the Federal government. The intervening years have brought major constitutional crises, fundamental changes in the political structure of the country, and growing dissatisfaction with the conduct of government at all levels.

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1 A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY viii (1973).

2 *Id.*

Most importantly, and partly as a result of these other events, there is today a markedly different assessment of the federal balance of power. Many students of government now claim that there has occurred a dramatic shift toward increased congressional power, with a corresponding decline in the influence and control of the Executive Branch. Indeed, some would argue that the spectre of an "imperial" Congress has all but replaced that of the "imperial Presidency."

In some Capitol Hill quarters the attitude toward this view of a resurgent Congress has been understandably fulsome. It is well established in the Washington political milieu that the perception of power has much to do with the formulation of basic policy decisions. Accordingly, as members of Congress rejoice in their allegedly revitalized strength, officials at the other end of Pennsylvania Avenue just as predictably exhibit a much more somber mood. Indeed, President Carter has been quick to warn of the perils this nation will face should Congress attain too dominant a role and thereby jolt our historic system of checks and balances out of alignment.

Of course, the existence of tension between the legislative and executive branches, with the resulting predictions by each of dire consequences should the other become the dominant partner in the joint venture of governing, is not a new phenomenon. In the late 19th century, for example, well before Woodrow Wilson became a principal in the Washington power struggle, he observed that Congress had ". . . entered more and more into the details of administration, until it [had] virtually taken into its own all the substantial powers of government."[3] Most commentators now feel that Congress, having been through a long period of decline, is once again ready to inject itself into the details of administration and to reclaim the high ground.

Because this perception of power is so important, examination of the new political wisdom — with its exaltation of Congressional strength — is important to an understanding of the role of Congress in dealing with the major issues of the 1980's. In our view, Congress decidedly is not the winner in the ongoing power struggle, and this fact should be recognized.

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3 W. WILSON, CONGRESSIONAL GOVERNMENT 49 (1956).

This Foreword is thus intended as an analysis of the factors which have given rise to the new perception, of the ways in which this power is supposedly manifest in the activities of Congress and of the need for a new perspective on congressional responsibilities in the 1980's. Each of these topics is very complex, and a full discussion requires a much more extensive work than this Foreword is intended to be. Our hope is that these observations will serve as a catalyst to the development, among commentators and lawmakers alike, of a more accurate assessment of congressional power and its role in the formulation and execution of our country's most basic policies.

* * *

Congress' aggressive interest in the activities of the Executive Branch is the product of a curious mixture of factors. First, as President Carter himself has noted, the increased desire for congressional involvement in executive activities "stems in part from Congress' mistrust of the executive, due to abuses of years past."[4] The largely dormant congressional penchant for involving itself in administrative policy execution was reawakened in the 1960's and 1970's by the contemptuous treatment of Congress by the Johnson and Nixon Administrations. Indeed, it is not unreasonable to assert that congressional oversight might easily have continued on its relatively somnambulent course had it not been for President Johnson's manipulation of Congress in securing passage of the Gulf of Tonkin Resolution in 1964 and the casual morality of the Nixon Administration during the Watergate era.

A second, and much more subtle, development which has also greatly affected the relationship between Congress and the Executive Branch during the past decade involved the changing composition and internal structure of Congress itself. With the arrival of generally younger, better educated, and markedly more independent legislators, there has been a significant erosion in the seniority system and an overall decline in party discipline, especially in the House of Representatives. Together, these changes fundamentally have transformed the way in

4 124 CONG. REC. S5879-5880 (daily ed. June 21, 1978) (President's Message on the Legislative Veto, H.R. DOC. No. 95-357, 95th Cong., 1st Sess. (1978)).

which most members of Congress perceive their roles in the governing process. Another factor — perhaps the most significant determinant of the new congressional outlook — arises not from within, but rather from the external pressure caused by growing popular discontent of the citizenry with government generally, and with the Federal government in particular. Ironically, voter dissatisfaction has generally kept pace with expanding governmental activity, still another agent in the changing alchemy of governmental power. Since World War II, the Federal government has spread like a cancerous tumor in a manner which has been largely unplanned, unrestrained, and, all too often, destructive. The statistics of this growth are staggering. Government spending has increased over 1000% since the end of World War II, consuming a growing percentage of the nation's gross national product.[5] The level of taxation, while also undergoing a significant increase, has not been sufficient to avoid persistently high budget deficits at the federal level.[6] The dollar figures of the explosion in federal taxing and spending, however, are not the only indications that the size and scope of governmental activities have reached unprecedented and unsatisfactorily high levels.

A much more serious, and potentially harmful, manifestation of the excessive growth of government in recent decades is found in the vast growth of federal regulatory activity during that period. The scope of existing regulatory efforts at the federal level is without precedent in the history of democratic societies. Each year, the various federal agencies consider over 10,000 different rules and regulations relating to virtually every aspect of American life.[7]

Aside from the complexity and confusion which this almost frenetic level of regulation has created, the costs of enforcement and compliance are enormous. It has been estimated by one observer that during the fiscal year 1978, the total outlays of forty-one federal regulatory agencies approached $5 billion

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5 President's Report on the Economy, Table B-1, at 184-85, Table B-69, at 263 (January 1979) (available at U.S. Government Printing Office).

6 *Id.* at 263.

7 Lilley & Miller, *The New "Social" Regulation,* THE PUBLIC INTEREST, Spring 1977, at 51.

— more than double the level of spending by those agencies just five years before.[8] Moreover, it is important to note that agency spending represents only one component of the cost of government regulation. Of much greater significance in calculating the total cost of regulatory efforts is the additional amount which businesses and consumers must spend to comply with the regulations. Recent studies estimate that American consumers pay about $7 billion more for their automobiles and $4 billion more for their homes each year as a result of government regulation.[9] For the economy as a whole, the aggregate cost of compliance with federal regulations may have amounted to as much as $62.9 billion in 1976.[10]

While much of the spending and many of the regulations are justifiable results of efforts to meet the constitutional obligation to "promote the general welfare, . . . and secure the blessings of liberty to ourselves and our posterity,"[11] no one can honestly contend that all of the money has been well-spent or that all of the regulatory activities have served a beneficial purpose. Certainly, the widespread indications of voter discontent over government activities are clear signs that such regulations are not uniformly supported.

It would be disingenious for someone who has been on Capitol Hill for more than half of the post-World War II era to deny that Congress must bear much of the responsibility for the existing state of affairs. Still, there is a growing sense in Congress, as in the country at large, that the Federal government has become too extravagant, too intrusive, and too unaccountable in its efforts to fulfill its constitutional responsibilities. Thus, there is a definite impression that contemporary government has exceeded its proper limits as set forth in the founding documents of our country. To be sure, underlying these documents is the fundamental principle that the primary justification for the existence of government is the protection of its citizens' welfare. As John Locke observed, man relinquishes

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8 M. WEIDENBAUM, THE COSTS OF GOVERNMENT REGULATION OF BUSINESS 1 (1978) [hereinafter cited as WEIDENBAUM].

9 *Id.* at 2, 3.

10 WEIDENBAUM, *supra* note 8, at 2-4.

11 U.S. CONST. preamble.

absolute freedom only because its existence is uncertain and insecure and he submits to the control of a common government with others for the "mutual preservation" of life, liberty, and property.[12] For government to fulfill this goal, a certain amount of regulation is naturally required. Nevertheless, in its enthusiasm to serve that purpose, Congress has, perhaps unwittingly, generated excesses which paradoxically threaten the government's ability to fulfill two of these basic functions — the preservation of liberty and property.

Having finally awakened to the existence of these excesses, Congress has begun in the past few years to probe for ways to bring back under its control the regulatory mechanisms which it has helped to create since World War II. For the most part, the existing regulatory structure is not a product of constitutional provisions, but was developed by Congress as an independent mechanism, insulated from the political influences and special interests that are shot through the entire congressional process. Ironically, as Congress now seeks to regain some measure of control over the various federal agencies, it is their very independence which constitutes the greatest obstacle. Although efforts to deregulate various sectors of the economy have become increasingly common, such efforts have not proved easy. As a result, perhaps out of frustration, and clearly with little heed either to constitutional concerns or to the vigorously expressed apprehensions of the executive branch, Congress has sought to develop a relatively new method of control — the legislative veto.[13]

The numerous legislative veto proposals have taken many different forms, but all reflect one basic principle: proposed actions by the executive branch must be submitted to Congress, which is then entitled to consider the actions and prevent them from taking effect. In many ways, the controversy swirling around the legislative veto raises most of the fundamental questions regarding the new and altered perceptions of congressional power. Accordingly, the balance of these observations on

12 J. LOCKE, TWO TREATISES OF GOVERNMENT 395 (P. Laslett ed. 1965).

13 For a discussion of the history of legislative veto mechanisms, *see* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

congressional power and policy-making will deal with the congressional veto. Our purpose, however, is not to discuss the constitutional uncertainties raised by the legislative veto concept.[14] Instead, it is to suggest that Congress has little reason to consider the veto a legitimate source of pride and strength. To our view, the very fact that Congress has had to resort to such a questionable device in its attempt to scale the barriers, erected in the beginning by James Madison and his Founder-colleagues to separate the branches of government from each other, serves primarily to illustrate that Congress' new-found power is, like the Emperor's new clothes, largely illusory.

While the modern form of the legislative veto has been in existence since the 1930's, it is only in recent years that such provisions have been incorporated into enabling legislation on a widespread basis. Prior to 1970, legislative vetoes were written into an average of fewer than four laws per year.[15] The pace quickened during the 1970's, however, and Congress has written veto provisions into laws at a rate of almost thirty per year since the beginning of the decade.[16] Not too long ago, a general legislative veto bill was considered on the House Floor which would have authorized Congress to veto any rule or regulation proposed by the executive branch.[17] The bill had widespread support and failed to pass the House only because it came up for vote under a rule requiring a two-thirds majority for passage.[18] Even so, the bill failed to attain this majority approval by only two votes.[19] Support for such a measure continues to be strong

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14 *See* Henry, *The Legislative Veto: In Search of Constitutional Limits,* 16 HARV. J. LEGIS. ____, ____ (1979) (this issue).

15 C. Norton, Congressional Review Deferral and Disapproval of Executive Action (report published by Library of Congress, Congressional Research Service, April 30, 1976) (on file at *Harvard Journal on Legislation,* Harvard Law School, Cambridge, Ma. 02138); C. Norton, 1976-1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Actions (report published by Library of Congress, Congressional Research Service, May 25, 1978) (on file at *Harvard Journal on Legislation*).

16 *Id.*

17 The Administrative Rule Making Reform Act of 1976, H.R. 10248, CONG. REC. H10718-10719 (Sept. 21, 1976). For debate on the bill, *see id.* at H10666-H10690.

18 *Id.*

19 122 CONG. REC. H10718-10719 (daily ed. Sept. 21, 1978) (the vote was 265 to 135; 207 votes were needed for ⅔ majority approval).

and passage of some form of blanket veto power over administrative rule-making appears practically certain.[20]

President Carter's response to these developments has been predictably negative. He has adopted the position enunciated by his immediate predecessors and has branded the legislative veto as an "intrusive device" which represents a fundamental departure "from the way government has been administered throughout American history [and which] increases conflict between the branches of government."[21] Indeed, in expressing his antagonism to this congressional device, President Carter has gone so far as to serve notice on Congress that he intends to ignore its legislative mischief.[22]

Despite this concern at the White House, however, the growing number of laws enacted with legislative veto provisions constitutes neither a reliable indication nor a realistic source of expanding congressional power. First, while Congress has dramatically increased the frequency with which it arms itself with this new weapon to control executive activities, the actual use of this weapon is a rare event. One recent study shows that between 1960 and 1975, Congress invoked its veto power on matters other than budget rescission and deferral of expenditures fewer than two times per year on average.[23] Between 1970 and 1975, while veto provisions were being written into almost thirty laws per year, administration-proposed regulations were actually vetoed only slightly more than two times per year.[24] Clearly, this is a pace which suggests neither reckless abandon nor a significantly more aggressive congressional attitude towards the executive branch. Briefly put, the congressional sabre is often rattled, but seldom is it withdrawn from the sheath.

As a practical matter, the legislative veto may create more

20 The Bill was reintroduced during this Congress as H.R. 1776, 96th Cong., 2d Sess. (1979). The Subcommittee on Rules of the House Committee on Rules held hearings on Nov. 15, 1979.

21 *See* note 4 *supra.*

22 *Id.*

23 C. Norton, Interim Report on the Exercise of Congressional Review, Deferral and Disapproval Authority Over Proposed Executive Actions, 1960-1975 (report published by Library of Congress, Congressional Research Service, 1975) (on file at *Harvard Journal on Legislation*).

24 *Id.*

problems than it solves, since effective use of this mechanism on a widespread basis would place an intolerable burden on Congress' ability to handle its already clogged agenda. One past experience with the National Traffic and Motor Vehicle Safety Act[25] serves as a good example of this dilemma. A provision of that law gives Congress veto power over any rule proposed by the Secretary of Transportation requiring passive restraint systems in automobiles.[26] When such a rule was promulgated in 1977, congressional committee staff spent over 3,000 man-hours reviewing it.[27] Were such scrutiny applied to every rule and regulation subject to a legislative veto, Congress would have to double the size of the already enormous Capitol Hill staff.

Some argue that the mere existence of the legislative veto in the congressional arsenal serves to intimidate. While that may be true in some cases, the oppressive and potentially paralyzing burden that consistent exercise of the veto power would impose upon Congress belies the notion that such a tool could be used effectively to check executive actions.

The fact that the legislative veto, upon close examination, does not appear to be a source of constructive power, however, should not obscure the equally significant fact that the legislative veto, and similar *ad hoc* efforts by Congress to inject itself into executive policy-making, even if sparingly used, carry the potential to create a considerable amount of chaos. This is especially true in the area of foreign policy, where sensitive questions of day-to-day conduct of foreign affairs do not lend themselves to either resolution or execution by a legislative assembly. Despite this fact, the validity of which is proven over and over, Congress has shown an unquenchable desire to assert influence over such delicate questions, often with unfortunate results.[28]

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25 Pub. L. No. 89-563, 80 Stat. 718 (1966), *reprinted in* 15 U.S.C. § 1409.

26 Pub. L. No. 93-492, 88 Stat. 1482 (1974), *reprinted in* 15 U.S.C. § 1410(b).

27 *Hearings on the Administrative Rule-Making Reform Act of 1977 (H.R. 959, H.R. 960, H.R. 961) Before the Subcomm. on the Rules and Organization of the House of the House Rules Comm.*, 95th Cong., 1st & 2d Sess. 5 (1977-1978) (statement of Rep. Eckhardt).

28 The Constitution itself may be responsible for the confusion over the proper roles of the different branches in the foreign policy area. As historian Edward S. Corwin has

There is little doubt in most quarters that a certain measure of congressional involvement in the details of administration — whether in foreign or domestic matters — is advisable. There is no substitute for the oversight, consultative and consensus-building roles that a broadly representative legislative body can play in the execution of public policy. The optimum level of such legislative activity is a matter on which there is little agreement — a fact which underscores the creative tension that binds together the executive and legislative branches in the common enterprise of governing.

Because our system is always evolving, the relative strengths and weaknesses of one branch cannot be assessed with finality. But in a perverse way, the quantitative analysis of the modern legislative veto reveals the illusory quality of that new power. In many respects, the new Congressional assertiveness is not very real. It is a hollow strength based on the ability to block events rather than influence their shape and texture, to obstruct rather than to formulate. And the Congressional veto contains other perils. Should the day arrive when such vetoes are exuberantly and carelessly used, should the day come when they supplant the traditional Congressional responsibilities and functions of consultation and oversight, we will have come closer than ever to the "tyrannical concentration" of governmental power that Madison and others sought to protect us against when they erected barriers between the "energy" of the legislature and the "stability" of the executive.[29]

Although it is beyond the scope of this foreword, there is yet another dangerous flaw in the legislative veto that deserves brief mention. The execution of public policy, unlike its formulation, should be at least partially insulated from the myriad special-interest-group pressures that rightfully thrive in a democracy.

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observed, the Constitution offers "an invitation to struggle for the privilege of directing American foreign policy." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 at 171 (1957). And it is a struggle forever joined, as a 1976 report of a House International Relations Subcommittee makes clear. *See* STAFF OF HOUSE COMM. ON INTERNAT'L RELATIONS, 94TH CONG., 2D SESS., REPORT ON CONGRESS AND FOREIGN POLICY 1975 (Comm. Print 1976).

29 THE FEDERALIST No. 37 and No. 48 (J. Cooke ed. 1961).

Government as a whole — and Congress in particular — has grown more "tactically-oriented," a tendency that promotes short-term rather than long-term objectives. If domestic and international policies are subject at every level of formulation and execution to tactical considerations and pressures — to the exclusion or minimization of countervailing strategic concerns — our rather finely-tuned system of checks and balances could indeed fail.

In the meantime, there appears to be little danger that a renascent Congress threatens the constitutional equilibrium. Notwithstanding this fact, many of the elements that lie behind the inflated assessments of Congressional power will endure. As such, they will provide the backdrop for a potentially far more persistent problem destined to plague policymakers in the 1980's. The real flaws of government, it seems, are the shortsightedness and provincialism that inhere in both the contemporary legislature and (perhaps to a lesser extent) the executive branch. Both the president and Congress appear to be waging government the way America fought the Vietnam War, rushing from one tactical firefight to the next with little concern either for the functional relationships that link various policy issues or the patterns that sound policies ought to lay down, patterns that, after all, help determine our future.

ARTICLE

THE CONGRESSMAN AS MEDIATOR BETWEEN CITIZENS AND GOVERNMENT AGENCIES: PROBLEMS AND PROSPECTS

ROBERT KLONOFF*

While legislative hearings, floor debates, fact-finding missions and other legislative activities regularly receive widespread publicity and scrutiny, one significant and time-consuming activity of Congress — the casework function — goes on virtually unnoticed. This lack of attention, however, belies the serious and far-reaching implications which casework has for the legislative process as a whole. In their current form, the uncoordinated and inefficient procedures used by most congressional offices to handle the massive volume of constituent requests for help have placed a burden on the ability of congressmen and members of their staffs to handle their other legislative duties adequately. At the same time, however, the ever-increasing inflow of citizen complaints has created a unique source of information regarding agency operations and malfunctions which, if properly monitored, could add a valuable new dimension to congressional oversight capabilities.

Based on the results of a survey of members of Congress and their staff personnel conducted by Mr. Klonoff, this Article critically examines the congressional casework function. Mr. Klonoff first provides a detailed description of current casehandling procedures and exposes the fundamental inadequacies of these procedures. Next, he considers some proposals, including those of Representatives Aspin and Reuss, which have recently been put forward to remedy these inadequacies. As Mr. Klonoff shows, however, these proposals contain some basic weaknesses which would prevent them from transforming the casework function into the powerful legislative tool which it could be. Accordingly, Mr. Klonoff concludes the Article by presenting a comprehensive plan, calling for the creation of a casehandling and monitoring service within Congress, designed to maximize the informational benefits and minimize the resource costs of handling constituent complaints involving federal agencies.

Introduction

Each year more than one million citizens turn to their congressmen and senators to assist them in their dealings with the

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federal bureaucracy.[1] Most of these citizens are too poor to seek judicial relief[2] and too alienated or confused to exhaust their administrative remedies.[3] Their complaints typically involve day-to-day problems[4] with the large benefit-granting agencies, such as the Social Security Administration, the Veterans Administration, and the Immigration and Naturalization Service. Members of Congress welcome the opportunity to help aggrieved constituents, since these efforts can provide both personal satisfaction and political support by humanizing an increasingly impersonal bureaucracy.[5] Thus, it is not surprising that "casework," the handling of constituents' problems involving federal agencies,[6] has become one of the most time-

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1 According to a survey of congressional offices conducted in 1977, the author estimates that approximately 1.5 million cases were handled in that year. *See* note 29 *infra*. For some time, commentators have noted a steady increase in volume of casework. *See, e.g.,* Reuss & Munsey, *Proposed Schemes: The United States, in* THE OMBUDSMAN: CITIZEN'S DEFENDER 195 (D. Rowat ed. 1968) [hereinafter cited as Reuss & Munsey]. Indeed, even a member of the Supreme Court has taken notice of "the increasing tendency of constituents to rely on their Congressional delegation to identify, press, and process their claims [involving the federal bureaucracy]." Johnson v. Avery, 393 U.S. 483, 491 (1969) (Douglas, J., concurring).

2 *See* Jenrette, *The Care and Feeding of a U.S. Congressman,* TRIAL, Apr. 1977, at 28; *but see* R. RIPLEY, CONGRESS: PROCESS AND POLICY 18 (1975) (pointing out that congressmen also handle cases for corporations, such as problems "involv[ing] enforcement and interpretation of the tax code or exemptions from various regulatory provisions").

3 *See, e.g.,* C. CHELF, CONGRESS IN THE AMERICAN SYSTEM 18 (1977); Hartke, *Ombudsman: Mediator Between the Citizen and His Government,* 10 CAL. W.L. REV. 324, 345 (1974) [hereinafter cited as Hartke] (indicating that the aggrieved citizen faces a "bewildering array of procedures," since only certain agencies conduct hearings and only certain categories of decisions can be appealed to court).

4 "Day-to-day" operations, as used in this Article, include the application of legal rules and regulations by the agency in the handling of individual cases. In addition, the term refers to the manner in which agencies process and respond to individuals seeking benefits or advice regarding federal programs, that is, whether agency personnel handle matters efficiently, quickly, politely, and thoroughly. For further discussion of this term, *see* note 40 *infra*.

5 *See* text accompanying notes 30-33 *infra*.

6 A "broad definition of casework would include processing constituent requests for assistance of any kind in which a problem is involved." J. SALOMA, CONGRESS AND THE NEW POLITICS 178 (1969). Under such a definition, requests for White House tour passes and for information relating to a high school debate topic would constitute "cases." This Article, however, limits the definition of casework to constituent problems involving a federal department or agency. For example, such cases may involve allegations of (1) administrative delay, (2) administrative rudeness, (3) an administrative decision resulting from a mistake of law or fact, (4) an administrative decision which is not adequately explained, or (5) administrative conduct which is otherwise unfair or incorrect. For numerous other examples of cases received, *see* Hartke, *supra* note 3, at 346 n.105.

consuming activities of congressional offices.[7] The significance of this increasing emphasis on the casework function is twofold. First, casework activities can interfere with the ability of staff personnel to perform adequately their primary legislative duties. At the same time, however, casework activities create a major potential source of information concerning recurrent agency malfunctions, a source which goes largely untapped under the existing system of managing cases.

It is apparent, then, that the casework function bears directly on the ability of Congress to perform two of its principal functions — enacting legislation and conducting oversight.[8] Despite this quantitative and qualitative importance, however, the casework process has received insufficient attention from legal scholars.[9] Even within Congress itself, thoughtful consideration of the mechanics of the casework function has been notably lacking.[10] In view of the actual and potential effects which casework has on the ability of Congress to fulfill its responsibilities, greater study by these groups is clearly warranted.[11]

This Article examines the casework function of Congress and proposes a set of reforms which can improve its operation. Part I describes the casehandling procedures currently employed by a typical congressional office and demonstrates the existence of

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7 *See* note 28 *infra* and accompanying text.

8 *See* Pearson, *Oversight: A Vital Yet Neglected Congressional Function,* 23 KAN. L. REV. 277 (1975) [hereinafter cited as Pearson].

9 The subject is only briefly mentioned in administrative law casebooks. *See, e.g.,* K. DAVIS, ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS 524 (6th ed. 1977); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 119-21, 983 (6th ed. 1974) [hereinafter cited as W. GELLHORN & C. BYSE]; L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 103-104 (4th ed. 1976). *See also* W. GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES 57-94 (1966); Cramton, *A Federal Ombudsman,* 1972 DUKE L.J. 1, 5, 7, 9-12; Hartke, *supra* note 3, at 325, 346-348, 352-58 (1974); Tibbles, *The Ombudsman: Who Needs Him?* 47 J. URBAN L. 1, 29-33 (1969) [hereinafter cited as Tibbles].

10 *But see, e.g., Hearings on S. Con. Res. 2 Before the Joint Comm. on the Organization of the Congress,* 89th Cong., 1st Sess. 79-100, 775-76 (1965) [hereinafter cited as *1965 JCOC Hearings*]; *Hearings Pursuant to H. Con. Res. 18 Before the Joint Comm. on the Organization of the Congress,* 79th Cong., 1st Sess. 295-300 (1945) [hereinafter cited as *1945 JCOC Hearings*].

11 To date, most of the discussions of the casework function have been in political science publications and have concentrated primarily on the political motivations for handling cases. *Cf.* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 108 (1974) ("[O]verall policy effects of congressional servicing activities have been given little scholarly attention.").

the two major problems with casework function as it currently operates. Next, Part II evaluates three alternatives which have been proposed to deal with these problems: removal of casework from Congress, office specialization and training, and the establishment of a centralized "Congressional Ombudsman" office to assist individual congressional offices in casehandling upon their request. Finally, Part III of the Article sets forth a broader, more flexible solution: the creation of a "Casework Handling and Monitoring Service." This Service would consist of two separate divisions: one would handle individual cases at the request of a congressional office, and the other would gather, analyze, and disseminate information from all congressional offices pertaining to the kinds and numbers of cases.

I. THE EXISTING CASEWORK PROCESS: STRUCTURE AND PROBLEMS

In its current form, the casework function is largely an uncoordinated process localized in the individual congressional offices. In spite of the diffuse nature of the overall process, however, each office follows very similar procedures in handling its constituents' complaints.[12] In many ways, it is the nature of these procedures which has lead to the serious inadequacies and problems in the existing casework process. First, the applications of these procedures to the hundreds of cases received annually by a typical office has resulted in the expenditure of an inordinate amount of staff time in this area. Moreover, because current procedures provide no method for accumulating information from the 535 congressional offices, investigation almost always begins and ends with an individual case, while the underlying conditions creating the problem remain uncorrected. The seriousness of these inadequacies can only be fully understood after the procedures themselves are examined.

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12 Some differences do exist. For example, some congressional offices have full-time caseworkers, while in others the casework burden is spread among a larger number of regular staff members. In some offices, caseworkers have specific areas of expertise, such as the Social Security system. In other offices, each caseworker handles a wide variety of problems. Furthermore, the cases of some congressmen and senators are handled in Washington, while the cases of others are dealt with in the district offices. For a discussion of different approaches in handling cases, *see generally* W. KRAVITZ, CASEWORK BY MEMBERS OF CONGRESS: A SURVEY OF THE LITERATURE 18-19 (Congressional Research Service rev. ed. 1972) [hereinafter cited as W. KRAVITZ].

A. *Current Casehandling Procedures*

The constituent initiates the casework process by bringing his problem to the attention of the congressional office through a telephone call, letter, or personal visit.[13] As soon as this contact is made, a staff assistant takes charge of the matter; the congressman rarely learns of a case at this initial stage.[14]

In the most simple cases, where the problem is primarily one of obtaining information for the constituent, the caseworker will usually know immediately whom to contact. If an unfamiliar matter arises, however, it may be necessary for him to investigate which agency, or division within an agency, will have the desired information.

In the more common cases, where the constituent is complaining of unfair treatment or requesting some specific action to be taken by an agency, the caseworker must forward some explanation of the constituent's grievance to the agency.[15] These cases generally present greater demands than the simple cases described above, since, as discussed below, the caseworker must not only determine where to send the grievance, but may also have to research the constituent's potential rights and remedies before forwarding the case to the appropriate agency.

Most offices employ two primary methods for transmitting complaints to agencies — the "buck slip" and the "cover letter." A buck slip is a standard, pre-printed form which simply requests "an immediate reply" from the agency where it is sent.[16] These forms are merely clipped to a duplicate copy of the constituent's letter and forwarded to the agency. The obvious advantage of this method is that it requires very little time or effort on the part of the caseworkers in the congressional office. However, many congressional offices believe that more careful attention is given to a case by an agency if the office

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13 D. TACHERON & M. UDALL, THE JOB OF THE CONGRESSMAN (2d ed. 1970) [hereinafter cited as D. TACHERON & M. UDALL]; Westen, *The Constituent Needs Help: Casework in the House of Representatives, in* TO BE A CONGRESSMAN: THE PROMISE AND THE POWER 58 (S. Groennings & J. Hawley eds. 1973) [hereinafter cited as Westen].

14 In fact, congressmen rarely become involved at any stage in most cases. *Cf.* C. CLAPP, THE CONGRESSMAN: HIS WORK AS HE SEES IT 80 (1963) [hereinafter cited as C. CLAPP].

15 *See* D. TACHERON & M. UDALL, *supra* note 13, at 71.

16 W. GELLHORN & C. BYSE, *supra* note 9, at 120.

demonstrates that it has already put some time into the matter.[17] Consequently, these offices avoid using buck slips and, instead, provide some type of cover letter to accompany constituent cases.

One form of cover letter, requiring minimal effort, merely provides a brief description or paraphrase of the attached copy of the constituent's letter.[18] However, unless the letter indicates familiarity on the part of the caseworker with the actual issues involved in the grievance, that case will generally receive no better treatment than a case clipped to a buck slip. Accordingly, before drafting a cover letter, a caseworker must usually spend time researching the constituent's right and remedies. Because of the wide variety of cases received,[19] the staff personnel are required to become familiar with a large body of administrative law and procedure. Still, the time and opportunity

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17 The more interest an office shows in a case, the more likely the agency is to respond favorably. *Cf.* D. MATTHEWS, U.S. SENATORS AND THEIR WORLD 227 (1960) (noting that the attitude of many agencies is that "if [an office] sends over a case with a 'buck slip' they can safely forget it"); K. Gray, Congressional Interference in Administration, Section on "The Interference Routine" (Sept. 5-8, 1962) (unpublished speech delivered at the 1962 Annual Meeting of the American Political Science Association in Washington, D.C.).

18 The following letter from a congressional office exemplifies the use of a brief summary instead of a buck slip.

> Dear Commissioner [of the Internal Revenue Service]:
>
> Ms. X alleges that _____ is an agent of the Internal Revenue Service and that he is guilty of a considerable number of financial irregularities, including extensive abuse of his expense account privileges. If true, Ms. X's charges represent a serious breach of public trust on [bureaucrat's] part. It would seem to me that an investigation is in order. I hope you will keep me informed of the results of any such investigation.

In addition, offices will often choose to paraphrase a constituent's letter instead of sending the original along with a cover letter when the original constituent letter expresses the grievance "too colorfully or in excessive detail." D. TACHERON & M. UDALL, *supra* note 13, at 71.

19 A study by Kenneth Gray of cases received by one congressman in 1957 exemplifies the wide variety of cases received by Members of Congress. According to the study, the congressman's office contacted over 77 offices, bureaus, and agencies to handle over 400 cases received during that year. Gray, *supra* note 17, section on "Some Indicators of the Volume and General Character of Interference-II." Among the more common types of cases were the following: difficulty in obtaining veterans benefits, social security, old age and survivors' insurance, or unemployment compensation; personnel and employment problems involving the federal bureaucracy; requests for help or information concerning visas and visa extensions, deportation, parole, and re-entry (immigration matters); requests for assistance in expediting decisions pending before various federal agencies. *Id. See also* Westen, *supra* note 13, at 55-58, 68-70 (discussing various types of congressional cases); W. KRAVITZ, *supra* note 12, at 4-8 (same).

for seemingly essential specialized training for caseworkers is not currently available.[20]

After the agency completes its investigation and consideration of the complaint, it relays the results to the congressional office, which in turn informs the constituent.[21] Whether the agency's action is favorable or unfavorable, the congressional office generally forwards the original reply to the constituent. This technique saves time but also shows the constituent that his problem has received careful consideration by top level agency personnel.[22] In addition, the office may send to the constituent an explanation of what the reply means and what effects it will have. Drafting such an explanation may require further research by the caseworker.[23]

The congressional office closes the case after forwarding the agency's response to the constituent. However, if a dissatisfied constituent presses his claim, the office will occasionally petition the agency to reconsider its decision.[24] Most offices do not actually argue on the constituent's behalf but simply facilitate communication between the agency and the constituent.[25] This reluctance to take sides may stem from a desire among offices

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20 *See* L. RIESELBACH, CONGRESSIONAL POLITICS 342 (1973) [hereinafter cited as L. RIESELBACH].

21 The following letter from a Social Security Administration Administrative Law Judge typifies the brief but complete responses received by congressional offices from agencies:

> The decision in this disability case is favorable to [constituent]. Suffice it to say that [constituent's] condition is such that under the current law and regulations he is disabled and entitled to disability insurance benefits.
>
> Under the regulations of the Social Security Administration, the Appeals Council has the authority to review my decision; therefore, there may be some delay before the decision is approved for effectuation. If the Appeals Council decides to review the decision you will be promptly notified.

22 D. TACHERON & M. UDALL, *supra* note 13, at 71.

23 *Cf.* Reuss & Munsey, *supra* note 1, at 194.

24 W. GELLHORN & C. BYSE, *supra* note 9, at 121.

25 *Id.* Despite the failure of congressional offices to take a more active role, the constituent may derive significant benefit from the intercession of his elected representative. The very fact that an office has forwarded the inquiry might induce an agency to exercise its discretion favorably to the constituent, C. CLAPP, *supra* note 14, at 80. Congressional participation may spur the agency to give the constituent's case additional consideration. At a minimum, the assistance of a congressional office in communicating the constituent's complaint will ensure accelerated processing and more thorough scrutiny by the agency than is accorded to cases received directly from citizens. *See* Rosenblum, *Handling Citizen Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices*, 26 AD. L. REV. 1, 11 (1974).

to avoid the appearance of pursuing an outcome to which the constituent may not be entitled.[26] A more likely explanation, however, is that congressional personnel simply lack the time necessary to learn the law and defend the constituent's interest skillfully.[27] Furthermore, as the following discussion indicates, this lack of time not only hurts an office's ability to handle cases properly, but also creates more far-reaching problems affecting Congress' fundamental duties.

B. *Problems With the Casework Function*

1. Time Spent Handling Individual Cases

While most congressmen and senators devote little of their own time to casework, their staff assistants spend a significant amount of time on this task. One-third of the offices responding to the 1977 Questionnaire devote 50% of all staff hours to case-handling, and over two-thirds of the offices spend in excess of 25% of their time on casework.[28] The large amount of time

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26 The fact that agencies give preferential treatment to cases funneled through congressional offices may sometimes reflect the use of "improper congressional influence." Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 CALIF. L. REV. 983, 1061 n.411 (1975). *See, e.g.,* D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir. 1972) (invalidating Secretary of Transportation decision to permit construction of bridge, in part because of "pressures exerted by Congressional advocates"). However, cases in which members of Congress improperly use their power to influence agency decision-making are rare. *Cf.* D. TACHERON & M. UDALL, *supra* note 13, at 71. More generally, the basic fairness of congressional casehandling is ensured by the fact that it is available to all constituents on an equal basis.

27 *See 1965 JCOC Hearings, supra* note 10, at 83 (statement of Rep. Reuss) (indicating that neither congressmen nor their staff members "can be truly expert in all the different types of cases that come up" and observing that caseworkers "often handle cases in the dark" and "must be content with a superficial swipe at the code").

28 The precise figures* are as follows:

	Staff Assistants**	Congressmen and Senators***
Less than 5%	0.0%	45.6%
5-15%	8.9%	36.0%
16-25%	19.5%	13.6%
26-50%	38.2%	4.0%
Over 50%	33.3%	.8%

*Figures do not add up to 100% because of rounding.
**Based on 123 responses. Data include district office staff members.
***Based on 125 responses.

Cf. J. SALOMA, *supra* note 6, at 183-85 (1969) (calculating, based on responses from 60 House offices and 160 congressmen to study conducted during the 89th Congress, that

devoted to this function can be explained in part simply by the growing number of cases submitted to Congress each year — an estimated 1.5 million in 1977 alone.[29]

Congressmen and their staffs consider it important to attend to every case received.[30] Not only do offices view casework as a means of humanizing an increasingly impersonal bureaucracy,[31] but members themselves derive significant political benefits

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an average of 18.7% of staff member's time is devoted to casework, while 8.6% of average congressman's time is spent on that task). Saloma's figures for staff time may be lower than those reached in the present study, in part because he did not include staff members stationed in the member's home district, where the bulk of casework is handled in many offices. *See* note 12 *supra*. It is also possible that the casework burden has simply increased significantly within the past decade. *See* note 1 *supra; see also* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 59 (1977) (contending that Saloma's data "understate" time devoted to casework since only Washington office work weeks calculated and since sheer number of cases has escalated since 1965).

The data used by the author (on file with the Harvard Journal on Legislation, Harvard Law School, Cambridge, Mass. 02138) were collected from congressmen and senators by means of two mailings during the summer of 1977. A total of 128 offices returned completed questionnaires. Thus, 24% of all congressional offices (128 out of 535) responded, making the return rate in this study slightly better than the (20%) norm for mail surveys. *See generally* R. PLUTCHIK, FOUNDATIONS OF EXPERIMENTAL RESEARCH 70-74 (1968).

The difficulties involved in obtaining accurate data from questionnaires are well known among social scientists. Empirical studies demonstrate that because of selective-return bias, the characteristics of the respondents may not represent entirely those of the group under investigation. Thus, congressional offices returning questionnaires may have a higher regard for casework and may, as a result, devote more time to the function than offices not responding. *See id.*

29 The 1977 Questionnaire asked for the average number of cases received monthly by the congressional office. The 111 responses to the question reveal an average of 236 new cases per office each month. The spread is wide: 14 offices receive less than 50 cases monthly, while 11 offices receive over 500 cases per month. One senator's office claimed to receive an average of 3000 cases per month and indicated that it employs 18 full-time caseworkers. Assuming that the data obtained are at least somewhat representative, a rough estimate can be made as to the number of cases received by all offices combined each year. Since the average office responding receives about 2800 cases per year, Congress as a whole receives in the neighborhood of 1.5 million cases annually.

30 *See* C. CLAPP, *supra* note 14, at 75 (reasonable complaints or queries by constituents seen as providing an "opportunity" for political benefit rather than as adding an "extra burden" to the office workload).

31 *See* 1977 Questionnaire (128 responses, evaluating statement that "congressional casework function (*i.e.*, handling problems of individual constituents concerning particular administrative departments and agencies) serves to humanize the bureaucracy"):

Agree strongly	52.3%
Agree somewhat	43.0%
Disagree somewhat	2.3%
Disagree strongly	.8%
Can't say	1.6%

from handling cases. To satisfy constituents is to win votes.[32] Indeed, casework may be as important a factor in a congressman's reelection bid as his voting record on legislative issues.[33]

Although much of the staff time devoted to casework can be accounted for by the large number of cases processed by congressional offices, a significant portion of this time must be attributed to inefficiency stemming from a lack of expertise in administrative matters.[34] Even the most perfunctory handling of an unfamiliar case may require that the caseworker acquire some degree of knowledge about the issues involved. Only in the most common types of problems will the staff member be capable of processing a case with little or no analysis or research. Thus much of the time spent by individual congressional offices on cases is necessary to develop expertise in dealing with special problems. Inefficiency in the casework system as a whole derives from the fact that each congressional office must rely on its own resources and expertise, thereby impeding specialization and precluding the effective sharing of experience.

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32 *See, e.g.,* Gwyn, *Transfering the Ombudsman, in* OMBUDSMEN FOR AMERICAN GOVERNMENT? 37, 59 (S. Anderson ed. 1968) ("[T]he principal motive behind the legislator's case work is to build and maintain political support by doing favors . . ."). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.20, at 239 (Supp. 1970) ("[S]ome Congressmen and their staffs are more interested in winning credit from complaining constituents than in assuring that the merits of cases will be judiciously considered"). *But see* 1977 Questionnaire (126 responses, evaluating statement that "Congressmen are, in general, motivated to handle casework primarily to secure their own reelection bids"):

Agree strongly	.8%
Agree somewhat	33.3%
Disagree somewhat	37.3%
Disagree strongly	25.4%
Can't say	3.2%

33 *See* Gray, *supra* note 17, section on "Why the Interference System Works" ("Most congressmen are frank to say that their services to individuals are as important to their re-election as how they voted, and many believe services to be even more important"). *See also* M. FIORINA, *supra* note 28, at 44-45 (pointing out that in spite of revelations of "sexual improprieties," Congressman Wayne Hayes won Democratic primary by two-to-one margin largely because of casework service to constituents).

34 At a minimum, true expertise would seem to require knowledge of "how the administrative agencies operate [and of] where and how to obtain most readily various kinds of service." K. KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 169 (1962). In addition, experienced caseworkers should know "key personnel who could greatly facilitate securing . . . assistance." *Id.* The increasing caseload burden and the problem of expertise are clearly related. *See* L. RIESELBACH, *supra* note 20, at 342 (arguing that as federal bureaucracy continues to grow, "skill requirements must inevitably enlarge as well, or the lawmaker will find himself unable to handle his caseload").

The most disturbing result of the growing caseload is that it limits the ability of congressional personnel to manage their legislative tasks properly.[35] Since budget and space constraints limit the availability of additional congressional aides,[36] increasing casework demands may compel a congressman to appoint a full-time caseworker instead of an additional legislative aide or to allocate casework to staff personnel originally hired for legislative tasks.[37] At the same time, complex legislation requires constant, careful attention by staff members, upon whom congressmen must rely for advice.[38] Hence, there is a trade-off between careful attention to legislation and thorough handling of constituents' cases. This trade-off is a significant problem, because it impinges on the main function of Congress: to pass carefully considered legislation.[39]

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35 The idea that casework detracts from proper performance of legislative duties has been expressed repeatedly in political science literature. *See* C. CLAPP, *supra* note 14, at 105 (result of casework "is to decrease appreciably the already inadequate time available for the pursuit of knowledge about legislation"); M. FIORINA, *supra* note 28, at 60 (noting that congressmen put most staff members to work on casework and other reelection functions, "perhaps reserving a few for secondary matters such as formulating our country's laws and programs"); D. MATHEWS, *supra* note 17, at 225 (quoting one senator as saying, "If only the people would leave us alone [with their cases] . . . we could do our job the way it ought to be done"); Reuss & Munsey, *supra* note 1, at 195 (congressman cannot help but "divert time from legislation" since "neglect of casework can have a political repercussion that will rid him of all the burdens of office"); Tibbles, *supra* note 9, at 30-31 ("Time spent either by the legislator or by his staff on casework, is time taken away from the vitally important function of lawmaking"); Comment, *Grievance Procedures in the Administrative State*, 7 DUQ. L. REV. 400, 404 n.21 (1969) (citing discussion with then-Congressman William Steiger in which the latter "acknowledges that the number of inquiries is fast consuming too much time . . . leaving too little time for the performance of the Congressman's principal function — legislation").

36 *See 1965 JCOC Hearings*, *supra* note 10, at 83 (statement of Congressman Reuss) (Congress cannot simply add to office staffs because such an approach would be "unwieldy" and "costly" and because office buildings cannot accommodate additional staff members).

37 Former Rep. Hechler has noted:

> One of the great difficulties in the past has been that frequently we will designate a man as a legislative assistant and then discover that there are so many immediate constituent problems that he has to handle that pretty soon he gets to become a generalist just like the rest of the staff. . . . For example, I have an assistant who spends a great deal of his time on legislative problems, but he happens to have the ability to solve knotty problems involving administrative relationships with the district. So when a problem raised by a constituent comes up I hand it over to him.

Id. at 371.

38 *Id.* at 371 (testimony of Sen. Tunney) (essential that members of Congress obtain "adequate briefing" on "every piece of legislation that [they vote] on," so as to prevent members from casting votes when they are "not even aware of what the provisions are").

39 *See* Tibbles, *supra* note 9, at 31 (indicating that "[n]o other agency can substitute

2. Inability To Identify and Correct Recurrent Problems.

The second, and more important, problem with the existing congressional casework system is its failure to fulfill its potential as a valuable source of information for congressional oversight of day-to-day agency operations.[40] The quantity and variety of complaints received by congressional offices,[41] provide a rich source of information upon which to base legislative reform of agencies.[42] Although many congressional offices believe that casework already serves this function,[43] in fact, individual cases

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for Congress [in the lawmaking process]"); Westen, *supra* note 13, at 64 (quoting one congressman as saying, "I think the main function of the congressman is to legislate, and in turn, the responsibility of the staff is to provide him with all possible assistance").

40 For a definition of "day-to-day operations," *see* note 4 *supra*. This definition is consistent with the use of the term "day-to-day" in Hartke, *supra* note 3, at 347, and with the use of the term "routine" in Cramton, *supra* note 9, at 7. *Cf.* Smith v. Board of Commissioners, 259 F. Supp. 423, 424 (D.D.C. 1966) ("day-to-day administration" of D.C. Department of Public Welfare defined to include the "methods," *i.e.*, oppressive, harsh, humiliating manner, by which the investigators determined whether an individual meets welfare eligibility requirements; court held that it lacked power to review day-to-day agency functions).

To be distinguished from supervision regarding day-to-day operations is oversight of a broader nature, *i.e.*, whether "congressional intent is carried out by the agencies in their administration of the laws." Krasnow & Shooshan, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission*, 10 HARV. J. LEGIS. 297, 299 (1973). *See generally* Pearson, *supra* note 8, at 277-78 (dividing oversight into two distinct functions: determining whether congressional intent is being carried out and determining whether the agency is "efficient, honest, and responsive to the needs of the people").

41 *See* note 19 *supra*.

42 *See* C. CLAPP, *supra* note 14, at 79 (cases often pinpoint "weaknesses in the executive branch").

43 *See* 1977 Questionnaire:

"By handling individual cases, a Congressman and his staff can learn of patterns of agency misconduct."*	•	"Problems discovered by handling individual cases often form the basis of legislation to effect administrative reform."**
Agree strongly 32.8%	•	18.9%
Agree somewhat 50.0%	•	59.8%
Disagree somewhat 10.2%	•	15.0%
Disagree strongly 1.6%	•	3.1%
Can't say 3.9%	•	3.1%

*Based on 128 responses.
**Based on 127 responses.

As a followup study, the 18.9% (24/127) of the offices expressing strong agreement with the second statement were asked to supply specific examples of legislation stemming from casework. Only three offices responded. One office responded as follows: "Native

handled by congressional offices rarely stimulate investigation and correction of administrative problems. Offices only infrequently perceive and almost never act upon the larger agency problems implied in citizens' allegations.[44]

This ineffectiveness stems partly from the time pressures imposed on congressional staff members.[45] Since basic case handling already occupies more than a quarter of all staff time in most offices, there is simply not enough time to explore the possibility that an individual complaint may be a manifestation of a broader agency malfunction.[46] Moreover, so long as offices handle the individual cases, they feel little immediate constituent pressure to act on the causes of these problems; staff members instead turn to more politically rewarding matters, such as researching bills and responding to letters requesting views on various issues.[47]

Claims Settlement Act Amendments; P.L. 95-174; many private bills (esp. immigration cases)." The other two indicated their agreement with the statement: "I believe that casework frequently stimulates legislation, but am unable to provide specific examples." *See* 1977 Questionnaire Followup Study (on file with the *Harvard Journal on Legislation,* Harvard Law School, Cambridge, Mass. 02138). Thus, 2 of the 3 respondents could not even provide one example of legislation stemming from casework. Since most offices did not respond, however, it is not possible to draw any solid conclusions from the followup study.

44 *See* W. GELLHORN, *supra* note 9, at 128 ("[C]asework tends to go no further than the case at hand, leaving untouched the problems that generated it."); Cramton, *supra* note 9, at 7 ("The great deficiency of casework is its preoccupation with the single instance rather than with the general problem."); Gwyn, *supra* note 32, at 59 ("Too often legislators are interested simply in doing favors for constituents and do not follow up the implications of complaints to gain a better understanding of administrative problems."); Hartke, *supra* note 3, at 348 ("Those defending the Congressman's casework contend that this function provides valuable information which assists the lawmaker in administrative oversight and reform. Unfortunately, this is not the case."); Olson, *The Service Function of the United States Congress, in* CONGRESS: THE FIRST BRANCH OF GOVERNMENT 337, 370 (A. de Grazia ed. 1966) (since "knowledge of recurring problems" is "difficult to coordinate," generally only "an accident — or a particularly flagrant abuse . . . leads to a full scale investigation and the necessary remedial legislation").

45 *See* J. SALOMA, *supra* note 6, at 185 (identifying thirteen different staff functions, including press relations, speech writing, answering legislative mail, and visiting with lobbyists and constituents).

46 *See* C. CLAPP, *supra* note 14, at 79 (after handling case in which the rights of constituent were "arbitrarily and flagrantly abused," one congressman remarked, "I will not have time to follow that up. . . . Obviously some bureaucrat just overstepped his authority. This happens every day"); Olson, *supra* note 44, at 370 ("Members are often too pressed for time to dig into a case beyond the level necessary to get a favorable result for [the] constituent.")

47 *See, e.g.,* Ogul, *Congressional Oversight: Structures and Incentives, in* CONGRESS

The diffusion of cases among 535 offices (that rarely communicate with one another) further impairs the operation.[48] As a result, the individual office must make sense out of "scattered pieces to a puzzle,"[49] instead of relying upon a systematic accumulation of data.[50] Since there is no centralized means of analyzing casework data to pinpoint recurring problems or conveying such information to oversight committees, casework now contributes very little to congressional oversight efforts.

The failure of the casehandling system to aid in identification

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RECONSIDERED 207, 212 (L. Dodd & B. Oppenheimer eds. 1977) ("[T]he incentives for conducting more intensive and extensive oversight are great in the abstract and modest in many concrete situations. Any analysis of legislative oversight has to be grounded in this reality."); Pearson, *supra* note 8, at 282 ("The fact is that for most members of Congress oversight is not a high priority item."); Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 421 (1976) ("Oversight is less attractive politically than enacting legislation or conducting investigations, both of which permit a member to receive significant public identification."). *Cf. Legislative Oversight of Bureaucracy, Panel Discussions Before the House Select Comm. on Committees*, 93d Cong., 1st Sess. 702 (1973) (statement of Morris S. Ogul) (arguing that any activity "perceived to contribute directly and substantially to political survival as well as to other legitimate functions . . . is likely to move toward the top of any member's priority list.").

In addition, congressmen may in some instances believe that the case-by-case adjudications handled in individual offices provide adequate oversight. *See* Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 535 (1963) (concluding, after interviewing 23 congressmen from committees with jurisdiction over the regulatory agencies (*e.g.*, F.C.C., F.P.C., I.C.C.), that seventeen members "seemed to be satisfied that their individual relations with the agencies were adequate to deal with their requests for help from 'outside'.").

48 Gellhorn intimates that congressional offices have little interest in the cases of other offices. W. GELLHORN, *supra* note 9, at 128 ("Ordinarily, investigation is superficial . . . so long as the present case has an appropriately happy outcome, tomorrow's case is left to its own devices; anyway it may involve some other congressman's constituent."). *But see* 1977 Questionnaire (127 responses, evaluating statement that "your offices are well aware of the kinds of and numbers of cases received by other congressional offices"):

Agree strongly	13.4%
Agree somewhat	33.9%
Disagree somewhat	27.0%
Disagree strongly	17.3%
Can't say	11.8%

These statistics indicate that there is some communication among offices. Even if this is so, the lukewarm responses themselves reveal that there is no *systematic* accumulation of knowledge from the various offices; indeed, over 44% of the offices are *not* well aware of the cases received by other offices. Thus communication is probably episodic at best.

49 Hartke, *supra* note 3, at 348.

50 *See* Gwyn, *supra* note 32, at 59 ("a single specialized [ombudsman] organization . . . would be able to spot patterns of poor administration invisible to the legislator, who can see only a tiny part of the whole.").

of recurrent agency problems would merit far less concern if Congress had other effective means of identifying such problems. To be sure, Congress does rely upon several mechanisms to supervise agency administration and conduct:[51] legislative and committee veto provisions,[52] committee hearings,[53] appropriations,[54] agency reports,[55] audits (*e.g.*, GAO studies),[56] and advice and consent.[57] However, all of these devices suffer

51 The congressional "oversight" function entails: (1) examination to ensure that legislative intent is being carried out; (2) investigation of pitfalls in program design in instances in which a program, carried out as anticipated, has failed to produce the expected results; and, (3) inquiry into bureaucratic functioning to ensure that programs are operating fairly, efficiently, and honestly. *See generally* L. RIESELBACH, *supra* note 20, at 19-20. For a discussion of these oversight devices, *see Congressional Oversight: Methods and Reform Proposals, Panel Discussions Before the House Select Comm. on Committees,* 93d Cong., 1st Sess. 710-23 (1973) (statement of Walter Oleszek) [hereinafter cited as *1973 Congressional Oversight Discussions*].

52 The legislative veto is a statutory device which permits Congress to disapprove proposed agency action. When the device is employed, an agency must submit applicable proposals to Congress before such proposals may take effect. *See generally* L. RIESELBACH, *supra* note 20, at 301-03; Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U. L. REV. 455 (1977); Anderson, *Forward,* 16 HARV. J. ON LEGIS. _____, _____ (1979). The committee veto enables a committee of either or both congressional branches to disapprove proposed agency action. *See 1973 Congressional Oversight Discussions, supra* note 51, at 712.

53 The various standing committees of Congress are required to ensure that agencies within their jurisdiction are properly carrying out their congressional mandate. 2 U.S.C. § 190d (1976); Javits & Klein, *supra* note 52, at 461 n.21. In addition, various joint, special, and select committees may undertake to supervise agency conduct. Hearings and investigations have long been used to carry out such supervision. *1973 Congressional Oversight Discussions, supra* note 51, at 713. *See, e.g., Delays in Social Security Appeals, Hearings Before Subcomm. on Social Security of the House Committee on Ways and Means,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Delay Hearings*].

54 The "power of the purse" has been described as "the single most important tool of congressional oversight." L. RIESELBACH, *supra* note 20, at 303. *See* text accompanying notes 100-103 for a discussion of this device.

55 *See* Javits & Klein, *supra* note 52, at 461 n.21 (requiring departments and agencies to submit reports "may have been the first method of legislative oversight"; 1789 congressional act required Secretary of Treasury to report to Congress regarding various activities of post).

56 The primary vehicle for congressional auditing of agency finances is the General Accounting Office, a "nonpolitical, nonpartisan agency in the legislative branch" created to examine "the manner in which Government agencies discharge their financial responsibilities in the use of funds allocated to them by Congress," and to "make recommendations looking to greater economy and efficiency in public expenditures." *Functions of the U.S. General Accounting Office: GAO Report for the Senate Committee on Government Operations,* 87th Cong., 2d Sess. 1 (1962), *quoted in* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 149 (1964).

57 Through this device, the Senate has the power to approve various high level presidential appointments to fill bureaucratic posts. This device enables Congress "to place in particular bureaucratic positions types of individuals that the legislature finds acceptable." L. RIESELBACH, *supra* note 20, at 309.

from limitations which clearly hamper their effectiveness in providing information about day-to-day agency malfunctions, the type of information developed most readily by the casework process.[58]

First, the traditional oversight mechanisms have failed to provide congressmen with adequate, useful information about many agency operations. Information which is provided by agencies is often fragmented and difficult to assimilate.[59] Furthermore, because such data may be incomplete or self-serving, it does not always provide a trustworthy basis for careful oversight.[60] Second, there is a clear manpower problem in the existing oversight area. Relatively few staff members work heavily on oversight activities, and those who do tend to lack the necessary expertise to analyze what little information is available.[61] Third, the problem of scarce resources tends to

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58 *See generally* Krasnow & Shooshan, *supra* note 40, at 325 (discussing "Congress' inability to maintain constant surveillance" over federal agencies); Pearson, *supra* note 8, at 281 ("Paradoxically, despite its importance, congressional oversight remains basically weak and ineffective.").

59 *See Improving Federal Fiscal Budgetary and Program Information for the Congress, Panel Discussions Before the House Select Committee on Committees,* 93d Cong., 1st Sess. 750, 757 (1973) (statement of Kenneth W. Hunter) (information possessed by Congress regarding executive branch is "fragmented" and "difficult to aggregate"); Janda, *Information Systems for Congress, in* CONGRESS: THE FIRST BRANCH OF GOVERNMENT 415, 418 (A. de Grazia ed. 1966) ("lack of information . . . prevents Congress from adequately evaluating the proposals it receives from the executive"); Krasnow & Shooshan, *supra* note 40, at 327 (noting that Congress "lacks sufficient access to the facts it needs" to analyze agency action); Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President,* 51 N.C.L. REV. 1279 (1973) (discussing Congress' "inability to acquire and assimilate information about existing federal programs, new executive proposals, and alternatives that might be preferable to both"). In particular, committees have almost no knowledge of "case problems arising in the agencies within their legislative jurisdiction." Olson, *The Service Function of the United States Congress, in* CONGRESS: THE FIRST BRANCH OF GOVERNMENT 323, 370 (A. de Grazia ed. 1967).

60 *See* Janda, *supra* note 59, at 406-07 (indicating that because of its "concentration of resources," the executive branch is "perhaps the legislature's main source of information" about agency operations); Krasnow & Shooshan, *supra* note 40, at 327 ("Committees often find themselves depending on the very people who have prepared the program they are considering to supply facts and figures needed to evaluate it critically."). *See also* Pearson, *supra* note 8, at 282 (Congress "stymied in its oversight efforts by an inability to gain access to independent information"; author cites as example unemployment statistics of Bureau of Labor Statistics, contending that they "understate unemployment," and that "analyses of economic policies remain highly influenced by the 'informed' bureaucrat").

61 *Cf.* Pearson, *supra* note 8, at 281 (lack of "staff capable of providing technical ad-

create a correlative problem of limited focus in the oversight area. In those instances when oversight activity does occur, it tends to concentrate on widely publicized or visible agency malfunctions[62] rather than day-to-day operational problems.[63] Finally, most of the traditional oversight mechanisms cannot feasibly be used to supervise day-to-day agency affairs;[64] some new method must be added to the existing oversight scheme to perform this function. The next part of this Article examines various proposals which have been made to accomplish this and other tasks necessary to improve the casework process of Congress.

II. PROPOSALS FOR REFORM OF THE CASEWORK PROCESS

A. *Eliminating the Casework Function*

Some commentators believe that members of Congress should dispense with the casework function entirely.[65] This

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vice" is "foremost" reason for inadequacy of congressional oversight). *See also* Krasnow & Shooshan, *supra* note 40, at 327 (pointing out that "Congress lacks sufficient numbers of experts . . . to independently analyze all agency actions" and contending that the best staff people are "lost to the lure of bigger money" available in trade associations and law firms).

62 Numerous case studies have reached this conclusion. *See, e.g.*, Krasnow & Shooshan, *supra* note 40, at 325 (investigating oversight of the FCC and concluding that "Congress has been forced . . . to do its overseeing primarily on a crisis basis only"); Vinyard, *The Congressional Committees on Small Business: Pattern of Legislative Committee-Executive Agency Relations*, 21 W. POL. Q. 391, 399 (1968) (investigating the oversight conducted by committees with jurisdiction over the Small Business Administration and concluding that "[s]ome areas, particularly those which are politically visible, are likely to get considerable attention while less visible areas will be neglected.").

63 *But see 1975 Delay Hearings, supra* note 53 (discussed at note 104 *infra*).

64 For example, advice and consent regarding high level appointments can do no more than to ensure that undesirable individuals do not head various agencies and departments, and, in fact, the "vast majority" of presidential selections are approved by the Senate. L. RIESELBACH, *supra* note 20, at 312.

65 *See, e.g.*, G. GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS 203-04 (1953) (proposing that congressmen voluntarily "refrain from specific interferences with administration in individual cases"); THE REORGANIZATION OF CONGRESS: A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 6 (1945) ("We suggest that Congress forbid its members to intervene in individual cases, con-

view appears to rest on the beliefs that casework serves no purpose other than to supply political rewards to members of Congress and that most constituents are capable of resolving their grievances through other channels without congressional assistance.

It should be noted initially that no proposal to remove casework from Congress could muster the necessary support to be adopted, given the benefits which the legislators derive from this service. Still, even if such a proposal could pass, removing casework from Congress would be undesirable. First, casehandling provides the only readily accessible grievance mechanism for many constituents, particularly the poor, who often have no idea about which agency or division to contact with their problems. For some constituents, a phone call or letter to the congressional office can bring rapid communication of a problem to the appropriate authorities in situations where other avenues of redress may be inadequate or completely unavailable. For example, the constituent may already have exhausted agency channels without success.[66] In addition, litigation may not be a feasible alternative, either because courts may

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tenting themselves with passing the criticism[s] . . . on to the appropriate legislative committee.").

At least some congressmen would agree that removal of casehandling from Congress would be a good idea. *See 1965 JCOC Hearings, supra* note 10, at 775 (Dartmouth College Public Affairs Center study in which members were asked to evaluate the statement that "[a]n important part of a congressman's job should be to go to bat for constituents in their dealings with executive agencies." Six percent of the 80 congressmen sampled disagreed with the statement, while an additional fourteen percent tended to disagree.).

One congressman has gone so far as to propose a constitutional amendment to "prohibit a Member of Congress, or Senator, from contacting the executive branch of Government except in regard to legislation." *1965 JCOC Hearings, supra* note 10, at 296 (testimony of Rep. Ramspeck).

66 *See, e.g., 1965 JCOC Hearings, supra* note 10, at 92-93 (testimony of Rep. Reuss) (typical procedure is to contact agency first and if constituents "do not get what they are after . . . the next step is the Congressman or Senator").

For a poignant example of the notion that some individuals have no one to turn to but their congressman, consider this letter to a congressman from a constituent seeking help in locating her mother's lost Social Security check. The daughter indicated that she had "spent the entire [summer] trying to have it replaced" for her mother and was "dumbfounded at [the] endless runaround" she was getting. After asking Congressman D to "get the missing check to my mother," the letter concluded with the observation: "I don't know what these older people do when they don't have someone to fight for them."

refuse to hear particular kinds of complaints,[67] or because the time and expense involved make judicial review too costly.[68]

Perhaps the most significant effect of abolishing the casework function, however, would be to deprive Congress of a stream of information that could be highly useful for oversight purposes. The fact that members of Congress gain political benefits from casework should not obscure the potential value of this function as a source of oversight information.

B. *District Ombudsmen: The Aspin Plan*

In contrast to the draconian solution just examined, Representative Les Aspin has proposed legislation designed to restructure the existing procedures to increase the amount of constituent access to the casework process. The Aspin bill would allocate $8,000 to $15,000 of each house member's staff allowance to finance an "ombudsman" for every congressional district.[69] These ombudsmen, appointed by the respective congressmen, would serve primarily to "seek out, find, and act

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67 *See, e.g.,* Smith v. Board of Comm'rs, 259 F. Supp. 423 (D.D.C. 1966) (refusing to provide relief against "harsh, oppressive, illegal, and humiliating methods" used by welfare officials in conducting investigations); Sturm v. McGrath, 177 F.2d 472, 473 (10th Cir. 1949) (court powerless to "superintend through mandamus or injunctive processes the administrative conduct of a penitentiary or its discipline); Aaron, *Utah Ombudsman: The American Proposals,* 71 UTAH L. REV. 32, 38 (1967) (judicial review limited by various "statutory and judicial restrictions [such as] finality, exhaustion of administrative remedies, and standing"); Carrow, *Mechanisms for the Redress of Grievances Against the Government,* 22 AD. L. REV. 1, 13 (1969); Gwyn, *supra* note 32, at 54. *But see, e.g.,* White v. Mathews, 559 F.2d 852 (2d Cir. 1977) (holding that excessive delay in Social Security disability hearings violates statutory mandate that such hearings be conducted within a reasonable time).

68 For discussions of practical considerations such as time and expense, *see* Aaron, *supra* note 67, at 39; Carrow, *supra* note 67, at 13; Gwyn, *supra* note 37, at 54. Arguably, the development of legal services for the poor has eased expense considerations somewhat. *But see* Cramton, *Promise and Reality in Legal Services,* 61 CORNELL L. REV. 670, 676 (1976) (estimating that 40.5% or about twelve million of America's poor live in areas without any free legal services). Moreover, strict financial eligibility requirements foreclose available free legal services to all but the very poor. Aaron, *supra* note 67, at 39.

69 H.R. 3198, 94th Cong., 1st Sess. (1975). Congressman Aspin previously introduced this bill as H.R. 11257, 93d Cong., 1st Sess. (1974) and H.R. 13742, 92d Cong., 2d Sess. (1972), 118 CONG. REC. 8100 (1972). Although the "Aspin Plan" has not been widely discussed, it has been alluded to in a few discussions of congressional reform. *See* M. GREEN, J. FALLOWS & D. ZWICK, WHO RUNS CONGRESS? THE PRESIDENT, BIG BUSINESS OR YOU? 204 (1972); H. RELYEA, THE OMBUDSMAN CONCEPT: BACKGROUND INFORMATION 6-10 (Congressional Research Service 1976).

upon problems which residents of such member's district have with any governmental agency or entity."[70] The bill would also create an "Ombudsmen Center" to serve as a training and resource center and to evaluate the performance of each ombudsman. The evaluation would be based in part on an annual report submitted by the individual ombudsmen to the Center.[71] The goal of the Aspin plan is to facilitate citizen access to congressional casework assistance by ensuring "that there is an ombudsman in virtually every congressional district in the country."[72] The plan is also aimed at increasing efficiency in case-handling through training of the ombudsmen at the Center.

Despite these admirable goals, however, the Aspin proposal does not effectively resolve, and may actually exacerbate, the two fundamental problems with the existing casework process. First, although the Center would provide special training to the ombudsmen, the time saved through increased efficiency would be more than offset by the increased caseload likely to be generated by use of an ombudsman system. Indeed, upon testing the plan in his own district, Aspin found that the number of cases received escalated enormously.[73] While it is true that such an escalation in each district would mean that significantly more individuals were being assisted, it must be emphasized that casework is only one of the many functions Congress must perform. Because even the current caseload detracts from Congress' ability to perform many of its legislative tasks adequately,[74] any move to increase the caseload burden would be

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70 H.R. 3198, 94th Cong., 1st Sess. (1975). The ombudsman would also "perform such other work assigned to him by [the] Member not to exceed 30 per centum of his time." *Id.* Aspin's ombudsman plan differs from the European ombudsman in that the former would not be independent, non-partisan, and impartial, since it would serve under and receive instructions from members of Congress. *Cf.* Verkuil, *The Ombudsman and the Limits of the Adversary System,* 75 COLUM. L. REV. 845, 847 (1975) (traditionally, ombudsmen independent, impartial checks on abuses of power).

71 The report would include information on the kinds and numbers of cases handled by the ombudsman, the percent "successfully resolved," any observable trends in caseloads, and "an analysis of [the ombudsman's] attempt to reach the people." H.R. 3198, 94th Cong., 1st Sess. (1975). The Center would also receive an annual report by each member of Congress evaluating the performance of his ombudsmen. In addition, the Center would solicit comments from constituents who have received assistance from the particular ombudsman under evaluation. *Id.*

72 118 CONG. REC. 8100 (1972) (Rep. Aspin).

73 *See* 118 CONG. REC. 8100 (1972).

74 *See* note 35 *supra.*

unwise unless coupled with the creation of a service within Congress to assist the offices in this task. Representative Aspin's proposal does not provide for such a service.

The other major weakness of the Aspin bill is that its provisions for analyzing casework done by the ombudsmen are not sufficiently comprehensive to present a complete picture of systemic agency problems raised by constituent complaints. Only information on cases handled by the ombudsmen would be reported to the Center. The Center would receive no information relating to cases handled by other members of a congressman's staff. In addition, the bill provides no mechanism within the Center for aggregating and analyzing the information that is received. Instead, the plan contemplates using the data solely to evaluate the performance of individual ombudsmen. Hence, by ignoring the possibility that certain recurrent agency problems can be solved more effectively through systematic oversight and corrective legislation than through ad hoc casework, the proposal fails to exploit the major benefits that the Center could provide.

C. *The Reuss Plan*

A third reform proposal has been put forward by Representative Henry Reuss.[75] The Reuss proposal would create a Congressional Ombudsman position to be filled by an individual appointed by Congress. His function would be to review complaints submitted to congressmen in which the complainant alleges that

> (a) he has been subjected to any improper penalty or has been denied any right or benefit to which he is entitled, under the laws of the United States; or (b) the relevant pro-

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75 H.R. 8017, 91st Cong., 1st Sess. (1969), 115 CONG. REC. 5051 (1969). The bill was previously introduced as H.R. 3388, 90th Cong., 1st Sess. (1967), 113 CONG. REC. 1140 (1967); H.R. 4273, 89th Cong., 1st Sess. (1965), 111 CONG. REC. 1881 (1965) (proposal entitled "Administrative Counsel of the Congress"); H.R. 7593, 88th Cong., 1st Sess. (1963), 109 CONG. REC. 12751 (1963) (same proposal). For scholarly discussion of the Reuss proposal, *see, e.g.*, W. GELLHORN, *supra* note 9, at 87-94; L. RIESELBACH, *supra* note 20, at 379; Cramton, *supra* note 9, at 10-11; Schwartz, *A Congressional Ombudsman is Feasible*, 56 A.B.A.J. 57, 57-58 (1970).

> ceedings are being conducted in a manner that is unreasonable, unfair, oppressive, dilatory, or inefficient.[76]

Although the Reuss proposal clearly gives the ombudsman a broad grant of jurisdiction over cases, it simultaneously restricts access to the ombudsman's services by providing that he may handle only cases forwarded by a member of Congress; no cases could be received directly from the public.[77] Forwarding of cases would be on a voluntary basis. Accordingly, complaints would still be addressed to the individual congressional offices and, at the discretion of those offices, sent to the ombudsman. After completing a case submitted by an office, the ombudsman would send the results back to that office which would, in turn, contact the constituent.

The Reuss plan is clearly superior to the previously considered proposals with respect to ameliorating the excessive burden which casework now places on most congressional offices. Because offices could send any and all cases to the ombudsman, staff personnel would be freed to devote more time to their legislative duties.[78] In addition, the problem of inefficiency arising from lack of expertise could be at least partially eliminated by the Reuss plan, which provides for the ombudsman to be "an eminent jurist or administrative expert"[79] and to be assisted by a staff of specialists in administrative matters.[80]

As with the Aspin plan, the Reuss proposal does not deal adequately with the inability of the existing casework process to contribute significantly to the oversight activities of Congress. Although the ombudsman's office is directed to make annual re-

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76 H.R. 8017, 91st Cong., 1st Sess. (1969), 115 CONG. REC. 5051 (1969). The ombudsman would have more power than individual caseworkers since he would have statutory authority to subpoena "books, records, files, or other documents" to carry out his duties. For criticism of this feature of the plan, *see* note 88 *infra*.

77 *Id.* As with the Aspin Plan, *see* note 69 *supra*, the Reuss Plan does not create a true ombudsman; the proposal *prohibits* direct citizen contact with the ombudsmen. *See 1965 JCOC Hearings, supra* note 10, at 83 (testimony of Congressman Reuss) (congressmen unwilling to give up such direct constituent contact, because it aids their reelection).

78 The great imbalance in the number of cases received by various congressional offices, *see* note 29 *supra*, could also be corrected by this plan. Presumably, offices with a lighter caseload would feel less need than those with heavier loads to forward cases to the congressional ombudsman.

79 *1965 JCOC Hearings, supra* note 10, at 81 (testimony of Congressman Reuss).

80 *Id.* at 86-87.

commendations to Congress on problems requiring legislative action,[81] the structure of the proposal creates a significant possibility that the office will not have access to adequate information on which to base informed recommendations. As indicated, utilization of the ombudsman's services by Congressional offices is voluntary. Consequently, unless congressional offices forward all, or at least a representative cross-sample, of the cases they receive, the ombudsman's office will necessarily develop an incomplete or distorted picture of the types of complaints made, and it will be restricted in its ability to identify meaningful patterns. For example, if offices chose to forward only "crank" or frivolous cases, then the ombudsman would obtain no insight into legitimate complaints and might erroneously conclude that constituents' grievances are generally meritless. Similar reasoning would apply if offices forwarded only routine cases or only complex cases.

While the distortion problem would not be a weakness of the Reuss plan if the plan required congressional offices to forward all cases to the ombudsman for handling, it is unlikely that Congress would approve such a measure. Indeed, the Reuss plan, even with its voluntary provisions, has met with little success in Congress.[82] In large part, this is due to the plan's identification with the ombudsman concept. Many congressmen fear that the existence of a visible bureaucrat with responsibility in this area would undercut their ability to receive credit for handling constituents' complaints.[83] Accordingly, to make utilization of the

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81 H.R. 8017, 91st Cong., 1st Sess. (1969), 115 CONG. REC. 5051 (1969).

82 In 1965, the Joint Committee on the Organization of Congress recommended that Congress not adopt Reuss' bill, H.R. 4273, 89th Cong., 1st Sess. (1965). FINAL REPORT OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, S. REP. NO. 1414, 89th Cong., 2d Sess. (1966).

83 *See* Gwyn, *supra* note 32, at 67; Kass, *We Can, Indeed, Fight City Hall: The Office and Concept of Ombudsman,* 19 AD. L. REV. 75, 78-79 (1966) ("[P]erhaps the primary reason for rejecting this seemingly worthwhile proposal was the fact that Congressman Reuss constantly identified his Administrative Counsel with that of an Ombudsman."). *Cf.* Butler, *Administering Congress: The Role of the Staff,* 26 PUB. AD. REV. 3, 10 (1966) (noting that Reuss seems to have contradicted himself in highlighting features of his plan by arguing that the ombudsman should be highly visible but that constituents would not need to know of his existence). Subsequent bills introduced by Reuss have also met with little success. Ironically, in the later bills, Reuss changed the title of the proposed administrator from "Administrative Counsel of the Congress" to "Congressional Ombudsman," further underscoring the visibility and publicity he intends for his

ombudsman's services mandatory would jeopardize support for reform in this area even among those legislators who would welcome the availability of centralized casehandling services on an optional basis and who recognize the need for some mechanism to aggregate the information derived from the cases handled by each office.

III. Casework Handling and Monitoring Service

It is evident from the discussion of the Aspin and Reuss proposals that any scheme to promote the realization of all the potential benefits of the casework function must preserve the ability of the individual congressional offices to control their caseload while, at the same time, providing an effective system for gathering and analyzing data on all cases handled. The plan proposed in this Article, creation of a "Casework Handling and Monitoring Service," recognizes these somewhat conflicting needs and resolves the conflict by establishing: (1) a voluntary casehandling service *and* (2) a separate scheme for collecting information on cases handled by congressional offices. The casehandling division would be modeled after such existing services as the Senate and House Legislative Counsel Offices[84] and the Library of Congress Congressional Research Service,[85] which are professional, efficient offices providing low-visibility technical assistance to members of Congress.[86] The monitoring

centralized casehandler. *Compare* H.R. 8017, 91st Cong., 1st Sess. (1969), 115 Cong. Rec. 5051 (1969) (Congressional Ombudsman) *and* H.R. 3388, 90th Cong., 1st Sess. (1967), 113 Cong. Rec. 1140 (1967) (same) *with* H.R. 4273, 89th Cong., 1st Sess. (1965), 111 Cong. Rec. 1881 (1965) (Administrative Counsel) *and* H.R. 7593, 88th Cong., 1st Sess. (1963), 109 Cong. Rec. 12751 (1963) (same).

84 The Office of Legislative Counsel, formerly called the Legislative Drafting Service, was established in 1919 to provide bill drafting service to members of Congress. The service has separate House and Senate divisions. *See generally* K. Kofmehl, *supra* note 32, at 183-200 (discussing origin and current operation); Lee, *The Office of Legislative Counsel,* 29 Colum. L. Rev. 381 (1929) (discussing origin); *1965 JCOC Hearings, supra* note 10, at 1181-95 (discussing modern operation).

85 The Congressional Research Service (formerly Legislative Reference Service) was established in 1914 to provide research assistance to members of Congress in matters involving legislation. *See generally* K. Kofmehl, *supra* note 34, at 9-10 (origin and functions); *1965 JCOC Hearings, supra* note 10, at 1109-81 (same).

86 Rep. Reuss recognized the analogy between a casehandling service and a bill drafting and legislative research service, *see 1965 JCOC Hearings, supra* note 10, at 80, but failed to pattern his plan after such low-visibility services. *See also* Hartke, *supra* note 3, at 355 (also recognizing analogy, but failing to consider the visibility question).

division would be a separate office with responsibility for collecting, analyzing and distributing information and recommendations to congressmen, committees, and agencies based on complaints processed not only by the casehandling division, but by all congressional offices.

A. *The Casehandling Division*

The casehandling division would consist of ten subdivisions: social security, veterans administration, post office and civil service, military problems, immigration and naturalization, tax, small business, education and housing grants/problems, prison matters and a miscellaneous group.[87] Each subdivision would be staffed by specialists with knowledge of the relevant agency and area of law.[88]

As with the Reuss plan, use of the casehandling division's services would be entirely optional. To obtain assistance, the congressional office would simply forward the constituent's letter to the division for handling. After receiving the letter, the division would pursue the matter until it was resolved. In those instances where further information was required from the constituent, the contact would be made through the individual congressional office that forwarded the case. After receiving the agency's reply, the division would return the case to the office

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87 This division is based upon a very general survey of the kinds of cases received by congressional offices. The responses to the 1977 Questionnaire indicated that the nine specific problem areas mentioned in the text account for the vast majority of cases in most offices — with Social Security and Veterans Administration cases the most frequently received cases.

Alternatively, the Division could be set up on a pilot basis to handle only a few kinds of cases (*e.g.*, Social Security, Veterans Administration, tax). *Compare* S. 1195, 90th Cong. 1st Sess. (1967), 113 CONG. REC. 5579-80 (1969) (proposing federal ombudsman pilot program pertaining to selected agencies).

88 The experts would be appointed by the Speaker of the House and the President pro tempore of the Senate. These "experts" would not necessarily need a legal education, though such background would be useful for understanding casework problems. K. KOFMEHL, *supra* note 34, at 85. Most importantly, these individuals would have to be well-acquainted with the agencies with which they would deal.

Unlike the Reuss Plan, the plan proposed in this Article would give the experts no subpoena powers. Not only is such power not needed for the division to serve congressional offices effectively, but granting such power to these caseworkers would raise complex constitutional questions. *See* 112 CONG. REC. 22470-72 (1966) (statement by Committee on Federal Legislation of New York Bar Association) (detailed criticism of subpoena power feature of Reuss Plan).

from which it was referred. Again, the individual office would report back to the constituent with the results.

Congressional offices would be likely to utilize the casehandling division's services, since those services would permit the offices to reduce their caseload burden without depriving them of ultimate control over, or the opportunity to take credit for, constituent casework. As with the Reuss plan, individual offices could forward only those cases they did not choose to handle, and the results would be reported back to the office, which would, in turn, relay the results to the constituent. Hence, offices would be under no obligation to forward any case to the division but would, at the same time, be able to claim credit for those cases which the division did handle. This latter aspect is one of the primary advantages of the proposal.

Another important advantage is that the casehandling division is intended to be a low visibility office. This is in marked contrast to the highly visible ombudsman provided for in the Reuss plan, who represents a potential rival and threat to the autonomy of the individual offices.[89] Reuss' plan envisioned the ombudsman as "an eminent jurist and administrative expert," who would actively seek to use "publicity and its power to marshal public opinion" in favor of necessary reforms.[90] The significance of this low profile is borne out by the current acceptance and success of the Legislative Drafting Service, which stems largely from its ability to draft bills while enabling members to claim credit for the finished product.[91]

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89 This concern was repeatedly expressed by members of Congress during hearings on the Reuss proposal. *See, e.g., 1965 JCOC Hearings, supra* note 10, at 80, 81, 91 (testimony of Rep. Mohroney). The service proposed in this Article, in contrast, would have no single public spokesman and would shun publicity.

90 Data pertaining to existing services suggest that congressional offices heavily use services available to them. For instance, although the proposal for a legislative drafting service originally faced strong opposition, *1965 JCOC Hearings, supra* note 10, at 84 (statement of Rep. Reuss), that service currently drafts thousands of bills each year. Similarly, as of 1965, the Congressional Research Service handled an estimated 45,000 inquiries annually for congressmen and committees. *1965 JCOC Hearings, supra* note 10, at 1113 (testimony of Dr. Hugh Elsbree, Director of CRS).

91 Congressmen are clearly able to claim credit for introducing problem-solving legislation. Pearson, *supra* note 8, at 282. Yet a substantial part of the work is handled by the bill-drafting service. *See 1965 JCOC Hearings, supra* note 10, at 1192 (statement of House Legislative Counsel Edward O. Craft) (estimating that House Legislative drafting service has "some contact" with 50 to 75 percent of all "the important legisla-

By allowing offices to reduce their caseload burdens, the proposal enables them to devote more time to their legislative tasks, thus restoring a more proper balance between legislative concerns and casework. Moreover, offices would be able to spend more time on the cases they chose to retain, thereby providing those constituents with better service. The most significant advantage in terms of efficiency, however, would result from the expert supervision by the division of the cases it did handle. In accordance with the principles of specialization and economy of scale, the division would be able to offer long-run cost savings in terms of both time and manpower.[92]

Finally, after the division became established, its duties could be expanded to include training programs to aid caseworkers in the individual offices. Through semi-annual seminars or the publication of casework manuals, division staff members could pass on the expertise which they developed during their daily activities to other congressional personnel. This could, in turn, result in greater efficiency within the individual offices.

B. *The Monitoring Division*

The second aspect of the proposed plan is the establishment of an office designed to remedy the information-gathering deficiencies of the existing system. This office, the monitoring division, would operate separately from the casehandling division. Each congressional office would be required to provide the monitoring division with a monthly report indicating the numbers and types of cases handled, actions taken, and results

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tion" passed by the House annually, such contact ranging from a "complete [drafting] job" to "drafting amendments"). In 1963-64 for example, the House bill drafting service drafted 5,495 bills, resolutions and amendments for members and committees, *1965 JCOC Hearings, supra* note 10, at 1192. No public criticism arose and no one accused members of Congress of shirking important responsibilities. Today, the service continues to draft bills and members continue to sponsor, introduce, and claim credit for them. The same should be true of the casework assistance service.

92 *See* Reuss & Munsey, *supra* note 1, at 199 ("[B]ecause of the efficiency that can be obtained through specialization, this staff should be considerably smaller than the total of congressional staff members saved from handling casework."). The same reasoning applies to the plan proposed in this Article.

obtained,[93] information that many offices record already.[94] To minimize the amount of time required to complete them, the reports would utilize standardized forms similar to those used by many state "ombudsman" offices.[95] As with the casehandling division, the monitoring division would be staffed by specialists and specially trained clerical workers.[96] A supervisor would oversee the operation, arrange work assignments, and attend to other technical matters. The monitoring division is intended to perform three valuable functions which are not currently carried out. First, it would compile an annual publication based on information received from the congressional offices in the monthly reports. It would then distribute this report to congressional offices and committees and to the various federal agencies. The report would contain quantitative and qualitative summaries of the scope and nature of problems handled by the casehandling division and congressional offices. In addition, the report would include such items as: geographical location of

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93 Specifically, the report would indicate: 1) the number of new cases handled by the office that month; 2) the number of cases forwarded to the casehandling division for processing; 3) the number of cases received in previous months that were closed during the month covered by the report; 4) distribution of the above cases among agencies (*e.g.*, Social Security, Veterans Administration) and specific problem types (*e.g.*, lost check, delay in obtaining hearing, inability to obtain status of pending matter); 5) action taken in each of the above cases, including cases handled by the central service (*e.g.*, telephoned agency for information, forwarded case to agency, responded with information available in office); 6) results obtained (*e.g.*, reversal of decision, reconsideration but no reversal, matter pending); and 7) a rough indication (for each case closed) whether the constituent's complaint was: a) justified, b) frivolous, c) based on misinformation on the complainant's part, or d) a combination of the above.

At least one commentator has recognized the potential value of accumulating and tabulating information on individual cases. *See State Legislative Committees, Panel Discussions Before the House Select Comm. on Committees,* 93d Cong., 1st Sess. 808 (1973) [hereinafter cited as *1973 State Legislative Committees Discussions*] (suggesting that agency "such as GAO" collect data on individual cases received by congressional offices and supply the information to the appropriate committees).

94 According to results obtained from the 1977 Questionnaire, over 90% of the offices responding keep records of all cases handled. Some keep total figures; for those that do not, cumulation of the data would not be difficult. *See also 1973 State Legislative Committees Discussions, supra* note 93, at 808 (indicating that a record keeping requirement "would not be very burdensome" for congressional offices).

95 For a useful model, *see* ESTABLISHING OMBUDSMAN OFFICES: RECENT EXPERIENCE IN THE UNITED STATES 273-74, 279-86 (S. Anderson & J. Moore eds. 1971) (various report sheets used by Hawaii Ombudsman to record detailed information about each case handled).

96 The procedure for appointing and hiring personnel would be the same as for selecting casehandling division personnel. *See* note 88 *supra.*

problems in regional agency offices; trends observed, in terms of the operation of legislative programs; agencies most often appearing in citizen complaints; and, the nature of results obtained in the handling of individual cases.

The second major function of the monitoring division would be to conduct informal inquiries into problems which it found to be recurrent on the basis of the information it received.[97] The forms which these investigations might take are numerous. monitoring division personnel could discuss problems with caseworkers in the casehandling division or in individual congressional offices. In addition, division personnel might contact agency staff members directly to discuss with or alert them to apparent problems.

As with the annual report, the more detailed information developed through such inquiries would be passed on to the appropriate oversight committees and to the responsible officials in the agencies concerned. It is hoped that through these efforts the monitoring division would be able to determine whether a particular recurring problem appears to stem from such problems as insufficient funds, incompetent personnel, agency misapplication of statutory provisions, poorly designed statutes, unreasonable demands by citizens, or lack of information on the part of citizens about agency standards or procedures.

The third function of the monitoring division would be to make formal recommendations to appropriate oversight committees regarding further investigation or legislation. On the basis of information collected in performing the first two functions, the division could develop precise recommendations and draft proposals for corrective legislation.

The monitoring division would provide a steady flow of highly useful information that would improve Congress' ability to conduct effective oversight of agencies' day-to-day activities. At the individual office level, the annual report would provide congressmen and their staffs with organized information that could serve as a basis for legislative proposals or further investiga-

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97 For reasons cited above, *see* note 88 *supra*, monitoring division workers would not have subpoena powers.

tion. For the most part, congressmen themselves rarely hear about the majority of individual cases handled by their staff assistants.[98] By consulting the report, a caseworker could determine if a case he is handling represents a problem which arises frequently and, if so, he could bring it to the attention of the congressman. By combining the information collected in the report with the experiences of his own constituents, the congressman would have an excellent basis on which to draft and promote corrective legislation.[99]

At the committee level, the information supplied by the monitoring division could significantly strengthen the oversight process, especially in the area of appropriations.

Under the appropriations process, subcommittees periodically conduct hearings to determine whether an agency's funding should be expanded, cut, or left the same.[100] The recommendations of the subcommittees are considered by the full appropriations committees in each house and ultimately by Congress as a whole. While members of a subcommittee characteristically know more than other members of Congress about agencies within that subcommittee's jurisdiction, they typically lack sufficient information to conduct a thorough investigation of an agency's performance.[101] Instead, members tend to probe in detail only those aspects of agency operations with which they are familiar. Their evaluation thus becomes somewhat impressionistic and arbitrary. The more comprehensive, independent information supplied by the monitoring division would increase the ability of the subcommittee members to discuss intelligently the agency's operations with the agency officials.[102]

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98 *Cf.* Olson, *supra* note 44, at 370 (congressmen generally give only "cursory supervision" to the casework handled by staff assistants).

99 *Cf.* Gray, *supra* note 17, section on "The Interference Routine" (indicating that when a member himself becomes involved in a case, a wide variety of tactics, *e.g.*, turning matter over to committee, conducting informal investigation, may be employed to resolve the problem).

100 *See* L. RIESELBACH, *supra* note 20 (describing subcommittee hearings as creating "a direct confrontation between agency personnel seeking to justify their use of funds appropriated in the past and to win new, and often larger sums," and congressmen, who are "fearful of bureaucratic distortion of congressional intent and administrative profligacy," and who seek to reduce government spending).

101 *Id.* at 305.

102 It should be noted that congressmen already use cases from their offices in evaluating an agency. Thus, if a case comes to their attention, they will generalize from

Information prepared by the monitoring division would be useful not only to appropriations subcommittees and agencies, but also to the various standing committees, which are required to supervise agencies within their jurisdiction. Committees currently receive little information regarding problems raised in individual cases.[103] Information prepared by the monitoring division would pinpoint those areas in which committee hearings or investigations might be useful.[104] Presumably, the frivolous problems and the problems that are the fault of constituents would be screened out, so that hearings would be conducted only in areas where a serious agency malfunction exists (*e.g.*, delay, misapplication of statute). In some instances, committee members might agree with suggestions of the division and might therefore introduce appropriate legislation. At the very minimum, the monitoring division could bring to the attention of the standing committees recurrent day-to-day agency problems, enabling the committees to set in motion their oversight machinery if they so decided.[105]

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it. *See id.* ("[I]f the program does not work well in his district, he is prepared to assume it is producing similarly unsatisfactory results elsewhere . . . ."). The proposed reforms would improve the use of cases (1) by ensuring that information about cases is used whenever available, and (2) by providing members of subcommittees with information based on cases received by *all* members of Congress, thereby eliminating the risk that congressmen will make incorrect inferences based on limited data.

103 *See* note 59 *supra.*

104 Even in those rare instances in which committees currently receive and make use of information pertaining to individual cases, the proposed reforms would improve the process. For example, in 1975, the House Subcommittee on Social Security of the Ways and Means Committee conducted hearings concerning delays in Social Security disability hearings. *See 1975 Delay Hearings, supra* note 53. The hearings consisted largely of testimony by congressmen in which individual "horror stories" of administrative delay were recounted. *See, e.g., id.* at 90-94 (testimony of Congressman Karth); 239-45 (testimony of Congressman Heinz III); 251-52 (testimony of Congressman Hechler); 262-63 (testimony of Congressman Rogers); 563-64 (statement of Congressman Fraser); 567-71 (statement of Congressman Hefner); 575 (statement of Congressman Litton); 579 (statement of Congressman Nichols). Had the proposed reforms been in operation, the problem may well have been recognized sooner. *See id.* at 253 (indicating that caseworker in one office had handled Social Security disability cases for twelve years). The monitoring division would have had information for the nation as a whole and would have been able to recognize patterns that were not apparent to any single office. Instead, recognition was forestalled until the problem became so serious that even the individual offices could spot recurrent patterns. (As a result of the hearings, Congress passed remedial legislation permitting Social Security to use SSI examiners to hear Social Security and Medicare cases.) 42 U.S.C. § 1383(c) (1976).

105 One might argue that the committees would simply not use the information — that oversight will never be a high priority item in Congress. Such an argument is an oversimplification. Oversight is *currently* unattractive to members of Congress

Since agencies would also receive the reports and publications of the monitoring division, they would be forewarned of the problems brought to the attention of congressmen. Agency officials might feel compelled to institute corrective measures, fearing that if subcommittee members questioned them about these problems and they could not point to remedial efforts, then the agency might jeopardize its chances of obtaining its requested appropriation. Thus, mere disclosure of problem areas by the monitoring division might lead to improved agency performance without any need for action on the part of Congress.[106]

Creation of the monitoring division might encounter some resistance among members of Congress, who may be reluctant to impose reporting requirements on themselves. On the other hand, by providing congressmen with ammunition with which to attack malfunctioning agencies and thus to gain valuable

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because, given the lack of information, and the lack of specialized staff, conducting any sort of oversight activity is enormously time-consuming, while the political payoff is often ambiguous. Even the most basic supervision requires: 1) obtaining information, 2) analyzing the information to identify problem areas, and 3) exploring various remedial possibilities. The monitoring division would greatly simplify the task for congressmen regarding the day-to-day problems raised in individual cases, since the division would perform the first and second functions described and would provide recommendations to guide congressmen in the performance of the third. The *1975 Delay Hearings, supra* note 53, provide a useful analogy. In that instance, because of the numerous cases received in congressional offices, performance of the first and second functions occurred automatically; congressmen could concentrate on the third. Dozens of congressmen revealed their desire to examine remedial possibilities. Similarly, the monitoring division would attempt to increase the attractiveness of oversight by performing the burdensome but necessary preliminary research and investigation.

106 It is quite reasonable to expect self-corrective action on the part of agencies. According to one commentator, agencies grant "special deference" to cases of members of the House and Senate appropriations committees because these members are "in a position to influence agency appropriations." C. CLAPP, *supra* note 14, at 81; *id.* (power of congressional offices to "expedite and influence bureaucratic decisions" result of "congressional control over . . . higher budgets and new program authorizations"); Gray, *supra* note 17, section on "Why the Interference System Works," (concern with favorable review of appropriations requests a primary factor in agencies' more rapid responsiveness to congressional requests than to requests received directly from the public). Moreover, there is evidence that agency personnel prepare in advance to say what members want to hear. *See* L. RIESELBACH, *supra* note 20, at 306 n.12 ("[Agency officials] rehearse for budget hearings, they seek to perform well in key legislators' districts, they pay considerable heed to subcommittee instructions; in short, they seek to generate that very confidence that the lawmakers are looking for."). Thus, if the monitoring division identifies problem spots within an agency, that agency, because of its general concern over funding, will in all likelihood institute corrective measures. *See generally* Hartke, *supra* note 3, at 345.

publicity, the monitoring division would increase the political rewards of the casehandling system. Moreover, the recent restrictions on the franking privilege,[107] the occasions in which congressmen have refused to vote pay increases for themselves,[108] and the myriad campaign reporting requirements enacted by Congress[109] demonstrate that Congress can impose burdens on itself when necessary to improve its efficiency and professionalism. Furthermore, the burden of reporting cases to the service would be marginal, because most offices already keep records of all cases handled.[110] In addition, the availability of the casehandling division would provide staff members with additional time, a small part of which could be used to complete the reports.[111]

Conclusion

As this Article has shown, despite its increasing significance as a congressional function, the casework process is plagued by two main inadequacies — excessive amount of time spent by individual offices on casework activities and failure of the casework function to help identify and lead to correction of underlying difficulties — which result, in large measure, from a failure to develop efficient, well-coordinated procedures. Furthermore, these two problems are interrelated and tend to reinforce one another. To the extent that the focus remains on solving individual cases while ignoring underlying causes, the number of

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107 *See generally* Ascher & Porro, *The Case for the Congressional Franking Privilege,* 51 U. TOL. L. REV. 259, 279-89 (1974) (discussing congressional decision to amend franking privilege statute to prohibit mass mailings within 28 days prior to a primary or general election).

108 *See, e.g.,* 120 CONG. REC. 5492-508 (1974) (Senate debate on and approval of S. Res. 293, which disapproved budget recommendations by President for pay increases for members of Congress).

109 *See generally* Federal Election Campaign Act Amendments of 1976, 2 U.S.C.A. §§ 431-56 (West 1977).

110 *See* note 94 *supra.*

111 If this feature of the proposal did run into political problems, then appropriate modifications could be made. For instance, the plan could simply *request* that members comply. *Cf.* S. 2500, 93d Cong., 1st Sess. (1973) (Hartke bill providing, *inter alia,* that a centralized office "request" that each congressional office supply information as to legislative issues of greatest concern to constituents). Alternatively, Congress could simply mandate that *agencies* be required to supply the Service with details about cases forwarded by congressional offices.

cases can only increase, as more laws are enacted and more agencies are set up. Conversely, as the amount of time required to process this expanding caseload increases, offices will be less likely or able to allocate time for following up implications and ramifications of individual grievances.

A well-conceived reform plan, however, could improve Congress' overall performance and at the same time reduce its workload. The plan advanced in this Article would accomplish those goals by establishing a low-visibility casehandling service, available at the option of congressional offices, and a monitoring service, which would spot agency malfunctions and propose possible solutions. At a time when legislators are complaining of overwork and are seeking constructive reforms to improve Congress' effectiveness, a scheme such as the one proposed here, which enhances both the legislative and oversight capabilities of Congress, merits serious consideration.

ARTICLE

THE LEGISLATIVE VETO: IN SEARCH OF CONSTITUTIONAL LIMITS

JOHN B. HENRY II*

In the aftermath of the Vietnam War and Watergate, the spectre of an imperial Presidency has been replaced by that of an imperial Congress. This pendulum swing is perhaps most clearly seen in the increasing use of the so-called "legislative veto." The legislative veto is a reservation of power by Congress, in enabling legislation, to repeal or modify its delegation of power without enacting a second statute. Congress employs this means of control over both the executive branch and the independent administrative agencies.

The proliferation of legislative veto provisions has stirred considerable constitutional controversy. Despite repeated protests by the executive branch about the unconstitutionality of this extension of congressional power, the Supreme Court has never ruled on the matter. With the continuing use of the legislative veto, however, the question of the validity of the veto may soon reach the Court.

In this Article, Mr. Henry questions the constitutional basis of the legislative veto. He argues that many legislative vetoes represent a new form of "legislation" enacted without employing the procedures for law-making prescribed by article I of the Constitution. Second, he points out how the use of the legislative veto by Congress fails to meet constitutional standards for the delegation of legislative power. Finally, Mr. Henry shows that the use of the legislative veto may in some cases usurp powers granted to the President alone by article II of the Constitution.

Introduction

A legislative veto provision in an enabling statute is designed to reserve future authority to repeal or modify the delegation of power other than by traditional legislative action under the Constitution. Congress has shown great imagination in devising different ways to employ the veto. Statutory authority might be reserved for both houses,[1] for a single house,[2] for congressional

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1 *See, e.g.*, Federal Salary Act Amendments of 1977, Pub. L. No. 95-19, 91 Stat. 39, § 401, 26 U.S.C.A. § 359 (West Supp. 1979) (concurrent resolution required to approve salary increases submitted by President for members of Congress); H.R. 3131, 95th Cong., 1st Sess. (1977), *reprinted in Providing Reorganization Authority to the President: Hearings Before the Subcomm. on Legislation and National Security of the House Government Operations Comm.*, 95th Cong., 1st Sess. 3-4 (1977) [hereinafter cited as *Reorganization Hearings*].

2 *See, e.g.*, Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, 5 U.S.C.A.

committees of one or both houses,[3] or even for an individual committee chairman.[4] Either the right to approve or disapprove the delegated act may be reserved and either right may be exercised actively by voting on a resolution, or through silence.[5] Congress frequently uses the legislative veto to give its members an active part in the execution of policy. In some instances, it has even sought to use the legislative veto to terminate authority which arose independently of congressional delegation.[6]

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§ 906(a) (West Supp. 1979) (reorganization plan becomes effective if neither house takes action within a 60-day layover period). *See* note 5 *infra.*

3 *See, e.g.,* Supplemental Appropriations Act, 1974, Pub. L. No. 93-245, ch. IV, 87 Stat. 1071 (1974) (requiring consent of two Senate committees and two House committees); Act of Nov. 7, 1973, Pub. L. No. 93-148, § 5(c), 87 Stat. 555, 556-57 (1973) (requiring concurrent resolution); Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 4(g)(2), 87 Stat. 627 (1973) (permitting one-house veto).

4 Supplemental Appropriations Act, 1953, ch. 758, § 1413, 66 Stat. 637 (1953) (House Appropriations Committee Chairman to approve budget changes for government-owned housing).

5 *Compare* Federal Salary Act Amendments of 1977, *supra* note 1 (affirmative action by Congress required to approve salary increases) *with* Reorganization Act of 1977, *supra* note 2.

The two most useful compilations and digests of legislative veto provisions are CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, CONGRESSIONAL REVIEW, DEFERRAL AND DISAPPROVAL OF EXECUTIVE ACTIONS: A SUMMARY AND INVENTORY OF STATUTORY AUTHORITY (C. Norton comp. 1976) and Comment, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 CALIF. L. REV. 983, 1959-2062, apps. A and B (1975). Two hundred ninety-five legislative veto provisions were enacted in 196 statutes between 1932 and 1975. Most of these provisions have been enacted since 1966. CONGRESSIONAL RESEARCH SERVICE, *supra.* Generally, Congress has preferred passive veto provisions. The attractiveness of this type of legislative veto is due to the fact that the houses and committees are not forced to take affirmative action before a delegation can be exercised. The most popular form of veto is the one-house resolution of disapproval. Increasingly, Congress has created multiple legislative veto powers in a single statute. *See* Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (1975) (embodies 16 vetoes).

6 In these instances, Congress has asserted a right to "veto" the use of power to which the President has a constitutional claim independent of congressional delegation. In the 1973 War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 555, 50 U.S.C. § 1545(c) (1973) (enacted by override of President Nixon's veto), Congress asserted authority to direct the President by a concurrent resolution to withdraw U.S. armed forces from overseas conflicts where he has thought their introduction necessary. Similarly, under Pub. L. No. 94-110, §§ 1-2, 89 Stat. 572 (1975), which authorized the establishment of the U.S. Early Warning System in the Sinai, Congress claimed the power to withdraw American technicians from that area by a concurrent resolution determining that their safety was "jeopardized or that continuation of their role is no longer necessary." *See also* Neutrality Act of 1939, ch. 2, § 1, 54 Stat. 4 (1939). In the event Congress passed these concurrent resolutions, the President might refuse to comply, relying on his authority to act under the powers given to him as Commander-in-Chief, U.S. CONST. art. II, § 2, and his general power to conduct foreign affairs.

The Constitution has already given Congress powerful tools with which to control delegated authority. These tools include, among others, the power to investigate through standing and special committees and other oversight activities, the power to grant, withhold or reduce appropriations, and the power to enact statutory standards limiting executive and independent agency discretion. If Congress disagrees with how a delegated power is being exercised, or wishes to change the scope of a delegation, the Constitution expressly provides a procedure for making new law, *i.e.,* an affirmative majority vote by the members of each house and the consent of the President, or the override of his veto by two-thirds of the members of each house. The legislative veto, however, represents an attempt by Congress to effect legal change without having to go through the cumbersome process of passing new legislation.

In many respects, the accelerating use of the legislative veto is an institutional response by Congress to the advent of "big government" which Congress itself created. With the blessing of the Supreme Court, Congress has in recent decades delegated broad legislative powers outside of the executive branch to a fourth branch of government which the founding fathers never contemplated. Today, independent agencies regulate countless aspects of American society without being subject to the accountability that comes from holding elective office. Having come to distrust its own creation, Congress has turned to the legislative veto as an easy means of making the independent agencies politically accountable for their actions. The legislative veto has also become an important element in congressional relations with the President; but it is doubtful that Congress would have come to rely so heavily on the veto if Congress were only concerned with policing its delegations to the executive branch.

The independence of the executive branch and the regulatory agencies has eroded as Congress has progressively sought to extend its power through use of the legislative veto.[7] While this

7 Every President since Woodrow Wilson has questioned the constitutionality of the legislative veto. *See, e.g.,* 59 CONG. REC. 7026-27, 8609 (1920) (Wilson); 76 CONG. REC. 2445 (1933) (Hoover); 83 CONG. REC. 4487 (1938), 90 CONG. REC. 6145 (1944) (Roosevelt); 97 CONG. REC. 5374-75 (1951), 98 CONG. REC. 9756 (1952) (Truman); 100 CONG. REC.

erosion has taken place, the judicial branch has been reluctant to interfere with political accommodations between the elected branches. The only federal court to rule on the constitutionality of a legislative veto provision to date has been the United States

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7135 (1954), 101 CONG. REC. 10459-60 (1955), 1956 PUB. PAPERS 597, 648-50 (Eisenhower); 1963 PUB. PAPERS 6 (Kennedy); 1963-64 PUB. PAPERS 861-62, 1249-51, 1 WEEKLY COMP. OF PRES. DOCS. 132, 432-33 (1965), 111 CONG. REC. 12639-40 (1965) (Johnson); 8 WEEKLY COMP. OF PRES. DOCS. 938, 1076 (1972), 9 WEEKLY COMP. OF PRES. DOCS. 1285-87 (1973) (Nixon); 10 WEEKLY COMP. OF PRES. DOCS. 1279 (1974) (Ford); 13 WEEKLY COMP. OF PRES. DOCS. 1186, 1726 (1977), 14 WEEKLY COMP. OF PRES. DOCS. 1146, 1155 (1978), 15 WEEKLY COMP. OF PRES. DOCS. 491, 495, 502 (1978-1979), 126 CONG. REC. S5480 (May 8, 1979) (Carter). *See also* Jackson, *A Presidential Legal Opinion,* 66 HARV. L. REV. 1353, 1357-58 (1953) [hereinafter cited as Jackson] (publishing confidential opinion on unconstitutionality of legislative veto prepared by President Roosevelt).

Legislative veto mechanisms have been challenged in opinions of the Attorney General. *See, e.g.,* 37 OP. ATT'Y GEN. 56 (1933); 41 OP. ATT'Y GEN. 32 (1955); 41 OP. ATT'Y GEN. 230 (1955); 41 OP. ATT'Y GEN. 47 (1957); 43 OP. ATT'Y GEN. 10 (1977) (however, Bell believes one-house veto in 1977 Reorganization Act constitutional).

Many members of Congress have raised questions concerning the unconstitutionality of legislative vetoes. *See, e.g.,* 76 CONG. REC. 3539 (1933) (remarks of Sen. Byrnes) (reorganization legislation); 84 CONG. REC. 2477-78 (1939) (remarks of Reps. Tabor and Wolcott) (reorganization legislation); 84 CONG. REC. 3090 (1939) (remarks of Sen. King) (reorganization legislation); 87 CONG. REC. 1100, 1246, 1269, 2063-75 (1941) (remarks of Sens. Clark, Gillette, McCarran, and Murdock) (Lend-Lease Act); 97 CONG. REC. 544-43 (1951) (remarks of Rep. Patman) (appropriations legislation); 100 CONG. REC. 5095 (1954) (remarks of Sen. Dirksen) (appropriations legislation); H.R. REP. NO. 95-105, 95th Cong., 1st Sess. (1977), *reprinted in* [1977] U.S. CODE, CONG. & AD. NEWS 41-70 (remarks of Reps. Brooks, Rosenthal, Conyers and Drinan) (reorganization legislation).

Legal scholars have also debated the constitutionality of the legislative veto for some time. *See, e.g.,* Note, *"Laying on the Table" — A Device for Legislative Control over Delegated Powers,* 65 HARV. L. REV. 637 (1952); Cooper and Cooper, *The Legislative Veto and the Constitution,* 30 GEO. WASH. L. REV. 467 (1952) [hereinafter cited as Cooper & Cooper]; Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees,* 66 HARV. L. REV. 569 (1953) [hereinafter cited as Ginnane]; Comment, *Congress Steps Out: A Look at Congressional Control of the Executive,* 65 CALIF. L. REV. 983 (1975); Note, *Congressional Veto of Administrative Action: The Probable Result of a Constitutional Challenge,* 1976 DUKE L.J. 285; Note, *Constitutionality of the Legislative Veto,* 13 HARV. J. LEGIS. 593 (1976); Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 HARV. L. REV. 1369 (1977) [hereinafter cited as Bruff and Gellhorn]; Javits & Klein, *Constitutional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U.L. REV. 455 (1977) [hereinafter cited as Javits & Klein]; Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework,* 52 IND. L. J. 367 (1970) [hereinafter cited as Miller & Knapp]; Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative,* 52 IND. L. J. 323 (1977) [hereinafter cited as Abourezk]; Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?* 56 N.C.L. REV. 423 (1978); Schwartz, *The Legislative Veto and the Constitution,* 46 GEO. WASH. L. REV. 351 (1978); *See also Reorganization Hearings, supra* note 1, at 66-75 (testimony of Antonin Scalia); *id.,* at 134-37 (testimony of Philip B. Kurland); Jackson *supra. See also* 122 CONG. REC. 32391-39392 (Oct. 8, 1975) (remarks of Rep. Eckhardt) (Sinai II Legislation).

Court of Claims. In May 1977, that court held in *Atkins v. United States*,[8] that a one-house veto barring an increase in salary for federal judges was constitutional. Although the Supreme Court refused to grant certiorari in *Atkins*, guidance from the highest Court on this important issue may soon be forthcoming.[9]

Supporters of the legislative veto maintain that it is both a permissible and a desirable way for Congress to exercise oversight and control over the way in which the executive branch and the various independent agencies carry out the extensive duties which Congress has delegated to them since the New Deal.[10] These supporters argue that article I, section 8, clause

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8 556 F.2d 1028, *cert. denied*, 434 U.S. 1009 (1977) (per curiam) (en banc). The constitutional issue of the one-house veto was decided by a 4-3 margin. Judge Skelton dissented on this point in an opinion in which Judges Kashiwa and Kunzig joined, *id.* at 1075. Judge Kashiwa also filed an opinion, *id.* at 1092. The judges' claim that the combination of inflation and Congressional refusal to increase judicial salaries had reduced their compensation in violation of U.S. CONST. art. III, § 1 was rejected unanimously.

The legislative veto issue was raised, but not adjudicated, in previous litigation. The Supreme Court had "no occasion to address" the issue in its consideration of the constitutionality of the Federal Elections Campaign Act, Buckley v. Valeo, 424 U.S. 1, 140 n.176 (1976) (per curiam). Another challenge to the one-house veto provision in that statute was dismissed for lack of standing. Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam) (en banc), *aff'd sub. nom.* Clark v. Kimmitt, 431 U.S. 950 (1977). A challenge to the legislative veto provision in the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 4(a)(2), 87 Stat. 657, 15 U.S.C. § 753 (1976) was rejected on similar grounds. Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 420 F. Supp. 162 (S.D. Ala. 1976). Several judges, however, have expressed opinions on the legislative veto. *Compare Buckley, supra,* at 284-86 (White, J., concurring in part and dissenting in part) (one-house veto constitutional) *with Clark, supra,* at 678, 684-90 (Mackinnon, J., dissenting) (one-house veto unconstitutional).

9 Section 244(c) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1254(c)(2) (1976) provides for a one-house veto of suspensions of deportations. In Chadha v. Immigration and Naturalization Service, No. 77-1702 (9th Cir., filed July 6, 1977), that provision has been challenged by an alien whose deportation was first suspended by administrative action, then ordered by H. Res. 926, 94th Cong., 1st Sess. (1975), 121 CONG. REC. 40800 (Dec. 16, 1975). Both the petitioner and the Solicitor General (on behalf of INS) have challenged the constitutionality of § 1254(c)(2). *See* Brief for Respondent, *Chadha supra,* at 7-10. As in *Atkins, supra* note 8, at 1038-40, where the Department of Justice argued against the one-house veto's constitutionality, the Senate and House have been asked to file briefs as *amici curiae* in support of § 1254(c)(2)'s constitutionality. Brief for Petitioner, *Chadha supra,* at 8 n.6.

10 In September 1976, the House of Representatives nearly passed a bill that would have made virtually all the independent regulatory agencies subject to legislative veto. *See* H.R. 12048, 94th Cong., 2d Sess. (1976), *defeated* 122 CONG. REC. H10718-19 (Sept. 21, 1976) (265 for - 135 against, but two-thirds required). In September 1978, the House blocked an appropriations bill for the Federal Trade Commission (FTC) after the Senate refused to extend legislative veto authority to all of that agency's regulations. *See* H.R.

18, of the Constitution, which gives Congress the power to enact legislation "necessary and proper" to carry out its other powers, legitimates the use of the legislative veto.[11] In most cases, legislative veto proponents emphasize the flexibility of the Constitution and minimize the importance of precise conformance to the procedure it establishes for the passage of legislation.[12] In their view, the actual exercise of a legislative veto should not be considered an independent legislative act, because such exercise has been expressly provided for by formal legislation in the first instance. Thus, proponents contend, a veto derives its legal force from the original legislation, which *was* subject to presidential veto and the procedural safeguards mandated by article I.[13] Finally, some supporters justify the legislative veto by arguing that it is a mere delegation of legislative power from Congress back to itself in a manner similar to the accepted practice of delegations to administrative agencies.[14]

Opponents of the legislative veto maintain that it distorts the distribution of power which existed during the first 150 years of our Constitution, and that the courts should monitor its development and adjudicate its validity as they have decided other separation of powers issues. Indeed, in other contexts, such as the appointment power holding in *Buckley v. Valeo*,[15] the Supreme Court has enforced the separation of powers even where Congress and the President have agreed otherwise. Opponents argue that change in the authority granted by statute or in the methods it prescribes for implementation requires a new act of legislation, and that to attempt to do so by less than a

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3816, 95th Cong., 2d Sess. (1978), 124 CONG. REC. H11019-32 (Sept. 28, 1978). The Senate has continued to oppose such blanket use of the legislative veto in legislation restricting the FTC now before the 96th Congress. *See* 126 CONG. REC. S1074-1082 (Feb. 6, 1980).

11 *See, e.g.*, Brief Amicus Curiae on Behalf of Frank Thompson, Jr., Chairman, House Committee on Administration, *Atkins, supra* note 8; Brief Amicus Curiae on Behalf of Nelson A. Rockefeller, President of the United States Senate, *id.*

12 *See, e.g.*, Cooper & Cooper, *supra* note 7, at 505; Miller & Knapp, *supra* note 7, at 370-78; Javits & Klein, *supra* note 7, at 455-56; Abourezk, *supra* note 7, at 323-43; Note, 13 HARV. J. LEGIS. at 616-19, *supra* note 7.

13 *See* Javits & Klein, *supra* note 7, at 482-83.

14 *See* Miller & Knapp, *supra* note 7, at 378-79.

15 424 U.S. 1 (1976).

new statute is a violation of the President's veto power in article I, section 7, and, in some forms, of the bicameral principle in article I, section 1. If the legislative veto is viewed as a mere delegation of power back to Congress, opponents assert that it does not satisfy the constitutional requirements for permissible delegation since no standards for action are defined. As regards some forms of legislative veto, opponents make the additional argument that efforts by Congress to control the implementation of *ad hoc* legislation invade the executive power of the President in article II, sections 1 and 3.

The following discussion examines the constitutional arguments on both sides. Part I considers whether the nature of the legislative veto is such that its use should be considered tantamount to formal legislation. Part II discusses the argument that the legislative veto is analogous to accepted notions of delegation of authority to federal agencies. Finally, Part III examines those aspects of executive power *implicated* by the legislative veto.

I. Is The Legislative Veto An Act of Legislation?

> All legislative Powers herein granted shall be vested in a Congress of the United States, which consists of a Senate and House of Representatives.[16]
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the Rules and Limitations prescribed in the Case of a Bill.[17]

A bill providing for a legislative veto, like any other act of Congress, must be adopted through constitutional means. Both the Senate and House of Representatives must approve by majority vote the enabling act pursuant to the bicameral legislative power vested in them by article I, section 1. The President may then sign or veto the bill pursuant to the

16 U.S. Const. art. I, § 1.
17 U.S. Const. art. I, § 7, cl. 3.

legislative power vested in him by article I, section 7. Should the President choose to veto the legislation, Congress may override his veto by a vote of two-thirds of the members of *both* houses pursuant to the legislative power vested by article 1, section 7.

Once legislative veto authority is enacted into a statute, the specified unit or units of Congress may later exercise the authority reserved therein simply by passing a resolution or, in some cases, by doing nothing at all. The issue under article I is whether Congress may, by legislative veto, unilaterally terminate or modify authority previously given to others, or whether such change requires a repetition of the full legislative process. In short, the issue is whether the second stage of the legislative veto process is itself a legislative act.

A. *The Formal Requirements for Legislation*

The first sentence of the Constitution grants the "legislative Powers" to a bicameral Congress. This form of legislature represented a basic change from the unicameral structure which existed under the Articles of Confederation.[18] The Framers of the Constitution hoped that the inevitable friction incident to this distribution of legislative power would serve as a countervailing force to the unwanted development of an imperial Congress.[19] In this sense, the bicameral principle is Congress' own internal separation of powers doctrine.

As a further "check" on the legislative power of Congress, article I, section 7, contains two separate clauses on the presidential veto. Clause 2 provides a lengthy description of the process by which "Every Bill" passed by both houses is subject to the President's veto. Clause 3 extends the provisions of clause 2 to "Every Order, Resolution, or Vote" as an additional constitu-

18 ARTICLES OF CONFEDERATION, art. V (1783).

19 Efficiency was consistently sacrificed for safeguards against the exercise of arbitrary legislative power. The "Great Compromise" gave the populous states more voting strength in the House of Representatives and the smaller states equal representation in the Senate. *See* THE FEDERALIST No. 62 (J. Cooke ed. 1961).

See, e.g., Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). *See also Congressional Oversight of Executive Actions — 1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary,* 94th Cong., 1st Sess. 67-203 (1975) (testimony of Antonin Scalia); *To Renew the Reorganization Authority: Hearings on S. 626 Before the Sen. Comm. on Government Operations,* 95th Cong., 1st Sess. 47-52 (1975) (letter of Antonin Scalia).

tional safeguard against any congressional attempt to evade the President's veto power through the passage of "bills" under a different name.[20] Both clauses guarantee the efficacy of the President's participation in the legislative process by raising the threshold of congressional consent to two-thirds of the members of each house when the President withholds his consent, as opposed to a majority of their members when the President gives his consent.[21] Congress bypasses this constitutionally-established procedure when it acts by legislative veto. The constitutional issue, therefore, is whether Congress can attain legislative ends by means of the legislative veto.

B. *The Legislative Character of Legislative Vetoes*

Article I, section 1 of the Constitution allocates "legislative Power" but does not define the power to "legislate." Whether a congressional act must satisfy the formal requirements set forth in article I depends upon whether the act in question is "properly to be regarded as legislative in its character and effect."[22] A resolution which only involves matters internal to

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20 James Madison observed during the debate over the text of U.S. CONST. art. I, § 7, cl. 2 that "if the negative of the President was confined to bills it would be evaded by acts under the form and name of Resolutions, votes, etc. . . ." To build in a safeguard against such evasion, Madison drafted language for that section proposing that "or resolve" be added after the word "bill." Madison's notes show that his proposal was originally rejected "after a short and rather confused conversation on the subject." Edmund Randolph, "having thrown [Madison's ideas] into a new form" reintroduced the proposal the next day. It was passed by the drafting committee by a vote of 9 to 1. M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1789 at 301-05 (rev. ed. 1937).

21 The Framers considered making it easier for Congress to repeal a statute, once enacted, than to enact one, but this alternative was flatly rejected. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 714-15 (1927) *quoted in* Ginnane, *supra* note 7, at 587.

22 One congressional committee attempted to define "legislation" in this way:

> Whether concurrent resolutions are required to be submitted to the President of the United States, must depend, not upon their mere form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President, to 'which the Concurrence of the Senate and House of Representatives may be necessary,' refers to the necessity occasioned by the requirement of the other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the

Congress cannot be deemed legislation. By the same token, resolutions which express the "sense of the Senate" or the "sense of the House of Representatives" on matters of national importance are not deemed legislation.

The clearest example of a legislative veto that is "legislative in its character and effect" is one which entirely terminates a statutory delegation. For example, Congress reserved the power to terminate the operation of the Lend-Lease Act by the passage of a concurrent resolution.[23] Through the exercise of such a power, the entire legal force of a statute could be abruptly ended by Congress in one guillotine stroke without any presidential involvement.[24] Yet, constitutional case law makes it clear that "to repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice."[25]

Legislative vetoes that repeal statutory delegations on an *ad hoc* basis would also appear to be of a legislative character requiring full legislation. The target of repeal does not have to be the whole enabling statute, as in the Lend-Lease Act, but may also be a selected action taken by an independent agency or the President.[26] In fact, most legislative vetoes are this type, repealing particular actions taken pursuant to an ongoing administrative program. Under the 1967 Federal Salary Act, for

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President. In brief, *the nature or substance of the resolution, and not its form, controls the question of its disposition.*

S. REP. No. 1325, 54th Cong., 2d Sess. § 8 (1897) (emphasis added).

23 Ch. 11, § 3(c), 55 Stat. 32 (1941). During the 1919 Senate debate on the Treaty of Versailles, Senator Henry Cabot Lodge proposed a reservation which would have allowed Congress to withdraw the United States from the League of Nations by passage of a concurrent resolution. 53 CONG. REC. 8022-23 (Nov. 6, 1919). While the Lodge Reservation was approved by the Senate, it never became law, as the Senate rejected the treaty as a whole. 59 CONG. REC. 4599 (Mar. 19, 1920).

24 *See* Jackson, *supra* note 7 (President Roosevelt believed the provision was unconstitutional on these grounds).

25 Matter of Moran v. La Guardia, 270 N.Y. 450, 452, 1 N.E.2d 961, 962 (1936). If a Presidential veto is cast, Congress cannot repeal a law if one-third of the members of one house (plus one) oppose repeal.

26 "[I]t would seem that the veto power over administrative rules would really just be another aspect of the amendatory power that Congress inherently possesses." *Congressional Review of Administrative Rulemakings: Hearings on H.R. 3658, H.R. 3231, and Related Bills before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 381 (1975) (remarks of Rep. Walter Flowers). *But see* Brief for Plaintiffs, *Atkins, supra* note 8. *See generally* Ginnane, *supra* note 7, at 593-97.

example, the President's recommendations for judicial salaries were to become effective thirty days after submission to Congress unless either house passed a resolution of disapproval within that period.[27] The *Atkins* case involved a challenge to Senate Resolution 293 which utilized this statutory authority to reject a pay increase for judges proposed by President Nixon.[28] This unicameral veto, which was sustained by the Court of Claims in *Atkins,* did not repeal the entire statutory delegation but only one submission of recommendations under it.[29]

Moreover, fresh legislative judgments are made when only selected portions of delegated acts are repealed through con-

27 Postal Revenue & Federal Salary Act of 1967, Pub. L. No. 90-206, § 225(1)-(2), (1967), 2 U.S.C. § 359(1)-(2) (Supp. 1975), *amended by* Pub. L. No. 95-19, § 401, 91 Stat. 45 (1977). The original version of 2 U.S.C. § 359 contains an example of the most frequently used one-house resolution of disapproval:

> (1) Except as provided in paragraph (2) of this section all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirteenth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—
>
> (A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations.
>
> (B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendation, or
>
> (C) both.
>
> (2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect.

The majority opinion in *Atkins, supra* note 8, correctly construed the word "legislation" in § 359(1)(B) of the Salary Act to mean "simple resolution." This interpretation was provided so as not to frustrate the "intent of Congress" to authorize the "use of the simple resolution to block the otherwise automatic effectiveness of the President's recommendations." 556 F.2d at 1057.

28 120 CONG. REC. 5508 (Mar. 6, 1974). Of course, were the President's recommendations fully rejected each time he made them, the delegation of authority would be nullified with the same legislative effect as a statute providing for complete termination of authority by only one legislative veto action.

29 U.S. CONST. art. I, § 9, cl. 7, gives Congress the power to appropriate public funds. Had the Senate and House of Representatives refused to appropriate funds for the future indexation of judicial salaries to inflation, all the formalities required for the passage of legislation would have had to have been followed. Nevertheless, it was held in *Atkins* that "the appropriation authority granted Congress under U.S. CONST. art. I, § 9, cl. 7, confirms its authority to fix the level of compensation" for judges by a simple resolution of one house. 556 F.2d at 1060. *Atkins* stands for the mistaken proposition that if Congress can withhold something from the President in a manner prescribed by the Constitution, it necessarily has an implied power to achieve the same result by other means of its own choosing. Yet, even in the fixing of congressional compensation, both houses of Congress must follow the legislative procedure. U.S. CONST. art. I, § 1, cl. 7.

gressional resolution. This kind of repeal allows all or part of Congress to pick-and-choose among the elements of an agency proposal rather than fulfill the constitutional requirement that the proposal be voted on as a whole. For example, sections 359(1)(B) and (2) of the 1967 Federal Salary Act provided each house with the authority to "item veto" both the substance and the timing of each set of presidential recommendations.[30]

It has been argued that in certain circumstances repeal by legislative veto does not amount to legislation in a constitutional sense.[31] Does law on the books change when Congress delegates authority to modify existing legislation subject to veto and then utilizes that power to block an executive or agency action?[32] When Congress rejects such proposals for change, is it only repealing inchoate law?[33] In finding the unicameral veto constitutional in *Atkins*, the Court of Claims emphasized its non-legislative effect.[34] The court felt that, because the judges' salaries continued to be fixed at the same level by an earlier

30 2 U.S.C. § 359(1)(B) allowed either house to disapprove "all or part" of the President's recommendations. 2 U.S.C. § 359(2) allowed either house to decide whether the President's recommendations should "be made operative on a date later than the date on which such recommendations otherwise are to take effect." These provisions were attacked in Judge Skelton's separate opinion in *Atkins*, which noted that either house under this provision could act

> "selectively, that is, they [could] veto 'all or part' of the salary adjustments made by the President and there is no recourse or appeal from their decision. In this manner they can dictate, change, or rewrite the salary adjustments made by the President. Not even the President has such an 'item veto' nor the security that his veto will not be overriden."

556 F.2d at 1075, 1079 (concurring in part and dissenting in part). *See also Atkins, supra* note 8, at 1064 n.26. In the event the Senate and House of Representatives made different changes in the President's recommendation, a conference committee would presumably have been required to work out a compromise veto resolution.

31 *See, e.g.*, Justice White's opinion in *Buckley, supra* note 8, at 284; Javits & Klein, *supra* note 7, at 482-83; Schwartz, *supra* note 7, at 374-75.

32 In *Atkins, supra* note 8, the Court of Claims majority appeared to believe that Congress did not delegate veto authority back to itself, but delegated legislative authority to "the President unless one house objects." Congress, however, may only make conditional delegations if the condition itself is constitutional:

> "Congress can confer jurisdiction upon the courts, but it cannot confer jurisdiction subject to the condition that judicial decisions must first be approved by the Senate Committee on the Judiciary. In other words, whether Congress can condition a delegation of authority depends upon the validity of that particular condition."

556 F.2d at 1086. (Skelton, J., concurring in part and dissenting in part).

33 *See Atkins, supra* note 8, at 1063. *See also* FTC v. Rubberoid Co., 343 U.S. 470, 485-87 (1952) (Jackson, J., dissenting); Schwartz, *supra* note 7, at 374-75.

34 "To the extent the recommendations of the President become effective, they

statute, the Senate veto did "not alter the existing law in any fashion, but only preserve[d] the legal status quo."[35] The court reasoned that further legislation was not required so long as old law was being kept rather than new law being made.[36] Nevertheless, the fact that a legislative veto does not modify existing law, but merely maintains it unaltered, does not mean that the veto is not of legislative character. The constitutional measurement of article I is concerned with who ultimately determines the content of prevailing law rather than whether other statutes are modified. Under such a statutory scheme, executive proposals for change are more than mere recommendations, because at the expiration of the waiting period they become law in the absence of congressional disapproval. Since the proposals themselves are the embodiment of legislation that has already been passed by Congress, their nullification aborts law that would otherwise take effect. Can Congress, in effect, change the ordinary constitutional requirement for repeal by "bootstrapping," by reserving the right to repeal by less than full legislation?

Where only authority to implement the law is delegated, a legislative veto provision may also reserve authority to frustrate attempts at such implementation. But, if the responsible congressional body fails to pass a veto resolution, it has effectively approved the implementation of, or the change in, the law. For example, under the Federal Election Campaign Act of 1971, the Federal Elections Commission was delegated authority to impose on candidates requirements for reporting contributions and expenditures, subject to veto by either house within thirty legislative days.[37] In *Clark v. Valeo,*[38] New York senatorial candidate Ramsey Clark challenged these disclosure requirements. The Court of Appeals treated "nonaction" under this one-house veto provision as not "equivalent to legislation,"

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modify, supersede, and render inapplicable any prior inconsistent provisions." 556 F.2d at 1057. Since the President's salary proposal was kept from going into effect by the Senate, the Court of Claims reasoned that it never became law because there had been no change in the "legal status quo." *Id.* at 1062-64.

35 *Id.* at 1063.

36 *Id.* at 1062-64.

37 5 U.S.C.A. § 438(c), *as amended* (West Cum. Supp. 1977).

38 559 F.2d 642, *supra* note 8.

relying upon dictum by Justice White in *Buckley v. Valeo.*[39] By confirming what the Commission did, this "nonaction" by Congress most decidedly changes Clark's "legal status quo," and cannot be considered a "non-legislative" act under the *Atkins* formula.[40]

C. *Bicameralism and the Presidential Veto*

Assuming that a legislative veto, in some forms, is a "legislative act," still another issue arises under article I, section I of the Constitution. Is the bicameral requirement satisfied by a legislative veto provision that permits either the Senate or the House of Representatives acting alone to block proposed action? The Reorganization Act of 1977, for example, provides that the President may submit plans to reorganize the executive branch which take effect unless either house passes a resolution of disapproval within sixty days.[41] With respect to this legislation, former Attorney General Griffin Bell asserted that the

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39 424 U.S. 1, 284-85 (1976) (White, J., concurring in part and dissenting in part). Although the Court in *Buckley* had "no occasion to address" the one-house veto provision under the 1971 Federal Election Campaign Act, *id.* at 150 n.176, Justice White expressed his view that "nonaction" was not "equivalent to legislation." He argued that the President's consent was unimportant where an independent agency charged with implementation takes action and neither house objects. But the courts should intervene, he argued, where "Congress *itself* purported to adopt and propound regulations by actions of both Houses." *Id.* at 285 (emphasis added). Justice White drew a constitutional distinction between the power of either house to disapprove agency lawmaking and the power of either house to adopt and propound agency regulations.

40 In *Clark,* the Court of Appeals found the plaintiff's claims "unripe" for adjudication because he had no specific veto resolution to challenge. Yet Clark was directly affected by regulations which the Federal Elections Commission proposed and which never became formally effective because the Congress adjourned before the end of the statutory layover period. 559 F.2d at 649. The facts of *Clark* thus fell within the "nonaction" exception announced by Justice White in *Buckley.* In two vigorous dissents in *Clark,* Judges MacKinnon and Robinson concluded that the mere existence of the one house veto provision created a "Damoclean congressional purview" and that this "action" gave Clark a ripe case and controversy. *Id.* at 664 (Robinson, J., dissenting); *id.* at 678 (MacKinnon, J., dissenting).

> "[T]o assert that Congress does nothing when the vote or action of Congress is to *not veto* [sic] a regulation is merely to play with words and to deny reality. Such interpretation of the legislative veto situation incorrectly describes what happens when Congress decides to not veto [sic] a regulation. That result is definite action — not 'nonaction.' "

Id. at 687. (MacKinnon, J., dissenting).

41 Reorganization Act of 1977, 5 U.S.C.A. § 906 (West Supp. 1979) Rep. Jack Brooks, Chairman of the House Government Operations Committee, opposed the one-house veto authority in the original reorganization bill on the basis of its divergence

one-house veto would be the functional equivalent of an affirmative bicameral veto because "both Houses have equal power with respect to the congressional decision to accept or reject the reorganization plan."[42] Bell did not read article I, section 1 as imposing a duty on each house to express its consent affirmatively. Instead, he found it sufficient that each house retained "the right that there be no change in the law without its consent."[43] But such an interpretation has serious ramifications, since it dispenses with legislative formalities and sets a precedent for further deviations from the law-making procedure mandated by the Constitution.

Even if a particular form of legislative veto does not run afoul of article I, section 1, of the Constitution, all legislative vetoes raise issues under article I, section 7. When a bill incorporating a legislative veto provision is passed, the President has an opportunity either to sign the bill or to veto it. But Congress apparently believes that subsequent veto resolutions made pursuant to the enabling legislation can be rendered constitutionally immune to a second presidential veto.[44] Supporters of this view claim that the legislative veto is not "legislation" and therefore not subject to presidential veto.

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from the bicameral principal of U.S. CONST. art. I. He argued that both houses should be obliged to vote "up-or-down" on each of the President's plans. As enacted, the 1977 Reorganization Act, 5 U.S.C. §§ 910, 912, virtually assures a vote by both the House and the Senate on every plan through a special procedure allowing a single member to force a floor vote. H.R. REP. No. 95-105, *supra* note 7, at 8-9, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 498.

42 OP. ATTY. GEN. No. 10, *reprinted in Reorganization Hearings, supra* note 1, at 45-46.

43 Under *Atkins,* Attorney General Bell's bicameral interpretation cannot be limited to the one-house veto in the 1977 Reorganization Act. In *Atkins,* the Court of Claims held that the one-house veto in the 1967 Federal Salary Act "neither expands nor contracts the powers of either House of Congress severally." 556 F.2d at 1063. The Court of Claims did suggest, however, that a "'veto' . . . imposed by one committee of Congress or one member" might violate bicameralism. *Id.* at 1064.

44 The Senate Foreign Relations Committee has stated that:

> The President will, if that bill passes each House, have an opportunity to veto it; if the bill is enacted, any resolution subsequently adopted pursuant to that statute will derive force not from itself, but from the enabling Act in which it is incorporated. Were the Congress to attempt, without first enacting S.2662, to exercise by resolution any of the legislative vetoes contained in S.2662, then the Committee believes that the presentation clause would require that such resolution be presented to the President for his signature.

S. REP. No. 94-605, 94th Cong., 2d Sess. 11 (1976).

But see National League of Cities v. Usery, 426 U.S. 833, 841-42 n.12 (1975) (Presi-

In some instances, the President would not have occasion to use his own veto and might not object to being deprived of its use. In legislative arrangements where the President submits a proposal for approval by both houses, the process may be seen as "reverse legislation."[45] Under the Reorganization Act of 1977, the President proposes a plan and either house may block it by passing a resolution.[46] Former Attorney General Bell asserted that this reorganization statute respects the President's veto power because he retains "ultimate veto power in his formulation of the reorganization plan."[47] The "unique" nonrecurring nature of this program allows the President to

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dent's approval of a statute has no bearing on its constitutionality). Brief for Petitioner, *Chadha, supra* note 9.

45 U.S. CONST. art. II, § 3 states that the President shall "recommend to their [Congress'] consideration such Measures as he shall judge necessary and expedient." But the Constitution says nothing about reverse legislation. Political scientist H. Lee Watson has argued that "reverse legislation" provisions are an exception to a general constitutional rule against the legislative veto. Comment, 65 CALIF. L. REV. 983, *supra* note 7, at 1072 (1975). In the limited context of reorganization legislation, he has noted:

> "Both the President, who formulates the proposal, and Congress, which passes upon the proposal, exercise power equivalent to that which they exercise in the 'legislative scheme.' The President has ultimate veto power through his formulation of the proposal. He will submit only proposals he approves, or he may refuse to submit any proposal. Congress will act favorably on the proposal only if both Houses approve. [This] . . . procedure may thus be termed 'reverse legislation,' for it merely reverses in time the final exercise of power by the President and Congress. Since there is no constitutionally significant impact on government power, this procedure must be judged a valid technique for responding to executive proposals."

Id. Watson has cautioned, however, that his "reverse legislation" theory is inapplicable where Congress employs the veto on a pick-and-choose basis rather than on a take-it-or-leave-it basis:

> "In that case Congress would be creating a power to affect governmental organization without presidential assent and without necessity for override of his veto. This would preserve the power that enabled Congress to pass such a statute initially. Though the President could still respond by refusing to submit a reorganization plan, any plan which he did submit would amount to a blank check and would portend domination of the Executive."

Id.

46 Throughout the full 60-day waiting period, the President is allowed to withdraw any reorganization plan. For the first 30 days, he may amend a plan any way he wishes. 5 U.S.C.A. § 903(c) (West Supp. 1979). Previous reorganization acts apparently did not allow the President to change or withdraw his plans once submitted to Congress. *See* H.R. REP. No. 95-105, *supra* note 7, at 7, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 497. In those circumstances, if Congress had approved a plan which the President had rejected, Watson's "reverse legislation" theory would not apply.

47 In his opinion on the Reorganization Act of 1977, *supra* note 7, *reprinted at Reorganization Hearings, supra* note 1, at 40-41, Attorney Bell adopted Watson's "reverse legislation" theory almost verbatim. *See* note 45 *supra.*

submit to Congress, in the Attorney General's words, "only plans which he approves and rather than be forced to accommodate the demands of Congress as to the shape of the plan, he can decide to submit no plan at all."[48]

This "reverse legislation" rationale, however, is not limited to reorganization legislation. Under the Federal Salary Act of 1967, the President also consents in advance to changes in existing law when he makes recommendations for salary increases.[49] Should the President withdraw his support for "reverse legislation," the Constitution requires Congress to observe formal legislative procedures and to allow a presidential veto to prevail in the absence of an override by two-thirds of the members of each house.

D. *Is the Legislative Veto "Necessary and Proper"?*

Despite the failure of the legislative veto to comply with the aforementioned formal constitutional requirements, proponents argue that the veto should be sustained as "necessary and proper" to carrying out other powers of Congress.[50] In *Atkins*, the Court of Claims found this argument persuasive.[51] The Court argued that the "necessary and proper" clause supported an article I, section 1 "legislative power" authorizing unilateral reversals of presidential decisions.

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48 *Id.*

49 Because "[t]here are no elements of the regulation or enforcement of, or of the planning or carrying on of, an ongoing or continuing program" under the 1967 Federal Salary Act, the Court of Claims found that the President "is not forced to recommend any increase or decrease" in salaries, making it similar to reorganization legislation. *Atkins, supra* note 8, at 1065.

50 U.S. CONST., art. I, § 8, cl. 18, vests in Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

51 The Court of Claims found the "constitutional underpinning" of the *Atkins* veto in "a combination of art. I, § 1, placing the legislative power in Congress, and art. I, § 8, cl. 18, the so-called 'necessary and proper' clause." 556 F.2d at 1061. Since the "necessary and proper" clause has "sanctioned the massive delegation of legislative functions over the past century," the court thought it should provide "a firm grounding for this legislative veto." *Id.* at 1071. The court also stated that "where there has been no violation of separation of powers principles or of any specific provision of the Constitution, the necessary and proper clause can authorize a given method of obtaining a desired result, as well as ground a substantive provision." *Id.* at 1061. *See also amicus* briefs filed on behalf of Nelson Rockefeller, and Frank Thompson, Jr., in *Atkins, supra* note 11.

The "necessary and proper" clause has long been held to grant Congress a power to legislate in addition to the powers enumerated in article I, section 7, in order to support the ends toward which those other powers are directed.[52] Yet, nothing in the clause suggests that Congress may legislate other than in conformity with the procedures set forth in article I, section 1 and article I, section 7, when it deems it necessary or proper. Such a construction would give Congress, in effect, the power to amend the Constitution by merely enacting a statute.[53] If the legislative veto is indeed legislation, it cannot be enacted by less than legislative procedure, whether Congress purports to act under the "necessary and proper" clause or under one of its specific powers. That clause cannot be read to allow an evasion of the other established provisions of article I.

II. Is the Legislative Veto a Permissible "Delegation"?

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of the Senate and House of Representatives.[54]

The bland first sentence of the first article of the Constitution grants the legislative power to Congress. By implication, this clause establishes important limitations on the delegation of the legislative power.[55] The Supreme Court has squarely held that Congress may not delegate authority to the President or to independent agencies without establishing some standards on the face of the statute to guide the exercise of the delegation.[56] Only Congress, acting as a whole, may legislate. Accordingly, Congress has no authority to delegate its legislative powers to other

52 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

53 *See* Brief for Respondent, *Chadha, supra* note 9.

54 U.S. Const. art. I, § 1.

55 "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1892). Hence, the Supreme Court has developed the doctrine of delegated powers to enforce, and at the same time to make workable, the separation of powers.

56 *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schecter Bros. Poultry Corp. v. United States, 295 U.S. 495 (1935). In *Schecter,* a provision of the National Industrial Recovery Act of 1933 authorizing the President to promulgate "codes of fair competition" was found to be a blank check rather than a real guideline for the exercise of the delegation. Justice Cardozo, in his concurrence, saw this as "delegation running riot":

bodies unless it also sets forth in the enabling statute, standards identifying the acts or class of acts encompassed by the delegation.[57]

Some supporters of the legislative veto argue that even if the veto is considered a legislative act, it is one which may be exercised by appropriate delegation from Congress. The legislative veto is seen as a mere delegation of power by Congress to one or both houses, to a committee, or to a committee chairman.[58] If Congress may delegate legislative power to others, the argument goes, surely it can delegate that power back to all or part of itself.[59]

Yet, the legislative veto is not really a delegation of power. Rather, it is a reservation of authority. Labelling the veto as a "delegation" by Congress back to itself should not obscure the fact that the veto fails to satisfy the constitutional requirements

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> The delegated power of the legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . . [It is] [n]ot confined to any single act nor any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

Id. at 551, 553. *See also, e.g.*, State Board of Dry Cleaners v. Thrift-t-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 59 (1953); Bell Tel. Co. of Pa. v. Driscoll, 343 P. 109, 21 A.2d 912 (1941); Chapel v. Commonwealth, 197 Va. 406, 89 S.E.2d 337 (1955) (finding state laws to be invalid under state constitutions for excessive delegation).

57 *See* note 56 *supra*. But the Supreme Court has not squarely held that the same limits on delegation to the executive are applicable to independent regulatory agencies. Nat'l Cable Tel. Ass'n v. United States, 415 U.S. 336 (1974) (fee-setting authority of the Federal Communications Commission narrowly construed to avoid reaching the question of excessive delegation). *But see id.* at 352, 353 (Marshall and Brennan, JJ., dissenting). It is arguably an open question whether Congress would be held to as high a standard of specificity in statutes delegating power as to independent regulatory agencies.

58 The legislative veto has been analogized to delegation cases which recognize Congress' power to prohibit the exercise of delegated legislative authority until the occurrence of specified conditions subsequent, *e.g.*, changes in the foreign trading posture of the U.S., J.W. Hampton & Co. v. United States, 276 U.S. 394 (1927); the existence of a state of war between two nations, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); and acceptance by farmers of a federal agriculture program, *e.g.*, United States v. Rock Royal Cooperative, Inc., 307 U.S. 533 (1939), Currin v. Wallace, 306 U.S. 1 (1939), H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939).

59 "[I]f the Secretary of Agriculture may be delegated powers the exercise of which is subject to a referendum vote of producers from time to time, then why may not the two Houses of Congress be similarly authorized to hold a referendum now and then as to the desirability of the President's continuing to exercise legislatively delegated powers?" E. CORWIN, THE PRESIDENT — OFFICE AND POWERS 1787-1957, 130 (4th ed. rev. 1957). The enabling legislation is seen as establishing a rival "delegation" in Congress to regulate the delegation operating outside of Congress. *But see* Ginnane, *supra* note 7, at 595.

for the delegation of power. It must first be asked whether any clear standards for the use of the legislative veto are set forth in the authorizing statute. Even if such standards are found to exist, it must then be determined whether there is any way to ascertain if Congress has followed these standards in applying the veto.

Congress currently does not set any standards to guide the application of its vetoes. Some supporters of the legislative veto point out that the courts have accepted vague standards, such as "the public interest," for the delegation of power, which, in effect, are no standards at all. Since Congress cannot violate the separation of powers by abdicating its legislative power, these supporters contend that the two-house veto is an acceptable substitute for the precise guidelines required for the delegation of power.[60] Accordingly, Congress defines standards for the use of delegated power when it exercises the legislative veto. But this argument begs the question. From its earliest decisions on delegation, the Supreme Court has held that an enabling statute must set forth "an intelligible principle" to which the delegatee must conform.[61] This necessity for constitutional standards would seem to apply regardless of whether Congress chooses to view its power to wield a legislative veto as a "rival" second delegation or as a substitute for such standards.

Even if Congress were to write into enabling statutes constitutionally acceptable standards for use of the legislative veto, there would often be no way to judge whether those standards have been properly applied. In contrast to executive and ad-

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60 The ineffectiveness of the delegation doctrine has been advanced as a justification for use of the legislative veto:

> "[t]he veto provides a means of preserving congressional authority when broad delegations of decision-making power are required and as a means of augmenting congressional control in areas that presently are not subject to effective control through Congress' traditional oversight weapons. The veto thus helps preclude the kind of abdication of power forbidden by the separation of powers principle. . . ."

Cooper & Cooper, *supra* note 7, at 505. *See also* Javits & Klein, *supra* note 7, at 472-73.

61 *See Hampton*, 276 U.S. at 409. The Supreme Court has not held any delegation by Congress to be unconstitutional since 1935. *See Panama Refining* and *Schecter*, *supra* note 56. However regrettable this permissive trend may be, the fact remains that Congress is not acting within its legislative powers unless it places an "intelligible principle" on the face of the statute to guide its delegation.

ministrative agencies, Congress need not follow the fact-finding procedure of the Administrative Procedure Act which establishes a basis for judicial review.[62] In *Clark v. Valeo,* the late Judge Leventhal noted that "it may be relevant whether the house of Congress rejecting the proposed regulation states its reasons along with its disapproval so that the 'legislative' foundation of the basis of that rejection could be presented for court analysis."[63] The fact that Congress need not disclose its purpose raises serious problems for the legislative veto under the delegation doctrine.[64]

Similarly, there is no way of determining what prompted Congress *not* to exercise its legislative veto against a proposal that changes or implements the law. Where such a proposal takes effect unopposed by a resolution of disapproval, none of the documents usually associated with legislative history may exist at all. While legislative history is more likely to be available when there is some form of affirmative action by legislative veto, the proper weight to be attached to these materials would be uncertain since any reasons given may have no relation to the actual reasons for the use of the veto. It is unlikely that the congressional body would regard statutory guidelines as binding. Of course, the court might try to hold Congress to any such guidelines provided in the original legislation, just as the judiciary in principle has authority to confine the President and the agencies to their statutory delegation. But this task may prove impossible.

Finally, the legislative veto differs from delegation case law in another fundamental respect. Whereas delegation cases give the delegatee authority to implement the congressional will, some forms of legislative veto "delegate" authority to repeal or modify what Congress has previously done. In each case in which the Supreme Court has upheld Congress' power to delegate with conditions, the delegation was limited to the triggering of statutory authority. In *Currin* v. *Wallace,*[65] the imple-

62 5 U.S.C. §§ 553, 556-57, 706 (1976).

63 *See Clark, supra* note 8, at 659 (concurring opinion).

64 *See* 121 CONG. REC. 40800 (Dec. 16, 1975) (remarks of Rep. Joshua Eilberg) (giving no reason for exercise of legislative veto now under challenge in *Chadha, see* note 9 *supra).*

65 306 U.S. at 14-15, *supra* note 58.

mentation of a federal agriculture program was made contingent upon the vote of affected tobacco farmers. Here, the legislative judgment had already been made and standards set when the statute was enacted, so that the farmers were free only to act within the statute, not repeal it. Surely when no standard is provided, authority to terminate legislative authorization seems not to carry out the original congressional intent, but rather constitutes a new judgment requiring full legislation.

In fact, Congress does not wish to be limited by original legislative policy or by any standards for later repeal or modification. What it arguably seeks to do is create a new power to make legislative judgments free of traditional constitutional constraints. Congress apparently wants to make legislative policy as it goes along without having to compromise with the President under threat of his veto. It, therefore, seems difficult to characterize the legislative veto as a delegation and bring it within accepted delegation doctrine.

III. Is the Legislative Veto an "Executive" Act?

> The executive Power shall be vested in a President of the United States of America.[66]
>
> [The President] shall take Care that the Laws be faithfully executed.[67]

Some forms of legislative veto seem to be less legislative than executive in character, raising questions of whether they constitute an infringement of the article II independence of the President in his execution of the law. Under the Immigration and Naturalization Act of 1952, a single house of Congress can reverse the Attorney General's decisions in deportation cases and thereby order an alien to leave the country.[68] Since World War II, Congress has frequently reserved the right to reject government contracts which the President has negotiated pursuant to statutory authorization. The Dwight D. Eisenhower

66 U.S. Const. art. II, § 1.

67 U.S. Const. art. II, § 3.

68 8 U.S.C. § 1254(c)(2) (1976). The unicameral veto provision in the Immigration and Naturalization Act may well be a bill of attainder. However, in *Chadha, supra* note 9, this provision has been challenged as an unconstitutional legislative veto. Brief for Petitioner, *Chadha, supra* note 9, at 24 n.9.

Memorial Bicentennial Civic Center Act of 1972, for example, requires four congressional committees to approve all construction contracts within thirty days.[69] Congress has not only determined legislative policy but also authorized itself to exert control over how that policy should be executed.

The records of the Constitutional Convention make it clear that the Framers contemplated an independent executive.[70] While the Framers harbored a lingering fear of monarchy, they were also concerned that the President not become a "creature or dependent of the legislature."[71] Indeed, a bicameral legislature was established because unicameralism was deemed to provide insufficient checks on the legislative tendency to encroach on the executive.[72] The appointment power was entrusted to the President rather than to Congress.[73] In addition, the incompatibility clause was adopted to prohibit members of Congress from holding executive "Office."[74] The President's independence was further buttressed by the cumbersome impeachment process.[75]

69 Pub. L. No. 92-590, 86 Stat. 1019 (1972). *See also* CONGRESSIONAL RESEARCH SERVICE, *supra* note 5, for other examples of such legislation.

70 *See* FARRAND, *supra* note 20, at 78-79; THE FEDERALIST No. 69 (A. Hamilton) (J. Cooke ed. 1961); C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 at 166-81 (1922).

71 "[The Convention rejected] the Virginia plan [which] would have established an executive who would have been the creature or dependent of the legislature. But the Convention had decided preference for an independent executive and carried that idea out as far as it was possible at this stage of proceedings. For instance, in addition to the usual executive powers and duties, he was given the power of appointment in all cases not otherwise provided for, and in place of a council of revision the executive alone was given the right of veto, subject, however, to being overruled by a two-thirds vote of both houses. And what is perhaps the clearest indication of intention to make the office an important one is that the executive was rendered subject to impeachment. From an official designed to be, at the outset of the Convention, a dependent of the legislature, the executive had developed into an independent figure of importance."

FARRAND, *supra* note 20, at 78-79.

72 During the ratification period, James Madison wrote:

In republican government the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will permit.

THE FEDERALIST No. 51, at 350.

73 U.S. CONST. art. II, § 2.

74 U.S. CONST. art. I, § 6.

75 U.S. CONST. art. I, §§ 2, 3; art. II, § 4.

The Framers believed that the President needed a veto power not only to prevent passage of ill-conceived laws but also to give added force to his office to protect it from legislative encroachment.[76] When Congress drafts a bill, it retains control of its legislative power by restricting the length of time and the policy guidelines of the statute.[77] The amount of discretion finally delegated, however, is the result of the article I legislative bargaining process in which the President's veto power may play an important or deciding role. In many instances, the threat of a presidential veto forces Congress to compromise and give the President more statutory power than he could otherwise hope to exercise. Thus, if Congress can circumvent the presidential veto by legislative veto it can weaken executive powers under article II and render them vulnerable to congressional manipulation.[78]

"The difference between the departments," Chief Justice John Marshall said, "is that the legislature makes, the executive executes, and the judiciary construes the law. . . ."[79] Article II, section 1 of the Constitution vests "the executive Power" in the "President of the United States of America." Article II, section

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76 *See* FARRAND, *supra* note 20, at 74-75. At the time of the Philadelphia Convention, the veto power was a relatively novel concept. South Carolina was the only state, in fact, whose constitution gave the chief executive a veto. THACH, *supra* note 70, at 35. *See* United States v. California, 332 U.S. 19 (1947) (reaffirming presidential veto power). Alexander Hamilton believed that "the primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." THE FEDERALIST No. 73, at 495.

77 James Madison suggested that, although congressional repeal of statutes might prove difficult in some cases, limiting their duration might be a desirable alternative. J. ELLIOT DEBATES 538 (2d ed. 1881). *See* Lend-Lease Act, *supra* note 23 (authority ends no later than July 1943).

78 "The accumulation of all powers," James Madison wrote, "legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301.

79 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825). It has been suggested that the legislative veto neither legislates nor executes law because it is only another form of congressional oversight. *See, e.g.*, Cooper & Cooper, *supra* note 7, at 493. A statute containing a "naked" layover period which delays an act of delegated power from taking effect at once is constitutional. Sibbach v. Wilson, 312 U.S. 1 (1941). A waiting period is a reasonable oversight tool because it may be presumed "the action under the delegation squares with the Congressional purpose" unless Congress can pass a repealing statute subject to veto by the President. In contrast, the legislative veto reserves in Congress the power to stop or modify executive or administrative action by less than full legislation. *See* Note, 65 HARV. L. REV. 637, *supra* note 7; Bruff and Gellhorn, *supra* note 7.

3 grants the President the power to "take care that the Laws be faithfully executed." While these two grants have rarely been the subject of constitutional litigation, the Supreme Court has considered other presidential powers and found them independent and not subject to congressional invasion.

The Supreme Court's strongest statement on the executive's right to independence have come in decisions construing the appointment power.[80] In *Springer v. Philippine Islands,*[81] it read article II, section 2 in light of the incompatibility clause and separation of powers doctrine to prohibit legislators from appointing themselves to vote stock in a government corporation. "Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection. . . ."[82] The Supreme Court has recently strengthened its earlier holdings on the appointment power, using broad separation of powers language and incompatibility clause references. In *Buckley v. Valeo,*[83] the Court held that Congress could not appoint its own members to the rule-making Federal Elections

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80 Myers v. United States, 272 U.S. 52 (1926); Springer v. Philippine Islands, 277 U.S. 189 (1927); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). *See* Note, 1976 DUKE L. J. 285, *supra* note 7.

81 277 U.S. 189 (1927). *Springer* was decided on the basis of the Philippine Organic Act which was modeled on the U.S. Constitution. Legislators of the Philippine Government had attempted to give an individual legislator a position on a commission exercising control over an administrative agency.

82 *Id.* at 202.

83 424 U.S. 1 (1976). In *Buckley,* the Court struck down that portion of the Federal Election Campaign Act of 1971 which allowed Congress to appoint four of the six voting members of the Federal Election Commission. The Court quoted from the broad separation of powers language in the majority opinion of Chief Justice Taft in *Hampton, supra* note 58, at 406.

> "[T]he rule is that in the actual administration of the government, Congress . . . should exercise the legislative power, the President . . . the executive power, and the Courts . . . the judicial power . . . it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power."

424 U.S. at 121-22.

The *Buckley per curiam* opinion cited the incompatibility clause as a "cognate provision" to the appointments clause. Defining "Officers of the United States" to mean those appointees who exercise "significant authority pursuant to the laws of the United States," the Court stated that such officers could only be appointed by the President using the procedure outlined in U.S. CONST. art. II, § 2, cl. 2, 424 U.S. at 125-26; *see also id.* at 131. If Congress is barred by the incompatibility clause, U.S. CONST. art. I, § 6,

Commission, and that all such appointments had to be made by the President. The question remains whether the Court will similarly view the power to execute the laws as immune to congressional usurpation.

A further invasion of presidential power might be seen in efforts by Congress to use a legislative veto to terminate authority delegated to an independent agency. While the very establishment of independent agencies to carry out congressional enactments might have been seen as an invasion of presidential power, the courts have long permitted Congress to substitute implementation by independent agencies for executive implementation.[84] It would seem that a legislative veto directed solely against such an agency would not draw presidential powers into question.[85] Although it is one thing for Congress to vest the execution of some laws in an agency "independent" of the President, the President might argue that it is a far more radical invasion of the executive power — and a far more serious distortion of the separation of powers — for Congress itself to seek to execute these laws by legislative veto.

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from installing its members as executive employees, it would seem that legislative vetoes which give Congress the power to exercise "significant authority" would be unconstitutional under the reasoning of *Buckley*.

84 The "take Care" clause has not been read as being exclusive. Art. II, § 1 vests the "executive Power" in the President and art. II, § 3 goes further in giving the President additional power "to take Care that the Laws be faithfully executed. But the "take Care" clause does not say that the President need faithfully execute" *"all Laws,"* only "the Laws." When the Interstate Commerce Commission was established in 1883, the courts might have found the creation of the "independent" regulatory agency to be unconstitutional under the "take Care" clause. Instead, Congress has been allowed to establish a fourth branch of government outside of the President's legal control. *Cf.* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

85 Congress has sometimes given the President a veto over an "independent" agency. *See, e.g.,* Clean Air Act of 1970, § 4(a), 42 U.S.C. § 1857c-7(c) (1976); Trade Act of 1974, § 202, 19 U.S.C. § 2252 (1976).

See Cutler & Johnson, *Regulation and the Political Process,* 84 YALE L.J. 395 (1975), where it is proposed that the President should have statutory authority to issue "Executive Orders" setting the policies and regulations of "independent" agencies subject to unicameral veto. In some cases, Congress has already interposed the President between itself and an independent agency. Under the 1974 Trade Act, § 203, 19 U.S.C. § 2253 (1976), for example, the International Trade Commission may recommend import restrictions for an "injured" domestic industry and, if the President objects, Congress may pass a concurrent resolution reversing his override and reinstating the Commission's recommendation. The final decision under this "triangular delegation," however, may not resemble either the agency or presidential recommendation if Congress resorts to "item veto." *See also* 1967 Federal Salary Act, *supra* note 27.

Conclusion

The availability of the legislative veto encourages ill-considered legislation by permitting Congress to avoid making thorough public policy judgments in the initial passage of laws. As long as legislators know that they will have an easy "second chance" to make statutory policies or alter their execution, the incentive for detailed research and precise drafting is greatly diminished. The resulting broadly-drafted laws only serve to enhance the power of the federal government.

Furthermore, unrestrained use of the legislative veto threatens the independence of the President. In many instances, the President is faced with a serious dilemma: either acquiesce in the creation of still more legislative veto authority or veto important enabling legislation. Whatever the President's political decision may be at any given time, it surely should not be interpreted as supporting the constitutionality of the legislative veto.

Were the Supreme Court to impose strict constitutional limits on the use of the legislative veto, Congress would be compelled to define delegated powers with greater precision in the initial enabling legislation. To protect its power, Congress would by necessity react to such limits by passing fewer laws and delegating less authority to government agencies. In some cases, judicial enforcement of separation of powers would also encourage better execution of the law and better protection of individual rights. Finally, restrictions on the legislative veto would strengthen the negotiating hand of the President where his veto power is presently not enough of a safeguard against legislative encroachment *upon* his constitutional powers.

The legislative veto is, at best, an *ad hoc* and illusory remedy for institutional problems which Congress and the courts have created since the New Deal. Permissive legislative standards and massive delegations of power to independent regulatory agencies have both deviated from separation of powers. How the Supreme Court will choose to deal with these problems is uncertain, but one can hope that the Court will not be persuaded to see the legislative veto as a solution. In the proper case, the

Supreme Court should take the high road and restrict the use of the legislative veto and thereby preserve a constitutional system which has more of the original conception and less of absolute congressional control.

NOTE

CRITICAL DETAILS: AMENDING THE UNITED STATES CONSTITUTION

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The United States Constitution leaves to Congress the responsibility for prescribing many details associated with the amendment process. The debate over The Equal Rights Amendment extension has sparked renewed interest in Congress' handling of issues such as extension and rescission. The authors examine these and related issues from historical, legal and policy-oriented perspectives, and they suggest a series of Constitutional interpretations that give Congress extensive supervisory authority over the amendment process.

Introduction

The United States Constitution possesses many strengths, but thorough delineation of procedural detail is not among them. Although the Constitution recognizes the need to allow amendments and outlines a procedure by which Congress can propose and the states can ratify them, it addresses none of the complex questions that can arise during the amendment process. Instead, it leaves those questions to be confronted by Congress and the courts.

Such problems include how Congess should express its judgment as to what constitutes a "reasonable time" for ratification; whether the proposing Congress or a subsequent Congress can extend the ratification period, shorten the period or withdraw the amendment entirely; whether states may rescind their ratifications before or after an extension of time; whether Congress can or should dictate that a simple majority in state

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legislatures will be sufficient to ratify the amendment; and whether a supermajority vote in Congress or a presidential signature would be necessary to authorize any of these exercises of congressional power over subsidiary detail.

As is the case with many procedural questions in the law, resolution of these problems often will significantly affect the outcome of the process. As one example, the fate of the Equal Rights Amendment will most certainly hinge on the resolution of these issues,[1] and the controversy surrounding that amendment supplies illustrative material throughout this Note.

This Note concludes that Congress possesses and should exercise its power to define and delimit procedures surrounding the amendment process. This generalization, and the many specific conclusions from which it springs, derives from an examination of past congressional approaches to these issues, of judicial responses, of policy arguments, and of potential analogies between these issues and other constitutional processes.

The examination leads to several specific conclusions. First, Congress can and should establish a reasonable time for ratification, and subsequent Congresses can extend that time. Congress should not, however, shorten the time or withdraw the amendment once proposed. Second, Congress can and should decide on a case-by-case basis whether to allow rescissions, and Congress may decide that a simple majority vote in state legislatures will be sufficient to constitute a ratification. Finally, each of these exercises of congressional power should require only a simple majority, and none needs the President's signature.

I. Reasonable Time To Ratify

The Supreme Court has held that an amendment to the Constitution may remain open for state ratification only for a rea-

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1 The extension and rescission issues are currently being considered in Idaho v. Freeman, No. 79-1097 (D. Idaho, filed May 9, 1979). *See also Idaho and Arizona Contest U.S. Equal Rights Proposal,* N.Y. Times, May 10, 1979, § A, at 16, col. 6.

sonable time[2] and that under article V,[3] Congress has the power to determine what constitutes a reasonable period.[4] Although only state legislatures or conventions will ultimately effect the ratifications, Congress can thus effectively supervise the process of state action by means of this power.

Throughout the history of the amending process, Congress has varied its approach to time limits. Sometimes it has entirely ignored its power to set time restrictions; sometimes it has included what it considered to be a reasonable time in the amendment text, and sometimes it has set a time limit in the resolution proposing the amendment. Each of these procedures represents a different perception of the appropriate congressional role in the ratification process.

A. *History of the Use of Time Deadlines*

In proposing the first seventeen amendments now ratified as part of the Constitution, Congress made no provision in the accompanying resolutions or amendments for limiting the time during which the states could ratify the provisions. Each of these amendments was ratified by the requisite number of states within four years of proposal.[5]

Nonetheless, the ratification process has not always operated so swiftly or so smoothly. Five amendments have been proposed by Congress which have been pending for over fifty years without ratification by the necessary three-fourths of the

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2 *See* Dillon v. Gloss, 256 U.S. 368, 375 (1921).

3 The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of equal Suffrage in the Senate.

U.S. CONST. art. V.

4 Coleman v. Miller, 307 U.S. 433, 454 (1939).

5 *See* Dillon v. Gloss, 256 U.S. 368, 372 (1921).

states.[6] Prior to the landmark Supreme Court decision in *Coleman v. Miller*,[7] there was no acknowledged constitutional safeguard against the possibility that an amendment which should have died of old age might be resurrected by a new wave of state attention and ratification.[8] State legislatures had no way of knowing how to respond to revived interest in such an amendment, whether to undertake hearings and debate on the proposal, or whether to urge resubmission by Congress of a fresh amendment to the states.

The Supreme Court provided a partial answer in *Coleman*. The *Coleman* case concerned the proposed Child Labor Amendment, which would have permitted Congress to pass legislation preventing products of child labor from moving in interstate commerce. Some Kansas state senators had sought a writ of mandamus to void the endorsement of that state's ratification, arguing, among other things, that the amendment had lost its vitality due to the passage of an unreasonable amount of time, nearly thirteen years, since its proposal. The Court declined to reach a decision on the merits,[9] finding that the determination of the timeliness of a state ratification is in the hands of Congress.[10] The Court suggested that "the question is an open one

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6 The proposed amendments are: an amendment relating to representation by population in the House of Representatives, Act of Sept. 29, 1789, 1 Stat. 97; an amendment requiring intervening elections prior to a change in salaries for members of Congress, *id.*; an amendment prohibiting citizens from accepting presents, pensions or titles from foreign powers, Act of Jan. 12, 1810, 2 Stat. 613; an amendment prohibiting Congress from interfering with slavery within the states, Act of Mar. 2, 1861, 12 Stat. 251; and an amendment giving Congress power to regulate child labor, Act. of Jun. 4, 1924, 43 Stat. 670.

7 307 U.S. 433 (1939).

8 Adoption of an amendment long after its initial proposal, with ratifications spread over a lengthy period, would not violate any provision of article V or any enactment of Congress, but such an adoption would offend the spirit of the amending process. By requiring supermajorities in proposal and ratification, the Constitution reflects a concern that an alteration in the fundamental law must reflect a strong national consensus. Ratification achieved over the course of generations probably would not comply with a reasonable consensus standard.

9 The "opinion of the Court" in *Coleman* was written by Chief Justice Hughes and joined by only two other justices. Four concurring justices would have held that the Kansas legislators lacked standing, 307 U.S. at 460-70, and that all Article V questions are nonjusticiable, *id.* at 459.

10 The Court declared that an amendment would be open to ratification only for a reasonable time, as it had held in *Dillon v. Gloss*, but that "the question, what is a reasonable time, lies within the congressional province." *Id.* at 454.

for the consideration of Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment."[11] The Court considered Congress' determination to be a flexible, discretionary decision not subject to judicial review.

Although *Coleman* did spell out some guidelines, the state legislatures could still only speculate about what amount of time Congress would conclude was reasonable. Only some direct signal from Congress before or during ratification would definitely prescribe the time for action in the states.[12]

Congressional provision of such an advance signal became an issue with the proposal of the Eighteenth Amendment, which was submitted to the states with a seven-year deadline in the text.[13] Any lingering doubt[14] that Congress could establish an initial ratification deadline expired shortly thereafter with the Supreme Court's decision in *Dillon v. Gloss*.[15] J.J. Dillon brought habeas corpus proceedings to secure release from custody following his violation of the National Prohibition Act passed under the authority of the Eighteenth Amendment. Dillon asserted that the amendment itself was invalid because the attempt to establish a seven-year ratification limitation exceeded congressional power under article V.

The Court disagreed and found that Congress has broad power to deal with time limits and other "subsidiary matters of detail as the public interests and changing conditions may require."[16] Specifically, it held that imposition of a precise

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11 *Id.*

12 *See* Freund, *Legislative Problems and Solutions*, 7 A.B.A.J. 656, 656 (1921):

> Where a law makes the validity of an act dependent upon the consent or concurrence of a number of other agencies or authorities . . . a time limit in some form or other for the perfection of the requisite consents is . . . eminently appropriate, and should always be provided for in framing a provision of this nature . . .

13 Act of Dec. 19, 1917, 40 Stat. 1050.

14 *See* 55 CONG. REG. 5652-53 (1917) (remarks of Sen. Cummins); *see generally id.* at 5557 (1917) (remarks of Sen. Ashurst).

15 256 U.S. 368 (1921).

16 *Id.* at 376 (footnote omitted). The Court refused to accept the argument that Congress was powerless to set fixed ratification periods in the absence of explicit constitutional language permitting it to do so. The text of article V was found to contain only two restrictions on congressional proposal power: the requirement that the proposal be approved by two-thirds of both houses, and a prohibition of any amendment depriving an unconsenting state of equal suffrage in the Senate.

ratification deadline in the amendment text is an appropriate exercise of Congress' supervisory power over the amending process.[17] The court found this authority in Congress' "power to designate the mode of ratification."[18]

Proposal of the Twenty-third Amendment, giving citizens of the District of Columbia the power to vote in presidential elections, introduced a second approach to the treatment of the ratification period. Congress proposed the time limit not in the amendment itself, but in the resolution accompanying the amendment. The reason later given for the change was that transfer to the resolution would avoid "cluttering up" the Constitution.[19] Furthermore, by separating the time deadline from the amendment text, Congress could assure that state ratification would be an assent to the language of the text, not to the time limitations under which its ratification took place. It is illogical for the states to assent to a time deadline which becomes operative only in the absence of a sufficient number of ratifications.

Since the Twenty-third Amendment, a seven-year ratification period has been included in the proposing resolution of each

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17 With the sanction of the Supreme Court in *Dillon*, Congress included a seven-year ratification period in the Twentieth Amendment (establishing the line of presidential succession), Act of Mar. 3, 1932, 47 Stat. 745; the Twenty-first Amendment (the repeal of prohibition), Act of Feb. 20, 1933, 47 Stat. 1625; and the Twenty-second Amendment (terms of office of the President), Act. of Mar. 24, 1957, 61 Stat. 959. A seven-year ratification period was proposed as an amendment to the text of the Nineteenth Amendment (women's suffrage) but was defeated on the floor of the House, 58 CONG. REC. 93 (1919).

18 256 U.S. at 376. Since article V also permits Congress to designate the mode of ratification for an amendment proposed by a constitutional convention, the *Dillon* rationale extends to amendments which Congress has not proposed. This creates potential conflicts if Congress should choose to abuse the reasonable time power to thwart a convention-proposed amendment that it did not favor.

19 Correspondence of Sen. Kefauver and Prof. Noel Dowling, *cited in Hearings on H.J.R. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 34 (1977-1978) (statement of Sen. Butler) (hereinafter cited as *Hearings on H.J.R. 638*). The members of Congress apparently failed to appreciate the significance of the placement of the deadline, because they changed the procedure "without ever indicating any intent to change the substance of their actions." *Id.* at 13 (statement of John Harmon). The Supreme Court in *Dillon* also apparently failed to notice the distinction between a deadline placed in text and one set forth in a proposing resolution: "The remaining grounds are, first, that the Eighteenth Amendment . . . is invalid because the congressional *resolution* (40 Stat. 1050) proposing the amendment declared that it should be inoperative unless ratified within seven years," 256 U.S. at 371 (emphasis added).

amendment adopted. Most recently, the limitation became a prominent political issue when Congress considered a resolution to extend the seven-year period for ratification of the proposed Twenty-seventh Amendment, the Equal Rights Amendment ("the ERA"). In House Joint Resolution 638, Congress amended the original resolution proposing the ERA to provide an additional three years, three months, and eight days for ratification,[20] focusing national attention on the significance of the time deadline.

B. *Future Action Setting Periods for Ratification*

In the aftermath of the ERA extension debate, Congress should attempt to decide how to approach the question of deadlines for amendment ratification. It must consider two factors in establishing any amendment-related procedure: first, the assurance of contemporaneous consensus, and, second, provision for an orderly and regular ratification process in the states. There are three alternative methods of dealing with ratification periods, and each has different ramifications for consensus and regularity.

The first alternative is for Congress to return to its original practice and set no deadline at the time of proposal. When the ratification process is complete, the Congress in session at that time will determine whether a reasonable time has elapsed. The *Coleman* decision authorized Congress not to adopt an amendment if it concludes that an unreasonable time has passed.

This *ad hoc* approach has the advantage of not forcing the proposing Congress to predict what period will constitute a reasonable time. The case of the ERA itself demonstrates that Congress cannot be sure at the outset what public and state legislative response to an amendment will be. By refusing to set a deadline, the proposing Congress would thus be acknowledging the difficulty of prediction and its determination to give a later Congress the opportunity to evaluate the presence of consensus among the states. Because most amendments have been ratified within a few years, the reasonableness of the period is not likely to be an issue.

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20 123 CONG. REC. S17318-19 (daily ed. Oct. 6, 1978).

If the consensus issue does arise after ratification by three-fourths of the states, the ERA experience suggests that the congressional inquiry should be sensitive to the ratification experience of that particular amendment.[21] Once a ratification history has been established, Congress can make a better judgment than it could possibly make at the outset. The no-deadline method is therefore most effective for on-going oversight of consensus.

Use of the *ex post facto* approach, however, would contribute little toward achievement of the second goal: an orderly ratification process. The states would have no sure way of knowing what Congress would deem to be a "reasonable time" for ratification and might well squander time and money debating an amendment that Congress would subsequently consider defunct. State legislators might also feel hesitant to spend the time needed to debate ratification fully if they found their vote might have no effect.

The ERA experience indicates another problem. When the appropriate time deadline for an amendment is surrounded with uncertainty, legislators' attention can be deflected from the merit of the amendment itself and focused instead on the time problem. Some ERA supporters indeed worried that the efforts spent on passing the extension might more successfully have been directed toward getting the three additional ratifications necessary for adoption.[22]

Especially in close cases, permitting after-the-fact congressional determination of consensus would give opponents a last chance to kill the amendment in Congress.[23] If the determination of whether too much time had passed could be made by ma-

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21 The hearings on the ERA extension in the House Subcommittee on Civil and Constitutional Rights centered not only on the constitutionality of an extension but on the experience of the ERA in the states and the wisdom of extending the ratification period. *See Hearings on H.J.R. 638, supra* note 19, at 161-280.

22 "We have the ability, and I think we have the capability if we would work to get ratification between now and March 22 and do it." *Id.* at 224 (statement of Rep. Robert McClory).

23 For example, if an amendment were ratified by three-fourths of the states within five years, but the history showed that the last ratification had been accomplished four years after the penultimate ratification, then the amendment's opponents could contend that a sufficiently contemporaneous consensus had not been achieved.

jority vote, an amendment ultimately could be defeated by a simple majority.[24]

For the present, however, Congress has adopted an alternative method for dealing with ratification: including the deadline in the text of the amendment. In the proposed Twenty-eighth Amendment[25] Congress thus sought to prevent subsequent change by including the deadline in the text and making it subject to state approval. This method eliminates the possibility of congressional reconsideration; the period is fixed and the amendment will die of its own terms if not adopted within the specified period. However, although the states can rest absolutely assured of a fixed period for ratification, they receive no ongoing protection of consensus.

If Congress includes the deadline in the text, it removes the time limit issue from the debate in the states and causes the debate to focus on the substantive issues. At the same time, however, the ratification period then risks becoming both immutable and arbitrary; at best, a proposing Congress can venture only a rough guess of what a reasonable time for ratification will turn out to be. To lengthen the time, Congress would have to re-propose the amendment and begin the ratification procedure anew.[26] And as the ERA experience demonstrates, Congress might later regret having so restricted itself.

An immutable time period may also invite conduct that disregards the spirit of the process. As the certification deadline draws near, opponents may be prompted to use the tactics of parliamentary delay in order to defeat ratification.[27] Such line-

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24 *See* text accompanying note 49 *infra*.

25 [1978 Vol. 8] U.S. CODE CONG. & AD. NEWS XXIII, *reprinted as* CONSTITUTION OF THE UNITED STATES, PROPOSED AMENDMENT, U.S.C. LVII (1976).

26 This problem may be less serious when the proposed amendment requires a decision at which the states are likely to arrive without a great deal of debate and investigation. For example, the proposed Twenty-eighth Amendment would provide citizens of the District of Columbia with voting representation in Congress. The advantages and disadvantages of the suggestion are apparent. The problem with an immutable deadline will be most serious in cases like that of the ERA, which would affect many state and federal programs. *See* U.S. COMMISSION ON CIVIL RIGHTS, SEX BIAS IN THE UNITED STATES CODE 204 (1977) (finding "a myriad" of unjustified sex-based differences in federal law).

27 Such tactics have been used in a number of states to prevent consideration of the ERA. *See Hearings on H.J.R. 638, supra* note 19, at 174 (statement of Liz Carpenter).

walking violates the spirit of full and fair consideration that underlies article V.[28]

Moreover, when Congress sets a fixed time, a lack of coordination with legislative calendars may effectively reduce Congress' time allotment. For example, action toward ratification was virtually impossible during the last five months of the seven-year ERA ratification period, because many state legislators were not in session.[29] Thus, the effective period was less than the seven years Congress intended to allow.[30]

Given problems such as these, Congress has on several occasions considered proposals to amend article V to provide uniform ratification periods for all amendments.[31] Such action would constitute a serious relinquishment of congressional power. Deadlines would be unchangeable, making an ongoing oversight by the proposing Congress and scheduling sensitive to state legislative sessions impossible. Considerations of consensus and orderly ratification procedures strongly militate against this alternative.

The third deadline option open to Congress is the procedure it used in proposing the ERA, in which Congress predicts and incorporates a "reasonable" period of time in the resolution accompanying the amendment. If the amendment is not adopted by the initial deadline, the Congress then sitting may reconsider the progress of the amendment in light of surrounding conditions and extend the period or allow it to lapse. Under this approach, Congress becomes a central administrator in the timing of the ratification process, attempting to balance the some-

28 *See* Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1696 (1976).

29 State legislatures generally recessed for the November 1978 elections and did not reconvene until January of 1979, when they had to take up the housekeeping details of a new session. *See Hearings on H.J.R. 638, supra* note 19, at 289 (statement of Eleanor Smeal).

30 In the case of the ERA extension, Congress for the first time explicitly tied the period to legislative sessions. It set the new deadline at June 10, 1982, to correspond with state legislative sessions in the unratified states. HOUSE COMMITTEE ON THE JUDICIARY, PROPOSED EQUAL RIGHTS AMENDMENT EXTENSION, H.R. REP. NO. 94-1405, 95th Cong., 2d Sess. 1 (1978) [hereinafter cited as PROPOSED EQUAL RIGHTS AMENDMENT EXTENSION].

31 *See* 55 CONG. REC. 5652-53 (1971) (proposal by Sen. Warren G. Harding to amend article V to provide an eight-year period for ratifications); 58 CONG. REC. 5694-5700 (1919) (debate on uniform six-year period).

times-conflicting interests of consensus and procedural regularity.

Use of such congressional power to extend a ratification period finds support in the language and interpretations of article V. As the Court indicated in *Dillon*, article V does not limit Congress to the acts of proposing an amendment and choosing a mode of ratification.[32] Congress retains an administrative role in the amending process, at both the proposal and ratification stages.

The *Dillon* Court's citation to *McCulloch v. Maryland*[33] further suggests that in matters concerning article V as well as article I legislative functions, Congress has "necessary and proper" power to use appropriate means to achieve legitimate objectives.[34] In *Dillon*, the Court drew a parallel to article I by finding an equivalent implied power in article V.[35] The *Coleman* decision further indicates that congressional power to assess the passage of a reasonable time for ratification implies an ongoing analysis, sensitive to the political realities which the amendment encounters; inherent in this power is a congressional responsibility to ensure that the law evolves in response to changing times.[36] Because Congress can set ratification periods at the time of proposal and reassess whether a reasonable time has elapsed under *Coleman* and *Dillon*, it therefore has similar power under article V to extend a fixed ratification period.

Historically, however, the seven-year ratification period has

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32 256 U.S. at 371-73.

33 17 U.S. (4 Wheat.) 316 (1819).

34 *Cf.* Barry v. United States, 279 U.S. 597, 613 (1929) (functions incidental to determining the qualifications of members may be exercised by Congress although not related to a legislative function).

35 In fact, Congress has used this power to regulate other procedures in the amendment process. It passed a law which provides that the Administrator of the General Services Administration shall publish amendments when they have been adopted in accordance with the Constitution. 1 U.S.C. § 106B (1976). Congress also has voted to determine the validity of questionable state ratifications, Act of Jul. 21, 1868, 15 Stat. 709-10, and has considered legislation to regulate state conventions, S. 2307, 90th Cong., 1st Sess. (1967).

36 As Rep. Shirley Chisholm emphasized in the House debate on H.J.R. 638, "The United States has the resonsibility of oversight in all laws that it creates." 124 CONG. REC. 8597 (1978).

not been viewed as the flexible, content-sensitive guideline that the Court has stated the Constitution permits Congress to provide.[37] The possibility of extension thus converts the seven-year period from an immutable time barrier to the first step in an ongoing analysis of the development of consensus.

Since Congress did not include the ratification period in the text of the amendment, it believed that it was free to extend the period without resubmitting the amendment. To this extent, the time limit in the proposing resolution has been described as a "statute"[38] which Congress alone can provide, alter or omit entirely.

Opponents of the extension reply that this distinction elevates form over function.[39] If the purpose of the seven-year period is to let the states know that they are operating under a deadline, then it seems unfair to change that deadline. If state legislatures know that the deadline will change, they may prefer to hold more extensive hearings, or delay a vote until a new session commences after the next elections.

No approach to the consensus issue can completely eliminate such uncertainties. Similar uncertainties exist even when the deadline is immutable. For example, no state can predict when thirty-seven other states will ratify, making the amendment part of the Constitution, and so no state can reasonably expect to be able to use for debate the full time-period allotted.[40] Op-

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37 The House Committee concluded that the deadline was included in the proposed ERA primarily because "such a provision had become customary and several influential Members of both Houses objected to its absence strongly enough that it was eventually added." PROPOSED EQUAL RIGHTS AMENDMENT EXTENSION, *supra* note 30, at 4. *See, e.g.*, 116 CONG. REC. 30301 (1970) (remarks of Sen. Sam Ervin citing the examples in note 6 *supra*); 117 CONG. REC. 35814 (1971) (the seven-year period is customary) (remarks of Rep. Martha Griffiths).

38 117 CONG. REC. 3514-15 (1971) (remarks of Rep. Griffiths).

39 *See, e.g., Hearings on H.J.R. 638, supra* note 19, at 187-88 (testimony of Rep. Donna Carlson).

40 For example, consider the case of Wisconsin's ratification of the ERA. Wisconsin ratified on April 26, 1972, the fifteenth state to do so. The Wisconsin legislature had no way of knowing whether the twenty-three additional states needed for adoption would ratify within a month, within five years, or whether adoption never would be accomplished. If an amendment will effect changes in state laws and practices, as would the ERA, states do have an interest in having time to make adjustments. But a lag provision, such as that provided by section three of the ERA, which states that, "this amendment shall take effect two years after the date of ratification," can assure a smooth transition. Act of Mar. 22, 1972, 86 Stat. 1523 (1972).

ponents of extension have nonetheless cogently argued that this change of the deadline in the midst of the ratification contest is unfair to the amendment's opponents as well as to the states. Like the states, opponents budget their efforts to last a certain period of time and concentrate their energies on specified targets as the deadline approaches in order to prevent key states from ratifying.

In the future, opponents will obviously be able to plan against the eventuality that amendment time limits will be changed. ERA opponents did not at first have any reason to consider the possibility of an extension. But even in the ERA case, opponents had no protected interest in the present state of the law; flexibility in the legal use of time deadlines is not uncommon.[41] The reliance argument also cuts both ways. Amendment proponents may have relied on the possibility of extension and diverted lobbying resources away from state ratification battles and toward the extension debate.

Allowing Congress to extend the deadline could also contribute toward fair consideration of the amendment by discouraging parliamentary stall tactics. Filibusterers will know that Congress could simply extend the deadline; therefore state legislatures will be more likely to turn directly to the substantive business of debating the proposed amendment rather than delaying unnecessarily.

Assuming extensions are allowed, there is always the possibility that debate will center on extension rather than on the merits. But in the future, at least, Congress would not have to grapple with the constitutionality of extension, an issue that severely side-tracked the ERA discussion in the states.

The ERA experience should help to dispel fears that members of Congress would find it impossible to dissociate the merits of the proposal from their concern over the reason behind extension. Of the fifty senators present and voting on the merits

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41 *See* Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) (Fourteenth Amendment permits states to repeal or extend a statute of limitations even after a right of action is barred unless the lapse of time has invested a party with property rights); Campbell v. Holt, 115 U.S. 620 (1885); Davis v. Valley Distributing Co., 522 F.2d 827 (9th Cir. 1975) (congressional extension of deadlines for filing of complaints with the Equal Employment Opportunities Commission was intended to revive claims already barred).

of the ERA in 1972 and voting on the extension in 1978, fourteen changed their votes from "yes" on the ERA to "no" on the extension.[42] The change was even greater in the House, where eighty of the one hundred and ninety representatives originally voting on the ERA changed "yes" votes to "no" votes for extension.[43]

An abuse of the extension procedure could occur if a later Congress resurrected an amendment that an earlier Congress had allowed to lapse. For example, if the Ninety-sixth Congress had allowed the ERA deadline to expire without extension, what would prevent a subsequent Congress from extending the time and resurrecting the amendment with the ratifications already achieved still in place? Such action certainly would jeopardize the sense of consensus surrounding the amendments, not to mention any sense of regularity or predictability in the process of ratifying constitutional amendments.

However, the Constitution itself may bar this result. In *Coleman,* the Court indicated that the Congress promulgating the amendment is empowered to judge whether a consensus has been established;[44] similarly, in the case of the ERA, it was argued that only the Congress in session when a deadline expires is capable of passing on the existence of consensus.[45] It is self-evident that the power to determine subsidiary matters of detail does not extend beyond the life of an amendment. When a proposal to amend lapses, the power of Congress to regulate the proposal lapses as well. Congress can no more repropose an amendment through its power to determine a reasonable time than it can reinstate repealed legislation by changing its effective date.[46]

Opponents of extension might also argue that reconsideration

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42 *Compare* 118 CONG. REC. 9598 (1972) *with* 124 CONG. REC. S17318-19 (daily ed. Oct. 6, 1978).

43 *Compare* 117 CONG. REC. 35815 (1971) *with* 124 CONG. REC. H8664-65 (daily ed. Aug. 18, 1978). No member of Congress who voted in favor of the extension had voted against the ERA.

44 307 U.S. at 454.

45 *See generally Hearings on H.J.R. 638, supra* note 19.

46 *See* United States v. Smith, 286 U.S. 6 (1932) (Senate cannot withdraw confirmation of a nomination once submitted to the President).

of an amendment after an extension by a state that had rejected the amendment would take time and money. Congress, too, would have to expend resources in debating extension. But such considerations should not excuse a failure to consider fully and fairly the important step of amending the Constitution.

The selection of one ratification process from among the three discussed — no deadline, text deadline, statutory resolution deadline — will depend on the implications for regularity and consensus of each alternative. Judging by these criteria, the approach of fixing a period suited to the amendment in the accompanying resolution with the possibility of reconsideration by a later Congress appears to be the most desirable. The tentative deadline provides some regularity in the process, while retaining the flexibility to be sensitive to the history of each amendment. There apparently is little potential for abuse of this procedure.

C. *Other Congressional Actions Suggested by the Power to Extend Ratification Periods*

If Congress would adopt the proposal suggested above and return to setting ratification periods in the proposing resolution, the question arises whether Congress could shorten such a period.

There are advantages to the shortening of a time period in terms of consensus. This procedure would provide a safeguard against a Congress which provided an unreasonably lengthy time for ratification. If a proposal originally passed with a one-hundred year ratification period attached, fifty subsequent Congresses would have the opportunity to reduce it. There would arguably be no other check on the congressional power to set a reasonable time unless the states were willing to reject an otherwise desirable amendment on the independent grounds that the ratification period was too long. And it would be better to permit Congress to shorten the period than to allow state ratifying bodies to determine what constitutes a reasonable time and thus to exercise a power that they are not given under article V.

Yet despite the apparent advantage in terms of consensus, both judicial precedent and public policy militate against per-

mitting Congress to shorten the allotted ratification period. Under the *Coleman* analysis, Congress can, after ratification of an amendment with no attached deadline, declare that a reasonable time has previously elapsed. The *Coleman* Court did not, however, indicate that Congress could constitutionally take any action regarding a time period before an event requiring its action occurred. In the case of the ERA, Congress felt compelled to act because of the imminent expiration of the original deadline. Reduction of the time period would interpose Congress in the ongoing ratification process in the states and call that process to a halt.

The *Dillon* holding, too, fails to support a reduction. The *Dillon* Court discussed the validity of congressional use of its power to set matters of detail in terms of adding regularity and certainty to the procedure of amending.[47] Shortening of ratification periods would inject uncertainty into the ratification process. If Congress could shorten a ratification deadline, those participating in the consideration of amendments in the states would find themselves without an orderly, predictable setting in which to work.

A fairness argument on behalf of the states is quite compelling when the deadline is cut back. The states do indeed have a practical interest in knowing that their consideration will make a difference, and this interest could be thwarted by a reduction in the ratification period. In such a case, a state legislature which had conducted extensive hearings on an amendment could find itself prevented from voting on the proposal. This unfairness contrasts with the claimed unfairness in the case of extension. The possibility of extension interferes with the use of stall tactics in state legislatures, an interest which Congress should have no desire to protect. In the case of reduced deadlines, however, orderly legislative activity is undermined.

Perhaps the most serious objection to a congressional ability to shorten time periods is that such an exercise could render the

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47 "Whether a definite period for ratification shall be fixed so that all may know what it is *and speculation on what is a reasonable time may be avoided,* is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification." 256 U.S. at 376 (emphasis added).

adoption of amendments more difficult than the Framers intended.[48] If each Congress may reconsider the time limit, the arrival of each new Congress may portend the death of the amendment on consensus grounds. Thus, the reasonableness of the time would require the approval not only of one Congress, but of all the Congresses sitting during the ratification period. The risk increases if the time period could be shortened by simple majority vote rather than by the two-thirds needed for proposal.

There remains the question whether Congress could, after a change of heart on the merits, withdraw an amendment entirely. If Congress had the power to shorten ratification periods on consensus grounds, it could abuse that power by drastically shortening the time allowed for ratification and thereby effectively killing the amendment on its merits. Yet withdrawal due to change of position on the merits and reduction due to absence of consensus are distinct procedures under article V.[49] The *Dillon* Court tied the power to set a reasonable time to Congress' textual authority to determine the mode of ratification, not to its authority to propose amendments. If Congress could withdraw an amendment due to a change of heart on the merits, the amending process would become more difficult than the Framers anticipated, because at least a majority in each Congress throughout the ratification period would have to support the amendment on the merits. Article V, however, requires only that a proposed amendment be approved by Congress once. The requirement of a two-thirds vote of both Houses provides assurance of a high level of consensus.

Proponents of congressional flexibility to withdraw an amendment base their argument on fear that Congress might propose an amendment with unforeseen disastrous consequences. If numerous states had already ratified the amendment, the amendment might pass unless Congress could with-

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48 *See* text accompanying notes 113 to 118 *infra*.

49 Commentators who have considered the issue generally have agreed that withdrawal is not constitutionally permitted. *See* C. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 39 (1922); J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 634 (1887); L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 51-52 (1942).

draw the proposal.[50] It is unlikely, however, that such a situation could arise. Congress typically debates extensively and consults constitutional scholars before proposing an amendment.[51] And even if a "bad amendment" were proposed, Congress could immediately propose a repealing amendment.

Opponents of the allowance of time-reduction or of withdrawal might argue that if the states may not shorten the time or rescind their ratifications, then Congress should not be allowed to do so either. But states in ratifying and Congress in proposing do not necessarily operate under the same standards, since their constitutional status is not the same. The structure of the federal government itself indicates that it is constitutionally proper to extend to Congress powers that do not apply to the states. The states are protected by representation in Congress, but federal interests do not necessarily have a forum in the states.[52]

These differences are especially significant in the amending process. Congress, as the federal body involved in the process, should not leave determinations that affect the level of national consensus to the states. Although the states do not have an explicit check on Congress' exercise of its incidental powers, they

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50 For example, imagine that, in the wake of the Vietnam war, Congress proposed an amendment forbidding the deployment of American troops outside American territory. Suppose that this amendment had been ratified by thirty-six states when Israel was attacked by a coalition of powers bent on its annihilation. Certainly, Congress should have considered this possibility before it proposed the amendment. But if it did not, state ratification might not be an adequate check to prevent adoption of an amendment which many Americans, and perhaps Congress, would prefer not to adopt. Public opinion favoring intervention on Israel's behalf is likely to vary widely from state to state. If two more states were to ratify, in the absence of a withdrawal power, Americans would be bound by the amendment.

51 For example, congressional subcommittees held eight days of hearings on the proposed Twenty-eighth Amendment, including consultations with legal scholars. *See District of Columbia Representation in Congress: Hearings on S.J. Res.* 65 *and H.J.R. 554 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. (1978); *Representation for the District of Columbia: Hearings on H.J.R. 129, 142, 392, 554, and 565, Before the Subcomm. on the Constitution of the House Judiciary Comm.,* 95th Cong., 1st Sess. (1977).

52 This was recognized in the earliest days of the constitutional system. "The State Governments may be regarded as constituent and essential parts of the Federal Government; whilst the latter is nowise essential to the operation or organization of the former." THE FEDERALIST No. 45 (J. Madison) 511 (J.E. Cooke ed. 1961). The principle was reiterated by the Marshall Court: "The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this [taxing] power." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433 (1819).

are well safeguarded in other ways. Not only are the states represented in Congress when it proposes amendments and makes reasonable time determinations, but they also have the explicit check inherent in the decision to ratify or reject.

The principle of congressional predominance already has been recognized in practice. The very fact that Congress can set a reasonable time and states cannot indicates that only Congress has a role throughout the process.[53] Congress, in effect, is putting a condition on an amendment proposal by setting a limit as to "reasonable time,"[54] although it is clear that states cannot ratify an amendment conditionally.[55] A congressional role throughout the amendment procedure is consistent with the change in national law that an amendment represents.

The argument that the states must enjoy a quid pro quo for every power held by Congress is thus invalid. Nonetheless, the analysis of article V and the related judicial precedents leads to the conclusion that the Constitution does not authorize Congress either to truncate the time it has allotted for ratification or to withdraw from the debate an amendment it has submitted to the states.

II. RESCISSION OF RATIFICATION

Virtually all scholars and legislators agree that states may not rescind their ratifications of amendments once three-fourths of the states have ratified.[56] But the question whether rescissions

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53 *See* 76 CONG. REC. 4152 (1933) ("It seems to me . . . if the power of Congress and the power of the State legislatures is coequal, that the State legislatures, by a reverse system of logic, could pass a resolution and say that after 7 years or after 10 years if the legislative (sic) shall not act upon a proposed constitutional amendment submitted to it by Congress it shall not have further power to act. I am taking the position that the original body submitting the proposed amendment to the states has more power to fix the conditions of that submission than the legislature to which it is submitted.") (remarks of Sen Barkley); C. BURDICK, *supra* note 49, at 39-40 (Congress may place conditions on state ratification which states themselves could not impose.).

54 *See* 55 CONG. REC. 5650 (1917) (remarks of Sen. Atlee Pomerene).

55 *See* text accompanying note 69 *infra*.

56 To allow such rescissions would be to promote instability: no individual, corporation, or governmental unit could rely upon the long-term validity of any constitutional amendment. Indeed, the effect of such a scheme would be to allow thirteen states effectively to repeal amendments to the Constitution by withdrawing their consent to any amendment.

prior to ratification by the thirty-eighth state are or should be permitted generates considerable conflict.[57] Three general theories of ratification bear on the rescission issue.

The first theory is expressed in the case of *Wise v. Chandler,*[58] in which the Kentucky Supreme Court held that the first action by a legislature, whether ratification or rejection of an amendment, exhausts that body's article V power, unless and until Congress subsequently reproposes the amendment. But the notion that one action — approval or disapproval — completely eviscerates a legislature's article V power has major theoretical difficulties. It rests heavily on an analogy to contract law where rejection nullifies any further power to accept an offer. This analogy is invalid, however, and the *Wise* theory is, for all practical purposes, a dinosaur.[59]

The Kansas Supreme Court enunciated a second theory in *Coleman:*[60] assent to an amendment is a final action, incapable of being rescinded, but an initial rejection could be followed by a later ratification.[61] That case ultimately reached the United States Supreme Court,[62] but the Court did not directly deal with the holding of the Kansas judges.[63]

A third theory holds both rejection followed by acceptance and ratification followed by rescission to be legitimate actions. Although some state legislators have espoused this position,[64] neither any court nor Congress has yet allowed rescissions.

A. *The Wording of Article V*

Article V itself provides the logical starting point for the discussion in its phrase "when ratified." Congress and the

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57 Five states — Nebraska, Idaho, Tennessee, Kentucky, and South Dakota — have attempted to withdraw their prior ratifications of the Equal Rights Amendment. *South Dakota Rescinds: Vote on Rights Amendment,* N.Y. Times, Mar. 2, 1979, § A, at 10, col. 6.

58 270 Ky. 1, 108 S.W.2d 1024 (1937).

59 The United States Supreme Court did not directly overturn *Wise* because it had concluded in *Coleman* that the validity of rescissions was a political question for determination by Congress. *See* Chandler v. Wise, 307 U.S. 474 (1939).

60 146 Kan. 390, 71 P.2d 518 (1937).

61 146 Kan. at 403, 71 P.2d at 524.

62 Coleman v. Miller, 307 U.S. 433 (1939).

63 *See* note 59 and text accompanying notes 7 to 11 *supra.*

64 *See* text accompanying note 57 *supra.*

courts give constitutional phrases their "plain meaning" whenever possible.[65] Are the words "when ratified" susceptible of such an easy interpretation?

It may be argued that the phrase confers only one power upon the states, the power to ratify; if the Framers had intended to allow rescissions, they would have so indicated. Two cases defining "ratification," *Dyer v. Blair*[66] and *Hawke v. Smith No. 1*,[67] lend support to this argument.

The "plain wording" analysis, however, proves unsatisfactory. The article V phrase does not specifically state that the legislatures possess only the power to ratify. The phrase "when ratified" suggests only a possible outcome of the legislative action without attempting to define what modes of action the Constitution will permit to reach that outcome. Certainly the act of ratifying, or assenting to, the amendment is permissible, but it does not necessarily follow that the act of rescission is forbidden. On the contrary, the power to perform an affirmative act may actually imply the power to negate the act. The power to pass legislation, for example, usually carries with it a concomitant right to repeal. Also, "plain wording" analysis is not a very effective method for resolving disputes over the meaning of constitutional phrases. Because the Constitution was drafted almost two hundred years ago and is a "living" document susceptible of changing interpretations in response to changing experience,[68] a simplistic appeal to a one-line definition is not a desirable way to resolve any constitutional question. Indeed, one must attempt to determine which mechanism of ratification best guarantees orderly and consensual change. In making that attempt, this section of the Note will first refer to history, next

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65 "[W]here the intention is clear there is no room for construction and no excuse for interpolation or addition." United States v. Sprague, 282 U.S. 716 (1931) (article V case affirming Congress' power to choose mode of ratification).

66 390 F. Supp. 1291 (N.D. Ill. 1975). Then-Judge John Paul Stevens noted that "The act of ratification is an *expression of consent* to the amendment by [the legislature]." *Id.* at 1307 (emphasis added).

67 253 U.S. 221 (1920). Ratification was called "the expression of the assent of the State to a proposed amendment," *id.* at 229, impliedly not including the withdrawal of that assent.

68 The late Justice Hugo Black would not agree with this conclusion. *See* note 117 *infra*.

attempt to reason by analogy to other article V mechanisms and then examine the policy implications of the various alternatives.

B. *The History of Rescission*

The authors have not found any discussion of the rescission question in the records of the Constitutional Convention of 1787. The only words of any of the Framers at all applicable to rescission appear in a letter from James Madison to Alexander Hamilton:

> [A] reservation of a right to withdraw, if [the Bill of Rights] be not decided on . . . within a certain time, is a conditional ratification. . . . In short, any condition whatsoever must vitiate the ratification. . . . The idea of reserving the right to withdraw . . . was considered as a conditional ratification which was abandoned as worse than a rejection.[69]

Any statement by Madison regarding ratification is worthy of some deference; article V was predominantly Madison's creation, with the active help of Hamilton.[70] Some scholars have thus taken the position that reserving the right to rescind ratification of an amendment is equivalent to attaching a proviso to ratification, an action which Madison would have abhorred.[71]

In context, however, the Madison quotation sheds little light on the question of rescission. Madison was referring to ratification by the states of the Constitution as a whole. Any subsequent withdrawal from such an agreement to establish a new governmental system would be far more serious than withdrawal of assent to a constitutional amendment not yet declared operative.[72]

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69 Letter from James Madison to Alexander Hamilton, 2 D. WATSON, THE CONSTITUTION OF THE UNITED STATES 1317 (1910).

70 Kurland, *Article V and the Amending Process in* 1 AN AMERICAN PRIMER 130-31 (D. Boorstin ed. 1966), *quoted in* SENATE COMM. ON THE JUDICIARY, FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. No. 92-336, 92d Cong., 1st Sess. 4 (1971).

71 For example, Professor William Van Alstyne has opined that the "Madison position is eminently sound," barring rescission; otherwise the ratification of amendments would be similar to a "poker game." *Hearings on H.J.R. 638, supra* note 19, at 138 (statement of Professor Van Alstyne).

72. *Cf.* THE FEDERALIST No. 85 (A. Hamilton) 545 (B. Wright ed. 1961). ("There can . . . be no comparison between the finality of effecting an amendment, and that of establishing in the first a complete Constitution.").

The question of rescission did not arise in a concrete context until the proposal of the Fourteenth Amendment. Two states — Ohio and New Jersey — first ratified the proposed amendment and then retracted their ratifications before the requisite number of states had approved the amendment. Secretary of State William Seward issued a proclamation[73] on July 20, 1868, certifying that if the two questionable ratifications were valid, then the amendment had become part of the Constitution.[74] The next day, Congress, by concurrent resolution, declared that the amendment had been ratified and directed Seward to make the appropriate proclamation, which was issued on July 28, 1868.[75]

Although the proclamation did issue, a number of circumstances render dubious the value of this congressional precedent. The Fourteenth Amendment was adopted in the wake of the Civil War, and Congress was in no mood to tolerate dissent on one of the cornerstones of Reconstruction.[76] In fact, when three Southern states rejected the proposed amendment, Congress replaced their governments with military-dominated regimes which quickly ratified.[77] Furthermore, the legislative history of Congress' resolution contains no explicit endorse-

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73. 1 U.S.C. § 106b (1976) requires that the General Services Administrator (formerly the Secretary of State) publish an amendment upon "official notice" that the proposed amendment "has been adopted," certifying "that the same has become valid, to all intents and purposes, as part of the Constitution of the United States." The GSA Administrator would probably appeal to Congress for a determination as to the validity of rescissions, as did Secretary Seward in the case of the Fourteenth Amendment.

The suggestion has been made that § 106b constitutes statutory authority forbidding rescissions since there is no provision in the statute for action on a state's rescission. Fasteau & Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment?* 1 HARV. WOMEN'S L.J. 27, 37 (1978). The suggestion is not persuasive. First, presumably the GSA Administrator must determine that the notices from the states are valid; they are arguably invalid if rescission has occurred and the Administrator has been notified of that fact. Second, § 106b mentions only "adoption," not ratification or rescission. Third, the statute was adopted before any rescissions had occurred and has been reenacted without any discussion of the question.

74 Act. of Jul. 20, 1868, Ch. 80, 15 Stat. 707.

75 Act of Jul. 28, 1868, Ch. 80, 15 Stat. 709-10.

76 Several cases have considered whether adoption of the amendment was coerced. The Supreme Court tacitly upheld the Fourteenth Amendment by construing it in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Similar challenges were warded off in United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954) and Negrich v. Hohn, 246 F. Supp. 173 (W.D. Pa. 1965), since both courts were understandably reticent to overturn an amendment that "has been recognized and acted on for more than three-quarters of a century. . .", 119 F. Supp. at 900.

77 *See* Wise v. Chandler, 270 Ky. 1, 10, 108 S.W.2d 1024, 1029 (1937).

ment of the general theory that rescissions are not allowed. Both houses approved the resolution without debate and without a record vote.[78]

The Supreme Court in *Coleman* referred to Congress' action as "historic precedent" that a state cannot change its vote from "yes" to "no."[79] But since *Coleman* held only that it is within Congress' power to determine whether rescissions are valid,[80] the Court's statement is dictum.

The rescission issue surfaced again with the proposal of the Fifteenth Amendment, which was ratified and then rescinded by New York.[81] A resolution introduced in Congress to proclaim that New York had ratified never reached a vote. The Secretary of State counted New York among those that had assented, but noted parenthetically that he was aware of the rescission attempt.[82] A definitive congressional ruling on the question became unnecessary when more than the required number of states ratified. During the debate, neither proponents nor opponents of rescission referred to the resolution of Congress on the Fourteenth Amendment as precedent.[83]

That the actions of Congress on the Fourteenth and Fifteenth Amendments were not deemed to dispose of the issue of rescission is reflected by the fact that a bill was subsequently introduced to declare revocations of ratifications null and void. The House of Representatives approved the measure,[84] but it was

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78 Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment,* 26 NOTRE DAME LAW. 185, 203-04 (1952) [hereinafter cited as Corwin & Ramsey].

79 Coleman v. Miller, 30 U.S. 433, 450 (1939.

80 "We think . . . the question of the efficacy of ratification by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Id.*

81 CONG. GLOBE, 41st Cong., 2d Sess. 377 (1870). One other state, Oregon, attempted to rescind its ratification of the Fifteenth Amendment, but it did so after the proposal had already been adopted by three-fourths of the states. Martin, *State Legislative Ratification of Federal Constitutional Amendments: An Overview,* 9 U. RICH. L. REV. 271, 294 (1975).

82 Act of Mar. 30, 1870, 16 Stat. 1131.

83 Corwin & Ramsey, *supra* note 78, at 205. As it did with the Fourteenth Amendment, the Supreme Court in *Coleman* imprudently referred to the history of the Fifteenth Amendment as yielding a precedent against allowing rescission. 307 U.S. at 449 n.25.

84 CONG. GLOBE, 41st Cong., 2d Sess. 5356-57 (1870).

reported unfavorably by the Senate Judiciary Committee[85] and ultimately died on the Senate calendar.

The rescission issue appeared again, however, during state consideration of the Nineteenth Amendment guaranteeing women's suffrage. Tennessee attempted to rescind its ratification after the amendment had been ratified by three-fourths of the states. Because of the timing of the rescission, the Secretary of State certified that Tennessee had ratified,[86] without the attempted revocation.[87]

In the course of this century, Congress has repeatedly attempted to resolve the rescission dilemma. In 1924, Senator James Wadsworth and Representative Finis Garrett introduced a comprehensive scheme to change article V, including a provision to allow rescissions. Both sponsors agreed that such a provision was contrary to what was perceived to be the law at the time, and their proposal attempted to correct that supposed defect.[88] Their amendment was never sent to the states.

Senator Sam Ervin of North Carolina three times introduced a bill which would have established procedures for a constitutional convention to propose amendments.[89] Originally, the bill allowed any state to rescind its ratification of a proposed amendment at any time before three-fourths of the states had ratified. The rationale for the provision was that "Congress previously has taken the position that having once ratified an amendment a State may not rescind,"[90] a conclusion probably resting upon the history of the Fourteenth Amendment.

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85 CONG. GLOBE, 41st Cong., 2d Sess. 1381 (1870).

86 Act of Aug. 26, 1920, 41 Stat. 1823.

87 A note in the Indiana Law Journal states that because the precedent of ignoring rescissions was well established by the time of the Nineteenth Amendment, the Secretary failed even to mention Tennessee's attempted rescission. Note, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratification of the Equal Rights Amendment,* 49 IND. L.J. 147 (1973). This conclusion is repeated in Fasteau & Fasteau, *supra* note 73, at 37 n.44. Such conclusions are unwarranted since the Secretary's proclamation occurred on August 26, 1920, five days prior to Tennessee's attempted rescission of August 31. *See* Martin, *supra* note 81, at 294.

88 66 CONG. REC. 215 (1924); 65 CONG. REC. 4492 (1924).

89 S. 2307, 90th Cong., 1st Sess. (1967); S. 623, 91st Cong., 1st Sess. (1969); S. 215, 92d Cong., 1st Sess. (1971).

90 SENATE COMM. ON THE JUDICIARY, FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. No. 93-293, 92d Cong., 1st Sess. 14 (1973). *See also id.* at 19-20 (additional view of Cook and Bayh that Ervin Bill "would clearly be a departure from the past policy of Congress. . .").

The Ervin bill passed the Senate in October of 1971 by an 84-0 margin,[91] but became stalled in the House Judiciary Committee, possibly because of a series of letters and articles by Yale Professor Charles Black attacking various aspects of the proposal.[92]

In 1975, Senator James Abourezk of South Dakota introduced a bill[93] substantially similar to the Ervin legislation, but it never emerged from subcommittee.[94] Most recently, Congress has rejected attempts to allow rescissions of the Equal Rights Amendment[95] and the amendment guaranteeing voting representation for the District of Columbia.[96]

But even if prior dispositions of amendments and proposed statutes were clearly to indicate that rescissions have not been accepted, those dispositions need not bind present or future Congresses.[97] Certainly, Congress' prior decisions on constitutional matters may be entitled to great weight. When the relevant precedent has grown out of careful investigation and embodies unassailable logic,[98] the precedent deserves respect.[99]

91 117 CONG. REC. 36804 (1971).

92 *See, e.g.*, Black, *Amending the Constitution*, 82 YALE L.J. 189 (1972). *But cf.* Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972) (reply to Black's criticism of the Ervin Bill).

93 S. 1815, 94th Cong., 1st Sess. (1975). *See also* S. 15968, 95th Cong., 2d Sess. (1978).

94 Fasteau & Fasteau, *supra* note 73, at 36 n.39.

95 The House Judiciary Committee and the full Congress rejected a rescission amendment to the ERA extension on the grounds that "the appropriate time to reconsider the validity of rescissions is when the time comes for Congress to determine whether in fact three-fourths of the states have ratified the amendment." HOUSE COMM. ON THE JUDICIARY, PROPOSED EQUAL RIGHTS AMENDMENT EXTENSION, H.R. REP. NO. 95-1405, 95th Cong., 2d Sess. 12 n.8 (1978).

96 *Hearings on H.J.R. 638, supra* note 19, at 144 (statement of Rep. Robert McClory).

97 As Professor Black has stated, "no Congress has the power to bind the consciences of its successors, with respect to grave questions of constitutional law." Black, *supra* note 92, at 192.

98 These are two of the elements that the courts use as a rationale for stare decisis. A third criterion which the courts use in implementing the stare decisis doctrine is the extent to which the decision addressed a concrete fact situation. This criterion is less valid in the congressional context. Since Congress is a political branch, decision on a specific case entails some risk that the previous outcome depended upon Congress' attitude toward the amendment's text.

99 For example, during the impeachment hearings against Justice William O. Douglas and President Richard M. Nixon, the standards and procedures for impeachment used by previous Congresses were carefully studied and proved influential. *See* HOUSE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., FINAL REPORT BY THE SPECIAL SUBCOMM. ON H. RES. 920, at 31-39 (Comm. Print 1970); STAFF OF THE IMPEACHMENT IN-

But none of the precedents[100] or bills concerning rescission meets both of these criteria. The analysis here may, therefore, start afresh.

C. *Analogies to Other Article V Mechanisms*

The first analogy is to congressional proposal of an amendment. One might contend that if Congress may (or may not)[101] withdraw an amendment it has proposed, states similarly may (or may not) rescind their ratifications. This analogy fails, however, because the existence of a congressional power to withdraw an amendment that it deems undesirable would eliminate the need for a state power directed toward achieving the same end.

Second, one might argue that rescission of ratification by the states is analogous to withdrawal of an amendment by constitutional convention. Although one would not suppose that a convention could reconvene to withdraw an amendment, the question is shrouded in speculation because no article V constitutional convention has existed. Indeed, the question may never be resolved, because the convention would be able to rely on Congress to provide an additional check on ill-conceived amendments; Congress could leniently allow states to rescind ratification in such cases.[102] Interestingly, the response to the second

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QUIRY, HOUSE COMM. ON THE JUDICIARY, 93d CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, at 6-37 (Comm. Print 1974).

100 A continuous process of citation has occurred until it has become "the rule" that rescission is not allowed. Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 60 AM. L. REV. 181, 184 (1926).

The work most often cited is J. JAMESON, THE CONSTITUTIONAL CONVENTION (3d ed. rev. 1873). Both the Kansas and U.S. Supreme Courts relied heavily on Jameson. *See* Coleman v. Miller, 307 U.S. 433, 447 n.13 & 448 n.15 (1939), *aff'g* 146 Kan. 390, 400-01, 71 P.2d 518, 526 (1937). But Jameson's advocacy was clearly influenced by congressional rejection of rescissions of the Fourteenth Amendment. Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 626 (1953).

101 *See* text accompanying notes 49 to 55 *supra*.

102 [T]he impetus for the [convention-proposed] amendment comes from outside Congress itself. Under these circumstances, it is not unreasonable for Congress to assume an attitude toward the states that in effect tells them, 'You may change your decisions about ratifying *your own* proposed amendment all you want, at least until we have received valid and unrescinded ratifications of such amendment from three-fourths of the states.'

Kantowitz & Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979, 1008 (1977) (emphasis in original).

analogy mirrors the response to the first; the existence of a congressional power to sanction rescissions eliminates the need for Congress or a convention to have the power to withdraw amendments.

A third analogy compares the state legislature's decision to rescind to a similar decision made by a state ratifying convention. Here again, as with the case of the constitutional convention, the question has never arisen in a concrete context. The argument for rescission by a convention is weaker than that for legislative rescission, because conventions are generally ad hoc bodies whose reassembly may be impractical. In contrast, legislatures are ongoing bodies well adapted to reconsider resolutions.

Finally, consider the analogy between ratification and a state legislature's action calling for a constitutional convention to propose amendments. One author has argued that applications could not be rescinded because neither ratifications nor congressional proposals could be withdrawn.[103] This view, however, has found little support among other authors, who maintain that applications for a convention are not "final acts" and therefore are not irrevocable.[104]

Such a distinction between ratification and application begs the question. An act is final whenever one so defines it. Perhaps the commentators mean that the act of application is less important, since it is only the first step in a long process that may culminate in a constitutional amendment.[105] If so, one can argue that there is a stronger warrant for rescission of ratifications than of applications, since a subsequently-regretted ratification would have wider, less easily nullified, ramifications, than would an error in making an application. On the other hand, since application occurs at an early stage in the process and is perceived to be less important, legislatures may act more hasti-

103 Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161, 161-63 (1959) (amendment to limit the federal income tax).

104 *See, e.g.*, Fensterwald, *Constitutional Law: The States and the Amending Process — A Reply*, 46 A.B.A.J. 717, 719 (1960); Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 889 (1968); Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 967 (1968) ("applications do not share the dignity or finality of ratifications").

105 Ervin, *supra* note 104.

ly and with less information than when they decide whether or not to ratify an amendment. Therefore, rescission of application may be more justified than withdrawal of assent to amendments.[106] This last analogy again appears to provide less than a firm conclusion.

In sum, none of the other article V processes appears to offer a valid analogy that can lead us to a mechanical rescission rule.

D. *The Consensus Quagmire*

Having discussed and discarded as inconclusive the "plain wording" doctrine, legislative history, judicial precedent and analogies to other article V mechanisms, this Note now examines the policy arguments associated with the rescission question and draws its conclusion on the basis of this examination.

Perhaps the most attractive argument advanced in favor of rescission is that if states may withdraw their ratifications, then no amendment will be promulgated without the necessary "consensus" of the citizenry.[107] For those amendments which would pass despite the availability of rescission, there would be greater assurance of consensus. The argument, however, is not really so simple.

Advocates of this consensus argument apparently believe that the legislative vote accurately reflects popular sentiment. It need not do so. Article V does not explicitly embody a "We, the People" consensus theory.[108] Indeed, the question whether

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106 Congress has given some reason to believe that it would accept withdrawals of applications. A proposal to limit the federal income tax received a sufficient number of applications over a period of fifty years, but Congress never called a convention. Twelve states had rescinded their applications. Graham, *The Role of the States in Proposing Constitutional Amendments,* 49 A.B.A.J. 1175, 1176-77 (1963). This precedent is not conclusive, however, since Congress may have based its refusal to act on an analogy to its power to determine a reasonable time for ratification, and decided that the applications were not contemporaneous.

107 "The fabric of the American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." THE FEDERALIST No. 22 (A. Hamilton), *supra* note 72, at 199. Professor Van Alstyne applied the theory to the amending process when he testified that a "sort of extraordinary consensus . . . is instinct in the demand of Article V for the change in the fundamental law." *Hearings on H.J.R. 638, supra* note 19, at 119.

108 "Whenever [the sufficient number of] *states* were united in the desire of a par-

legislators should vote with their consciences or with their constituencies has been often asked and never satisfactorily answered. In practice, legislators sometimes vote their own personal interests, ignoring both conscience and constituency. Thus, the possibility of rescission does not necessarily contribute toward the achievement of popular consensus.

In fact, rescission opponents can reasonably argue that the possibility of rescission would allow special interest groups to engineer rescission of a truly popular amendment by intensive campaigning to defeat legislators who voted for the amendment.[109] But to the extent that this argument is valid, it proves too much; such possibilities are inherent in the consideration by a representative body of any issue. The argument appears to cut both ways in another sense as well: special interest groups can similarly engineer the ratification of an amendment that the legislature at first rejected. But few people would argue that such reconsiderations should be forbidden.[110] Furthermore, it is not always clear that pressure groups fail to reflect popular sentiment; there is no reason to believe that the engineering described would necessarily work in opposition to the achievement of consensus.

Proponents of rescission further argue that the amendment process needs a check against ill-conceived, hasty ratification. But the congressional power in some cases[111] to refuse to promulgate on consensus grounds, the possibility of a repealing amendment,[112] and the likelihood that states regretting their ratification would pass resolutions urging the undecided states not to ratify, all provide such a check. Also, if legislators know

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ticular amendment that amendment must infallibly take place." THE FEDERALIST No. 85 (A. Hamilton), *supra* note 72, at 545 (emphasis added).

109 During the last five years approximately ten states per year have been targeted for rescission attempts by ERA opponents. *Hearings on H.J.R. 638, supra* note 19, at 285 (statement of Eleanor Smeal). Such focused efforts bore fruit in Nebraska, Idaho and Tennessee. *See, e.g.*, Burke, *Validity of Attempts to Rescind Ratification of the Equal Rights Amendment*, 8 U.W.L.A. REV. 1, 21 (1976).

110 *Cf.* text accompanying note 58 *supra.*

111 *See* text accompanying notes 20 to 21 *supra.*

112 Repeal is no painless panacea, however; it is a laborious process, consuming time and resources. In the meantime, the "horrible" amendment would be in full force and effect. Repeal may also be unavailable if more than a majority but fewer than three-quarters of the states oppose the original amendment.

that they cannot rescind, they may debate the ratification measure more carefully.[113]

The arguments and counterarguments regarding consensus have thus far balanced fairly evenly. However, this discussion has ignored completely the real underlying issue. Allowing rescissions will make ratifications of amendments more difficult, and so the real policy question is this: how difficult, or how easy, should it be to change the fundamental governing document of our land?

The inquiry that follows does not attempt to delve into political philosophy and answer the rescission question on an abstract level. Instead, it analyzes concrete historical and policy arguments, dating from the Constitution's creation.

One major reason for the Constitutional Convention was the defective nature of the Articles of Confederation; it was virtually impossible to amend them because all of the states were required to assent to any change.[114] The Constitutional Convention purportedly remedied the deficiency. James Madison declared that article V "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."[115]

Article V has been criticized for too-effectively deterring amendments. Chief Justice Marshall called the amendment process "unwieldy and cumbersome."[116] But the small number of amendments passed to date reflects more than article V's intrinsic unwieldiness.

First, by almost any standard, the Constitution has been a remarkably successful instrument. Second, by putting flesh and blood on the bare bones of the Constitution, the judiciary has

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113 Legislators' attitudes in this regard are, however, difficult to determine empirically.

114 As George Mason of Virginia commented, "The plan now to be formed will certainly be defective as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust to chance and violence." THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 203 (M. Farrand ed. 1937) [hereinafter cited as CONVENTION OF 1787].

115 THE FEDERALIST No. 43 (J. Madison) *supra* note 72, at 315.

116 Barron v. Baltimore, 7 U.S. (Pet.) 242, 249 (1833).

made the formal article V process unnecessary.[117] This Note does not purport to add to the mountain of literature on the judicial role; it simply notes that one's view of article V may well be influenced by one's perception of that role.[118] Third, painfully aware of the constant amendments to which the state constitutions have been subjected, both proposers and ratifiers may have feared that too many amendments to the Constitution would decrease respect for that document.[119]

Nonetheless, the amendment process should not be so unwieldy as to preclude formal constitutional change. Excessive reliance on the judiciary to effect change undermines the tradition of a popular consensus. Also, complex constitutional revisions should be drafted from scratch with all factors considered, not evolved piecemeal in response to narrow problems. For example, it would have been almost impossible for the judiciary to have evolved a coherent scheme to determine the presidential succession.

Nor need frequent amendments necessarily result in diminished public respect for the Constitution. A few more amendments should hardly decrease respect for a document that embodies cherished principles. To the contrary, flexibility may actually increase respect by preventing the Constitution from becoming anachronistic. The Constitution was adopted as a document of compromise, not an immutable Sacred Writ.

The ideal amendment process would make formal constitutional change available and practical, but not so frequent as to

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117 As Justice Black commented regarding the Fourth Amendment, "[D]istort[ing] the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times' . . . make[s] us a continuously functioning constitutional convention." Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting).

118 An opponent of judicial activism might contend that the Constitution should be easy to amend in order to undo "judicial amendments." On the other hand, some people might prefer both to allow rescissions — which make amendments more difficult to achieve — and to see the courts play a passive role; such people probably would oppose change in any form. The opposite preferences for judicial activism and easy amendment also are not mutually exclusive. *See* McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1010-13 (1968), one of the few articles to recognize the relationship between the rescission issue and the judicial role.

119 *See Federal Constitutional Convention: Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 61 (1967) (statement of Professor Bickel) [hereinafter cited as *Federal Constitutional Convention*].

be destabilizing. In some cases, the possibility of rescission may present one more barrier in an already unwieldy system. Rescission could become an instrument of oppression if slight majorities in the least populous states were to block generally popular amendments. Conversely, allowances of rescissions may be desirable if it becomes clear that that no majority supports a possibly permanent constitutional change.

Therefore, this Note eschews the adoption of any hard and fast rule. By deciding on a case-by-case basis whether to allow rescissions, Congress may reflect popular sentiment regarding how easy or difficult it should be to pass each specific amendment. Permitting rescission on a case-by-case basis thus allows Congress to determine the extent to which consensus exists in each case, as it does when it decides whether to grant an extension of time for ratification.

E. *Rescission After Extension*

Even strong opponents of rescission may find themselves at a loss for a persuasive response to the argument that rescission should always be allowed after Congress extends the time for ratification of an amendment. Allowing rescissions in that situation intuitively seems "only fair": if the proponents received one more chance to secure ratifications, the argument goes, then opponents should also receive time to work for rescissions.

Although appealing, the "fairness" argument nonetheless eludes logical formulation. Suppose that a proposed amendment had an initial four-year ratification deadline which Congress later extended for three more years. Suppose, alternatively, that Congress had subjected the same amendment to an initial seven-year limit. Both amendments would have to have been ratified within seven years. One could no more justify allowing rescissions in the first instance than in the second.

In fact, allowance of rescissions arguably is more rational in the second case than in the first. In the first example, Congress decided after four years that the proposed amendment was still current and that the quality of debate warranted an additional three years for consideration. In the second, Congress made no such explicit determination that a consensus on the amendment

was still possible after four years. Its failure to act would thus make it logically more reasonable for the states to withdraw earlier, perhaps ill-conceived ratifications, which, due to changing social and political conditions, might no longer reflect a consensus.

Proponents of rescission-after-extension might also argue that a spate of rescissions would help indicate to Congress that a reasonable time for ratification had elapsed. Although the argument for rescission may seem to be stronger after an extension than before, Congress alone bears the responsibility for determining timeliness.[120] A firm rule validating rescissions, before or after extension of time limits, would thus undercut Congress' sole authority to weigh the changing political, social, and economic conditions in its determination of a reasonable period for ratification.

F. *Consistency Versus Flexibility*

Does Congress have the authority to decide on a case-by-case basis whether to allow rescissions? Under *Coleman v. Miller,*[121] Congress would clearly appear to be able to decide under article V whether states' initial rejections or ratifications will bind them or whether to promulgate a resolution on the subject.[122]

The states themselves clearly lack the power to pass upon the effectiveness of a rescission. State legislatures, when they ratify, are acting in a federal capacity.[123] The Constitution vests the article V amending power in the government of the United

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120 This view has wide currency. The Judiciary Committee Report on the ERA extension noted that ". . . there was virtual unanimity among the constitutional scholars that extension of the time period for ratification does not automatically give rise to the constitutional right of rescission. Several believed that extension of the time period made the argument for rescission stronger, but none felt it was dispositive." HOUSE COMM. ON THE JUDICIARY, PROPOSED EQUAL RIGHTS AMENDMENT EXTENSION, H.R. REP. No. 95-1450, 95th Cong., 2d Sess. 12 (1978).

121 307 U.S. at 450.

122 This conclusion is consistent with some recent scholarly opinion. Harvard Professor Laurence Tribe, for example, believes that Congress has the power to recognize or reject rescissions on an amendment-by-amendment basis, and that when Congress has set no time limit on the amendment, it should be more willing to treat a rescission as effective. *Hearings on H.J.R. 638, supra* note 19, at 40-41 (statement of Professor Tribe). *See also id.* at 135-36, 140 (statement of Professor Van Alstyne).

123 Hawke v. Smith No. 1, 253 U.S. 221, 230 (1920).

States.[124] It follows that Congress may control details of the ratification process, since it has authority to enact laws "necessary and proper"[125] to carry into execution that power. The alternative is the possibility of fifty different standards defining ratification.[126] At least one court, however, has objected to recognizing this congressional power,[127] on the grounds that the article V process should be consistent from one amendment to another. As in the case of the ERA, whether or not rescissions are allowed will influence both sides' allocations of time and money. Absent a congressional statement on rescissions at the time of proposal, both sides will remain in a state of confusing uncertainty.

If both sides are uncertain, neither side will gain an advantage. The only real losers will be the legislators, who will have to decide whether to spend time on rescission resolutions or whether their first vote on an amendment will prove binding.

But an even thornier problem arises if Congress establishes one policy on rescission at the time of proposal and then changes that policy prior to certification. In such a case, partisans on only one side of the issue would be significantly harmed. Once again, the outcome depends on the contestants' desires to rely on an inflexible ratification procedure when they map strategy. Nonetheless, both sides take the risk that Congress can change its mind.[128] One side might divert funds to attempt to bring about a change; the other side might divert funds to prevent such a change. Ultimately, the consensus consideration must dictate the final decision.

Some political observers might also worry that a congression-

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124 Dodd, *Amending the Federal Constitution,* 30 YALE L.J. 321, 339 (1921).

125 U.S. CONST. art. I, § 8.

126 This argument presumes that the courts do not define the phrase, "when ratified."

127 Judge Stevens set forth the following opinion in *Dyer v. Blair,* 390 F. Supp. 1291 (N. D. Ill. 1975): "We are persuaded that . . . whatever the word 'ratification' means as it is used in Article V, that meaning must be constant for each amendment that Congress may propose." *Id.* at 1303. Judge Steven's opinion in *Dyer* was not faithful to this standard; it allowed the legislatures of different states to enact different majority requirements for ratification. The meaning of "ratification" for one amendment may thus vary from another, depending on what voting requirements the state legislatures choose to adopt.

128 *Cf.* text accompanying note 41 *supra.*

al vote on rescission will reflect partisan sentiment toward the amendment rather than an independent evaluation of consensus. These observers need not worry. For one thing, a Congress deciding whether to allow rescissions, sensitive to the inequity of changing its stance, would probably defer to the proposing Congress' pronouncements. Moreover, the ERA experience may indicate that many members of Congress can separate the merits of the amendment from procedural questions.[129] Finally, resort to the judiciary is always possible if the legislature appears to have exceeded the bounds of its constitutional authority.

Over time, Congress would almost certainly evolve general standards allowing it to dispense with amendment-by-amendment contests over rescission. As members of Congress dealt with their article V responsibilities, these standards might even crystalize in the form of a rescission resolution. It would be more than just a point of reference; it would exert a strong influence on the members of Congress confronting the question whether or not to allow rescissions. Although no Congress is bound by the resolutions enacted by another, members would hesitate to upset the settled expectations of an amendment's proponents and opponents, state legislators, and the body politic. They would also recognize that a resolution has the advantage of being dissociated from the merits of particular amendments.

III. Voting Requirements in State Legislatures

Article V allows Congress to choose between state legislatures and special ratifying conventions but is silent regarding the procedures by which the two bodies are to perform the process of ratification. To this date, Congress has given no guidance as to what procedures should be followed. This section discusses whether Congress could, by resolution, specify the margin required in the state legislatures to ratify an amendment. The following discussion assumes that if Congress had such power it would require a simple majority rather than a supermajority in

129 *See* text accompanying notes 42 and 43 *supra.*

the legislatures. If a supermajority in Congress approves the amendment, it then arguably follows that the same majority will wish the ratification to be less rather than more difficult to achieve.

A. *The Problem and Dyer v. Blair*

The state-by-state battle over the ERA has focused attention on voting and other procedural requirements in the state legislatures. The ERA has faced three such barriers. The first of these is the large number of assemblies that must consent to the amendment. In the late 1700s, ratification of an amendment required the approval of ten states; agreement by a minimum of twenty legislative bodies was necessary. Today a total of 193 decision units, including committees, are involved in the process of ratification, and affirmative votes must be obtained in 140 of them in order to adopt an amendment.[130] Second, a number of legislatures have pigeonholed the ERA in committee.[131] Third, some state constitutions require a supermajority for ratification by their legislatures.[132]

The Illinois constitution, for example, specifically provides that amendments must be ratified by a three-fifths vote in the General Assembly. A three-judge federal district panel declared that provision unconstitutional in *Dyer v. Blair*.[133] *Dyer* confirmed the notion that legislatures perform a federal function

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130 State legislatures have emulated Congress and provided for initial consideration of amendments by various committees. Forty-six states now begin the ratification process in each house at the committee level. In addition, Connecticut and Massachusetts utilize joint committees. Martin, *supra* note 81, at 289.

131 In the case of the ERA, free and open floor debate on the amendment has been stifled in one or both houses of at least nine state legislatures. *See Hearings on H.J.R. 638, supra* note 19, at 217 (statement of Dorothy McDiarmid); *id.* at 315 (statement of Marilyn Heath).

132 In the course of its opinion in Dyer v. Blair, the court summarized a 1972 study made by the Illinois Legislative Council. Twenty-four states required a majority of the elected representatives (a constitutional majority) and seventeen required a simple majority — a majority of those present and voting. Three specified a majority of those elected to the state senate and two-thirds of those elected to the house; two required two-fifths of the members elected and a majority of those voting. Louisiana mandated a majority of those elected to the senate and a majority of the authorized membership of each house, notwithstanding possible vacancies, and Idaho required two-thirds of those elected. 390 F. Supp. 1291, 1305 n.34 (N.D. Ill. 1975).

133 390 F. Supp. 1291 (N.D. Ill. 1975).

when ratifying, echoing the holding of *Hawke v. Smith No. 1.*[134] Since the Illinois constitutional provision encroached upon the legislature's power to ratify, it unconstitutionally abridged a federal function.

The Illinois legislature, however, had also provided for the three-fifths requirement by a procedural rule, and that rule the *Dyer* court upheld. Since then, a majority of the Illinois legislators have voted for the ERA, but that state has not been counted as ratifying, because the three-fifths margin has not been satisfied.[135] *Dyer's* acceptance of the procedural rule poses the danger that a minority of states may thwart adoption of an amendment by delaying its consideration or by making the required majority virtually unattainable.

The question more generally before the court in *Dyer* was whether the Illinois constitution or legislature could require a supermajority for ratification in the absence of an explicit congressional statement on the subject.[136] In dicta, then-Judge John Paul Stevens went beyond this question to reach the broader issue: whether Congress has the power to set such requirements.

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134 253 U.S. 221 (1920).

135 The Illinois example does not necessarily prove that the ERA would pass in that state but for the legislative rule. The possibility exists that some legislators, knowing that three-fifths of their colleagues will not vote to ratify, are casting "free votes" — ballots that will please their constituents but that would not be cast were the outcome in doubt. In the case of Illinois, however, it is probable that few such votes were cast, because Illinois has an electronic voting system which discourages "free votes" since the House Speaker may lock in the votes at any time. *Hearings on H.J.R. 638, supra* note 19, at 156-57 (statement of Rep. McClory).

This Note has not undertaken to determine what the response of the legislatures of other states to the *Dyer* rule implicitly invalidating their ratification voting provisions has been, although it seems that the response or lack of it may be relevant in determining the extent of the problem of lack of uniformity after *Dyer*.

136 Several bills have been introduced concerning legislative ratification procedures but all have failed. In 1866, it was proposed that the Fourteenth Amendment be submitted to the state legislatures with several conditions, one of which was that the most popular branch of their legislature undergo election before they could vote to ratify. Dodd, *supra* note 124, at 341. A proposal in 1869 to set the voting level at a majority of members elected to each house in all legislatures was unsuccessful. CONG. GLOBE, 41st Cong., 1st Sess. 75, 102, 334 (1869). Senator Ervin's bill, *see* text accompanying note 89 *supra*, incidentally provided that "All questions concerning the validity of State legislative procedure shall be determined by the legislatures and their decisions shall be binding on all others." S. 2307, 90th Cong., 1st Sess. § 13(a) (1967). The House of Representatives never voted on the Ervin bill. The dispositions of these proposals shed little light on the question and current members of Congress are free to draw their own conclusions.

Judge Stevens asserted that "Article V delegates to the state legislatures — or the state conventions, depending upon the mode of ratification selected by Congress — the power to determine their own voting requirements."[137] Presumably, Congress may not take back what article V has given. The *Dyer* opinion noted that no "significant discussion" occurred at the Constitutional Convention about the procedures legislatures or conventions should follow.[138] But if no discussion occurred, then a conclusion that Congress has preemptive control over the federal function of ratification seems as plausible as one that the legislatures may set their own requirements. Judge Stevens also observed that there has never been any objection by Congress to the state legislatures' independent determination of their own voting requirements.[139] Silence, however, may merely have indicated an abstinence from the exercise of power, not the absence thereof.[140]

B. *The Convention Analogy*

Article V provides that Congress must propose amendments by a two-thirds vote but specifies no figures for constitutional conventions. Some scholars have argued that a two-thirds rule should be mandatory for conventions, in order to eliminate possible "forum-shopping" by amendment proponents and to ensure that the amendment procures a strong consensus.[141]

Congress' authority to specify convention procedures rests on its capacity to enact legislation "necessary and proper" to carry out its duty to call a convention. Some procedures for the convention must be specified in advance. For example, Congress is the logical agency to decide how the delegates will be chosen,

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137 390 F. Supp. at 1308.

138 *Id.* at 1304.

139 *Id.* at 1307 n.38.

140 Congress' silence was not definitive for the authors of the Illinois Constitution, which provided, in the section requiring a three-fifths vote and nonconsideration of amendments by the General Assembly until after an intervening election, that, "The requirements of this Section shall govern to the extent that they are not inconsistent with requirements established by the United States." ILL. CONST. OF 1970, art. XIV, § 4, *quoted in* Dyer v. Blair, 390 F. Supp. at 1295.

141 *See* Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 964 (1963); Bonfield, *supra* note 104, at 992.

where, when, and for how long the convention will meet, and how much money it should spend.[142] The question therefore arises whether specification of the majority necessary to propose amendments is similar to arranging such "housekeeping" functions.

One might argue that the convention should be able to establish its own procedures as it deliberates since the constitutional convention would be a unique animal, virtually a fourth branch of government. The convention mechanism was designed to come into existence in response to congressional insensitivity to public demands for a constitutional amendment.[143] To allow Congress to check the convention through a voting requirement would be anomalous under this reasoning.[144] For example, suppose that the proposed convention planned to debate a balanced-budget amendment,[145] an amendment which most members of Congress adamantly opposed. Congress conceivably could stifle any convention action by requiring a unanimous vote before any such amendment could be proposed.

It is highly unlikely, however, that Congress would act in so high-handed a manner. Unlike convention delegates, members of Congress would have to face the wrath of their constituents during the next election. Also, if Congress' response were not a necessary and proper incident to the calling of a convention, then perhaps the judiciary could step in.

On balance, it seems that Congress should avoid the constitutional issue and refrain from legislating on the convention voting rule. Congress could still, by resolution, encourage the convention to establish its own two-thirds rule in order to en-

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142 *Federal Constitutional Convention, supra* note 119, at 7 (statement of Senator Hruska).

143 George Mason, in opposing a proposal at the 1787 Convention which would have barred resort to a constitutional convention to initiate amendments, commented that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive." CONVENTION OF 1787, *supra* note 114, at 629.

144 Forkasch, *The Alternative Amending Clause in Article V: Reflections and Suggestions,* 51 MINN. L. REV. 1053, 1077 (1967).

145 This Note presumes that a constitutional convention could be called for a limited purpose and restricted to a particular area of inquiry. *See* Feerick, *ABA Report: Rules Needed to Govern Calling of Constitutional Convention,* 1 NAT'L L.J. 22,23 (March 26, 1979).

sure a sufficient consensus concerning the desirability of a proposed amendment.

The power of Congress to create a voting rule is clearer, however, when amendments are ratified by state conventions, because in that case the rationale concerning a need for a counterweight to congressional insensitivity does not apply. Only one amendment, the Twenty-first, repealing Prohibition, has been ratified by state convention. Congress did not establish specific procedures in that instance, leaving that task to the state legislatures. Twenty-one of the states, constructing their own ratification machinery, provided that their mechanisms would become inoperative should Congress pass legislation prescribing the way in which the conventions should be constituted or conducted. Only one state, New Mexico, explicitly resolved that any attempt on Congress' part to set rules for the convention would be void.[146]

C. *Power and Policy*

Congressional power to establish the level of majority by which state legislatures will ratify amendments hinges on the words of article V "as one or the other mode of ratification may be proposed by the Congress. . . ." This phrase may be interpreted in either of two ways. First, one might read it as allowing Congress only to choose between legislature and convention as the ratifying body. Such an interpretation would emasculate the convention alternative if the state legislative bodies could decide the conventions' make-up, their operating procedures and their majority requirements, because the convention alternative was designed to by-pass the state legislatures. Under this interpretation, Congress would have no real option if the state legislatures were to fail to represent public opinion adequately.[147] The potential for stifling amendments through unreasonable procedures would be great, and state legislatures would probably have an interest in doing so, in light of the fact that a

146 Martig, *Amending the Constitution — Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1275 (1937).

147 Black, *supra* note 141, at 959.

majority of amendments after the first ten have reduced the power of the states.[148]

Another reading would grant Congress the power to decide what majority would be necessary for ratification. This reading finds that power in the word "proposed." Congress, as part of its proposal, could make ratification of the amendment contingent on the vote of a specified majority. Alternatively, Congress could legislate on the subject as a necessary and proper adjunct to its capacity to choose the mode of ratification.[149]

On a policy level, congressional control of ratification would be consistent with state legislatures' "federal function" and would ensure that legislative procedures would not be manipulated by state legislators reacting to the substance of the amendment.[150] If Congress adopted a simple majority requirement, it would generate the conclusiveness of a majority consensus on an amendment.

A congressional enactment would also promote uniformity. Uniformity for its own sake is merely aesthetically pleasing, but uniformity in voting requirements would at the very least make a legislator's vote in one state comparable to a counterpart's in another state.[151] Since legislators represent constituents, uniformity would more nearly equalize the impact each citizen has upon the amending process. Notice, however, that the uni-

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148 Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1, 18-19 (1968).

149 *See* Dillon v. Gloss, 256 U.S. 368 (1921).

150 If legislatures were completely free to set their own voting requirements, they could conceivably allow ratification by a less-than-majority vote. The possibility is unlikely given the sanctity of the "majority rule" principle. Certainly, such an interpretation of the phrase "when ratified" would bring down the wrath of Congress (which might refuse to promulgate the amendment) or the courts (which could read justiciability doctrine narrowly in order to justify their intervention). In the unlikely event that Congress acted to establish a less-than-majority vote, the probable response would be judicial intervention or a convention-proposed amendment to article V.

151 For example, Illinois' General Assembly consists of 236 members, 177 in the house and 59 in the senate. Georgia also has a legislature with 236 members, of which 180 are in the house and 56 in the senate. THE WORLD ALMANAC & BOOK OF FACTS 318 (Newspaper Enterprise Ass'n., Inc., Pub. 1979). Assuming that three-fifths of each house are required to approve an amendment in Illinois, and one-half are required in Georgia, the Illinois representative opposing an amendment has more power to block the amendment than does a Georgia legislator with similar views. A member of the Georgia legislature has more influence in ratifying an amendment than does an Illinois delegate also in favor of the proposal.

formity argument falters somewhat in light of the fact that the number of representatives in each house of the state legislatures varies and that one legislature, Nebraska's, is unicameral. Further, article V does not embody a "one person, one vote" philosophy,[152] since the ratification of a small state is equivalent to that of a large one.

Weighing the potential congressional abuses and vagueness of the constitutional mandate on the one hand, against the desire for consensus uniformity on the other, one concludes that Congress should, and can, set a voting requirement for legislative ratification.[153] A minority of legislators should not be allowed to block changes. Otherwise, ratifying legislatures would not be "deliberative assemblages representative of the people . . . voic[ing] the will of the people."[154]

IV. Incidental Powers: The President's Role and the Need for Supermajority

The amending process poses still more questions regarding the manner in which Congress may exercise its power under article V. First, must each such exercise by Congress receive a presidential signature, as is the case with ordinary acts of legislation? Second, to what extent does the requirement of a two-thirds vote of both Houses to "propose" an amendment extend to the incidental powers under article V? These two questions are part of the larger issue of checks and balances in the amending process.

In an area such as the amending process, in which the Constitution's wording offers so little guidance, we again look first to the continuing practices of government which have given mean-

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152 *Cf.* Baker v. Carr, 369 U.S. 186 (1962).

153 The foregoing discussion leads to the conclusion that Congress should be able to control certain aspects of state legislative procedure. The extent of this control should increase with the need to ensure consensus, but Congress should not be able to restrict the legislatures' freedom to deliberate without coercion or change the structures of such assemblages. For example, an attempt by Congress to redistrict the legislature or to require ratification votes without deliberation would essentially deprive the legislatures of their status as independent ratifying bodies. *See Hearings on H.J.R. 638, supra* note 19, at 146 (Statement of Professor Van Alstyne). Similarly, requiring less than a majority vote or a unanimous vote would be neither necessary nor proper.

154 Hawke v. Smith No. 1, 253 U.S. 221, 227 (1920).

ing to the text. Congressional precedent with respect to the exercise of article V powers is scant, but it supports the view that Congress may proceed by majority vote and without a Presidential signature.

The adoption of the Fourteenth amendment is most directly on point.[155] When Congress declared the purported rescissions to be invalid,[156] it acted by means of a concurrent resolution, requiring a simple majority vote, which was not sent to the President for his signature.[157]

The impeachment proceeding yields another example of the Senate's authority to act by majority vote and without the President's signature. The Senate's power to sit in a nonlegislative capacity as a court of impeachment derives from article I, section 3, another of the specific constitutional provisions incorporating the requirement of a two-thirds majority. Pursuant to that mandate, the Senate in 1868 adopted a set of twenty-five rules of procedure and practice for the trial of Andrew Johnson.[158] Sitting as a committee of the whole, it adopted each rule by majority vote.[159] Those rules, of course, were not sent to President Johnson for his signature.

The President plays no part in the exercise of article V power. Article I, section 7 of the Constitution requires presidential approval or veto of "Every order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary." Since the 1798 decision of *Hollingsworth v. Virginia*,[160] however, an exception has been carved out of this apparently unequivocal language for the case of congressional proposal of amendments to the Constitution. In *Hollingsworth*,

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155 *See* text accompanying notes 72 to 75 *supra*.

156 *See* CONG. GLOBE, 40th Cong., 2d Sess. 4296 (1868).

157 Concurrent resolutions are usually used to express "facts, principles, opinions, and purposes" of Congress. CANNON'S PROCEDURES IN THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 122, 86th Cong., 1st Sess. 237 (1959). Typically, they are not sent to the President for signature. *Id.* at 236.

158 CONG. GLOBE, 40th Cong., 2d Sess. 1521-35, 1568-1603 (1868).

159 *See, e.g., id.* at 1531, 1592, 1594. The rules were summarily readopted by the Senate convened as a court of impeachment. Chief Justice Salmon Chase, presiding over the trial, explained, "In the judgment of the Chief Justice the Senate is now organized as a distinct body from the Senate sitting in its legislative capacity." *Id.* at 1701.

160 3 U.S. (3 Dall.) 378 (1798).

a unanimous Court held that the Eleventh Amendment had been validly ratified despite the fact that the joint resolution by which it was proposed had not been submitted to President Washington. Congressional power under article V to set a reasonable time for ratification and to choose a mode of ratification has been the incidental beneficiary of the same exception, insofar as the power has been exercised simultaneously with the proposal of an amendment.[161]

Professor Black has argued that *Hollingsworth* was incorrectly decided, and that its holding of exemption from the requirement of presidential signature should be limited to the actual proposal of amendments.[162] "The only even semirational ground for [*Hollingsworth*] is that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is otiose."[163] A rational distinction, however, can be drawn between congressional actions taken under different heads of constitutional power. The presidential signature is required only to effectuate acts of legislation: it is the check on congressional power under article I, section 7. In this regard, concurrent resolutions are not customarily sent to the President unless they contain "a proposition of legislation."[164] With respect to article V power, Justice Chase thus remarked during oral argument by the Attorney General in *Hollingsworth* that, "The negative of the President applies only to the ordinary case of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution."[165] Numerous state cases likewise have held that pro-

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161 *See* United States v. Sprague, 282 U.S. 716 (1931) (mode of ratification); Dillon v. Gloss, 256 U.S. 368 (1921) (reasonable time for ratification).

162 This narrow reading of *Hollingsworth* would cast doubt even on the validity of the *original* seven-year ERA time limit, which likewise was not signed by the President. Were enactment of the time limit not valid, the ERA would still be available for state ratification — subject, of course, to Congressional action. *See* Coleman v. Miller, 307 U.S. 433, 452-53 (1939).

163 Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 209 (1972).

164 JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, *reprinted in* H.R. DOC. NO. 769, 79th Cong., 2d Sess. 167 (1947). JEFFERSON'S MANUAL is one of four sources for parliamentary practice in the House of Representatives, along with the Constitution, rules adopted by the House, and prior precedent. *Id.* at v.

165 3 U.S. (3 Dall.) at 381 n.1.

posals for amendments to state constitutions do not require executive signature because they are not legislative in character.[166]

To require a presidential signature for congressional exercise of incidental powers under article V also would not be appropriate in light of the foregoing discussion of constitutional structure. Congress alone possesses the primary powers to which all the others are incident. For example, when the Supreme Court in *Coleman* held that Congress has the power to fix a reasonable period for ratification, its decision "proceeded upon the assumption that the question, what is a reasonable time, lies within the Congressional province."[167] Presidential approval of congressional extensions or reductions of the ratification period would effectively allow the President to substitute his or her judgment of what is a reasonable time for that of Congress.

The ERA extension was passed by a simple majority of both Houses.[168] For the extension to be valid, then, the two-thirds vote required by the Constitution for the *proposal* of amendments by Congress must not apply. Two arguments suggest that a majority vote is sufficient for all but final approval of the wording of the amendment itself.

First, experience suggests that the requirements for a supermajority be interpreted narrowly; a majority vote is sufficient for all but extraordinary matters specifically enumerated in the Constitution.[169] The two-thirds majority is a negative safeguard: not every proposed amendment will become part of the Constitution, but no amendment can be proposed without encountering supermajority requirement.[170] So construed, it

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166 *See, e.g.*, Opinion of the Justices, 261 A.2d 53, 57 (Me. 1970); Collier v. Gray, 116 Fla. 845, 856-57, 157 So. 40, 44 (1934); Mitchell v. Hopper, 153 Ark. 515, 525, 241 S.W. 10, 12 (1922).

167 Coleman v. Miller, 307 U.S. at 454.

168 The vote in the House in favor of the extension was 233 to 189, 124 CONG. REC. H8664-65 (daily ed. Aug. 15, 1978); in the Senate, 60 to 36, 124 CONG. REC. S17318-19 (daily ed. Oct. 6, 1978).

169 "The voice of the majority decides; for the *lex majoris partis* is the law of all councils . . . where not otherwise expressly provided." JEFFERSON'S MANUAL, *supra* note 164, at 231.

170 The same can be said about the heretofore untried method of proposing amendments by convention. The convention itself assembles upon requests by two-thirds of the states.

would serve little purpose to require the exercise of Congress' incidental powers to be subject to an additional two-thirds majority.

Second, congressional power to extend the deadline for passage of the ERA is not rooted solely in the function of *proposing* amendments for which article V requires a two-thirds vote in both Houses. The Supreme Court in *Dillon v. Gloss* described the power to set a fixed period for ratification as "an incident of [congressional] power to designate the mode of ratification."[171] Further, the limits of the incidental powers derive from the structure of article V as a whole.[172] The amending process presents a coherent scheme in which any one constitutional phrase is given meaning by all the others. It is thus from Congress' custodial role in this scheme, as much as from any specific wording, that the power to pass the ERA extensions was derived.

Conclusion

This Note calls for Congress to act to establish several procedures associated with the amendment process. Congress should include estimates of a reasonable ratification period in the resolution accompanying the amendment and a Congress sitting at the expiration of that period should feel free to reevaluate that estimate and grant an extension. If and when the need arises, Congress should decide whether to allow any attempted rescissions to become effective, basing its decision on the criteria of consensus and regularity. Finally, in order to ensure consensus and to aid uniformity, Congress should count states as having ratified upon the casting of votes in favor of the amendment by a simple majority of state legislators. Congress is free to authorize all these actions by simple majority vote and without the President's signature. Suggested, if not explicitly authorized, by historical and judicial precedent, these procedures will contribute most effectively toward maintaining consensus and regularity in the amendment process.

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171 256 U.S. 368, 376 (1921).
172 *See* Section I *supra*.

NOTE

NEW URBAN ECONOMIC DEVELOPMENT INITIATIVES: HISTORY, PROBLEMS AND POTENTIAL

ROD SOLOMON*

Urban America in the 1980's faces economic crisis. The cities are losing jobs and business investment to suburban areas and the Sunbelt. The Carter Administration has responded by introducing a set of national urban policy proposals which emphasize the use of subsidies, typically grants, as a means of making urban business more profitable and thus diverting jobs to the cities. Congress has also responded with a set of proposals; these proposals downplay the use of subsidies and emphasize the use of capital availability mechanisms, typically loan guarantees, as a means of providing city businesses with the capital necessary to maintain and expand operations and thus retain and create city jobs. Mr. Solomon reviews these proposals and compares their merits by focusing on the preferability of capital availability mechanisms over the use of subsidies.

On March 27, 1978, President Carter submitted to Congress a set of twenty-five "proposals for a comprehensive national urban policy."[1] The proposals laid heaviest stress on job creation and economic development.[2] The centerpiece of these proposals was the creation of a "National Development Bank," which would have grant, loan guarantee, interest subsidy, and loan purchase authority. Treasury Secretary Blumenthal described these devices as "financial incentives to private business to remain, expand or locate in economically depressed areas."[3]

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1 President's Message to Congress on the National Urban Policy (March 27, 1978) *reprinted in* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, THE PRESIDENT'S NATIONAL URBAN POLICY REPORT: 1978 (1978).

2 Over 60 percent of the appropriations and a far larger percentage of the budget authority requested for the first year would have gone to programs focused primarily or exclusively upon these goals. *See id.* App. B., at 133-141.

3 124 CONG. REC. S9537 (daily ed. June 23, 1978) (reprinted letter from W. Michael Blumenthal to the President of the Senate).

Carter's proposal for a National Development Bank (the "Administration Bank Proposal") received only one day of hearings and no further consideration in the 95th Congress.[4] On March 1, 1979, the President announced that he was replacing his initial proposals with new proposals (The "Revised Administration Proposal"), which would incorporate the financial authority suggested for a National Development Bank into the existing program structure of the Economic Development Administration (EDA).[5] In part because Congress had to legislate a continuation of existing EDA programs,[6] the President's incorporation of the new financial authority in the EDA program structure prompted serious Congressional consideration of his proposals. On August 1, 1979, the Senate passed S.914 (the "Senate Proposal"), which differed from the Revised Administration Proposal by limiting the use of grants and by favoring the use of loan guarantees for small businesses as a means of promoting economic development.[7] On November 14, 1979, the House passed a compromise bill[8] which includes parts of both the Revised Administration Proposal and the Senate Proposal. As of early 1980, no House-Senate conference has been held.

This Note first describes more fully the history of the urban economic development proposals. Then it analyzes and compares the Revised Administration Proposal and the Senate Proposal.

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4 *See To Establish a National Development Bank: Hearings on H.R. 13230 before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs,* 95th Cong., 2d Sess. (Aug. 1 and 2, 1978) [hereinafter cited as *Hearings on H.R. 13230].*

5 White House Press Release (March 1, 1979).

6 Authority for present EDA programs was scheduled to expire on September 30, 1979. 42 U.S.C. § 314(e) (1976).

7 S. 914, 96th Cong., 1st Sess. (1979), *reprinted in* 125 CONG. REC. S11092-11106 (daily ed. Aug. 1, 1979). All citations to sections in this legislation refer to sections of the Public Works and Economic Development Act of 1965, 42 U.S.C. § 3121 *et seq.* (1976), as proposed to be amended, rather than to sections of the Senate bill.

8 H.R. 2063, 96th Cong., 1st Sess. (1979), *reprinted in* 125 CONG. REC. H10732-45 (daily ed. Nov. 14, 1979) [hereinafter cited as H.R. 2063]. All citations to sections in this legislation refer to sections of the Public Works and Economic Development Act of 1965, 42 U.S.C. § 3121 *et seq.* (1976), as proposed to be amended, rather than to sections of the House bill.

I. DESCRIPTION OF LEGISLATION

Legislation proposed for a national urban policy has provided financial mechanisms designed to promote economic development, eligibility criteria for allocating the resources Congress makes available, and an administrative mechanism for implementing the scheme.

A. *Financial Mechanisms*

1. The Administration Bank Proposal

The National Development Bank would have provided for five financial mechanisms — grants, loan guarantees, interest subsidies on guaranteed loans, interest subsidies on local government sponsored bonds and a liquidity facility.

a. *Grants*

Grants would have been given to defray the capital costs of business investments in eligible areas, such as buildings and equipment, thereby increasing the relative profitability of those investments. $550 million annually in such grants[9] would have been channelled through two existing programs which now provide similar assistance to businesses — the Urban Development Action Grant (UDAG) program administered by the Department of Housing and Urban Development[10] and the Title IX program administered by EDA.[11] The existing programs would

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9 Amounts listed here and in conjunction with descriptions of the Bank's other financial mechanisms are for the first full year of the program, unless otherwise specified. Such amounts are listed and described at 124 CONG. REC. S9537, *supra* note 3.

10 42 U.S.C.A. § 5318 (1979). UDAG's annual funding level has been $400 million. Through 1978, the average UDAG grant was $3 million to cities larger than 50,000 in population and other central cities of Standard Metropolitan Statistical areas, and $900,000 to other, generally smaller, cities. U.S. Dept. of Housing and Urban Development, Preliminary Review of the Urban Development Action Grant (UDAG) Program, at 1, 12 (Jan. 22, 1979) (working paper, Office of Community Planning and Development).

11 42 U.S.C. § 3241 *et seq.* (1976). The relevant portion of Title IX received about $22 million in fiscal 1977 and about $42 million in fiscal 1978. The Administration requested about $137 million for fiscal 1979. The list of Title IX grants as of August 1978 varied in size and included several very large grants to cities averaging about $9 million, three grants to states averaging about $1 million to create local revolving loan funds and miscellaneous smaller grants mostly for planning. *Amending Title IX of the Public*

have been changed, however, to emphasize payment of the grants directly to businesses rather than indirectly through funding of auxiliary public works and facilities.[12]

b. *Loan Guarantees*

The government's provision for loan guarantees for businesses in troubled urban areas was designed to serve two purposes. First, because the risk of default would be reduced by the guarantee, the private lenders could charge the businesses lower interest rates. From the businesses' standpoint, the result would be identical to an interest rate subsidy.[13] Second, the guarantee would encourage lenders to make loans available for investments which lenders otherwise, for complex reasons including discrimination, would perceive to be too risky. Thus, the Administration proposed that $2.9 billion in loan guarantees be made available.[14]

Again to limit the government's exposure per investment, each guarantee would have been limited to $15 million and a term of thirty years.[15] To ensure that private lenders would continue to be somewhat discerning in their credit decisions, rather than making loans regardless of the risk to the government, guarantees would have been limited to 75 percent of loan principal.[16]

Loan guarantees presently are used for similar purposes in

Works and Economic Development Act of 1965: Hearings Before the Subcomm. on Regional and Community Development of the Senate Comm. on Environment and Public Works on S. 3319, 95th Cong., 2d Sess. 38, 66, 67 (1978).

12 H.R. 13230, 95th Cong., 2d Sess. § 902 (1978). The UDAG program generally does not provide direct subsidies to businesses, but instead pays for "public" works and facilities, such as roads, lighting and waterlines which are necessary or helpful to the investment. Some of these expenses, however, might have had to be paid by the investing business (*e.g.*, infrastructure for an industrial park).

UDAG's statutory basis for providing grants more directly to private businesses in the form of a cash payment or its equivalent for part of the investment expense is ambiguous, *see* 42 U.S.C.A. § 5318(f) (1979), and is provided specifically only for neighborhood-based nonprofit organizations, local development corporations or minority small business corporations, 42 U.S.C.A. § 5305(a) (1979). Such direct grant assistance is provided, but rarely.

13 *See Hearings on H.R. 13230, supra* note 4, at 81 (statement of Roger C. Altman, Assistant Secretary of the Treasury.)

14 *See* note 9 *supra*.

15 H.R. 13230, 95th Cong., 2d Sess. (1978).

16 *Id.* § 702.

various government housing, economic development and other programs,[17] including an EDA program.[18] The Administration Bank Proposal would have differed, however, by increasing the volume of such business loan guarantees and by providing for individual guarantees of much larger amounts than present programs typically provide.[19]

c. *Interest Subsidies on Guaranteed Loans*

The Bank would have been authorized to grant interest subsidies of up to thirty years in conjunction with these loan guarantees; $1.38 billion of interest subsidy contracts were authorized to cover the total cost over the life of the loans made during the first year of the program.[20] Such subsidies could have been used to reduce the effective interest rate on the guaranteed loans to 2.5 percent.[21] Because interest expenses would be defrayed by the government, the effect would be the same as a grant provided over time.

Profitability would be increased directly. On the other hand, like other subsidy mechanisms (but unlike loan guarantees), the interest subsidies would not address directly any problem of obtaining loan capital. That problem would be addressed indirectly to the extent interest subsidies encourage project investment by making the investment more profitable.

Interest subsidies have been used most heavily in the past for government housing programs.[22] A small interest subsidy is authorized for economic development under present EDA programs,[23] but that subsidy authorization never has been implemented.

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17 *See, e.g.*, 12 U.S.C. §§ 1709-1713 (1979), *supra* note 15, (Federal Housing Administration Mortgage Loan Insurance Programs); 15 U.S.C. § 636 (1976) (Small Business Administration small business loan guarantee program).

18 42 U.S.C. § 3142 (1976).

19 H.R. 13230, § 702; 124 CONG. REC. S9537. Authorization of $2.9 million for the Bank loan guarantees would have been more than six times the fiscal 1979 EDA loan guarantee program level of $473 million.

20 H.R. 13230, *supra* note 15, § 801.

21 *Id.*

22 *See* 12 U.S.C. § 1715 (1976) (homeownership interest subsidy program); 12 U.S.C. § 1715-1 (1976) (multifamily interest subsidy program).

23 42 U.S.C. § 3142(a) (1976).

d. *Interest Subsidies on Local Government Sponsored Bonds*

The Bank would have been authorized to provide interest subsidies of $376 million for taxable industrial revenue bonds sponsored by local governments.[24] The heart of this concept was that without such subsidies, localities would continue to rely on tax-exempt bonds. Because the tax-exempt bond market must rely on purchasers with tax brackets high enough to make the tax exemption on interest sufficiently attractive, the demand for such bonds is limited and interest rates are thereby pushed up. Thus, it was hoped that the provision of subsidies on taxable bonds would provide localities an alternative to reliance on the tax-exempt market.[25] In addition, the Treasury Department and various Congressional sponsors have tried for years to discourage the use of tax-exempt bonds for both tax equity and efficiency reasons.[26]

e. *Liquidity Facility*

Finally, the Bank's mechanisms included a "liquidity facility" to provide additional credit for eligible "distressed areas."[27] To accomplish this goal, the Bank would have bought up to $1.1 billion in loans made by private lenders at unsubsidized market rates to businesses in such areas. The purchase price paid by the Bank would have been high enough to allow lenders to profit from the low interest rates at which the government can borrow funds. Private lenders' liquidity thus would have been restored immediately, but they would have been required to loan the sale's proceeds to another business in an eligible area. The government would have held the loans and attempted to resell them to private investors.[28]

There is precedent for a program in which the government

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24 H.R. 13230, § 802.

25 *See Hearings on H.R. 13230, supra* note 4, at 85 (statement of Roger C. Altman).

26 *See The President's 1978 Tax Reform Proposal, Hearings Before the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 66 (1978) (statement of Treasury Secretary W. Michael Blumenthal); Note, *The Taxable Bond Option: An Elusive Tax Reform Goal*, 27 AM. U. L. REV. 773, 740 n.45, 752-53 (1978).

27 H.R. 13230, *supra* note 15, Title X.

28 *Id.* § 1008.

buys and sells loans, notably in the housing field.[29] The liquidity facility would have differed, however, from many of these programs in a crucial respect—upon default of any loan purchased by or through the liquidity facility, the original lender would be obligated to repurchase it immediately from the Bank.[30] As a result, the risk to the government would be minimized.

2. The Revised Administration Proposal

The Administration omitted the interest subsidies on local revenue bonds in the Revised Administration Proposal and thus left the tax-exempt bond problem to be addressed another day. The liquidity facility proposal also was dropped, on the grounds that properly designed loan guarantees would make the guaranteed loans salable to investors and thus provide lenders with the necessary liquidity through a simpler process.[31] The proposals for grants, loan guarantees and interest subsidies remained.

The authorizations for the remaining programs which measure in dollars the Administration's priorities were nonetheless changed. The first-year authorization of $550 million for grants was not cut in the Revised Administration Proposal, but the first-year authorization for loan guarantees was slashed by one-third (to $1.8 billion) and the authorization for interest subsidies was slashed by two-thirds (to $350 million in the first year).[32] Although the Administration gave no formal explanation for these changes, they probably were motivated by both general budget control concerns in an inflationary period and the failure of the Bank proposal.

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29 The Government National Mortgage Association's mortgage purchase programs constitute the major example. *See* 12 U.S.C. § 1717 *et seq.*, § 1723e (1976).

30 H.R. 13230, *supra* note 15, § 1003.

31 *Hearings on S. 914 before the Subcomm. on Regional and Community Development of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 23 (April 10, 1979) (unpublished statement of Robert T. Hall, Assistant Secretary for Economic Development, U.S. Department of Commerce) [hereinafter cited as Statement of Robert T. Hall]. Technically, the Bank would have sold the loans to the Federal Financing Bank (an entity of the Treasury Department) which would have held and resold them. There would be a requirement similar to that of the liquidity facility, however, that the proceeds of the loan sales be used for new loans in eligible areas.

32 EDA's New Economic Development Financing Program (April 1979) (unpub-

The Revised Administration Proposal also added some measures to address the problem of capital availability for small businesses. First, it authorized $100 million for loans directly from the government ("direct loans") of up to 75 percent of investment costs to businesses unable to attract private capital.[33] That amount would have approximately doubled in size a present EDA direct loan program.[34] Second, it provided loans and loan guarantees for working capital, which small businesses in particular have trouble obtaining, of up to 30 percent of total program authorizations.[35] Third, it increased the maximum percentage loan guarantee from 75 percent to 90 percent of the loan principal amount, a step which would leave lenders more willing to take risks and would make the guaranteed loans more salable to "secondary market" investors.[36]

3. Congressional Reaction to the Revised Administration Proposal

The Congressional response to the Revised Administration Proposal has been mixed. Half of the Revised Administration Proposal's $550 million in grants was to be channelled through UDAG and $275 million through EDA.[37] Both the Senate and the House agreed to the $275 million in UDAG grants.[38] The rest of the financial package to be channelled through EDA did not fare so well, however. First, the Senate balked at the prospect of direct grants for private businesses. Senator Burdick, the bill's floor manager, made clear that the authorization is to be used on a "demonstration basis" in fiscal 1980 and that no more than $50 million to $75 million should be used in this manner.[39] Second, although the Senate Proposal basically retains

lished fact sheet, distributed by U.S. Department of Commerce, Economic Development Administration) [hereinafter cited as EDA Fact Sheet].

33 *Id.*

34 The present program is authorized for $91 million in fiscal 1979. 42 U.S.C.A. 3142 (1979).

35 EDA Fact Sheet, *supra* note 32.

36 *Id. See* Statement of Robert T. Hall, *supra* note 31, at 23.

37 White House Press Release (March 1, 1979).

38 This change is included in both the House and Senate versions of the Housing and Community Development Amendments of 1979, S. 1149 and H.R. 3875, 96th Cong., 1st Sess. (1979).

39 125 CONG. REC. S11061 (daily ed. of Aug. 1, 1979) (statement of Senator Burdick).

the Revised Administration Proposal's proposed funding level for loan guarantees and direct loan programs, it redirects them to small businesses and projects. The shift occurred on the grounds that large businesses and projects could find capital without government help.[40] Thus, the Senate Proposal limits each guarantee to $10 million and total guarantees to $20 million[41] and direct loans to $5 million per loan and $10 million to be used per firm.[42] In addition, not more than 10 percent of the aggregate amount of direct or guaranteed loans in any fiscal year could be used for projects involving firms with assets exceeding $50 million in the most recent fiscal year.[43]

Third, the Senate Proposal authorizes only $50 million for interest subsidies to reduce up to 5 percent interest rates (to a rate no lower than 5 percent).[44] This action was based on the assessment that the interest subsidies could not constitute a grant of sufficient enough size to make much difference to business location.[45]

In summary, the Senate Proposal reduces the EDA subsidy mechanisms both in the form of direct grants and interest subsidies, and refocuses loans and loan guarantees to address the capital needs of small businesses.

The House Committee which reported the bill, the Committee on Public Works and Transportation, approved the revised administration Proposal's EDA financial package verbatim.[46] Subsequently, amendments were accepted on the House floor which place restrictions similar to those in the Senate Proposal on loan guarantees, direct loans and the term (but not the authorized amount) of interest subsidies. The House bill still retains somewhat more flexibility than the Senate Proposal,

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40 S. 914, § 208.
41 *Id.* § 208(a).
42 *Id.* § 208(b).
43 *Id.* § 208(c).
44 *Id.* § 205.
45 JOINT REPORT OF THE COMM. ON ENVIRONMENT AND PUBLIC WORKS AND THE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS ON THE NATIONAL PUBLIC WORKS AND ECONOMIC DEVELOPMENT ACT OF 1979, S. REP. No. 96-270, 96th Cong., 1st Sess. at 29 (1979) [hereinafter cited as SENATE REPORT].
46 REPORT OF THE HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION ON THE NATIONAL PUBLIC WORKS AND ECONOMIC DEVELOPMENT ACT OF 1979, H.R. REP. No. 96-180, 96th Cong., 1st Sess. at 7 (1979).

however, by exempting fifteen percent of the amount of loans made or guaranteed from the loan and firm size limitations.[47]

Table I summarizes these changes. The House bill raises no new issues since it presents a compromise between the financial mechanisms of the Revised Administration Proposal and those of the Senate Proposal. Thus, it is not listed separately.

Table I
Program Comparisons*

Financial Mechanisms	Administration Bank Proposal	Revised Administration Proposal	Senate Proposal
Grants	$275 UDAG $275 EDA	$275 UDAG $275 EDA	$275 UDAG** $50-75 EDA
Loan Guarantees	$2,900 75%; $15 maximum	$1,800 90%; no maximum	$1,800 90%; $20 maximum amount per firm; firm asset size limits
Direct Loans	—	$100 75%; no maximum	$89 65%; $10 maximum amount per firm; firm asset size limits
Interest Subsidies	$1,380 30 years	$350 30 years	$50 10 years
Revenue Bond Subsidies	$376	—	—
Liquidity Facility	$1,100	—	—

*in millions (full first year authorization)
**passed separately

B. *Eligibility Criteria*

Under present law and all versions of the economic development legislation, the eligibility of proposed investments for assistance basically is determined by a two-step process. First,

47 125 CONG. REC. H10687 (daily ed. Nov. 14, 1979); H.R. 2063, § 205. The Senate Proposal contains a smaller exemption. *See* S. 914, § 208.

the proposed investment must be in a geographic area adjudged eligible for assistance because of its economic problems. Second, applications within each eligible area must promise to address these problems effectively enough — both absolutely and relative to other applications competing for the same funds[48] — to merit funding.

1. Selecting the Eligible Geographic Area

The eligible geographic areas for economic development programs, as well as other domestic economic assistance programs,[49] generally are determined by a formula in the EDA bill based on "objective" demographic statistics, such as low per capita income, high employment rate, low employment growth rate in recent years and high percentage of population living in poverty.[50] Not surprisingly, such formulae are subject to congressional maneuvering[51] and have become quite complex. In addition, because the formulae attempt to cover the entire country, and local circumstances vary, the formulae have unusual results. Thus, it became necessary to add in the Revised Administration Proposal a ceiling on eligible area per capita income of 125 percent of the national average, so that wealthy areas could not slip through under the "objective" tests.[52]

While it is difficult to generalize regarding the eligible areas under various programs, it appears that both UDAG and the Administration Bank Proposal tilt toward industrial areas facing severe decline.[53] The Revised Administration Proposal, on

48 This assumes, of course, that the amount of funds requested would exceed the amount available. That assumption seems reasonable. The UDAG program, for example, rejected three of every four applications in the first few months. *Hearings on H.R. 13230,* at 128 (comments of Robert C. Embry, Assistant Secretary for Community Planning and Development, U.S. Department of Housing and Urban Development).

49 *See, e.g.,* 31 U.S.C. § 1221 *et seq.* (1976) (general revenue sharing program); 42 U.S.C. §§ 5301, 5306 (1976) (community development block grant program).

50 S. 914, § 401(a); H.R. 2063, § 401(f).

51 For example, the Senate Banking, Housing and Urban Affairs Committee wrestled with variation upon variation of a formula for the community development block grant program for several months in late 1973 and early 1974, then dropped any formula whatsoever, *see* S. REP. No. 93-693, 93d Cong., 2d Sess. (1974).

52 Statement of Robert T. Hall, *supra* note 31, at 14.

53 *Id.* at 15; *see* 42 U.S.C.A. § 5318(e) (1979) (UDAG program selection criteria).

the other hand, places relatively more emphasis on underdeveloped rural areas.[54] No proposal attempts to limit areas eligible under its formulae to parts of cities, and thus entire cities such as Los Angeles are eligible.[55] These various programs, however, do have a provision to include "pockets of distress" in otherwise ineligible cities.[56] The definition of "pockets of distress" varies in different bills, but generally the "pockets" comprise geographical areas of at least a specified size or population which meet the qualifying criteria even though the city as a whole does not.[57]

No attempt to describe the results of these various formulae could be so telling as the aggregate geographic coverage which the formulae yield. In the UDAG program where HUD rather than Congress set the guidelines and where the program is limited essentially to cities,[58] 32.5 percent of the population lives in eligible areas.[59] By contrast, the existing EDA program criteria were defined by Congress and apply to both urban and rural areas. Under these criteria, a whopping 84.5 percent of the population lives in the areas defined as eligible "distressed" areas.[60]

Senator Proxmire, the chairman of the Banking, Housing and Urban Affairs Committee (which considered the Senate Proposal's finance provisions), labelled the EDA situation as "ridiculous" and "a joke."[61] He commented generally that many of these areas are not distressed enough to merit the commitment of limited government funds, and commented specifically that assistance in these areas may simply substitute for private financing which would have been available.[62]

The EDA bill's legislative history, however, makes clear the

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54 *Id.* at 15.

55. Los Angeles was eligible under the much more restrictive Administration Bank Proposal. Hearings on H.R. 13230, *supra* note 4, at 229.

56 S. 914, § 401(a); H.R. 2063, § 401(f); S. 1149, 96th Cong., 2d Sess., § 106(d) (1980).

57 *See* 42 U.S.C.A. § 5318(e) (1979); 24 C.F.R. § 570.

58 *See* 42 U.S.C. §§ 5302(a), 5306(a) (1976).

59 During the debate on the Senate Proposal, Senator Tsongas claimed that UDAG targets to roughly 32 percent of the population. 125 CONG. REC. S11077 (daily ed. Aug. 1, 1979).

60 125 CONG. REC. S11062 (statement of Senator Proxmire).

61 *Id.*

political difficulty of avoiding broad eligibility criteria. By the time the President unveiled his National Development Bank as part of his comprehensive urban policy statement, the White House had decided that the Bank would have to serve rural areas to be acceptable politically.[63] That was only the first concession. The percentage of the nation's population which resides in eligible areas has risen from 42 percent under the Administration's Bank Proposal to 61 percent under the Revised Administration Proposal[64] to 68 percent under the Senate Proposal.[65] H.R. 2063 would weaken present EDA eligibility criteria and result in eligibility of areas containing 90 percent of the nation's population.[66]

2. Selecting Individual Projects

The inclusion of broad geographical areas in the program necessarily will place a heavy burden on the government agency's shoulders to choose beneficial projects from many which are eligible. The UDAG program has a competitive application process in which HUD's primary selection criterion is the city's comparative degree of physical and economic distress, as indicated once again by "objective" measurements such as the percentage of pre-1940 housing.[67] Other selection criteria relate to the impact of the proposed investment, the extent of private and other investment involved and the city's demonstrated ability to conduct the program.[68]

Provisions in both the Senate Proposal and the Revised Administration Proposal regarding grants to private business (and for public works) instead would require more generally that the project be in an eligible area, tend to expand businesses or

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62 *Id.*

63 Thus, although the Administration Bank Proposal first was introduced in the President's Message to Congress on the National Urban Policy, *supra* note 1, the bill as introduced included rural areas fully. *See Hearings on H.R. 13230, supra* note 4, at 87-89 (statement of Roger C. Altman).

64 Statement of Robert T. Hall, *supra* note 31, at 14.

65 125 CONG. REC. at 11062 (daily ed. of Aug. 1, 1979) (statement of Senator Proxmire).

66 *Id.* at § 11084 (statement of Senator Muskie).

67 42 U.S.C.A. § 5318(e) (1979) and 24 C.F.R. § 570.

68 *Id.*

employment there and serve a pressing area need.[69] For the financing (as opposed to grant) provisions, the Senate Proposal does specify that in deciding among applications, EDA should give "primary consideration" to: the project's provision of long-term private sector jobs to residents of the eligible area, particularly the unemployed; long-term unemployment; lower-income and minority residents; the area's degree of economic distress; the level of private sector equity committed; and the degree to which the proposed project will "benefit" minorities or firms owned by them.[70] The Senate Proposal also lists several other factors which EDA "shall" consider, such as contribution to the area's fiscal base.[71] It is clear that such considerations will differ greatly by project and that a project which rates highly on some (*e.g.*, service to the long-term unemployed) is likely to rate poorly on others (*e.g.*, extent of private investment committed.) Thus, much will be left to the discretion of the administrators.

C. *Administrative Mechanism*

The National Development Bank would have been a new entity.[72] While the Administration never clearly explained its rationale for proposing a new agency, one factor may have been its aim to encourage political independence. Some political independence for the administering entity is particularly desirable in economic development programs, because a high degree of agency discretion is required to select suitable projects and because political pressure will be strong for quick and visible results.[73]

The Bank's political independence, however, would have been limited by its continued reliance on Congress for annual appropriations.[74] In view of this difficulty, the creation of a

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69 H.R. 2063, § 101(a); S. 914, § 101(a).
70 S. 914, § 206(a).
71 S. 914, § 206(b).
72 *Hearings on H.R. 13230, supra* note 4, at 565.
73 *See* B. Daniels and M. Kieschnick, Development Finance: A Primer for Policy Makers, Part III at 19-22 (March 15, 1979) (paper published by Policy Project on Development Finance, sponsored by National Rural Center and Opportunity Funding Corporation) [hereinafter cited as Primer].
74 H.R. 13230, Title XII.

development bank with the ability to sustain itself by raising its own capital has been suggested,[75] although the Administration has never given serious consideration to this suggestion.

It seems likely that the Administration's reversal on the Bank was due primarily to opposition both within the Administration and in Congress to the creation of a new governmental entity of any kind. While the degree of political independence the Bank could have obtained cannot be determined,[76] EDA has very little independence as a division of an executive agency. To the contrary, EDA has developed a reputation for eagerness to please Congress.[77]

The other major organizational issue is the administering entity's degree of centralization. The Bank would have had only one office, in Washington[78]; similarly, the present UDAG program keeps major funding decisions in Washington. EDA's proposed program, however, would involve six times as many transactions annually (approximately 1500) as UDAG (approximately 250).[79] Thus, the EDA would have to rely more heavily on its regional offices and local support. EDA's present plans call for reliance on ten regional offices, state and local governments and local lender expertise. Local governments would be recipients of the grants, to be passed on to private businesses, and generally would have to concur on loan assistance extended within their borders.[80] Private lenders whose credit judgments

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75 Groups whose staffs advocated such an approach in early 1979 include the National Governors' Association, Council of State Planning Agencies (memorandum by Robert Wise, staff director, Feb. 5, 1979), and the Policy Project on Development Finance, sponsored by the National Rural Center and Opportunity Funding Corporation (memorandum by Paul Pride, Washington, D.C., March 12, 1979).

76 The Administration Bank Proposal would have had a Board of Directors composed of the secretaries of Commerce, Treasury and Housing and Urban Development. H.R. 13230, § 303. A federal executive entity governed by the heads of three agencies probably could have achieved more political independence than a program in a single agency can achieve, but the extent is debatable.

77 *See* Primer, *supra* note 73, at Part III, 33-34.

78 *Hearings on H.R. 13230, supra* note 4, at 565.

79 In 1978, prior to the $275 million authorization 241 UDAG awards were made. U.S. Dept. of Housing and Urban Development, Preliminary Review of the Urban Development Action Grant (UDAG) Program, *supra* note 9, at 12. By contrast, the anticipated program volume for EDA's new financing program is 1500 transactions per year. SENATE REPORT, *supra* note 44, at 31.

80 H.R. 2063, § 101(a) (3); H.R. 2063, § 205(b). There was some hope on the part of the Administration that if grants were routed through local entities, those entities

theoretically would be made reliable by their retained share of risk of default on the loans, would also be utilized to some extent.[81]

II. The Potential of Proposed Approaches – Subsidy and Capital Availability Effects

The financial mechanisms under consideration by Congress either attempt to provide a subsidy or to facilitate capital availability. A subsidy effectively reduces an investment's costs. Grants and interest subsidies are basically subsidy mechanisms. The capital availability effect is to produce funds for investment which otherwise would be unavailable. Loan guarantees and direct loans are basically capital availability mechanisms, at least when supplied to small businesses.

Each of the proposed financial mechanisms would produce some subsidy effects and some capital availability effects. Most notably, grants probably would increase capital availability by increasing investment profitability and loan guarantees would have a subsidy effect by reducing interest rates.[82] Loan guarantees and direct loans also would be subsidies to the extent any losses due to loan defaults were not paid by charges to program beneficiaries. Some loan and loan guarantee programs have been designed to be subsidy programs of this type.[83]

The Administration originally stressed subsidy rather than

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would police the recipients' actual need for the grants. *See H.R. 13230, supra* note 4, at 605.

81 Of course, while private lenders would have an incentive to assess risks accurately, they would have no incentive to assess need accurately. Decentralization of decision-making would seem particularly appropriate in connection with very small loans. One response to the high volume of transactions, and a resulting political temptation to allocate funds by geographic area rather than project merit, would be to keep funding decisions in Washington for relatively large projects (*e.g.*, $3 million or larger) but generally give the regional offices responsibility for smaller projects. Along these lines, members of the Brookings Institute's Monitoring Studies Group suggested a two-tier economic development program delivery system. Under this system, the program for small projects would be administered by State economic development agencies, thus freeing the federal staff to concentrate on major products. *See* R. Nathan, Lessons from European Experience for a U.S. National Development Bank at 15-18 (1978) (paper published by Council for International Urban Liaison).

82 *See Hearings on H.R. 13230, supra* note 4, at 64 (statement of Roger C. Altman).

83 A good example of such a program is the Small Business Administration's Equal Opportunity Loan Program, 15 U.S.C. § 636(i) (1976).

capital availability mechanisms for urban economic development, partly because some existing programs already address the capital availability problem[84] and partly because of a desire to emphasize development of "permanent" jobs (*i.e.*, sound investments).[85] In the Senate EDA bill, however, the main emphasis clearly is on capital availability. This emphasis is reflected most dramatically in the bill's refocusing of loan-related programs to use by small businesses which may have most of the capital availability problems.[86] This emphasis is also reflected, however, in committee report explanations, limitation of the loan guarantee program's use specifically to situations where financing otherwise would be unavailable,[87] and reduction of the guarantee's subsidy elements.[88]

A. *Analysis of Subsidies*

1. A Problem with Subsidies — Job Diversion

The purpose of economic development subsidies is to provide an incentive to attract business investment to a distressed area.[89] Because, from an investor's standpoint, urban areas suffer from disproportionately high land, construction and operating costs[90] as well as other problems,[91] the subsidies must

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84 EDA has provided relatively large loans and loan guarantees to businesses, but its program, 42 U.S.C. § 3142 (1976), has been very small until recently. Community Development Corporations supported by the Community Services Administration, 42 U.S.C. § 298 *et seq.* (1976), also extend a small aggregate amount of funds for such types of loan investments as well as for some equity investments in urban businesses. The only program approaching the magnitude of the economic development proposals, however, is the Small Business Administration's "regular business loan" ("Section 7a") program, 15 U.S.C. § 636 (1976). The SBA loans are limited to businesses of relatively small size (*e.g.*, less than 1500 employees in manufacturing), and the maximum principal of individual loans is generally $500,000. *See* HOUSE COMM. ON SMALL BUSINESS, SUMMARY OF SBA PROGRAMS, 95th Cong., 2d Sess. (1978).

85 Interview with Marshall Kaplan, Deputy Assistant Secretary for Urban Policy, U.S. Department of Housing and Urban Development (Washington, D.C., Jan. 29, 1979). The implication was that the capital availability programs support riskier investments.

86 SENATE REPORT, *supra* note 44, at 25.

87 *Id.*; S. 914, § 203(g).

88 Specifically, S. 914, § 203(f), requires a minimum fee for use of the guarantee, which is designed to cover administrative costs of the program, SENATE REPORT, *supra* note 44, at 27.

89 *See Hearings on H.R. 13230*, at 81 (statement of Roger C. Altman).

90 *Id.* at 63.

91 Two of these factors are crime and congestion.

be used in large part to compensate for the choice of an otherwise undesirable investment. To that extent, the subsidy must be used to divert a specific investment to the city[92] from a more favorable location, usually a suburban site in the same metropolitan area.[93]

In some situations, such a subsidy would facilitate new investment, rather than divert investment. The most common example is probably expansion of a central city manufacturing plant when no branch plant could be used.[94] Without the subsidy, expansion would not take place. The Administration acknowledged, however, that such situations would be relatively rare.[95]

Any proposal which primarily causes diversion rather than creation of investment needs special circumstances to justify.[96] The Administration implicitly assumes that the inability of a

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92 *See* R. Nathan, *supra* note 81; Primer, *supra* note 73, at Part III, 16-23. In the broadest sense, growth in market demand largely determines opportunities for investment. *See* R. LIPSEY AND P. STEINER, MICROECONOMICS, Part II (5th ed. 1979). With demand taken as a given, if markets were perfectly competitive and supply adjustments could be made instantaneously, every investment in a sense would preclude other investments by lowering potential profitability. For various reasons, however, such adjustments on supply may be made gradually or not at all. Thus, the difference between the diversion of an investment specifically contemplated by an investor and the theoretical displacement of alternative investment opportunities by any new investment is important, although the difference may be simply a matter of the alternative investment's timing. B. Daniels and M. Kieschnick, Theory and Practice in the Design of Development Finance Institutions, at 241, 258 (April 1978) (unpublished manuscript available at Harvard University Dep't of City and Regional Planning, Cambridge, Ma.). The stated premise of the Administration was to influence business location decisions, which implies that the specific investments assisted otherwise would have been made elsewhere. *See Hearings on H.R. 13230, supra* note 4, at 69 (statement of Roger C. Altman).

93 Research indicates that industrial location decisions are generally a two-stage process. First a general area such as a metropolitan area is chosen. Then a specific site is chosen. *See* Mulkey and Dillman, *Location Effects of State and Local Industrial Development Subsidies,* GROWTH AND CHANGE (April 1976).

94 Another example might be a commercial facility which is so entertaining or unique that it increases consumer's net purchases (*e.g.,* Faneuil Hall, Boston, Mass.). In addition, in order to be sufficiently attractive, an urban economic development subsidy must be valuable enough to make the projected investment *more* profitable than alternatives, rather than simply *as* profitable; to that extent, the subsidy would be capable of stimulating new investment.

95 This is implied by the three elements cited by the Administration to ensure that Bank assistance is needed: actual plans or intentions of the applicant to locate outside of the eligible area, relative capital and operating costs in both areas and finally the contribution of the Bank's financing to the project's economic viability. *Hearings on H.R. 13230, supra* note 4, at 600.

96 Along these lines, both UDAG and the proposed EDA bills generally would prohibit assistance for outright business relocations, as opposed to the diversion of new in-

large proportion of the central city work force to reach suburban (or Sunbelt) jobs constitutes such a special circumstance since it results in costly unemployment of central city workers. Limited suburban housing, unavailability of suburban job information, inadequacy of public transportation to suburban worksites, and the psychological costs of residence relocation all may contribute to this immobility.[97]

The program's employment benefits, therefore, would result largely from diversion of jobs from non-"target group" to "target group" workers. A favorable result of the subsidy, for example, might be the diversion of jobs from 30-year-old suburban whites to 18-year-old inner city blacks with otherwise poor employment prospects.[98]

Proponents would claim that such a job diversion could yield net benefits to society resulting from decreased public assistance benefits,[99] decreased central city crime and disease related to unemployment, and increased output and worker income over time. In a pure job diversion program, however, net unemployment might not drop initially and job benefits would have to result from the differential circumstances and responses to unemployment of the two groups of workers.[100] For example, public assistance costs would decrease only if

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vestment as discussed here, 42 U.S.C.A. § 5318(i) (1979); S. 914, § 714; H.R. 2063, § 717. Either event costs jobs at the loser location.

97 *See* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, THE PRESIDENT'S URBAN AND REGIONAL POLICY GROUP REPORT — A NEW PARTNERSHIP TO CONSERVE AMERICA'S COMMUNITIES: A NATIONAL URBAN POLICY at I-54, III-20-21 (1978).

The great post-World War II migration of blacks to the North prompts the question of whether interarea worker mobility might be an answer to urban unemployment problems. Even if worker migration to more favorable labor markets could (in the long run) alleviate urban problems significantly, substantial interarea worker immobility must be faced in the short run.

98 These programs are motivated partly by the staggering unemployment among central city minority residents: in 1977, 15.6% for blacks, 27.1% for 20-24 year-old black males and 51.2% for 16-19 year-old black males. These figures don't include persons working part-time who desire full-time employment or those discouraged from entering the labor force.

99 The reduction in public assistance program costs amounts to redistribution away from would-be recipients and in favor of taxpayers, rather than a net social benefit in itself. The lower taxes and public assistance payments, however, may result in such net benefits to society as increased taxpayer employment and investment and decreased taxpayer dissatisfaction caused by the tax burden.

100 This statement is accurate enough for purposes of generalization, but it certainly is a simplification which does not represent the entire picture over time. In particular, if

unemployed suburbanites were less likely than unemployed central city residents to claim as many benefits or to claim for as long a time. Similarly, the program would reduce crime if, on average, unemployed urban residents commit more crime than unemployed suburbanites, perhaps because urban workers average a longer period of unemployment, have fewer assets and live in a social environment more conducive to crime.[101]

The dominant effect of job diversions would thus not likely be net benefits to society as a whole, but instead, income redistribution from suburban to urban workers. This redistribution could, however, be quite progressive,[102] if — as is likely — suburban workers generally are unemployed for shorter terms and have greater nonwage assets than urban workers. In large part, the political support for such a program thus results from its perceived redistribution of economic resources to relatively poor persons.[103]

This brief discussion implies that the apparent employment benefits of economic development grants must be discounted considerably to the extent that jobs are *diverted* from non-target to target workers, rather than *created.* It must also be noted that the prototype target and non-target workers were chosen to illustrate groups for which job diversion would yield the maximum benefit. As the disparity between the groups decreases, both net benefits and redistributive effects would decrease.

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there is little suburban unemployment and the local labor market is tight, location of new employment opportunities there would result in increased competition for workers and possibly inflationary wage increases. While such developments would benefit suburban workers with higher wages, the inflation caused thereby would have been avoided if the investment had been in an unemployment-ridden central city. That possible advantage of economic development subsidies is important. Moreover, over time suburban employers may respond to higher wages by substituting capital for labor or otherwise foregoing some additional hiring. In that case, the suburban worker still would benefit from higher wages, but the number of net additional employment opportunities fostered by the investment would be reduced.

101 Along the same lines, net output would increase only if unemployed urban residents would have been more likely to drop out of the labor force or not receive job-related training, than suburban workers.

This portion of the analysis draws heavily on a discussion with Professor Marc Roberts of the John F. Kennedy School of Government, Harvard University.

102 In other words, on balance income would flow toward persons with lower incomes and away from persons with higher incomes.

103 *See, e.g.,* 125 CONG. REC. S11062 (daily ed. Aug. 1, 1979) (statement of Senator Proxmire).

2. Local Tax and Other Effects of Subsidies

Increased local tax revenues for distressed cities, another major goal of the economic development grant approach, also must be evaluated in view of the program's tendency to divert investments. The subsidized business can provide a long-term addition to the city's tax base, but often at the expense of a locality which has lost the investment. If diversion is from a wealthy to a poor area within the same local taxing jurisdiction (*e.g.*, Boston), there is no local tax gain.

Even a relatively successful economic development subsidy program will have several drawbacks in addition to the dominant problem of investment diversion rather than creation. In some instances, inner city residents may be displaced to make room for businesses. This effect has proved to be political dynamite, in the case of both the urban renewal program (which earned the nickname "Negro removal")[104] and the UDAG program.[105] Another drawback is some inevitable unfairness in the program, most notably the provision of subsidies to some businesses which would have made the same investment without government assistance. Inflation may be encouraged where the program does result in new rather than diverted investment and borrowing.[106]

On the other hand, the diversion of investments from suburb to central city may have benefits in addition to job and tax base considerations. Such benefits include reduced demand for new suburban public infrastructure, improved land use and fundamentally, reduced inflationary pressure on wages, if the investments would have been in low-unemployment areas.[107] Unfortunately, there are only a few methods — case study,[108] anec-

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104 *See* J. WILSON, URBAN RENEWAL: THE RECORD AND THE CONTROVERSY (1966).

105 The only substantive amendment to the UDAG program added by the Housing and Community Developments of 1978 is a requirement that HUD's application assessments take account of potential residential displacement by proposed projects. Pub. L. No. 95-557, § 103(g)-(h), 92 Stat. 2084 (1978).

106 This problem is far more important with regard to capital availability mechanisms, which typically do generate new investment and borrowing.

107 *See* Jack Faucett Associates, Inc., Effectiveness of Financial Incentives on Investment in the Economic Development Administration iii (1976).

108 *See, e.g.*, NATIONAL COUNCIL FOR URBAN ECONOMIC DEVELOPMENT, COORDINATED URBAN DEVELOPMENT: A CASE STUDY ANALYSIS (1978).

dote, conjecture and political judgment — to assess the relative importance of all these effects, and they are unreliable.

3. Likely Effectiveness: Employment Effects

The preceding discussion outlines the likely costs and benefits of an economic development subsidy which successfully diverts investments. This section analyzes the subsidies' capacity for achieving that success.

The ability of economic development subsidies to divert jobs to target workers depends upon two factors: the subsidies' ability to attract (or "leverage") private capital, and the leveraged investments' ability to deliver jobs to target workers.[109] Generally, the ability of subsidies to accomplish either task is significant, but unequal to expectations.[110]

The subsidies' ability to attract private investment to distressed areas depends, in the first instance, on the magnitude of the economic and social disadvantages the subsidies must overcome. The larger these disadvantages, the less private capital can be attracted per subsidy dollar. The fact that employment has decreased in the central city — 18 percent of all manufacturing jobs between 1970-1976[111] — while suburban employment has increased dramatically,[112] is a sure indication that the factors to be overcome by urban economic development subsidies are powerful. Decentralization of population and its

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109 The desired employment effects include attraction, retention or improvement of jobs for the targeted group.

110 A typical declaration of an Administration spokesman, for example, is that each public dollar can leverage five or six private dollars. *Hearings on H.R. 13230, supra* note 4, at 117 (comments of Robert C. Embry on the performance of the UDAG program).

111 *Hearings on H.R. 13230, supra* note 4, at 121 (statement of Robert C. Embry). While total U.S. manufacturing employment declined 1.3% annually from 1972 to 1975, central cities' manufacturing employment declined 3.8% annually in the same period. THE PRESIDENT'S URBAN AND REGIONAL POLICY GROUP REPORT, *supra* note 97, at I-18a.

112 Between 1973 and 1976, central cities of metropolitan areas lost 2.5 percent of their total employment, while suburban employment increased 7.9 percent. Ewing, Background Paper: Barriers to Economic Development at 1 (1978) (Congressional Budget Office, U.S. Congress) During the 1960's, central cities in the fifteen largest metropolitan areas lost 800,000 jobs, while the suburbs gained 3 million jobs. B. Daniels and M. Kieschnick, *supra* note 92, at 13.

markets,[113] shortages of land and skilled labor,[114] unfavorable political and sociological conditions[115] and recent technological changes[116] all inhibit leveraging ability.

The initial results of the UDAG program reflect these problems. The UDAG grant approval procedure heavily favors those proposals which project substantial leveraging of private capital. Nevertheless, notwithstanding the Administration's claim of a five-to-one or six-to-one leverage ratio,[117] the ratio of total investment dollars to public dollars *projected by successful applicants* for urban projects funded through 1978 was only 3.44.[118]

The magnitude of the disadvantages which an economic development subsidy must overcome, however, is only one of two factors which determine its leveraging effectiveness. The other factor is the accuracy with which the government can discern whether the subsidy actually affects business investment. When a subsidy is provided to a business which would have made the same investment without it, no private investment is leveraged. Thus, the actual leverage ratio for the UDAG

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113 Not surprisingly, this market decentralization is a particularly important determinant of location for commercial enterprises. *See* R. Ewing, *supra* note 112, at 14. The phenomenal success of a few large urban commercial centers, such as Faneuil Hall in Boston, may indicate potential for unique urban projects which can attain the scale and character to become regional entertainment centers. Lecture of Melvin Gamzon, Senior Associate and Real Estate Economist, Economics Research Associates, Boston, Ma. (November 1978) (delivered at the Harvard School of Urban Design).

114 Urban land shortages are a problem largely because new manufacturing technologies favor one-level plants. The difficulty and expense of assembling urban land held in small parcels, and high costs generally of urban land relative to suburban land are also key elements of this problem. *See* R. Ewing, *supra* note 112, at viii, 5.

115 These conditions include crime, congestion, pollution and central city government red tape and perceived incompetence. Incidence of crime apparently is much more important to business location for psychological reasons (fear) than for economic reasons (loss of property). *Id.* at xi.

116 Such changes include continuous processing and automatic handling material devices which favor one-story manufacturing plants and containerization and packaging advances which favor trucks over trains. *See id.* at 5, 17.

117 *Hearings on H.R. 13230, supra* note 4, at 117 (comments of Robert C. Embry).

118 Preliminary Review of the Urban Development Action Grant (UDAG) Program, *supra* note 10, at 26. The author calculated this number by adding "Total Funds Leveraged" for industrial and commercial projects and dividing that number by the sum of "UDAG Amount Awarded" and "Public Funds Leveraged" for each project. Thus, this leverage ratio compares *total* investment dollars to *all* public dollars, rather than *private* dollars to *UDAG* dollars as Administration spokesmen typically do. The important difference is that the author counts local public dollars leveraged as an addi-

program is even lower than 3.44 to the extent that UDAG grants have been allocated to investments which would have occurred in any event.[119]

Both the Administration and the Senate EDA proposals address this problem, by requiring that subsidies apply only to investments that would not occur otherwise.[120] It will be extremely difficult, however, for government officials to ascertain what would happen without the subsidies. Their task will be complicated further by the proposals' broad geographic eligibility, their emphasis on projects which can attract significant amounts of private capital, political pressure to fund projects and the incentive for any business which plans to invest in an eligible area to apply for a subsidy.[121]

At the other end of the spectrum, the subsidies will not accomplish their purposes if they are extended to projects which fail rapidly. Most of the same factors which militate in favor of providing grants to companies which could find capital otherwise, however, reduce the likelihood of subsidies going to companies which would fail.[122]

The proposed EDA grants might be more effective than UDAG grants in leveraging private investment, since they subsidize businesses directly rather than through provision of

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tional cost of leveraging private capital, while the Administration counts such dollars as a benefit. The author believes that all public dollars should be counted as government costs, regardless of whether they come from the federal government or from state or local governments.

Neither Administration estimates nor the 3.44 estimate which the author makes from the same data make any adjustment for funding of investments which would have been made anyway, "investment multiplier effects," or the extent to which investment is diverted or will not help target workers.

The UDAG program funds industrial, commercial and neighborhood projects, in both "metropolitan cities" (cities which have a population of 50,000 or more which are central cities of Standard Metropolitan Statistical Areas) and other cities. *Id.* at 1-4. The author's estimates of leverage ratio and the costs per job are based only on commercial and industrial metropolitan city projects accepted through 1978.

119 In that connection, note that while the program seeks to produce a high leverage ratio, higher leverage ratios required by a subsidy's legal requirements increase the chances that private investment would have been made without the subsidy. Thus, a grant limited to a penny per dollar invested (an apparent leverage of ratio of 100:1) would be phenomenally effective if it determined investment location, but such a small subsidy would have no actual leveraging effect to the extent that private investment would have been made anyway.

120 S. 914, § 102(c); H.R. 2063, § 101(a).

121 *See* Primer, *supra* note 73, at Part III, 29-33.

122 A very important exception is political pressure, which may be used in connection with unsound proposals as well as with proposals not in need of assistance.

investment-related public works.[123] Because such subsidies would still be limited to capital costs as opposed to operating costs (such as wage payments), the potential leveraging ability of such subsidies is nonetheless constrained. The problem is that capital costs typically comprise only about 6 percent of the costs of doing business,[124] and thus capital cost subsidies can influence only a limited portion of investments.

The limitation of grants to 15 percent of project costs[125] reduces the potential clout of that capital cost subsidy still further. In addition, the costs to businesses of participation in the program, most notably resulting from the proposed requirement that Davis-Bacon Act wage levels be paid,[126] would lower the effective grant amount. At such grant levels, EDA could only hope to achieve an actual leverage ratio greater than about three total investment dollars to each government dollar.[127]

Similarly, the subsidy effects of both loan guarantees and interest rate subsidies[128] would be small. Interest costs are such a small percentage of business costs that, standing alone, they can have scant decisive impact on many business location decisions.[129]

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123 *See* note 10 *supra.*

124 SENATE REPORT, *supra* note 44, at 29. Largely as a result of that characteristic, one study concluded that direct grants of 15 percent of project capital costs would increase equity for an average manufacturing firm from 14 percent to 17 percent. The study concluded that such a profit differential is sufficient to influence the location of some, but not many, projects. Primer, *supra* note 73, Part III at 19-22. Other research indicated that over a 20-year capital payback period, a subsidy with a present value of 20 to 25 percent of capital costs could compensate for a 10 percent city/suburban operating cost differential but not for a 15 percent differential. L. Hubbell, Development Banking and Financial Incentives for the Private Sector at 34 (June 1978) (unpublished paper prepared for conference sponsored by the University of Missouri-Kansas City on the Federal Response to the Fiscal Crisis in American Cities, Washington, D.C.). Studies of foreign regional development efforts indicate that subsidies of at least 25 percent of capital costs were generally necessary to have significant effect on industrial location. *See* R. Nathan, *supra* note 81.

125 S. 914, § 103(a); H.R. 2063, § 101(a).

126 S. 914, § 710; H.R. 2063, § 712 (House bill does not change present law). For an extended discussion of the impact of Davis-Bacon Act wage requirements on federal housing and community development programs, *see* REPORT OF THE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS ON THE HOUSING AND COMMUNITY DEVELOPMENT AMENDMENTS OF 1979, S. REP. No. 164, 96th Cong., 1st Sess. 83-94 (additional views of Sens. Tower, Kassebaum, Morgan and Garn on the Davis-Bacon Act).

127 This estimate does not include the investment multiplier effect. A leverage ratio of 3.33 would be reached if half the investment dollars generated by the grants would not have been invested in any event (100/15 × ½ = 3.33).

128 *See Hearings on H.R. 13230, supra* note 4, at 64 (statement of Roger C. Altman).

129 Thus, one study estimates that a loan guarantee on average would decrease a

In addition to the direct employment effect of a successfully leveraged investment, increased purchases by both the subsidized business and employees whose incomes have increased as a result of the investment generate employment indirectly. This "employment multiplier effect" effectively could double leveraging ability,[130] but the jobs created may or may not be in the distressed area.

It is possible to estimate in rough and ready fashion the likely leveraging potential of an economic development subsidy.[131] While a confidence interval for such an estimate would cover a wide range,[132] mean guestimates indicate that each government dollar could leverage $4.75 in total investment,[133] that 57.5 percent of this investment would not have been under-

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manufacturing firm's costs as a percentage of sales by only 0.8 percent and would increase its after-tax rate of return on equity by only 0.1 percent. The maximum interest subsidy allowable in the Administration Bank Proposal, which was larger than the maximum proposed interest subsidies in the pending EDA bills, would have increased the rate of return for the average manufacturing company by only 0.3%. Primer, *supra* note 73, Part III, 17-19.

Both loan guarantees and interest subsidies have other distinct features, however, which must be considered to evaluate their potential as cost reduction mechanisms. Loan guarantees' delivery of the subsidy on a deferred basis and inability to reduce businesses' initial borrowing needs are disadvantages relative to grants, but their ability to correct lender risk-averseness or other market failures which cause interest charges to be higher than risks' merit is an advantage. *See* B. DANIELS AND M. KIESCHNICK, THEORY AND PRACTICE IN THE DESIGN OF DEVELOPMENT FINANCE MECHANISMS, Chapter II (1978).

The delivery of subsidies on a deferred basis is a disadvantage because private firms probably discount the value of future interest reductions at a higher rate than the government should discount the subsidy's future costs. The reason for this is partly psychological. In addition, some economists believe that the private sector discounts the future more than the public sector because the opportunity costs of private capital investment is higher than the public's opportunity cost. The public's opportunity cost is determined in part by the social rate of time preference, which is the rate at which consumers are willing to trade off present for future income. This rate typically is considered to be the interest rate paid on insured savings deposits, which is lower than the return on marginal private investment. *Id.* at 109-114. On balance, any advantage of the loan guarantee mechanism relative to grants is not significant enough to allow guarantees to add much as a cost-reducing tool in view of guarantees' unique disadvantages and minor cost reduction potential.

Interest subsidies share loan guarantees' disadvantages relative to grants, but not their capacity to correct market failures. The only economic advantage interest subsidies have is that they stop upon project failure.

130 This, however, is an upper bound estimate. The typical investment multiplier effect would be much weaker. B. Daniels and M. Kieschnick, *supra* note 92, at 241.

131 This assumes no restriction similar to the 15% capital cost limitation in the proposed EDA bills.

132 See notes *138* and *143 infra.*

133 The author's estimated range, based largely on the UDAG experience and the

taken without the subsidies,[134] and that the investment multiplier effect would be 1.65.[135] Multiplication of these three guestimates yields an even more speculative guestimate for the leveraging potential of about $4.50 in total investment for each dollar of government subsidy.[136]

This leveraging prediction can in turn be translated into an estimate of government cost per job. Early estimates prepared by applicants to the UDAG program indicate that about $24,000 in total investment will be needed to attract or retain each job.[137] Division of this figure by the estimated leverage ratio yields a government cost per job estimate of about $5300.[138] At first blush, given recent estimates of $10,000 to $20,000 per new public service employment job[139] and $15,000 to $35,000 per new public works job,[140] this looks like a favorable result.

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possibility that a program which could provide grants directly to businesses might achieve better leverage, was 3.5 to 6.0.

134 The author's estimated range for percentage of investment which would not have occurred anyway is 45% to 70%. This range is admittedly subjective and attempts to take account of both depth of the typical subsidy and situations in which the picture is mixed (*i.e.*, an investment which would have been made anyway is expanded as a result of the subsidy).

135 The author's estimated range here, based partly on the discussion of B. Daniels and M. Kieschnick, *supra* note 92, at 241, is 1.3 to 2.0.

136 $4.75 x .575 x 1.65 = $4.50.

137 The inclusion in these estimates of jobs claimed to be retained is particularly speculative because of the difficulty of knowing whether the business would have shut down or moved away. If only jobs claimed to be attracted were counted, the cost per job would be $47,000. Preliminary Review of the Urban Development Action Grant (UDAG) Program, *supra* note 79, at 26, 30. The author calculated these estimates by dividing total investment in commercial or industrial projects by the number of jobs listed as "New Permanent" or "Retained," as appropriate.

138 It is important to realize, however, that the possible range of results from the author's estimates is very wide. The estimated costs per job range from $2,900 (most optimistic estimate) to $11,700 per job (least optimistic estimates).

139 F. Russek, Estimated Number of New Jobs Created and Cost Per New Job Created by Various Employment Tax Credits at 6-8, Table 1 (Sept. 1978) (Congressional Budget Office unpublished memorandum in response to request of Senator Floyd Haskell, Chairman, Subcommittee on Administration of the Internal Revenue Code, Senate Finance Committee). Mr. Russek is citing earlier unpublished Congressional Budget Office estimates for various programs, in this case an estimate for fiscal 1979 public service employment based on provisions of a Senate passed authorization bill (S. 2570, 95th Cong., 2nd Sess. (1978)). These estimates include net jobs created in the economy rather than net jobs obtained by target group workers. Cost per job obtained by target group workers might be higher or lower since these estimates cited count new jobs held by nontarget workers but do not count jobs diverted from nontarget to target workers. Although the estimates from other programs are included here for illustrative purposes, there are many important differences between such programs and economic development subsidies which detract from the usefulness of these estimates.

140 *Id.* at 9-12, Table 1 (preliminary estimate for fiscal 1979).

These figures fail to take into account, however, the far greater extent to which jobs added by economic development subsidies are diverted from other locations rather than created. Moreover, and of utmost importance, the subsidy's ability to leverage private investment is only the first part of the picture. A substantial proportion of all the employment benefits generated simply may miss the targeted workers. This happens, in large part, because inner city residents lack the education and skills to compete for jobs and because minority workers are discriminated against in hiring.[141] The problems of job diversion and inaccurate job targeting are related, because jobs diverted from one non-target worker to another do not necessarily yield any program benefits.

Thus, the government cost per job calculation should be revised to count only jobs which reach target workers as a result of the subsidy. The best guestimate is that only 26.5 percent of total jobs generated would reach target workers due to the subsidy.[142] As a result, the government's cost per job increases fourfold, to $20,200.[143]

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141 The President's Urban and Regional Policy Group, which provided the background analysis for the Administration's Urban Policy, attributed minority urban residents' unemployment entirely to such factors. The Group noted that central cities offer more jobs than the number of potential workers who live there, but minority city residents cannot compete successfully for the positions. THE PRESIDENT'S URBAN AND REGIONAL POLICY GROUP REPORT, *supra* note 97, at I-55. Factors such as the specific type of jobs created (*e.g.*, percentage of low-skill jobs), the nature of the local employment market (*e.g.*, degree of hiring discrimination), and the breadth of the group defined as targeted workers will determine the percentage of employment benefits which reach their targets. Once again, the government's ability to discern particularly beneficial project characteristics is crucial.

142 The author's estimate is that 20% to 50% of the jobs generated would go to target workers. Because only *net additional jobs* for target workers should be counted, however, the percentage of jobs obtained by target workers which they would have obtained even in suburbia, must be subtracted. The author estimated that percentage to be one fourth of the jobs obtained by such workers. Thus the author estimated the range of net job gain to target workers at 15% to 38% of total jobs generated.

The estimate of 20% to 50% depends on the definition of a target worker. This estimate is based on the Senate Proposal's implicit definition in § 206(a) of target group for the loan programs, residents of an eligible area with the addition of low-income or long-term unemployed persons not from the eligible area. That definition is overinclusive, because not all persons living in an eligible area should be considered target workers. The 20%-50% range is based on the author's estimates with respect to statistics such as percentages of jobs generated which will be suitable for low-skill workers and likely extent of competition from commuters.

143 Again note the broad range of results produced by the author's estimates: $7600

On top of that, the value of those jobs for target workers still must be discounted because they largely are diverted. On the other hand, the relative position of economic development subsidies is strengthened greatly by the relative permanence of the jobs added, in contrast to the short duration of public service and public works employment.[144]

It is impossible to balance out these factors definitively and empirically. It appears, however, that the problem of job diversion caused by economic development subsidies may be counterbalanced in large part by their capacity to produce jobs of long duration and to leverage private capital, even though leveraging ability is unlikely to match Administration pronouncements. If the income redistributional effects of the job diversion are considered sufficiently beneficial, the subsidy's employment potential appears to be comparable to or better than the potential of the other urban employment programs.

4. Likely Effectiveness: Other Effects

It appears the economic development subsidy dollar could generate about eight cents annually for targeted jurisdictions based on the average local tax rate reported for UDAG's urban projects.[145] If the underlying investments are of fairly long duration, the subsidy thus could result in considerable tax redistribution to distressed areas.[146] It should be noted that in

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per new job obtained by a target worker (most optimistic) to $78,000 per job (least optimistic).

144 For example, if the average job slot lasts ten years and the discount rate is 8%, chosen to refer to society's marginal rate of time preference as reflected in interest rates on insured savings accounts, *see* note 129 *supra*, the annual cost is slightly less than $3,300. If the average job slot lasts 16 years, the annual cost is about $2,300. A crucial political advantage of this characteristic of economic development subsidies is that there is no need to supply additional federal aid year-by-year to achieve a long-term effect. These estimates do not include construction jobs.

145 The average local tax rate reported for UDAG urban industrial and commercial projects approved through 1978 was about 2.2%. Preliminary Review of the Urban Development Action Grant (UDAG) Program, *supra* note 10, at 35 (calculated by dividing appropriate "Increases in Property Revenue" by "Increases in Property Value"). Thus, if the lower bound multiplier estimate of 1.3 is used (because only investment in target jurisdictions is relevant), the author's mean estimates yield a leverage ratio of 3.55. That ratio times tax rate yields $.078 in local taxes per dollar of investment.

146 For example, a local tax return of eight cents per original dollar, over a period of

the "pockets of distress" projects, the taxes would accrue to relatively wealthy jurisdictions. Thus, such projects would not generate favorable local tax redistribution and their likely employment effects must receive particularly concentrated scrutiny.

5. Summary

The use of subsidies has a major drawback — to a large extent it diverts jobs and investment rather than creating jobs and investment. Further, it will be expensive even to divert jobs as the social and economic ills of the cities dictate that large and costly subsidies will be necessary to divert investment away from the more lucrative suburbs. On the other hand, those same social and economic ills make it imperative that some action be taken to stem the flow of jobs and taxes from the cities.

B. *Analysis of Capital Availability Mechanisms*

Because loan guarantees would receive more than nine-tenths of the proposed authorization for such mechanisms, the following discussion refers in large part to them.[147]

1. The Advantage of Capital Availability Mechanisms — Job Creation Rather Than Job Diversion

A capital availability mechanism targeted successfully to an investment, fosters new (rather than diverted investment) to a much greater extent than a subsidy. The specific investment facilitated is not simply one which would have taken place in a more favorable location without government intervention.[148]

One important qualification must be added. Because these mechanisms generate new investment, they increase total borrowing demands in the economy. This increased total borrowing may discourage other investments by pushing up interest

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ten years (discounted at 8%) is $.54 over 10 years and $.71 over 16 years. In some cases, however the taxes would merely have been "diverted" from one jurisdiction to another.

147 Direct loans and the rejected liquidity facility, however, are capital availability mechanisms as well.

148 If a new (rather than diverted) investment is thus fostered, however, it could have the secondary effect of reducing investment opportunities elsewhere by providing more competition for other enterprises. *See* note 92 *supra*.

rates and thus "diverting" jobs indirectly.[149] The same result does not occur through subsidies which merely divert investments from one site to another, because those investments must be financed regardless of where they are located.[150] Because the capital availability program's effect on interest rates would be spread nationwide, however, any resulting increases may be too small to be important.[151]

2. Local Tax and Other Effects

Because local tax effects as well as job effects depend on total net investment, the investment potential of the capital availability program for all local jurisdictions has comparable implications for taxes as well as jobs. Thus, capital availability mechanisms probably would result to a greater extent than economic development subsidies in net tax gains, rather than diversion of taxes from some jurisdictions to others.

As with subsidies, the potential for residential displacement remains in a capital availability program.[152] Other potential benefits of subsidies—improved land use, use of existing rather than new public infrastructure and reduced pressure on area wages—all depend on diversion of an investment from suburb to city. Therefore, capital availability mechanisms may not produce such benefits and may even intensify these problems. The far greater likelihood that investments are new rather than

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149 The extent of this effect depends on debatable economic phenomena, notably the response of the rate of savings in the economy to interest rate levels.

150 The subsidy mechanisms must be financed from either additional taxes, offsetting reduction in government spending, or increased borrowing, with repayments from future tax revenues to finance the subsidies. The subsidy costs reflect the additional cost of undertaking investments in central cities. If the immediate financing choice is borrowing, however, the additional burden on credit markets is the cost of the subsidies rather than the cost of the entire investment.

151 Relative size of the program is the key to this situation. If fully funded, the proposed EDA program would have assets equivalent only to the country's 60th largest bank. 125 CONG. REC. S11077 (daily ed. Aug. 1, 1979) (statement of Senator Tsongas, referring to testimony of Professor Belden Daniels before the Senate Banking, Housing and Urban Affairs Committee).

152 This potential should be reduced, however, because the individual investments financed are likely to be physically smaller than in the case of subsidies. "Availability" as used here includes the ability to obtain financing upon reasonable terms. If a loan guarantee increases the maximum fixed-asset loan term lenders will give from 5 years to 20, under this definition it would increase the availability of capital.

diverted, however, would seem to overshadow this shortcoming relative to subsidies.

3. Likely Effectiveness: Employment Effects

The capacity of capital availability mechanisms to create jobs, like the capacity of subsidies, depends upon both stimulation of private investments and the investments' ability to deliver desired job benefits. The first factor, however, works quite differently for capital availability mechanisms than for subsidies. Specifically, the total amount of capital investment generated is the principal amount of the loan guaranteed or made by the government (plus any required 15 percent private equity or risk share),[153] and the leverage ratios can be determined when a loan loss pattern develops.[154] Unlike the case for subsidies, there is no direct additional leveraging of private investment. The magnitude of the investment influenced by pure (no subsidy involved) capital availability mechanisms, therefore, depends on the government's ability to choose projects on need rather than on leverage.

Unavailability of capital, rather than limited expected profitability, appears to impede risky but viable investments of some businesses. Several factors may result in the lack of capital for such investments despite their high potential returns. Lenders may be forced to be conservative by government regulations, or may act conservatively in uncompetitive markets because they are risk averse. High costs for obtaining information about unknown companies, discrimination and fixed transaction costs for stock issuance regardless of issue volume take their toll. Inability of small venture capitalists to

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153 The Senate Proposal's loan programs contain several new provisions to prevent excess government assumption of risks. Direct loans (like the Revised Administration Proposal) and guaranteed loans (unlike the Revised Administration's Proposal) would be available only for investment in which 15% of costs are supplied by private equity or subordinated loans. §§ 204(c), 403(e), S. 914. Unlike the Revised Administration Proposal, only up to 10% of guaranteed loans could be subordinated to unguaranteed private sector loans. *Id.* § 209(b).

154 Only then will the costs to the government of the program become apparent. If the program charged guarantee fees which covered losses (as do several Federal Housing Administration programs), the program would be costly and the leverage ratio infinite.

diversify and to spread losses adequately also leads to reduced risk-taking.[155]

These problems affect small and young corporations disproportionately. Indeed, there is significant evidence that these corporations are hampered by capital availability problems which are unjustified by their risk and rate of return.[156] Even medium-sized firms, possibly with annual sales up to the $100 million level, appear to suffer from unjustified financing problems.[157] Capital availability problems seem to correlate more directly with size of firm than size of investment. However, lenders may even be reluctant to risk substantial amounts on long-term projects planned by sizable businesses.[158]

Thus, there appears to be a need for capital availability mechanisms apart from a need for subsidies. Even in the event the government directs its aid improperly, the loan may be repaid and the government could lose nothing. This contrasts with the waste of subsidy funds if a subsidy is provided for an investment which would have been made anyway.

Nonetheless, the task of discerning need for assistance may be even more difficult for capital availability mechanisms than for subsidies. Because subsidy-free capital availability assistance would be used, by definition, in conjunction with

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155 *See* B. DANIELS AND M. KIESCHNICK, *supra* note 129, chapter II.

156 For example, between 1972 and 1976, manufacturing corporations with assets under $1 million produced an average after tax return on equity of 15.95%. At the same time, a 1976 report of the U.S. Federal Trade Commission notes that 76.1% of acquisitions were of companies with less than $1 million in assets. These statistics partly may reflect the paradox of very profitable firms with no other way to obtain capital for growth. The low volume of publicly issued equity in the past few years for firms with under $5 million in assets has been documented convincingly. *See Small Business Access to Equity and Venture Capital: Hearings Before the Subcomm. on Capital Investment and Business Opportunities of the House Small Business Comm.*, 95th Cong., 1st Sess. (1977) (statement of William J. Casey). Small firms apparently also have trouble obtaining other forms of capital, such as working capital loans, because their lending sources are geographically confined and the amounts they need are relatively small. M. Katzman and B. Daniels, Development Incentives to Induce Efficiencies in Capital Markets, at 44 (1976) (report prepared for the New England Regional Commission and the Industrial Center of New England, Inc.). They apparently have difficulty securing financing partly because traditional long term lenders, such as insurance companies and pension funds, have a practice of dealing with larger companies. Hearings on H.R. 13230, *supra* note 4, at 85 (statement of Roger C. Altman).

157 *See* B. DANIELS AND M. KIESCHNICK, *supra* note 129, at 92, and *Hearings on H.R. 13230, supra* note 4, at 129.

158 B. DANIELS AND M. KIESCHNICK, *supra* note 92, at 222.

viable investments, the problem is not even so straightforward as an assessment of whether a subsidy would result in a sufficient change in profitability to affect the location decision.[159] Instead, assistance would be appropriate if the private sector would not extend funds to reasonable proposals.[160]

Several factors (which also exist with respect to subsidies) exacerbate this situation: the program's broad geographical eligibility criteria, the large volume of projected transactions in the EDA program,[161] program requirements to assure reasonable private sector risk participation[162] which could skew the program toward investments which do not need assistance, and susceptibility to political pressure.

The opposing possibility that an investment will not be viable is a problem for capital availability mechanisms as well as subsidies. Because loan losses constitute the only possible government cost of the loan programs (ignoring administrative costs)[163] and because these program investments are likely to be riskier than those of subsidy programs,[164] the risk of project failure takes on a more important dimension in this context.

Implementation of the capital availability mechanisms pending before the Congress probably will generate *some* uncompensated loan losses,[165] and thus contain a "hidden" subsidy effect.

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159 At least for subsidies, one could judge, for example, the extent of operating cost differences for which the subsidy compensated. *See* note 124 *supra.*

160 The extent of profitability would be a relevant factor in this assessment of "reasonableness." Many of the investments in question may have high risks, but also high potential returns.

161 *See* note 79 *supra.*

162 S. 914, § 203(a), 203(c); H.R. § 202(a).

163 *See* S. 914, § 203, as to funding of administration costs by loan guarantee fees.

164 This is true partly because the subsidized investments must be given a large enough cost advantage over alternative locations to merit the higher risk of central city location, while the capital availability mechanisms provide virtually no cost reduction. *See* note 129 *supra.* Companies which lenders spurn also are likely to be less-established than those which would participate in the subsidy program with less ability (by definition) to draw on outside resources in troubled times.

165 In the past, EDA reserved 20% of its total business loan guarantee liability for losses. The agency staff now believes that reservation was too high. The cumulative loss rate to date on EDA guaranteed and direct business loans is about 6%, but that figure is of somewhat limited value in view of the program's relatively recent beginnings (1965 for direct loans; 1972 for guarantees) and its sensitivity to agency accounting practices. (Information supplied by Bernard Jenkins and Beverly Milkman of the EDA staff (December 6, 1979)).

The probable leverage ratio of total investment stimulated to uncompensated government losses is thus calculable.[166]

To calculate that leverage ratio, one would begin with the principal amounts of loans guaranteed or made by the government. That amount must be multiplied by a number which accounts for the investment multiplier effect, because this effect would work in the same manner with capital availability mechanisms as with grants. The resulting estimate then must be reduced to account for assisted investment which would have taken place without help. It is this net figure which must be compared with estimated government costs — here loan losses[167] — to yield the leverage ratio.

Unfortunately, estimates for both the percentage of investments which would have been made anyway and government costs must be even more speculative here than in the case of investment cost reduction subsidies. At least there the initial cost of the government subsidies is known. Subsidies have an effect on costs and profit margins which can be evaluated for significance.[167] In addition, the UDAG experience provides some preliminary leverage estimates for subsidies. For capital availability mechanisms, however, the costs cannot be known until a loan loss pattern develops; there is no change in profitability to assess and there is no reliable experience to draw upon.[168]

Therefore, it is necessary to postulate rough guestimates of the relevant figures for the guaranteed loans.[169] Assuming the

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166 *See* note 165 *supra*. Government Administrative costs also would have to be included to the extent not covered by program charges. The loan loss figure must be a net figure, which gives the government credit for losses recouped by asset sales in the foreclosure process. A basic measure of the relative effectiveness of subsidies versus capital availability mechanisms is whether more dollars of long-term private investment can be leveraged through one dollar of investment subsidy or one dollar of loan loss.

167 *See* notes 124 and 159 *supra*.

168 *See* note 165 *supra*. The projected loss rate of the Small Business Administration's "regular business loan guarantee" program, 15 U.S.C. § 636 (1976), is about 7.5%, but those loans are not so risky as the loans EDA would make. *Hearings on H.R. 13230, supra* note 4, at 572.

169 For simplicity's sake, the 10% private lender share and the Senate's 15% private equity requirement are not considered. Consideration of these refinements would raise the leverage ratio accordingly.

investment multiplier is 1.65,[170] half of the principal of loans guaranteed would not have been otherwise made,[171] and the program's losses would be twelve percent of total loan amounts made or guaranteed,[172] then the guestimated leverage ratio (obtained by multiplication) of these numbers would be $7.00 in total investment dollars for each government dollar. That ratio is slightly better than the comparable leverage ratio of $4.50 estimated for subsidies.

A precise evaluation of subsidies versus loan guarantees cannot be based on these estimates. The ratios do indicate, however, that loan guarantees can obtain leverage ratios comparable to and better than those of grants if the ratio of loan amounts actually made available to loan losses can be kept at about 3:1 or higher.[173] It is unlikely that this ratio would fall far below 3:1, but there is no way to be certain in view of the lack of program experience.[174] As with investment cost reduction subsidies, projections of employment effects for capital availability mechanisms must be adjusted to reflect jobs generated which would miss the target workers.[175]

It is only by considering all of the factors influencing the job generating capacity of capital availability mechanisms that the legislation's specific limitations on and variations from the basic loan guarantee mechanism should be evaluated.

The most important variations to evaluate are the Senate Proposal's loan and firm asset size limitations on loan guarantees.[176] Extremely sketchy evidence indicates that

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170 This is the mean of the author's estimates discussed *supra* at note 135.

171 This estimate must be almost totally subjective. The result depends partly on EDA's success at interest rate regulation. In view of the pressures toward approval of unneeded assistance, the estimate is more likely optimistic than pessimistic.

172 This estimate is based on EDA staff comments regarding past fund reservation practices for the loan guarantee program and past SBA experience. *See* note 165 *supra*.

173 The existence of a capital availability need apart from the need for any investment subsidy provides a cushion which will help the leverage ratio.

174 This is possible because the investment multiplier effect would increase the leverage ratio for the loan guarantees to the range projected for subsidies.

175 If the firms helped by capital availability mechanisms are smaller on average than those helped by subsidies and if their employment recruiting is more localized, then perhaps a larger percentage of central city workers would receive jobs as a result. In addition, the Senate Proposal's project selection factors for loan guarantees and loans *see* § 206, S. 914, try to emphasize the provision of jobs to target workers.

176 S. 914, § 208(a).

capital availability may be less a problem for firms or investments which do not meet the Senate Proposal's requirements.[177] Accordingly, the task of discerning need for the guarantee would be more difficult for loans not within the Senate Proposal's restrictions. Eligibility of such loans thus is likely to result in a higher proportion of program authorizations siphoned off for investments which do not need help, either because of mistaken needs of assessments or program abuses such as funding decisions based on politics rather than need. On the other hand, when guarantees for relatively large projects do matter, they could make a more concentrated and thus visible impact with lower administrative costs per loan dollar guaranteed[178] than guarantees for smaller projects.[179]

The other side of the equation is possible loan losses. It is unclear whether the ratio of loan dollars extended where capital otherwise would be unavailable to loan losses would be any lower with respect to larger guarantees or guarantees to larger firms than with respect to guarantees within the Senate Proposal's limitations. The established position of the relatively larger companies could result in a lower proportion of loan losses despite the companies' alleged inability to borrow without assistance, but this is uncertain. On the other hand, provision of a number of larger guarantees could reduce the scope of EDA's portfolio and thus increase its risk.[180] It thus appears, on balance, that the Senate Proposal limitations generally are desirable from a capital availability standpoint.[181]

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177 *See* text accompanying notes 156 to 158.

178 The importance of such a visible impact in central cities for psychological reasons (*e.g.*, appearance of improved "business climate," which may attract other investments) should not be overlooked.

179 In such a case, particularly if the capital availability approach serves very small firms, considerable technical assistance and loan monitoring expenditures would be necessary. *See* Primer, *supra* note 73, Part I at 37 & Part II at 37-40. The legislation increases the authorization for EDA technical assistance. *See* S. 914, § 305; H.R. 2063, § 307. Such expenditures should be included in computing a leverage ratio.

180 The risk might not increase very much on this account if the EDA made a reasonable number of medium-sized loan guarantees (*e.g.*, thirty guarantees in the $15-30 million range). Of the $197 million in loan guarantees provided by EDA during the period from fiscal 1966-fiscal 1977, however, sixty percent of such guarantees went to just two ship building companies. Senate Report, *supra* note 44, at 35. Such a concentrated allocation of capital increases the government's risk greatly.

181 The liquidity facility included in the Administration Bank Proposal (H.R. 1323,

None of the particularities of these limitations on and variations of the loan guarantee mechanism alters this section's conclusions regarding the job effects of proposed capital availability mechanisms. These mechanisms will contain a subsidy element; the leverage ratio produced by that element seems unlikely to be worse than for investment cost reduction subsidies (although there is little information on which to base such projection); and the mechanisms' potential to create rather than divert jobs probably outweighs any disadvantages relative to such subsidies.

4. Likely Effectiveness: Tax and Other Effects

The likely tax effects of capital availability mechanisms parallel the likely employment effects; more private investment will be leveraged and more private investment will be created rather than diverted. Thus, there will be more total revenue

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Title X,) would have involved a similar analysis but different results. The requirement that private lenders repurchase defaulted loans would have limited risk. With respect to the other side of the leverage picture, however, there was no mechanism to target loans to businesses which otherwise could not raise capital except for the general requirement that the business be located in an eligible area. Thus, the main question would have been the extent to which private lenders would have used the federal credit to make loans they would not have otherwise made, notwithstanding the requirement that they re-lend sale proceeds in eligible areas.

Another type of capital availability mechanism which the government could use would be equity financing. The leveraging analysis would be somewhat different. Like grants, equity investments would leverage private capital at the front end. Thus, loss would be limited to a percentage of the investment if the entire investment were foreclosed. Even where the investments were successful, the extent to which dividend repayments do not reimburse the government sufficiently for the use of its money would have to be taken into account.

Both bills respond to clear documentation of a shortage of equity capital for small businesses, *see* note 156 *supra*, by calling on equity financing programs. S. 914, § 303(c); H.R. 2063, § 309(b). Advocates of such a program argue that even a portfolio of risky small business equity investments could be profitable if it were sufficiently diversified.

For example, a proposal outlined in an informal memo by Robert Wise, Director of the Council of State Planning Agencies (Feb. 5, 1979) relies heavily on this concept. It advocates, among other proposals, an unsubsidized (after initial capitalization) "Capital Development Fund" to make equity investments of up to $500,000 for certain young and small corporations in eligible areas.

Apart from philosophical objections to government part ownership of private firms (*see* 125 CONG. REC. S11064) (daily ed. Aug. 1, 1979) (statement of Senator Garn), the main problem for such a program would be its ability to refrain from competition with private investors, provide major benefits for residents of distressed areas and still be diversified in order to insure against excessive losses.

generated for local jurisdictions under a capital availability plan.

Potential benefits of cost reduction subsidies which depend upon investment diversion, however, notably use of existing public infrastructure and reduced pressure on area wages, would not result from the capital availability mechanisms.

C. *Comparison of Legislative Proposals*

Now that the major potential effect of the legislative proposals has been discussed, it is appropriate to discuss the proposals' relative merits. The most important issues are geographic eligibility criteria, interest subsidies and loan guarantees.

1. Geographic Eligibility Criteria

It is clear that with respect to subsidies, the proposed EDA geographic eligibility criteria are too permissive. Eligibility of areas containing two-thirds or more of the nation's population simply will dissipate the subsidies and fail to provide a significant advantage for the areas which suffer substantial hardship. The issue is somewhat tougher in connection with use of capital availability mechanisms, which could create new jobs *anywhere* if successfully targeted. More stringent geographic eligibility criteria seem appropriate, however, to increase the chances of successful targeting and to concentrate program resources where the needs are greatest.

2. Grants

The evaluation of subsidy mechanisms indicated that they may be about as effective and expensive as alternative mechanisms which address urban unemployment. There can be no objective determination of the proper level of funding for grants. In view of the gravity of the urban problems addressed, the modest additional appropriation of $275 million for UDAG seems reasonable. The EDA grant proposals are flawed by the 15 percent capital cost restriction. In addition, providing grants

more directly to businesses ought to be experimented with because it may have leveraging potential.

3. Interest Subsidies

The basic purpose of interest subsidies is to reduce investment costs. Because they cannot reduce costs enough to make a difference to business location, the Revised Administration Proposal's substantial authorization request for such subsidies should be rejected. Even the very limited authorization in the Senate Proposal may not be justified.

4. Loan Guarantees

Despite the Administration's original interest in the use of guarantees as an investment cost reduction tool, such use is improper for the same reason as for interest subsidies — the potential subsidy effect simply is too small to matter.

Thus, the use of guarantees must stand on their ability to promote capital availability. The analysis supports use of the approach because it avoids investment diversion in favor of investment creation and has leveraging potential.

Targeting assistance will be difficult, particularly as EDA expands rapidly. Some losses will result and a large proportion of guarantees may be used where unnecessary. Adoption of the Congressional loan size and firm size restrictions, however, may help to prevent such unnecessary uses. The proposed authorization probably expands the loan guarantee program too rapidly, but the approach as refined by Congress does have substantial potential.

5. An Independent Development Bank?

Finally, the evidence that market imperfections result in a capital availability problem even for necessarily viable investments raises the issue of whether an independent development bank is needed. It is indeed possible that such an unsubsidized entity, with power to raise its own funds for debt and equity investment where capital would otherwise be unavailable, could enhance economic development. This issue should be explored further.

Conclusion

This Note has emphasized that both Administration and Congressional attempts to address urban economic development needs have encompassed two quite different approaches: a rather traditional subsidy approach and a capital availability approach. A progression has been traced from the Administration Bank Proposal, which heavily emphasized the subsidy approach, to the Revised Administration Proposal and Congressional modifications which lay heaviest stress on capital availability mechanisms. The analysis demonstrates that this shift in emphasis has improved the legislation.

Despite this progress, serious drawbacks remain, including overly broad geographic eligibility criteria, investment diversion problems, and difficult administrative targeting problems. Even after the programs are in effect, there will be no reliable method of ascertaining whether successful projects needed government assistance or what economic activity was sacrificed by the diversion of capital to assisted projects.

Thus, Congress' acceptance of these programs is and to some extent must continue to be a leap of faith. The legislation is far from a sure answer to urban economic development problems. Nevertheless, in view of urban unemployment and fiscal difficulties, there is enough potential in the revised proposals to merit support.

NOTE

ZONING FOR THE MENTALLY ILL: A LEGISLATIVE MANDATE

DEBORAH A. SCHMEDEMANN*

Under the aegis of President John Kennedy, Congress first began to concern itself with the needs of the mentally ill over two decades ago. Bills providing for community mental health centers and congregate housing have appeared subsequently to attempt to expedite integration of the mentally ill into community life.

These congressional mandates, however, have met with reluctance—if not hostility. While federal lawmakers have been the champion of deinstitutionalization, they have placed responsibility for implementation of their programs on the state and local levels. There, local governmental authorities have reacted defensively to exclude the mentally ill from their neighborhoods, primarily by exclusionary zoning.

In this Note, Ms. Schmedemann argues that state legislatures must endeavor to fulfill the broad mandates of deinstitutionalization set out by Congress. To that end, she proposes creation of statewide mental health agencies. Such programs, says Ms. Schmedemann, would not only assure federal financial assistance, but set up uniform land use patterns on the state level to avoid parochial local efforts to exclude group residences for the mentally ill.

In 1963, President Kennedy proposed to Congress and the American people a new national goal: "We must act," he urged "(t)o retain . . . and return to the community the mentally ill and mentally retarded,[1] [in order] to restore and revitalize their lives."[2]

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1 This Note focuses on exclusionary zoning of group residences for the mentally ill. Because legislatures and courts often have addressed the needs of the mentally ill and mentally retarded (or developmentally disabled) in tandem, group residences for the mentally ill often are mentioned in passing. The reader should not assume, however, that the analysis and conclusions of this Note may be applied to group residences for the mentally retarded. Indeed, differences in the clinical characteristics of the two groups may well argue for differences in legal treatment.

Also, this Note does not distinguish the mentally ill who have been institutionalized through civil commitment proceedings and those who have been adjudged criminally insane. That distinction is more properly considered in an analysis of commitment statutes.

For legal developments in the area of mental disability law in general, *see* MENTAL DISABILITY LAW REPORTER (ABA).

Finally, group residences are of course used in the rehabilitation of numerous groups—ex-offenders, ex-drug addicts, juvenile delinquents, etc. I do not pretend to analyze here the factual or legal issues raised by these different group residences, except to the extent that all group residences face the same basic obstacles in the community and among lawmakers.

2 President's Message to Congress on Mental Illness and Mental Retardation, [1963] U.S. CODE CONG. & AD. NEWS 1466 (Feb. 5, 1963).

Fifteen years later, the President's Commission on Mental Health reported that "ghettos" of the mentally disabled "destroy the residential character of the affected neighborhoods and subvert the right of handicapped persons to live in normal residential surroundings."[3]

Why has so noble an effort — the integration of the mentally ill into community life — been so unsuccessful? Of key importance has been exclusionary zoning. Local zoning ordinances have been written or construed to prohibit the establishment of group residences for the mentally ill in many residential areas, relegating the mentally ill to a city's least desirable neighborhoods or to life alone. Neither of these arrangements can be deemed restorative or revitalizing.

This Note undertakes several tasks. Part I surveys the conflicting interests of the mentally ill and residential communities. Part II first describes the conflicting reactions to date by the nation's lawmakers—local, state, and federal — and then proposes legislative solutions on the state level. Part III examines the contours of that solution, through a defense of its legal validity as a general matter, critical appraisal of existing legislation, and suggestions for future enactments.

I. COMMUNITIES IN CONFLICT

Judge David Bazelon has appropriately described the tensions affecting the movement to integrate the mentally ill into community life. Says Bazelon:

> On the one hand, we want to "protect ourselves" from these individuals and thereby end our discomfort. But, on the other hand, we want to protect them and ameliorate their suffering by helping and treating them. Too often the types of custody that make us feel more comfortable are *not* the best treatment or custody for these individuals.[4]

The problems of the mentally ill are indeed often reduced to

3 U.S. PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT FROM THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, VOLS. II-IV: APPENDICES: TASK PANEL REPORTS, Appendix Vol. IV at 1390 (1978) [hereinafter cited as TASK PANEL REPORTS].

4 Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 897 (1975). Bazelon was writing about the criminally insane: his assessment, however, is equally applicable to the mentally ill who have been civilly committed.

an "us vs. them" situation, with the mentally ill and the mentally stable depicted as two distinct camps. But the image is overly simplistic. Mental illness remains a common phenomenon[5]; a 1977 federal report in fact maintains that ten percent of the American population is mentally ill.[6] Nonetheless, it is useful for purposes of analysis to view the mentally ill and the general public as distinct groups with separate interests to be protected in any resolution of the exclusionary zoning dilemma.

A. *The Mentally Ill: Deinstitutionalization*

The movement to return the mentally ill to the mainstream of American life spurred by President Kennedy has been labeled "deinstitutionalization." A recent federal report has defined the term as "the process of (1) preventing both unnecessary admission to and retention in institutions, [and] (2) finding and developing appropriate alternatives in the community for housing, treatment, training, education and rehabilitation of the mentally disabled."[7] The number of individuals immediately affected by deinstitutionalization has been and will continue to be significant. From 1958 to 1973, the patient population of state mental hospitals decreased by more than 300,000 with most of the released patients re-entering community life; in 1975, approximately 300,000 more remained in institutional settings.[8]

Contemporaneous medical advancements and shifts in treatment philosophy have prompted the recent move for deinstitutionalization within the psychiatric profession. During the 1950's, psychotropic drugs, which mitigate the bizarre behavior

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5 Mechanic, *Explanations of Mental Illness,* 166 J. NERVOUS & MENTAL DISEASES 381, 384 (1978). The origins of mental illness are unclear. Many psychiatrists view it as the capricious and unfortunate interaction of predispositional factors, social situation and personal history. For a general description of mental disorders, *see* Redlich & Kellert, *Trends in American Mental Health,* 135 AM. J. PSYCH. 22 (1978).

6 COMP. GEN. REP. TO CONGRESS, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE (Jan. 1, 1977) [hereinafter cited as RETURNING THE MENTALLY DISABLED].

7 *Id.*

8 S. REP. NO. 94-198, 94th Cong., 1st Sess. (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 469, 540 (1975). The precise figures are 570,000 in 1957 to 248,564 in 1973. The Senate Report found that in 1975 over one million persons resided in state mental hospitals and nursing homes, and that institutional care was inappropriate for between one-quarter and one-third of that number.

patterns associated with some forms of mental illness, were developed, making life in the community a feasible option for the first time for a large number of mental patients.[9] Furthermore, psychiatrists became increasingly conscious of the debilitating impact of institutionalization itself.[10] The logic of treating the mentally ill in the community therefore seemed clean and strong. As one writer notes: "[T]reatment and support *in the community* — precisely where the patient needs help in adjusting — appears as an appropriate direction to follow."[11]

The components of an ideal system for integrating former mental hospital patients into the community are many and interrelated: a rehabilitation program to build or restore the patient's employment skills, psychiatric care, social support services and — of key importance — a residential placement in the community.[12] Residential placements come in many forms, reflecting the differing needs and functional levels of patients. A highly independent patient may be able to live alone upon release from the institution, with a foster family, or with several other patients in a cooperative apartment setting.[13] For the less independent patient, a more appropriate placement may be the "therapeutic community" of a group residence, where a small group of mentally ill persons live together as a "surrogate family" under the guidance of live-in house staff.[14]

9 RETURNING THE MENTALLY DISABLED, *supra* note 6, at 2.

10 The seminal treatise is E. GOFFMAN, ASYLUMS (1961). *See also* the texts of the right to treatment cases, notes 71 to 86 *infra*. The debilitating impact has been documented in *e.g.*, Stein, Test & Marx, *Alternatives to the Hospital: A Controlled Study*, 132 AM. J. PSYCH. 517 (1975).

11 Marx, Test & Stein, *Extrahospital Management of Severe Mental Illness: Feasibility and Effects of Social Functioning*, 29 ARCH. GEN. PSYCH. 505, 505 (1973) [hereinafter cited as Marx].

12 *See* H. LAMB, COMMUNITY SURVIVAL FOR LONG TERM PATIENTS (1976) [hereinafter cited as LAMB] for a more comprehensive description of a complete community-based mental health system.

13 None of these residential placements is likely to encounter zoning obstacles. For a description of the cooperative apartment model, *see* Chien & Cole, *Landlord-Supervised Cooperative Apartments: A New Modality for Community-Based Treatment*, 130 AM. J. PSYCH. 156 (1973).

14 A more complete description of a group residence is:

> The halfway house is essentially a therapeutic community with an environment that has been organized to maximize the therapeutic potential of all the components. These elements include the physical surroundings, the attitudes and behavior of staff, the resident-to-staff and resident-to-resident interactions, and all activities, including such routine tasks as preparing and eating meals and doing daily clean-up chores. . . .

Over the years, group residences have constituted an integral and apparently successful link in systems aimed at integrating the mentally ill into community life. Although it is difficult to quantify improvement in an individual's mental health, it does appear that placement in a group residence operates to the benefit of patients released from institutions.[15] The relapse rates (frequency of readmission to the institution) for patients placed in group residences are believed to be no higher than and in some cases lower than those for patients released without such a placement.[16] Studies further indicate that group residences are particularly successful in terms of how well patients fare in the community.[17] Finally, some psychiatrists have argued that, even absent such relatively quantifiable factors as reduced relapse rates and improved functioning, community life in a group residence is preferrable over life in an institution for the simple reason that it is more humanly satisfying.[18]

> [T]he residents are able to experiment with additional responsibility, learn and test new attitudes and behaviors, and develop constructive social relationships. The staff play a nondirective, facilitative role, using appropriate role modeling and reinforcement and encouraging the residents' initiative.
>
> The therapeutic community approach is implemented primarily in two ways: first, in the informal, family-like relationship in the residents' house . . . and second, in the structured activities. . .

Beigel, Hollenbach, *et al., Practical Issues in Developing and Operating a Halfway House Program,* 28 HOSP. & COMM. PSYCH. 601, 601 (1977). *See also* Jansen, *The Role of the Halfway House in Community Mental Health Programs in the United Kingdom and America,* 126 AM. J. PSYCH. 1498 (1970) [hereinafter cited as Jansen].

For a description of a group residence from the perspective of the legal system, *see* Township of Wash. v. Central Bergen Community Mental Health Center, Inc., 156 N.J. Super. 388, 383 A.2d 1194 (1978) [hereinafter cited as *Township of Washington*].

15 This result assumes that the group residence conforms to the model of a group residence as a therapeutic community. Clearly, group residences which lack the necessary funding, community support, and neighborhood stability contemplated by the model are less likely to prove beneficial to their residents.

16 For surveys of recent studies, *see* Bachrach, *A Note on Some Recent Studies of Released Mental Patients in the Community,* 133 AM. J. PSYCH. 73 (1976); Rog & Rausch, *The Psychiatric Halfway House: How Is It Measuring Up?,* 11 COMM. MENTAL HEALTH J. 155 (1975).

17 *E.g.,* Linn, Caffey, Klett & Hogarty, *Hospital vs. Community (Foster) Care for Psychiatric Patients,* 34 ARCH. GEN. PSYCH. 78 (1977); Lamb & Goetzel, *Discharged Mental Patients — Are They Really in the Community?,* 24 ARCH. GEN. PSYCH. 29 (1971).

18 R. GLASSCOTE, ET AL., HALFWAY HOUSES FOR THE MENTALLY ILL (Joint Information Service of the American Psychiatric Association and the National Association for Mental Health 1971).

B. *The Mentally Stable: Self-Protectionism*

As Judge Bazelon has noted, the attitude of the general public toward the mentally ill is ambivalent.[19] In the abstract, most Americans are likely to be solicitous of the mentally ill and desirous of improving their plight.[20] Yet, when the issue becomes more immediate and concrete, *i.e.*, when aiding the mentally ill entails admitting them into one's own community, altruism fades and self-protectionist attitudes emerge. Expressed and "unexpressed but patently recognizable"[21] fears motivate communities to exclude group residences from within their borders. The fears may be real; but the grounds for them appear to be, for the most part, unrealistic. While a given community's concern no doubt is multifaceted and complex, it is useful for analytical purposes to examine two causes of this reluctance: resistance to the group residence and resistance to the residents.

Legal challenges to group residences, regardless of the identity of the occupants, frequently claim that the residence's social and physical structure is incompatible with the character of the neighborhood. Reluctant neighbors view group residences as mini-institutions[22] or as pseudo-correctional institutions.[23] They cite with apprehension the overcrowding,[24] disruption,[25] and undermining of the neighborhood's family character[26] which in

19 *See* note 4 *supra.*

20 At least, this has been one of the operating premises of much of the federal legislation supporting deinstitutionalization. *See* the legislative history of the federal legislation discussed in text accompanying notes 42 to 71 *infra.*

21 *Township of Washington, supra* note 14, at 395.

22 *E.g.*, Berger v. State, 71 N.J. 206, 34 A.2d 993 (1976) (multihandicapped children) [hereinafter cited as *Berger*]. *Cf.* Browndale International Ltd. v. Board of Adjustment for County of Dane, 60 Wisc. 2d 182, 208 N.W.2d 121 (1973), *cert. denied*, 416 U.S. 936 (1974) (complex of six homes for emotionally disturbed children) [hereinafter cited as *Browndale International*].

23 *E.g.*, State *ex rel.* Ellis v. Liddle, 520 S.W.2d 644 (Mo. 1975) (male juvenile delinquents); Crist v. Bishop, 520 P.2d 196 (Utah 1974) (boys with mental or emotional problems).

24 *E.g.*, Y.W.C.A. of Summit v. Board of Adjustment, 134 N.J. Super. 384, 341 A.2d 356 (1975), *aff'd*, 141 N.J. Super. 315, 358 A.2d 211 (1976) (twelve girls); City of Newark v. Johnson, 175 A.2d 500 (N.J. 1961) (state wards).

25 *E.g.*, Little Neck Community Ass'n v. Working Organization for Retarded Children, 52 A.D.2d 90, 383 N.Y.S.2d 264 (1976) (mentally retarded children); Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 580 P.2d 1246 (Colo. 1978) (mentally retarded) [hereinafter cited as *Adams County*].

26 *E.g.*, Hessling v. City of Broomfield, 563 P.2d 12 (Colo. 1977) (mentally retarded

their view inevitably attend a group residence. These apprehensions, however, stem from a misconception of the structure and operations of a group residence. The very premise of a group residence is to serve its occupants by providing for them an inconspicuous, normal, family-like environment.[27] As one state supreme court wrote of a group residence for the mentally retarded, group homes are "consonant with, not destructive of, the residential nature of the community."[28]

A second class of concerns, often unstated, derives from the attribute of the residents themselves — mental illness. It is almost a truism that the disturbed are disturbing to the sane.[29] A recent study exploring the reactions of landlords to potential tenants found that a background of mental illness results in a stigma comparable to that created by a prison record.[30] In many cases, the uneasiness appears to stem not from an actual encounter with a mentally ill individual, but from an abstract stereotype, a stereotype which is usually disproven by actually meeting him.[31] Although attitudes are becoming more accepting,[32] it appears that the uninformed public often imagines mental illness only in its most acute forms; accordingly, providing information about the various types and magnitudes of mental illness may ease the fear.[33]

Eliminating preconceptions, however, is unlikely to prove easy. For some, the nebulous sense of discomfort produced by potential contact with the mentally ill stems from an ingrained

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children); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (neglected children) [hereinafter cited as *City of White Plains*].

27 *See* note 14 *supra*.

28 *Adams County, supra* note 25, at 1250.

29 *E.g.*, Fracchia, Sheppard, et al., *Public Perceptions of Ex-Mental Patients*, 66 AM. J. PUB. HEALTH 74 (1976) [hereinafter cited as Fracchia]; Aviram & Segal, *Exclusion of the Mentally Ill: Reflections on an Old Problem in a New Context*, 29 ARCH. GEN. PSYCH. 126 (1973) [hereinafter cited as Aviram]; Gove & Fain, *The Stigma of Mental Hospitalization: An Attempt to Evaluate Its Consequences*, 28 ARCH. GEN. PSYCH. 494 (1973) [hereinafter cited as Gove].

30 Page, *Effects of the Mental Illness Label in Attempts to Obtain Accommodation*, 9 CANADIAN J. BEHAVIORAL SCIENCES 85 (1977).

31 Gove, *supra* note 29.

32 Fracchia, *supra* note 29.

33 Aviram, *supra* note 29.

Uneasiness towards the mentally ill is analogous to racial discrimination in interesting ways. For a thought-provoking analysis of the legal implications of the similarity, *see* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

belief that the mentally ill are more dangerous than the mentally stable. For many, this conviction is based on nothing more than a belief that the mentally ill have a penchant for unpredictable behavior. Whether there is a correlation between mental illness and crime and violence (*i.e.*, whether the mentally ill as a group are more prone than the general public to violence, given identical environments) remains an unanswered question.[34] The American Psychiatric Association estimates that no more than ten percent of the hospitalized mentally ill qualify as "dangerous,"[35] and presumably, the percentage would be significantly less among patients released to life in the community, since the ability to function well in the community is a primary prerequisite for that release.[36]

Legal challenges to group residences also raise neighborhood property values as a distinct interest deserving protection.[37] Whether the monetary value of a piece of property is or should be legally cognizable standing alone is questionable.[38] In this context, at least, the property interest of reluctant neighbors, if indeed imperiled by the establishment of a group residence, is threatened only because of the fears described above. Thus, to the extent those fears are unrealistic, the validity of concern with property value diminution is undermined. In fact, at least

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34 The difficulty in establishing or refuting the correlation lies in isolating the mental illness factor out of a very complex context. One study which did find a higher arrest rate for former mental patients (from Bellevue in New York City) than for the general public explained the results in part by citing the higher-than-average incidence of past criminal records among the patients studied and noted that "[t]he provision of suitable community facilities for treatment, supervision, or follow-up has not kept pace with the needs generated by the discharge of large numbers of mental hospital patients and by more restrictive admission policies." Zitrin, Hardesty, et al., *Crime and Violence Among Mental Patients*, 133 AM. J. PSYCH. 142, 147 (1976). For a survey of recent studies on the issue, *see* Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 AM. J. PSYCH. 33 (1978).

35 A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION 27 (1976).

36 *See* note 14 *supra*.

37 *E.g.*, *Adams County*, *supra* note 25; *Township of Washington*, *supra* note 14; Nicholson v. Connecticut Half-Way House, Inc., 218 A.2d 383 (Conn. 1966) (parolees) [hereinafter cited as *Nicholson*].

38 *Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1460-62 (1978) [hereinafter cited as *Developments-Zoning*].

one study has found that property values remain undisturbed once a group residence has been established for the mentally ill.[39]

* * *

The drama underlying exclusionary zoning of group residences for the mentally ill thus is built upon a fundamental conflict between two communities. The interest of the mentally ill, clinically and on a societal level, is served when they are a part of the mainstream of American life. Yet many American communities more generally perceive it to be in their best interest to exclude the mentally ill from their particular borders. One may well doubt, however, whether the perceptions of the general public are valid; indeed, at least some communities actually faced with accommodating group residences for the mentally ill have found themselves quite able and, ultimately, willing to do so.[40] As one psychiatric professional has observed, the establishment of a group residence in a community may well benefit the community by prompting it to "recognize its likeness to the disturbed rather than its unlikeness and take back some of the projections that isolated the patient and impoverished the community before."[41]

II. Governments in Conflict

Tension between the mentally ill and the mentally stable residents of America's communities has been particularly evident in the legislative struggle over mental health laws. Broadly speaking, federal lawmakers have been the champions of deinstitutionalization, while local lawmakers, *e.g.*, zoning authorities, generally have acted to exclude the mentally ill from their particular jurisdictions, in accordance with the desires of their limited and insular constituencies. Until recent-

39 The Social Impact of Group Homes: A Study of Small Residential Service Programs in Residential Areas, Green Bay Planning Commission (1973), *cited in* Lamb, *supra* note 12, at 52.

40 Marx, *supra* note 11.

41 Jansen, *supra* note 14, at 1498.

42 For a more detailed description of federal activity furthering deinstitutionalization through 1976, *see* Returning The Mentally Disabled, *supra* note 6.

ly, states have either abdicated their role or displayed more sympathy with local governments opposing integration than with the receptive stance of the federal government.

A. *Federal Law: Facilitating Deinstitutionalization*

The response of federal lawmakers to President Kennedy's 1963 call for a national effort to return the mentally disabled to life in the community has been resounding and affirmative.[42] In only 14 years, legislation and executive orders had resulted in 135 programs operated by eleven federal departments and agencies for the needs of the mentally ill, with an emphasis on life in the community.[43] At the same time, some segments of the federal judiciary have begun to formulate a legally cognizable "right" on the part of the mentally ill to certain forms of treatment and self-determination, including integration into the community.[44]

1. Legislation

On the federal level, funding aimed at furthering deinstitutionalization has come to provide a wide range of government services, commensurate with the range of the needs of the mentally ill. "Mentally disabled persons frequently have a variety of needs, including housing, income support, mental health and medical care, education, vocational training, employment and social services."[45]

The foundation of federal deinstitutionalization efforts — historically, conceptually and in terms of practical operations —

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43 RETURNING THE MENTALLY DISABLED, *supra* note 6, at 5. The burden of providing for the various needs of the mentally ill in institutions remains for the most part on the states, the traditional primary providers of institutional care. For a description of the state/federal scheme of mental health care, *see* NAT'L INST. OF MENTAL HEALTH, FINANCING MENTAL HEALTH CARE IN THE UNITED STATES: A STUDY AND ASSESSMENT OF ISSUES AND ARRANGEMENTS (1973) [hereinafter cited as FINANCING MENTAL HEALTH CARE].

Admittedly the course of federal activity here has been somewhat uneven, reflecting shifts in the nation's economic welfare and philosophical views. See the history of the Community Mental Health Centers legislation described in S. REP. No. 94-198, *supra* note 8. Throughout the past few decades, nonetheless, the direction of federal legislation has been unswervingly pro-deinstitutionalization.

44 *See* text accompanying notes 72 to 87 *infra*.

45 RETURNING THE MENTALLY DISABLED, *supra* note 6, at 172.

is the community mental health centers network (CMHC). Congress first authorized funds to aid states in the establishment of community mental health centers in 1963,[46] and has amended the program several times since then to increase its appropriations and expand the range of services offered by the centers.[47] In the CMHC legislation, Congress has emphasized the role of the community in mental health treatment not only by providing for treatment facilities which are oriented toward a specific community,[48] but also by positing its major objective to "discourage the inappropriate placement of persons in inpatient facilities."[49] Of particular importance to the group residence component of deinstitutionalization is the requirement that one of the services provided by a center be "a program of transitional halfway house services."[50] Appropriations for these programs for fiscal year 1980 total approximately $65 million.[51]

The CMHC program is augmented by Title XX, enacted in 1975,[52] a broad program that provides for federal reimbursement of state expenditures directed at the goals of "achieving or maintaining self-sufficiency" and "preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive

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46 Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).

47 *See* Community Mental Health Centers Extension Act of 1978, Pub. L. No. 95-622, 92 Stat. 3412 (1978), S. REP. No. 95-838, 95th Cong., 2nd Sess. (1978) *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9042, for a summary of the various changes. The legislation currently in effect is found at 42 U.S.C.A. §§ 2689 *et seq.* (1979 Supp.).

48 The scheme of the legislation is to divide the nation into approximately 1500 areas, each of which is to be served by its own CMHC. As of 1977, 675 CMHCs have been funded, 592 of which were fully operational; forty-four percent of the American population was covered. S. REP. No. 95-838, *supra* note 47, at 9046.

49 S. REP. No. 94-198, *supra* note 8, at 540.

50 42 U.S.C.A. § 2689(b)(1)(B)(iv) (1970). This requirement becomes effective three years after the establishment of a new CMHC. As of the date of establishment, a CMHC must provide inpatient, emergency and outpatient services; screening assistance to courts and public agencies; follow-up care; consultation and education services. Three years later, the CMHC must provide, in addition to halfway houses, day care and partial hospitalization; services for children; services for the elderly; alcoholism and drug abuse programs (as needed). CMHCs not providing the second group of services initially must provide a plan for their phase-in within three years. 42 U.S.C.A. § 2689 (1970).

51 42 U.S.C.A. §§ 2689a-2689d (1970).

The CMHC system's theory and operations have been examined critically in F. CHU & S. TROTTER, THE MADNESS ESTABLISHMENT: THE NADER REPORT (1974).

52 Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 42 U.S.C.A. §§ 1397(a) *et seq.* (1979 Supp.).

care."[53] Reference to the list of services suggested for funding under Title XX "demonstrates the program's intent to address the daily needs of former mental patients in the community."[54] Those programs are comprehensive and cover "services for . . . adults in foster care, day care services for adults, transportation services, training and related services, employment services, referral, and counseling"[55] and others, to the exclusion of medical care and residential expenses of institutionalization in a mental hospital.[56]

Congress very recently has attempted to facilitate the establishment of group residences for the mentally ill in terms of housing legislation. Federal law for some time has provided housing support for the handicapped in the form of loans to public housing agencies and other developers.[57] In 1978, Congress directly addressed the group residence model in the Congregate Housing Services Act of 1978.[58] The Act provides for contracts between the Department of Housing and Urban Development and local housing agencies or nonprofit corporations for the provision of services "to promote and encourage maximum independence within a home environment for such residents capable of self-care with appropriate supportive congregate services."[59] The statement of Congressional findings prefatory to the legislation evinces the strong commitment of Congress to group residence programs:

> [C]ongregate housing, coordinated with the delivery of supportive services, offers an innovative, proven, and cost-effective means of enabling temporarily disabled or handicapped individuals to maintain their dignity and independence and to avoid costly and unnecessary institutionalization.[60]

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53 42 U.S.C.A. § 1397a(a)(1) (1975).

54 *See* also the federal support of state vocational rehabilitation programs, 29 U.S.C.A. §§ 701 *et seq.* (1979 Supp.).

55 *Id.*

56 42 U.S.C.A. § 1397a(a)(7)(e), 42 U.S.C.A. § 1397a(a)(11) (1970).

57 12 U.S.C.A. 1701q (1970 Supp.). Until 1974, only physically handicapped persons were covered by this program; Housing & Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 669 (1974), deleted that limitation.

58 Pub. L. 95-557, 92 Stat. 2104, 42 U.S.C.A. §§ 8001 *et seq.* (1978).

59 42 U.S.C.A. § 8003 (1978).

60 42 U.S.C.A. § 8001. For further elaboration, see the legislative history *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4773.

Not all federal funding of community housing for the mentally ill, however, disburses funds via state and local providers. The major program channeling financial support directly to individual former mental hospital patients is Supplemental Security Income.[61] Although SSI benefits, which are in essence subsistence payments,[62] generally are available only at a reduced level or not at all to persons residing in treatment facilities,[63] patients living in "publicly operated community residence[s] which [serve] no more than 16 residents" are eligible for full benefits under the program.[64] The SSI payment scheme thus evinces an assessment by federal legislators that group residences are distinguishable in salient ways from other treatment facilities and that group residences are a valuable mechanism for treatment of the mentally ill.

Federal funding operates to induce states to establish group residences as one component of a community-based mental health system. Under the federal system,[65] grants are predicated on the state's efforts in the community mental health sphere. Thus, for example, a state plan "to eliminate inappropriate placement in institutions of persons with mental health problems [and] to insure the availability of appropriate noninstitutional services"[66] is a prerequisite to the receipt of health care revenue sharing monies in general. Similarly, applications by local agencies for federal aid for community development must include state housing plans that survey and assess the housing stock and needs of the handicapped.[67]

Complementing the funding legislation described above is Section 504 of the Rehabilitation Act of 1973.[68] Section 504 constitutes a limited civil rights act for the handicapped:

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61 42 U.S.C.A. § 1381 *et seq.* (1979 Supp.).
62 42 U.S.C.A. § 1382(b).
63 42 U.S.C.A. § 1382(e)(1)(A), (B).
64 42 U.S.C.A. § 1382(e)(1)(C).
65 The benefits for the mentally ill being treated in the community under Medicare and Medicaid are fairly limited: Medicare payments are limited to the lesser of $312.50 or 6½% of the patient's annual outpatient expenses. 42 U.S.C.A. § 13951 (1979 Supp.). And Medicaid requirements vary according to the patient's age, as well as type of treatment facility and administering state. 42 U.S.C.A. § 1395(1) (1979 Supp.).
66 42 U.S.C.A. § 246(d)(2)(D)(i)(I) (1978 Supp.).
67 42 U.S.C.A. § 5304(a)(4) (1979 Supp.).
68 Pub. L. No. 93-112, 87 Stat. 393, *as amended by* Pub. L. No. 95-602, 92 Stat. 2982, 29 U.S.C.A. §§ 793, 794 (1979 Supp.).

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .[69]

An individual qualifies for the protection of the provision if he actually has, or is perceived as having, "a physical or mental impairment which substantially limits one or more of such person's major life activities."[70] Although the magnitude of Section 504's impact is yet to be measured or defined,[71] the tenor of its mandate is unmistakable: absent compelling cause, the handicapped — including the mentally ill — are not to be treated differently than the general public.

2. Judicial Action

An important development in mental disability law during the deinstitutionalization era has been the success of mentally ill plaintiffs challenging the fact or conditions of their treatment in state mental health systems.[72] In terms of the group residence

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69 29 U.S.C.A. § 794.

70 29 U.S.C.A. § 706.

The implementation regulations of the Department of Health, Education and Welfare further define "mental impairment" as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3.

71 The practical impact of Section 504 likely will depend on the stringency of the regulations set forth by the various agencies and on the sanctions applied in cases of noncompliance. The Department of Health, Education and Welfare's regulations, 45 C.F.R. Part 85, 43 C.F.R. § 213.2 (Jan. 13, 1978) are to serve as the model for the other agencies. *See* Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing Section 504 of the Rehabilitation Act of 1973,* 6 FORDHAM URB. L.J. 399 (1978). The most immediately effective enforcement mechanism likely will be termination of federal support, as provided for in Exec. Order No. 1194, 41 Fed. Reg. 17871 (Apr. 28, 1976).

The primary legal issue is the role of the courts in effectuating the broad language of Section 504, *e.g.,* does it imply a private cause of action? May a court review de novo the determination of an administrative agency? *E.g.,* Doe v. Colautti, 454 F. Supp. 621 (D. Pa. 1978) (the court assumes without deciding that Section 504 creates a private cause of action, and still finds no unlawful discrimination in a state medical insurance plan which differentiates between general and psychiatric hospital care); NAACP v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1978) (court refuses a trial de novo, limiting its role to a review of the administrative agency's findings by the traditional criteria; HEW had found a violation of Section 504 in the defendant's plan to move its facilities from the inner city to the suburbs and had negotiated a compliance plan which the court found adequate).

72 *See generally* the decisions noted in MENTAL DISABILITY LAW REPORTER, note 1 *supra.*

movement, such litigation has produced far-reaching results by way of both legal theory — *i.e.,* the construction by certain activist judges of the "rights" of the mentally disabled to treatment — and judicial mandates on state mental health systems to provide residential treatment services.[73] Whether the analytical basis of these decisions is sound as a matter of law remains an open question[74] (and beyond the scope of this essay); yet their practical impact remains strong.

Three suits spanning the 1970s constitute the clearest successes by the mentally ill to secure judicial action resulting in the provision of adequate group residence services.[75] In the 1971 landmark case of *Wyatt v. Stickney,*[76] Judge Frank Johnson found a violation of due process in Alabama's practice of confining mentally retarded and mentally ill persons for therapeutic reasons in state institutions when no adequate treatment was provided.[77] He ordered and subsequently monitored a program of extensive reform.[78] Several years later, the residents of Washington, D.C.'s St. Elizabeth's Hospital brought suit alleging unlawful failure on the part of the District to provide adequate community residential services.[79] In *Dixon*

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73 *See* text accompanying notes 75 to 87 *infra.* A systematic discussion of the evolution of these rights is provided in NATL ASSOC. OF ATT'YS GEN., THE RIGHT TO TREATMENT IN MENTAL HEALTH LAW (February 1976).

74 The main ground for doubt is O'Connor v. Donaldson, 422 U.S. 563 (1975), discussed in text accompanying notes 85 to 87 *infra.* Legal scholars seem to be more favorably disposed towards the development than is the Supreme Court. According to TASK PANEL REPORTS, *supra* note 3, at 1422, at least fifty law review articles have been written on the subject, most concurring with the activist courts as a matter of law or policy. A fairly comprehensive analysis is found in a law review symposium in 62 U. CAL – BERKELEY L. REV. 617 (1974).

75 For parallel developments regarding the mentally retarded, *see* Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978); Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977) and 451 F. Supp. 233 (E.D. Pa. 1978) (extensive discussion of the rights to treatment and habilitation); New York State Ass'n for Retarded Citizens v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

76 325 F. Supp. 781 (M.D. Ala. 1971).

77 *Id.* at 785.

78 *Id.* at 785-86. For subsequent opinions attempting to implement the reform, *see* Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971); 344 F. Supp. 373 (M.D. Ala. 1972); *affd. sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

79 The District of Columbia has spawned a long series of important cases in the right to treatment area; read together they provide insight into the evolution of the right. Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (petition for habeas corpus by an indigent senile patient committed as insane; held the District's mental health code conferred a right to have alternatives to the institution evaluated); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (petition for habeas corpus by criminal defendant acquitted by

v. Weinberger,[80] the D.C. district court agreed with the plaintiffs, relying on the District's mental health code,[81] and, after noting that "housing . . . is integrally related to 'treatment,' "[82] ordered the District's social services agencies and the hospital to provide the missing services under the court's continued supervision.[83] More recently, a federal district court in Massachusetts approved a consent decree in the case of *Brewster v. Dukakis,*[84] which requires the state's department of mental health to provide an adequate community residence network for patients served by one of the state's mental hospitals.

The Supreme Court has been much more conservative than the lower federal courts in its examination of the interests of the mentally ill in community life. Thus far, it has refused to validate the theory asserted by the lower courts that the mentally ill have a right to treatment generally, much less a right to treatment in the least restrictive alternative.[85] When presented with the opportunity to do so in *O'Connor v. Donaldson,*[86] the Court opted for a holding based on the liberty interest, stating, "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible

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reason of insanity; held the defendant held a statutory right to treatment); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) (petition for habeas corpus by patient in the hospital's maximum security ward; held that the principle of the least restrictive alternative applies to the choice of treatment modes within an institution).

80 405 F. Supp. 974 (D.D.C. 1975).

81 D.C. CODE ANN. § 21-562 (1973): "A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."

82 405 F. Supp. at 979.

83 *Id.*

84 D. Mass., Ct. No. 76-4423, filed Dec. 15, 1976. Among the grounds alleged by the plaintiffs are Massachusetts law, the federal legislation described in text accompanying notes 45 to 70 *supra,* and the first, eighth, ninth and fourteenth amendments.

85 Chief Justice Burger expressly suggests that the right to treatment theory suffers from serious flaws in his concurring opinion in O'Connor v. Donaldson, *supra* note 74. *See* note 86 *infra.*

86 422 U.S. 563. The case concerned a patient who had been civilly committed and kept involuntarily in a state mental institution for fifteen years without treatment. The Court could have viewed the case as a right to treatment case or as a test of civil commitment standards; it seems to have chosen the latter approach. For a survey of the states' civil commitment standards as of 1974, *see Developments in the Law — Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190 (1974); for updates, *see* MENTAL DISABILITY LAW REPORTER, note 1 *supra.*

family members or friends."[87] Although the language clearly stopped short of recognizing a constitutional right, it at least appeared to contemplate a place in the community for the mentally ill.

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In general, then, the deinstitutionalization movement has garnered considerable support among federal lawmakers. Although it is untenable to assert that the place of the mentally ill in the community is constitutionally protected, some segments of the federal judiciary have recognized an entitlement on the part of the mentally ill to adequate treatment in the community. More important perhaps in practical terms, Congress has exercised its powerful funding incentive to prompt states to provide group residence services for their mentally ill citizens.

B. *Local Law: Exclusionary Zoning*

As federal legislation and judicial activism have attempted to facilitate integration of the mentally ill into community life, local government authorities have reacted defensively to exclude the mentally ill from their neighborhoods. The primary defense mechanism has been exclusionary zoning of group residences for the mentally ill.[88]

The zoning power of local governments generally derives

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87 422 U.S. at 576.

88 At least, exclusionary zoning has given rise to the most litigation in the field. For an example of an alternative method of exclusion, *see* Stoner v. Miller, 377 F. Supp. 177 (E.D.N.Y. 1974) (successful challenge to a local ordinance barring registration of persons requiring continuous medical or psychiatric services in boarding houses). Private citizens may also use legal mechanisms to exclude group residences; *see* Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (Ct. App. 2d Div. 1972) (restrictive covenants may prohibit the establishment of a group residence) [hereinafter cited as *Seaton*]; City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (Ct. App. Fla. 1975), *on remand*, 332 So. 2d 610 (1976) (zoning and nuisance challenge to home for mentally retarded) [hereinafter cited as *Hillsborough*]; *Nicholson, supra* note 37 (unsuccessful nuisance suit against a home for parolees).

For the perspective of mental health professionals on zoning as only the latest in a long line of methods of excluding the mentally ill from community life, *see* Aviram, *supra* note 29; Cupaiolo, *Community Residences and Zoning Ordinances*, 28 HOSP. AND COMM. PSYCH. 206 (1977) [hereinafter cited as Cupaiolo].

from state zoning enabling acts:[89] these acts delegate a measure of the state's police power to municipalities in order to promote the "health, safety, . . . [or] general welfare of the community"[90] through property use planning and regulation. Zoning affords local governments considerable latitude in regulating (or prohibiting) the establishment of group residences for the mentally ill, in part because the permissible purposes of zoning ordinances are phrased in very broad terms by statute,[91] and in part because the standards for judicial review of zoning ordinances and their operation are less than rigorous.[92]

Often communities have used this latitude[93] to exclude group residences for the mentally ill from those areas, *e.g.*, single family residential districts, most appropriate to their purposes and operation.[94] Methods of exclusion range from the blatant to

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89 Every state has a zoning enabling act; alternative sources of the power to zone are state constitutions and home rule charters. Even when the latter exist, the enabling act is looked to in defining the scope of local authority. V. ROHAN, ZONING AND LAND USE CONTROLS §§ 32.02-.05, 35.03-.05 (1978) [hereinafter cited as ROHAN].

90 U.S. DEP'T. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, S. 1 (1926). (The model statute is the basis for most state zoning enabling acts.)

91 The Standard State Zoning Enabling Act lists the following as permissible objectives: to lessen congestion; to secure safety from fire, panic and other dangers; to promote the health and general welfare of the community; to provide adequate light and air; to prevent overcrowding of land and undue concentrations of people; to facilitate the adequate provision of public services such as transportation, water, sewage, schools, parks. *Id.* For descriptions of how these objectives have been construed, *see* ROHAN, *supra* note 89, §§ 34.01-43.03; *Developments — Zoning, supra* note 38, at 1443-62.

92 In an early case approving the mechanism of zoning in general, the United States Supreme Court set forth the constitutional standard applicable to zoning ordinances: that they not be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

ROHAN, *supra* note 89, at S. 36.05, defines the scope of judicial review here as "limited to a determination whether the record shows a reasonable basis for the action of the zoning authorities. If the reasonableness of the ordinance is fairly debatable, the administrative action will not be disturbed. A court will interfere only where the ordinance, either in its language or application, is clearly arbitrary or unreasonable, or where it violates due process or equal protection guarantees. The courts will also review governmental action that involves alleged abuses of discretion or overuse of power or errors of law. The meaning of certain words or terms in zoning questions is a question of law for the courts. Moreover, courts must construe statutes in such a way as not to deprive persons of important rights, and to avoid an unconstitutional or irrational result."

93 Not all communities are afforded complete free rein here; *see* text accompanying notes 109 to 132, 148, 182 to 199 *infra*.

94 *See* note 14 *supra*.

the sophisticated. Paradigmatic of the former is an ordinance of Boston, Massachusetts, which expressly designates halfway houses for the mentally ill as forbidden uses in most residential districts.[95] Probably more typical are ordinances which prohibit group residences by defining "family" (as in "single family residential") to exclude the social unit composed of a group of unrelated mentally ill adults and their house staff.[96] For example, an ordinance of White Plains, New York, defines a family as an individual plus his or her spouse, children, parents or other specified relatives living together as a single housekeeping unit.[97] A third, procedural, technique which may operate to exclude an undesired group residence from a neighborhood often overlays the other methods. Group residences may be allowed as a special use if they qualify for a special use permit, the requisites of which are within the discretion of local zoning administrators (who, sensitive to local pressures, may well impose prohibitively stringent requirements).[98] Whether the method of exclusion is intentional or fortuitous,[99] apparent on the face of the ordinance or only as applied, the result is the same — an effective barrier to group residences.

C. *Inefficacy of Judicial Action and the Need for State Legislation*

The burden of reconciling the federal government's directive to deinstitutionalize the mentally ill and the local governments' practice of exclusionary zoning rests with the states. Not only do the states occupy the middle ground between the federal and local governments, they also constitute the major provider of

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95 Boston Zoning Code, Use Item No. 23.

96 For a more detailed description of the various types of family definitions and an analysis of their applications to group residences, *see* Wildgen, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single-Family Dwellings*, 24 KANSAS L. REV. 677 (1976).

97 *Cited in City of White Plains, supra* note 26.

98 For descriptions of how the special use permit may be used to block the establishment of an undesired facility in an area, *see* Aviram, *supra* note 29; Mile Square Service Corp. v. City of Chicago Zoning Bd. of Appeals, 42 Ill. App. 3d 849, 356 N.E.2d 871 (1976) (judicial affirmance of a refusal of a special use permit for a drug addiction treatment center).

99 Cupaiolo, *supra* note 88, depicts exclusionary zoning practices as an unfortunate happenstance rather than a conscious effort.

mental health care, traditionally and as contemplated under federal programs.[100] Further, it is unlikely that either the local or federal government will act to effectuate the needed compromise. Absent pressure from above, local governments are unlikely to ease zoning restrictions of their own accord.[101] And zoning in general has long been regarded as the almost exclusive province of the state and local governments,[102] thus precluding preemptive federal action.

The few federal zoning cases decided during the past decade, several of which bear indirectly on exclusionary zoning of group residences for the mentally ill, affirm the fact that state and local governments are responsible for arranging land use systems to accommodate different communities. The Supreme Court has refused to entertain federal equal protection challenges to zoning on the grounds of de facto racial discrimination;[103] it has also denied certiorari in a case where the state court held that developing communities are obligated to provide a fair share of the region's low income housing.[104] Furthermore, the Court's scrutiny of definitions of "family" as used in zoning ordinances has resulted in invalidation only in the clear case where the definition penetrated the traditional,

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100 *See* text accompanying notes 43 and 46 to 60 *supra*.

101 A specific community is unlikely to perceive any benefits to it or its citizens by easing its exclusionary zoning practices, since the funding incentives tend to be channeled to or through the states and the narrow visions of community members may obscure the less tangible benefit of increased understanding of mental illness.

102 The Standard State Zoning Enabling Act was developed as a model for — not as a mandate upon — state governments. *Developments — Zoning, supra* note 38, at 1435. And in *Euclid, supra* note 92, zoning earned constitutional approval as "some aspect of the police power" — in the province of the states. 272 U.S. at 387. The involvement of the federal government in zoning per se has been minimal since zoning's inception. *See Developments — Zoning, supra* note 38.

It is of course overly simplistic to assume that the federal government does not influence local land use decisions in any way: federal funding incentives and contracts reach land use indirectly, as this subject exemplifies. *See* Freilich, *Awakening the Sleeping Giant: New Trends and Developments in Environmental and Land-Use Controls, published in* 1974 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 1-3 (1974) (Southwestern Legal Foundation, Dallas, Texas).

103 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (plaintiffs had not proved discriminatory intent); Warth v. Seldin, 422 U.S. 490 (1975) (plaintiffs lacked standing in the absence of a personal and immediate injury).

104 Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mt. Laurel*].

nuclear family unit,[105] while a less egregiously restrictive definition (excluding a group of college students) has been approved.[106] Thus, regardless of whatever else these cases may be read to say,[107] one may safely assume that the federal judiciary is not ready or willing to engage in local land use planning.

In approving zoning as a general matter, the Supreme Court over fifty years ago realized that the zoning power of local governments could not be limitless, for there would be "cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[108] Some state judiciaries have come to recognize that exclusionary zoning of group residences in general presents such a case; yet it is not clear that these decisions provide adequate precedent for the mentally ill. Furthermore, whether courts acting alone are competent to effect the necessary changes in state zoning law is doubtful. State-level legislation thus emerges as the most satisfactory method of resolving the conflicts among communities and governments inherent in this exclusionary zoning dilemma.

1. The Inadequacy of State Case Law

Persons desiring to provide community residential services for various client groups roughly analogous to the mentally ill,

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105 Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) (the ordinance had resulted in a jail sentence for a woman who lived with her son and two grandsons, who were first cousins).

106 Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The end of the zoning ordinance legitimated by the Court was assuring "family values, youth values, and the blessings of quiet seclusion." 416 U.S. at 9.

107 *See* In State *ex rel.* Thelen v. City of Missoula, 543 P.2d 173 (Mont. 1975) [hereinafter cited as *Thelen*]. In upholding a state law preempting local exclusionary zoning of group residences, the Supreme Court of Montana read *Belle Terre, supra* note 106, to place the issue of exclusionary zoning in the province of legislatures, rather than the judiciary and thus as consistent with the legislation under discussion.

More broadly, these cases together may be read so as to cast doubts on exclusionary zoning of group residences for the mentally ill. That is, the Court has tacitly affirmed, or at least not refuted, the use of zoning to integrate communities. And the Court has recognized the validity of state definitions of "family," so that state legislation which would define and protect a group of mentally ill persons as a family would seem to be valid. An in-depth analysis of these cases clearly is beyond the scope of this note. *See Developments — Zoning, supra* note 38.

108 *Euclid, supra* note 92, at 390.

e.g., the mentally retarded or emotionally disturbed children,[109] have achieved significant successes in state court challenges to exclusionary zoning.[110] Yet, in terms of eradicating exclusionary zoning of those group residences, these successes largely are symbolic rather than sources of sound legal precedents. The rationales of these cases almost uniformly are unpersuasive[111] when applied to group residences for the mentally ill.

Perhaps the most typical ground for judicial overrule of exclusionary zoning (in keeping with the zoning mechanism most often used to attempt exclusion[112]) is a liberal construction of the term "family" as used in zoning ordinances. Thus, courts have found that, even though a group composed of two houseparents and up to ten unrelated mentally retarded or neglected children would not come within the words of a zoning ordinance's restrictive definition, it would nonetheless qualify from "outward appearances" to be "a relatively normal, stable and permanent family unit, with which the community is properly concerned."[113] When the outward resemblance to a tradi-

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109 This analysis does not encompass judicial treatment of group residences for other client groups, such as parolees, in any comprehensive fashion. Nor does it pretend to encompass all of the cases brought on behalf of the mentally retarded or emotionally disturbed.

110 Litigation results and strategies in the area of exclusionary zoning of group residences have been analyzed in Levey, Comment, *Municipal Corporations — Zoning*, 7 FORDHAM URB. L. J. 203 (1978); Wildgen, *supra* note 96; Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976); Kressel, *The Community Residence Movement: Land Use Conflicts and Zoning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975); Hong, *Exclusion of the Mentally Handicapped: Housing the Nontraditional Family*, 7 U. CAL.–DAVIS L. REV. 150 (1974).

111 There have been a few successes in litigation concerning group residences for the mentally ill; either the results were straightforward or the reasoning strained. *Township of Washington*, note 14 *supra*, (group residence: treating five former mental patients qualifies as a family within the broad definition of a single housekeeping unit); Ganim v. Village of New York Mills, 75 Misc. 2d 653, 347 N.Y.S.2d 372 (Sup. Ct. 1973) (a boarding house for the mentally ill is comparable to a boarding house in general for zoning purposes); Zarek v. Attleboro Human Services, No. 2450 (Bristol Sup. Ct. Mass. June 11, 1976) (home for 12 to 15 mental patients qualifies as an educational use, broadly defined, in light of the Massachusetts policy of normalization of the mentally ill).

112 *See* text accompanying notes 96 to 97 *supra*.

113 *City of White Plains*, *supra* note 26. Other cases relying at least in part on this rationale include Hessling v. City of Broomfield, *supra* note 26, State *ex rel.* Ellis v. Liddle, *supra* note 23, and the progeny of *City of White Plains*: Committee for the Betterment of Mount Kisco v. Taylor, 63 A.D.2d 650, 404 N.Y.S.2d 380 (1978) (ten children); Incorporated Village of Freeport v. Ass'n for the Help of Retarded Children, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (Sup. Ct. 1977) (eight mentally retarded young women);

tional family fades, the force of this justification for affording favorable zoning to a group residence dissipates.[114] Clearly, a group composed of two houseparents and six mentally ill adults scarcely resembles "a relatively normal . . . family unit."[115]

Those seeking authorization for a group residence have also succeeded by arguing that the proposed home qualifies either for exemption according to state law or for favorable treatment according to local ordinance because of its educational use.[116] This approach requires depicting the group residence as a school[117] or asserting that it serves a school or educational purpose.[118] Both arguments succeed most smoothly when the home is in fact linked to the public school system[119] or when state law defines these terms broadly.[120] Applying this rationale to facilities housing adults who do not require continued education tends to strain the theory beyond its limits of credibility.[121]

A third rationale for invalidating restrictive zoning provisions rests on state-wide policy grounds. To block a residence by operation of a local zoning ordinance, so the argument goes,

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Group House of Port Washington, Inc. v. Bd. of Zoning and Appeals of the Town of North Hempstead, 82 Misc. 2d 634, 370 N.Y.S.2d 433 (Sup. Ct. 1975) (seven foster children); Moore v. Nowakowski, 46 A.D.2d 996, 361 N.Y.S.2d 795 (1975) (ten juveniles).

114 This may be true even where the client group is composed of children. *E.g., Browndale International, supra* note 22; Culp v. City of Seattle, 22 Wash. App. 618, 590 P.2d 1288 (Ct. App. 1979).

115 *E.g.,* People v. Renaissance Project, Inc., 36 N.Y.2d 65, 364 N.Y.S.2d 885, 324 N.E.2d 335 (1975) (narcotics rehabilitation residence with five to twelve clients does not constitute a single housekeeping unit). A rare decision finding a group of adults to constitute a family unit is Oliver v. Zoning Comm. of Town of Chester, 31 Conn. Sup. 197, 326 A.2d 841 (C.P. 1974) (eight mentally retarded residents constitute a single housekeeping unit; the facility had been a nursing home previously).

116 *See* Annot., 64 A.L.R.3d 1087 (1975).

117 *E.g.,* Crist v. Bishop, *supra* note 23.

118 *E.g.,* Harbor Schools, Inc. v. Bd. of Appeals of Haverhill, 366 N.E.2d 764 (Mass. App. Ct. 1977) (emotionally disturbed girls) [hereinafter cited as *Harbor Schools*]; Armstrong v. Zoning Bd. of Appeals of Town of Washington, 158 Conn. 158, 257 A.2d 799 (1969) (mentally disturbed, but not mentally ill, children).

119 *E.g., Harbor Schools, supra* note 118; In re Wiltwyck School for Boys, Inc. v. Hill, 11 N.Y.2d 182, 182 N.E.2d 268 (1968) (six dormitories for delinquent children linked to public school system).

120 The definition relied upon in *Zarek, supra* note 111, is "the process of developing and training the powers and capabilities of human beings. . . . Education may be particularly directed to either the mental, moral, or physical powers and facilities, but in its broadest and best sense it relates to them all."

121 For a good try, *see Zarek, id.* The holding relies heavily on the state's broad definition of education.

would thwart the state policy favoring community care and treatment of the state's troubled or disadvantaged citizens.[122] Variations on the theme assign the group residence sovereign immunity from zoning as a governmental entity,[123] bring it within the exemptions afforded government agencies,[124] or rely on vague notions of preemption.[125] At first glance, this argument would appear to encompass group residences for the mentally ill as well as any other group residence, assuming the expression in state law of the requisite policy.[126] Yet the approach is highly problematic. Absent a clear legislative directive, there is nothing in a state policy favoring community treatment or care that inherently or logically overrules the state policy of local control of land use.[127] Thus, the state policy argument has prevailed primarily in three situations: in situations buttressing results based on the other two rationales,[128] in safe situations (*e.g.*, permitting the continuation of a nonconforming use),[129] and in situations where the two state policies have been ranked expressly by the legislature with residential care prevailing over local control of land use[130] (by no means the prevalent pattern).[131]

Thus, while it may be tenable to portray case law in the broad area of exclusionary zoning as more sympathetic to providers and residents than to hesitant neighbors, the case law is

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122 *E.g.*, Abbott House v. Village of Tarrytown, 34 A.D.2d 821, 312 N.Y.S.2d 841 (1970) (six neglected children).

123 *E.g., Hillsborough,* note 88 *supra.*

124 *E.g.*, Town of Southern Pines v. Mohr, 30 N.C. App. 342, 226 S.E.2d 865 (1976) (children's center).

125 *E.g.*, Nowack v. Dep't of Audit and Control, 72 Misc. 518, 338 N.Y.S.2d 52 (Sup. Ct. Special Term 1973) (youth center).

126 The use of this argument in successful zoning cases brought on behalf of the mentally ill is interesting: In *Township of Washington, supra* note 14, the court cited state policy but found no grounds to subordinate local zoning authority to it. The argument carried more weight in *Ganim* and *Zarek, supra* note 111.

127 *See* note 126 *supra; see also* City of Newark v. Johnson, *supra* note 24.

128 *E.g., Ellis, supra* note 23, and *Harbor Schools, supra* note 118.

129 *Ganim, supra* note 111. The facilities which benefitted from the success of the cases cited in notes 122 to 125 and note 128, for whatever reasons, are viewed as less troublesome within the law.

130 Cases construing the state legislation discussed here which use that legislation as the grounds for a state policy argument are discussed in text accompanying notes 158 to 168 *infra.*

131 *See* text accompanying note 148 *infra.*

ultimately insufficient. It is a substantial leap from ordering a community to admit a home for the mentally retarded or children, to orderering a community to allow a facility housing mentally ill adults.[132] Thus far, case law has not provided the analytical support for taking that leap.

2. The Inadequacy of Judicial Resolutions

Even if case law provided adequate precedent for judicial overrule of exclusionary zoning of the mentally ill, it would be unwise to rely on the judiciary as the agent of reform.[133] The often tortuous course of a lawsuit, even a successful one, underlines some of the weaknesses of judicial resolution in this context.

To start, judge-made law arises only when instigated by an appropriate case.[134] Whether such a case will arise in a given state depends on fortuity and the relative resources and degrees of commitment of the litigants,[135] rather than on the legal system's need for the litigation. Thus, the proper case may never reach the judiciary's consideration if, for example, the prospective provider of the group residence is too poor to pursue costly litigation, the prospective provider never finds an economically feasible site, or a local zoning authority proves sympathetic and allows the group residence. There is no reason to assume that the litigant with the most convincing and representative case will be the litigant who makes it to court.

Assuming the appropriate case is indeed presented, it is still

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132 At least, the special fears of mental illness held by the American public, *see* notes 29 to 36 *supra*, may cause a court to think twice before extending what precedent there is to homes for the mentally ill. *See, e.g., Oliver, supra* note 115, where the court specifically distinguishes the mentally retarded from the mentally ill.

133 For a more complete analysis of the inefficacy of courts in the area of exclusionary zoning generally, *see,* Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning,* 74 MICH. L. REV. 760 (1976).

134 At the least, judge-made law must be predicated on a case presenting an appropriate fact situation to be minimally defensible.

135 Should there be a disparity in resources between the litigants here, it likely would work to the disadvantage of the residence providers. One may assume that the providers of group residence programs are not likely to be wealthy individuals or organizations. Resistant members of a community or their local government are more likely to be sufficiently funded to pursue litigation. *See* Cupaiolo, *supra* note 88, for a social worker's assessment of the expense, in time and money, of litigating in exclusionary zoning challenges.

problematic whether the court can fashion a holding of the requisite scope without exceeding its legitimate role. In the first instance, courts reviewing zoning decisions are bound by a fairly narrow scope of review[136]; to invalidate a local zoning ordinance as applied or on its face thus could well be construed as overstepping. Equally problematic is the issue of how far-reaching the decision should be, given that the typical court challenge to exclusionary zoning involves only one residence and one community.[137] Assuming the case reaches a court with a statewide jurisdiction,[138] its outcome will be restricted to the facts of the case in controversy (*e.g.,* establishment of the particular group residence in issue or invalidation of the challenged ordinance) potentially resulting in a patchwork pattern of restrictive and open areas. Such a pattern in turn would produce an undesirable clustering of group residences.[139] On the other hand, to use the litigated case as a springboard for a statewide rule may seem imprudent in an area where local peculiarities are factually crucial and highly valued.

Technical questions arise as well in the process of fashioning an appropriate holding. The multiplicity of exclusionary zoning mechanisms[140] means that a decision which would address the ordinance of one community would pass over those of other areas. For example, a judicial redefinition of "family" would not ameliorate exclusionary zoning when arduous requirements for special use permits must first be met. Further, jurispruden-

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136 *See* note 92 *supra.*

137 Theoretically at least, one could bring a class action suit on behalf of mentally ill residents denied community residential placements in an area in general due to exclusionary zoning; but see *Warth, supra* note 103, requiring personal and immediate injury prior to suits challenging restrictive zoning practices.

138 Presumably, judicial reform here to be truly effective must emanate from a state's highest court. It may also be that the legal structure of a state's authority to zone makes the uniform application of even a Supreme Court decision problematic. For example, zoning in Massachusetts has been (and perhaps still is) bifurcated, so that Boston and the rest of the state operate under separate bodies of statutory and case law. MASS. GEN. LAWS ANN. ch. 40A (West 1979). The same issue could arise where a state has home rule and general law cities with disparate sources of zoning power. *See* note 89 *supra* and note 167 *infra.*

139 *See* note 3 *supra.* For a journalist's description of the undesirable consequences of excessive concentrations of the mentally ill in a geographically confined area (not due to judicial action), *see* Koenig, *The Problem That Can't Be Tranquillized,* N.Y. Times, May 21, 1978, § 6 (Magazine), at 14.

140 *See* text accompanying notes 95 to 99 *supra; see* note 138 *supra.*

tial considerations militate against predicating a legal solution on strained constructions of ordinances which themselves address the controversy in an awkward fashion.[141]

Finally, problems of implementation of judicial decrees in this area loom large. One could expect several undesirable consequences to flow from the eradication of exclusionary zoning by judicial mandate without more, *e.g.*, a glut of hastily conceived and executed programs, and defensive efforts by local governments or private neighborhood groups to devise alternative methods of exclusion.[142] Courts attempting to block these results would find themselves serving as super-zoning boards, wasting scarce judicial resources while pursuing a legislative function.[143]

The risks in relying on judicial resolution of the exclusionary zoning dilemma are thus both practical and legal. And even if the problems are overcome once, they are still prone to repetition.[144] As one scholar notes: "Adjudication through the courts is often costly in terms of both time and money. Furthermore, decisions in this novel and complex area are rarely so definitive and final that issues are settled permanently."[145]

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The conflict over exclusionary zoning of the mentally ill is thus reflected in the struggle between the federal government, acting to return the mentally ill to life in the community, and local governments, acting to exclude the mentally ill. While recent action by state judiciaries may be laudable and favorable to

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141 *See* Levey, *supra* note 110, for an apt criticism of the approach of eradicating exclusionary zoning through a liberal construction of "family" on these grounds. *See Zarek,* for an example of the problem in the approach of deeming group residences educational uses.

142 *See* note 88 *supra.*

143 For critical commentary on the inefficacy and wastefulness of judicial reform in the zoning area, see the discussion of the activist New Jersey courts in the area of racially and economically exclusionary zoning *in* Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning,* 29 RUTGERS L. REV. 803 (1976). Equally instructive for the mental health realm is the series of opinions in *Wyatt,* note 78 *supra.*

144 For example, the authoritative opinion in *White Plains,* did not put an end to zoning dilemmas concerning group residences in New York, *supra* note 113.

145 Cupaiolo, *supra* note 88, at 208.

the interests of the mentally ill, it cannot be relied upon for the ultimate resolution of the conflict here.

In the words of one mental health professional:

> Although such policy issues are complex and not easily resolved, state legislation, nevertheless, appears to offer the best opportunity for guaranteeing the right of the mentally disabled to live in residential communities in the least restrictive setting possible. Such legislation would also be the most effective means of preventing excessive clustering of facilities that can unfavorably alter the character of a neighborhood to the detriment of all.[146]

III. Resolution: State Legislation to Integrate the Mentally Ill Into Community Life

The solution of state legislation to prohibit exclusionary zoning of group residences for the mentally ill has garnered support within the legal community as well as within the mental health system. The 1978 report of the President's Commission on Mental Health advocated "state zoning laws . . . which preempt local zoning ordinances and permit small group homes for the mentally handicapped."[147] Indeed, during the 1970's, sixteen state legislatures enacted statutes pertaining to zoning of group residences.[148] Unfortunately, only a handful reached

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146 *Id.* at 210.

147 Task Panel Reports, *supra* note 3, at 1388.

148 Ariz. Rev. Stat. Ann. §§ 36-581 to 36-582 (Supp. 1979) (developmentally disabled); Cal. Welf. & Inst. Code §§ 5115-5116 (Deering Supp. 1979) (mentally disordered, otherwise handicapped, dependent or neglected children); Colo. Rev. Stat. § 31-23-303 (1977) (developmentally disabled); Md. Ann. Code art. 59A, §§ 19A, 19B, 20C (Supp. 1978) (mentally retarded); Mich. Comp. Laws Ann. § 125.583b (Supp. 1980) (adults or children in general); Minn. Stat. Ann. § 462.357 (Supp. 1978) (mentally retarded or physically handicapped); Mont. Rev. Codes Ann. §§ 11-2702.1 to .2 (Supp. 1977) (developmentally disabled, handicapped, alcoholics and drug addicts, youths, adults in need of foster care); N.J. Rev. Stat. Ann. §§ 40:55D-66 to 66.2 (West Supp. 1980) (foster children, developmentally disabled, or mentally ill); N.M. Stat. Ann. § 3-21-1.C (1978) (mentally ill or developmentally disabled); N.Y. Mental Hyg. Law § 41.34 (Consol.) (Supp. 1978) (1978) (mentally disabled); Ohio Rev. Code Ann. § 5123.18 (Page) (Supp. 1977) (1977) (developmentally disabled); R.I. Gen. Laws § 45-24-22 (Supp. 1978) (mentally retarded); Tenn. Code Ann. §§ 13-2402 to 2404 (Supp. 1978) (mentally retarded or physically handicapped); Vt. Stat. Ann. tit. 24 § 4409(d) (Supp. 1979) (developmentally disabled or physically handicapped); Va. Code § 15.10486.2 (Supp. 1979) (mentally retarded and other developmentally disabled); Wisc. Stat. § 60.74(a) (1977) (faster children and others). Other states have legislation which acknowledges

group residences for the mentally ill,[149] thus rendering broad liberalization of zoning practices unlikely.[150] It is timely, then, to consider the form future legislation should take.[151]

The analysis presented here is not intended to suggest a model statute or even advocate features of universal appropriateness. Diversity among the fifty states in terms of governmental structure,[152] demographic patterns of the general population and the mentally ill,[153] mental health delivery systems,[154] socio-economic characteristics, and social philosophy, is significant and counsels against positing a model statute. Rather, the following is intended as a set of principles of wide applicability,[155] a starting point for individual state

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the intersection of zoning and group residences without resolving the issue, *e.g.*, N.H. REV. STAT. ANN. § 126-a:39 (Supp. 1977) or which one might argue applies to this context, *e.g.*, MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979). At least one state expressly has declared that group residences are to conform to local zoning. LA. REV. STAT. ANN. § 154 28:206 West (1978).

149 Only five of the statutes by their terms or through liberal construction reach the mentally ill — California, Michigan, Montana, New York, Wisconsin.

150 *See* analysis in text accompanying notes 200 to 226 *infra*.

151 The analysis below should be of interest not only to state legislatures where laws covering zoning of group residences of any sort are lacking, but also to the legislatures of states whose laws do not encompass group residences for the mentally ill, since expansion of the current laws' coverage soon may be necessary. In terms of potential amendments to current provisions, the comments below should be considered even in those states where exclusionary zoning of the mentally ill has been treated in statutory law.

152 For example, some states may need to deal with issues of home rule charters, *supra* note 89, or bifurcated zoning systems, *supra* note 138.

153 The incidence of mental illness varies appreciably from state to state with the 1973 average being one mental patient to 578 non-mentally ill citizens. FINANCING MENTAL HEALTH CARE, *supra* note 43, at 72. The incidence within a state, one might assume, would vary as well (*e.g.*, between urban and residential areas). I question the accuracy of this statement and how the author is defining "mentally ill." There seems to be some inconsistency in the way states are categorized as reaching the mentally ill or not. For example, Montana's statute applies to the "developmentally disabled" and is categorized as being one of the states with statutes reaching the mentally ill. However, Arizona, Colorado, New Jersey, New Mexico, Ohio, Vermont, and Virginia statutes also apply to the "developmentally disabled," yet they are not categorized as reaching the mentally ill. Moreover, the New Jersey and New Mexico statutes specifically apply to the mentally ill but are not categorized as reaching the mentally ill.

Maryland, Minnesota, Rhode Island, and Tennessee statutes apply to the mentally retarded but are not categorized as reaching the mentally ill. Some clarification should be given.

154 As of 1973, twenty-one states had independent mental health agencies. In the remainder, mental health care was administered by state departments of health or social services or by hospitals or institutions. *Id.* at 74-75.

155 To reiterate the caveat set forth in note 1 *supra*, the scope of this Note is confined to group residences for the mentally ill. Some of what is said below may apply to

legislatures. The following analysis is designed to show that such legislation is valid under current law and to analyze that law critically in order to suggest improvements for future legislation.

A. *Validity of State Legislation Generally*

Because preemptive state legislation in the area of exclusionary zoning is likely to require an alteration in a city's local land use,[156] it, by definition, diminishes the scope of the local government's authority in determining certain land use questions in the future.[157] It is, therefore, only prudent to preface a proposal for such legislation with an assessment of the likely success of challenges to it based on allegations of unlawful tampering with the proper province of local governments. While the analysis here may be of only a very general nature in the absence of application of a specific state constitution or statute, the conclusion may be stated with some assurance: current law indicates that, as a general matter, preemptive state legislation in the area of exclusionary zoning of group residences for the mentally ill would be held valid.

To start, the courts have expressly affirmed zoning legislation in two of the 16 states with statewide zoning statutes.[158] In passing on the validity of Montana's provision which liberalizes

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other group residence networks, but I make no pretentions that this is so. Of course, any legislation touching upon group residences for the mentally ill would do well to cover other group residence networks as well, since, from the land use perspective, the issues are inextricably linked.

156 Restrictive local zoning ordinances and practices would be rendered invalid; even liberal zoning ordinances might be changed so as to reflect the scheme of inclusion required under the legislation.

157 This assumes that the state's judiciary has not divested local authorities of their decisionmaking role here; few of the cases, if any, described in text accompanying notes 110 to 132 *supra* can be described as doing so.

158 Approval of the state legislation cited in note 148 *supra* has been rendered in several state decisions which cite the laws and rely on them in finding for the group residence providers: *Adams County, supra* note 25; Bellarmine Hills Ass'n v. Residential Systems Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978) (group residence for mentally retarded children and foster parents constituting a "family" held not barred by a private restrictive covenant allowing a single-family private dwelling only) [hereinafter cited as *Bellarmine*]; *Township of Washington, supra* note 14; *Berger, supra* note 22; *Y.W.C.A. of Summit, supra* note 24. *Berger* in particular echoes the analysis of *Thelen,* text accompanying note 160 *infra,* so that it may be read to create a strong implication of constitutionality.

zoning laws for a wide range of group residences,[159] that state's supreme court declared:

> While we recognize respondent city's arguments as to the desirability of maintaining local government control of zoning regulations in its city, there is no question that the power of the legislature over the city in this matter is supreme. The legislature can give the cities of this state the power to regulate through zoning commissions, and the legislature can take it away. . . .
>
> Montana's legislature having determined that the constitutional rights of the developmentally disabled to live and develop within our community structure as a family unit, rather than that they be segregated in isolated institutions, is paramount to the zoning regulations of any city, it becomes our duty to recognize and implement such legislative action.[160]

The opinion underlines the two most direct and forceful grounds on which to hold legislation of this type constitutional in the face of challenges by local governments. To the extent that zoning power is delegated by state legislation (rather than inherent in local governments[161]), that power may be restricted by amendatory state legislation.[162] And once such power is recognized, the policy of fulfilling the needs of disadvantaged or troubled citizens through community care may be given precedence over local zoning by the legislature.[163]

Thus, in *City of Los Angeles v. California Department of Health,*[164] California legislation protecting a wide range of group residences from exclusion through zoning[165] warded off

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159 *See* note 148 *supra.*

160 *Thelen, supra* note 107, at 176-177.

161 At least this is generally the case, *see* note 89 *supra. See also* text accompanying notes 164 to 168 *infra.*

162 This principle is widely recognized in zoning law in general. ROHAN, *supra* note 89, at § 35.02.

163 *See* text accompanying notes 122 to 126 for instances of the judiciary's ranking of these two interests in case law absent statutory guidance.

A starting point for analysis of what interests should prevail over conflicting zoning provisions is the test set forth in Payne, *supra* note 143, at 833: "Where local decisionmaking under delegated power would result in a significant adverse impact upon an unrepresented interest or which, even absent such demonstrable impact, touches upon very important functions traditionally reserved for state decisionmaking, the delegation [of zoning power] [should] be deemed unconstitutional."

164 63 Cal. App. 3d, 473, 133 Cal. Rptr. 771 (1976) (no particular home at issue).

165 *See* note 148 *supra.*

two challenges used frequently to attack this type of legislation. The court there rejected a claim that the legislation was fatally flawed due to overbreadth by noting that the appropriate standard for state legislation is not conservatism but constitutionality.[166] More important, the court found the legislation valid as applied to "home rule" as well as general law cities[167]:

> If the scheme of regulation involved in the case at bench is treated as classical zoning, it then may well be a municipal affair subject to charter city ordinance which is inconsistent with state law. [citations omitted] If, however, the scheme is considered one relating to governing the location of homes for the placement of handicapped persons, then it relates to a matter of statewide concern. The consequences of placement, treatment, and, hopefully, return of the handicapped to a productive and respected place in society is a subject that transcends municipal boundaries.[168]

City of Los Angeles thus again provides precedent for rejecting the arguments of overbreadth and "home rule" autonomy. The case provides support not only for the constitutionality of the laws but also for the proposition that they should be applied uniformly, local variations and political questions notwithstanding.

Case law authority from one state does not of course bind other states. However, there are still other means of precluding restrictive zoning. Legislation preempting restrictive zoning of group residences can be held valid under statutory exemptions in current zoning law or under the principle of sovereign immunity.[169] By invoking immunity, litigants may indeed argue successfully that general public interest concerns outweigh the need for strict compliance with local regulations.

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166 133 Cal. Rptr. at 774.

167 The crucial distinction between the two in this context is the disparity in sources of zoning authority.

168 133 Cal. Rptr. at 774.

169 There are of course differences between preemptive legislation on the one hand and exemption and sovereign immunity on the other, *e.g.*, local ordinances which exempt a use represent the volition of the local unit while preemptive state legislation represents pressure from a larger constituency; sovereign immunity as a judicial product depends on factual situations as they arise, rather than pre-ordained results as legislation does. Exemptions mandated by state law closely approximate the approach of legislation in this context. These arguments are presented by way of analogy, not direct application.

Exemption from local zoning has already been afforded by legislatures at all levels. Some state zoning enabling acts delimit expressly the authority of local zoning bodies vis-a-vis certain activities.[170] For example, the zoning enabling act for Massachusetts prohibits local zoning ordinances which regulate "the use of land or structures for religious purposes or for educational purposes" when owned by certain entities.[171] Further, some state zoning legislation contains more inclusive exemption clauses, *e.g.*, that governmental agencies or public uses may be exempted from local zoning upon determination by the appropriate state body.[172] Exemptions include, at one end, federal or state statutes which explicitly or implicitly exempt certain government functions from local zoning ordinances[173] and, at the other end, local zoning ordinances which exempt municipal, governmental, or public uses.[174]

In the absence of statutes providing for exemption or in the face of equivocal statutes, courts have found certain governmental or public uses immune from zoning under the doctrine of sovereign immunity.[175] Courts in different jurisdictions faced with different contexts have developed several tests by which to determine whether a judicially-created exemption should be granted, *e.g.*, superiority of government position, the governmental vs. proprietary distinction, and the availability of eminent domain.[176] A recent trend has been the development of a less formalistic approach — the balance of interests test — which asks courts to weigh "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served

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170 *See* R. ANDERSON & B. ROSWIG, PLANNING, ZONING & SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE UNITED STATES (1966) for a state-by-state summary of uses afforded exemptions or favorable treatment in state zoning enabling acts.

171 MASS. GEN. LAW STAT. ANN. ch. 40A, § 3 (West 1979).

172 *Id. See* note 170 *supra.*

173 *See generally* Annot., 61 A.L.R.2d 970 (1958); FREILICH, *supra* note 102.

174 Annot., *supra* note 173.

175 *Id.*; ROHAN, *supra* note 89, at §§ 35.07 and (VI) 40.03.2. This is to be distinguished from sovereign immunity from liability in tort afforded state officials by statute.

176 These tests are summarized in *Hillsborough, supra* note 88. For a discussion of the various tests, *see* Note, *Governmental Immunity from Local Zoning Ordinances,* 84 HARV. L. REV. 869 (1971).

thereby, the effect local land use regulation would have upon the enterprise concerned, and the impact upon legitimate local interests."[177]

A survey of governmental entities typically held outside the reach of the local zoning body yields a wide range, from sewage treatment plants and turnpikes to multi-family housing projects and parks.[178] Among the land use items often exempted from zoning restrictions completely or in part are schools[179] and hospitals.[180]

The favorable treatment afforded under present law to units such as hospitals and state office buildings argues for similar treatment of group residences for the mentally ill. In terms of environmental impact, *e.g.*, consumption of space, size of structure, noise, fumes, and traffic, group residences are less objectionable than the favored uses, since group residences by definition are in physical terms identical to the community's other homes. In terms of concerns ancillary to land use issues, such as peace and quiet and the tranquility of community residents, group residences should pose no greater threats than the favored uses. And group residences are equally deserving of relief from local regulation on the grounds that they perform an identifiable and valuable public function which extends beyond the local boundaries.[181]

Against this background of favorable case law and analogous authority, preemptive state zoning legislation benefitting group residences for the mentally ill should thus be deemed valid as an exercise of the various states' police power.

B. *The Existing Legislation*

The sixteen zoning statutes already in effect[182] are far from

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177 Rutgers State University v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972). The *Hillsborough court, supra* note 88, is among those preferring this mode of analysis.

178 R. ANDERSON, *supra* note 170; Annot., *supra* note 173.

179 *Id.;* Annot., *supra* note 116.

180 *See* note 178 *supra;* Annot., 27 A.L.R.3d 1022 (1969).

181 *See* notes 4 to 41 *supra.*

182 This discussion includes all sixteen of the acts cited in note 148 *supra* even though not all of them are on point in terms of client group.

identical; nonetheless, there is sufficient uniformity in their basic design and provisions to justify an overview.[183]

Generally, the statutes serve as amendments to their state zoning enabling acts; alternatively, they are included in mental health or public welfare codes.[184] Most of the statutes by their terms confine their reach to group homes serving only specified types of clients[185] and to facilities housing no more than a specified number of residents (generally six).[186] Others create several classes of group homes deserving different degrees of protection depending on the number[187] or type[188] of residents. Almost all of the statutes expressly limit their coverage to state-licensed facilities.[189]

Most of the statutes attempt to eradicate exclusionary zoning by process of definition, declaring that, for zoning purposes, group residences fitting the statutory definition are acceptable residential or single-family uses of property.[190] Most of the statutes do not provide for different zoning treatment in more or less restrictive zones, although a few of the provisions do take cognizance of this factor.[191] In most instances, the statutes impose one of several mechanisms by which the number and placement of the newly-defined residential uses within a city or town are to be controlled: dispersion limits (*i.e.*, group

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183 For a schematic comparison of eleven of the acts (Arizona, Maryland, New York, Tennessee, Vermont excluded), *see* 3 AMICUS 2:38-39 (1978).

184 The laws of Arizona, California, Maryland, New York and Ohio are found outside of the state zoning laws.

185 *See* note 148 *supra*.

186 *See* statutes in California, Colorado, Michigan, New Jersey, New Mexico, New York, Rhode Island, Tennessee, and Vermont, *supra* note 148.

187 *See* statutes in Arizona, Minnesota, Ohio, Wisconsin. The laws of Maryland, Montana and Virginia disregard the number of residents in a home, *supra* note 148.

188 Legislatures in Colorado and Wisconsin have approached the problem in this way. See note 148 *supra*.

189 The statutes of Montana, Rhode Island, Tennessee and Virginia fail to mention licensure. *See* note 148 *supra*.

190 Exceptions are: New Jersey (bar on discrimination between children in the state's foster homes and biological families), Ohio (certain homes are permitted uses), Virginia (local ordinances shall provide for these homes), Wisconsin (same as Ohio). *See* note 148 *supra*.

191 Ohio and Wisconsin distinguish among different residential zones. The sixteen statutes essentially are uniform in focusing on residential zones and failing to mention zoning treatment of group residences elsewhere, except by implication (*e.g.*, Virginia), note 148 *supra*.

residences must be a specified distance apart),[192] density ceilings *(i.e.,* a group residence may be denied entry into a community if its presence would raise the percentage of group residence occupants in the community above a fixed number),[193] or the special use permit.[194] The laws further allow localities to impose on group residences the safety and health restrictions applicable to similar structures.[195] Several of the acts provide procedures involving prior notice to the affected community and a negotiation process[196] or post-establishment community review.[197]

Beyond the general description above, the acts vary widely, not only in terms of the relative complexity or apparent simplicity of their methods,[198] but also in the strength of legislative conviction displayed by their language.[199]

C. *A Critique: Errors of the Past*

Ultimately, the strengths and weakness of the statutes already in existence (and of any future legislation) will be revealed in their results — how well they accommodate the often divergent desires of the mentally ill and the mentally stable. In the interim, analysis of the provisions yields several grounds for reservations as to their efficacy.[200] The root of most

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192 *See* statutes in Arizona, Colorado, Michigan, Minnesota, Vermont, Wisconsin, note 148 *supra.*

193 Wisconsin. *See* note 148 *supra.*

194 The laws of Arizona, Minnesota, Montana, Ohio and Wisconsin give specific approval to special use permits. This issue is less than clear in most states. *E.g.,* does the term "permitted" connote permitted as of right, or permitted by statutory grant only (which likely would entail a use permit)?

195 Some statutes do not specify this per se, but inferring exemption from regulations applicable to other family uses would be a difficult argument to maintain.

196 *See* statutes in Arizona, Michigan, New York, Ohio, *supra* note 148.

197 Wisconsin, *supra* note 148.

198 Compare the Rhode Island statute with that of Wisconsin, *supra* note 148.

199 Compare, *e.g.,* the language of the New Jersey statute ("No zoning ordinance shall, by any of its provisions or by any regulations adopted in accordance therewith . . .") with that of the New Mexico statute (community residences "may be considered a residential use of property."), *supra* note 148.

200 *See* ZONING FOR COMMUNITY HOMES: A HANDBOOK FOR LOCAL LEGISLATIVE CHANGE (Law Reform Project, Developmental Disability Law, College of Law, Ohio State University 1975) for a proposal of local legislation similar to much of that currently in force.

It should be noted at the outset that this analysis is not intended as a complete critique of any one of the acts, but rather as a challenge to certain features shared by all or some of the acts.

of the flaws in the statutes enacted to date is the narrowness of their vision. Viewing the exclusionary zoning dilemma as merely a zoning issue,[201] legislatures have provided solutions that operate within the strictures of zoning law and practices. In so doing, they have imported into their solutions the troublesome limitations of zoning itself: undue reliance on problematic definitions which may be re-worked to accomplish the forbidden end under a different guise; a substructure of regulations which also may accomplish what zoning itself may not do; and mechanistic approaches to allocational issues where case-by-case analysis is indicated.[202]

What is perhaps most striking about the approach of the present legislation is the uniformity of its method. While there is little reason to quarrel with the labeling of "group residences" as single family residential uses,[203] the approach itself is seriously flawed. "Residential use" does not uniformly appear in all zoning legislation[204]; nor does the term "residential use" denote *a priori* a use free from zoning restrictions. That is, residential uses themselves may be barred from areas where one may wish to establish a group residence.[205] Similarly, definitions of residential uses currently in local ordinances do not necessarily contemplate a structure that could feasibly be used for a group house residence program. Wealthy communities may attach restrictions on the term, such as set-back or acreage requirements, which make it economically impossible to establish a group residence under a qualifying residential use. Most of the statutes apparently would not disturb this situation.[206]

Furthermore, because local zoning authorities may construe the residential use definition as they see fit, the opportunity for communities to bar group residences through zoning

201 *See* note 184 *supra.*

202 *See* note 190 *supra.*

203 The little reason that does exist would be that group residences are more than mere residences; they also are treatment modalities. *See* note 14 *supra.*

204 Admittedly, the term "residential" would seem to be one of wide usage, but whether it is of universal usage is doubtful.

205 It is more likely than not, however, that a group residence provider would prefer an area with other homes; yet economic forces, past land use patterns, etc., might combine to make a site in, for example, a light commercial zone appropriate.

206 *See* note 195, *supra.* Countenancing the application of separate local rules regarding safety, building specifications, etc., probably reflects implicit approval of restrictions in the zoning definitions themselves.

remains.[207] For example, the statutes do not by their terms preclude local zoning bodies from evading the impact of the legislation by eliminating the term from their ordinances altogether, by attaching (or retaining) prohibitive qualifications to the term, or by devising other terms to cover preferred uses (such as normal private homes) in order to exclude "residential uses" from the category.[208] Thus, reliance on the simple terminology of statutes is undesirable since legal definitions may be construed to reach an end not comtemplated by the definition itself.

Second, devising a solution that operates within the zoning system retains the very procedures which in practice may diminish the impact of the legislation's apparent reform. In particular, the majority of the sixteen provisions already enacted expressly provide or imply that local zoning authorities may require group residences to acquire special use permits.[209] As noted above, the special use permit has been recognized under present zoning law as an effective means of excluding an undesired use.[210] The specific approval of the device by the state legislature might be viewed by local zoning authorities as justification for employing it frequently and rigorously to exclude group residences. In addition, some of the legislation as applied could still require a prospective group residence provider to apply for a variance or continuation of a nonconforming use.[211] These application procedures thus tend to be

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207 *See Developments — Zoning, supra* note 38, at 1624-1708. *Mt. Laurel, supra* note 104, is the landmark case in the area of economically exclusionary zoning. The issue most often arises when the exclusion operates to the detriment of racial minorities. One could argue, however, that the practice is even less defensible when it disadvantages the mentally ill, whose particular problems entail not only discrimination of a general nature, but also specific clinical and functional needs.

208 Admittedly, such approaches are prone to attack as relying to an impermissible extent on the terms while evading the spirit of the legislation. Yet conceivably a strict constructionist court might be convinced that a specific statute was meant only as a definitional guide and not as an enactment infused with a public purpose, particularly in the absence of clearly expressed legislative intent.

209 *See* note 194 *supra.*

210 *See* note 98 *supra.*

211 This can occur when the site of the residence is in a nonresidential area in which residential uses are conditional; where statutory language deeming group residences to be permitted residential uses is construed to require prior zoning board approval of such residences; or, where the structure to be used was previously nonconforming.

weighted against the applicant whose use is unpopular by vesting the decisionmaking authority in the zoning board (composed of community members) and by allowing opponents of the use to register their views without attempting to measure whether the expressed views are representative of the community consensus.[212] Thus, the burden of implementing the apparent reform instituted by the statutes may well fall on the group residence provider by virtue of zoning's procedural obstacles. And that burden may be a heavy one.

A third, related flaw in the current legislation is that, along with the definitional restrictions and procedural burdens of zoning itself, comes a substructure of ancillary regulations. Thus, the group residence that gains entry to a neighborhood through liberalization of a community's zoning ordinances would be subjected to its safety and health regulations, its building code, *etc.*[213] While compliance with these rules probably would be in the best interests of the residents and the community, it is possible that the rules could be unduly stringent or inapposite to the group residence context.[214] Another potential cause for concern is possible abuse of the inspection procedures,[215] since the enforcement of local health and building codes is a governmental function of comparatively low visibility, and attendantly low public accountability.

Fourth, most of the statutes contain provisions aimed at regulating the distribution of group residences among and within the states' communities. Because the thrust of the legislation is to resolve future particular cases with a single *a priori* rule, they resort to numerical schemes — the density and dispersion limits.[216] Both of these schemes are questionable, not only in terms of the numbers chosen, but also in terms of the legal theories underlying them and their probable practical consequences. The density limit relies on a notion that has earned

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212 For a general discussion of zoning and procedural due process, *see Developments — Zoning, supra* note 38, at 1502-550.

213 *See* note 195 *supra.*

214 This is most likely to be a problem in wealthy areas where community residential standards would exceed the means of a group residence program.

215 *See* Aviram, *supra* note 29, for a description of the problem from the mental health professional's perspective.

216 *See* notes 192 and 193 *supra.*

increasing support among some legal theoreticians — that certain public services should be allocated among and responsibility assumed by communities according to their fair share of a region's needs.[217] According to this theory, one could argue that it is defensible to set a ceiling on the percentage of a city's population composed of persons residing in group residences, so long as the figure corresponds to the percentage of persons needing residential placement services.[218] The "fair share" doctrine expounded by the New Jersey Supreme Court arguably allows such an allocation. Thus far, however, the doctrine has been construed to require communities to ease their restrictive land use policies, not make them more restrictive.[219] Extending the doctrine to support the density control scheme here thus would abort its rationale.

Similarly, the dispersion limit is designed to allow a community to mitigate the potentially undesirable consequences of a particular land use by dispersing incidences of the use, thereby dissipating their aggregate impact. The principle has been declared constitutionally sound — in the context of pornographic theaters.[220] However salient differences between pornographic theaters and group residences for the mentally ill — *e.g.,* the former exists primarily for private enjoyment while the latter serves an important public welfare function — make invocation of this "precedent" highly questionable.

The practical wisdom of the dispersion and density devices is also far from clear. Both devices are designed to restrict the number and location of group residences within a distinct geographical area by imposing an arbitrary ceiling, a ceiling which predicates the permissibility of a new program on the

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217 A seminal article in advocating a regional approach to determining land-use issues involving public services is Haar, *Regionalism and Realism in Land-Use Planning,* 105 U. PENN. L. REV. 515 (1957) [hereinafter cited as Haar]. The leading case authority for the notion is *Mt. Laurel, supra* note 104. *Cf. Township of Washington, supra* note 14, in which the court discounts *Mt. Laurel* as requiring assumption of responsibility for group residences on a regional basis.

218 Calculating the percentage would be difficult as a practical matter and raises numerous questions: Should the figure be calculated on a regional basis, or statewide? How often should it be updated? Should it distinguish among different group residence client groups?

219 *Cf. Township of Washington, supra* note 14; *see Developments — Zoning, supra* note 38, at 1624-1708.

220 Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976).

number and location of programs already established. The mechanisms thus prefer early-comers over late-comers without regard to the comparative qualities of their programs. Both schemes ignore the disparities among geographical areas and even neighborhoods in terms of socio-economic and physical characteristics, not to mention, incidence of mental illness[221] — the factors that should and do determine the appropriateness of a group residence site. Numerous undesirable results could flow from reliance on such schemes: a large region could lack a group residence altogether because all of the towns would be small enough to claim the density exemption; the benefits of geographical proximity could be denied a consortium of commendable programs by the dispersion provision; and an urban area could be seriously underserved because the small sector where group residences feasibly could be located is already full. The schemes thus suffer from the inherent weakness of all numerical cut-off schemes: regulating quantity is a poor means of assuring quality.

The statutes already enacted not only bring with them the problems endemic to zoning as a legal construct, but also the pressing concerns ignored by zoning. These concerns are both legal and factual.

Zoning alone does not constitute the entire legal system governing land use. As previously discussed, legal constructs such as sovereign immunity and second-level local regulations like building codes, also determine the use to which a piece of property may and probably will be put. Two legal instruments also remain by which private parties may affect the course of someone else's enjoyment of property — the tort action of nuisance and restrictive deeds and covenants. Both of these have been used to challenge group residences, with mixed success.[222] The speculative nature of a nuisance challenge to a proposed group residence renders such a suit a relatively minor obstacle to the establishment of group residences.[223] By con-

221 *See* note 153 *supra.*

222 *See* notes 223 and 224 *infra.*

223 In *Nicholson, supra* note 37, Connecticut's Supreme Court refused an injunction against the future operations of a halfway house for parolees on the grounds that fears regarding community disruption and lowered property values were too speculative. *See also Hillsborough, supra* note 88.

trast, courts have been receptive to assertions that restrictive zoning covenants are legally (if not practically) consistent with statewide legislation and have excluded group residences under that rationale.[224] Thus, even if the sixteen statutes discussed here could be said to solve conclusively the zoning dilemma, the broader and ultimate issue of whether a community lawfully may exclude a group residence could persist.

Finally, zoning by definition addresses only the land use ramifications of multifaceted social and political conflicts. Yet in the context of group residences for the mentally ill, numerous other obstacles operate simultaneously, *e.g.*, non-existent public education programs, incomplete supportive services networks,[225] and inadequate funding.[226] Thus, as an ultimate solution to zoning rules excluding the mentally ill, current legislation is a shortsighted response.

D. *A Critique: Suggestions for Future Laws*

As discussed above, the failings in present state legislation aimed at prohibiting exclusionary zoning of group residences derive from the narrowness of the legislation's operating premise — that exclusionary zoning is primarily a zoning problem. These failings could be remedied in large part by abandoning that premise in favor of a broader perspective — that exclusionary zoning is a multifaceted dilemma of exclusion, of which zoning is only the most easily identifiable part. A shift in premises calls for a shift in the approach of the legal solution. The following are very general suggestions concerning principles and mechanisms for future legislation in keeping with the broad view that the real problem here extends beyond the zoning arena.[227]

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224 In *Seaton, supra* note 88, California's legislation overruling exclusionary zoning practices was held not to bar enforcement of restrictive private covenants, while in *Bellarmine, supra* note 158, Michigan's legislation was held to bar enforcement of the same. *See also Berger, supra* note 22, which avoids the issue.

225 *See* Part I of this Note for a discussion of the importance of public education and support services to the success of a group residence.

226 *See* RETURNING THE MENTALLY DISABLED, *supra* note 6; Jacobs, *A Hard Look: Seeking the Best Care for the Mentally Ill,* San Francisco Examiner, Aug. 26, 1979, p. 1 (describing the difficulties in the California mental health services network even after the liberalization of zoning laws, due to insufficient funding).

227 Several of the suggestions here are incorporated in some of the present legisla-

First, to the extent that some of the difficulties in the present legislation (awkward and malleable definitions, procedures capable of skewing the legislation's intent, arbitrary allocation schemes, *etc.*) are endemic to zoning, the appropriate remedy is to circumvent completely the zoning structure. Thus, rather than defining the status as assigned group residences in local zoning ordinances, state legislation should remove group residences from the province of local zoning and zoning-related authorities altogether.[228] Extensive legal precedent supports the exemption of public uses from zoning.[229] And so long as an alternative system to regulate the establishment and operation of the homes replaces the imperfect control mechanism presently afforded by zoning, no practical deleterious consequences should result.

Second, the task of determining the placement of group residences in order to produce a mental health services network responsive to the needs of the state's mentally ill and mentally stable citizens should be vested in a state agency.[230] Exclusionary zoning of group residences poses a dilemma for the legal system in part because of the "lack of correspondence between the political boundary (of the decisionmaking government) and the functional problem."[231] Assigning ultimate authority and responsibility for a state-level problem[232] to a state-level agency could correct the incongruity. One could expect the consolidation of responsibility in one agency to heighten the sense of organization and expertise in the decisionmaking body. In particular, the assumption of responsibility by

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tion; where this is so, the notes cite the state. None of the present statutes, however, could be said to follow the pattern suggested here as a whole.

228 The Maryland and Ohio statutes appear at first glance to take this approach. Whether they really do is doubtful.

229 *See* notes 170 to 174 *supra*.

230 The New York and Ohio statutes provide for a role for the state's departments of mental health in the placement of group residences; whether the state agency or the local body has the first or final say is not clear.

Whether the most appropriate agency for the task here is the mental health department is open to serious doubt. One would prefer an agency whose expertise incorporates more than mental health issues, *e.g.*, an agency charged only with locating group residences.

231 Haar, *supra* note 217, at 515.

232 *See* note 43 *supra*.

a state agency could ease the confusion and imbalance now evidenced by exclusionary zoning by providing: a statewide plan, uniform standards for group residences, and procedures governing the establishment and continued operations of group residences.

First, the involvement of a state agency would no doubt eventuate in statewide coordination; with such a scheme, group residences could be apportioned according to assessments of current and future regional mental health needs and community development patterns. As a pragmatic matter, the development and implementation of such a plan would assure the state's eligibility for federal financial assistance where grants are awarded according to the efforts of the state.[233] Furthermore, one would expect that a group residence network established pursuant to a statewide plan would better serve a state's citizenry than a network established haphazardly. In terms of land use, the institution of a state plan would serve the functional role of zoning, since it would establish its own set of expectations with regard to property use.[234]

Second, the involvement of a state agency charged with locating and regulating group residences would lead to the development of appropriate and comprehensive standards for group residences. Vesting the responsibility for defining the status of group residences in a state agency would at the very least demand a conscious policy and obviate the piecemeal approach of previous state endeavors. State licensure systems for group residences exist already[235]; expanding the licensure system to include land use criteria would complement that process. Of course, local variations in land use and community characteristics would be a key variable in the application of any standards. A comprehensive and cohesive set of standards, which include consideration of local peculiarities, should result in a system of group residences that meet not only the needs of the residents but also the concerns of neighborhoods.[236]

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233 *See* text accompanying notes 45 to 67.

234 *Developments — Zoning, supra* note 38.

235 For a description and analysis of a state's licensure provisions, *see* Plonavich, *Washington's Adult Group Home Regulations,* 13 GONZAGA L. REV. 813 (1978).

236 *See* Part I of this Note.

Third, implementation of a state plan and enforcement of the standards for group residences would necessitate a comprehensive study of the competing interests of neighborhoods and group residents. As described above,[237] the decision to permit a particular residence (both with and without preemptive state legislation) often is made first by local officials who are pressured by community groups or by private citizens. Given the public needs met by group residences,[238] this localized focus appears inappropriate; the procedural safeguards afforded by a state's administrative procedure act[239] would probably produce more equitable results. Further, the case-by-case analysis afforded by a license system could produce more refined results than the quota devices in current legislation.[240] A systematic approach to allocating community residences would necessitate solicitation of views of the general public and thus potentially educate the community and still some of the unfounded fears.[241]

A system of state planning and licensure exempting group residences from regulation, however, would be as ineffective as the legislation already in force, in the absence of provisions dealing with nuisance suits and private restrictive convenants. While it may be unnecessary to bar nuisance challenges altogether, legislation could attempt to mitigate their deleterious consequences by providing for state defense of the suit if the residence complies with the state's standards, creating a presumption in favor of the residence under the same circumstances, or devising a mechanism in the licensure application and renewal process which would afford the community a structured opportunity to express its views.[242] The threat posed by private restrictive covenants and deeds may also warrant some legislative action.[243]

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237 *See* text accompanying notes 98, 209 to 215, 222 to 224.

238 *See* text accompanying notes 7 to 18 *supra*.

239 State administrative procedure acts vary somewhat; for a general impression, *see* UNIFORM LAW COMMISSIONERS' REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1946, as amended 1958).

240 *See* text following note 219 *supra*.

241 *See* text accompanying notes 30 to 32 *supra* explaining why education of the public is so crucial here.

242 This has been done in Wisconsin, *see* note 148 *supra*.

243 *See* Arizona statutes, note 148 *supra*.

Finally, legislation purporting to eradicate exclusionary zoning of group residences for the mentally ill will involve novel areas of law[244] and controversial aspects of American society. To forestall limiting constructions of legislation, lawmakers would do well to state their intentions clearly. Of course, the strength of a legislature's commitment to the integration of the mentally ill into community life is most forcefully evidenced by complementary legislation providing funding. Regardless of whether such accompanying legislation exists, legislatures must spell out their intent to prohibit exclusionary zoning, as in the following California provision: "The Legislature hereby finds and declares: (a) It is the policy of this state . . . that mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability."[245]

Conclusion

In 1974, the United States Supreme Court held that zoning may be used to create residential neighborhoods where "family values . . . and the blessings of quiet seclusion . . . make the area a sanctuary for people"[246] The federally-sponsored deinstitutionalization movement of the past fifteen years has sought to find a place in residential communities for the mentally ill who are capable of leading relatively independent lives. Yet, the beneficiaries of "quiet seclusion" have sought to use zoning to exclude the mentally ill from their sanctuaries.

The burden of reconciling the needs of the mentally ill as recognized by the federal government and the self-protectionist concerns and defense mechanisms of communities and local governments lies with the states. Since efforts by state judiciaries are inadequate to the task, state legislation is necessary. In particular, preemptive state legislation which would exempt group residences for the mentally ill from regulation by zoning authorities and institute an alternative com-

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244 *See* generally MENTAL DISABILITY LAW REPORTER, *supra* note 1, and *Developments — Zoning, supra* note 38, for a sense of the rapid change in mental health and zoning laws.

245 CAL. WELF. & INST. CODE § 5115 (Deering Supp. 1979).

246 *Belle Terre, supra* note 106, at 9.

prehensive state-level planning and licensure system commends itself as a potential method of reform.

To resolve the conflicts underlying exclusionary zoning of the mentally ill, legislatures must recognize that the root conflict is a social one: a struggle between groups, which, as one scholar notes, view themselves as distinct, whether they are or not: "Physical inclusion in a community is not enough; social inclusion, a willingness among community members to allow a decrease in their social distance from the mentally ill living among them, is necessary for true integration."[247]

247 LAMB, *supra* note 12, at 53.

BOOK REVIEW

PAT, A BIOGRAPHY OF DANIEL PATRICK MOYNIHAN. By *Douglas Schoen.* New York: Harper and Row, 1979. Pp. 336. $10.95.

*Review by John D. Montgomery**

If this book is a campaign biography, it is surely premature for a senator whose term expires in 1982. This indisputable fact forces the reader to conclude that Mr. Schoen considers Daniel Patrick Moynihan a possible presidential candidate. A long shot, perhaps, but Pat himself has won such gambles before. Anyway, Harper and Row is in a gambling mood, too, or it would not have allowed this book to appear in its present form at all.

The Librarian of Congress, or whoever catalogued it on his behalf, thought of this book in more serious terms and classified it as "Statesman - U.S. biography" as well as "U.S. Senator-biography" and "Sociologist - U.S. biography." It seems as unlikely that this book will be taken so seriously as that its subject will become the 40th president of the United States.

But perhaps it is not a campaign biography after all. The author engages in the required idolatry, but in adding plausibility to the description of his Statesman-Senator-Sociologist he presents enough of Moynihan's less admirable qualities to assure that the book will not be distributed free of charge to the Party Faithful. The book is idolatry merged with something approaching calumny. Thus we are told on page 13 how Moynihan slashed tires on his stepfather's car, and on page 17 how he stole as a lad, on page 20 how he loved to kiss-and-tell when he was old enough to have something to tell, how in his youth he found it impossible to resist gambling (p. 22) but not difficult to resist arrest forcibly (p. 23) or to go absent without leave during his period in service (p. 34) or to refuse to accept double pay

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* Professor of Public Administration, Harvard. B.A., Kalamazoo College, 1941; M.A., Kalamazoo College, 1942; LL.D., Kalamazoo College, 1962; M.A., Harvard, 1948; Ph.D., Harvard, 1951.

when the couple for whom he was working failed to consult each other before compensating him independently for his services.

What is missing in the book is not the description of the warts and dogfights that give to Pat a very, very human quality indeed, but something quite different: a convincing presentation of the equally real qualities that made Daniel Patrick Moynihan a confidant of four presidents and a vote getter when the chips were down in New York state. There is an upbeat conclusion and an unfailingly applauding stance in Douglas Schoen's account of his subject's political achievements, but for the most part we have to take the author's word for them.

For there is something about the record on these pages that makes it hard to realize that Moynihan is a man of principle, even though the proposition is advanced on nearly every page describing his life after service in the Navy. Was it a childish prank to lie about passing entrance examinations to CCNY (p. 19) and to stretch the blanket a bit in order to board an off-limits British ship (p. 45)? Was it out of principle that he changed his pro-socialist leanings to a strong defense of capitalism by the time we reach page 21? Or that he switched from a belief in great to little government intervention in the social order (p. 62)? What are we to conclude of the fact that the professor, the ambassador, and the legislator all thought Watergate unimportant (p. 206)? Can we take it as a moral principle that a leader should remain loyal to ideology without worrying about personal behavior (p. 216)? Such a dichotomy may be quite rational to some policy analysts, but it scarcely coincides with current American political ethics.

After reading about the boyhood and youth of this energetic and productive man and his life as statesman-senator-sociologist, we begin to identify the core of his beliefs. These are the principles that Schoen admires so unrestrainedly: the priority of the family unit, which imposes on the state an obligation to maintain and reinforce it; ethnicity as an ultimate value in the human community; employment as a remedy for the evils of poverty and the most effective means of reducing the American "underclass," the submarginal elements in society; the unequalled capacity of the American government to extract money from its citizens, and its parallel inability to spend it wisely for social purposes; the superior capacity of local govern-

ment to perform most domestic services; the importance of subjecting foreign policy to domestic political values; and the immutable hostility of the Communist leadership, especially that of the Soviet Union, toward the central values of the Moynihan-American belief system.

In the international arena, we also learn of Moynihan's ideological principles by contrasting them with those of Kissinger, his ex-colleague and boss. Here, too, Moynihan's innovative views are of interest to the political observer. The senator divides the world into three arenas, each of which imposes its own rules on the players. First, there are the powers with whom the United States has significant positive interest; then there are those with which it does not; and finally, there is the international parliamentary arena represented at the General Assembly of the United Nations. The first group requires obligations at all costs; the second is a game of charades; and the third arena constitutes for Moynihan, the basis for determining in which group the doubtful states belong. Some states are inherently hostile (notably those contained in what Moynihan considers the Communist bloc). The Third World is not so much hostile as ungrateful, sullen, and potentially useful if sufficiently disciplined to regard its own self-interests. States that offend an American position in the United Nations should be punished through bilateral foreign policy; those that vote for American resolutions should be rewarded.

Of all states in the first category, Moynihan has devoted primary attention to Israel. Even the most trivial criticisms lodged against Israeli policies in the U.N. prompted an automatic stream of Moynihan venom that bore marks of a childhood spent in Hell's Kitchen. Impetuously, and without clearance from Washington, Moynihan once introduced a resolution in the United Nations requiring the release of political prisoners everywhere, not so much out of concern for political prisoners as from a desire to punish those states that had supported resolutions criticizing Zionism as racist. Curiously enough, Moynihan interprets America's support of Israel as the product of a shared commitment to "democratic" values rather than as a result of the ethnic politics that he understands so well.

Schoen presents Moynihan's "bloody-mindedness" as the

source of his skill in forecasting the outcomes of major events. For example, Moynihan expected Lee Harvey Oswald to be shot once he had been taken in Dallas; he did not expect LBJ's War on Poverty to succeed because it focused on political organization rather than employment-generation. So often disappointed in the work of sociologists as policy advisors, he expected nothing from them or from their liberal followers in other academic fields when they appeared on the Washington scene. And he was right there, too.

But as a thoughtful statesman-scholar-sociologist, Pat Moynihan deserves a better book. Perhaps the problem is stylistic. How can one take seriously a book that uses sentences like the following: "Harry Phipps' wife, Margaret Bickell, was from a German family in Louisville who owned a grocery store and brought her up rigidly. Consequently she was the sort of mother with whom children did not argue." (p. 6.) "Greenley arrived and tolerated a somewhat soused Moynihan for the weekend, giving him cake with pink, chocolate, and green icing and taking him to Sunday dinner at the Middlebury Inn." (p. 26.)

There are also some important questions suggested by Moynihan's career that might have been illuminated by this biography but are not. For example: what is the role of social scientists in government, and how should they make use of their access to privileged information when they later perform as scholars? Moynihan was a specialist in ethnicity: what can he tell us of its place in American public life? Should politicians cater to it? Should they allow it to enter foreign policy decisions? Should they build a career upon it if it does? Is the American ethic better served by efforts to link ethnic groups to the larger national community? Or is the individual the proper source of community values? Can the United States legitimately attack the political values and structures of nations whose leadership departs from the American ideals, or should the United States work with those elements in such a society whose commitments to human values most closely resemble its own? But Moynihan is also a realist: does he now think that the United States government can really act like a "great" power rather than a "superpower," allowing its U.N. spokesman like

himself to discharge his animus against states of which he does not approve?

Daniel Patrick Moynihan's public life is an invitation to reflect on issues like these, but it is an invitation that Douglas Schoen evidently decided to reject. We are left with a campaign biography that may not help the campaigner very much after all.

RECENT PUBLICATIONS

POLICYMAKING FOR SOCIAL SECURITY. By *Martha Derthick.* Washington, D.C.: The Brookings Institution, 1979. Pp. xiv, 434, index. $11.95, cloth; $4.95, paper.

Martha Derthick's *Policymaking for Social Security* is first and foremost a piece of investigative history. Beginning with passage of the original Social Security Act in 1935, Derthick traces a skein of policymaking for the program running through eight administrations of varying political persuasions. She finds that a surprisingly small number of individuals — primarily officials of the Social Security Administration, members of the House Ways and Means Committee, and organized labor — ran the Social Security system outside politics for almost forty years, deciding among themselves when to increase benefits, when to expand program coverage, or when to raise payroll taxes. These "proprietors" of the Social Security program, as she calls them, were dedicated to gradual expansion of the system through patient compromise (p. 207). As a result of an excessive deference to their expertise by Congress, Presidents, and others, got their way in virtually every major piece of legislation.

This system of consensual, proprietary policymaking ulimately broke down, according to Derthick, after 1972 when the spectre of huge deficits loomed for the first time over the Social Security program. It was only then that the proprietors' expert assumptions and policies were questioned and that outsiders — economists, actuaries, other branches of the executive and the legislature — entered the field of Social Security policymaking (p. 387).

According to Derthick, widening of the policy debate, both in terms of numbers of participants and numbers of options presented, was and is a "good thing" (p. 428). She maintains that a program so large a part of total government expenditures should not be left alone to seek its own programmatic goals. Instead it should be brought into the mainstream of government policymaking where it must contend against other

worthy government programs for scarce tax dollars and suffer the scrutiny of "generalist supervision" by the President's staff (p. 421).

Derthick's book is not one that recites a laundry list of legislative recommendations for the Social Security program. The book presumes only to point out how policy decisions have been made in the past and may be made in the future. It portrays program executives trying to depoliticize their program, while at the same time making it impossible for anyone but experts in social planning and a few expert congressmen to tamper with the program. That the program proprietors were so successful in limiting policy choices and access to Social Security decisionmaking may have been one of the chief causes of the program's "blowing up" in the mid-1970's. To the dismay of a Congress largely ignorant of the program's details, what followed was a necessary and precipitous increase in taxes to clean up the mess the proprietors had left.

Derthick shows us that as a paradigm of closed policymaking, Social Security's evolution provides a lesson of much broader relevance than simply care for the elderly.

Carlton M. Smith

YOUTH OR EXPERIENCE? MANNING THE MODERN MILITARY. By *Martin Binkin* and *Irene Kyriakopoulos*. Washington, D.C.: The Brookings Institution, 1979. Pp. 84. $2.95, paper.

In the wake of recent Soviet aggression and the declining number of volunteer recruits, reinstatement of the draft has figured prominently in the concerns of Congress and the President. In *Youth or Experience? Manning the Modern Military,* Martin Binkin and Irene Kyriakopoulos propose an alternative to both the draft and the current all-volunteer military for filling the manpower requirements of America's armed forces, namely de-emphasis of the "accent on youth" (p. 14) in military recruiting and retirement policies.

The authors argue that past manpower policies which made youth and physical vigor the *sine qua non* of entrance and reten-

tion in the armed forces may have served our country well in an era when most soldiers were infantrymen or other unskilled workers and when the young were considered "free goods" to be drafted and compensated by little more than room and board. However, in an era when 1) white collar workers and craftsmen comprise almost three-quarters of all enlisted personnel (p. 19) and the proportion of combat troops in all branches of the military continues to decline, 2) military technology has become so complex as to require great investments in time and money in training soldiers to be able to use and repair new weapons, 3) enlisted personnel are no longer free goods, and 4) the baby-boom of military-aged youth is passing, the policy of trying to enlist primarily inexperienced high-school-aged soldiers for short tours of duty no longer makes sense.

The solution to the problem, the authors contend, is to focus manpower policies on encouraging recruits trained at great expense to remain in the military for longer tours of duty. This would result in higher levels of experience and productivity (though a slight loss in physical agility) in the average soldier and would reduce the astronomical turnover rate in the present-day military with its associated costs.

Although a more "professional" military might worry some Americans who fear the growth of a separate military ethos, Binkin and Kyriakopoulos do not feel the fear is sufficiently concrete to constrain their proposals (p. 50).

The authors concede, however, that the cost of a more professional military as compared with the current youth-oriented armed forces might prove to be a constraint. Based on current statistics, the authors nonetheless conclude that, balancing the savings in recruitment and wasted training expenses against the cost of incentives necessary to encourage enlisted men to stay in the service, the "professional" army will in the long run be cheaper (pp. 60-65).

To implement their manpower suggestions, the authors propose at least two short-term reforms: 1) change the military retirement system from its present form which encourages retirement after only twenty years of service (the typical retiree is only 40 years old under the current system) to a system that encourages enlisted men to stay in the armed forces throughout

their productive years; and 2) reform the current military grade and promotion structure, which effectively provides equal pay for unequal work, by devising a system of advancement and pay opportunities more consistent with occupational requirements and private-sector standards (p. 84).

C.M.S.

BOOKS RECEIVED

ACCESS TO JUSTICE. By *M. Cappelletti, ed.* The Netherlands: Sijthoff & Noordhoff International Publishers, 1979. 4 vol. Pp. 3000. 6 Binders. $42.00.

AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA. By *Morton Keller.* Cambridge, Ma.: Harvard University Press, 1977. Pp. ix, 600, index. $17.50 cloth; $7.50 paper.

ANALYSIS OF WORKER'S COMPENSATION LAWS. By *Chamber of Commerce* of the United States. Washington, D.C.: Chamber of Commerce of the United States, 1979. Pp. 47, charts. $6.00 paper.

THE ARAB-ISRAELI MILITARY BALANCE TODAY. By *Dale R. Tahtinen.* Washington, D.C.: The American Enterprise Institute, 1973. Pp. 37. $2.00 paper.

THE AUTOMOTIVE POPULATION EXPLOSION. By *Anthony Downs.* Washington, D.C.: The Brookings Institution, General Series Reprint, 1979. Pp. 15, (reprint).

BEFORE WATERGATE, PROBLEMS OF CORRUPTION IN AMERICAN SOCIETY. By *Abraham S. Eisenstadt, Ari Hoogenboom & Hans L. Trefousse.* New York: Columbia University Press, 1979. Pp. xi, 231. $15.00.

THE CONFEDERATE NATION: 1861-1865. By *Emory M. Thomas.* New York: Harper & Row, 1979. Pp. xvi, 306, appendix, bibliography, index. $15.00.

CONFESSION AND AVOIDANCE. By *Leon Jaworski.* New York: Anchor Press, 1979. Pp. 336, index. $10.95.

CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE AND ALTERNATIVES. By *Irwin Hyman & James Wise, eds.* Philadelphia: Temple University Press, 1979. Pp. xv, 465, index. $25.00.

THE DEVELOPMENT OF AMERICAN CITIZENSHIP. By *James H. Kettner.* Chapel Hill: University of North Carolina Press, 1978. Pp. 351, index. $20.00.

FDR AND THE PRESS. By *Graham J. White.* Chicago: University of Chicago Press, 1979. Pp. xiii, 162, notes, index. $13.95.

A FRAMEWORK FOR POLITICAL ANALYSIS. By *David Easton.* Chicago: University of Chicago Press, 1979. Pp. xviii, 135, index. $4.50, paper.

HEALTH AND THE WAR ON POVERTY: A TEN-YEAR APPRAISAL. By *Karen Davis & Cathy Schoen.* Washington, D.C.: The Brookings Institution, 1978. $11.95, cloth; $4.95, paper.

IDEOLOGICAL COALITIONS IN CONGRESS. By *Jerrold E. Schneider.* Westport, Ct.: Greenwood Press, 1979. Pp. xvi, 270. $22.50.

INDIVIDUALISM AND THE PHILOSOPHY OF THE SOCIAL SCIENCES. By *Murray N. Rothbard.* San Francisco: Cato Institute, 1979. Pp. 66, recommended reading. $2.00, paper.

THE IRONY OF VIETNAM: THE SYSTEM WORKED. By *Leslie H. Gelb with Richard K. Belts.* Washington, D.C.: The Brookings Institution, 1979. Pp. xi, 369, appendix, index. $14.95, cloth; $5.95, paper.

LAWYERS AND THE PURSUIT OF LEGAL RIGHTS. By *Joel F. Handler, Ellen Jane Hollingsworth & Howard S. Erlanger,* New York: Academic Press, Inc., 1978. Pp. 272, appendices, references. $14.50.

OSHA: FIELD OPERATIONS MANUAL AND INDUSTRIAL HYGIENE FIELD OPERATIONS MANUAL. By *U.S. Department of Labor.* Chicago: Commerce Clearing House, 1977. Pp. v, 320, index. $4.50.

OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR GENERAL INDUSTRY. Chicago: Commerce Clearing House, Inc., 1977. Pp. 384, index. $5.00.

THE POCKET DICTIONARY OF LEGAL WORDS. By *John J. Kasaian & Douglas B. Oliver, eds.* New York: Doubleday & Co., Inc., 1979. Pp. 179, appendix. $2.95, paper.

PRINCIPLE AND PRACTICALITY. By *William Theodore de Bary & Irene Bloom, ed.* New York: Columbia University Press, 1979. Pp. 543, index. $27.50, cloth; $12.00, paper.

RISE GONNA RISE: A PORTRAIT OF SOUTHERN TEXTILE WORKERS. By *Mimi Conway.* New York: Anchor Press, 1979. Pp. 240, index. $5.95, paper.

SOUTHERN MOUNTAIN REPUBLICANS 1865-1900. By *Gordon B. McKinney.* Chapel Hill: University of North Carolina Press, 1978. Pp. 255, bibliography, index. $18.00.

THE SUPREME COURT REVIEW 1978. By *Philip B. Kurland & Gerhard Casper.* Chicago: University of Chicago Press, 1979. Pp. vii, 409. $30.00.

TORT REFORM AND RELATED PROPOSALS. By *Bruce Levin & Robert Coyne.* Chicago: American Bar Foundation, 1979. Pp. 249, index, (reprint).

THE TRANSFORMATION OF AMERICAN LAW, 1780-1860. By *Morton J. Horowitz.* Cambridge, Ma.: Harvard University Press, 1977. Pp. xvii, 266, notes, index. $16.50, cloth; $5.95, paper.

WOMEN AT WORK. By *Thomas Dublin.* New York: Columbia University Press, 1979. Pp. 312, appendices, selected bibliography, index. $17.50.

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