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ARTICLE

SOLAR BANKING: CONSTRUCTING NEW SOLUTIONS TO THE URBAN ENERGY CRISIS

STEVEN E. FERREY*

The Solar Energy and Energy Conservation Bank was created by the Energy Security Act of 1980 and is designed to provide a collection of finance and tax incentives for the development and use of conservation and renewable energy resources. In this Article, Mr. Ferrey describes the need for the Bank, the federal and state regulatory context in which it was created, and the uncertain prospects for its future. He argues that the Bank's success or failure has implications that reach beyond the energy marketplace, to the economic well-being of existing and developing urban areas. He further argues that the impact of a weak solar energy and conservation policy will be felt disproportionately by the poor and the elderly, and concludes that the fate of the Bank will test the commitment of the Reagan Administration to urban regions and to the disadvantaged.

Introduction

Newly enacted federal legislation creating the Solar Energy and Energy Conservation Bank[1] marks a radical departure from conventional national energy policy. The mission of the Bank is to encourage investment in solar energy and other renewable energy sources. Unlike many prior federal energy programs, the Bank will deliver investment incentives exclusively through existing market mechanisms, actually increasing consumer and industry choice and financial security for lenders. For urban regions, the Bank is the one best hope for economic rejuvenation and soaring energy costs. The fate of this embryonic program in the coming years will be a test of the Reagan Administration's commitment to intelligent energy policy, the health of the cities, and social equity.

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1 Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (1980) (to be codified in scattered sections of 2, 5, 7, 10, 12, 15, 16, 18, 26, 30, 42, 49, 50 U.S.C.).

The challenge confronting the nation during the remainder of this century is to match available energy resources with appropriate and cost-effective energy applications. Any successful reindustrialization of America cannot go forward on the grossly inefficient foundation of current wasteful practices. The diversion of scarce capital resources to fund costly and inefficient energy supply ventures drains from other sectors of the economy desperately needed capital for modernization and growth.

A host of detailed evaluations from various private institutions concludes unanimously that the nation's best and most cost-effective energy investments are in conservation and renewable energy resources.[2] These investments, principally because they require the retrofitting of energy efficiency improvements on the consumer side of the energy equation, are not contemplated by the supply-side economic approach to the energy dilemma. Because structural inefficiency is built into existing buildings and appliances, only carefully tailored efficiency improvements in the constituents of energy demand can be the cornerstone of a cost-effective energy policy.

Federal and state incentives for residential energy efficiency improvements, enacted during recent years, are an important first step toward providing these developing technologies with a measure of federal support commensurate with that enjoyed by conventional power resources.[3] However, the market through which these incentives are delivered is seriously flawed. This Article will demonstrate that many of the households in the country are left wholly without access to these incentives, and that urban regions are threatened with effective exclusion from this energy incentive market. This Article further argues that what is required is not the abandonment of the existing foun-

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2 *See* R. STOBAUGH & D. YERGIN, ENERGY FUTURE: A REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL (1979); R. SANT, THE LEAST-COST ENERGY STRATEGY (1980); NATIONAL ACADEMY OF SCIENCES, ENERGY IN TRANSITION: 1985-2010 (1979); A. LOVINS, SOFT ENERGY PATHS: TOWARDS A DURABLE PEACE (1977).

3 A recent Department of Energy study calculates that federal subsidies for nuclear power have exceeded $37 billion (in 1979 dollars), or the equivalent of $28 to $42 per barrel of oil-equivalent in delivered energy. ENERGY INFORMATION ADMINISTRATION, U.S. DEP'T OF ENERGY, FEDERAL SUBSIDIES TO NUCLEAR POWER: REACTOR DESIGN AND THE FUEL CYCLE (1980). Work by economist Duane Chapman for the California Energy Commission concludes that federal and state subsidies for each new nuclear plant exceed $200 million (in 1980 dollars), excluding construction and operating subsidies. D. CHAPMAN, NUCLEAR ECONOMICS: TAXATION, FUEL COST AND DECOMMISSIONING (Cornell Univ. A.E. Res. 79-26) (1979).

dation of incentives, but rather the development of market mechanisms that will reach through existing market barriers. The Solar Energy and Energy Conservation Bank is designed to serve precisely this function. The ensuing struggle for the Bank's survival amidst current budget and program cuts will stand testament to the national commitment to an equitable, accessible, and cost-effective energy marketplace. For older urban communities, this struggle foreshadows no less than future economic viability in the rapidly changing energy crucible.

I. Business as Usual: Existing Residential Energy Conservation and Solar Energy Incentives

The federal government currently sponsors a variety of solar and energy conservation activities in residential housing, utilizing direct assistance, regulation, and indirect tax subsidy mechanisms. Direct assistance programs are administered primarily by the Department of Housing and Urban Development (HUD), the Veterans Administration (VA), the Community Services Administration (CSA), and the Department of Energy (DOE). The primary federal tax and loan incentives are authorized by the Energy Tax Act of 1978.[4] Federal promotion of residential solar energy and energy conservation within this scheme has been neither aggressively pursued nor vigorously funded. As a consequence, federal incentives have reached a small, relatively select segment of the population.

The Energy Tax Act of 1978[5] created tax credits for conservation and renewable energy resource investments in existing principal residences. Absentee landlords, therefore, cannot utilize these credits. Fifteen percent of the first $2,000 spent on qualifying energy saving equipment may be credited against income taxes. The credits are nonrefundable, so they must be taken against current tax liability. Thus, low-income families

4 Pub. L. No. 95-618, 92 Stat. 3174 (codified in scattered sections of 26 U.S.C. (Supp. III 1979)). For a recent discussion of the Energy Tax Act of 1978 and related provisions of the Crude Oil Windfall Profits Tax Act of 1980, *see* Friedmann & Mayer, *Energy Tax Credits in the Energy Tax Act of 1978 and Crude Oil Windfall Profits Tax Act of 1980*, 17 Harv. J. on Legis. 465 (1980).

5 Residences qualify if "substantially completed" by April 20, 1977. 26 U.S.C. § 44C(c)(1) (Supp. III 1979).

with no taxable income or with minimal tax liability[6] cannot take advantage of the residential energy tax credits. A one-year carry-forward applies to utilization of a credit.[7]

Renewable energy residential property tax credits were also established by the 1978 Energy Tax Act. These differ from the conservation credit in that their application is not limited to existing dwellings. Solar,[8] geothermal, and wind systems and the requisite labor, assembly, and installation expenses are eligible for the credit. The original credit of 30 percent of the first $2,000, and 20 percent of the next $8,000, to a maximum of $2,200, has been recently revised to a flat 40 percent credit on the first $10,000.[9]

Title III of the Energy Tax Act provided a 10 percent business credit,[10] since amended to 15 percent,[11] for alternative energy investments.[12] The credit is in addition to the normal 10 percent investment tax credit for which conservation and renewable energy resource improvements to business property are eligible. This creates an effective 25 percent credit for solar investments in multi-family dwellings. Furthermore, this business credit applies on a refundable basis, entitling businesses to a rebate on the credit amount in excess of annual tax liability.

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6 Estimations for tax credit eligibility levels, based on cut-off points for tax liability in 1979, are: $3,200 for the single taxpayer, one exemption; $4,200 for the single taxpayer, two exemptions; and, $7,200 for the married taxpayers (filing joint return) with four exemptions. *The National Energy Act: Representing the Low-Income Consumer,* 12 NAT'L CLEARINGHOUSE REV. 818 (1979). Conservation credits equalling less than $10 annually, representing a $70 expenditure, cannot be taken pursuant to I.R.S. computation procedures.

7 26 U.S.C. § 44C(b)(6) (Supp. III 1979). Qualifying equipment under federal income tax law includes caulking and weatherstripping, furnace modification, automatically timed thermostats, insulation in home or water heaters, storm and thermal windows and doors, and other materials as indicated by the Secretary of Energy. 26 U.S.C. § 44C(c) (Supp. III 1979). First-time improvements made after April 20, 1977, which are expected to last at least five years, qualify. *Id.*

8 Eligible solar improvements do not include those systems which include a "significant structural function" in a dwelling. S. REP. No. 1324, 95th Cong., 2d Sess. 44 (1978).

9 Crude Oil Windfall Profit Tax of 1980, Pub. L. No. 96-223, § 202, 94 Stat. 258 (1980) (to be codified in 26 U.S.C. § 44C(b)).

10 26 U.S.C. § 46(a)(2)(C) (Supp. III 1979).

11 Pub. L. No. 96-223, 94 Stat. 230 (to be codified in 26 U.S.C. § 46(a)(2)) (1980).

12 Qualifying improvements include automatic energy control systems, energy recovery systems, cogeneration systems, regenerators which store heat, turbulators which increase boiler efficiency, preheaters, modification to alumina electrolytic cells, and other devices specified by the Secretary of the Treasury. 26 U.S.C. § 48(1)(3) (Supp. III 1979).

TABLE 1
TOTAL INDIVIDUAL RESIDENTIAL CREDITS, 1978
(before limitations)

Adjusted Gross Income	Number Returns Claiming Credits (1000s)	Percent	Total Dollar Credits Claimed (1000s)	Percent
$ 0 -$ 5,000	57.1	1%	$ 44.5	1%
$ 5,000-$10,000	436.6	7%	$ 282.7	7%
$10,000-$15,000	641.3	11%	$ 413.7	10%
$15,000-$20,000	1,119.6	19%	$ 696.3	17%
$20,000- plus	3,646.1	62%	$2,653.0	65%
TOTAL	5,901.7	100%	$4,090.1	100%

Source: I.R.S., 1978 STATISTICS OF INCOME, Table 8 (1978).

Tax credit mechanisms perform poorly in catalyzing solar and energy conservation improvements across all income groups in the population. Internal Revenue Service (IRS) income tax return data shows a maldistribution in the usage of the residential energy tax credit. In 1978, 81 percent of the residential credits claimed were taken by those with adjusted gross incomes in excess of $15,000, with fully 62 percent of the credits claimed by those earning more than $20,000 annually.[13] Those with adjusted income in excess of $15,000 constituted only 38 percent of the returns filed, while those with incomes in excess of $20,000 filed only 25 percent of all tax returns.[14]

A separate examination of conservation and renewable energy investment credits is revealing. Table 1 displays conservation investment credits indexed by income level. Table 2 shows renewable energy credits in the same configuration. A comparison of these tabulations reveals that the disparity of tax credit use in proportion to income is even more acute for renewable energy credits than for conservation credits. Income groups earning less than $10,000 and $5,000 annually, representing 47 percent and 25 percent of all returns filed, accounted

13 I.R.S., 1978 STATISTICS OF INCOME Table 8 (1978). Dollar amounts of total residential energy credits claimed were parallel to the incidence of returns, showing 82 percent and 65 percent of expenditures falling to the over $15,000 and over $20,000 annual adjusted income groups, respectively.

14 *Id.*

TABLE 2
TOTAL INDIVIDUAL RESIDENTIAL RENEWABLE RESOURCE CREDITS, 1978
(before limitations)

Adjusted Gross Income	Number Returns Claiming Credits	Percent	Total Dollar Credits Claimed (1000s)	Percent
$ 0 -$ 5,000	8	0.01%	$ 70	.06%
$ 5,000-$10,000	4,361	6.00%	$ 1,612	1.00%
$10,000-$15,000	4,982	7.00%	$ 12,129	10.00%
$15,000-$20,000	6,415	10.00%	$ 9,405	8.00%
$20,000- plus	52,336	77.00%	$ 92,324	80.00%
TOTAL	68,102	100.00%	$115,540	100.00%

Source: I.R.S., 1978 STATISTICS OF INCOME, Table 8 (1978).

for only 6 percent and 0.01 percent of the renewable credits claimed, respectively.

Translating this phenomenon to the median-income-percentile eligibility categories employed by the Bank statute yields an equally skewed distribution. As Table 3 illustrates, the proportion of homeowners who take the energy tax credit is lower in each income bracket than in any of the higher brackets. As a consequence, the operation of federal residential tax credits is very regressive.

Direct federal energy assistance is delivered in a variety of forms.[15] Three generic types of direct assistance are of particular relevance: (1) federally subsidized loans, (2) general weatherization and solar assistance, and (3) conservation programs administered in conjunction with federal housing assistance.

The National Energy Conservation Policy Act of 1978[16] (NECPA) authorized three federally subsidized loan programs for residential energy improvements. First, HUD was authorized to guarantee up to $3 billion in conservation loans, in face

15 Direct assistance includes direct grants, subsidies, direct loans, loan insurance, construction and government ownership of housing, research and establishment of standards, housing industry regulation, and demonstration projects.

16 Pub. L. No. 95-619, 92 Stat. 3206 (codified in scattered sections of 12, 15, 42 U.S.C. (Supp. III 1979)).

TABLE 3
HOMEOWNERSHIP BY INCOME, 1980, AND PERCENTAGE OF HOMEOWNERS WHO TOOK ENERGY TAX CREDIT IN 1978

Percent Median Income*	1980 Incomes*	Number U.S. Families*	Number U.S. Family Homeowners*	Percent Homeowners Who Took Energy Tax Credit
80% or less	$17,000 or less	21,919,667	15,408,167	6%
80–100%	$17,000–$21,000	7,470,133	4,871,633	16%
100–120%	$21,000–$25,000	7,259,466	4,776,300	21%
120–150%	$25,000–$31,000	7,477,229	5,623,166	26%

*Figures are derived from figures given by the Census Bureau for 1978, approximated to correlate with the percent of median categories in the Solar Energy and Energy Conservation Bank Act, and adjusted to 1980 levels by increasing 1978 figures by 20 percent.

Source: CENTER FOR RENEWABLE RESOURCES, HOMEOWNERSHIP BY INCOME, Oct. 8, 1980.

amounts to $2,500, to low- and moderate-income owners of single-family dwellings.[17] These loans bear interest rates between the aggregate rate of outstanding government obligations of comparable maturity and the statutory ceiling on HUD title I loans.[18] Priority is afforded to handicapped and elderly persons and their families.

Second, HUD was provided standby authority to guarantee an additional $2 billion in conservation loans.[19] This authority would be triggered by a finding by the HUD Secretary that "insufficient credit is available on a national basis . . . to advance the achievement of a national program of energy conservation in residential dwelling units."[20] Unlike those of the former program, no income limitations apply to these loans. These monies could be used to convert to individual meters for rental units, among other purposes. A recipient of these loans could simultaneously benefit from a federal tax credit for the same investment. However, the Carter Administration never requested any monies to be appropriated for these programs.[21]

Third, two provisions of NECPA facilitate low-cost solar loans. Fifteen-year solar loans of less than $8,000, at interest rates not less than those on the aggregate of outstanding government obligations of comparable maturity, are available from the Federal National Mortgage Association.[22] These loans are available for owners of single-family dwellings only. Multi-family dwellings covered by a mortgage insured under section 241 of the National Housing Act[23] are eligible to receive additional loan amounts for solar equipment from HUD.

Direct weatherization and solar assistance are provided by four programs. First, DOE administers the Energy Conservation in Existing Buildings Act of 1976.[24] The program allocates

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17 12 U.S.C. § 1723f (Supp. III 1979). Eligibility would be for families earning below median area income.

18 *Id.* Loan terms would be 5 to 15 years with no prepayment penalty.

19 12 U.S.C. § 1723g (Supp. III 1979).

20 *Id.*

21 The Energy Security Act, in creating the Bank, repealed the secondary-market authority of section 314 of the Federal National Mortgage Association Charter Act. Pub. L. No. 96-294, § 533, 94 Stat. 740 (1980) (repeals 12 U.S.C. § 1723f).

22 12 U.S.C. § 1723h (Supp. III 1979).

23 12 U.S.C. § 1715z-6 (Supp. III 1979).

24 Pub. L. No. 94-385, title IV, 90 Stat. 1150 (codified in scattered sections of 5, 12, 15, 29, 42 U.S.C. (Supp. III 1979)). DOE has only managed to spend about 20 percent of the almost $500 million appropriated for its program.

money pursuant to state formulae to community-based organizations to accomplish direct service weatherization of low-income homes.[25] Income can not exceed 125 percent of Office of Management and Budget poverty guidelines for program eligibility.[26] The program has led a frustrated existence. Only about 5 percent of the 14 million eligible households have received weatherization assistance, portending forty years of effort at this rate to reach all low-income households.[27]

Second, HUD has administered a Residential Solar Heating and Cooling Demonstration Program.[28] Twenty-seven million dollars in grants were distributed in five award cycles to stimulate active and passive solar applications in approximately 23,000 homes.

Third, HUD has administered a domestic hot-water initiative program in eleven East Coast states. This program provides grants of $400 to homeowners installing solar hot-water systems. The Low-Income Energy Assistance Program[29] provides further grants to low-income persons to defray winter heating costs. While this program is not specifically designed to fund improvements in energy efficiency, the money might be used for these purposes.[30]

Fourth, the Residential Conservation Service (RCS) program requires all qualifying regulated and nonregulated utilities,[31] pursuant to state plans, to assist residential utility customers

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25 CETA, public service, or volunteer labor are to be used "to the maximum extent practicable." 42 U.S.C. § 6864 (Supp. III 1979). DOE's weatherization-assistance program establishes a maximum subsidy of $800 for labor and $800 for materials.

26 10 C.F.R. § 440.18 (1980).

27 While renters are eligible to receive benefits, as a practical matter they have been excluded from participation. Weatherization of multi-family dwellings is permitted only if at least 66 percent of a building's units are income eligible. 10 C.F.R. § 440.15 *et seq.* In addition, procedures must be in place to ensure that there is no "undue or excessive enhancement" to the value of the unit and that rents will not be raised as a result of weatherization. Of 144,000 dwelling units weatherized in the past three years, only 15,000 have been rental units. Counihan & Nentzow, Energy Conservation: Neglect in Rental Housing, in NATIONAL CONFERENCE OF STATE LEGISLATURES 12 (1980).

28 42 U.S.C. § 5501 *et seq.* (Supp. III 1979).

29 Pub. L. No. 96-223, title III, 94 Stat. 288 (1980) (to be codified in 42 U.S.C. § 8601).

30 Under state plans, payments can be made to eligible households directly or on their behalf to their heating energy supplier. 45 C.F.R. § 260.152(d) (1980). In the latter situation, an individual would never receive the cash and thus could not apply it to efficiency improvements.

31 All utilities with annual retail residential natural gas sales in excess of 10 billion cubic feet or annual retail residential electric sales exceeding 750 million kilowatt-hours are covered. 42 U.S.C. § 8212 (Supp. III 1979).

with conservation and solar improvements.[32] Each utility must: (1) provide information to customers regarding methods of conserving energy, (2) provide a residential energy audit, (3) suggest cost-effective conservation or solar measures as determined by audits, and (4) assist interested customers in arranging financing and installation of selected measures.[33] However, absent a specifically enacted utility-financing program, RCS provides neither loans nor subsidized assistance for energy conservation and solar energy investments.

These four types of general government assistance suffer from being limited programs with small budgets. Many of the demonstration programs have already exhausted the monies appropriated for their functions. The conclusion is inescapable that these general federal weatherization and solar assistance programs are grossly inadequate to satisfy the need for cost-effective residential energy improvements.

HUD further influences the energy efficiency of the housing stock it administers in three respects. First, it administers a number of programs providing specific subsidies or assistance mechanisms. HUD subsidizes the tenancies and, in some instances, the costs of public,[34] section 8,[35] section 236,[36] section 221(d)(3)(4),[37] and section 202 elderly rental housing.[38] It pro-

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32 After January 1, 1982, multi-family residents who are not supplied by a central heating/cooling source, rather than master metered, must be included in the program. 42 U.S.C. § 8211 (Supp. III 1979).

33 42 U.S.C. § 8216 (Supp. III 1979).

34 42 U.S.C. § 1437 *et seq.* (Supp. III 1979). With in excess of 1 million public units (with over 40 percent devoted to elderly and handicapped), the scale of this program exceeds that of all other rental assistance programs combined. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, 1976 HOUSING YEARBOOK, 169, at table 108 (1976). In 1976 there were more than three million tenants residing in federally subsidized public housing in more than 4,000 localities.

35 42 U.S.C. § 1437f (Supp. III 1979) (originally enacted by Pub. L. No. 93-383 § 201, 88 Stat. 737 (1974)). Based on the particular area, eligible families can earn up to 80 percent of median income. HUD funds the difference between fair market rent and the "affordable" family rent payment, calculated as 25 percent of adjusted gross income.

36 12 U.S.C. § 1715z-1 (Supp. III 1979) (originally enacted by Pub. L. No. 90-448 § 201, 82 Stat. 575 (1968)). Assistance to lower income families in rental and cooperative housing is provided in the form of mortgage and interest subsidies to lenders. Local project management is by nonprofit, limited dividend, or cooperative organizations. Annual mortgage interests are reduced to as little as one percent. HUD finances the difference between the actual operating costs and the tenants' contributions, which are based on tenant income.

37 12 U.S.C. § 1715k-1 (Supp. III 1979) (originally enacted by Pub. L. No. 83-560 § 123, 68 Stat. 683 (1954)). Mortgage insurance is provided for construction and rehabilitation of multi-family rental units. Under Section 221(d)(4), 90 percent of a mortgage sponsored by a profit-motivated organization is insured. Section 221(d)(3) insures

vides mortgage insurance for owners under the section 235[39] and section 221(d)(2)[40] programs, and it administers the section 233 Experimental Housing Program.[41] With the exception of public housing, all of the programs assist those of low- and moderate-income in renting or purchasing private-market housing. Consequently, there is no direct control over energy efficiency. Most private-market owners have proved unwilling to increase equity investments in buildings to make efficiency improvements, even when this would subsequently reduce energy operating costs.

In contrast, public housing, because it is government-owned and -financed, offers the possibility of efficient improvement to the housing stock. Because the government is both the owner and ultimately the party financially responsible for energy costs, it is in a unique economic position among rental owners to benefit from investments in residential energy efficiency.[42]

The public housing stock offers a notorious potential for efficiency improvements. Prior to 1973, HUD minimum property standards were so lax as to allow the walls of public housing in almost any climate to be constructed of cellophane wrap and still satisfy the minimum standards.[43] President Nixon imposed

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100 percent of a mortgage offered by a cooperative or nonprofit group. Expenditures have statutory per unit limitations to assure moderate construction costs.

38 12 U.S.C. § 1715v (Supp. III 1979) (originally enacted by Pub. L. No. 86-372 § 202, 73 Stat. 751 (1959)). Long-term direct loans are provided to private nonprofit project sponsors. This housing is reserved for families headed by persons who are at least 62 years old or handicapped. At least 20 percent of the units must be simultaneously assisted by section 8 subsidies to ensure low-income elderly housing assistance under section 202.

39 12 U.S.C. § 1715z (Supp. III 1979) (originally enacted by Pub. L. No. 90-448 § 101, 82 Stat. 549 (1968)). This program makes interest payments to lenders on behalf of eligible owners—those with a maximum income of 95 percent of median area income—reducing mortgage interest costs to moderate-income homebuyers to 4 percent. The dollar limit on mortgages ranges from $32,000 to $44,000 for homes, according to area cost and home size.

40 Note 35 *supra*. Mortgages with payback periods of up to 30 years may be obtained by qualifying owner-occupants. The maximum insurable loan amount ranges from $31,000 to $42,000, depending upon area cost and family size. A 3 percent down payment is required.

41 This program provides insurance for single-family and multi-family housing projects which are exempted from minimal HUD minimal-property-standards requirements. Apparently, this program has been little-used for funding residential energy innovations.

42 Public housing is owned and administered by local housing authorities who receive annual HUD funds to service debt on long-term construction financing. Pursuant to the Brooke Amendment, 42 U.S.C. § 1437(a) (Supp. III 1979), tenants pay 25 percent of their adjusted incomes for rent, including reasonable quantities of utilities. Additional operating subsidies are provided by HUD.

43 HUD, Heat Loss Calculations, FHA G 4560.1 (1968), updated under same title, HUD Cir. 4940.6 (1973).

a moratorium on new public housing construction in 1973, just as the minimum property standards were made meaningful for the first time. As a result, the great majority of public housing remains of poor thermal and structural quality.

Modernization funds from HUD,[44] first authorized in 1974 to bring dilapidated public housing up to reasonable quality, are available in limited part for energy conservation retrofit investments. However, until very recently, the bulk of modernization dollars devoted to energy expenditures were employed for mandatory conversion from master to individual utility meters[45] rather than for more cost-effective conservation investments such as insulation, caulking, and storm windows. Recent regulatory revisions now provide that twenty-one conservation and solar retrofit measures will compete on a cost-effectiveness basis for public housing modernization funds.[46] In addition, the most efficient major appliances must now be procured for furnished units. For the first time, subject to available modernization appropriations, a federal program will comprehensively make cost-effective conservation investments in rental housing.

Second, HUD provides direct long-term housing rehabilitation loans to selected federally aided communities under the section 312 program.[47] Financing of residential, mixed-use, and nonresidential property rehabilitation, including insulation and weatherization, is available at subsidized rates in federally aided program areas.[48] Refinancing of owner-occupied property is also allowed with section 312 funding. Priority is given to low- and moderate-income borrowers unable to secure loans from other

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44 The modernization program operates by providing monies to amortize the debt service associated with modernization improvements.

45 24 C.F.R. § 865.400 *et seq.* (1980).

46 24 C.F.R. § 865.305 *et seq.* (1980). These regulations do not allow the installation of individual metering systems in dwellings in need of substantial weatherization when such action would result in economic hardship for tenants. 24 C.F.R. § 865.306 (1980). The conversion to individual metering is accompanied by a substantial reduction in the utility allowance received by public housing tenants. 24 C.F.R. § 865.470 *et seq.* (1980).

47 42 U.S.C. § 1452b (Supp. III 1979) (originally enacted under Pub. L. No. 88-560, § 312, 78 Stat. 899 (1964). Federally aided community development block grants, urban homesteading, and neighborhood strategy areas are eligible residential areas for recipient households.

48 *Id.* For families with incomes up to 80 percent of the median area income level, the interest rate is 3 percent or less on maximum principal amounts of $12,000 for residential units, or $50,000, for nonresidential properties. Families whose income exceeds that level receive an interest rate tied to the treasury borrowing rate. Loans are available for 20 years, or three fourths of the property's remaining useful life, whichever is less.

sources.[49] Section 312 assistance requires satisfaction of applicable minimum property standards and local building code requirements.

Third, HUD provides block grants to states and localities under the Community Development Block Grant (CDBG)[50] and Urban Development Action Grant (UDAG)[51] programs. These funds enable qualifying local communities and metropolitan areas to undertake local development strategies consistent with federal guidelines.[52] About 15 percent of CDBG funds are earmarked to fund housing rehabilitation, although residential solar and conservation activities are not specifically promoted.[53] The strategic importance of CDBG and UDAG for energy efficiency improvements lies not only in their direct application, but in their use as matching funds for Bank energy conservation grants, HUD title I or section 312 home improvement loans and DOE low-income weatherization efforts.

The Farmers' Home Administration (FmHA) within the Department of Agriculture administers three direct loan programs that can be utilized to finance residential energy efficiency improvements.[54] All of these programs must serve cities with populations of less than 20,000 and rural communities of less than 10,000 persons.

First, the section 502 homeownership loan program provides direct loans or loan guarantees for as much as 100 percent of

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49 *Id.* Higher-income residents qualify only when their objectives are seen as necessary for neighborhood progress in revitalization or conservation.

50 Pub. L. No. 93-383, title I, 88 Stat. 633 (codified in scattered sections of 12, 31, 42 U.S.C. (Supp. III 1979)), *as amended by* The Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (codified in scattered sections of 12, 40, 42 U.S.C. (Supp. III 1979)). CDBG replaces several previous categorical grant programs, including model cities and historic preservation grants.

51 42 U.S.C. § 5318 (Supp. III 1979). UDAG provides support for distressed urban areas which require funds in addition to those available from other programs to alleviate severe housing deterioration.

52 While some 6,600 communities are guaranteed a minimum amount of CDBG funds, metropolitan areas and urban counties qualify for added funds based on a "needs" formula which considers population, poverty, and housing conditions.

53 Some local communities have elected to utilize CDBG monies innovatively to fund district heating, cogeneration, energy audit, weatherization, and solar projects at the community level. *See generally* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, BLOCK GRANT ENERGY CONSERVATION (1980).

54 FmHA loans are directly issued by the agency, secured by Certificates of Beneficial Ownership deposited with the Federal Financing Bank. Unlike HUD, loans are not made through conventional lenders. FmHA can insure loans extended by conventional lenders.

the financing needed for the purchase or rehabilitation of dwellings.[55] An eligible family must be able to pay the mortgage principal, interest, taxes, and insurance with 20 percent of its adjusted income.[56] Second, for those low-income and elderly owners with insufficient income to qualify for the section 502 program, the section 504 program offers ten- to twenty-year loans of up to $5,000 at 4 percent interest or less.[57] Finally, the section 515 program provides loans to private and public organizations for construction of and repairs to cooperative or rental housing for low- and moderate-income families.[58] The HUD section 8 program can be used in conjunction with the section 515 program.

Despite the seeming abundance of programs, the fabric of federal assistance does not begin to cover the market. Various authorized programs have never received appropriated funds.[59] Other grant subsidy programs provide only limited weatherization assistance to the poorest segments of society, while some demonstration programs terminated after limited periods of existence. The CDBG and UDAG programs are not specifically aimed at energy conservation, while RCS provides no actual federal monies for implementation.

Local communities have generally been slow to implement comprehensive community energy plans which provide assistance to the residential sector. Several local conservation and solar initiatives are exceptions. These local initiatives are of three types: (1) direct assistance, (2) subsidized loans, and (3) tax inducements. However, these programs are fiscally small, limited in their scopes, and inconsistent in their coverages.

Notable among the direct assistance programs are Michigan's home weatherization program (grants for labor but not materials

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55 42 U.S.C. § 1472 (Supp. III 1979).

56 On privately financed housing loans, FmHA guarantees 90 percent of the principal and interest; homes older than one year may be 100 percent financed. Interest rates vary between 1 and 8 percent depending on family income, and loan terms can extend to 33 years.

57 42 U.S.C. § 1474 (Supp. III 1979). Loans must be to improve homes which have health or safety hazards.

58 42 U.S.C. § 1475 (Supp. III 1979). Loan terms can be for up to 50 years for projects for the elderly and up to 40 years for other projects, at interest rates as low as 1 percent.

59 For a discussion of recent solar budget machinations, *see* Ferrey, *Solar Eclipse: Our Bungled Energy Policy*, SATURDAY REV., March 3, 1979, at 24.

in owner-occupied low-income residences)[60] and the Minnesota low-income weatherization grant program ($5,000 maximum grant for home repairs and efficiency improvements).[61] Each of these small, state direct assistance programs is specifically targeted at low-income owners who are otherwise eligible to be served by the federal low-income weatherization program.[62] All ignore the rental market.

State-subsidized loan programs for conservation have been established in Connecticut,[63] West Virginia,[64] Oregon,[65] and other states. All of these programs predominantly benefit owners rather than renters, and provide minimal assistance for low-income owners. In California, where Pacific Gas and Electric operates a low-cost insulation financing program,[66] less than 0.03 percent of the more than 7,000 loans made have been to renters, despite vigorous efforts to reach the rental market.[67] Less than 0.02 percent of the loans have benefited multi-family stock.[68]

State tax incentives are provided in several forms. Nine states offer income tax credits to households which make conservation investments.[69] The most aggressive of these plans, in California,

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60 Mich. Stat. Ann. § 16.613(1) *et seq.* (Supp. 1980). Fifty percent of funds expended in counties with over 100,000 population are to be allocated to private contracting firms when more than two private contractors bid on a job. Ten percent of appropriated funds are authorized for "model programs." Eligibility is established at 125 percent of federal poverty levels.

61 Minn. Stat. Ann. § 462A-05 (Supp. 1980). This program is administered by the Minnesota Housing Finance Agency through local community action agencies. Eligible owners must have incomes less than $5,000 annually and net assets of less than $25,000. Annual appropriation levels are $21 million.

62 The Michigan program, by restricting its funds for labor, must specifically rely on federal funds for insulation materials.

63 Conn. Pub. Acts No. 79-509 (1979). Bonding authority up to $3 million for the program was authorized. Loans of between $400 and $3,000 are made to single-family households earning less than $30,000 annually.

64 W. Va. Code § 31-18A-7 (Supp. 1980). This legislation provides 3-year, 3 percent, $2,000-maximum loans to owners of residential property.

65 Or. Rev. Stat. §§ 407.010, 407.210 (1979). These loans are available to war veterans for weatherization of owned dwellings built before 1974.

66 Several utilities, most notably Pacific Gas and Electric, Pacific Power and Light, and the Tennessee Valley Authority, have initiated programs for utility financing of conservation investments. *See, e.g.*, California Public Utilities Commission Decision No. 92653 (1981).

67 *Hearings before the California Public Utilities Commission on Application No. 59537* at 977 (1980) (statement of Lee Callaway).

68 *Id.*

69 These states include Alaska, Arizona, Arkansas, California, Hawaii, Idaho, Indiana, and Minnesota. Alaska, Hawaii, and Idaho restrict the credit to the cost of insulation materials, disallowing labor costs.

provides a 40 percent tax credit of up to $1,500, which can be carried forward against subsequent years' tax liability, with a refund for low and moderate income taxpayers.[70] Two states, Montana and Oregon, provide their tax credits directly to commercial lenders who make subsidized-interest conservation loans. Three states exempt efficiency improvements to residential dwellings from property tax assessments.[71] Low-income homeowners and renters receive almost no benefit from existing incentives, with the possible exception of those in California. Eleven states specifically exempt solar equipment from state sales tax; twenty-two states offer personal income tax incentives for solar installation; and twenty-seven states partially or wholly abate renewable energy improvements from property tax assessments.[72] Only Michigan's solar tax credit is refundable for those who have insufficient tax liability. In California, which provides the most ambitious solar tax credit, only 6 percent of the credits, comprising less than 2 percent of the total dollar value, were claimed by that half of the population below median family income.[73] Some states also provide limited demonstration grant programs and loan programs for various solar investments.

Two experimental solar marketing programs underway in California are of particular interest. The California Energy Commission is funding the operation of six Municipal Solar Utilities which locally facilitate the financing and delivery of solar improvements. The California Public Utilities Commission has ordered a varied set of utility incentives for the installation of solar water heaters in residences.[74] Both of these innovative programs are capable of penetrating all housing types over all income levels but their actual performance remains to be ascertained.

With the exception of those in California, the scope of these various forms of state residential solar and conservation incentives, like that of their federal counterparts, is extremely limited. In many cases, the incentives merely facilitate investment by

70 Cal. Rev. & Tax. Code §§ 17052.8, 17208.7, 23601.5, 24349.7 (Supp. 1980).

71 These states are Hawaii; New York, which limits exemptions to single-family dwellings; and Oregon, which exempts only elderly housing.

72 S. REP. No. 387, 96th Cong. 1st Sess. 41 (1979) (referring to a G.A.O. report).

73 CALIF. ENERGY COMM'N., CALIFORNIA'S SOLAR ENERGY TAX CREDIT: AN ANALYSIS OF TAX RETRUNS FOR 1977, Doc. No. 500-79-012 (1979). Thirty-one percent of the credits were utilized by households with 1977 adjusted income in excess of $50,000.

74 Calif. Pub. Util. Comm'n Decision No. 92251 (1980).

those already predisposed and economically able to undertake residential energy improvements. Many states in the coldest regions of the country, where these investments are most cost-justified, have not enacted incentives. Further, this patchwork of federal and state incentives *de facto* directs solar and conservation investments to certain segments of the population, as the next section illustrates.

II. Who Benefits from Business as Usual?

The collection of federal programs available to promote residential solar and conservation investments is limited in scope and spotty in application. Many programs operate in conjunction with existing private-market lending functions. To understand the significant impact of existing private-market conservation and renewable energy incentives on population groups and urban regions, these technologies must be viewed within the context of their probable social and economic effects.

Renewable energy resources are not merely another new appendage to be grafted onto the conventional way of life. Rather, like many of the energy technologies in use today, such as coal, natural gas, and oil, solar energy is a pivotal technology which will fundamentally mold the structure and environment of societies where it is employed. Renewable technologies will dramatically affect urban planning and demography, industrial location and specialization, architectural design densities, environmental amenities, and the quality of life itself. In essence, renewable technologies can become an important arbiter of the sustaining and dynamic social and physical flows in the urban environment.

Renewable energy sources are similarly pivotal with regard to development and renovation in urban areas. In the case of solar energy, land use determines energy production.[75] Renewable energy sources will have different applications and impacts in urban as opposed to rural environments, and on dense as opposed to sprawled architectural forms. Traditionally, cities have been importers of energy. Decentralized resources offer

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75 Ferrey, *Building an Equitable Solar Future,* in Papers of the Annual Meeting of the American Academy for the Advancement of Science (1980).

the potential and the challenge to alter this equation.[76] The importance in terms of equity and socio-economic impact of this transition to renewables cannot be overstated. It is likely the final transition in energy technology which this society will undertake.

Both the private-market and traditional federal programs have fostered the use of renewable energy and related conservation technologies in a manner blind to the barriers which exist across geographic areas, income levels, and housing groups. Lending markets and federal programs have inadequately addressed the problem of designing equitable mechanisms to reach urban as well as suburban, rental as well as owner-occupied, and poor as well as affluent dwellings. Energy technologies have been well understood as to their scientific properties, but policymakers have remained ignorant of the important marketing aspects of any energy transition.

Good solar and conservation policy must also be good social and urban policy. Solar and conservation design or hardware by themselves are neither inherently good nor bad. A vigorous residential solar and conservation commercialization policy does not necessarily comport with good urban policy, good housing policy, or good social policy. Conventional energy policy does not receive particularly high marks in terms of any of these substantive concerns, including its value as a commercialization strategy. However, authorities agree that intelligent national energy policy is impossible without dramatically increased reliance on cost-effective conservation and renewable energy options.[77]

After an exhaustive Cabinet-level review, former President Carter's Domestic Policy Review on Solar Energy concluded that by the year 2000 this country can satisfy 20 percent of its energy requirements from renewable resources.[78] The former President subsequently established a shift to renewable energy

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76 R. TWISS, P. SMITH, A. GATZKE, & S. MCCREARY, LAND USE AND ENVIRONMENTAL IMPACTS OF DECENTRALIZED SOLAR ENERGY USE, at ch. 5 (DOE/ EV-0067) (1980).

77 *See* A. LOVINS, SOFT ENERGY PATHS: TOWARD A DURABLE PEACE (1977), R. STOBAUGH & D. YERGIN, ENERGY FUTURE; D. HAYES, RAYS OF HOPE: THE TRANSITION TO A POST-PETROLEUM WORLD (1977).

78 U.S. DEP'T OF ENERGY DOMESTIC POLICY REVIEW OF SOLAR ENERGY, at iii (TID-22834) (1979).

of this magnitude as a national goal.[79] To reach this target, DOE calculates that there will be required as many as 40 million new and retrofit solar energy systems in residential and commercial applications within the next two decades.[80] This cannot be accomplished if the market screens off large segments of the population from participation. To achieve this goal, market incentives must be made to reach through existing institutional barriers to every market segment—renters as well as owners, multi-family as well as single-family housing stock, urban as well as rural and suburban regions, and poor as well as affluent citizenry. In this sense, a successful solar and conservation commercialization policy, by definition, must also be a far-reaching and equitable economic policy. Conventional policy, however, has fallen far short of this goal.

The tools of conventional energy policy are of little avail to low-income sectors of the population. Their ability to respond to price or tax incentives, or to participate in residential efficiency programs, is distinguished and limited by three factors: (1) lack of discretionary disposable income, (2) low energy use and inability to reduce use in response to incentives, and (3) residence in the least energy-efficient housing stock.

Almost one of every five Americans lives at or below a level equal to 125 percent of the federal poverty guidelines.[81] This figure, based on 1977 data, represents 13.4 million households and 35.7 million persons, of whom 13 percent are elderly (65 years or older) and 54 percent children (18 years or younger).[82] Almost 40 percent of all unrelated individuals living alone had incomes under $4,000 in 1976.[83] More than one third of all low-income households are headed by the elderly; more than one

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79 "We should commit ourselves to a national goal of meeting one-fifth—20%—of our energy needs with solar and renewable resources by the end of this century." 15 Weekly Comp. of Pres. Doc. 1099 (June 20, 1979).

80 U.S. DEP'T OF ENERGY, ACTIVE SOLAR HEATING AND COOLING PROGRAM PLAN BACKGROUND INFORMATION, 14-16 (1980). DOE has estimated that to achieve this measure of active solar heating and cooling by the year 2000, 25 to 40 million additional residential and small commercial solar systems will be required within the next 20 years.

81 E. GRIER, COLDER . . . DARKER (prepared for the COMMUNITY SERVICES ADMINISTRATION) 2 (1977).

82 U.S. BUREAU OF THE CENSUS, *Characteristics of the Population Below the Poverty Level: 1977* in CURRENT POPULATION REPORTS 189, 194 (series P-60, no. 119) (1977).

83 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1977, at table 733 (1977).

third are black or Hispanic; and more than one half of such households have female heads of households.[84]

The incomes of the poor have not kept pace with the cost of living and have trailed even further behind the escalation in energy costs. Between 1973 and 1977, the median family incomes of those below the federal poverty level increased by only 34.7 percent while the index of household energy fuels increased by 78 percent.[85] During the five-year period ending February, 1980, fuel oil prices increased 158 percent, natural gas prices increased 155 percent, and electricity prices increased 70 percent.[86] In almost half the states, the increase in payments under the Aid to Families with Dependent Children program during this period fell short of the increase in the Consumer Price Index.[87]

As a consequence, low-income families not only spend a much larger percentage of their incomes on energy, but must devote a steadily increasing share of their incomes to energy needs. An analysis by Lester Thurow for the Congressional Joint Economic Committee, set out in Table 4, illustrates this phenomenon. In the bottom 20 percent of the population, corresponding roughly to that segment of the population at or very near the federal poverty level, between 16 and 30 percent of before-tax income is devoted to energy.[88] For many in this category, the percentage is as high as half or more.[89] By contrast, the upper 20 percent of the population devotes only 4.2 to 6.3 percent of before-tax income to energy.[90] A crippling fraction of the limited budgets of the poor must be devoted to energy.

Poor households consume only about two thirds as much energy as average households, despite the fact that their dwell-

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84 E. GRIER, *supra* note 81, at 3. Among the population generally, only 18 percent of households are headed by the elderly and only 21 percent are headed by women.

85 *See* U.S. BUREAU OF THE CENSUS, note 82 *supra;* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX DETAILED REPORTS, 1973-1977. Household energy fuels include electricity, natural gas, fuel oil, and coal.

86 *Id;* U.S. COMMUNITY SERVICES AD., TOO COLD . . . TOO DARK 7 (ET 6143-18) (1980).

87 *Id.;* 42 SOC. SECURITY BULL. 64 (1979).

88 *Hearings on the Economics of the President's Proposed Energy Policies Before the Joint Economic Committee*, 95th Cong., 1st Sess. 22 (1977) (testimony of Lester Thurow).

89 GRIER PARTNERSHIP, HIGH FUEL OIL PRICES: THE IMPACT ON LOW-INCOME HOUSEHOLDS 16 (1978).

90 L. Thurow, *supra* note 88.

TABLE 4
DIRECT 1976 HOUSEHOLD ENERGY CONSUMPTION AS A PERCENTAGE OF BEFORE-TAX INCOME

Decile	Home Energy Consumption	Gasoline Consumption	Total
1st	20.2%	9.6%	29.9%
2nd	10.4%	5.8%	16.2%
3rd	7.4%	5.6%	13.0%
4th	5.6%	5.2%	10.8%
5th	4.7%	4.8%	9.5%
6th	3.9%	4.5%	8.4%
7th	3.9%	3.8%	7.7%
8th	3.3%	3.7%	7.0%
9th	3.0%	3.3%	6.3%
10th	2.0%	2.2%	4.2%

Source: *Hearings on the Economics of the President's Proposed Energy Policies Before the Joint Economic Committee,* 95th Cong., 1st Sess. 22 (1977) (testimony of Lester Thurow).

ings and appliances are less energy-efficient.[91] The energy which the poor do consume is devoted predominantly to the necessities of survival: space-heating, water-heating, and cooking.[92] Because a greater portion of energy consumption is comprised of necessary expenditures, the poor have much less discretion than average households to trim energy consumption in response to rising prices or regulatory incentives. A major study by the Rand Corporation estimates that the price elasticity of demand for energy among the most affluent is two and one-half times that among the least affluent.[93] This is particularly pernicious given that 39 percent of all low-income households and 49 per-

91 *See* D. NEWMAN & E. WACHTEL, THE AMERICAN ENERGY CONSUMER (1975); E. GRIER, *supra* note 81, at tables 7, 8.

92 *Id.*

93 M. BERMAN, M. HAMMER & D. TIHANSKY, THE IMPACT OF ELECTRICITY PRICE INCREASES ON INCOME GROUPS, (prepared for the Rand Corporation) (1972). This study estimates that the price elasticity of demand for electricity for a family with a yearly income below $5,000 (in 1970 prices) is −0.5, while for a family earning greater than $15,000 the price elasticity of demand for electricity is −1.2. This means that for every one hundred kilowatt-hours of electricity that a moderate- to high-income family could save, a low-income family could only save 40 kilowatt-hours. These results are borne out by a later study which found that while middle- and high-income households in the sample decreased their electricity consumption by 14 percent and 10 percent respectively in response to 1974 price increases, the low-income group experienced a 3 percent increase in consumption in response to the same price increases. Expressed in terms of elasticity, the study found that the high-income group had a demand elasticity of −.31, the middle-income group of −.85, and the low-income group of +1.2. Roth *Micro-data Measurement of Residential Rate Restructuring,* 97 PUB. UTIL. FORTNIGHTLY 28, 30-32 (1976).

cent of all low-income renters utilize heating systems with no thermostat to control or regulate dwelling temperatures.[94] In addition, the homes of low-income families lack most of the energy-saving measures common in the general housing stock. Over 50 percent of the homes nationwide which have neither storm windows or doors, nor attic insulation, belong to low-income persons; over half of all homes occupied by the elderly lack all three.[95] Stated another way, of all dwellings of low-income persons, 60 percent have no weatherstripping, 43 percent have no insulation, and 56 percent have no storm doors; and little progress is apparent.[96]

Persons of low income generally exhibit a profile of energy use characterized by relatively low usage and inelastic demand in inefficient dwellings. Almost by necessity, the only available efficiency improvements for this group must come from conservation improvements to dwellings, heating systems, and appliances—precisely the types of improvements which federal incentives seek to motivate. However, low-income families are at a significant disadvantage in using either federal tax credits or federally assisted loans to finance efficiency improvements.[97]

A federal tax credit does not provide an actual cash incentive until a tax return is filed, usually four to sixteen months after an expenditure is made. It will not provide a low-income family with the cash necessary to finance a solar or conservation improvement. Moreover, since the federal tax credit is nonrefundable, a taxpayer must have sufficient tax liability to offset the credit amount. For 1980, a family of four taking the standard deductions and exemptions at the median income level of $19,500 will have a tax liability of $2,165; at 75 percent of the median income level, or $15,000, this falls to $1,247; and at half the median income level, or $10,000, a federal income tax lia-

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94 E. GRIER, *supra* note 81, at 72.

95 *Id.;* U.S. DEP'T OF ENERGY, NATIONAL INTERIM CONSUMPTION SURVEY FOR 1978-79; URBAN INSTITUTE, POTENTIAL EFFECTS AND ADMINISTRATIVE FEASIBILITY OF ENERGY CONSERVATION STANDARDS FOR EXISTING HOMES, 10-11 (1980).

96 *Id.;* COMMUNITY SERVICES AD., note 86 *supra.* Nationally, about 26 million single-family and 7 million multi-family units lack one of these three measures. About 5 million single-family homes lack all three measures, and more than half of these dwellings were occupied by low-income families. Between 1973 and 1975, high-income families were two to four times as likely as poor families to invest in conservation improvements.

97 This assumes that low-income owners would have sufficient motivation to make improvements. Almost half the national population moves at least once every five years. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT 1979 at 39 (1979).

bility of only $378 is incurred.[98] Thus, even spreading the credit over the allowable two years, a family earning $15,000 would not be able to realize the maximum $4,000 solar tax credit. A family earning $10,000 could effectively realize less than an aggregate of $800 in energy credits spread over two years. The effective credit is reduced even further if a family is entitled to other non-energy tax credits. One consultant to HUD calculated that a tax credit of this magnitude would be unavailable in full to 78 percent of American taxpayers, and 65 percent of all present homeowners, because of insufficient liability to offset the full credit.[99] Moreover, less than 5 percent of the dollar benefits of the tax credit will accrue to households with incomes under $16,000 per year (in 1976 dollars).[100] The tax impact of such a credit is clearly regressive.

Federally subsidized loans are similarly inaccessible to low-income persons. Although a low-interest loan surmounts the operating cash problem associated with the tax credit, low-income persons traditionally experience great difficulty in dealing with credit institutions. The vast majority of the poor do not work full time[101] and do not have significant savings.[102] These characteristics make it extremely difficult for low-income families to receive even federally subsidized loans from conventional lenders.

In light of the deductibility of loan interest payments for federal income tax purposes, loans are more attractive to taxpayers in higher income brackets and to those who itemize deductions. Three fourths of all taxpayers do not itemize.[103] As a result, federally subsidized loans for energy improvements will have little appeal for those in relatively moderate or low

98 This assumes a standard deduction applied against adjusted gross income from wages, with no other credits. 26 U.S.C. § 1 (1980).

99 REGIONAL URBAN PLANNING INSTITUTE, FEDERAL INCENTIVES FOR SOLAR HOMES: AN ASSESSMENT OF PROGRAM OPTIONS, pt. III, at 23-24 (prepared for the U.S. Dep't of Housing and Urban Development) (1977).

100 *Id.*, pt. III, at 6.

101 U.S. BUREAU OF THE CENSUS, *supra* note 82 at tables 38 and 39. Only 8.5 percent of those earning less than $5,000 in 1976 were employed full time.

102 U. MICH. SURVEY RESEARCH CENTER, 1970 SURVEY OF CONSUMER FINANCES, at tables 6 and 7 (1970).

103 SUBCOMM. ON THE CITY OF THE HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, COMPACT CITIES: ENERGY SAVING STRATEGIES FOR THE EIGHTIES, H.R. COMM. Doc. No. 15, 96th Cong., 2d Sess. 28 (1980). Because itemized interest deductions are taken "above the line," their cash-equivalent value is a function of the marginal tax rate of each individual taxpayer.

income brackets, and for renters. As a group, this is fully a half of all American consumers.[104] One critic has estimated that less than 8 percent of all loans made for solar water or space heating systems will benefit those earning less than $10,000 annually.[105] Clearly, it is not sound to design a federal energy policy that is virtually inaccessible to those citizens who already are most ravaged by the costs and uncertainties of energy supply.

In rental housing, a new element is introduced into the market equation: the residential energy user is a different party than the residence owner. Rented dwellings constitute more than one third of the total housing stock.[106] Of these 26 million rental units two thirds are multi-family in design, and fully 40 percent of the multi-family dwellings are in units of ten or more.[107] Seen from a different perspective, there are an estimated 20 million units in buildings with two or more units per building, representing more than one quarter of the total housing stock.[108] About 14 percent of these dwellings are owner-occupied, while the balance, or 86 percent (about 17 million), are rented.[109] Low-income families are the only population group with a higher incidence of rental than home ownership: 55 percent of those earning less than $5,000 annually are renters.[110]

The dimensions of this potential market barrier are affected by the type of metering in rental housing. Almost without exception, single-family units are individually metered for energy consumption.[111] Multi-family units are metered by the utility supplier with multiple, individual, or master metering systems. Samples suggest that for electricity service about 20 percent are individually metered.[112] For heating fuels, about 58 percent of rental units are master metered, and 42 percent are individually

104 Of all U.S. dwellings, 35 percent are rented full time, and 8.4 percent are owned by low-income families (45.3 percent of 13.4 million low-income families are owners). U.S. BUREAU OF THE CENSUS, *supra* note 82 at 189, 194, table 3.

105 A. OKAGAKI & R. OKAGAKI, SOLAR ENERGY AND THE POOR, at table 23 (unpublished paper, Sept., 1979) (copy on file with the HARV. J. ON LEGIS.).

106 U.S. BUREAU OF THE CENSUS, 1976 ANNUAL HOUSING SURVEY, at table U-53-40 (1976).

107 *Id.* Thirty-one percent of the rental stock is single-family, while 27 percent is in buildings with two to four units.

108 REGIONAL URBAN PLANNING INSTITUTE, *supra* note 99, pt. VII, at 4.

109 U.S. BUREAU OF THE CENSUS, *supra* note 106.

110 *Id.* at table A-1.

111 The exceptions are units which generate their heat on-site or which are without any heating source.

112 U.S. DEP'T OF ENERGY, CHARACTERISTICS OF THE HOUSING STOCK AND HOUSEHOLDS, at table 28 (1979).

metered.[113] When rental units are individually metered, tenants, as the customers of the utilities, receive the pricing signals of their usage directly and the owner experiences no direct economic incentive to undertake conserving capital improvements. Correspondingly, in individually metered rental units, tenants have neither the economic incentive nor the legal ability to make energy efficiency changes to the owner's building. Since few tenants itemize interest deductions for federal income tax purposes, they cannot receive the tax benefits of interest deductions associated with a solar or conservation loan. In 1977, tenants' average income was only about half that of a typical homeowner,[114] providing further testament to tenants' inability to make additional investments. With 30 percent of all renters moving every year, and in light of the historically low vacancy rates of rental units, there is scant incentive to improve.[115]

Even in master metered rental units, owners commonly will make no unnecessary investment unless it promises a sure two- to three-fold investment payback.[116] When additional investment in rental property is required, it must compete against other off-site investments which the owner might make. Since the federal tax credit is limited to principle residences, rental buildings in which the owner does not also reside are ineligible for incentives.

Additionally, multi-family structures are often built with a goal of reducing cost per unit. In 1976, the average per-unit cost of newly built rental housing was less than half the cost of new owner-occupied housing.[117] Therefore, a $3,000 solar hot-water system or a $10,000 to $15,000 combined water-and-space-heating system would comprise a much higher fraction of the cost of a new rental unit than of a new owner-occupied unit.

Almost the entire rental housing stock, constituting more than one third of all dwellings, is institutionally screened off from access to market and government conservation and solar in-

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113 *Id.; see also* MIDWEST RESEARCH INSTITUTE, 1 ENERGY CONSERVATION IMPLICATIONS OF MASTER METERING at vii (1975). Central boilers supplying heat or domestic hot water to multi-family units cannot be individually metered. Central boilers can be master metered, and this is the predominant practice.

114 A. LEVINE & J. RAAB, SOLAR ENERGY, CONSERVATION AND RENTAL HOUSING, 1981, at 7 (SERI/RR-744-901), 2 (1981).

115 SUBCOMM. ON THE CITY, *supra* note 103, at 24; *id.* at 3.

116 A. LEVINE & J. RAAB *supra* note 114, at 31.

117 R.S. MEANS CO., BUILDING CONSTRUCTION COST DATA (1976).

centives. This phenomenon renders conventional federal incentive programs highly regressive. Work by Alan and Ron Okagaki concludes that low-income persons will be only 15 percent as likely to be able to benefit from existing opportunities to utilize solar hot-water heaters as all affluent families.[118] In large part they find this is because renters are denied effective access to credit and tax incentives. The Okagakis demonstrate that none of the households earning less than $5,000 annually would be able to qualify for a conventional $2,000 solar loan, and that such a household is only one sixth as likely as any other income group to be able to benefit from the solar credit.[119]

III. City Lights: The Urban Stake in the Transition to Renewable Energy Resources

What constitutes a tough break for the poor, the elderly, and renters in terms of conventional energy policy may forebode problems for our major urban regions. Urban areas are distinguished from the national norm by land use, density, residential and industrial composition, housing ownership patterns, income of inhabitants, and, unfortunately, fiscal burdens. Each of these distinctions plays an important role in the shaping of the energy future of urban areas. Without careful planning of community energy initiatives, the cities and their inhabitants will fare poorly in the energy marketplace.

Almost two thirds of all dwelling units are in urban areas; a large percentage of these are in cities of greater than 50,000 inhabitants.[120] Clearly, one cannot talk of national residential energy policy without addressing urban energy usage, but market forces have cast urban regions in the shadows of national energy policy. Urban areas harbor large numbers of those most in need of more efficient dwellings, but least likely to benefit from conventional policies.

Nationally, as of 1978, 27 million of a total 85 million dwelling units (32 percent) are rented year-round.[121] However, these

118 A. Okagaki & R. Okagaki, *supra* note 105, at 33.

119 *Id.* at 37-38. This analysis concludes that those earning less than $5,000 have, on the average, less than $100 annual tax liability against which to realize the nonrefundable federal credit.

120 U.S. Bureau of the Census, Annual Housing Survey, 1978, vol. A, at 1 (Nov. 1980).

121 *Id.* at xvii, 1.

rental dwellings are not spread uniformly between cities and suburbs. Nearly half of all central city housing units are rental units.[122] Eighty-one percent of all rental housing is in metropolitan areas.[123] Particularly in large older cities, the proportion of rental housing in the central city dwarfs that in the surrounding suburbs. Seventy-one percent of New York's 1.8 million occupied housing units are rented; in Boston, 73 percent of the housing stock is rented.[124] In San Francisco and Chicago, the figures are 64 percent and 62 percent respectively.[125] The suburbs surrounding these central cities have a majority of owner-occupied housing.[126] In sharp contrast, in many of the newest cities, the proportion of rental housing is just above the national average. In Seattle, only 41 percent of the housing stock is rented; and in metropolitan Phoenix, only 37 percent of the 365,000 housing units are rented.[127]

Similarly, the poor, including the elderly poor, disproportionately reside in urban areas. The majority of these low-income urban residents are renters. The fact that urban regions have large numbers of those individuals unable to participate in federal market incentives affects the overall energy-use pattern of urban areas.

Implementing energy efficiency and renewable energy technologies in the urban environment poses an additional set of design considerations. It is easier and less expensive to design conservation and renewables into new buildings than to retrofit these technologies into existing structures. However, especially in dense older cities, there is relatively little new residential construction occurring.

While highrise apartments constitute only a small portion of the rental stock, these units are concentrated in the older urban areas of the Northeast. As Table 5 illustrates, the Northeast has significantly more multi-family rental stock than any other region of the nation. This rental stock is old and in most cases totally uninsulated. Over 40 percent of the rental stock predates

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122 *Id.* at 1.
123 *Id.*
124 Ferrey, note 75 *supra.*
125 SUBCOMM. ON THE CITY, *supra* note 103, at 24.
126 Less than one third of suburban housing and less than one quarter of rural housing is rented. *Id.* at 23.
127 Ferrey, *supra* note 75, at 18.

TABLE 5
REGIONAL DISTRIBUTION OF RENTAL HOUSING TYPES

	Single Detached %	Single Attached %	2–4 %	5+ %	Mobile %
Northeast	9	28	33	31	9
North Central	22	21	25	21	18
South	45	30	23	25	54
West	24	21	19	23	19

Source: U.S. BUREAU OF THE CENSUS, ANNUAL HOUSING SURVEY, 1978, vol. A (1980).

World War II, compared with only 28 percent of the owner-occupied stock.[128]

Multi-family highrise structures are also more likely to use expensive, inefficient electricity for space heating than are single-family or small multi-family units.[129] This explains why the Northeast's share of multi-family rental housing is less than one third of the national total yet consumes almost half the total energy of all multi-family rental units.[130] Utility costs presently account for about half of all operating expenses in this housing, and have doubled in the last six years.[131] There is a visible pattern of concentration in older urban areas of uninsulated, energy-inefficient multi-family rental housing, disproportionately heated with electricity.

Physically, urban high-rise multi-family structures may face problems in using solar energy. The available roof solar-collector area is relatively small, which could lead to design and implementation problems. However, several factors aid the adaptability of urban solar energy systems. In densely built cities, there is a high ratio of building surface (for collectors)

128 A. LEVINE & J. RAAB, SOLAR ENERGY, CONSERVATION AND RENTAL HOUSING 6 (SERI/RR-744-901) (prepared for the U.S. Dep't of Energy) (1980). More than 10 percent of all rental stock is federally assisted or subsidized.

129 *Id.* at 15. Between 1970 and 1977 the total number of United States households heating with electricity increased by 128 percent. COMMUNITY SERVICES AD. *supra* note 86, at 3.

130 BOOZ, ALLEN, & HAMILTON, ALTERNATIVE METERING PRACTICES, (DOC. No. HCP/M 1693-1703, prepared for the U.S. Dep't of Energy) (1979). Moreover, oil-heated dwellings in the Northeast require 26 percent more expenditure to heat than the average U.S. household. COMMUNITY SERVICES AD. *supra* note 86, at 20.

131 INSTITUTE OF REAL ESTATE MANAGEMENT, INCOME AND EXPENSE ANALYSIS: APARTMENTS, CONDOMINIUMS, AND COOPERATIVES (1978), *cited in* Ferrey, *supra* note 124, at 11.

to open land. Many of the buildings in cities have flat roofs as opposed to pitched roofs, providing excellent opportunities to orient, and yet hide, solar collectors. In addition, at the height of most urban rooftops there is little foliage to obstruct direct solar access.[132] These features make solar technology adaptable to the urban environment. Kurt Hohenemser estimates that it would require collector surfaces on one third to one sixth of the entire urban land mass to meet urban energy needs with solar power.[133]

Unless specific exemptions are enacted for dwelling efficiency improvements, addition of a solar device or significant conservation improvements could significantly contribute to yearly property tax bills. Tax rates in many large older cities are significantly more than in surrounding suburbs. The Urban Institute found that between 1967 and 1972, "growing cities managed to cut their effective tax rates by more than 25 percent . . . while the declining cities were obliged to raise their rates by nearly 25 percent."[134] Table 6 ranks effective residential property tax rates in the thirty largest cities as of 1974. The effective tax rate in Boston, at almost $6 per $100 of assessed valuation, was one third higher than in any other city surveyed. Eight of the ten cities with the highest effective tax rates are located in the Northeast and Midwest regions of the country, where utility costs already are the highest in the nation.

On a hypothetical $10,000 investment for a solar space-heating system, a taxpayer in Boston would pay almost $600 each year in additional taxes; a similar taxpayer in Los Angeles would pay $343 and a taxpayer in New York City would pay $218. For many middle-income consumers, these additional costs would make solar improvements unattractive and unaffordable. It has been estimated that property taxes alone can add as much as 10 to 25 percent to the cost of using solar energy[135] and reduce the value of annual savings by as much as 20 to 70 percent.[136] High urban tax rates, unabated, will discourage re-

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132 New York State Legislative Commission on Energy Systems, Forum on Solar Access 8-20 (July 28, 1977).

133 Hohenemser, *Energy Efficiency versus Energy Growth*, 20 Environment 5 (1978).

134 U.S. Dep't of Housing and Urban Development, The President's 1978 National Urban Policy Report 78 (HUD-CPD-328) (Aug. 1978).

135 1 U.S. Office of Technology Assessment, Application of Solar Energy to Today's Energy Needs 78 (June 1978).

136 Regional Urban Planning Institute, *supra* note 99, pt. VI, at 22-23.

TABLE 6
PROPERTY TAX RATES IN SELECTED U.S. CITIES
Residential Property Tax Rates in Selected Large Cities: 1974

City	Effective Tax Rate per $100		City	Effective Tax Rate per $100	
	Rank	Rate		Rank	Rate
Boston	1	$5.94	New York City	16	$2.18
Buffalo	2	4.31	San Francisco	17	2.13
Milwaukee	3	3.63	Cleveland	18	1.88
Los Angeles	4	3.43	Seattle	19	1.82
San Antonio	5	3.43	St. Louis	20	1.80
Indianapolis	6	3.29	Memphis	21	1.77
Baltimore	7	3.24	Denver	22	1.71
Pittsburgh	8	2.82	Jacksonville	23	1.69
Philadelphia	9	2.80	New Orleans	24	1.69
Chicago	10	2.75	Kansas City	25	1.57
Detroit	11	2.73	Phoenix	26	1.55
Dallas	12	2.60	Washington, D.C.	27	1.54
Houston	13	2.38	Nashville	28	1.39
Atlanta	14	2.24	Cincinnati	29	1.31
San Diego	15	2.23	Columbus	30	1.17

Source: DEP'T OF FINANCE AND REVENUE, GOVERNMENT OF THE DISTRICT OF COLUMBIA, TAX BURDENS IN WASHINGTON, D.C. COMPARED WITH MAJOR STATE AND LOCAL TAX BURDENS IN THE NATION'S THIRTY LARGEST CITIES (1974) *reprinted in* U.S. OFFICE OF TECHNOLOGY ASSESSMENT, APPLICATION OF SOLAR TECHNOLOGY TO TODAY'S ENERGY NEEDS, vol. N, at 78 (1978).

newable energy or major conservation investments in urban residential housing.

Banks and other lending institutions are understandably reluctant to offer mortgages for residential buildings which employ apparently exotic energy technology, especially in urban areas. In a recent survey, 63 percent of lending institutions interviewed reported that they would "exclude the excess cost [of solar equipment] from the appraised value of the house" in determining the range of money they would loan.[137] An additional 22 percent of lenders interviewed indicated that they would lower the loan-to-value ratio of any loan they contemplated on a residence including solar technology.[138] In California, often considered the solar vanguard, less than 10 percent of the state's

137 D. BARRETT, P. EPSTEIN, & C. HAAR, HOME MORTGAGE LENDING AND SOLAR ENERGY 13 (1977) *cited in* Ferrey, *supra* note 75, at 16 n.25.
138 *Id.* at 99 *cited in* Ferrey, *supra* note 75, at 16-17 n.26.

banks, savings and loan associations, or credit unions recently surveyed offered special solar or conservation loan programs.

In addition, *de facto* "redlining" practices have steered mortgage money away from creditworthy borrowers in urban areas merely because of the geographic location of their properties.[139] Richard Morris documents that banks, following the lead of the federal government, withdrew from lending in older American cities in 1973, two years before there was any basis for concluding that cities were in trouble:

> In 1975 Washington channeled 29 percent of its loan insurance to three states—Florida, California and Arizona—which had, together, 15 percent of the country's population. By insuring loans in the Sun Belt and not in the Northeast, Washington led the way for the bank redlining of American cities.[140]

Three interesting factors are converging in many urban environments: (1) utility rates are increasing dramatically, (2) economies of scale in the self-generation of power and production of heat are becoming attractive to large energy users, and (3) utilities are required to purchase surplus power from private small power producers.[141] The Office of Technology Assessment concluded in a study of four representative American cities that "[w]ithin 3-5 years it should be possible to construct systems capable of supplying all of the heating and hot water requirements of large buildings at prices which would be competitive with conventional electric heating. . . ."[142]

This phenomenon is causing large buildings in high-cost urban areas to switch to generating some or all of their energy requirements with cogeneration and solar technologies. This trend is most pronounced in New York City, where Consolidated

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139 National Housing and Economic Development Law Project, Redlining and Disinvestment: Causes, Consequences and Proposed Remedies (prepared for Hearings before the Dep't of Housing and Urban Development, July 14-16, 1976), *cited in* Ferrey, *supra* note 75, at 17 n.27. Redlining can take the form of outright refusal to invest in a neighborhood, requiring higher downpayments, higher loan interest rates, higher loan closing costs, shorter loan maturities, appraisal of property for loan purposes below the actual market value, and charging excessive discount "points."

140 R. MORRIS, BUM RAP ON AMERICA'S CITIES: THE REAL CAUSES OF URBAN DECAY 12-13 (1978).

141 16 U.S.C. § 824a-3(a) (1978 Supp. III); 18 C.F.R. § 292.303 (1980). Utilities must purchase surplus power at their "avoided cost" from small power producers, which generate electricity from renewable, waste and biomass resources, or from qualifying cogeneration facilities. 18 C.F.R. §§ 292.203, 292.303-304 (1980).

142 U.S. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 135, at 78.

Edison Company (Con Ed) charges some of the highest electric rates in the nation. Since 1975, several dozen apartment complexes have started generating their own power.[143] In 1979, a major 32-story office building in mid-town Manhattan began a $26 million renovation project to remove the building entirely from the Con Ed system. The utility has opposed vociferously these cogeneration projects. Con Ed Senior Vice-President Bertram Schwartz argues that the withdrawal of only one hundred buildings from the Con Ed system could decrease demand by 5 percent and increase costs for all other consumers by 3 percent.[144] He notes that "[i]t [will] . . . increase electrical rates to our customers, who will have to pay higher charges to cover our fixed expenses when big customers are lost to cogeneration."[145]

Cogeneration is one element of an energy trinity, also composed of renewable resources and conservation, which threatens to halt or even reduce the growth in net demand for electric energy in high-cost urban regions. While urban buildings may be more difficult to adapt initially to these technologies, the high costs of conventional centralized power, coupled with high heating demand in the colder regions of the Northeast and Midwest, render these investments cost-effective. Notes New York developer Richard Stone, "Utility costs now account for more than 50 percent of most apartment operating budgets . . . we can produce electricity at 4.5 cents a kilowatt-hour compared to Con Edison's 10.1 cents."

The deployment of urban self-generation is a conundrum. The potential impact of self-generation, which utilities such as Con Ed fear, promises to effect very real changes in the urban energy economy—threatening to divide consumers between the new technology "haves" and the old technology "have-nots."

Most utility companies qualify as "summer-peaking"; that is, across an entire year, the maximum demand for electricity which they must service occurs in the summer months—on those summer days when maximum use is made of air conditioning.[146] Even for summer-peaking utilities, there is usually

143 Environmental Action Foundation, Power Line 3 (1978).

144 Energy User's News, July 17, 1978, at 15.

145 O'Haire, *Con Ed Battles Energy Officials on Cogeneration*, N.Y. Times, Nov. 2, 1980, § 8, at 1, col. 4.

146 Since the cost of a 100 percent solar heating or cogeneration system does not greatly exceed the cost of a system capable of delivering 75 percent of heating needs,

a substantial demand, with resulting sales, during the coldest months of winter when electric heating customers make maximum demand upon the system.

To the degree that renewable energy technologies, in conjunction with increased cogeneration and conservation, displace existing electric heating, the volume of electricity sales during the winter season will be diminished. Summer-peaking utilities will have to maintain an undiminished capacity to meet summer demand, while winter sales are reduced as a result of these technologies.[147] Therefore, in each kilowatt-hour of electricity sold, customers will have to absorb a larger and larger share of the billions of dollars of fixed capital costs of a typical utility.

Because the need for backup power for a solar heating system can occur on a cloudy winter day, as well as during sunless evening hours, the additional daytime demand for electric backup power could increase daily peak electric load. This might arguably result in the use of more expensive peaking generators to meet this demand, and conceivably could require utilities to build or at least accelerate the construction of additional peak-generating capacity; thus raising costs for all consumers. On the other hand, the implementation of these less expensive decentralized technologies might reduce the long-term costs for the central utility.

A great number of variables will influence whether and to what degree decentralized technologies will increase daily peak demand, worsen utility load factors, and raise costs. Chief among these are the electric load management capabilities of solar and cogeneration systems,[148] electricity rate structures, the generating mix and construction program of utilities, the prices

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many of those residences or commercial establishments which adopt these technologies may choose to largely, if not totally, generate their own heating energy. This, in effect, will allow many of the residences to "disconnect" from their utility companies, except during particularly cold periods when their systems are not sufficient to meet heating needs. 4 U.S. OFFICE OF TECHNOLOGY ASSESSMENT, APPLICATION OF SOLAR ENERGY TO TODAY'S ENERGY NEEDS 41-42 (June 1978).

147 This is what utility executives refer to as a displacement of fuel without a corresponding displacement of capacity. Utilities will have to spread a high fixed volume of capital costs (to build and maintain facilities) over a declining total volume of electricity sales.

148 Interestingly, solar residential tax credits and loans do not require the installation of any storage capacity to assist with load management. Electric load management is the use of electricity at night to charge solar heat storage tanks, thus shifting the demand for backup power to off-peak times. Load managed electric backup has the advantage of using off-peak baseload or intermediate load electric power.

of competing fuels, and federal and state tax practices. Research under widely varying assumptions yields contradictory results—finding that a partial shift to decentralized sources will raise electricity peak demand,[149] and to the contrary, that it will not raise peak demand.[150]

It is not clear what the ultimate net impact of either of these two potential phenomena would be. It is possible that for urban areas, which are not experiencing population or job expansion, they will only add to the increasing system inefficiency which electric utilities have experienced over the past two decades.[151] Whatever its utility impact, decentralized technology will spawn a dual urban energy economy. Those who make the transition to self-generation will in large part avoid both the impact of escalating fossil fuel prices and their fair share of the costs imposed by increasing electric system inefficiency.

Those who do not share in this transition will be left in the cold. To the extent that market forces conventionally determine beneficiaries, urban regions will be disproportionately disadvantaged. Renters, the poor, the elderly, and those cities which harbor large segments of these populations will share least in the transition to renewables and conservation improvements. This means that suburbs will benefit more than cities; new cities more than old cities; and the sunbelt more than the frostbelt.

Energy is the fastest rising cost for most industrial and commercial establishments. As energy prices and availability vary, an industry which is potentially mobile will make its location decisions accordingly. For example, the fact that Con Ed in New York charges $15,000 for a quantity of industrial electricity that costs about $7,500 in Chicago and $9,500 in Los Angeles has an impact on location decisions for any potentially mobile energy-consuming corporation.[152]

The weight which energy prices and supply carry in firm location decisions is becoming more significant. A recent survey of business decision-making in New York state concludes that

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149 Asbury & Mueller, *Solar Energy and Electric Utilities: Should They be Interfaced?* 195 SCIENCE 445-50 (Feb. 4, 1977).

150 *See* C. CRETCHER & W. MELTON, SOLAR HEATING AND COOLING OF BUILDINGS: REQUIREMENTS DEFINITION AND IMPACT ANALYSIS (EPRI, ER-808-54) (1978).

151 For an extensive discussion of this phenomenon, *see* Ferrey, *supra* note 75, at 21-22.

152 ENERGY USER'S NEWS, July 17, 1978, at 15.

energy costs and availability form one of the four most important reasons why businesses would not locate in the New York region.[153] As industry relocates, population follows. Experts are predicting that because of energy's importance in transportation, industry, and housing, its cost and availability will be a major demographic force in the 1980's.[154]

To date, the growth in suburban and sunbelt jobs has been not the product of relocation from Northeast and Midwest urban areas but rather the result of the location of new companies or the expansion of existing plants in these regions.[155] Between 1970 and 1975, the growth rates of employment in urban areas in the Northeast and North Central regions were much less than the population growth rates of these regions; both in turn were much less than the growth rates in the booming South and West.[156] This phenomenon is clearly illustrated by Table 7. From 1960 to 1975, the Northeast experienced a net loss of almost a million manufacturing jobs, while the South gained 1.5 million.[157] Central-city manufacturing jobs in the frostbelt have decreased even more radically than those in the frostbelt as a whole.[158]

With the transition to renewable and cogenerated energy, a new wrinkle will be added to industrial location decisions. Two location pressures will result: (1) to relocate to sunbelt regions where insolation is maximum, and (2) to relocate in suburban areas to take advantage of greater land area for solar collector devices and plant expansions (as well as potentially lower utility rates). Either of these pressures will cause an exodus of industry from the cities, further undercutting the urban economic and tax bases in an era of fiscal conservatism. There is ample evidence that this phenomenon is already occurring.[159]

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153 Foltman, *The Business Climate in New York State: A Survey of the Perceptions of Labor and Management Officials*, in F. FOLTMAN & P. MCCLELLAND, NEW YORK STATE'S ECONOMIC CRISIS: JOBS, INCOME AND ECONOMIC GROWTH 145, 151-52 (1975). This survey, taken before the current energy situation, ranked 58 business climate factors in order of importance for business location decision-making.

154 Goodman, *People of the City*, in AMERICAN DEMOGRAPHICS, Sept. 1980, at 14-17; *cf.* Reynolds, *The Demographics of Energy*, in AMERICAN DEMOGRAPHICS, June 1980, at 25-31.

155 U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra* note 21, at 25.

156 *Id.* at 26.

157 *Id.* at 20.

158 *Id.* at 35.

159 Ashmont Systems, Inc. is now considering locating a steel mill in the former Brooklyn Navy Yard's industrial park. This mill would employ 1,500 to 2,000 workers,

TABLE 7
COMPONENTS OF EMPLOYMENT CHANGE BETWEEN 1969 AND 1974
IN THE NORTH AND SOUTH

Region	Total Job Opportunities	Percent Change 1969–74	Change in Jobs as a Percent of 1969 Level—Attributable to:				
			Closure of Firms	Birth of Firms	Expansion/ Contraction	Migration Out of Region	Migration Into Region
North	20,718,094	− 5.8	20.5	8.9	5.6	0.21	0.06
New England	2,897,583	− 7.4	21.9	9.4	4.5	0.11	0.03
Middle Atlantic	8,731,946	−11.1	21.7	8.6	2.0	0.27	0.06
East North Central	9,088,565	− 0.3	18.9	9.1	9.5	0.18	0.08
South	20,983,550	+11.6	21.7	17.1	15.7	0.16	0.61

RATES OF CLOSURE, BIRTH, IN- AND OUTMIGRATION OF FIRMS
IN THE NORTH AND SOUTH, 1969–1974

Region	Closure Rate	Birth Rate	Immigration Rate	Outmigration Rate
North	0.33	0.20	0.0002	0.0007
New England	0.33	0.22	0.0022	0.0009
Middle Atlantic	0.33	0.18	0.0005	0.0017
East North Central	0.33	0.22	0.0005	0.0008
South	0.35	0.29	0.0010	0.0003

Source: C. JUSENIUS & L. LEDEBUR, DOCUMENTING THE "DECLINE" OF THE NORTH (1977), *reprinted in* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, THE PRESIDENT'S 1978 NATIONAL URBAN POLICY REPORT (HUD-CPD-328) (1978).

The implications for urban areas are unsettling. Affected utilities will respond in two fashions. First, they may seek to lower the rates charged for utility service to industries and commercial facilities, in order to prevent mass exodus from the area and to discourage self-generation. If this occurs, revenue losses will be recouped from higher rates charged to residential and other customers. Second, utilities could allow the quality of their service to decline, further encouraging relocation and withdrawal from the system. In either event, the long-term impact on urban areas will be negative.

Recent econometric work at Cornell University suggests that, contrary to common assumption, industries which are most apt to relocate in reaction to rising energy prices are those which are the *least* energy-intensive.[160] Several implications follow. First, those industries which are more energy-intensive are less job-intensive. As low-energy industries leave the urban areas in response to cheaper solar and other energy outside the cities, a greater number of jobs will disappear than if high-energy industries leave.

Second, not only do energy-intensive industries produce few jobs per unit of investment, but they also tend to hire disproportionate numbers of white males to the exclusion of minorities and females.[161] Therefore, a continued exodus of low-energy-use industries will leave behind large unemployed pools of those with historically the greatest difficulty in finding stable, suitable work.

Third, since the Reagan Administration is promoting immediate deregulation of natural gas and oil, fossil fuel prices may rise more quickly than electricity costs. Electricity has been the prime energy source employed for automation, and thus the prime substitute for human labor. Econometric analysis suggests

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80 percent of whom would be minorities. However, the project is not economically viable if the mill would have to purchase Con Ed's exorbitantly priced electricity. On the other hand, if the Navy Yard cogenerates its own power, Con Ed would lose one of its 20 largest customers. The result of this strange paradox is that to attract jobs, the load factors of the utility must decrease and the costs to other customers increase. ENERGY USER'S NEWS, Oct. 2, 1978, at 1, 8.

160 Hornig, Energy Pricing and Employment in New York State Manufacturing, 1964-1973, at 10-11, 16-19 (unpublished master's thesis at Cornell University) (Nov. 1978).

161 *Id.* at 19.

that if electricity becomes less expensive relative to other fuels, automation will be promoted at the expense of job creation.[162] All of these trends pose significant problems for cities in this era of structural unemployment.

For years, federal tax and spending policies have exhibited an anti-urban bias. The institutional barriers of the marketplace have been fostered by the federal government. George Peterson of the Urban Institute concludes that by providing tax benefits for new structures which do not apply to the maintenance and rehabilitation of existing buildings, federal tax policy exercised "a bias in favor of suburban and fringe development and a bias against preservation of the older parts of American metropolitan areas."[163] The availability of financing from federally tax-exempt bonds promotes the relocation of industry from cities to suburbs.[164]

Energy adds a new dimension to the urban equation. Not only are large regional variations in energy prices affecting industry's choice of location, but new renewable energy and cogeneration technologies affect the land-use requirements of industry. Already, the urban environments of the Northeast and Midwest are suffering a severe energy-related cash drain. While frostbelt states are spending increasing amounts to import energy, southern energy-producing states derive substantial revenue from this commerce. The United States Treasury estimates that energy severence taxes, which benefit oil-producing states at the expense of oil-consuming states, will yield an additional $128 billion in revenue from domestic oil price decontrol alone during this decade.[165] In this equation, the dense older cities of the frostbelt, dependent almost exclusively on energy from outside their boundaries, will be the big economic losers.

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162 *Id.* at 16.

163 *Hearings on Federal Tax Policy and Urban Development Before the Subcomm. on the City of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 4 (1977) (testimony of George Peterson).

164 Also, tax-exempt bonds used for industrial purposes "grossly discriminate against central cities," says former Birmingham Mayor David Vann. For an existing industry in a city, eligibility for a $10 million bond is reduced by the amount of its previous investment there. But if the same industry moves into an exurban location, it is rewarded because the new jurisdiction can float a bond for the full amount. And if the industry scatters into several jurisdictions, it can raise its financing to $30 or $50 million. This places cities at a disadvantage in trying to hold their old firms. SUBCOMM. ON THE CITY, *supra* note 103, at 45.

165 Ferrey, *A Chilly Forecast*, Boston Globe, Nov. 26, 1980 § B, at 24, col. 3.

This cold reality paints in graphic relief the energy crisis confronting urban areas during the 1980's. The older urban building stock is in desperate need of efficiency improvements and renewable energy resources. Yet, federal incentives for improving the energy efficiency of existing buildings barely penetrate urban areas. What is needed is not the elimination of existing tax credits and subsidies for solar energy and energy conservation—which merely equalize federal incentives for conventional fuels—but rather the creation of incentives to make existing markets reach those previously denied effective access. A newly created institution, the Solar Energy and Energy Conservation Bank, can do precisely this. The energy future of our urban economies rides largely on the Bank's success.

IV. The Solar Energy and Energy Conservation Bank

On June 30, 1980, former President Carter signed into law the Energy Security Act of 1980.[166] The former President stated, "Its scope, in fact, is so great that it will dwarf the combined efforts expended to put Americans on the Moon and to build the entire Interstate Highway System of our country."[167] The Act authorizes a mixed bag of incentives including:

(1) $88 billion in government financial guarantees for synthetic fuels development in the form of loan guarantees, price supports, loans, purchase committments, and joint-venture capital;
(2) $1.4 billion for biomass and alcohol fuel production loans, loan guarantees, and purchase agreements;
(3) $250 million in financial guarantees to cover 80 percent of the construction costs of municipal waste to energy conversion facilities;
(4) $20 million for up to 10 rural or agricultural biomass energy demonstration projects;
(5) $85 million in loan authority to develop geothermal energy sources;

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166 Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (1980) (to be codified in scattered sections of 2, 5, 7, 10, 12, 15, 16, 18, 26, 30, 42, 49, 50 U.S.C.).

167 *Energy Security Act, Remarks on signing S. 932 Into Law,* 16 Weekly Comp. of Pres. Doc. 1253 (June 30, 1980).

(6) $3 billion to create a Solar Energy and Energy Conservation Bank to provide incentives for greater energy efficiency in the building sector; and
(7) various provisions to train energy auditors, facilitate the entry of utilities in the financing of residential energy conservation, augment the low-income weatherization program, promote industrial conservation, and establish four prototype residential conservation programs.[168]

For many of those who struggled for two years for its enactment, the Solar Energy and Energy Conservation Bank embodied in Title V was the cornerstone of a balanced energy program. As Senator Edward M. Kennedy stated, "The Solar and Conservation Bank is the most important symbol of this country's commitment to a balanced energy program and a challenge to the next Administration to implement aggressively this nonregulatory, noninflationary incentive program."[169]

Lest its name belie the true function of Title V, the Solar Energy and Energy Conservation Bank is neither a bank nor a regulatory program. It is to banking what the military march is to music; it bears only the faintest resemblance to other banking organizations. In fact, the Bank stands in stark contrast to the other federal financial guarantee and regulatory provisions of the Energy Security Act. The Bank makes no loans, guarantees no credit, insures no financing, and imposes no regulatory sanctions on banks. It will not establish branch offices, hire tellers, or accept deposits.

What the Bank *will* do is direct an arsenal of flexible subsidies to lending institutions. These subsidies are for the purpose of encouraging the lending market to overcome barriers which have prevented access to adequate credit to make energy conserving and solar investments in residential, agricultural, and commercial property. Such barriers include inadequate access to home or business improvement loans at affordable rates, the unwillingness of banks to lend and service small loans, and the inability of the elderly, tenants, and low-income persons to qualify for credit. The Bank fills voids in the lending market: lenders are provided financial incentives to make loans, carefully targeted borrowers are the beneficiaries of these incentives,

168 Energy Security Act of 1980, note 1 *supra*.
169 Senator Edward M. Kennedy, press release of Dec. 3, 1980 (copy on file with the HARV. J. ON LEGIS.).

and the nation benefits from investment in the most cost-effective energy options.

The Bank is administered by a five-member Board[170] composed of the Secretaries of HUD, Energy, Treasury, Agriculture, and Commerce.[171] An Executive President of the Bank is appointed by the President of the United States.[172] A five-member Energy Conservation Advisory Committee[173] and a five-member Solar Energy Advisory Committee[174] are each composed of representatives of the consuming public, financial institutions, builders, architects or engineers, and industry. Committee appointments are not subject to Senate confirmation. Both committees have been appointed by former President Carter.

The Bank, which is given life until September 30, 1987,[175] is physically and organizationally situated in HUD, and is delegated the same powers as the Government National Mortgage Association.[176] It is authorized to be appropriated $2.5 billion

170 A quorum of the Board is three members. 12 U.S.C.A. § 3604(b) (1980). The by-laws of the Bank allow a Board director to designate only another member of his or her department "who shall occupy a position equivalent at least to Assistant Secretary, who may act in the absence of the designated Director." 45 Fed. Reg. 61,291 § 3.02 (1980). If President Reagan abolishes DOE, three of the four remaining Board directors will be required for a quorum.

171 The Secretary of HUD chairs the Board. 12 U.S.C.A. § 3604(c) (1980).

172 The President of the United States appoints a President of the Bank with the advice and consent of the Senate. 12 U.S.C.A. § 3605(a) (1980). Former President Carter nominated banker Joseph Bracewell for this position. Mr. Bracewell served as Bank President in an acting capacity until the expiration of the Carter Presidency. The Bank President appoints an Executive Vice-President for Solar Energy and an Executive Vice-President for Energy Conservation, who assist in managing the Bank. 12 U.S.C.A. §§ 3605(b)-3605(c) (1980).

173 12 U.S.C.A. § 3606(a) (1980). Because the Advisory Committee members are not subject to Senate confirmation, as are the President and Executive Vice-Presidents of the Bank, they are expected to provide some degree of program continuity at the current critical stage of the Bank's implementation, as a consequence of the entire Bank Board and executive staff being removed with the installation of President Reagan. All Committee members serve a two-year term with the exception of the initial consumer and financial appointees who serve a term of three years. 12 U.S.C.A. § 3606(c)(1)-3606(c)(2). The Advisory Committees are empowered to hold hearings and to issue reports. 45 Fed. Reg. 78, 236-37 (1980).

174 12 U.S.C.A. § 3606(b) (1980).

175 12 U.S.C.A. § 3603(a) (1980).

176 12 U.S.C.A. § 3603(a) (1980) states that the Bank shall have the same powers as those given to the Government National Mortgage Association (G.N.M.A.) by 12 U.S.C.A. § 1723a(a) (1980). The powers of the G.N.M.A. include the authority to enter into and perform contracts, leases, or other transactions on terms deemed appropriate; to sue and be sued; to avoid attachment of its property; to lease, purchase or acquire property which can be operated and maintained or improved; to sell or otherwise dispose of any property it holds; and to make rules necessary to govern its conduct and affairs.

for energy conservation and $525 million for solar energy over a four-year period, as illustrated in Table 8.[177] In fiscal year 1981, up to $10 million of each appropriation can be obligated for promotional expenses, and three fourths this amount can be so obligated in subsequent years.[178]

The Bank may transact business with the national network of lending institutions by two methods. First, in order to provide assistance to eligible recipients,[179] the Bank may make lump-sum payments to financial institutions. These payments in turn would be used to reduce the principal or interest on conservation or solar energy loans made to eligible recipients[180] or to make grants for conservation to low-income tenants and owners.[181]

Second, the Bank is empowered to engage in secondary-market loan financing by purchasing any loans made in whole or in part for residential solar energy or conservation improvements.[182] Significantly, this secondary-market authority is limited to residential properties and can be employed to purchase

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177 12 U.S.C.A. § 3620 (1980). Note that appropriated funds remain available if not expended in the initial fiscal year.

178 *Id.*

179 12 U.S.C.A. § 3616 (1980). "The Bank shall promote the program . . ." by dissemination of information to "financial institutions, builders and consumers." In addition, the Bank is authorized to provide "technical assistance to nonprofit entities, low-income groups, and local governments" in the use of the Bank. *Id.*

180 Eligible recipients of assistance for loan-financed conservation improvements are owners and tenants in existing single- and multi-family residential buildings for the purchase and installation of residential energy conserving improvements, and owners who occupy and tenants in existing commercial and agricultural buildings for the purchase and installation of commercial energy conserving improvements. 12 U.S.C.A. § 3607(a)(1)(A) (1980). Eligible recipients of assistance for loan-financed solar improvements are owners of existing buildings for the purchase and installation of solar energy systems, builders of newly constructed or substantially rehabilitated residential buildings that will contain solar systems (pursuant to Board determination), and purchasers of new or substantially rehabilitated buildings containing solar energy systems. 12 U.S.C.A. § 3607(a)(1)(B) (1980).

181 Grants can be made to owners of and tenants in existing residential buildings and tenants in existing multi-family rental buildings for the purpose of installing energy conservation improvements. 12 U.S.C.A. § 3607(a)(3) (1980).

182 12 U.S.C.A. § 1723g (1980). This authority is vested in the Bank unless the Board determines that such authority is unnecessary. *Id.* at § 1723g(a). The loans purchased in the secondary market must have terms between 5 and 15 years with no prepayment penalties and a face amount less than $15,000 at an interest rate and security acceptable to the Board. *Id.* at § 1723g(g). Moreover, the Federal Home Loan Mortgage (FHLMC) Act has been amended to permit the FHLMC to make commitments to purchase residential mortgages carried by any public utility if the mortgage is approved for participation in any mortgage insurance program under the National Housing Act. 12 U.S.C. § 1454(a)(1) (Supp III 1979). Energy Security Act of 1980, Pub. L. No. 96-294, § 534 (1980). Under 12 U.S.C.A. § 1717(b)(3) (1980) the Federal National Mortgage Association has similar powers.

TABLE 8
SOLAR ENERGY AND ENERGY CONSERVATION BANK AUTHORIZATIONS*
(in millions)

	Fiscal Year			
	1981	1982	1983	1984
Energy Conservation	$200/10	$625/7.5	$800/7.5	$875/7.5
Solar Energy	100/10	200/7.5	225/7.5	—

*The second figure represents the maximum amount of the appropriation which can be expended for promotion. (*For example, of the $200 million authorized for energy conservation in 1981, only $10 million can be spent for promotion.*)
Source: 12 U.S.C.A. § 3620 (1980).

loans made to residential customers by utilities.[183] The Energy Security Act also deletes the provision[184] of NECPA prohibiting utilities from financing or installing (through independent contractors) residential energy conservation and solar energy improvements.[185] By requiring conservation loan terms of at least five years,[186] prohibiting prepayment penalties,[187] restricting Bank establishment of security requirements for small conservation loans to low-income persons,[188] and requiring lenders not to establish minimum conservation loan requirements greater than $600 for terms of less than five years,[189] the Bank bridges many of the credit gaps which otherwise frustrate access to credit by ordinary borrowers.

Traditionally, ownership has been to federal conservation incentives as money is to wealth: one had to possess the former to reap the latter. The Bank changes this causal relationship on a comprehensive scale for the first time. Tenants are specifically made eligible for conservation loans and grants, although not for

183 *Id.*

184 12 U.S.C.A. § 8217 (1980). Utility financing and installation were prohibited except pursuant to a federal waiver. 12 U.S.C.A. § 8217(e) (1980).

185 There is great concern expressed that utility involvement in financing and supply "must not involve unfair methods of competition or have a substantial adverse effect upon competition." ENERGY SECURITY ACT; CONFERENCE REPORT, S. REP. No. 824, 96th Cong., 2d Sess. 295 (1980) [hereinafter cited as CONFERENCE REPORT]. The Energy Security Act amends NECPA to permit state regulatory authorities (in the case of regulated private utilities) or nonregulated utilities discretion to determine the rate treatment for recovery of costs of labor and materials under a utility financed conservation program. This allows expense or ratebase treatment at the discretion of states or nonregulated utilities. Energy Security Act of 1980, Pub. L. No. 96-294, § 544, 94 Stat. 742, (1980) (42 U.S.C. § 8216 (1980)).

186 12 U.S.C.A. § 3612(a)(1) (1980).

187 *Id.*

188 CONFERENCE REPORT, *supra* note 185, at 284.

189 *Id.*

solar energy loans.[190] The amounts of maximum grant or loan subsidies, the percentage subsidized, and the terms of the conservation loan or grant are the same for both owners and tenants.[191] The only effective difference is that tenants, unlike owners, are not eligible to receive, simultaneously, assistance for conservation and solar energy improvements, and must receive the written permission of the owner for such improvements.[192]

The Bank also has the flexibility to make subsidies available beyond the category of individual consumers. Builders of new residences may receive subsidies for the purchase and installation of a solar energy system if the Bank Board makes three findings: (1) a direct builder subsidy is necessary to encourage a greater number of single-family solar dwellings; (2) a direct builder subsidy is a more effective expenditure of Bank funds; and (3) a system is established to prevent both builders and purchasers from claiming a Bank subsidy or residential energy tax credit for the same expenditure.[193]

Cooperative corporations and condominium associates are eligible to make collective application for conservation and solar subsidies.[194] Moreover, individual owners and tenants in residential and commercial dwellings are eligible to make collective application for commonly owned renewable energy systems.

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190 12 U.S.C.A. §§ 3607(a)(1)-3607(a)(3) (1980). Tenants must receive written permission from their landlord before receiving subsidies for conservation improvements. 12 U.S.C.A. § 3612(a)(4) (1980).

191 12 U.S.C.A. § 3607(b) (1980).

192 12 U.S.C.A. §§ 3607(a)(1), 3612(a)(4) (1980). "The Conferees expect that an applicant who qualifies for both solar and conservation subsidies will be able to receive assistance through a single loan transaction." CONFERENCE REPORT, *supra* note 185, at 284.

193 12 U.S.C.A. § 3613(b)(1) (1980). The builder is required to inform the purchaser of the amount of credit claimed and to provide such information to the Bank as necessary to prevent double subsidization. The Board has not elected to provide builder subsidies during its first year.

194 In the House version of the Bank, a window was opened explicitly for the purpose of providing technical assistance and subsidized loans to organizations and nonprofit groups representing eligible consumers:

> The Bank would also be required to provide technical assistance to nonprofit groups, low-income groups and local governments which are considering solar and energy conservation strategies. Nonprofit groups and low-income groups are eligible for assistance under the Bank's programs and may participate as either owners or tenants (acting with the approval of the owner of the property) in receiving assistance. In addition, these groups may include consumer co-ops, neighborhood organizations, or other nonprofit groups of energy consumers who may want to utilize solar to meet their energy requirements.

NATIONAL SOLAR AND ENERGY CONSERVATION INCENTIVES ACT, H.R. REP. No. 625, 96th Cong., 1st Sess. 24 (1979).

For urban areas, where available collector space is limited and densities are greatest, collective systems employing available solar access and utilizing more efficient collective energy storage systems are a necessity:

> The inclusion of these groups [nonprofits] as eligible recipients is intended to indicate the Committee's concern that in many communities housing patterns and densities may best foster solar energy development when undertaken on a block or district scale. In this way, a broader application of solar may be achieved. However, block or district scale solar is a complex and difficult undertaking and thus the Committee believes that this technical assistance is crucial to assuring that these groups are able to achieve the maximum benefits of solar technology.[195]

The Bank has the potential to assist local and state governments with conservation and solar improvements. Under the general loan program for commercial buildings, government-owned buildings used for general government functions are excluded.[196] However, while this would exclude government office buildings (and perhaps the mayor's dwelling) it would not preclude Bank assistance for government-owned residential and commercial space.[197] This could be particularly important in major urban areas, such as New York and Detroit, where the city has inherited title to tens of thousands of tax-delinquent or abandoned dwellings desperately in need of energy efficiency improvements. Thus, the Bank uniquely adapts to the character of the housing stock, rather than reinforcing subsidized advantages for conventional owners.

> It was clear to the Committee that without providing additional inducements to moderate- and low-income families, they would be unlikely to participate in any meaningful respect in the solar retrofit portions of the program. It is clear to the Committee that for solar to gain broad acceptance by consumers, it could no longer be relegated to the role as the plaything of the rich.[198]

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195 *Id.*

196 CONFERENCE REPORT, *supra* note 185, at 278.

197 However, a partnership or corporation seeking Bank solar assistance is deemed to have income in the highest bracket established in the Act. Proposed 24 C.F.R. § 1815.20(b) (unpublished Dep't of Housing & Urban Development document, at 28, (1980) (copy on file with the HARV. J. ON LEGIS.) [hereinafter referred to as Proposed HUD Regulations]. This effectively reduces the percentage subsidy available and renders such entities ineligible after 1983. The section suggests government entities should be similarly treated.

198 H.R. REP. No. 625, 96th Cong., 1st Sess. 20 (1979).

Both the conservation and solar components of the final version of the Bank, unlike most other energy legislation, are sensitive to the very real income limitations which constrain large segments of the population from making conservation improvements. From the time of its conception, the Bank has been structured flexibly to transcend income barriers. It accomplishes this goal through three simultaneous mechanisms: (1) subsidies which are inversely a function of recipients' income; (2) tailored subsidies which are delivered through grants, loan interest subsidies, or loan principal reductions; and (3) maximum income limitations and prohibitions against "double subsidization." Operating in conjunction, these mechanisms enable the Bank to provide a more equitable distribution of subsidies.[199]

First, income is a factor in the determination of subsidy amounts in two basic respects. The maximum percentage of subsidy for both solar and conservation is directly related to income on a sliding scale. As Table 9 displays, the maximum federal conservation subsidy ranges from 50 percent, for those earning less than 80 percent of median area income (MAI),[200] to 20 percent for those earning 120 to 150 percent MAI and for multi-family, commercial, or agricultural borrowers.[201] As Table 10 illustrates, maximum solar energy subsidy levels range from 60 percent of costs, for those earning less than 80 percent MAI or for owners of multi-family dwellings whose buildings are primarily occupied by low-income tenants,[202] to 40 percent MAI for more affluent owners of single-family dwellings and all other multi-family, commercial, or agricultural borrowers.[203]

In establishing subsidy levels, the Bank Board is specifically directed to consider, among other factors, "the levels of financial assistance needed to induce owners and tenants from various income groups" to make conservation and solar improvements.[204] Each maximum percentage subsidy level is accompanied

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199 12 U.S.C.A. §§ 3609-3615 (1980).

200 The Board will rely on HUD data developed for the section 8 housing program to determine median area income. CONFERENCE REPORT, *supra* note 185, at 283.

201 12 U.S.C.A. § 3609 (1980).

202 "Primarily occupied by low-income tenants" is defined to mean that a majority of tenant householders must have incomes below 80 percent of median area income. 12 U.S.C.A. § 3610(b)(2) (1980). There is no indication in the section that an owner/recipient of such a solar subsidy must maintain the low-income character of his building after receipt of the subsidy.

203 12 U.S.C.A. § 3610 (1980).

204 12 U.S.C.A. § 3608(b)(4) (1980). The other factors for Board consideration in establishing subsidy levels are market interest rates, availability of other federal in-

TABLE 9
MAXIMUM ASSISTANCE LEVELS FOR RESIDENTIAL OR COMMERCIAL ENERGY-CONSERVING IMPROVEMENTS

Building Type	Assistance as Percentage of Improvement Cost	Maximum Assistance			
		1 Unit	2 Unit	3 Unit	4 Unit
1) 1- to 4-unit residential buildings:					
Income of owner or tenant:					
Less than 80% of area median	50% up to	$1250	$2000	$2750	$3500
80 to 100% of area median	35% up to	875	1400	1925	2450
100 to 120% of area median	30% up to	750	1200	1650	2100
120 to 150% of area median	20% up to	500	800	1100	1440
2) Multi-family residential building: No income differential for owner or tenant	20% up to	$400 per dwelling unit			
3) Agricultural or commercial building: Gross annual sales of owner who occupies buildings or tenant may not exceed $1,000,000	20% up to	$5,000 per building			

Source: 12 U.S.C.A. § 3609 (1980).

by a per-dwelling-unit dollar limitation, as illustrated in Tables 9 and 10. Unlike the provisions for conservation loans, in the first years of operation there is no maximum income level beyond which owners are not eligible for subsidized loans for solar energy improvements. However, the 40 percent maximum solar energy subsidy for those owners of single-family dwellings earning in excess of 160 percent MAI is equal to the 40 percent federal solar tax credit.[205] Because the latter can be realized within fifteen months of investment, and "double dipping" is prohibited, it will be the preferred form of federal subsidy for most higher-income-bracket taxpayers. The only possible advantage of utilizing the 40 percent Bank subsidy would be that the loans apply to a wider variety of solar energy improvements.[206]

centives (including tax credits), and costs and efficiencies of conservation and solar technologies. 12 U.S.C.A. § 3608(b)(1)-3608(b)(3) (1980). While state subsidy programs are not explicitly a factor in setting Bank subsidy levels, the Board is directed to "examine" existing state programs. CONFERENCE REPORT, *supra* note 185, at 289.

205 12 U.S.C.A. § 3610(3) (1980). 26 U.S.C. § 44C(b)(2) (Supp. III 1979) *as amended by* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 202, 94 Stat. 258 (1980).

206 The Solar Bank is more liberal in granting subsidization for passive solar technologies, which usually do not employ contained heat transfer media or mechanical

TABLE 10
MAXIMUM ASSISTANCE LEVEL FOR SOLAR ENERGY SYSTEMS

Building Type	Assistance as Percentage of System Cost	Maximum Assistance 1 Unit	2 Unit	3 Unit	4 Unit
1) 1- to 4-unit residential building					
Income of owner or purchaser:					
Less than 80% of area median	60% up to	$5000	$7500	$10,000	$10,000
80 to 160% of area median	50% up to	5000	7500	10,000	10,000
Above 160% of area median	40% up to	5000	7500	10,000	10,000
2) 1- to 4-unit new or sub-rehab residential building: Builder	40% up to	5000	7500	10,000	10,000
3) Multi-family residential building:					
In general	40% up to	$2,500 per dwelling unit			
Except owner of building where majority of tenants have incomes below 80% of median	60% up to	$2,500 per dwelling unit			
4) Agricultural or commercial buildings	40% up to	$100,000 per building			

Source: 12 U.S.C.A. § 3610 (1980).

Second, the delivery of subsidies is flexibly tailored to reach individuals of limited means. Low- and moderate-income owners and tenants can elect either 50 percent grants or 50 percent loan subsidies for conservation. While the remaining 50 percent share of grant funds must be matched by the recipient,[207] it is possible for this share to be provided though creative use of CDBG, UDAG, or Low Income Energy Assistance Program

circulation devices. Tax credits for passive solar designs are more difficult to obtain. Materials and components that serve a dual purpose—*i.e.*, those that are structural as well as collectors of solar energy—are not eligible for a tax credit. 26 U.S.C. § 44C (1980 & Supp. June 1980). *See* Energy Tax Act of 1978, S. REP. No. 1324, 95th Cong., 2d Sess., 44 n.1, (1978); Treas. Reg § 1.44C-2(f)(4) (1980).

207 Section 3609(a)(1) states that financial assistance is available. 12 U.S.C.A. § 3609(a)(1) (1980). For an owner or tenant whose income is less than 80 percent median area income, this can be an amount equal to 50 percent of the cost of conservation improvements, subject to certain ceiling limitations. *See* section I *supra*, at table 2. Section 3612(a) indicates that such assistance is available in the form of a loan for owners or tenants. 12 U.S.C.A. § 3612(a) (1980). Grants are available to owners or tenants whose incomes are less than 80 percent of median area income, although the party must certify that other sufficient resources are available to complete the payment for the conservation improvement financed by the grant. 12 U.S.C.A. § 3612(b)(1)-3612(b)(2) (1980). The total cost of the improvement must exceed $250. 12 U.S.C.A. § 3612(b)(3) (1980).

(LIEAP) funds, thereby increasing leverage for the grant recipients.[208] This is a particularly important alternative for those low-income recipients who would not be able to qualify for subsidized conservation loans from conventional lenders.[209] Moreover, the Bank provides that "[a]ny individual receiving any financial assistance from the Bank shall not include such assistance as gross income or as an increase in the basis of any real property."[210] This prevents Bank assistance from being used to disqualify a recipient from eligibility for welfare, Supplemental Security Income (SSI), or other assistance programs. An eligible recipient for a solar or conservation loan has the choice to realize his subsidy in the form of an interest subsidy or a reduction of the principal amount of the loan.[211] To prevent siphoning of these subsidies away from new-home purchasers by builders, proposed Bank regulations state that subsidies to new construction must be realized as long-term interest subsidies rather than up-front reductions of principal.[212]

Third, the Bank statute prohibits and imposes double subsidization income limitations on eligibility. Three separate income ceilings on eligibility are established:

(1) conservation loans or grants are not available to those earning in excess of 150 percent MAI;[213]
(2) conservation loans or grants are not available to owner-occupiers and tenants of commercial and agricultural buildings if they have greater than $1 million in annual gross sales;[214] and
(3) for solar loans made after December 31, 1985, no owner whose income exceeds 250 percent MAI is eligible.[215]

Together, these provisions direct subsidies away from the most affluent residential recipients or large agricultural or com-

208 Proposed HUD Regulations, *supra* note 197, preamble at v. (1980).

209 Under § 3607 the Bank makes payments to financial institutions who in turn lend money or make grants to those parties fulfilling the criteria of §§ 3609-3615. 12 U.S.C.A. § 3607 (1980). Since the Bank does not guarantee, but rather subsidizes loans made by lenders, borrowers not otherwise credit worthy under a particular lender's criteria will not receive a loan. However, there is no such problem where the financial institution is passing out a wholly federal grant to an eligible recipient.

210 CONFERENCE REPORT, *supra* note 185, at 282.

211 12 U.S.C.A. § 3607 (1980).

212 Proposed HUD Regulations, *supra* note 197, at 50-51 (proposed 24 C.F.R. §§ 1825.10(b), 1825.10(e).

213 12 U.S.C.A. § 3609(a)(4) (1980).

214 12 U.S.C.A. §§ 3612(a)(8), 3612(b)(1) (1980).

215 12 U.S.C.A. § 3613(a)(2)(A)(4) (1980).

mercial enterprises, which already have sufficient access to debt capital and can avail themselves of federal and state tax credits. To establish a floor for subsidy monies for low-income persons, the Bank allocates a minimum of 5 percent of each year's solar energy appropriation[216] and a minimum of 15 percent of the energy conservation appropriation[217] to those earning less than 80 percent MAI or to owners of predominantly low-income multi-family housing. In addition, a minimum of 70 percent of all solar monies[218] and a minimum of 80 percent of all conservation monies[219] must be used in residential and multi-family applications. In practice, the Bank will direct subsidies to small businesses and individuals disadvantaged by existing federal mechanisms. A breakdown of Bank benefits is charted in Table 11.

From a legal perspective, the "sleeper" in the Bank regulations, with potentially profound repercussions, is the provision designed to prevent "double dipping," or multiple subsidies, employing Bank funds. In its operation, the Bank is directed: "For the purpose of developing procedures to prevent double subsidization of expenditures, the Board should examine existing state programs developed for this purpose."[220] In this effort, the government is required to prevent Bank subsidy recipients from also taking federal tax credits for the same expenditures[221] and to prevent both builders and purchasers of a

216 12 U.S.C.A. § 3615(c)(1) (1980). Low-income multi-family housing must have the majority of tenants earning less than 80 percent MAI. *Id.* Monies not used for these purposes during the fiscal year become available during the following fiscal year for any solar bank improvements. 12 U.S.C.A. § 3615(d) (1980).

217 12 U.S.C.A. § 3614(b)(1) (1980). Funds not expended for these purposes during any fiscal year become available during the following fiscal year for any residential or commercial conservation improvements. 12 U.S.C.A. § 3614(2) (1980).

218 12 U.S.C.A. § 3615(b) (1980).

219 12 U.S.C.A. § 3614(a) (1980).

220 CONFERENCE REPORT, *supra* note 185, at 289. Twenty-two states currently exempt solar equipment from state sales tax or offer income tax incentives. Twenty-seven states wholly or partially abate property tax increases resulting from solar installations. Extending the Defense Production Act of 1950, *as amended, reprinted in* S. REP. No. 387, 96th Cong., 1st Sess. 41 (1979).

221 Section 3607(b)(2)(E) prohibits financial assistance if a taxpayer has "applied for or received any credit against taxes allowed by sections 38 or 44C of title 26 made with the proceeds of such loan, or portion of a loan." 12 U.S.C.A. § 3607(b)(2)(E) (1980). This indicates a strict prohibition of federal subsidy money if a tax credit has been taken or applied for. However, §§ 44C(c)(10)(A)-44C(c)(10)(B) state that if federal

new home from realizing solar subsidies either from the Bank or from federal tax credits on the same expenditure.[222] The potential significance of these provisions will be determined by what existing programs are deemed by the Board to be subsidized federal financing. Under proposed Bank regulations, sections 38 and 44(c) federal tax credits; sections 502 and 504 FmHA programs; the section 312, section 235, and section 8 HUD housing rehabilitation programs; and the Energy Department low-income weatherization program would be Federal energy "subsidies" which would disqualify one from Bank participation.[223] However, excluded from these disqualification provisions are:

(1) utility financing of conservation through rates;[224]
(2) indirect federal tax assistance, such as federally tax-exempt state or municipal revenue or general obligation bonds;[225] and
(3) state and local direct, loan, or tax subsidies.[226]

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subsidy money has been obtained, the dollar amount of the credit will be reduced by the size of the subsidy. 26 U.S.C. § 44C(c) (Supp. June 1980).

222 Sections 3613(b)(1)(A)(iii) and 3613(b)(1)(B) provide that subsidized solar loans are only available to builders when the Board determines that it can effectively prohibit double dipping into the Bank and federal tax credits. 12 U.S.C.A. § 3613(b)(1)(A)(iii), 3613(b)(1)(B) (1980). To provide assistance directly to builders, the Board must make three findings: (1) it is necessary to encourage new solar construction; (2) it is able to establish procedures to prevent both the purchaser and builder from receiving federal subsidies on the same expenditure; and (3) it is a more effective incentive than subsidizing purchasers. 12 U.S.C.A. §§ 3613(b)(1)(A)(i)-3613(b)(1)(A)(iii) (1980). The Bank subsidies received by a builder are attributed to the ultimate purchaser. 12 U.S.C.A. § 3613(b)(2) (1980).

223 Proposed HUD Regulations, *supra* note 197, at 27 (proposed 24 C.F.R. § 1815.10).

224

> Section 545 provides that any subsidy provided to a customer by a utility's financing program for residential energy conservation measures shall not be treated as income or as an increase in the basis of the customer's residence for tax purposes. The Conferees intend that any financial assistance which is provided to a customer by a utility for residential energy conservation measures and which does not include Federal, State or local governmental financial assistance (such as assistance from the Solar Energy and Energy Conservation Bank) shall not be considered subsidized energy financing for the purposes of the Internal Revenue Code, and shall not, therefore, disqualify such a customer from receiving the relevant tax credits for expenditures so financed.

CONFERENCE REPORT, *supra* note 185, at 294.

225 Sections 3612 and 3613 do not mention the possession of such bonds as a criterion for disqualification for federal loan assistance or subsidization by the Bank. 12 U.S.C.A. §§ 3612, 3613 (1980).

226 State and local direct, loan, or tax subsidies are also not discussed as disqualifying criteria. 12 U.S.C.A. §§ 3612, 3613 (1980).

TABLE 11
SOLAR ENERGY AND ENERGY CONSERVATION BANK ELIGIBILITY & BENEFITS

Technology	Residential Housing Type	Housing Vintage	Recipient	Recipient Income Limitations
Single-Family Conservation Grants	1-4 Units	Completed Before Jan 1, '80	Owner or Tenant	Less than 80% Median Area Income
Multi-Family Conservation Grants	5 Units or More	Completed Before Jan 1, '80	Condominium Owner, Cooperative Shareholder or Tenant	Less than 80% Median Area Income
Single-Family Conservation Loans	1-4 Units	Completed Before Jan 1, '80	Owner or Tenant	Less than 80% Median Area Income → 80% to 120% Median Area Income →
Multi-Family Conservation Loans	5 Units or More	Completed Before Jan 1, '80	Condominium Owner, Cooperative Shareholder or Tenant	Less than 120% Median Area Income****
Single-Family Passive* Solar Loans	1-4 Units	New** or Existing	Owner, Purchaser or Builder (on behalf of purchaser)	No Limitations
Single-Family Active*** Solar Loans	1-4 Units	New** or Existing	Owner or Purchaser	Less than 80% Median Area Income

*Includes earth-sheltered houses.

**"New" means that permanent mortgage financing must be arranged after effective date of bank operations.

***There is a preference for financing systems incorporating active space-heating and water-heating. Wind, photovoltaic or wood devices are not eligible.

****Cooperative corporations and condominium associations are eligible collectively if the median family income of residents is less than 120% of median area income. Absentee owners are eligible without regard to income.

Source: Author's compilation.

Subsidy Calculation	Maximum Subsidy (# of units)	Minimum Expenditure	Subsidy Form
50% of Purchase & Installation Costs	(1) $1,250 (2) 2,000 (3) 2,750 (4) 3,500	$250	Joint Check to Recipient & Contractor After Assurance By Recipient of 50% Matching
20% of Purchase & Installation Costs	$400/Unit	$250	Joint Check: for Owners can apply to Costs of Audits, Planning, Architectural & Technical Services
50% of Cost ⟶ 15% of $700, 30% of Balance ⟶	(1) $1,250 (3) $2,750 (2) 2,000 (4) 3,500 (1) $ 750 (3) $ 550 (2) 600 (4) 525	$250	Reduction of Interest or Principal
20% of Purchase & Installation Costs	$400/Unit	$250	Reduction of Interest or Principal
Calculated Relative to Potential Energy Savings Attributable to Passive Features in Particular Climate	(1) $5,000 (2) 7,500 (3–4) 10,000	None	Existing Dwelling: Subsidy of Principal or Interest. Builder Subsidy: Subsidy of Interest.
60% of Purchase & Installation Costs	(1) $5,000 (2) 7,500 (3–4) 10,000	None	Existing Dwelling: Subsidy of Principal Interest. New Dwelling: Subsidy of Interest

Moreover, the final conference committee version of the Bank carelessly omits prohibition of double dipping by business (as opposed to individual) recipients of Bank assistance.[227]

227 Double subsidization is described only as receipt of a § 38 (investment) or § 44C (renewable and conservation) tax credit. 12 U.S.C.A. § 3613(b) (1980) (omitting the business energy credit of 15 percent on qualifying investments under 26 U.S.C. § 46 (1976 & Supp. III 1979) *as amended by* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 221, 94 Stat. 260 (1980).

This definition of double subsidization, resulting in part from careless drafting of the conference committee compromise, creates a host of strategic opportunities. Businesses can reap both full Bank subsidies and a 15 percent business energy-investment credit, with important implications for the structuring of renewable energy projects.[228] Secondly, in those states[229] which have adopted utility-financing programs, individuals can effectively "triple dip" into utility rate-financed subsidies, state tax subsidies, and federal tax or Bank subsidies for residential energy conservation and renewable energy investments.[230] There could be a resulting bonanza of subsidization for commercial interests at the expense of low- and moderate-income persons.

Third, substantial local leveraging power is created through the issuance of industrial development or revenue bonds devoted to renewable energy development projects, in conjunction with available Bank subsidies and federal tax incentives. Particularly important is the possibility of employing tax preference financing for the matching half of the 50 percent Bank conservation grants for low- and moderate-income persons. The Bank, newest in the arsenal of complementary financing tools, should be empowered to facilitate equitable access to the energy conservation market by all income groups.

The Bank will open new vistas through the conservation and solar measures it will subsidize. For residential energy conservation applications, the Bank must order an energy audit detailing the conservation needs of each potential loan recipient. In the case of a commercial subsidy application, borrower submission of an application is a prerequisite.[231] Such measures ensure that Bank subsidy funds will be applied to specific solar and energy conservation needs. One of the most important con-

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228 *Id.*

229 These include Oregon, Washington, California, and the Tennessee Valley Authority. *See, e.g.*, Calif. Pub. Util. Comm'n Decision No. 92653, Jan. 28, 1981, in Application No. 59537 (1981).

230 Utility-financed subsidies must be generated from utility revenues, and cannot be mere pass throughs of Bank or other federal or state tax subsidies, in order to qualify as exempt from double-dipping exemptions. CONFERENCE REPORT, *supra* note 185, at 294.

231 12 U.S.C.A. §§ 3612(a)(5)-3612(a)(6) (1980). It is odd that there is no requirement in the section that the requisite commercial energy audit demonstrate that Bank-financed improvements are cost-effective or satisfy any minimum efficiency criteria. The aspects of what constitutes a commercial energy audit are defined in the Act. 12 U.S.C.A. § 3602(1) (1980).

TABLE 12
ELIGIBLE RESIDENTIAL PROGRAM MEASURES
Eligible Conservation Measures

Under Both Federal Tax Credits & Bank	Under Bank Only
1. Caulking & Weatherstripping	
2. Furnace Modifications:	2. Furnace Modifications:
a. Replacement Burners	
b. Flue Modifications	
c. Electric or Mechanical Ignition Devices	
3. Automatic Thermostats	d. Replacement Boilers
4. Home or Water Heater Insulation	
5. Storm Windows & Doors	
	6. Heat-Absorbing or Heat-Reflecting Windows & Doors
	7. Load Management Devices
	8. Meter Conversions in Multi-Unit Buildings (along with at least one of measures 1-7)

Source: 12 U.S.C.A. § 3602(6) (1980); 26 U.S.C. § 44C (1976 & Supp. III 1979).

tributions of the Bank will be the subsidization of a broader scope of energy measures than those included under present, conventional tax credits. Present conservation tax credits apply only to homes substantially completed by April 20, 1977, while Bank conservation grants and loans apply to any structure completed prior to January 1, 1980.[232] Table 12 illustrates the residential conservation measures eligible for Bank and tax credit funding. Table 13 contrasts those commercial and multi-family conservation measures eligible for funding. The broader provisions of Bank subsidization are particularly evident in comparing eligible conservation measures under the federal tax credit and the Bank regimes: only the Bank can fund conventional caulking, weatherstripping, insulation, storm doors and windows, furnace efficiency modifications, and lighting improvements.[233]

232 26 U.S.C. § 44C(c)(1)(C) (Supp. III 1979) (amended 1980); 12 U.S.C.A. § 3612(a)(3) (1980).

233 12 U.S.C.A. § 3602(7) (1980); 26 U.S.C. § 48 (1976 & Supp. III 1979) *as amended* by Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 222, 94 Stat. 261 (1980).

TABLE 13
ELIGIBLE COMMERCIAL PROGRAM MEASURES
Eligible Conservation Measures

Under Both Federal Tax Credits & Bank	Under Federal Tax Credits Only	Under Bank Only
		1. Caulking & Weatherstripping
		2. Insulation of Building & Water Heaters
		3. Storm, Heat-Absorbing, or Heat-Reflecting Windows or Doors; Window & Door Modifications
4. Automatic Energy Control Systems		
		5. Furnace Modifications: a. Replacement Burners & Boilers b. Flue Modifications c. Electric or Mechanical Ignition
		6. Lighting Efficiency Improvements
7. Energy Recovery Systems		
8. Cogeneration Systems		
	9. Regenerators, Turbulators & Preheaters	
	10. Modifications to Alumina Electrolytic Cells	

Source: *See* note 234.

Moreover, the Bank can provide planning, architectural, audit, and technical assistance for the planning and implementation of energy efficiency improvements.[235] The one glaring *faux pas* in the Bank itemization of energy conservation measures is its

234 Section 3602(7) lists the commercial energy conserving improvements eligible for assistance by the Bank. 12 U.S.C.A. § 3602(7) (1980). For the more limited energy conservation measures that are eligible for federal tax credits, *see* 26 U.S.C. § 48 (1976 & Supp. III 1979) *as amended by* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 222, 94 Stat. 261 (1980).

235 12 U.S.C.A. § 3602(7)(K) (1980).

indiscriminate inclusion of meter conversions, defined as "any conversion from master utility meters to individual utility meters, which are directly related to and undertaken with the installation of any of the [other eligible conservation] items. . . ."[236]

This effectively subsidizes the shifting of utility bills from landlords to tenants, employing the vehicle of meter conversions, as long as some other minor conservation improvement is made simultaneously. The impact of this is to eliminate the market forces which otherwise motivate landlords to conserve utility costs by investing in building efficiency improvements. Moreover, such conversions:

(1) promote the installation of horrendously inefficient and expensive electric resistance heating;[237]
(2) render the building heating and cooling system difficult to adapt later to solar, cogeneration, or district heating;[238]
(3) expose newly individually metered tenants, in jurisdictions where declining block-rate mechanisms operate, to higher per-unit energy costs;[239]
(4) subject newly individually metered tenants to the risk of summary termination of service, to which master-metered tenants are not exposed;[240] and

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236 12 U.S.C.A. § 3602(6)(I) (1980).

237 This occurs because many local codes prohibit the extension of gas or oil lines above the second or third floors, thus necessitating master-metered central fossil boilers located at ground level or individually metered electric heating. In addition, individual electric heating is much less expensive to install than individual fossil furnaces and distribution networks. The total end-use efficiency of natural gas is approximately twice that of conventionally generated electric resistance heating. BOOZ, ALLEN, & HAMILTON, *supra* note 130, pt. II, at 16-17. Note that the study assumes a gas system is properly sized and operating near full load.

238 This occurs because most renewable or district back-up heating/cooling systems experience technical as well as equitable-allocation problems interfacing with individually metered primary heating/cooling systems. AMERICAN GAS ASS'N, UNDERSTANDING AND RESPONDING TO REGULATIONS PROHIBITING MASTER METERING 20-22 (1979).

239 A majority of states maintain declining block residential rate structures which render energy less expensive per unit when purchased in bulk through a master meter serving multiple units. The potential economic impacts on tenants of conversion to individual meters in existing multi-family dwellings is apparent. Letter from M. D. Anderson, Executive Director of Housing and Redevelopment Authority, City of St. Paul, to T. Feeney, HUD Area Office (Sept. 19, 1977) (copy on file with the HARV. J. ON LEGIS.).

240 The problem of terminations has flooded the courts and reached the Supreme Court twice in four years. *See, e.g.*, Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) (low income); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (tenant, in *forma pauperis* suit).

(5) reduce the benefits tenants receive pursuant to the newly enacted LIEAP program[241] and reduce the utility subsidies received by public housing and federally-assisted tenants.[242]

For solar energy technologies, the measures made eligible by the statute are "purposely broad," including active, passive, and photovoltaic systems; wood-burning stoves or appliances; solar-process heat devices; and earth-sheltered homes.[243] Under the proposed Bank regulations, photovoltaics, wind devices, and wood-burning stoves would be excluded by regulation from eligibility for the initial period of operation.[244] There is a statutory preference for integrated applications of solar technology to space-heating, water-heating, space-cooling, and water-cool-

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241 The regulations implementing the Low Income Energy Assistance Program (LIEAP) allow a state to "deem" a reasonable portion of a private market master metered tenant's rent or income to be the cost eligible for payment under LIEAP. 45 Fed. Reg. 36,817 (1980). There is no guidance as to the basis for this determination. In many ways this standard is discriminatory. "Deeming" a fixed portion of income or rent to equal eligible LIEAP energy costs compensates most liberally those who have the highest incomes or pay the greatest rent, regardless of actual or estimated energy costs. Moreover, the regulations do not require that LIEAP payments for master metered tenants to be paid to tenants rather than to landlords, are not effective in ensuring payments made in cash and do not require any reduction in rent by benefitted master-metering landlords. In contrast, eligible individually metered tenants, who receive LIEAP payments directly, do not suffer these uncertainties. Individually metered tenants receive cash payments not dependent on rent or income, but that are based merely on eligibility. As a result, several state plans pursuant to LIEAP will benefit individually metered tenants more than similarly situated master metered tenants.

242 For example, HUD regulations provide a significantly larger utility subsidy to master or sub-metered tenants than to individually metered tenants. 45 Fed. Reg. 59,502-08 (1980). This arbitrary distinction bears no relation to tenant need, energy waste or building thermal quality. *See generally* Ferrey, *Energy Needs of the Poor*, 11 NAT'L CLEARINGHOUSE REV. 341 (1977).

243 12 U.S.C.A. § 3602(8) (1980). Passive technologies are not eligible for the federal tax credit. *See* 26 U.S.C. § 44C (1980).

> The definition of "solar energy system" is purposefully broad in order to include any solar technology likely to be commercially available during the life of the Bank. . . . The Conferees expect the Bank, during its first years of operation, to focus on subsidizing commercially viable solar technologies and to specify the circumstances under which products presently under development could be considered commercially viable and eligible for subsidy. The criteria developed by the Bank are not to discriminate against simple passive or hybrid solar energy systems.

CONFERENCE REPORT, *supra* note 185, at 279.

244 Proposed HUD Regulations, *supra* note 197, at 29 (proposed 24 C.F.R. § 1815.25(b)).

245 CONFERENCE REPORT, *supra* note 185, at 289. Solar heating/cooling does not receive a priority in climatological regions where it is impractical, inefficient, or would constitute a market disincentive. *Id.* The purchaser or builder of a newly constructed residential or multi-family building which receives a Bank solar subsidy must certify "to the lending institution that the building meets or exceeds cost-effective energy

ing.[245] Under the federal tax credit scheme, however, passive solar technologies are generally not eligible for subsidy.[246]

Unlike the case with conservation expenditures, where the Bank is encouraged to vary the percentage subsidized in direct relation to the amount *invested*,[247] for solar projects the Bank is encouraged to vary the percent subsidized in direct relation to the amount of energy *saved*. Passive solar energy improvements must always be subsidized in relation to energy saved to the extent practicable,[248] and active solar energy improvements should be subsidized on this savings basis, if practicable, after January 1, 1983.[249]

While this adds significant complexity to the mechanics of the Bank program, it is preferable to the Bank conservation trigger, which increases the percentage of subsidization on the basis of dollar outlay. This latter alternative discriminates against those unable to make large expenditures and encourages system "goldplating" at the expense of efficiency. This novel savings approach is unparalleled in federal tax credit or loan incentive programs. For the first time, the measures eligible for

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conservation standards established by HUD." The Conference Report language makes clear that HUD Minimum Property Standards are appropriate cost-effective standards. *Id.* at 288.

246 Note 206 *supra*.

247 Conference Report, *supra* note 185, at 283. Sliding-scale subsidies "should not apply" to low-income families, who should receive "[t]he maximum percentage subsidy level set by the Bank." Id.

248 12 U.S.C.A. § 3610(d)(2) (1980).

249 12 U.S.C.A. § 3610(d)(1) (1980).

> The determination of whether it is practicable to apply the energy efficiency principle to active solar energy systems should be based, among other factors, upon whether a reliable industry-wide energy efficiency rating system is in place and whether the Bank can develop an uncomplicated method of applying this concept to active solar system. It is not the intent of the Conferees that the energy-efficiency test act as an impediment to the acceptance of solar systems rather it is the intent of the Conferees that persons purchasing solar energy systems should be encouraged to purchase those systems that would save the greatest amount of energy.
>
> It is the intent of the Conferees that every savings are to be estimated using the difference on an annual basis between (1) the amount of oil, gas, electricity or other conventional fuels required to meet the heating/cooling load of the solar equipped buildings, and (2) the amount of such fuels required to meet the heating/cooling load of a reference residential building in a similar location. No assistance in excess of the amounts specified in subsection (a) of this section shall be provided. Additionally, the Conferees intend that the installation of a solar energy system on an existing building does not constitute *per se* a substantial rehabilitation of the building.

Conference Report, *supra* note 185, at 284.

Bank financing place comprehensive energy efficiency improvements within the reach of the average owner or tenant.

The Bank promotes maximum competition in the lending market. Instead of utilizing only conventional banks, the definition of eligible lenders is purposely broadened to include any lender eligible under title I of the National Housing Act;[250] there are now 6,000 such lenders. This broad net can include state and local governments, neighborhood housing services, credit unions, mortgage companies, and charitable organizations and foundations.

Furthermore, organizations which have developed special relationships with groups underserved by conventional lenders—*e.g.*, community development corporations, native American tribes, local redevelopment authorities—can qualify as Bank lenders. The importance of this is two-fold. First, because the Bank does not guarantee but merely subsidizes loans, each lender will establish its own criteria to determine who is creditworthy. Many of these novel lenders can make Bank credit available to individuals denied access to conventional credit markets,[251] and leverage other funding sources to match the 50 percent Bank conservation grants. Second, the participation of additional lending institutions increases both number of consumers reached and competition in the making of loans.

In addition, utilities financing conservation and solar energy improvements are eligible as lenders of Bank-subsidized funds.[252] While a maximum of 10 percent (20 percent if the Board so authorizes) of solar energy appropriations may be passed through

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250 12 U.S.C.A. § 3602(9) (1980). Section 1703 expounds the qualifications for title I lending status, which require insurance of lending institutions by the Federal government. The Secretary of HUD is given wide discretion in applying the statute. 12 U.S.C. § 1703(a) (1976 & Supp. III 1979).

251 A risk of imprudent loans which are not repaid can subject the lender to financial penalties imposed by the Bank:

> The conferees intend that where the Bank determines that a pattern of 'bad loans' is developing in a given area, with certain lenders or particular technologies, the Bank should impose a repayment requirement similar to the one contained in Section 513(3). However, the Bank should consider appropriately the potential chilling effect any such terms and conditions may have on participation by lenders in the solar program. Any such requirements should not be adopted generally on a nationwide basis, but rather should be applied to a specific area, lender or technology.

CONFERENCE REPORT, *supra* note 185, at 285.

252 12 U.S.C.A. § 3602(a) (1980). Eligible utilities must be financing pursuant to title II of NECPA or meet qualifications designated by the Board. CONFERENCE REPORT, *supra* note 185, at 279.

utility lenders, an unlimited amount of conservation funds may be passed through utility lenders.[253] In addition, the Bank can utilize its secondary-market financing authority to purchase loans for solar energy and conservation purposes made by utilities.[254]

As a financing tool, the participation of various lending institutions builds maximum flexibility into Bank delivery mechanisms. For example, Bank-subsidized utility loans can be employed to target conservation and solar improvement to the hard-to-reach urban rental stock. On the other hand, using village or native Alaskan corporations as lenders of Bank-subsidized funds is a vital means to finance renewable energy investments in remote Eskimo villages, thus providing community energy technologies to sustain threatened cultures.[255] The genius of the Bank is that it accommodates virtually every credit situation, geographic location, and individual variation through existing financial institutions.

For the purpose of guaranteeing the integrity of federal subsidies, promoting quality assurance, and protecting participating consumers, safeguards are designed into the application, financing, and operation stages of Bank-financed improvements. A residential borrower must be told about the availability of, and a commercial borrower must present the results of, an energy audit as a prerequisite to Bank financing.[256] As a protection for low-income grant applicants, a lender cannot require information regarding current debts, property ownership, or other information related to credit status.[257] Moreover, no lender is allowed to set a minimum loan requirement of more than $600 whenever a borrower requests a loan term of less than five years.[258]

Warranties are required for all financed program measures. For conservation improvements, the manufacturer, supplier,

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253 12 U.S.C.A. § 3615(a)(1) (1980).

254 Energy Security Act of 1980, Pub. L. No. 96-294, § 531 (1980) (amending 12 U.S.C.A. § 1723h (1980)).

255 *See* Ferrey, *In Thrall to Oil, Eskimoes Lose Their Way,* L. A. TIMES, July 6, 1980, § IV, at 3, col. 1.

256 12 U.S.C.A. §§ 3612(a)(5)-(6) (1980).

257 CONFERENCE REPORT, *supra* note 185, at 287.

258 *Id.* at 284. Also, the Bank may specify no security requirements for "small" conservation loans if such requirements would prohibit low-income families from participation. *Id.*

and installer must each provide a minimum one-year, written, full warranty.[259] For solar improvements, written warranties specifying a minimum of three years on manufacture and a minimum of one year on supply and installation must be provided.[260] The Board retains discretion to require longer warranties.[261]

In addition, the Board can require the installer to conduct an on-site inspection of any solar systems fifteen days prior to the expiration of the installation warranty.[262] This warranty requirement compares to a recently reduced one-year warranty requirement under the RCS program.[263] Finally, on completion of installation, the borrower must certify that completion has occurred and the proceeds of the funds were used for the specified purpose.[264] The requirements of the Equal Credit Opportunity Act probably apply to the Bank loans made through private institutions,[265] but will have a more limited application with regard to utility[266] or government lenders.[267].

These requirements form a protective cocoon around Bank programs which fill gaps in the operation of the retrofit conservation market. This is achieved not by rigid regulation, but by extending the reach of existing financial institutions to serve all segments of the population, particularly those not served by existing federal loan and tax mechanisms. The Bank provides front-end debt capital to all types of consumers. It facilitates the competitive employment of independent auditors, manufacturers, suppliers, installers, and lenders. Most importantly, the Bank complements, rather than duplicates or usurps, the existing marketplace. Unique among government-financed energy intitiatives, the Bank promises to return several times over its

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259 12 U.S.C.A. § 3612(a)(2)(A) (1980). A supplier can satisfy his warranty obligation by an assignment of the manufacturer's warranty. CONFERENCE REPORT, *supra* note 185, at 286.

260 12 U.S.C.A. § 3613(a)(2)(A) (1980).

261 CONFERENCE REPORT, *supra* note 185, at 287.

262 *Id.*

263 Energy Security Act of 1980, Pub. L. No. 96-294, § 542(b) (1980) (amending 42 U.S.C.A. § 8213 (1980)).

264 CONFERENCE REPORT, *supra* note 185, at 284.

265 15 U.S.C. § 1691 (1976).

266 Loans made by regulated utilities under a state's auspices will be exempt from the Act only if the state law is comparable to, or more strict than, the Equal Credit Opportunity Act. 15 U.S.C. § 1692d(g) (1976). Thus, the consumer should not suffer in this situation.

267 Loans made by government entities are exempt from the Act in certain situations. 15 U.S.C. §§ 1692(c)(1)-(3) (1976).

investment in the form of greater American energy self-sufficiency, a vigorous market, and a more equitable distribution of energy conservation.

V. Conclusion: The Solar Waltz

This remarkable progeny is at risk of being stillborn. After a vigorous and enthusiastic beginning, the Bank, along with dozens of other federal programs, faces an unsure future in the Reagan Administration. The politics engulfing the Bank are a microcosm of the new economic spirit which exists in Washington. Yet, in many respects, the success of the Bank is a test of the new administration's pledge to let the market work.

In its first few months of operation under the Carter Administration, the Bank began vigorously. Top executive staff was appointed, appropriation of $122.5 million for fiscal year 1981 was secured,[268] and the drafting of regulations commenced. Under the statute, final regulations for the single-family housing stock were due by December 27, 1980, with regulations for multi-family, commercial, and agricultural sectors due before March 27, 1981.[269]

In a somewhat unusual practice designed to meet these deadlines, the Bank elected to promulgate interim final regulations on single- and multi-family housing,[270] adopting a minimum sixty-day comment period.[271] No HUD regulation, including final Bank regulations, can be published in the Federal Register

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268 The initial $125 million appropriation for fiscal year 1981 was subject to a subsequent across-the-board 2 percent decrease in appropriations. Since a ceiling of $100 million is authorized for solar purposes in fiscal year 1981, at least $22.5 million (and as much as $122.5 million) is required to be expended under the Bank for conservation. 12 U.S.C.A. § 3620(b)(1) (1980).

269 12 U.S.C.A. § 3618 (1980). A period of 180 days from enactment was allowed for the promulgation of final regulations for the single-family housing stock, and a period of 270 days was allowed for the promulgation of all other Bank regulations. However, the Bank chose to promulgate single-family and multi-family regulations together under the 180-day deadline.

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> Interim or temporary rules are regulatory documents that are effective immediately for a short or definable period of time. They have the same effect as a final rule in that they amend the CFR and give an effective date. However, in issuing an interim or temporary rule, the agency often asks for public comment. After the comment period expires, the agency considers adjustments to the interim or temporary rule before issuing the final rule.

Federal Register, Document Drafting Handbook, § 1.4(b)(2).

271 A minimum 60-day comment period is required by Executive Order 12044. 3 C.F.R. 12044 (1979).

prior to a period for congressional review of fifteen legislative days.[272] Not only was the Bank's request for waiver of this requirement denied by Republican members of Congress, but the congressional holiday recess tolled the running of these fifteen legislative days until after the Reagan inauguration, thereby stranding the proposed regulations on the Hill for over one and one-half months before they were eligible to be published.

The preamble to the Bank's proposed regulations sets the standards for implementing an extremely complex statute: "To encourage the use of proven technology but not to 'commercialize' new technologies, to be compatible with private sector practices rather than intrusive, and to accomplish these goals with a minimum of structure and bureaucratic growth."[273] Because of the Bank's complexity and its relatively small fiscal year 1981 appropriation, the regulations adopt two guiding conventions. First, the scope of the Bank during its first year of operation is trimmed. Solar energy loans are limited to active, passive, and earth-sheltered homes; photovoltaic, wind, and wood-burning appliances are not eligible for single-family application.[274] Bank funds will not be employed in the secondary finance market and no solar energy loans will be made directly to builders.[275]

Second, the regulations attempt to standardize the provision of subsidized benefits. With one exception, the maximum statutory subsidy is as follows: for conservation loans, those earning between 80 and 120 percent MAI can receive subsidies equal to 15 percent of the first $700 expenditure, and 30 percent of the remaining $1800.[276] This equates the value of the initial subsidy block with the subsidy embodied in the residential tax credit. The regulations lower the maximum single-family income-eligibility limit for loans from 150 percent MAI to 120 percent MAI.[277] The same income limitations which restrict

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272 42 U.S.C. §§ 3535(o)(2)-(3) (Supp. III 1978).

273 Proposed HUD Regulations, *supra* note 197, preamble, at iii (proposed 24 C.F.R. §§ 1800 *et seq.*).

274 *Id.* at 29 (proposed 24 C.F.R. § 1815.25).

275 *Id.* at 26-27, 29 (proposed 24 C.F.R. §§ 1825.10, 1820.30).

276 *Id.* at 44-46 (proposed 24 C.F.R. § 1820.40).

277 *Id.* at 39-40 (proposed 24 C.F.R. § 1820.30(a)(2)). There is no income limit imposed on owners of rental multi-family buildings in acknowledgement of the difficulty in reaching this segment of the housing stock.

owners and tenants of single-family dwellings making Bank-subsidized conservation improvements apply to shareholders of housing cooperatives and condominium associations.[278]

For solar improvements financed by Bank loans, the maximum subsidy ceilings for each income group are, with two exceptions, as follows: (1) earth-sheltered dwellings which do not also contain a passive solar system can receive no more than one half the maximum passive solar subsidy;[279] and (2) solar hot-water systems can receive a maximum subsidy significantly less than the maximum available for active or passive space-heating systems.[280] Active solar systems are available only to those earning less than 80 percent MAI, while no such restrictions accompany passive design.[281] A partnership or corporation seeking a Bank solar loan is deemed to have income in the highest bracket established in the Act and thus statutorily barred from assistance after 1983.[282] For new solar or earth-sheltered residences, Bank subsidies may only be realized as interest subsidies and not as a reduction of principal.[283]

For solar improvements, financial assistance is denied any applicant who has any federal assistance pursuant to HUD section 8,[284] section 235,[285] section 312;[286] or in the form of Indian housing;[287] or pursuant to the Farmers' Home Administration

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278 *Id.* (proposed 24 C.F.R. § 1820.30(a)). Subsidized assistance to individual residents of housing cooperatives is available only if the cooperative corporation has given prior written consent. *Id.* (proposed 24 C.F.R. § 1820.25).

279 *Id.* at 30-31 (proposed 24 C.F.R. § 1815.30(a)). For example, a single-unit building with passive solar space heating can receive a maximum Bank subsidy of $5000, while a single-unit earth-sheltered home can receive no larger subsidy than $2500.

280 *Id.* Space heating systems are eligible to receive a subsidy between $2500 and $5000 per unit (depending on the number of units in the building), while solar water heating systems are only eligible to receive a subsidy of between $1800 and $2100 per unit.

281 *Id.* at 28-29 (proposed 24 C.F.R. § 1815.20(b)). However, passive solar domestic water heaters alone are also restricted to those earning less than 80 percent MAI. These restrictions do not apply to recipients in Puerto Rico, where because citizens pay no federal tax, federal solar tax credits are inapplicable.

282 *Id.*, preamble, at xxii, 28-29 (proposed 24 C.F.R. § 1815.20(b)).

283 *Id.* at 19-20 (proposed 24 C.F.R. § 1810.1(b)(3)). This is to discourage arrangements in which the builder effectively captures a lump-sum principal reduction subsidy by raising the price of a new solar home by the amount of the subsidy realized by the purchaser. With interest subsidies, the laon must be carried to term to realize the full subsidy.

284 42 U.S.C. § 1437f (1976).

285 12 U.S.C. § 1715z (1976).

286 42 U.S.C. § 1452(b) (1976).

287 42 U.S.C. §§ 1437 *et seq.* (1976).

section 502[288] and 504[289] programs.[290] Additionally, for conservation improvements, an applicant is ineligible if he has an outstanding commitment from DOE's Low-Income Weatherization Program.[291]

For either solar energy or conservation, subsidies cannot reduce interest rates below zero.[292] However, zero interest would still be a particularly attractive loan provision for low-income borrowers. In an important compromise, prepayment of interest is not permitted on loans assisted by local tax-exempt funds.[293] For such loans, the Bank subsidy can still be realized in the form of reduction of loan principal.

The financial transactions of Bank funds will be accomplished through allocation cycles during which lenders can "reserve" up to $250,000 of Bank funds in $25,000 increments.[294] Oversubscription and a consequent failure to lend results in the loss of an earnest money fee posted by the lender.[295] To spread the Bank's reach and to promote market competition, the Bank by regulation[296] widens the scope of eligible lenders to include:

(1) any HUD Title I[297] or Title II[298] lenders;
(2) NECPA Title II lenders;[299]

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288 42 U.S.C. §§ 1472, 1490a (1976).

289 42 U.S.C. § 1474 (1976).

290 Proposed HUD Regulations, *supra* note 197, at 26-27 (proposed 24 C.F.R. § 1815.10).

291 42 U.S.C. § 6863 (Supp. III 1978). Since the weatherization program makes neither grants nor loans, but provides direct conservation services with no repayment obligation, it is arguable that it is not possible to have an "outstanding commitment" pursuant to the weatherization program. Thus, receipt of weatherization assistance would not disqualify a recipient of Bank subsidies.

292 Proposed HUD Regulations, *supra* note 197, at 29, 44-46 (proposed 24 C.F.R. §§ 1815.30, 1820.40). Loans must be of a similar nature as those normally offered by the lender. *Id.*, preamble, at xiii, xxviii (proposed 24 C.F.R. § 1810.30).

293 *Id.* at 24 (proposed 24 C.F.R. § 1810.40). Initially, the Treasury Department attempted to prohibit Bank subsidies for any loans provided through tax-exempt funds, such as revenue or mortgate bonds. This would have compromised incentives developed at the local level with tax-preference financing. The eventual compromise prohibits only prepayment of interest on such loans.

294 *Id.* at 49 (proposed 24 C.F.R. § 1825.5). A maximum of 10 percent of annual funds may be reserved by utilities. *Id.* (proposed 24 C.F.R. § 1825.5(e)). Builders can reserve a Solar Bank commitment on behalf of their eventual purchaser. *Id.* at 50-51 (proposed 24 C.F.R. §§ 1825.10(b), (e)).

295 *Id.* at 50 (proposed 24 C.F.R. § 1825.5(e)).

296 *Id.* at 1-14 (proposed 24 C.F.R. § 1800.10).

297 12 U.S.C. § 1703 (1976).

298 12 U.S.C. § 1709(b)(1) (1976).

299 42 U.S.C. §§ 8211 *et seq.* (Supp. III 1978).

(3) any existing local government with a HUD-approved lending program;[300] and
(4) any HUD section 312 lender.[301]

As currently defined, the list of eligible lenders will exclude most rural electric cooperatives which engage in conservation lending programs. This is significant in that rural electric cooperatives do not enjoy the advantage of being able to market tax-exempt debt securities, as do municipal utilities. On balance, the Bank's proposed regulations demonstrate a profound sensitivity toward the Bank's mission. By refining the targeting of Bank loans and grants to those least served by the existing fabric of federal and state loan and tax credit incentives, the Bank positioned itself to mend the existing holes in credit markets. The Bank regulations accomplish this with a minimum of regulation and bureaucracy.

Despite widespread bipartisan support among legislators, industry, and consumer groups, the future of the Bank was placed in doubt after the election of President Reagan. The Bank was at a particularly delicate stage of development at the time of Presidential transition because of five factors: (1) the executive president and two vice-presidents of the Bank had been installed but not yet confirmed by the Senate; (2) the two advisory boards were permanently installed, but had not yet ample opportunity to exercise a formative role; (3) permanent staff was in the process of being hired; (4) operative regulations were in draft, not in final form; and (5) $122.5 million in appropriations for fiscal year 1981 were in-hand, but a mechanism for disbursement was still a few months away.

As a result, on January 20, 1981, the embryonic development of the Bank was stunted. Neither the president nor the vice-presidents of the Bank, all of whom serve at the discretion of the President, were asked to remain. These positions are still vacant. Moreover, the Reagan Administration's hiring freeze, retroactive to November 4, 1980, wiped out the in-progress hiring for many of the Bank's approximately two dozen staff positions, and the Bank's consultants were terminated. The staff

300 42 U.S.C. §§ 4301 *et seq.* (1976); 24 C.F.R. § 570.3 (1980).
301 42 U.S.C. § 1452(b) (1976).

void renders it extremely difficult for the Bank to comply with pending statutory obligations for commercial and agricultural sectors,[302] let alone to establish the sophisticated subsidy mechanisms and relationships necessary for Bank operations. The Office of Management and Budget has publicly announced that it plans not to issue any final Bank regulations.[303]

The dramatic across-the-board hiring freeze, in its debilitating impact on the Bank, illustrates the harsh effect of indiscriminate government action. While no doubt there are many places in operational government programs where personnel cuts are warranted, a freeze on new hiring for programs not yet staffed is devastating. Certainly a program as modest and cost-effective as the Solar Energy and Energy Conservation Bank deserves better. As a consequence, the Bank, with limited staff, may have to initiate operation on a demonstration project in a few carefully selected states.

In an atmosphere of profligate budget slashing, the future funding of any domestic program is in doubt. At confirmation hearings, HUD Secretary Samuel Pierce indicated that the Bank "under present thinking . . . is not necessary."[304] While the Bank's budget for fiscal year 1981 is already appropriated, unspent portions could be recalled by a Presidential rescission proposal if approved by both houses of Congress.[305] The Reagan Administration is currently seeking a complete rescission.[306] As a practical matter, administration failure to support and staff the Bank can exert an equally debilitating effect.

It is difficult to imagine the Bank not complementing the goals of any national energy policy, Republican or Democratic, conservative or liberal. At a time of double-digit inflation fueled in large part by energy waste, the Bank promotes cost-effective

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302 Regulations for multifamily, commercial, and agricultural lending are due in final form by March 27, 1981. 12 U.S.C.A. § 3618 (1980).

303 OFFICE OF MANAGEMENT AND BUDGET, AMERICA'S NEW BEGINNING: A PROGRAM FOR ECONOMIC RECOVERY 4-24 (1981).

304 *Hearings on the Nomination of Samuel Pierce Before the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 2d Sess. (1981) (Statement of Samuel R. Pierce).

305 The President may propose either outright rescission, or he may propose that a budget authority be reserved from obligation in the current year. In either case, Congress must approve such rescission or reservation in a rescission bill, which must be passed within 45 days after the President's proposal is transmitted to Congress. Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-1407 (1976).

306 OFFICE OF MANAGEMENT AND BUDGET, *supra* note 303.

conservation. At a time of significant unemployment, the Bank creates more jobs per dollar expended than any other form of energy investment.[307] At a time of increasing balance-of-payments deficits, the Bank conserves imported fuel by employing domestic conservation and solar resources. At a time of increasing world insecurity and tension, the Bank, by reducing American dependence on OPEC oil, mends the Achilles heel of national defense. The Bank promotes the best investments possible in the security of America's future. And, it does so in a manner which facilitates, rather than regulates, existing market mechanisms and institutions. Even more, it ensures the reach of the market to groups and housing types that otherwise are left out in the cold. Unlike most other elements of national energy policy, the Bank is cost-effective and equitable. It is not only responsible energy policy, but intelligent social policy and good urban policy.

The Bank should escape simplistic mortality as a consequence of general budgetary cuts. Resorting to a cleaver to make domestic program cuts, which done properly require a surgeon's careful incision, is an indication of legislative policy run amok. Already the national coalition which labored for two years to create the Bank is mobilized to defend this new program. Administration policy regarding this small, highly visible program constitutes a major legislative challenge for the Ninety-seventh Congress. Moreover, it is a test of the Reagan Administration's commitment to an equitable energy future in which the market is allowed to work for all segments of the population.

307 *See* ENVIRONMENTALISTS FOR FULL EMPLOYMENT, JOBS AND ENERGY (1977); CALIFORNIA PUBLIC POLICY CENTER, JOBS FROM THE SUN (1978).

ARTICLE

THE STRUCTURE OF CHOICE IN THE HOUSE OF REPRESENTATIVES: THE IMPACT OF COMPLEX SPECIAL RULES*

STANLEY BACH**

The House Rules Committee, through its power to report special rules under which legislation may be considered on the floor, is chiefly responsible for regulating the flow of House business. One aspect of this responsibility involves the determination of the extent to which measures may be amended once they are brought to the floor. Formerly, legislation was considered either under an open rule, which placed no restrictions on amendments, or under a closed rule, which limited amendments to those proposed by the reporting committee. In recent years, however, a third option, which Dr. Bach calls the "complex rule," has come into use. Dr. Bach shows how the availability of this tool has permitted the Rules Committee a new degree of discretion in choosing which legislative alternatives will be presented to the House. Dr. Bach goes on to show how this discretion has been exercised — on some occasions in the interest of legislative efficiency, and on others, in the interest of partisan advantage.

Introduction

Throughout this century, the Committee on Rules has been instrumental in determining the order of legislative business on the floor of the House of Representatives. In contemporary practice, the Committee reports a resolution, known as a "rule" or special rule, that usually makes "in order" a motion that the House resolve itself into Committee of the Whole to debate and amend a specific bill or other measure.[1] Such a resolution also

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* This article is based upon a paper by the author entitled The Structure of Choice in the House of Representatives: Recent Uses of Special Rules, delivered at the 1980 Annual Meeting of the American Political Science Association, Washington, D.C., Aug. 28-31, 1980; copyright 1980, American Political Science Association. Used with permission.

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1 Special rules are reported for other purposes as well — for example, to waive points of order that otherwise might arise during consideration of general appropriation bills and conference reports, to dispose of Senate amendments to House measures, and to provide for consideration of measures in the House or in the House as in Committee of the Whole.

may waive the application of certain House rules on which Members otherwise might base points of order against consideration of the bill, or one of its provisions, or against an amendment that is expected to be offered. Each special rule is presented to the House in the form of a House resolution that is itself subject to amendment, adoption, or rejection by majority vote. It is by means of these special rules that most significant measures come before the House for consideration.

In addition to their impact on the order of business, special rules may establish special sets of parliamentary conditions for considering individual bills and resolutions. In this respect, the most important, and frequently the most controversial, provisions of special rules are those governing the amending process in Committee of the Whole. The most common distinction is one that distinguishes between open and closed rules. An open rule permits Members to offer all amendments that do not violate established House rules and precedents — for example, the requirements that an amendment must be germane and that it must be offered to the specific part of the measure that it would amend. A closed rule precludes all amendments, or all amendments except those offered at the direction of the committee or committees that recommended the measure's passage. However, this distinction does not fully capture the true variety of special rules, and the rich diversity of their provisions, that have structured the deliberations of the House of Representatives in recent years.

I. The Emergence of Complex Rules

In addition to open and closed rules, with the waivers of House rules that frequently accompanied them, there emerged during the decade of the 1970's an increasing number of special rules — often on the most controversial and important measures — that were neither open nor closed. These rules have been considerably more complex in their provisions, and have reflected a deliberate attempt by the Rules Committee to arrange and even define the alternatives to be presented to the House during the course of the amending process in Committee of the Whole. In some cases, complex rules have expanded the range of permissible floor amendments beyond those that would have

been in order under the normal operation of House rules and precedents. In other cases, these rules have restricted the amending process, short of imposing closed rules, to permit certain non-committee amendments but prohibit others that otherwise would have been in order. Still other complex rules do not fit comfortably within either of these categories — for example, by combining elements of both or by attempting to organize the amending process without directly affecting the amendments that might be proposed.[2]

The frequency with which such complex rules have been reported by the Rules Committee has increased, in both absolute and relative terms, since the late 1960's. Their number increased tenfold from the Ninetieth through the Ninety-sixth Congress, from four in 1967-68 to forty-three in 1977-78 and forty in 1979-80. Only 2 percent of the special rules reported during the Ninetieth Congress for considering measures in Committee of the Whole were complex; this figure increased to the 12-13 percent range during the Ninety-third and Ninety-fourth Congresses, and exceeded 20 percent during the Ninety-fifth and Ninety-sixth Congresses.[3]

Despite this impressive increase, complex rules continue to constitute only a small minority of all special rules reported.[4] Yet their numbers belie their importance in two crucial respects.

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2 Because some complex rules have combined restrictive and expansive provisions, the focus of later sections of this Article is on the restrictive and expansive uses of complex rules. Although many of the examples cited will be characterized as being primarily "restrictive" or primarily "expansive," some of the complex special rules discussed in these sections were, in fact, restrictive in some respects but expansive in others.

3 Data for the 90th through 92d Congresses are based upon an inspection of the texts of all special rules reported by the House Rules Committee. Data for the 93d through 96th Congresses are based, first, upon the descriptions of special rules granted, as these descriptions appear in the final Legislative Calendar of the Rules Committee for each of these Congresses, and, second, upon an examination of the texts of all complex special rules reported by the Rules Committee and considered by the House. Data have not been compiled for Congresses preceding the 90th. *See generally* J. A. ROBINSON, THE HOUSE RULES COMMITTEE (1963). Robinson defines a closed rule as one that allows "no amendments, certain amendments, or only those offered by the committee with original jurisdiction." *Id.* at 43-44. While the scope of this definition would be broad enough to include some complex special rules, Robinson focuses exclusively on truly closed rules. His treatment of this subject supports the inference that special rules restricting amendments were either unknown or rare during the period he studied.

4 Including special rules for other purposes, *see* note 1 *supra*, complex rules as a percentage of all special rules increased from 10 percent during the 93d and 94th Congresses to 17 percent during the 95th Congress and 15 percent during the 96th Congress.

First, they reflect an expansion of the range of options available to and exercised by the Rules Committee. Second, they have been the cause of much of the criticism directed in recent years at the Committee and at the groundrules for considering measures on the House floor.

Half of the complex special rules reported from 1967 through 1980 were primarily expansive in character.[5] These rules frequently made in order one or more specific amendments, other than committee amendments, and often waived points of order that otherwise could have been raised, on grounds such as germaneness, against the amendments made in order. During the Ninetieth, Ninety-first, and Ninety-second Congresses, all such rules provided that part or all of the text of one or more other measures could be proposed as amendments to the measure under consideration or to the committee amendment in the nature of a substitute for the measure. During subsequent Congresses, the types of specific amendments made in order by complex rules have become more varied — including, for example, particular amendments printed in certain editions of the *Congressional Record,* amendments on designated subjects if offered by named individual Members, and even amendments quoted verbatim in the special rules themselves.

Most other complex rules have been restrictive in one respect or another.[6] In a few cases, such rules have closed part of a measure to all but committee amendments. More commonly, restrictive complex rules have permitted only committee amendments and certain other amendments: amendments directed to certain provisions of the measure, amendments addressed to certain subjects, or amendments specifically identified in the special rules. Less restrictive rules have permitted all germane amendments to be offered, but only if printed in the *Congressional Record* by a fixed date or by a date one or more days before consideration of the measure. Special rules also have been reported that combine two or more of these restrictive features or both restrictive and expansive features. Data on the varieties of complex rules appear in Table 1.

In short, the construction of special rules has increasingly become an act of political and parliamentary craftsmanship.

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5 *See* Table 1 *infra.*
6 *See* Table 1 *infra.*

TABLE 1

VARIETIES OF COMPLEX SPECIAL RULES REPORTED BY THE HOUSE RULES COMMITTEE: 90TH CONGRESS - 96TH CONGRESS

	90th		91st		92d		93d		94th		95th		96th	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Part of text closed to all but committee amendments[1]	0	—	4	36	1	7	0	—	3	10	3	7	1	2
Committee amendments and certain other amendments only	0	—	0	—	5	36	2	8	8	26	13	30	15	38
Amendments printed in the *Congressional Record*	0	—	0	—	0	—	0	—	2	6	4	9	1	2
Amendments on certain subjects	0	—	0	—	0	—	0	—	1[5]	3	0	—	3	8
Amendments to certain provisions[2]	0	—	0	—	3	21	2	8	1	3	1	2	0	—
Amendments specifically identified in special rules	0	—	0	—	1[5]	7	0	—	4	13	8	19	9	22
Combination	0	—	0	—	1	7	0	—	0	—	0	—	2	5
Other restrictive special rules	0	—	1	9	0	—	0	—	1	3	0	—	2	5
Specific amendments made in order[3]	4[4]	100	6[4]	55	8[4]	57	19[6]	73	11	35	20	47	16	40
Combination	0	—	0	—	0	—	5	19	8	26	7	16	6	15
Total number of complex rules	4	100	11	100	14	100	26	100	31	100	43	100	40	100

[1] The text being either the text of a measure as introduced or the text of a committee amendment in the nature of a substitute to be considered as an original measure for the purpose of amendment.

[2] Certain provisions of a measure or a committee amendment in the nature of a substitute to be considered as an original measure for the purpose of amendment.

[3] Also may include restrictions on amendments to the specific amendments made in order.

[4] All provide for part or all of the texts of one or more other measures to be in order as amendments to measures or committee substitutes therefor.

[5] Committee amendments not in order.

[6] All but 5 provide for the texts of one or more other measures to be in order as amendments to measures or committee substitutes therefor.

Sources: See note 2 *supra.*

Note: This table includes data only on special rules for initial consideration in Committee of the Whole of measures other than general appropriation measures.

Through expansive provisions, the Rules Committee can bring to the floor in the form of an amendment a proposal which otherwise would be out of order and be precluded from consideration. Through restrictive provisions, the Committee can limit the aspects of a measure that Members can address through amendments and define the legislative alternatives among which Members may choose. In reporting a complex rule, rather than an open or closed rule, the members of the Rules Committee are able to play a much more discriminating part in shaping outcomes by controlling options.

As might be expected, complex rules have aroused more controversy and opposition than other special rules. The 140 complex rules reported between 1973 and 1980 constituted 16 percent of all the special rules providing for initial floor consideration of measures in Committee of the Whole. But these complex rules accounted for one-fourth of the special rules amended by the House, more than 30 percent of those defeated (or referred) or opposed unsuccessfully by more than 100 Members on roll-call votes, and almost one-half of the special rules on which the previous question had to be ordered by roll-call vote. Thus, Members of the House have been more likely to resist complex rules than open ones. Some data on the disposition of special rules are presented in Table 2.[7]

Although relatively more controversial than open rules, few complex rules were ultimately amended or defeated — of the 126 such rules considered between 1973 and 1980, only four were modified substantially on the floor and only five were rejected by the House. During this period, 93 percent of the complex rules on which the House voted were adopted without amendment, and 84 percent of the time the previous question was ordered by voice vote. Of the complex rules that were adopted as reported, nearly one in seven was subjected to an attempt at amendment in the form of a roll-call vote on ordering the previous question. But the roll-call votes on the previous question that did take place are striking. Fourteen of the twenty votes were party votes — a majority of Democrats opposed a majority of Republicans — and in twelve cases (more than half of the votes on the previous question), five or fewer Republicans

7 *See* Table 2 *infra* and sources cited therein.

TABLE 2
DISPOSITION OF ALL SPECIAL RULES REPORTED BY THE HOUSE RULES COMMITTEE:
93D CONGRESS - 96TH CONGRESS

	93d		94th		95th		96th	
	#	%	#	%	#	%	#	%
Special rules adopted as reported	236	91	285	95	220	86	218	84
by voice vote	173	67	161	53	100	39	125	48
by division vote	1	—	1	—	1	—	1	—
by roll call vote	62	24	123	41	119	46	92	36
Special rules amended and then adopted	6	2	1	—	7	3	2	1
Special rules defeated or referred	9	3	3	1	2	1	2	1
Special rules laid on the table or not considered	8	3	12	4	27	11	37	14
Special rules adopted with more than 100 Members voting in opposition	11	4	19	6	18	7	22	8
Special rules on which previous question ordered by roll call vote	5	2	6	2	7	3	15	6
Total number of special rules reported	259	100	301	100	256	100	259	100

Sources: See note 2 *supra.*

voted in support of the rule as reported. The minority party was unanimous in its opposition on five occasions and suffered only one defection in each of five others.[8] After the initial organizational votes at the beginning of each Congress there are few, if any, other sets of votes on which either party can achieve such unity.

The explanation for these data lies in the fact that complex special rules have evolved in response to a series of developments within the House that have created both new institutional needs and new political opportunities.

One of the most important and visible causes of this evolution has been the frequency of multiple referrals in cases of jurisdictional overlap. Many measures do not fall solely within the jurisdiction of one of the House's twenty-two standing committees. Twice during the 1970's, the House created Select Committees on Committees and directed them to re-examine the existing division of labor among standing committees, as

8 *See* Table 2 *infra* and sources cited therein.

well as other aspects of the committee system. Neither effort, however, was conspicuously successful.

The 1973-74 Select Committee, under the leadership of Representative Bolling of Missouri, proposed fairly major changes in committee jurisdictions. Instead, the House ultimately adopted an amended version of an alternative plan, developed initially within the Democratic Caucus, that focused more on organizational and procedural than jurisdictional change.[9] The second Select Committee, created in 1979 and chaired by Representative Patterson of California, concentrated on the management of energy legislation, and proposed the creation of a standing Committee on Energy after finding that "as many as 83 House committees and subcommittees had considered aspects of energy policy during the 95th and 96th Congresses."[10] The House accepted instead a substitute proposal that made fewer jurisdictional shifts but that emphasized the energy-related responsibilities of the Committee on Interstate and Foreign Commerce (renamed the Committee on Energy and Commerce).[11]

It is arguable, however, whether the jurisdictional problems of the House could be resolved fully, much less permanently, by any reorganization scheme, no matter how carefully constructed. The shape, scope, and salience of policy issues change over time, and the set of jurisdictional alignments that are appropriate today soon will be overtaken by events. Recognizing this dimension of the problem, the Bolling Committee did more than recommend changes in existing committee jurisdictions. It proposed, and the House adopted, procedures for referring measures to two or more committees — in a joint, sequential, or split manner — to deal with jurisdictional ambiguities.[12]

Before adoption of the Committee Reform Amendments of 1974, multiple referrals had not been authorized by House

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9 On the history of the Bolling Committee, *see* R. H. DAVIDSON & W. J. OLESZEK, CONGRESS AGAINST ITSELF (1977).

10 H.R. REP. No. 96-741, 96th Cong., 2d Sess. 7 (1980).

11 H.R. RES. 549, 96th Cong., 2d Sess., 126 CONG. REC. H2128-62 (daily ed. Mar. 25, 1980).

12 H.R. REP. No. 93-916, 93d Cong., 2d Sess. 59-60 (1974). In the case of a joint referral, a measure is referred in its entirety to two or more committees for concurrent consideration. In the case of a sequential referral, a measure is referred to one committee and, once reported by that committee, then is referred to a second committee, normally for a specified period of time. In the case of a split referral, different parts of a measure are referred to different committees, with each committee bearing responsibility only for those parts of the measure within its jurisdiction.

rules.[13] In its report, the Bolling Committee described the situation it proposed to change:

> Under the precedents, bills are not divided or referred jointly even though they may contain matters within the jurisdiction of several committees. . . . In the absence of some special arrangement . . . the committee to which a bill is referred receives and exercises jurisdiction over the entire bill. Other committees can ordinarily do nothing to assert control over those portions of such bills in which they have jurisdictional interest or to remove those parts that encroach on their jurisdiction.[14]

Since clause 5 of House Rule X has been modified to permit multiple referrals,[15] their number has grown rapidly. During the Ninety-fourth Congress, 1,161 measures (6 percent of all measures introduced) were referred to more than one House committee and thirty-eight multiply-referred measures were reported. During the Ninety-fifth Congress, both the number and percentage of multiply-referred measures increased: 1,855 measures (more than 10 percent of all measures) were referred in this manner, of which 84 were reported. During the first session of the Ninety-sixth Congress alone, sixty-four multiply-referred measures were reported by House committees.[16]

Whatever the advantages of multiple referrals, they have created problems for the Rules Committee and the House. In procedural terms, mechanisms have had to be perfected that allow the members of two or more committees to share influence over the control of floor debate and the course of the amending process on measures they have considered. In policy terms, choices have had to be made on the floor between conflicting recommendations of two or more presumably expert committees. One means of resolving these problems — or at least facilitating their resolution — has been through special rules.

Over time, the impact of multiple referrals has come to be reflected in the provisions of special rules governing the division

13 H.R. Res. 988, 93d Cong., 2d Sess., 120 Cong. Rec. 34469-70 (1974).

14 H.R. Rep. No. 93-916, *supra* note 12, at 56.

15 For the most recent published version of the House Rules, *see* H.R. Doc. No. 96-398, 96th Cong., 2d Sess. (1981).

16 Data on multiple referrals during the 94th and 95th Congresses are taken from the final report of the Patterson Committee, H.R. Rep. No. 96-866, 96th Cong., 2d Sess. 442 (1980). Data for the 96th Congress were provided by the Office of Automated Information Services of the Congressional Research Service.

and control of time for general debate in Committee of the Whole. (See Table 3.) All the special rules of the Ninetieth Congress assigned control of the time for general debate to one committee only. During the next three Congresses, other arrangements were made in a total of ten instances — generally to reflect the legitimate interest of one committee in a measure referred exclusively to another. Since then, control of time by other than one committee has become more common: such provisions were included in nineteen special rules of the Ninety-fourth Congress, twenty-seven of the Ninety-fifth, and twenty-five reported during the Ninety-sixth.[17] In a few instances, part of the time for general debate has even been placed under the control of individually named Members of the House. For instance, the special rule that permitted consideration of amendments on the oil depletion allowance, at the direction of the Democratic Caucus, gave partial control of general debate to proponents of two of the amendments.[18] Only a small minority of special rules provide for control of general debate by more than one committee, but the increasing number of such rules is a noticeable response to the development of multiple-referral practices.[19]

Coping with the impact of multiple referrals on the amending process has proven to be a more complicated task than allocating time for debate, and the Rules Committee has reported complex rules with a variety of provisions for considering amendments proposed by two or more committees. The provisions of special rules for multiply-referred measures may depend upon both the type of referral — split, sequential, or joint — and the form of committee action. In the case of a bill referred jointly to two committees, for example, one or both of the committees may report "clean" bills or may report the original bill with either an amendment in the nature of a substitute or a series of separate amendments. Special rules for considering such bills will vary accordingly. But the problems, and the manner in which the Rules Committee proposes to resolve them, also can have substantive implications. If two committees report

17 *See* Table 3 *infra* for data on control of time for general debate.

18 H. RES. 259, 94th Cong., 1st Sess., 121 CONG. REC. H4593-600 (daily ed. Feb. 27, 1975) (for consideration of H.R. 2166).

19 *See* Table 3 *infra*.

TABLE 3

CONTROL OF TIME FOR GENERAL DEBATE IN SPECIAL RULES REPORTED BY THE HOUSE RULES COMMITTEE: 90TH CONGRESS - 96TH CONGRESS

	90th		91st		92d		93d		94th		95th		96th	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Control by one committee	183	100	198	98	177	98	220	99	228	92	177	87	170	87
Control by two committees	0	—	4	2	2	1	2	1	12	5	19	9	17	9
Control by three committees	0	—	0	—	0	—	0	—	1	—	4	2	3	2
Control by four committees	0	—	0	—	0	—	0	—	1	—	3	1	3	2
Control in part by designated Members	0	—	0	—	1	1	1	—	5	2	1	—	2	1
Control by other than one committee	0	—	4	2	3	2	3	1	19	8	27	13	25	13
Total number of special rules	183	100	202	100	180	100	223	100	247	100	204	100	195	100

Sources: See note 2 *supra.*

Note: This table includes data only on special rules for initial consideration in Committee of the Whole of measures other than general appropriation measures. The Legislative Calendars of the Rules Committee for the 93d-95th Congresses only identify the Members controlling time for general debate in cases in which such control is by other than one committee. This table reflects the assumption that, when not otherwise stated, general debate was controlled solely by the chairman and ranking minority member of a single committee.

amendments to the same bill, their prospects for success on the floor may be influenced by the time at which and the order in which they can be offered. To some extent, these matters are controlled by well-established precedent, but they also may be affected by the manner in which the special rules are framed.

It is probable also that changes in special rules have been inspired by institutional changes other than the increasing use of multiple referrals — changes that are considerably more difficult to measure. One set of changes has had a significant effect on the Ways and Means Committee. Since 1974, the number of its members has increased substantially, much of its work has been delegated to subcommittees with fixed jurisdictions, and the effective power of its chairman has been reduced. The result has been a Ways and Means Committee that is somewhat more decentralized and less prone to consensual decisions than in the past.[20] In addition, Democratic Caucus rules regarding requests for closed rules have made it at least possible for Ways and Means members to appeal their defeats in committee markup to the Caucus or directly to the Rules Committee and then to the House floor.[21] The Ways and Means Committee has become less likely to request closed rules and the Rules Committee has become less inclined to grant them. But neither the Ways and Means Committee nor the House has been prepared to consider major revenue bills without some restrictions on amendments. Therefore, it has fallen to the Rules Committee, with the advice of Ways and Means, to frame those restrictions. And the use of complex rules for revenue bills may have encouraged other committees to seek similar rules for measures that otherwise would have been considered under fully open or fully closed rules.

More generally, a number of trends lend support to the generalization that coalition-building within committees and in the House has become a more difficult task. The remarkable influx

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20 On recent changes in the Ways and Means Committee, *see* M. K. Bowler, The New Committee on Ways and Means (1976) (a paper prepared for delivery at the 1976 Annual Meeting of the American Political Science Association, Chicago, Illinois); C. E. Rudder, *Committee Reform and the Revenue Process*, in CONGRESS RECONSIDERED 117-39 (L. C. Dodd & B. I. Oppenheimer eds. 1977).

21 MANUAL OF THE HOUSE DEMOCRATIC CAUCUS § M IX (1979), providing that 50 Democratic members may request a meeting of the Caucus at which the Caucus may direct the Democratic members of the Rules Committee to make one or more specific amendments in order as part of a special rule that the Committee is to consider.

of new Members may have weakened or upset shared policy goals and decision-making norms on some committees.[22] The increased autonomy of subcommittees, the impact of the Legislative Reorganization Act of 1970 on committee rules and procedures, the trend toward open meetings, the Democratic Caucus rules governing subcommittee assignments and chairmanships for its members, and the prospect of contested Caucus votes on committee chairmanships — all of these developments may have combined to limit the capacity of committees and committee chairmen to take to the House floor well-drafted bills with broad-based support.[23] In addition, the changing shapes of some issues and the shifting focus of some committees' responsibilities probably have made it more difficult to resolve issues within committee. The impact on food prices of farm policies considered by the Committee on Agriculture and the energy and environmental implications of public lands legislation within the jurisdiction of the Committee on Interior and Insular Affairs are cases in point.

One result of all these developments collectively may have been to increase the number of conflicts decided on the floor rather than in committee, even without regard to the conflicts implicit in multiple referrals. An impressionistic view of the House also suggests that some Republican Members have been making more active use of the floor to press their own alternatives in amendment form, and that some junior Members of both parties are less inclined than their predecessors to defer to the judgment of the standing committees of jurisdiction. One set of figures that is at least consistent with these speculations is the number of record votes that have occurred during the past several Congresses. Even after the initial increase attributable to the provision for recorded teller votes in the Legislative Reorganization Act of 1970, the total number of record votes increased almost 50 percent from the Ninety-third Congress to the Ninety-fifth — from 1,078 during 1973-74 to 1,540 during 1977-78.[24]

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22 With the convening of the 97th Congress, 48 percent of all Representatives are in their first, second, or third term of continuous service. On shared committee goals and norms, *see* R. F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973).

23 These developments are discussed in CONGRESS IN CHANGE: EVOLUTION AND REFORM (N. J. Ornstein ed. 1975); L. N. RIESELBACH, LEGISLATIVE REFORM (1978).

24 A. G. STEVENS, INDICATORS OF CONGRESSIONAL WORKLOAD AND ACTIVITY (Library of Congress, Congressional Research Service Rep. No. 79-159 GOV, 1979).

The import of these observations is to suggest, though not to demonstrate, that a series of interrelated institutional changes have taken place within the House, in addition to multiple-referral practices, that have encouraged the Rules Committee to propose complex special rules — sometimes expanding the range of possible floor amendments, at other times restricting it. But there is a more explicitly partisan dimension to this development as well, which derives from changes in the relationship between the Democratic members of the Rules Committee and the Democratic majority of the House.

The Rules Committee that was condemned during the 1950's for thwarting the will of the House majority came to be characterized during the 1970's as an agent of the House Democratic leadership.[25] Both generalizations are somewhat overstated but they do point to a change of great importance to the House. Although the votes in 1961 and 1963 to increase the size of the Committee did not transform it into a compliant instrument of the leadership, subsequent changes in its membership have created a Committee majority that is prepared to give serious weight to the preferences of Democratic party leaders, when such preferences are expressed.[26] That this goal was a deliberate result of party policy is indicated by the change made in Caucus rules at the beginning of the Ninety-fourth Congress to allow the Speaker to nominate the Democratic members of the Committee, subject to Caucus ratification.[27]

By no means, however, has the Rules Committee merely ratified recommendations for special rules that have been made regularly by party leaders to promote enactment of party policy. First, no assemblage of House Members would be content with such a subservient role. Second, there frequently is no clear party policy to be promoted. Third, congressional leaders hoard their influence and expend it selectively, not routinely. At least since 1910, the members of the Rules Committee have had to strike a balance among their responsibilities to their party, to

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25 For example, compare the discussions of the Committee in W. R. MACKAYE, A NEW COALITION TAKES CONTROL: THE HOUSE RULES COMMITTEE FIGHT OF 1961 (Eagleton Institute, Rutgers Univ.: Cases on Practical Politics, Case No. 29, 1963) with B. I. Oppenheimer, *The Rules Committee: New Arm of Leadership in a Decentralized House*, in CONGRESS RECONSIDERED 96-116 (L. C. Dodd & B. I. Oppenheimer eds. 1977).

26 Oppenheimer, *The Rules Committee*, note 25 *supra*.

27 *Id.* at 99-102.

the House as an institution, to the interests of their constituents, and to their own views of desirable public policy.[28] The manner in which the Democratic members of the Committee now are selected tends to promote a natural congruence among these potentially conflicting responsibilities. The Democratic members generally (but not invariably) cooperate with the Speaker and other party leaders because they share the same goals, not because they feel compelled to do so.

Thus, the construction of particular special rules may reflect partisan motives in addition to the institutional incentives discussed above. The party divisions on some complex rules indicate that, at least in the eyes of Republicans, this possibility has been more than hypothetical.[29]

The content of complex rules has been limited only by the imagination of the Rules Committee members, and the reasons for proposing particular rules have been mixed. The range of their provisions and effects can best be appreciated by examining how such rules actually have been used.

II. Restrictive Uses of Complex Rules

Prior to the recent development of complex rules, it was fairly easy to predict what sort of rule the Rules Committee would report for any particular bill. The prevailing expectation was that most revenue measures reported by the Ways and Means Committee would be considered under closed rules and that most other measures would be considered under open rules. Exceptions were exceptional.

The availability of restrictive complex rules — rules that place some limitations on the amending process, without closing a bill to amendment altogether — has begun to undermine this expectation. Although the number of primarily restrictive complex rules (hereinafter referred to simply as "restrictive rules") has remained rather small, both relatively and absolutely, the Rules Committee has reported such rules often enough to have created different expectations, opportunities, and frustrations.

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28 On these various influences, *see* S. M. Matsunaga & P. Chen, Rulemakers of the House (1976).

29 *See* text accompanying note 8 *supra*.

The traditional case for closed rules on revenue bills usually had two components: first, that these measures were too complicated and too carefully balanced to be rewritten under the time pressures of the five-minute rule and the confusion that can prevail on the floor; and second, that a major tax bill considered under an open rule might, under the precedents governing germaneness, be subject to amendments dealing with all aspects of the tax code, whether or not covered by the bill itself. Restrictive rules have provided ways for assuaging these concerns while permitting the House something more than an "all or nothing" vote on the Ways and Means Committee's recommendations. It seems likely, therefore, that a heavier burden of proof has come to rest on the members of Ways and Means when they request a closed rule that permits only their own committee amendments to be offered.

At the same time, the precedent of restrictive rules as an available middle ground between open and closed rules may have undermined the traditional presumption that measures other than revenue bills ought to be considered under open rules. It is now easier for committees other than Ways and Means to argue, on occasion, that individual bills they have reported also deserve the protection of restrictive rules. And, naturally enough, party leaders have not been slow to recognize the potential utility of restrictive rules for attempting to overcome a defeat in committee by amending a measure on the floor, and for assuring the majority party an advantage over the minority in offering and defining policy alternatives on the floor.

In some cases, restrictive rules have been half-open and half-closed accommodations to the referral of legislation to two or more committees, one of which has been Ways and Means. Under these circumstances, the Rules Committee has reported special rules that are closed with respect to the Ways and Means provisions of the bill, but open with respect to its other parts. For example, the Navigation Development Act of the Ninety-fifth Congress, H.R. 8309, was considered under the terms of H.R. Res. 776,[30] which provided for an amendment in the nature

30 H.R. Res. 776, 95th Cong., 1st Sess., 123 Cong. Rec. 32593 (1977) (for consideration of H.R. 8309). The author wishes it understood that he bears no responsibility for the choice of this form of citation, which has been adopted by the editors in conformance with the Uniform System of Citation (12th ed. 1976).

of a substitute reported by the Committee on Public Works and Transportation to be considered as an original bill for purposes of amendment. The rule also closed title II of the substitute to all amendments except those offered by direction of the Ways and Means Committee and prohibited amendments to those amendments. In effect, the special rule was closed only with respect to a title developed by Ways and Means, even though that title was incorporated in a substitute reported by another committee.

A more complex jurisdictional situation was addressed by H.R. Res. 505 of the Ninety-fourth Congress, providing for floor consideration of H.R. 6860, which the House took up on June 9, 1975.[31] The Committee on Ways and Means and the Committee on Interstate and Foreign Commerce both had been working on major energy bills — energy policy having become the source of some of the most difficult and persistent problems involving ambiguous jurisdictional boundaries among House committees. In some respects, the interests of the two committees overlapped — *e.g.*, in the selection of incentives for promoting automotive fuel efficiency. In other respects, the jurisdictions of the committees required each to act on different aspects of the same issue — *e.g.*, Commerce had jurisdiction over the policy question of whether or not to decontrol oil prices, while Ways and Means had jurisdiction over any windfall profits tax legislation which might be enacted to recoup the increased profits that could result from decontrol. The special rule, H.R. Res. 505, dealt with the Ways and Means Committee's Energy Conservation and Conversion Act and included both restrictive and expansive provisions. It was restrictive in that (1) it precluded amendments in the nature of substitutes and amendments to add new titles to the bill; (2) it required that amendments to be offered must have been printed in the *Congressional Record* no later than June 4th (five days before the rule even was considered); and (3) it foreclosed second-degree amendments to such amendments. But it also was expansive in that it made in order what was, in effect, a Commerce Committee substitute for the fuel efficiency provisions of the Ways and Means bill.

31 H.R. Res. 505, 94th Cong., 1st Sess., 121 Cong. Rec. 17871 (1975) (for consideration of H.R. 6860).

According to Representative Gillis Long of Louisiana, the majority floor manager of the resolution, these provisions were intended to achieve three purposes: (1) to assure time for adequate study of the amendments to be offered, (2) to permit the House to choose between the Ways and Means and Commerce Committees' approaches to the fuel efficiency question — the Commerce Committee having completed action on that issue, and (3) to avoid effectively discharging both committees from further consideration of other energy questions on which they had not yet reported, especially oil and gas decontrol and windfall profits. Representative Long explained:

> Fuel efficiency is the only area that has received consideration by both committees. This action by the Rules Committee, if approved by the House, will give the Members of the House an alternative to the approval [*sic*] recommended by the Committee on Ways and Means. To do as some have asked and fully open H.R. 6860 to amendment in all respects would be premature and therefore is not provided for in this rule. There are several reasons for this decision. First, the Ways and Means Committee has not yet considered such things as windfall profits and decontrol of oil and gas. Second, the Committee on Interstate and Foreign Commerce is still working on its energy bill and itself is considering a number of controversial issues. To make new titles in order on these issues would in effect discharge both the Committee on Interstate and Foreign Commerce and the Committee on Ways and Means of their rightful responsibilities. An additional danger is that if we start doing this sort of thing now, the jurisdiction of all committees will be up for grabs. Third, let me again remind the Members that the fuel efficiency section is the only area of direct overlap and the proposed rule allows the alternative course to the House of Representatives if we should so choose.[32]

The Republicans urged the House not to order the previous question so that Representative Conable of New York, a senior Republican member of the Ways and Means Committee, could offer an amendment in the nature of a substitute for the bill that would include provisions on decontrol, plowback, and windfall profits. The previous question was ordered by a vote of 237 to 148, with Democrats supporting the motion, 237 to 19, and Republicans opposing it, 0 to 129.[33]

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32 121 CONG. REC. 17871 (1975).

33 CONGRESSIONAL QUARTERLY, 31 CONGRESSIONAL QUARTERLY ALMANAC 64-H (1975).

This case illustrates a number of points. First, it can fall to the Rules Committee to cope with problems of jurisdictional overlap and uneven rates of committee activity. Second, special rules can be restrictive in a number of different ways. Third, not all complex special rules can be described as being exclusively, or even primarily, restrictive or expansive. Fourth, complex rules usually are justified in terms of equity, efficiency, and the clear presentation of alternatives, but not in terms of partisan program or advantage. The partisan division over ordering the previous question, however, suggests strongly that, other considerations aside, the Republicans were prepared to act on decontrol and windfall profits while the Democrats were not.

The special rule for considering H.R. 6860 required that, to be in order, amendments had to be printed in the *Congressional Record* by June 4th even though the rule was not considered until June 9th.[34] In explanation, Representative Long reminded members that they had been given warning in the *Record* of June 3d that this requirement was going to be proposed.[35] Representative Ottinger of New York, a member of Interstate and Foreign Commerce, approved of this procedure:

> This is a worthy compromise. For years many of us have complained about the Ways and Means Committee bringing out all its legislation under a closed rule, preventing participation by the membership in working its will fully on such legislation.
>
> On the other hand, this legislation is so complicated and controversial, with such great economic implications, there are great dangers in having it written on the floor. Indeed, 160 amendments have been noticed under the rule, including several that are mischievous, handing huge advantages to various special economic interests. It will be difficult for the Members to act intelligently on so many amendments of such great intricacy.[36]

As this statement indicates, an alternative to a closed rule is a restrictive rule that permits germane amendments to be offered, but only if they have been "noticed" in the *Congressional Record* sometime in advance. This requirement gives committee members and others some advance warning and time for ex-

34 *See* note 31 *supra*.
35 *Id.*
36 121 CONG. REC. 17872 (1975).

amination of the amendments to be considered. The meaning of technical provisions and the full implications of superficially appealing or innocuous amendments then can be explored in debate. Especially if special rules also protect printed amendments against amendments in the second degree, legislating on the spur of the moment can be avoided. At the same time, however, the requirement that amendments must have been printed in the *Record* prior to the day of consideration may have the effect, anticipated or not, of minimizing the participation of Members who were not intimately involved in the development of the legislation at the committee stage, because they are less likely to become aware that such a rule has been requested, reported, or adopted.

The requirement for the prior printing of amendments also can hold attractions for committees that are unlikely to be granted closed rules but that occasionally may report bills of exceptional complexity. During the Ninety-third Congress, for example, the Judiciary Committee reported H.R. 5463, dealing with federal rules of evidence, and requested and received a special rule, H.R. Res. 787, that closed one part of the committee substitute to all amendments and left the remainder open only to committee amendments and amendments printed in the *Congressional Record* at least two calendar days prior to consideration.[37] The rationale for this rule was stated by Representative Hungate of Missouri on behalf of the Judiciary Committee:

> Mr. Speaker, the purpose of the rule is that we find here a rather complex and technical field and we sought not to close the matter but to open it up so there could be amendments but also so as to have an opportunity to respond responsibly to such amendments. . . .[38]

The rule was adopted by a vote of 386 to 18.[39]

In this instance, the Rules Committee and the House accepted the recommendation of the committee of jurisdiction, but the Rules Committee also has imposed printing requirements at its own initiative. During the same Congress, H.R. Res. 963 was

37 H.R. Res. 787, 93d Cong., 2d Sess., 120 Cong. Rec. 1408 (1974) (for consideration of H.R. 5463).
38 120 Cong. Rec. 1408 (1974).
39 *Id.* at 1410.

reported for consideration of H.R. 69, the Elementary and Secondary Education Amendments of 1974.[40] This rule provided that one title of the committee substitute, to be considered as original text, be closed to all but committee amendments and amendments printed in the *Congressional Record* at least two days prior to being offered. In addition, the rule mandated that three legislative days would elapse between the conclusion of general debate and the beginning of the amending process. These arrangements were proposed, according to Representative Bolling of the Rules Committee, because of the complexity of the formulas in title I of the bill for allocating the funds it authorized:

> This is not exactly the rule that was requested by the Committee on Education and Labor. . . . The Committee on Rules agreed to the rule . . . because the House of Representatives in a whole series of different ways has found it extraordinarily difficulty to know what it was doing when it was voting on the formulas that applied to this particular piece of legislation. . . .
>
> The whole purpose of providing for this particular kind of rule is to see that whatever else happens the Members of the House of Representatives will have an opportunity — a reasonable opportunity — to know what the meaning of an amendment to the committee provisions might be.[41]

The rule was criticized for also prohibiting second degree amendments, but it was adopted, 234 to 163, with Republican Members dividing more or less evenly on the question.[42] Past experience with amending this Act apparently had convinced a majority of the House that some constraints on their freedom to offer amendments were advisable.

Restrictive rules that permit only certain amendments to be offered on the floor may be supported by Members of both parties as reasonable and desirable alternatives to closed rules. After reporting H.R. 10710, the Trade Reform Act of 1973, the Ways and Means Committee requested a special rule that made in order only committee amendments and three other non-amendable amendments. This request was granted by the Rules

40 H.R. Res. 963, 93d Cong., 2d Sess., 120 Cong. Rec. 6267 (1974) (for consideration of H.R. 69).
41 120 Cong. Rec. 6268 (1974).
42 *Id.* at 6275.

Committee, and the resulting special rule, H.R. Res. 657 of the Ninety-third Congress,[43] was supported by Representative Martin of Nebraska, the ranking Republican on Rules:

> The rule granted on this bill is a good rule. To consider this legislation, Mr. Speaker, under an open rule would lead to a Christmas tree piece of legislation. The last time, I believe, that we had an open rule on a trade bill was in 1930 when the Smoot-Hawley bill was considered on the floor of the House. Debate went on for days and the bill ended up a hodgepodge of irresponsible provisions. To open this bill on this complex subject to any amendment would result in a chaotic situation on the floor of the House.[44]

In this case, his Republican colleagues concurred, by a vote of 136 to 24, while 94 of 217 Democrats voted unsuccessfully against adoption of the rule.[45]

The possibility of bipartisan support for a restrictive rule is likely to be greatest when the Rules Committee accepts the recommendations of the reporting committee and permits amendments to be offered by Members of both parties. A case in point was H.R. Res. 456 of the Ninety-sixth Congress, for consideration of H.R. 2313, authorizing funds for the controversial Federal Trade Commission.[46] The rule permitted only three amendments, in addition to committee and pro forma amendments, to the committee substitute — and two of the three amendments were to be offered by Republicans. Representative Quillen of Tennessee, the minority floor manager of the rule, endorsed it:

> The reason the floor managers of this bill . . . requested this rule is that without it the bill offers an irresistable temptation to offer well-intentioned, though perhaps unwise, amendments aimed at specific FTC proceedings.[47]

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43 H.R. RES. 657, 93d Cong., 1st Sess., 119 CONG. REC. 40489 (1973) (for consideration of H.R. 10710).

44 119 CONG. REC. 40494 (1973).

45 *Id.* at 40499; *see also* CONGRESSIONAL QUARTERLY, 29 CONGRESSIONAL QUARTERLY ALMANAC 148-H (1973).

46 H.R. RES. 456, 96th Cong., 1st Sess., 125 CONG. REC. H9765 (daily ed. Oct. 26, 1979) (for consideration of H.R. 2313).

47 125 CONG. REC. H9766 (daily ed. Oct. 26, 1979). Representative Bauman, on the other hand, opposed it: "[W]e have been told by the Speaker, by the majority leadership repeatedly that they are opposed to legislative riders on appropriation bills, that the place to legislate on any question is on an authorization bill. So, now you bring us an authorization bill and we cannot offer amendments to deal with a very controversial agency. You cannot have it both ways. . . ." *Id.* at H9767.

The two Republicans whose amendments were made in order also spoke in favor of the rule, the adoption of which was supported by majorities of both parties.[48]

The availability of complex restrictive rules has created both problems and opportunities not presented by open or closed rules. One of the primary problems has become how to decide which amendments to permit and which to exclude. From the perspective of the Rules Committee, the simplest and least demanding response has been to defer to the request of the committee of jurisdiction. Such was the Committee's decision with respect to H.R. 13385 of the Ninety-fifth Congress, a bill reported by Ways and Means to increase the public debt ceiling.[49] During debate on the special rule, H.R. Res. 1277, which made amendments in order only on certain subjects covered by the bill, Representative Sisk of California, the majority floor manager, explained why other amendments were not permitted:

> Let me say that there was a request for some additional modification by the gentleman from Ohio (Mr. Vanik). In view of the opposition of the chairman [of Ways and Means, Mr. Ullman], the Committee on Rules simply saw fit to preclude that change and go along, basically, with the rule requested. And I suppose there is no other justification. We were simply complying with the request.[50]

The use of restrictive rules to consider some Ways and Means measures may have made it more difficult to secure acceptance by the House of fully closed rules when they are requested and reported. In 1975, the House rejected a closed rule for consideration of H.R. 10210, the Unemployment Compensation Amendments of that year.[51] Later in the year, when Representative Sisk called up another rule that permitted only a specified series of amendments to the three primary titles of the same bill, he told the House that, "[v]ery frankly, this is as far as the Ways and Means Committee was willing to go."[52] Responding to Representative Ashbrook of Ohio, Sisk expanded:

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48 Congressional Quarterly, 35 Congressional Quarterly Almanac 160-H (1979).

49 H.R. Res. 1277, 95th Cong., 2d Sess., 124 Cong. Rec. H6988 (daily ed. July 19, 1978) (for consideration of H.R. 13385).

50 124 Cong. Rec. H6988 (daily ed. July 19, 1978).

51 H.R. Res. 1183, 94th Cong., 2d Sess., 122 Cong. Rec. 14072 (1976) (for consideration of H.R. 10210).

52 H.R. Res. 1259, 94th Cong., 2d Sess., 122 Cong. Rec. 22510 (1976) (for consideration of H.R. 10210).

> In cases where committees come in and make specific requests, where we can the committee goes along and abides by the request coming from the legislative committee as to the length of time and as to the type of rule.
>
> There are times when the Committee on Rules, because of concerns by the leadership and because of other reasons, does not necessarily go exactly in line with what the committee has requested, but to the extent that we can, we do accede to its request. That is all this Member proposed to indicate here.[53]

The rule was adopted by a margin of almost two to one, but over the opposition of a majority of Republicans.[54]

However gently, Sisk's statement alludes to the partisan considerations that can affect construction of complex special rules. The remarkable unity demonstrated by House Republicans on a number of votes to order the previous question on complex rules certainly demonstrates their belief that those rules organized the amending process in a fashion that operated to their clear disadvantage.[55] It may not be reasonable to expect Democratic leaders to acknowledge in debate that parliamentary devices have been used to promote enactment of policies supported primarily by Democratic Members while handicapping the prospects, or even preventing the consideration, of those advanced by Republicans.[56] However, it would be equally unreasonable and naive to expect Members to forego opportunities to affect legislative outcomes through whatever legitimate means are available to them. Changes in the membership of the Rules Committee and the Speaker's enhanced role in selecting its members undoubtedly have made the majority on the Committee more responsive to the interests of Democratic party goals and programs in the House. But the use of special rules to promote party interests is limited by the frequent absence of clear party positions, by the lack of unity and the means for enforcing it among House Democrats, and by the necessity to attract majority support for special rules on the floor.

53 122 CONG. REC. 22510-11 (1976).

54 *Id.* at 22512; *see also* CONGRESSIONAL QUARTERLY, 32 CONGRESSIONAL QUARTERLY ALMANAC 110-H (1976).

55 *See* note 33 *supra; see also* text accompanying note 8 *supra.*

56 In fact, the *Congressional Record* debates on special rules certainly do not always explore all of the considerations that entered into their formulation. As one might expect, opponents are more likely than proponents to discuss how Rules Committee proposals might promote certain outcomes at the expense of others.

In 1975, the House considered the first special rule that made specific amendments in order to a revenue bill at the direction of the Democratic Caucus.[57] The resolution, H.R. Res. 259, for consideration of the Tax Reduction Act of 1975, made several other amendments in order in addition to the two mandated by the Caucus. The Republican response was to criticize the effective power of the majority party organization to dictate House procedure. Although one Republican member of the Rules Committee, Representative Latta of Ohio, expressed some satisfaction that the rule was not completely closed, he joined all of the other 134 Republicans voting to oppose ordering the previous question; 119 of 134 Republicans then voted against adoption of the rule.[58] Republican Representative Anderson of Illinois, also a member of the Rules Committee, was one of the leaders of the opposition:

> Really, I think it does not do very much to launch a meaningful debate on tax policy or fiscal policy, because what we will really be doing for the next 4 hours is to have a kind of coronation service here on the floor of this Chamber, a coronation ceremony for King Caucus, because this rule, for the most part, with a couple of minor changes, was largely made up behind the closed doors of the Democratic Caucus, and not in the open Chamber of the Committee on Rules. . . .[59]

On only one other occasion has the Democratic Caucus issued instructions to its members on the Rules Committee to make particular amendments in order, and in that case, the rule was amended significantly even though it was defended on politically neutral grounds. On August 30, 1976, the House took up H.R. Res. 1496 which permitted only committee amendments and the two amendments supported by Caucus vote to be offered to H.R. 14844, the Estate and Gift Tax Reform Act.[60] On behalf of the Rules Committee, Representative Pepper of Florida defended the inclusion of these amendments on the ground that they had been rejected by very narrow margins in the Ways

57 H.R. Res. 259, 94th Cong., 1st Sess., 121 Cong. Rec. 4593 (1975) (for consideration of H.R. 2166).

58 121 Cong. Rec. 4599 (1975); Congressional Quarterly, 31 Congressional Quarterly Almanac 10-H (1975).

59 121 Cong. Rec. 4594–95 (1975).

60 H.R. Res. 1496, 94th Cong., 2d Sess., 122 Cong. Rec. 28304-12 (1976) (for consideration of H.R. 14844).

and Means Committee.[61] Opponents countered by pointing to other amendments, not in order under the rule, that also had enjoyed significant support at the committee stage. Eighty-eight Democrats then joined with all but one of the Republicans voting to refuse to order the previous question.[62] Given this opportunity, Representative Anderson offered a substitute rule making in order all germane amendments printed in the *Congressional Record* before consideration of the bill began — giving all Members the opportunity to propose amendments, but also giving Ways and Means an opportunity to study them beforehand.[63] Ninety-two Democrats supported the successful substitute (no Republicans opposed it), even though Ways and Means Chairman Ullman urged defeat of the rule, promising that Ways and Means would reconvene to agree on a new request to the Rules Committee that would permit other selected amendments to be offered.[64]

The Caucus may be able to instruct Democrats on the Rules Committee, but its actions do not bind House Democrats when a special rule comes to a vote on the floor. It is also interesting to note that, unlike H.R. Res. 259 of the previous year, H.R. Res. 1496 included only the amendments the Caucus had voted to have made in order.[65] No effort was made to broaden the base of support for the special rule by including a number of amendments, at least one of which most Members wanted to support. In this case, the attempt to rigidly structure and limit the amending process failed. Still, if the voting patterns of Democrats and Republicans are any indication, these two cases of direct Caucus intervention were not the only instances in which efforts were made to use special rules "for confining within specified limits the consideration of bills involving important policies for which the majority party in the House may be responsible."[66]

One set of policies that the majority party can be particularly anxious to control are those affecting the organization, procedures, and rules of the House itself. The resolution by which

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61 122 Cong. Rec. 28305 (1976).

62 Congressional Quarterly, 32 Congressional Quarterly Almanac 144-H (1976).

63 122 Cong. Rec. 28310 (1976).

64 *Id.* at 28309-12; *see also* 32 Congressional Quarterly Almanac, *supra* note 62, at 144-H.

65 *See* notes 57 and 60 *supra*.

66 4 Hinds' Precedents of the House of Representatives § 3152, at 192.

the House rules are adopted at the beginning of each Congress is considered under the equivalent of a closed rule.[67] It is considered in the House, not in Committee of the Whole, so that all amendments can be precluded by a majority vote to order the previous question during the first hour of debate. The Committee Reform Amendments of 1974 were debated and amended under what was in fact an expansive rule, but the Democrats themselves were far from being united on a single proposal.[68] During 1977, though, the Rules Committee reported two complex rules for dealing with the proposals of the Commission on Administrative Review (Obey Commission) under restrictive conditions.[69]

The Obey Commission's first set of recommendations, in the form of H.R. Res. 287, was directed primarily toward questions of ethics and financial disclosure. H.R. Res. 338 for its consideration permitted only committee amendments, motions to strike full titles of the measure, and several other specific amendments.[70] The rule thus prevented Members from offering amendments to add new provisions or to strike out or amend sections of titles. Representative Bolling defended the Rules Committee's proposal on the ground that the resolution constituted a package that would fall apart if opened fully to amendments.[71] The concerns of those supporting the rule evidently were that a free amending process would destroy the balance of provisions contained in the resolution and put Members in the awkward position of having to vote on politically attractive proposals that they personally opposed.

A critic of the rule, Representative Anderson of Illinois, explained how the limitation on motions to strike put Members in what he considered to be an equally unacceptable position:

> The rule reported by the Rules Committee only permits amendments to strike by title. This in turn does not permit a separate vote on the controversial $5,000 increase in Mem-

67 *See, e.g.*, H.R. Res. 5, 97th Cong., 1st Sess., 127 Cong. Rec. H5-20 (daily ed. Jan. 5, 1981).

68 On the history of the Bolling Committee, Members' attitudes toward its recommendations, and the actions of the Democratic Caucus, *see* R.H. Davidson & W. J. Oleszek, note 9 *supra*.

69 H.R. Res. 338, 95th Cong., 1st Sess., 123 Cong. Rec. 5885-94 (1977) (for consideration of H.R. Res. 287); H.R. Res. 819, 95th Cong., 1st Sess., 123 Cong. Rec. 33435-44 (1977) (for consideration of H.R. Res. 766).

70 *See* note 69 *supra*.

71 123 Cong. Rec. 5888 (1977).

> bers' expense allowances which is contained in section 302(b) of title III. An amendment to strike that entire title would throw the baby out with the bath water since the rest of the title contains three salutary reforms. . . . Thus, the House will not be permitted an opportunity to deny itself this allowance increase without throwing these important reforms out the window.[72]

Over the nearly unanimous opposition of the Republicans, the previous question was ordered, and the rule was then adopted by voice vote.[73]

Later in the year, the Rules Committee reported a similarly restrictive rule, H.R. Res. 819, for considering the Obey Commission's proposals for administrative change within the House (as modified by the Rules and House Administration Committees).[74] This rule made in order only a series of amendments which, in general, permitted the Committee of the Whole to make limited modifications in the proposals included in H.R. Res. 766, or to strike them altogether. However, it did not permit amendments in the form of proposals for certain additional changes that some Republican Members wished to offer. In this case, apparently, opposition was directed less to the special rule than to the merits of the resolution with which it dealt. The previous question was ordered routinely, but the rule

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72 123 CONG. REC. 5890 (1977). If the increase in office allowances was included as a "sweetener" to make the entire package more palatable to some Members, then Anderson's comments suggest that the rule was designed to protect it and the other provisions of title III by compelling Members to accept or reject the title as a whole. In addition, the provision of H.R. Res. 338 that prohibited amendments adding new provisions may have protected the entire resolution from being burdened with further rules changes and requirements that could have imperiled its passage. Representative Frenzel of Minnesota also opposed the rule:

> I once visited a foreign parliament where one of the members told me that his legislative body was allowed to pass bills, but was not allowed to change them at all. I mourned for the demise of democracy in that country at the time and reflected with pride on my own House of Representatives where free debate was the rule and germane amendments were always considered. In light of today's rule, it is very hard to reflect with pride on the operations of this House. If this gag rule is passed, I can only mourn for the freedoms we have lost.

Id. at 5888. On the other hand, Representative Waggonner of Louisiana predicted the consequences of adopting an open rule instead: "The press gallery will be sending down suggested amendments for this or that. And the House will, solely out of fear, vote for every restriction proposed." *Id.* at 5890.

73 123 CONG. REC. 5894 (1977); CONGRESSIONAL QUARTERLY, 33 CONGRESSIONAL QUARTERLY ALMANAC 12-H (1977).

74 H.R. RES. 819, 95th Cong., 1st Sess., 123 CONG. REC. H10819-28 (daily ed. Oct. 12, 1977) (for consideration of H.R. RES. 766).

was rejected, 160 to 252, with all the Republicans voting against it.[75]

The Republican alternative to a Rules Committee proposal for a restrictive rule has not always been an open rule. As already noted, there have been some measures—particularly revenue bills—that Members of both parties have agreed should be considered under restrictive conditions of some kind.[76] The issue then has become whether the amendments permitted by the proposed rule present a reasonable and balanced range of alternatives or whether the rule "stacks the deck" in favor of one policy preference. In 1979, Republicans voted almost unanimously against ordering the previous question on H.R. Res. 465, for consideration of the Welfare Reform Amendments of that year, which permitted only one amendment in addition to committee amendments.[77] They based their opposition on the ground that the rule should have permitted at least one other amendment that had been devised by one Democratic and two Republican members of the Ways and Means Committee.[78] In their view, evidently, the Rules Committee was presenting them with two unattractive alternatives — H.R. 4904 as reported or no welfare reform bill at all. Democrats, on the other hand, voted for the previous question and for adoption of the resolution by margins of roughly five to one.[79]

One way to defuse opposition to restrictive rules, therefore, has been to make in order one or more major amendments sponsored or supported by minority party Members. That was the approach taken by the Rules Committee in reporting H.R. Res. 839 of the Ninety-fifth Congress, providing for consideration of another Ways and Means bill, the Social Security Financing Amendments of 1977.[80] The rule permitted only a series of specific amendments to be offered by Democratic and Republican members of Ways and Means, including an amendment

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75 123 Cong. Rec. H10828 (daily ed. Oct. 12, 1977).

76 *See* text accompanying notes 37 to 47 *supra*.

77 H.R. Res. 465, 96th Cong., 1st Sess., 125 Cong. Rec. H10103-10 (daily ed. Nov. 1, 1979) (for consideration of H.R. 4904); *see also* Congressional Quarterly, 35 Congressional Quarterly Almanac 164-H (1979).

78 125 Cong. Rec. H10103-10 (daily ed. Nov. 1, 1979).

79 *Id.*; *see also* Congressional Quarterly, 35 Congressional Quarterly Almanac 12-H (1977).

80 H.R. Res. 839, 95th Cong., 1st Sess., 123 Cong. Rec. H11527-32 (daily ed. Oct. 26, 1977) (for consideration of H.R. 9346).

in the nature of a substitute to be proposed by Representative Conable of New York, the ranking minority member. Republican Rules Committee member Delbert Latta of Ohio criticized the proposed rule, not for excluding Republican amendments, but instead for allowing Ways and Means Committee members to monopolize the amending process. Conable, on the other hand, supported the resolution:

> Mr. Speaker, I rise in strong support of this rule. It is not a perfect rule. It is not the best of possible parliamentary situations when every Member in this body cannot propose anything he wants. But I tell the Member quite frankly that our propensity for doing whatever lovely thing we want to do whenever we want to do it, regardless of the consequences, is one of the reasons that we have got the social security system in some trouble. This rule is necessary.[81]

On the question of adoption, thirty-eight Republicans voted "aye," including seven of twelve Ways and Means Republicans.[82]

However many Members may dislike restrictive rules in principle, most seem to believe that they are necessary under some circumstances, to expedite floor action or to protect Members against their own excesses. There is evidence also that, from time to time, a majority on the Rules Committee has attempted to construct special rules for partisan advantage — or, more precisely, for the advantage of policy positions supported by most Democrats. Sometimes these efforts have been successful. But when the Republicans have felt totally excluded, so that their proposals could not receive a fair hearing, they have demonstrated the capacity for unanimous or nearly unanimous opposition. Such opposition presents a formidable challenge to Democratic leaders, whose ostensible followers can be difficult indeed to unite.

III. Expansive Uses of Complex Rules

Complex rules that are primarily expansive in character (hereinafter referred to simply as "expansive rules") may make in order one or more amendments, other than committee amend-

81 123 Cong. Rec. H11530 (daily ed. Oct. 26, 1977).

82 Congressional Quarterly, 33 Congressional Quarterly Almanac 184-H, 185-H (1977).

ments, that otherwise could not be offered, or may establish complicated procedures for two or more committees to propose amendments to the same measure. In some instances, expansive rules have been designed to respond to the concerns of a single committee or to problems caused by multiple referrals in ways that are acceptable to all the committees concerned. Although the provisions of rules reported for this purpose may have had some effect on legislative decisions, that does not appear to have been their primary intent. In other cases, though, the provisions, debates, and votes on expansive rules suggest that the Rules Committee formulated them in a manner intended to promote particular policy outcomes.

One relatively common use of expansive rules has been to make in order what is, in effect, a committee amendment not printed in the measure at the time of its consideration. For example, H.R. 13367 of the Ninety-fourth Congress, the Fiscal Assistance Amendments of 1976, was reported with fifty-nine separate committee amendments.[83] Merely to simplify and expedite the process of consideration, H.R. Res. 1269 provided for a number of these amendments to be offered en bloc, by making in order a series of amendments printed in the *Congressional Record* and foreclosing demands for their division. The special rule was adopted, 358 to 1.[84] In this instance, the Rules Committee evidently was not attempting to confer strategic advantage; the only effect of the special rule was to consolidate action on committee amendments and promote prompt action by the House.

Other expansive rules have carried with them a very obvious intent to promote a legislative outcome by permitting a Member to offer a non-germane amendment that responded to a situation, related to the subject of the measure, which had not developed when the measure was reported and on which the Rules Committee and the House believed prompt action to be necessary. H.R. 10898 of the Ninety-fifth Congress authorized funds for the United States Railway Association (USRA). The special rule for its consideration, H.R. Res. 1321, made in order a non-germane amendment the text of which was quoted in full in the

83 H.R. Res. 1269, 94th Cong., 2d Sess., 122 Cong. Rec. 17064-66 (1976) (for consideration of H.R. 13367).
84 122 Cong. Rec. 17064-66 (1976).

rule.[85] The amendment was to be offered by the chairman of the Commerce Committee subcommittee that had reported the bill and was supported by the ranking minority member of the subcommittee. Representatives Moakley and Anderson, the floor managers of the resolution, both indicated that the House needed to act promptly on the amendment so that the USRA could make a loan to a railroad that otherwise might face bankruptcy.[86]

In each of these cases, the legislative committee could have reported a clean bill on the same subject — a bill that incorporated the amendment made in order by the Rules Committee. This approach would have avoided any germaneness problems, but it would have required additional time and effort, including the preparation of a committee report. To expedite matters, apparently, the Rules Committee chose to report expansive rules instead.

The Committee also has acted to expedite the legislative process by making in order an amendment in the nature of a substitute, sometimes in the form of the text of another bill, proposed by members of the reporting committee to increase support on the floor. During the Ninety-fourth Congress, H.R. 7743, to amend the Pennsylvania Avenue Development Corporation Act of 1972, failed to pass under suspension of the rules.[87] Subsequently, the Committee on Interior and Insular Affairs developed a substitute version to improve the bill's prospects for passage. The Rules Committee then proposed that this amendment, printed in a supplemental report of the Interior Committee, be considered as an original bill for purposes of amendment.[88]

In the same fashion, H.R. Res. 872 of the Ninety-fifth Congress provided for the text of another bill to be in order as an amendment in the nature of a substitute, considered as original text, during action on H.R. 6805, to establish an Agency for Consumer Protection.[89] Critics of the rule argued that normal

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85 H.R. Res. 1321, 95th Cong., 2d Sess., 124 Cong. Rec. H8887-89 (daily ed. Aug. 17, 1978) (for consideration of H.R. 10898).

86 124 Cong. Rec. H8887-89 (daily ed. Aug. 17, 1978).

87 H.R. 7743, 94th Cong., 2d Sess. (1976), considered in the House under a motion to suspend the rules, 122 Cong. Rec. 6414-19 (1976).

88 H.R. Res. 1341, 94th Cong., 2d Sess., 122 Cong. Rec. 23709 (1976) (for consideration of H.R. 7743).

89 H.R. Res. 872, 95th Cong., 2d Sess., 124 Cong. Rec. H733 (daily ed. Feb. 7, 1978) (for consideration of H.R. 6805).

legislative procedures were being abandoned by making in order as an original bill a substitute that had not been debated, amended, and reported by the Committee on Government Operations. After adoption of the rule, Representative Jack Brooks, Chairman of Government Operations, offered the following explanation at the beginning of general debate:

> At the time the committee approved H.R. 6805, its chances on the House floor were not very bright. So, we held it up and did what I think responsible legislators should do. We have attempted to identify those provisions in the bill which numerous members found objectionable that could be adjusted without damaging the principal concept embodied in the legislation.[90]

In these instances also, expansive rules made further action by the reporting committees unnecessary. They may have offered a tactical advantage as well. By avoiding formal action by the committee of jurisdiction, the proponents of each purported compromise may have sought to avoid exposure of their new proposal to potentially damaging scrutiny and opposition. Whether intended or not, this can be the effect of expansive rules, as suggested by the observation of Representative Blackburn of Georgia in a similar situation:

> If we are going to have orderly processes, we should insist that the House Rules Committee, which is our policeman, which is our watchdog, so to speak, to insure that proper legislative processes have been followed, should itself follow those rules. Yet we are seeing ourselves debating here a bill which is admittedly going to be offered as a substitute for the so-called Patman bill because the Patman bill could not get a rule. Yet none of us on the House Banking and Currency Committee has discussed or deliberated one moment the so-called Stephens substitute. How can we expect the other Members of the House who have not been involved in this for the last 6 months to exercise orderly judgment on a bill of this importance?[91]

Like restrictive rules, expansive rules may be designed to organize the amending process and cope with parliamentary problems that can arise during consideration of measures reported by more than one committee. When the two (or more) committees have been able to reach agreement among them-

90 124 CONG. REC. H739 (daily ed. Feb. 7, 1978).
91 119 CONG. REC. 12506 (1973).

selves, the Rules Committee may attempt to focus attention in Committee of the Whole on the consensus approach, rather than on either version of the measure as originally reported. Representative Beilenson of California explained that this was the approach adopted by the Rules Committee for dealing with an authorization bill for the Nuclear Regulatory Commission:[92]

> As you may know, differing versions of the bill were reported by the two committees [Interior and Insular Affairs and Interstate and Foreign Commerce]. In an effort to seek an orderly procedure to allow the House to work its will on this measure, a substitute bill, H.R. 5297 was subsequently introduced by the chairmen and ranking minority members of the subcommittees that reported H.R. 2608. Both committees have indicated that this substitute bill is a mutually acceptable vehicle for floor consideration of the NRC authorization. Therefore, in lieu of the amendments recommended by the committees and now printed in the bill, H.R. 2608, this rule allows consideration of the substitute bill as an original bill for the purpose of amendment under the 5-minute rule.[93]

Somewhat more complicated procedures may be proposed when the several committees of jurisdiction have been able to reach only partial agreement among themselves. The Alaska lands bill of the Ninety-fifth Congress, H.R. 39, had been referred to the Committees on Interior and Insular Affairs and Merchant Marine and Fisheries. Leaders of the two committees developed another version of the bill in the form of H.R. 12625, which the Rules Committee made in order as original text for purposes of amendment.[94] In addition, in this case, the special rule (H.R. Res. 1186) also made in order, as amendments to the text of H.R. 12625, provisions of H.R. 39 as introduced, provisions of the Interior substitute for H.R. 39, and the Merchant Marine amendments to H.R. 39.[95] The Rules Committee evidently selected as the base bill, to which amendments would

92 H.R. RES. 472, 96th Cong., 1st Sess., 125 CONG. REC. H11206 (daily ed. Nov. 27, 1979) (for consideration of H.R. 2608).

93 125 CONG. REC. H11206 (daily ed. Nov. 27, 1979). In the case of H.R. 12163, authorizing funds for the Department of Energy for Fiscal Year 1979, H.R. Res. 1261 made in order as an original bill an amendment in the nature of a substitute, printed in the *Congressional Record,* developed by members of the three committees to which the bill had been referred. 124 CONG. REC. H6713-15 (daily ed. July 14, 1978).

94 H.R. RES. 1186, 95th Cong., 2d Sess., 124 CONG. REC. H4080-87 (daily ed. May 17, 1978) (for consideration of H.R. 39).

95 *Id.*

be offered, the version that enjoyed support among the majority party leaders of the subcommittees and committees involved. But the Rules Committee also arranged for all or parts of other versions to be offered as amendments.[96] The vote on this rule indicates that most Members considered it an equitable arrangement; it was adopted by a vote of 354 to 42, with the support of the chairmen and ranking minority members of both committees.[97]

The range of possible procedures for coping with multiple committee amendments is further illustrated by two other special rules. During the Ninety-fifth Congress, H.R. Res. 1348, for consideration of the Clinical Laboratory Improvement Act, provided that the amendments of the Committee on Interstate and Foreign Commerce would have priority during consideration of title I of the bill, but that Ways and Means Committee amendments would enjoy priority during consideration of title II.[98] By contrast, H.R. Res. 393, dealing with the International Sugar Stabilization Act of 1979, made one committee's amendment in the nature of a substitute in order as an original bill and any of the provisions of the other committee's version in order as amendments thereto.[99] By these means, the Rules Committee made it possible for the Committee of the Whole to choose between the two committees' positions, provision by provision. These two rules were adopted by unanimous or overwhelming votes,[100] indicating that they both allowed equitable opportunities for the committees involved to present their proposals. The differences between the two rules reflected, in part at least, the ways in which the committees had reported and wished to offer their amendments.

When two or more committees have considered the same measure but have been unable to reach even partial agreement, the Rules Committee must attempt to arrange for the orderly consideration of their amendments. In that event, expansive rules may give one committee or the other a strategic advantage

96 124 CONG. REC. H4080 (daily ed. May 17, 1978).

97 *Id.* at 4086-87.

98 H.R. RES. 1348, 95th Cong., 2d Sess., 124 CONG. REC. H11186 (daily ed. Sept. 29, 1978) (for consideration of H.R. 10909).

99 H.R. RES. 393, 96th Cong., 1st Sess., 125 CONG. REC. H8747 (daily ed. Sept. 28, 1979) (for consideration of H.R. 2172).

100 124 CONG. REC. H11187-88 (daily ed. Sept. 29, 1978); 125 CONG. REC. H8753 (daily ed., Sept. 28, 1979).

— *e.g.*, when one version is made in order as a substitute for the other.

For consideration of a lobby-law reform bill, H.R. Res. 1551 of the Ninety-fourth Congress provided for the Judiciary Committee substitute for the bill as introduced to be considered as original text, and for the version of the Committee on Standards of Official Conduct to be offered as a first degree substitute for the Judiciary Committee proposal.[101] This procedure was acceptable to both committees, according to the majority floor manager of the rule, even though it permitted the Standards Committee version to be amended and voted on before the Judiciary Committee version could be perfected by amendments. (The Judiciary Committee substitute was to be read for amendment by parts, instead of being open to amendment at any point which would have allowed Members to perfect both versions before voting on either.) By focusing attention in Committee of the Whole first on the Standards Committee version, the Rules Committee could have been criticized for putting the Judiciary Committee at a parliamentary disadvantage. But H.R. Res. 1551 was supported by the Judiciary chairman and ranking minority member, perhaps because they anticipated that the amended Standards Committee proposal would be rejected, as it was by a vote of 74 to 291; the Committee of the Whole then proceeded to consider amendments to the Judiciary version.[102]

A similar amending situation, though with a different result, was created by H.R. Res. 1584 of the Ninety-fourth Congress, for consideration of the Alaska Natural Gas Transportation Act.[103] A substitute version proposed by the Committee on Interstate and Foreign Commerce was made in order as original text, to be read for amendment; the recommendations of the Interior and Insular Affairs Committee were to be offered as a substitute for the Commerce Committee version. After adoption of the rule and general debate, Representative Melcher of Montana offered the Interior version after the first section of the Commerce substitute had been read.[104] This meant that

101 H.R. Res. 1551, 94th Cong., 2d Sess., 122 Cong. Rec. 32095 (1976) (for consideration of H.R. 15).

102 122 Cong. Rec. 32095-98 (1976).

103 H.R. Res. 1584, 94th Cong., 2d Sess., 122 Cong. Rec. 34121 (1976) (for consideration of S. 3521).

104 122 Cong. Rec. 34132-36 (1976).

amendments could not be offered to any other part of the Commerce version until after disposition of the Melcher substitute, and then only if the Melcher substitute were to be rejected. Members could have felt that these procedures put the Commerce Committee at a strategic disadvantage — in that amendments would be directed first to perfecting the Interior Committee version — and that it would be unlikely for the Committee of the Whole to devote considerable time and attention to amending the Interior version, only to reject it and then engage in a second amending process on the Commerce Committee substitute. Perhaps in reaction, Representative Dingell of Michigan, Chairman of the Commerce Subcommittee on Energy and Power, offered a second degree perfecting amendment, with the support of the ranking minority member of the subcommittee, that was in effect a third version of the bill.[105] Because the Dingell amendment to the Melcher substitute was drafted in the form of a perfecting amendment, it could not be amended. The first vote occurred, therefore, on the Dingell proposal. Although Dingell's amendment was rejected, he had retrieved the advantage that can accompany having the first vote, notwithstanding the provisions of the special rule.[106]

The strategic potential of expansive rules was illustrated by the procedures followed in Committee of the Whole for acting on H.R. Res. 988, the Committee Reform Amendments of 1974, proposed by the Bolling Committee.[107] After the Democratic Caucus's Committee on Organization, Study and Review (the Hansen Committee) had reviewed the recommendations of the Bolling Committee, it proposed H.R. Res. 1248 as an alterna-

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105 *Id.* at 34139-44.

106 *Id.* at 34151-52. An alternative procedure is available to the Rules Committee, but it also has advantages and disadvantages. If two committees report versions of the same bill, a special rule may provide for one committee to offer its version immediately after the enacting clause of the bill has been read, and then for the second committee's version to be offered as a second-degree substitute. In this situation, neither committee version is considered as an original bill for purposes of amendment. Since both versions are open to amendment at any point, the advantage of this procedure is that it permits both to be perfected before final action is taken on either. Its disadvantage lies in the fact that each may be perfected in one degree only, whereas an amendment in the nature of a substitute considered as an original bill may be perfected in two degrees. Thus, this alternative procedure may permit more even-handed treatment of two committee substitutes, but only by limiting the opportunities of individual Members to offer amendments from the floor.

107 H.R. Res. 1395, 93d Cong., 2d Sess. (1974) (for consideration of H.R. Res. 988). *See* note 9 and accompanying text *supra*.

tive. The Caucus then agreed to a resolution introduced by Representative O'Hara of Michigan, a member of the Hansen Committee. This resolution directed the Democratic members of the Rules Committee to report a rule allowing the Hansen substitute to be offered immediately following the reading of the first section of the Bolling proposal.[108] The Rules Committee complied with this directive and reported H.R. Res. 1395, which was adopted, 326 to 25.[109]

After general debate on H.R. Res. 988, the Clerk read the first section of the resolution at which point, pursuant to the special rule, Representative Hansen offered her amendment in the nature of a substitute. Shortly thereafter, Representative Martin of Nebraska, the ranking minority member of the Bolling Committee, offered a substitute for the Hansen substitute. Members then proceeded to offer perfecting amendments to the Martin and Hansen proposals, but not to the original text of the resolution. The special rule had provided for the Bolling resolution to be read for amendment under the five-minute rule, meaning that amendments could be offered only to parts of the resolution as they were read. But the Hansen substitute had been offered, as the rule provided, immediately after the reading of the first paragraph of H.R. Res. 988, which stated only that "this resolution may be cited as the 'Committee Reform Amendments of 1974'." As a result, unless and until the Committee of the Whole rejected both the Hansen and Martin substitutes, as they may have been amended, the only amendments in order to the original text of the Bolling resolution were amendments in the first and second degree to its title. The Committee of the Whole eventually accepted an amended version of the Hansen substitute, so there never was an opportunity to perfect and vote on the Bolling Committee proposal itself.[110]

A somewhat comparable situation had arisen earlier during the Ninety-third Congress. The Committees on Public Works and Merchant Marine and Fisheries both had reported bills on deepwater ports; the Public Works bill subsequently was revised in the form of an amendment in the nature of a substitute printed in the *Congressional Record* by Representative Bob Jones, sec-

108 R.H. Davidson & W. J. Oleszek, *supra* note 9, at 217.
109 *See* note 107 *supra*.
110 R. H. Davidson & W. J. Oleszek, *supra* note 9, at 231-50.

ond ranking Democrat on the Committee.[111] The special rule reported by the Rules Committee provided for the Jones substitute to be offered immediately after the enacting clause of the original bill was read (thereby precluding amendments to the bill itself unless and until the Jones substitute was rejected), and provided further that the Merchant Marine bill could be offered as a first degree substitute for the bill if the Jones substitute were rejected.[112] This procedure clearly gave the advantage to the Public Works version. However, Representative Sullivan of Missouri, who chaired the Merchant Marine Committee, did not oppose the rule because of her announced intention to offer the Merchant Marine version as a second degree substitute for the Jones version, instead of waiting until after disposition of that amendment.[113]

The possible strategic and policy consequences of the order in which competitive versions of measures are made in order by the Rules Committee also arose when the House returned to the issue of Alaska lands during the Ninety-sixth Congress. The bill, again H.R. 39, had once more been reported by the Interior and Merchant Marine Committees.[114] This time, the Rules Committee proposed that the Interior Committee substitute be considered as original text for purposes of amendment, that the Merchant Marine version be in order as a substitute for the Interior proposal, and that a third version, advanced by Representatives Udall and Anderson, be offered as a substitute for the Merchant Marine position.[115] In short, three versions of the bill (excluding its original text) would be before the Committee of the Whole, and both the Merchant Marine approach (known as the Breaux-Dingell amendment) and the Udall-Anderson amendment would be amendable in one degree. The Interior (or Huckaby) version would not be open to amendment

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111 H.R. 10701, 93d Cong., 1st Sess. (1973) (reported by the Committee on Public Works, Nov. 28, 1973); H.R. 11951, 93d Cong., 2d Sess. (1974) (reported by the Committee on Merchant Marine and Fisheries, May 15, 1974).

112 H.R. Res. 1139, 93d Cong., 2d Sess., 120 Cong. Rec. 18116 (1974) (for consideration of H.R. 10701).

113 120 Cong. Rec. 18117-18 (1974).

114 H.R. 39, 96th Cong., 1st Sess. (1979) (reported by the Committee on Interior and Insular Affairs on April 18, 1979, and by the Committee on Merchant Marine and Fisheries on April 23, 1979).

115 H.R. Res. 243, 96th Cong., 1st Sess., 125 Cong. Rec. H2685 (daily ed. May 4, 1979) (for consideration of H.R. 39).

unless and until both of the other substitutes were rejected, but Representative Huckaby stated that perfecting amendments would be offered to Breaux-Dingell that would consolidate provisions of the two committee versions.[116]

Consequently, controversy centered around the order in which two of the substitutes, Breaux-Dingell and Udall-Anderson, would be offered. Under the Rules Committee proposal, the substitute to be voted on first would be Udall-Anderson, perhaps as amended, as a substitute for Breaux-Dingell. Opponents of the rule contended that this arrangement gave Udall-Anderson an advantage that should belong instead to the consolidated committee version.[117] In defense of the rule, however, Representative Anderson argued that it was consistent with normal procedures for committee amendments to be offered before amendments proposed by individual Members. (The Udall amendment was not to be offered at the recommendation of the Interior Committee which he chaired.) After describing the order in which the substitutes were to be offered under the rule, Anderson noted:

> As I indicated, this would be the normal sequence of events under our rules and procedures with priority recognition going to the committees involved for the offering of their amendments, and then to other members of the committee and the House for offering further amendments. . . .
>
> . . . The alternative rule offered in the Rules Committee would have departed from normal legislative procedure by making the Udall-Anderson substitute in order as a substitute to the Interior Committee's bill, thus forcing the Merchant Marine and Fisheries Committee to offer their version as a substitute to Udall-Anderson. I have never before heard a committee argue that their product should be reglated [*sic*] to a subordinate position to a noncommittee substitute.
>
> Those who opposed this rule and argued for that unusual alternative seem most upset by the fact that the first major vote would come on the Udall-Anderson substitute. But that is a fact of life which confronts every committee every time it brings a bill to the floor under an open rule. It always has been and always will be. That objection also glosses over the fact that the House can simultaneously consider perfecting amendments to both the Merchant Marine Commit-

116 125 CONG. REC. H2689 (daily ed. May 4, 1979).
117 *Id.*

> tee's substitute and the Udall-Anderson substitute. So it is not accurate to claim that the House will somehow be forced to accept or reject Udall-Anderson as it now stands. It is subject to amendment just as the so-called Breaux-Dingell substitute from Merchant Marine and Fisheries is subject to amendment.[118]

After this debate, the special rule was adopted as reported, 236 to 18.[119]

In summary, then, expansive rules have become a useful, and sometimes necessary, device for organizing the amending process on bills in which more than one committee has a legitimate jurisdictional interest. When the committees themselves have not been able to resolve their differences, the Rules Committee has proposed an order in which their amendments are to be offered. Major amendments to be offered by individual Members, such as the Udall-Anderson substitute, also may have to be taken into account. When confronted with several versions of a bill, some Members tend to feel that the advantage belongs to the version on which the first vote occurs. If so, then the order in which expansive rules provide for amendments in the nature of substitutes to be offered may have strategic and policy consequences. However, it bears emphasizing that special rules must be adopted by majority vote, and that procedural groundrules may influence but do not determine outcomes. The Committee of the Whole is not compelled to accept the first substitute on which it votes, and, as Representatives Dingell and Sullivan demonstrated, there sometimes are ways to regain advantages apparently lost.

The possibilities for strategic uses of expansive rules are not limited to multiple-referral situations. Expansive rules may make specific amendments in order, and waive points of order against them. Thus, they can be used to offer the House a broader range of alternatives and, probably not incidentally, to broaden the base of support for adopting the rule and, consequently, for considering the measure itself.

The rule for considering a bill, in the Ninety-third Congress, to establish a Consumer Protection Agency made in order as an amendment the text of a bill introduced by Representative

118 *Id.* at H2687.
119 *Id.* at H2691-92.

Brown of Ohio, a senior Republican member of the Government Operations Committee, which met many of the objections of the Nixon Administration to the bill.[120] The rule was adopted with only twenty dissenting votes, but the Brown substitute later was rejected in Committee of the Whole, with Democrats dividing 41 to 184 in opposition. All ten Democratic members of the Rules Committee voted against the Brown substitute.[121] In deciding to make the Brown substitute in order, the Committee may have been motivated only by a desire to allow a choice between serious alternatives. A second purpose, however, may have been to minimize opposition to the rule so that a highly controversial bill could be considered.[122]

The provisions of expansive rules that identify certain amendments as being in order may not always be absolutely necessary. As Representative Anderson's defense of the Alaska lands rule suggested, both the Breaux-Dingell and Udall-Anderson substitutes probably could have been offered, and in the order specified by the rule, even if the Rules Committee had not made explicit provision for them.[123] The rule waived points of order against the Huckaby substitute to be considered as original text, but no waivers were necessary to protect either of the other versions. By providing for them, however, the Committee resolved any doubts that the principal proponents of each position might have had about the sequence of events that would occur so that they could plan accordingly. It also alerted other Members to the major choices they would be facing and to the order in which the alternatives would be presented. Expansive rules, then, simply may highlight amendments that are expected to

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120 H.R. RES. 1025, 93d Cong., 2d Sess., 120 CONG. REC. 9561-64 (1974) (for consideration of H.R. 13163).

121 120 CONG. REC. 9565-99 (1974).

122 On another occasion during the 93d Congress, the House rejected an expansive rule that made a Republican substitute in order as an amendment. The amendment was to be offered to a land-use planning bill by the Minority Leader, John Rhodes, and Representative Steiger of Arizona, the third-ranking Republican on the Interior and Insular Affairs Committee. *See* H.R. RES. 1110, 93d Cong., 2d Sess., 120 CONG. REC. 18800-24 (1974) (for consideration of H.R. 10294). After a debate that focused almost exclusively on the merits of the bill, the rule was defeated, 204 to 211. If one reason for including the Rhodes-Steiger substitute in the rule was to ensure that the bill would reach a vote on final passage, the effort failed. As a fellow Republican, Representative Symms of Idaho, expressed himself during the debate: "I think that the best time to kill a rattlesnake is when you have a hoe in your hand, and that is right now, I will say to the Members of the House." 120 CONG. REC. 18810 (1974).

123 *See* note 115 and accompanying text *supra*.

be offered but that do not require protection from points of order that might lie against them.

The most controversial waivers of House rules in expansive rules tend to be those that set aside the germaneness requirement of Rule XVI, clause 7.[124] This requirement serves to concentrate the attention of the House and expedite consideration of bills by preventing the introduction of extraneous issues. From time to time, however, the Rules Committee has found these benefits of the germaneness rule to be outweighed by the desirability — or necessity — of bringing issues to the floor in the form of protected non-germane amendments. There usually has been some reasonably close relationship between the amendment made in order and the measure to which it is to be offered. In one exceptional instance, however, the Rules Committee proposed a procedure more characteristic of the Senate — to minimize the likelihood of a Presidential veto by adding an unrelated controversial provision to essential legislation.

During the Ninety-third Congress, a bill to require confirmation of incumbent and future directors and deputy directors of the Office of Management and Budget had been passed and vetoed.[125] To avoid a second veto, the Rules Committee proposed that the text of the vetoed bill be made in order as an amendment to a Ways and Means bill to increase the public debt ceiling.[126] The supporters of this unlikely combination presumably hoped that President Nixon could not veto the debt ceiling bill, and therefore, would be compelled to accept the admittedly non-germane confirmation requirements as well. However, the previous question was rejected by an overwhelming vote, and the House adopted an open rule instead.[127] The fact that six of the ten Rules Democrats voted against ordering the previous question suggests that the Committee had reported the rule with some reluctance, possibly in order to accommodate the wishes of members of the Government Operations Committee.[128]

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124 For the most recent published version of the House Rules, *see* H.R. Doc. No. 96-398, 96th Cong., 2d Sess. (1981).

125 S. 518, 93d Cong., 1st Sess., 119 Cong. Rec. 16194 (1973) (bill vetoed), 119 Cong. Rec. 16764-73 (1973) (veto sustained).

126 H.R. Res. 437, 93d Cong., 1st Sess., 119 Cong. Rec. 19337-45 (1973) (for consideration of H.R. 8410).

127 119 Cong. Rec. 19342-43 (1973).

128 *Id.*

The Rules Committee also possesses the power of "extraction," in that special rules may make a bill in order for consideration even if it has not been reported by the committee of jurisdiction. This authority rarely is used, but the same result can be achieved by permitting a non-germane amendment to be offered to a measure that has been reported. In May 1979, the Committee on House Administration voted, 8 to 17, against a motion to report H.R. 1, dealing with public financing of elections.[129] A second bill affecting campaign financing that attracted great attention was H.R. 4970, the Obey-Railsback proposal to limit campaign contributions by political action committees.[130] Perhaps anticipating that H.R. 4970 would be no more successful in the House Administration Committee than H.R. 1 had been, its supporters bypassed the Committee and brought the proposal directly to the floor through H.R. Res. 414, which made the text of the Obey-Railsback bill in order as a non-germane amendment to S. 832, amending and extending the authorizations in the Federal Election Campaign Act.[131] The rule also prohibited all amendments to Obey-Railsback except a few that were specifically designated by the Rules Committee. Potential opposition within the committee of jurisdiction was bypassed and opportunities to amend the proposal were restricted. The rule was adopted, 228 to 182, with a substantial majority of Democrats voting against a substantial majority of Republicans.[132]

During this debate, the Rules Committee was criticized for having forsaken enforcement of the germaneness requirement (and for avoiding committee action) in order to bring the Obey-Railsback proposal to the floor.[133] But with the precedent for germaneness waivers having been established, Members have reacted to proposed waivers in light of their support for or opposition to the amendments thereby made in order. In some cases, special rules also have been criticized for not being ex-

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129 H.R. 1, 96th Cong., 1st Sess. (1979) (on May 24, 1979, the Committee on House Administration voted not to report the bill).

130 H.R. 4970, 96th Cong., 1st Sess., 125 Cong. Rec. H6762 (daily ed. July 26, 1979) (introduced and referred to the Committee on House Administration).

131 H.R. Res. 414, 96th Cong., 1st Sess., 125 Cong. Rec. H9261-73 (daily ed. Oct. 17, 1979) (for consideration of S. 832).

132 125 Cong. Rec. H9272-73 (daily ed. Oct. 17, 1979).

133 *Id.* at H9262, H9265, H9270-71.

pansive enough. Representative Frenzel, for example, a leading Republican member of the House Administration Committee, opposed the 1976 special rule for considering a postcard voter-registration bill on the ground that it did not make the text of his bill in order as a substitute, which presumably would have required a germaneness waiver. His argument that there were alternatives to postcard registration that the House should have an opportunity to consider was rejected by a predominantly party-line vote.[134]

In the following year, Republican Members criticized the proposed rule on the Labor Law Reform Act of 1977 for not permitting certain non-germane amendments to be offered to a bill which, they contended, had been narrowly drawn so these amendments would not be in order.[135] The Minority Leader charged that the Rules Committee had acted unfairly in not waiving Rule XVI:

> Contrary to what my Democrat colleagues infer, there is nothing immoral or even very strange about having a rule that makes a matter germane which might not otherwise be germane. Germaneness has been waived many times. . . . The majority saw fit to write a bill that would preclude the germaneness of the substitute which the gentleman from Illinois (Mr. Erlenborn) and the gentleman from Ohio (Mr. Ashbrook) will offer later. I think the majority knew full well what they did. I think they undoubtedly constructed the bill in such a way that these very well known amendments would not be germane.[136]

Like restrictive rules, expansive rules have become established as a recognized and sometimes desirable alternative to open rules. As with restrictive rules also, the use of expansive rules has enabled the Rules Committee to have a more selective and discriminating impact on the amending process. In evaluating them, Members must ask themselves the same questions that guide the Rules Committee's deliberations: which amendments are to be made in order, for what purposes, and to whose advantage?

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134 H.R. Res. 1444, 94th Cong., 2d Sess., 122 Cong. Rec. 25778-83 (1976) (for consideration of H.R. 11552).

135 H.R. Res. 799, 95th Cong., 1st Sess., 123 Cong. Rec. 32107-18 (1977) (for consideration of H.R. 8410).

136 123 Cong. Rec. 32116 (1977).

Conclusion

The range of alternatives available to the Rules Committee has expanded considerably during the past decade. The decision to grant or not grant a special rule that has been requested remains an important threshold determination, as does the timing of this decision. In this respect, the role of the Committee as "traffic cop" remains undiminished. What has changed is the frequency with which the Committee has departed from the models of simple open and closed rules, through the use of committee substitutes as original bills, through the inclusion of waivers for various purposes, and, most importantly, through the development of complex rules, in restrictive or expansive forms or in hybrids that combine elements of both.[137]

The development of complex rules represents in part a necessary response by the Committee to institutional changes within the House that have complicated the process of floor consideration. The most obvious of these changes has been the growth of multiple referrals. It seems likely that the Committee's decisions have been influenced as well by the gradual and cumulative impact of a series of other changes — changes in the distribution of influence within committees, in the relationships among Members in committee and on the floor, and possibly even by a shift in the locus of decision-making from committees to the floor. But in part also, the growth of complex rules has reflected changes in Rules Committee membership and the procedures for selecting its members — changes that have en-

137 Special rules reported by the Rules Committee for other purposes, *cf.* note 1 *supra,* also have included restrictive or expansive provisions. For example, H.R. Res. 1220, 95th Cong., 2d Sess. (1978), waived points of order against a section of the Labor-HEW appropriation bill for fiscal year 1979 — the section being a legislative provision affecting the use of funds for abortions. In addition, the rule provided that only two amendments could be offered to that section: a motion to strike, and a substitute which was the text of a laboriously achieved House-Senate compromise on an earlier continuing resolution. According to Representative Bolling, this arrangement had been requested by the Majority Leader in the hope of avoiding another prolonged conference negotiation over the issue. The rule was adopted by voice vote. 124 CONG. REC. H5098-99 (daily ed. June 7, 1978). Later in the year, the House adopted H.R. Res. 1434, 95th Cong., 2d Sess. (1978), which provided for consideration en bloc of five energy conference reports, an unusual procedure designed so that the House could continue its package approach to President Carter's energy proposals. 124 CONG. REC. H12810-19 (daily ed. Oct. 13, 1978). On the latter case, *see* S. BACH, COMPLEXITIES OF THE LEGISLATIVE PROCESS: A CASE STUDY OF CONGRESSIONAL CONSIDERATION OF NATIONAL ENERGY LEGISLATION DURING THE 95TH CONGRESS (Library of Congress, Congressional Research Service Rep. No. 79-68 GOV, 1979).

couraged the developmemt of a coherent Committee majority acting to promote party positions.

It is reasonably certain that, in reporting many complex rules, the Rules Committee has been motivated primarily by the need to organize the process of general debate and amendment and to permit equitable participation by all interested Members and committees. In other instances, complex rules have expanded or restricted the amending process in generally acceptable ways that expedited decisions, promoted consideration of alternatives, or permitted action on amendments that enjoyed significant support within the House. In still other cases though, it seems clear that complex rules have been constructed deliberately to promote certain outcomes and impede others. Nothing more nor less should be expected from Representatives with both institutional and political responsibilities.[138]

It should not be concluded, however, that the Rules Committee has become dominated by a monolithic majority that can be mobilized at will. Some rules have been delayed or denied altogether because the necessary majority could not be constructed. And in other instances, the Democrats on the Rules

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138 Some Members have come to view restrictive rules as a device for improving institutional efficiency. On August 2, 1979, Representative LaFalce of New York circulated to his colleagues the draft of a letter to Speaker O'Neill and Chairman Bolling which contended that "there are times when saving the institution may require that some individual desires be limited." To this end, the letter urged

> ...a judicious expansion [of the use of the restrictive or] modified open rule, an approach permitting reasonable proposed amendments to bills on the Floor, but limiting the number of such amendments, and the time permitted for debate on the amendments. This technique has proven effective in dealing with tax bills; there is no reason why it shouldn't be used in other areas as well. To be sure, use of this approach would have to be judicious and sensitive to the rights of the minority, but we are confident that the Rules Committee and the Leadership could and would work with the leading proponents and opponents of bills and amendments and exercise prudent judgment in formulating modified open rules. If a particular modified open rule did not adequately protect minority rights, we could always defeat the rule.

According to Representative Bauman, 43 Members co-signed this letter. Bauman criticized the type of rule LaFalce recommended in the following terms:

> [t]his new restrictive procedure on offering amendments on the House floor is the most serious and scandalous blow struck against democratic procedures in the House to date, for it effectively disenfranchises all 435 members by denying them the opportunity to offer, consider, and vote on amendments to legislation when it comes to the House floor. In addition to being undemocratic, this restrictive approach is based on the assumption that the judgments of our committees are somehow infallible and therefore beyond question or alteration.

R. E. Bauman, *Majority Tyranny in the House,* in VIEW FROM THE CAPITOL DOME (LOOKING RIGHT) 11-12 (J. H. Rousselot & R. T. Schulze eds. 1980).

Committee have been divided among themselves. For example, all the Republicans on the Committee supported, and five of ten Democrats opposed, the restrictive rule for considering the Revenue Act of 1978. The rule was supported by Representatives Bauman and Rousselot, two Republicans who had been vocal in their opposition to other restrictive rules, but was opposed by Representative Bolling because the Committee had voted, 7 to 8, against including an amendment he thought should be considered.[139]

On an earlier occasion during the Ninety-fourth Congress, the Rules Committee took up a bill dealing with natural gas supplies, but not with deregulation, that had been reported by the Interstate and Foreign Commerce Committee, even though a hearing had not yet been requested.[140] Not only did the special rule that was reported make in order a non-germane substitute on deregulation, to be offered by Representative Krueger of Texas, it also authorized the Speaker to recognize any member of the Commerce Committee to move for the bill's consideration, and allocated part of the time for general debate to Krueger's control. The rule was adopted with the support of the Majority and Minority Leaders and the two party Whips, but over the opposition of Representatives Staggers and Dingell of the Commerce Committee and five of the ten Democrats on the Rules Committee who voted, including Representative Bolling and Chairman Ray Madden. Democrats opposed the rule, 102 to 175; Republicans favored it, 128 to 9.[141]

Although these last two instances were exceptional, they do demonstrate that the Democratic majority on the Rules Committee has not been monolithic. Moreover, ultimate control over the Rules Committee rests with the House, and the Committee's ability to structure the choices that Members may make depends finally on the acquiescence of the majority.

A recent development, however, may make it more difficult for future voting majorities in the House to reject proposed

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139 H.R. Res. 1306, 95th Cong., 2d Sess., 124 Cong. Rec. H8269-76 (daily ed. Aug. 10, 1978) (for consideration of H.R. 13511).

140 H.R. 9464, 94th Cong., 1st Sess., 121 Cong. Rec. 28053 (1975) (introduced), 121 Cong. Rec. 40783 (1975) (ordered reported, as amended, by the Committee on Interstate and Foreign Commerce).

141 H.R. Res. 937, 94th Cong., 2d Sess., 122 Cong. Rec. 1956-72 (1976) (for consideration of H.R. 9464).

special rules in favor of different sets of parliamentary groundrules for the amending process in Committee of the Whole. Members who oppose the provisions of a special rule, but who favor action on the measure in question, can vote to refuse to order the previous question so that an amendment to the special rule itself, usually in the form of an amendment in the nature of a substitute, can be offered and accepted. Such attempts may be more difficult in the future because of the precedent established by a 1980 ruling that proposed amendments to special rules must satisfy the same germaneness requirement that applies to amendments to other measures.[142]

On May 29, 1980, the House took up a proposed closed rule for consideration of H.R. 7428, a bill to extend the public debt limit.[143] After the House voted, 74 to 312, not to order the previous question, Representative Bauman of Maryland offered an amendment in the nature of a substitute that made in order, any rule of the House to the contrary notwithstanding, a single amendment in the form of the text of H.R.J. Res. 531 as reported by the Committee on Ways and Means.[144] This joint resolution was a resolution of disapproval directed toward former President Carter's proposal to impose an oil import fee. Representative Bolling then made, and Speaker O'Neill sustained, a point of order against the amendment to the special rule on the ground that it did not satisfy the germaneness requirement of clause 7 of Rule XVI. In the course of his ruling, the Speaker quoted former Speaker Rayburn as having stated that it was

> a rule long established that a resolution from the Committee on Rules providing for the consideration of a bill relating to a certain subject may not be amended by a proposition providing for the consideration of another and not germane subject matter.[145]

Immediately thereafter, Representative Bauman offered a privileged motion to refer the proposed rule to the Rules Committee, a motion to which the House agreed by a vote of 211 to 175.

142 126 CONG. REC. H4285 (daily ed. May 29, 1980).

143 H.R. RES. 682, 96th Cong., 2d Sess., 126 CONG. REC. H4279-90 (daily ed. May 29, 1980) (for consideration of H.R. 7428).

144 H.R.J. RES. 531, 96th Cong., 2d Sess., 126 CONG. REC. H2545 (daily ed. April 15, 1980) (introduced), 126 CONG. REC. H3992 (daily ed. May 22, 1980) (ordered reported by the Committee on Ways and Means), enacted as P.L. 96-264, 126 CONG. REC. S6376-87 (daily ed. June 6, 1980).

145 *See* note 142 *supra*.

This was the first instance in the recent history of the House in which the germaneness requirement was imposed, through a point of order made and sustained, on a proposed amendment to a special rule; the full consequences of this decision remain to be developed through further rulings.[146] The germaneness requirement is both an integral dimension of House procedure and an interpretive quagmire. The precedents on the subject are voluminous and immensely difficult to reduce to a series of clear, comprehensive, and readily applicable standards. The most that can be said with confidence at this time is that this 1980 ruling may stimulate a series of future rulings which, collectively, could limit the ability of Members to modify proposed special rules on the floor. To the extent that the Rules Committee can present the House with "take it or leave it" propositions — propositions that are even more difficult to amend than in the past — the Committee's ability to influence decisions by defining choices will be enhanced significantly.[147]

146 The possibility of such a ruling had been raised but not resolved in 1979. During the discussion of H.R. Res. 157, 96th Cong., 1st Sess. (1979), for consideration of an earlier debt ceiling bill, H.R. 2534, Members spoke of the possibility that a point of order, on grounds of germaneness, might lie against an amendment offered to the rule if the previous question were not ordered. However, the House voted, 201 to 199, to order the previous question. 125 CONG. REC. H1364-73 (daily ed. Mar. 15, 1979).

147 Members retain the option of defeating a proposed special rule and then discharging the Rules Committee from further consideration of an alternate rule for considering the same measure. Both procedurally and politically, however, this is a difficult recourse.

ARTICLE

A STATE-BASED APPROACH TO HOSPITAL-COST CONTAINMENT

CARL J. SCHRAMM*

For many years, health-care policymakers have been actively concerned with the shortage of physicians and hospitals in various parts of the country. However, the rising cost of health care arguably has become a more serious problem than geographical maldistribution of health-care services. Even in our inflationary economy, the health-care sector stands out because of the extraordinary rate at which its prices and overall costs are rising.

In this Article, Prof. Schramm proposes a model state act for hospital-cost containment. The act provides for a commission that would regulate prices, capital expenditures, and overall budgets at hospitals throughout the state. Prof. Schramm contends that the commission would create market-related incentives for hospitals and physicians to be more cost-effective, so that quality health care would become more affordable for everyone.

Introduction

Rapid inflation in health-care costs is one of the most difficult problems with which the makers of domestic policy must wrestle.[1] While the dimensions and consequences of the problem are universally agreed upon,[2] the causes of the disproportionate rate of increase in the cost of medical attention relative to other

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1 *See generally* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978); V. FUCHS, WHO SHALL LIVE? (1974); L. RUSSELL & C. BURKE, THE POLITICAL ECONOMY OF FEDERAL HEALTH PROGRAMS IN THE UNITED STATES: AN HISTORICAL REVIEW (1978); Roberts & Bogue, *The American Health Care System: Where Have All the Dollars Gone?*, 13 HARV. J. ON LEGIS. 635 (1976); Schweitzer, *Health Care Cost-Containment Programs: An International Perspective*, in HOSPITAL COST CONTAINMENT: SELECTED NOTES FOR FUTURE POLICY 57 (1978); Wildavsky, *Doing Better and Feeling Worse: The Political Pathology of Health Policy*, 106 DAEDALUS 105 (1977); COUNCIL ON WAGE AND PRICE STABILITY, THE COMPLEX PUZZLE OF RISING HEALTH CARE COSTS: CAN THE PRIVATE SECTOR FIT IT TOGETHER? (Summary of Hearings held in New York, Chicago, San Francisco, Philadelphia, Houston, and Miami) (1976).

2 *See* notes 15 to 20 and accompanying text, *infra*.

goods and services are hotly contested by health economists.[3] Proposed solutions have ranged from rationing care[4] to establishing a national health service in which most health professionals would become government employees.[5] The establishment of comprehensive coverage under a national health insurance scheme has been proposed,[6] as has a shift to health maintenance organizations (HMOs) as the principal means of delivering health care.[7] It has also been suggested that the government assume an active role in the promotion of more healthful lifestyles in order to reduce the demand for medical attention.[8]

The political pressure for government intervention has grown during the last twenty years as the health-care sector has been recognized as the most inflationary sector of an increasingly inflationary economy.[9] Predictions of price inflation suggest that costs will continue to grow faster in health care than in other areas of the economy.[10]

Perhaps because regulation of the prices charged for medical attention poses less of a threat to the present structure and

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3 For the debate between the "cost-push" and "demand-pull" theories of health-care cost inflation, *see* D. SALKEVER, HOSPITAL SECTOR INFLATION 95-119 (1979); A. SORKIN, HEALTH ECONOMICS 12 (1975); Berry, *Research Needs for Future Policy,* in HOSPITAL COST CONTAINMENT: SELECTED NOTES FOR FUTURE POLICY 575 (1978); Evans, *Supplier-Induced Demand: Some Empirical Evidence and Implications,* in THE ECONOMICS OF HEALTH AND MEDICAL CARE 162 (M. Perlman ed. 1974).

4 *See, e.g,* D. HIRSHFIELD, THE LOST REFORM: THE CAMPAIGN FOR COMPULSORY HEALTH INSURANCE IN THE UNITED STATES (1970); Lindsay, *Medical Care and the Economics of Sharing,* 36 ECONOMICA 351 (1969); Mechanic, *Rationing Health Care: Public Policy and the Medical Marketplace,* 6 HASTINGS CENTER REP. 34 (1976).

5 For an examination of the British system, *see* G. FORSYTH, DOCTORS AND STATE MEDICINE: A STUDY OF THE BRITISH HEALTH SERVICE (1966).

6 *See, e.g.,* Falk, *Proposals for National Health Insurance in the USA: Origins and Evolution, and Some Perceptions for the Future,* 55 MILBANK MEMORIAL FUND Q. 161 (1977); Fuchs, *From Bismarck to Woodcock: The "Irrational" Pursuit of National Health Insurance,* 19 J. L. & ECON. 347 (1976); Newhouse, Phelps & Schwartz, *Policy Options and the Impact of National Health Insurance,* 290 NEW ENG. J. MED. 1345 (1974).

7 *See, e.g.,* Corbin & Krute, *Some Aspects of Medicare Experience with Group-Practice Prepayment Plans,* 38 SOC. SEC. BULL. 3 (1975); Egdahl, *Foundations for Medical Care,* 288 NEW ENG. J. MED. 491 (1973); Ellwood, *Interstudy,* quoted in AMA News, Dec. 18, 1977; H. Luft, How Do HMOs Achieve Their "Savings" (1977) (Research Paper No. 77-7, Stan. U. Sch. Med.).

8 *See, e.g.,* Knowles, *The Responsibility of the Individual,* 106 DAEDALUS 57 (1977).

9 Roberts & Bogue, *supra* note 1. *See also* Figure 1 *infra.*

10 Freeland, Calat & Schendler, *Projections of National Health Expenditures, 1980, 1985, and 1990,* 1 HEALTH CARE FINANCING REV. 1, 11 (Winter 1980); Blendon, Schramm, Moloney & Rogers, *An Era of Stress for Health Institutions,* J. AM. MED. ASSOC. 1843 (1981).

functioning of health-care delivery institutions than do other proposals, such regulation has gathered significant support as a means of controlling health-care costs. Various plans for regulating the price of health services, particularly hospital services, have been put forward at both the federal[11] and the state levels.[12] So far, state-level activities to curb health-care cost inflation have ranged from encouraging voluntary efforts based on industry-imposed price restraint[13] to enacting statutes that establish independent state agencies with rate-setting power much like that of public service commissions.[14] In the face of mounting political pressure, there is no consensus as to what steps should be taken to dampen the inflation of health-care prices.

This Article attempts to outline the essential components of an effective state statute that would reduce inflation in hospital costs. The model act proposed here incorporates features of some existing state rate-setting legislation. It also includes language designed to control hospital capital expenditures, one of the underlying causes of rising hospital prices. The resulting proposal, which integrates price-setting authority with power over capital expenditures, represents a more rational approach to cost containment than presently exists under either federal or state law.

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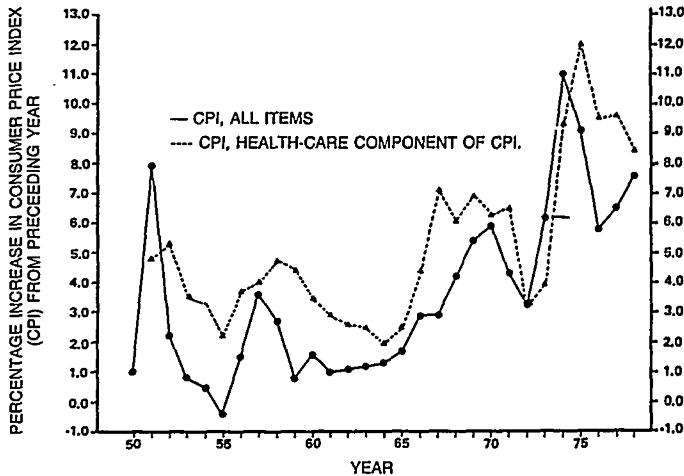
11 N.Y. Times, Apr. 26, 1977, at 1.

12 To date, twenty-eight states have enacted statues of one kind or another in an effort to contain health-care cost inflation. Washington Rep. on Med. & Health, Finance Letter, August 18, 1980, at 3. *See also* Table 1.

13 Lewin, *State Health Cost Regulation: Structure and Administration,* 6 U.TOL. L. REV. 647, 659 (1975). In some other jurisdictions, the hospital industry has implemented a plan of self-regulation, widely referred to as the "voluntary effort," in an attempt to reduce the rate of price inflation. Additionally, a nationwide voluntary cost-containment program, sponsored by the American Hospital Association, the American Medical Association, the Blue Cross/Blue Shield Association, the Federation of American Hospitals, the Health Insurance Association of America, and others, was organized at the request of the Carter Administration. Cohn, *Hospitals Asked to Limit Spending Rise,* Washington Post, Dec. 29, 1978, at A6.

14 For general economic analyses of price regulation, *see* A. KAHN, 1 THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 20-57 (1971); A. KAHN, 2 THE ECONOMICS OF REGULATION: PRINICIPLES AND INSTITUTIONS. 95-112 (1971); Noll, *The Consequences of Public Utility Regulation of Hospitals,* in INSTITUTE OF MEDICINE, NAT'L ACAD. SCIENCES, CONTROLS ON HEALTH CARE 25 (1975); Corley, *Hospitals as a Public Utility: or "Work with Us Now or Work for Us Later,"* 2 J. HEALTH POLITICS, POLICY & L. 304 (1977); H. A. Cohen, Public Utility Regulation: Rates, Revenues, and Capital Acquisition (Sept. 14, 1978) (mimeograph from Maryland Health Services Cost Review Commission).

FIGURE 1
ANNUAL PERCENTAGE INCREASES OF CONSUMER PRICE INDEX (CPI), ALL ITEMS, AS COMPARED WITH ANNUAL PERCENTAGE INCREASES OF HEALTH-CARE COMPONENT OF CPI



Source: U.S. Bureau of Labor Statistics, Dep't of Labor, CPI Detailed Report (various monthly issues).

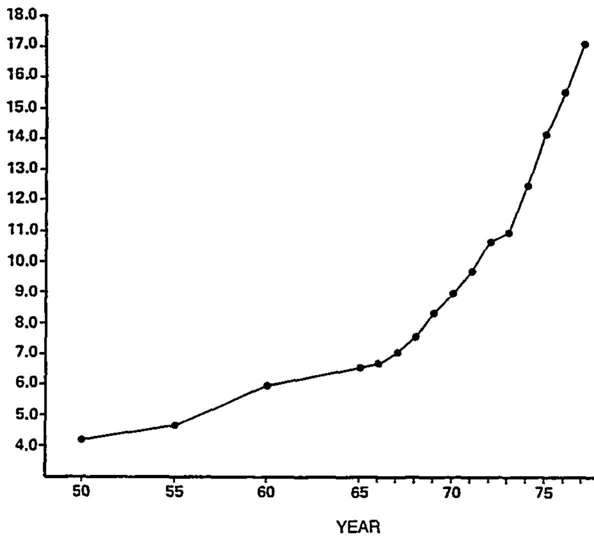
I. The Political Issue in Economic Perspective

A. *Health-Care Cost Inflation*

Health-care cost inflation has been a major political issue since World War II. As Figure 1 shows, the rate of inflation in health-care prices has exceeded the overall rate of inflation throughout the past three decades. Not surprisingly, as Figure 2 shows, the proportion of per capita income devoted to health care has grown accordingly.

This disproportionately rapid increase in health-care prices and in expenditures for health care has been accompanied and, in part, caused by an increase in the demand for medical attention, particularly that delivered in hospitals. As reflected by Figure 3, which shows the number of hospital admissions per thousand since 1960, the demand for hospital care has increased steadily over time. This increase in demand, coupled with the disproportionate increase in health-care prices relative to other prices, has resulted in a steady increase in the proportion of

FIGURE 2
PER CAPITA NATIONAL HEALTH-CARE EXPENDITURES AS A PERCENTAGE OF PER CAPITA NATIONAL DISPOSABLE PERSONAL INCOME



Source: Gibson, *National Health Care Expenditures, 1979,* HEALTH CARE FINANCING REV., Summer 1980, at 1-36; COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT TO THE PRESIDENT 229 (1980).

resources that is devoted to health care: in 1950, 4.6 percent of the Gross National Product (GNP) was expended on health care; in 1965, 5.9 percent; in 1980, 9.7 percent, or roughly one of every ten dollars of wealth being generated in our society.[15]

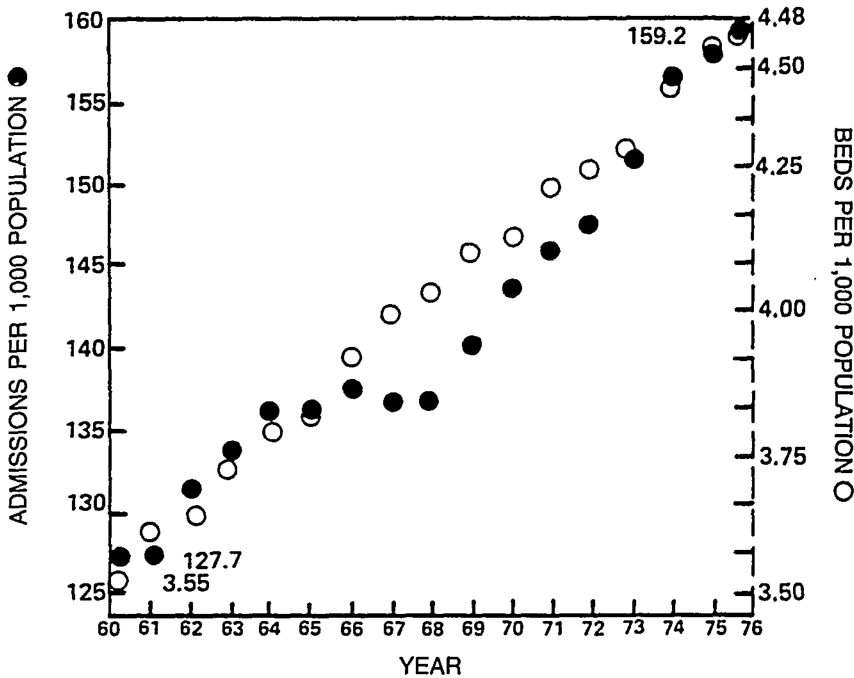
B. *Political Pressure over Health-Care Costs*

This rapid doubling of the proportion of wealth expended on health care has generated significant political pressure.[16] Four

15 NAT'L COMMISSION FOR MANPOWER POLICY, SPECIAL REP. NO. 11, EMPLOYMENT IMPACTS OF HEALTH POLICY DEVELOPMENTS 16 (1976).

16 The rampant inflation in health-care costs moved the Congress, in 1972, for example, to amend the Social Security Act to authorize the Secretary of Health, Education, and Welfare (HEW) to set prospective limits on the costs reimbursed under Medicare. Section 1861(v)(1) of the Social Security Act (42 U.S.C. § 1395x(v)(1)), as amended by section 223 (limitation on coverage of costs) of Pub. L. No. 92-603, the Social Security Amendments of 1972, authorizes the Secretary of Health and Human Services (HHS) to set prospective limits on the costs that are reimbursed under Medicare. Regulations pursuant to this authority are set forth at 42 C.F.R. § 406.460 (1979).

FIGURE 3
HOSPITAL ADMISSIONS AND BEDS PER 1,000 POPULATION



Source: Booz, Allen & Hamilton, Evaluation of Future Hospital Capitalization 4 (Oct. 16, 1978) (study commissioned by Standard & Poor's Corp.).

reasons explain why health-care cost inflation has been widely recognized as a persistent problem and will continue to be a major political issue until the inflation rate falls significantly.

First, while there has been a large increase in the proportion of the GNP devoted to health care, no commensurate improvement in the health of the population has been observed.[17] Thus, health-care cost inflation has become a major political question because many citizens doubt that they are getting their money's worth for their ever-increasing health-care expenditures.[18]

Second, health-care cost inflation substantially raises the overall rate of price inflation. Because of the disproportionate rate of price inflation in health care, health-care costs have

17 CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE U.S., EXPENDITURES FOR HEALTH CARE: FEDERAL PROGRAMS AND THEIR EFFECTS (1977).

18 *Id.*

contributed increasingly to aggregate inflation during the last decade. To the extent that inflation in the entire economy continues to attract attention, inflation in health-care costs will continue to be a major concern for policymakers and politicians.

Third, increased spending on health care occurs at the expense of society's other needs. The increase in the GNP devoted to health care represents a transfer of resources away from mass transit, housing, defense, improved nutrition, new cars, more vacations, and other items. The shift of five percent of the GNP to health care from other sectors over a fifteen-year period has brought with it a significant amount of political pressure as various groups advocating interests outside the health-care area have fought to maintain the shares of resources historically allocated to serving those interests.[19]

Finally, the issue of health-care cost inflation continues to be a major domestic problem because of its long-range impact on the distribution of wealth. By permitting a disproportionate rate of inflation to persist in the health-care sector, society allows income and wealth to be redistributed to individuals and institutions in that sector and away from individuals and institutions outside of it.[20]

II. The Non-Competitive, Cost-Insensitive System of Distributing Care

Attempts to cope with the political issue of health-care cost inflation have met with frustration for several reasons. First, policymakers in our society do not have an unchecked ability to solve first one problem and then another. In the last decade, the problem of rising hospital costs has vied for attention with countless other domestic problems. Second, economists are uncertain about how the general problem of price inflation can be subdued in a generally dampened economy, a situation that has caused most policymakers to place little hope in an engineered solution based on conventional economic theory.[21] Third

19 D. Abernethy & D. Pearson, Regulating Hospital Costs: The Development of Public Policy 11 (1979); A. Enthoven, Health Plan 15-16 (1980).

20 Marmor, *The Politics of Medical Inflation*, 2 J. Health Politics, Policy & L. 69, 74-75 (1977).

21 *See* A. Weber, In Pursuit of Price Stability: The Wage-Price Freeze of 1971 (1973).

and most important, no comprehensive plan has been enacted or even developed to reform the health-care market. The actions and incentives of various suppliers of health services are poorly understood, and no theory of consumer behavior, as it relates to the decision to seek medical attention, has been generally accepted.

Despite the absence of a general theory of the market for medical care, however, several distinctive, cost-inflating characteristics of that market are well-understood.[22] These characteristics are described below.

A. *Health Insurance and Consumer Indifference to Price*

Perhaps the most important of the health-care market's cost-inflating characteristics is that consumers are largely indifferent to price when making decisions about whether to purchase medical attention. The presence of health insurance, which was rare in the 1930s but is common today,[23] largely insulates individuals from price differences that exist among providers. Thus, consumers often discriminate among physicians, hospitals, and clinics on non-price grounds such as perceived differences in quality, religious orientation, or convenience to one's residence.[24] The presence of health insurance has also significantly influenced the patient-physician relationship. In a world where the costs of care are not paid directly by the individual, the physician acts as a "purchasing agent" for the patient. The physician is less concerned about economizing, because the insured patient is not directly at risk for the costs of care.[25]

22 *See generally* P. FELDSTEIN, HEALTH CARE ECONOMICS (1979); A. SORKIN, *supra* note 3.

23 S. LAW, BLUE CROSS: WHAT WENT WRONG? 11 (2d ed. 1976). As recently as 1972, 38 million Americans under the age of 65 (one fifth of that population) still had no economic protection against hospital costs, and 43 million (about one fourth) had no insurance for medical-care costs. A. SORKIN, *supra* note 3, at 172. However, according to an estimate by the Congressional Budget Office, 92 to 95 percent of the total population had some health-insurance coverage. Congressional Budget Office, Profile on Health-Care Coverage: The Haves and Have-Nots (March 1979) (background paper, Washington, D.C.).

24. *See, e.g.*, Macstravic, *Market Research in Ambulatory Care*, J. AMBULATORY CARE MANAGEMENT, May 1981, at 37-38; Flexner, *Discovering What the Health Consumer Really Wants*, HEALTH CARE MANAGEMENT REV., Fall 1977, at 43.

25 CONGRESSIONAL BUDGET OFFICE, *supra* note 17, at 30.

B. *Supply-Induced Demand*

In most markets, supply and demand relate to one another through the price mechanism. In the medical-care market, however, copious evidence shows the weakness of price as the mediator of supply and demand. In the case of hospital beds, for example, a situation of supply-induced demand exists.[26] Even in communities that under objective medical criteria are identified as having a significant over-supply of hospitals beds,[27] expansion in hospital capacity triggers an increase in the demand for inpatient care, so that new beds are in constant use shortly after they are made available. In short, demand expands to meet supply.

C. *High-Cost Technology*

The rapid profusion of sophisticated equipment for diagnostic testing is well-documented,[28] and the meteoric increase in the routine administration of recently developed tests is known to be one of the most important causes of inflation in hospital costs and total health expenditures.[29] For example, the proliferation of CT scanners in the last five years has revolutionized the practice of neurology, cardiology, and urology.[30] But, in contrast to the outcome in other industries, the development of capital-intensive technology in health care has not meant a reduction in labor inputs. Instead, new technology in health care nearly always creates a demand for new, more highly skilled technicians. In fact, the overall need for additional personnel invar-

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26 D. ABERNETHY & D. PEARSON, *supra* note 19, at 49; May, *Utilization of Health Services and the Availability of Resources*, in EQUITY IN HEALTH SERVICES (1975); Shain & Roemer, *Hospital Costs Relate to the Supply of Beds*, 92 MODERN HOSPITAL 71 (1959).

27 INSTITUTE OF MEDICINE, NAT'L ACAD. SCIENCES, A POLICY STATEMENT: CONTROLLING THE SUPPLY OF HOSPITAL BEDS (1976).

28 *See* L. RUSSELL, TECHNOLOGY IN HOSPITALS: MEDICAL ADVANCES AND THEIR DIFFUSION 71-131 (1979); Moloney & Rogers, *Medical Technology — A Different View of the Contentious Debate Over Costs*, 301 NEW ENG. J. MED. 1413 (1979).

29 Moloney & Rogers, *supra* note 28. *See also* The Blue Sheet, July 23, 1980, at 13.

30 *See generally* Willems, *The Computed Tomography (CT) Scanner*, in MEDICAL TECHNOLOGY: THE CULPRIT BEHIND HEALTH CARE COSTS? 116 (1979); Banta, *The Diffusion of the Computed Tomography (CT) Scanner in the United States*, 10 INT'L J. HEALTH SCI. 251 (1980).

iably offsets the reduced demand for persons skilled in the outdated equipment and procedures. The net result is a higher total labor bill.[31] To the extent that new technology continues to be developed and to proliferate, and to the extent that physicians' incomes increase in proportion to the amount of testing ordered,[32] the phenomenon of new technology and new capital equipment being linked with higher unit prices will remain a distinctive characteristic of the health-care market.[33]

D. *Consumers' Lack of Information*

It is widely accepted that consumers entering a market seldom have perfect knowledge, but there are few markets where informed consumer choice occurs so rarely as in health care.[34]

Because medical services are purchased infrequently, the consumer is inexperienced, most often not knowing what it is he should buy. In many cases, the individual fears that some serious, perhaps life-threatening, condition exists, and may unconsciously seek to be shielded from information.[35] Further, the technology and terminology encountered in the medical environment can be intimidating to even the most educated layperson. Finally, the usual process of consumer acclimation to a given market commonly does not take place because physicians and other health-care providers often fail to provide detailed information or to discuss alternate courses of treatment.[36]

31 *See* NAT'L COMMISSION FOR MANPOWER POLICY, *supra* note 15, at 63; Feldstein & Taylor, The Rapid Rise in Hospital Costs (Jan. 1977) (Staff Report for Council on Wage and Price Stability).

32 One study explained how a primary-care internist, while limiting charges to those allowable under Medicare, can effect a threefold increase in income by merely providing a modest array of common laboratory tests in the office. Schroeder & Showstack, *Financial Incentives to Perform Medical Procedures and Laboratory Tests: Illustrative Models of Office Practice,* 16 MED. CARE 289 (1978).

33. D. ABERNETHY & D. PEARSON, *supra* note 19, at 32.

34 A. SORKIN, *supra* note 3, at 4; Schuck, *A Consumer's View of the Health Care System,* in ETHICS OF HEALTH CARE 95, 100. One illustration of this problem comes from the results of two recent studies which concluded that hospital consent forms, intended to provide information on planned surgery, are so cluttered with long sentences and medical jargon that they are unintelligible to most people. 8 HEALTH LAW. NEWS REP. 6-7 (1980).

35 *See generally* Mechanic, *Patient Behavior and the Organization of Medical Care,* in ETHICS OF HEALTH CARE 67, 69.

36 *See, e.g.,* Note, *The Abortion Alternative and the Patient's Right to Know,* 1978 WASH. U. L. Q. 167; Simon, *The Physician's Duty to Screen Patients for Elective Surgery,* 1979 SPECIALTY DIG. HEALTH CARE L. 3.

These factors form a cyclic pattern that produces a chronically uninformed consumer.

E. *Hospitals' Lack of Profit Incentives and the Health-Care Industry's Lack of Competition*

Hospitals, the major institutional providers of health care, operate for the most part as non-profit entities. As a result, the typical incentives to produce in the most cost-efficient manner so as to be price-competitive do not apply.[37] The secondary institutional interest in price competition, that is, preserving the institution for the future,[38] is largely vitiated by Medicare's guarantee of payment of "reasonable and related costs"[39] and the Blue Cross method of paying "reasonable and customary costs."[40]

Finally, the lack of competition among providers is further retarded by the strength of both voluntary and state regulations that limit market entry and in some cases establish price floors.[41] Examples of voluntary regulation include the various specialty boards that administer certifying examinations for physicians[42] and the accrediting bodies that approve hospitals.[43] The state role in regulating physicians and hospitals is manifest in licensing statutes, some of which almost totally delegate to local professional societies the authority to decide who can provide health care.[44] In the case of hospitals, the states' control of

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37 *See* C. Schramm, Hospital Consolidation: Lessons from Other Industries 8-16 (March 28, 1980) (mimeograph at Johns Hopkins Center for Hospital Finance and Management, Baltimore, Md.).

38 *See* J. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASIS OF ADMINISTRATIVE THEORY (1967).

39 Cost Related to Patient Care, 42 C.F.R. § 405.451 (1979).

40 S. LAW, *supra* note 23, at 59–114.

41 Entry of hospitals into the industry, traditionally regulated by state licensing statutes, has been recently turned over to the "Certificate of Need" laws. *See generally* Havighurst, *Regulation of Health Facilities and Services by "Certificate of Need,"* 59 U. VA. L. REV. 1143 (1973); Salkever & Bice, *The Impact of Certificate-of-Need Controls on Hospital Investment,* 54 MILBANK MEMORIAL FUND Q. 185 (1976). *But see also* Miller, *Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture,* 68 GEORGETOWN L.J. 873, 874 (1980) (entry barriers can and should be used to reinforce competition).

42 *See generally* IIA HOSPITAL LAW MANUAL *Medical Staff* 56 (1979).

43 Salkever, *Competition Among Hospitals,* in FEDERAL TRADE COMMISSION, COMPETITION IN THE HEALTH CARE SECTOR: PAST, PRESENT, AND FUTURE 193 (1978).

44 *See, e.g.,* MD. ANN. CODE art. 43, §§ 119-123A (1976).

market entry has become explicit under Certificate-of-Need laws.[45]

In sum, the health-care market harbors many individual, institutional, and governmental idiosyncrasies that have grown from the unique nature of its services. As health-care institutions have changed to pursue various goals, including some that conflict with one another, the market has become increasingly complex, confounded, and dysfunctional. The concurrent pursuit of universal and equal access to medical care,[46] the ambivalence with which legislatures and courts address the issue of whether medical care should be treated as a fundamental right,[47] and acute concern over the change in the absolute and relative costs of care have produced a market whose malfunction has caused the inordinate rate of cost inflation observed in recent years.

III. Origins of the Health-Care System's Inflation-Causing Insensitivity to Costs

The cost-insensitivity of the health-care market is largely of recent origin, having resulted from three major developments that have shaped the market during the last thirty years. Those developments are the proliferation of private health insurance, federal financing of health care, and the increasing reliance of health-care providers on high technology.

A. *Private Health Insurance*

Prior to World War II, the treatment of illness commonly was financed on an out-of-pocket basis. Health insurance, although discussed as a potential government initiative by labor reform groups at the turn of the century, was nearly non-existent.[48] The system of private insurance emerged during the Depression.

45 Havighurst, *supra* note 41; Salkever & Bice, *supra* note 41.

46 *See* V. Fuchs, *supra* note 1; H. Somers, Doctors, Patients, and Health Insurance (1961).

47 *See* Blackstone, *Health Care as a Legal Right: An Exploration of Legal and Moral Grounds,* 10 Ga. L. Rev. 391 (1976); Fried, *Equality and Rights in Medical Care,* 6 Hastings Center Rep. 29 (1976); Outka, *Social Justice and Equal Access to Health Care,* 2 J. Religious Ethics 11 (1974); Sade, *Medical Care as a Right: A Refutation,* 285 New Eng. J. Med. 1288 (1971).

48 D. Hirshfield, *supra* note 4, at 1.

"Voluntary" plans such as Blue Cross were developed as a means of ensuring hospitals a stable source of revenue.[49] Later, the spread of commerical health insurance was spurred by the War Labor Board's imposition of wage ceilings during World War II.[50] Faced with extraordinary demand in extremely tight labor markets, employers competed with each other by offering non-wage, "fringe" benefits.[51] As a result, health insurance, whether supplied by a voluntary or a commercial plan, became an expected incident of employment after the war.

B. *Federal Financing of Health Care*

No single entity has done more to fuel health-care cost inflation than the federal government has in its roles as a stimulator of hospital construction and a direct purchaser of services.[52] Except for emergency funding of medical care during the Depression and direct provision of medical attention to veterans following World War I,[53] federal involvement in the financing and delivery of acute hospital care was non-existent through most of our history. Indeed, until the 1950s the typical community hospital reflected its medieval origins as a self-governing, eleemosynary enterprise designed to give comfort and care to the ill as a subsidized activity of various religious groups or as the object of philanthropy.[54]

In retrospect, it seems inevitable that government would eventually intervene in the delivery of health care. Both because the Depression and World War II had established government as an active force in battling social problems and because the inequitable distribution of care had become a major political concern,[55] government began to assert itself in health care during

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49 O. ANDERSON, THE UNEASY EQUILIBRIUM: PRIVATE AND PUBLIC FINANCING OF HEALTH SERVICES IN THE UNITED STATES, 1875-1965, at 119 (1968); S. LAW, *supra* note 23, at 6.

50 [1942] 1 WAR LAB. REP. (BNA) ix.

51 *See generally* J. OWEN, THE PRICE OF LEISURE 62-63 (1970).

52 A recent survey reported that hospital administrators viewed government regulation and reporting as the most important causes of hospital-cost inflation over the past decade. 7 HEALTH LAW. NEWS REP. 3 (1979).

53 O. ANDERSON, *supra* note 49, at 115-18.

54 *See* COMMISSION ON HOSPITAL CARE, HOSPITAL CARE IN THE UNITED STATES (1947).

55 The experience of the Depression had highlighted a number of distributional issues, particularly the acute shortages of hospitals and physicians in rural America. In urban

the late 1940s. State legislatures enacted measures ranging from authorizing localities to provide increased medical care to the destitute,[56] to initiating programs in which medical care was purchased directly by the state in the private market.[57] At the federal level, Congress gave serious consideration to a number of health-care proposals, the most far-reaching of which was President Truman's proposal for national health insurance.[58] Rather than establishing a national health insurance program, however, Congress enacted a massive funding program for hospital construction.

1. Federal Assistance for Hospital Construction

Because there was little dispute that medical care was poorly distributed thoughout the country and because it seemed clear that President Truman's health insurance proposal had substantial support in Congress,[59] the American Medical Association (AMA) and the American Hospital Association (AHA), both of which felt that some of the proposed changes would be detrimental to their memberships, joined together to advocate alternatives to national health insurance. The AHA offered a plan for public funding of hospital construction throughout the country. In doing so, it sought to limit the government's role in health care to the financing of construction. The AHA was clearly concerned about containing government regulation, cor-

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communities with adequate delivery resources, the economic and racial barriers to care were recognized as serious and intolerable. In 1927, the Commmittee on the Cost of Medical Care was formed to study the incidence of disease in the population, existing facilities, and family expenditures for health care. Funded by six philanthropic foundations, the majority report of the Committee in 1932 recommended several major organizational changes in the health-care system, including group practice and group payment for services or insurance. O. ANDERSON, *supra* note 49, at 95.

In response to an ever-worsening situation of hospital availability and accessibility, the Commission on Hospital Care was orgainzed in 1941. Sponsored by the AHA with the assistance of the U. S. Public Health Service, the Commission's nationwide survey showed hospitals to be inadequate in number and haphazardly distributed. Comment, *The Hill-Burton Act, 1946-1980: Asynchrony in the Delivery of Health Care to the Poor,* 39 MD. L. REV. 316, 319 (1979).

56 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1445 (West 1979); N.J. STAT. ANN. §§ 44:5-2, 44:5-11 (West 1940 & Supp. 1980-81).

57 *See, e.g.*, MASS. ANN. LAWS ch. 117, § 24A (Michie/Law. Co-op 1965).

58 H. SOMERS & A. SOMERS, MEDICARE AND THE HOSPITALS: ISSUES AND PROSPECTS 4 (1967).

59 R. HARRIS, A SACRED TRUST 27-38 (1966).

rectly assuming that under a grant-making program there would be less stringent federal regulation than under a program that financed care on an ongoing basis.[60] To a large extent, the AHA's viewpoint was embodied in a bill introduced by Senators Lister Hill of Alabama and Harold Burton of Ohio. The original Hill-Burton bill offered federal grants in order to increase the number and improve the quality of health-care facilities.[61]

Because the opposition to the Truman national health insurance proposal was so intense, the chances of enactment seemed far better for a construction-financing bill. Consequently, senators who desired federal action to improve the distribution of health care focused on ensuring that the government would receive some redistributive *quid pro quo* for its underwriting of hospital construction.[62] Under the Hill-Burton Act as finally passed in 1947,[63] state governments were required to establish planning mechanisms under which existing and proposed hospitals would become eligible for federal funds. To qualify for Hill-Burton monies, an applicant institution had to furnish assurances that it would be available to all persons in the community without regard to race or creed.[64] It also had to satisfy a free-care provision requiring it to make available "a reasonable volume of hospital services to persons unable to pay" for them.[65] Meanwhile, the federal government was explicitly prohibited from interfering with the operation of grantee hospitals.[66]

The Hill-Burton program was immensely successful in achieving the goal of stimulating construction of new hospital facilities. Between 1947 and 1973, nearly four billion dollars were granted to almost six thousand hospitals, providing in part for the addition of 358,000 beds, or roughly one third of all hospital capacity in existence in 1973.[67] Even though the free-care obligation was at best loosely complied with by many hospitals, it

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60 *See* Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L. J. 243 (1978).

61 Comment, *The Hill-Burton Act*, *supra* note 55, at 320.

62 Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act: Realities and Pitfalls*, 70 NW. U. L. REV. 168, 170-72 (1975).

63 Title VI of the Public Health Service Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (codified, as amended, at 42 U.S.C. §§ 291-291o (1976)).

64 42 U.S.C. § 291c(e)(2) (1976).

65 42 U.S.C. § 291c(e)(1) (1976).

66 42 U.S.C. § 291m (1976).

67 Rosenblatt, *supra* note 60, at 269; Comment, *The Hill-Burton Act*, *supra* note 55, at 324.

established the federal government as a major albeit indirect source of health care for the poor. Whether the poor were in fact better cared for under Hill-Burton is doubtful;[68] it is certain, however, that the increased numbers of beds provided by the program meant that many more days of care were supplied overall than would have been otherwise. To the extent that demand for hospital care is supply-induced,[69] the inflationary pressures on hospital costs were activated. Moreover, the Hill-Burton program established the federal government as a permanent presence in the hospital industry.

2. Direct Federal Financing of Health Care

A far more significant federal contribution to health-care cost inflation came from the 1965 passage of titles XVIII and XIX of the Social Security Act.[70] Title XVIII established Medicare, under which the federal government finances hospitalization and related care for the elderly.[71] Title XIX established Medicaid, which provides for the poor and disadvantaged. Medicaid, which is financed jointly by the federal government and the states, resembles earlier programs that purchased hospital care and physician attention for poor persons qualifying for welfare support.[72] It provides qualified beneficiaries with complete hospital coverage and partial physician and dental support.[73]

Both programs had two goals. The primary aim was to guarantee access to hospital care and physician attention.[74] The second goal was the assurance of equal facilities and treatment for the elderly and poor once admitted to hospitals.[75] Prior to

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68 Rose, *supra* note 62, at 200.

69 May, *supra* note 26; Shain & Roemer, *supra* note 26.

70 Social Security Amendments of 1965, Pub. L. No. 89-97, §§ 1801-1875, 79 Stat. 291 (1965) (current version at 42 U.S.C.A. §§ 1395-1395rr (1974 & Supp. 1980), Pub. L. No. 89-97, §§ 1901-1905, 79 Stat. 343 (1965) (current version at 42 U.S.C.A. §§ 1396-1396j (1974 & Supp. 1980).

71 42 U.S.C.A. §§ 1395i, 1395t (1974 & Supp. 1980).

72 Loebs, *Medicaid—A Survey of Indicators and Issues*, in THE MEDICAID EXPERIENCE 5-6 (1979).

73 42 U.S.C.A. 1396 (1974 & Supp. 1980).

74 *See, e.g., Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 92 (1965) (statement of Hon. Anthony J. Celebrezze).

75 Congressional concern that state Medicaid programs should eliminate the traditional dual-track system and provide comprehensive, high-quality benefits is evident in § 1903(c) of the original federal statute. 42 U.S.C. § 1396b(e) (1970) (repealed 1973).

Medicare and Medicaid, hospitals commonly maintained a two-tier system in which experienced physicians cared for middle- and upper-income patients in settings apart from the wards where the poor and uninsured elderly received treatment from physicians in training.[76]

Several attributes of Medicare and Medicaid have stimulated price inflation. The first is the application of a uniform benefit level to all those eligible for the programs. Substantially all persons over age 65 receive Medicare benefits without regard to personal resources, other insurance coverage, or physical health. Similarly, in almost every state, Medicaid extends uniform benefits to any individual or family qualifying as needy under an income test or other means tests.[77] By providing financing without a strict regard to need, Medicare and Medicaid discourage savings and encourage extensive use of health-care resources.

Another inflation-producing attribute of Medicare and Medicaid has been the high level of benefits provided. In order to eliminate the two-tier system of medical care, both programs have attempted to provide funding sufficient to ensure that the care rendered to beneficiaries is identical to that enjoyed by privately insured and cash-paying patients. As a consequence, the existence of ward practice in hospitals has been all but eliminated, the poor and elderly have much-improved access to private physicians and specialists, and community hospitals and doctors' offices have emerged as major providers of care to those groups.[78]

An additional inflation-inducing trait of Medicare and Medicaid is the government's role as a direct "deep-pocket" purchaser of health care. Health-care providers have fashioned their accounting and billing practices to maximize reimburse-

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This and other provisions of the statute were interpreted by the Department of Health, Education, and Welfare to mean that "the medical and remedial care and services made available to recipients . . . [should] be of high quality and in no way inferior to that enjoyed by the rest of the population." DEP'T OF HEALTH, EDUCATION & WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Supplement D, Medical Assistance Program § 5140 (1970).

76 Seigel, *Medical Service Plans in Academic Medical Centers*, 53 J. MED. EDUC. 791, 792 (1978).

77 2 MEDICARE & MEDICAID GUIDE (CCH) ¶¶ 14,231, 14,251, 14,303, 14,311 (1980).

78 *See generally* Saward, *Institutional Organization, Incentives, and Change*, 106 DAEDALUS 193, 197 (1977).

ment[79] because the reimbursement is drawn not from the pockets of individuals but from the "boundless" resources of the federal government, administered by a highly impersonal and geographically remote bureaucracy.

The final characteristic linking the advent of Medicare and Medicaid to health-care cost inflation is the open-ended, cost-based formula by which the government has chosen to reimburse health-care providers for their services. By paying all the reasonable costs of covered services which are related to the care of beneficiaries,[80] the programs have reduced the incentive for hospitals to be economical in their use of resources. Prior to the federal government's emergence as a direct purchaser of health care, hospitals operated in a fashion more analogous to religious institutions than to the entrepreneurial firm: expenditures were limited by revenues, and deficits were offset by the limited contributions available from philanthropy. Under the new reimbursement formula, hospital budgeting took on the character of cost-plus contracting, and previous resource constraints became irrelevant.[81] Thus, it has been argued, Medicare and Medicaid have been in large measure responsible for the explosion in the use of high-cost diagnostic technology, for the awesomely expensive modernization of hospital facilities, for the movement by physicians to hospital-based practices, and for the marked trend toward specialization.

C. *Diagnostic and Therapeutic Advances*

Concurrent with Congress's desire to provide the elderly and poor with equal access to quality medical attention was the strengthening of the belief that modern diagnosis and intervention truly held the promise of longer life.[82] While this belief had its origins in the scientific advances of Lord Lister, Koch, and Virchou,[83] the emergence of successful surgical intervention, and the establishment of clinical medical education,[84] it was catalyzed by pharmacological innovations such as sulfa drugs.

79 Demkovich, *The "Maximum Reimbursement" Game — Hospitals May Face New Rules*, 11 NAT'L J. 1940 (1979).

80 42 U.S.C.A. § 1395x(u)(1) (1974 & Supp. 1980) (Medicare); 42 U.S.C.A. § 1396a(a)(13)(D) (1974 & Supp. 1980) (Medicaid).

81 COUNCIL ON WAGE AND PRICE STABILITY, *supra* note 1, at 11-12.

82 *See, e.g.*, D. RUSTEIN, THE COMING REVOLUTION IN MEDICINE (1967).

83 COMMISSION ON HOSPITAL CARE, *supra* note 54, at 465.

The 1950s witnessed still further advances in health-care technology. In the 1960s, as dramatic breakthroughs were made in open-heart surgery and organ transplants, the issue of equal access to hospitals became even more pressing. To the extent that high-cost, high-technology medicine is much more common now than only a few years ago and requires more capital resources and labor to be devoted to each hospitalization, technological advance in medicine has played a major role in increasing the cost of health care.[85]

IV. FEDERAL EFFORTS TO CONTROL HEALTH-CARE COST INFLATION

The disparity between the rate of health-care price inflation and the economy's overall rate of price inflation markedly increased shortly after the 1965 enactment of Medicare and Medicaid.[86] During the late sixties and the early seventies, the nondiscretionary portion of the federal budget devoted to the purchase of health care grew significantly beyond the level predicted during congressional consideration of the Medicare and Medicaid programs.[87] Within six years after the programs were

84 M. KAUFMAN, AMERICAN MEDICAL EDUCATION: THE FORMATIVE YEARS 174 (1976).

85 *See generally* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 79-3216, MEDICAL TECHNOLOGY: THE CULPRIT BEHIND HEALTH CARE COSTS? (S. Altman, R. Blendon, eds. 1979).

86 *See* Figure 1 *supra*.

87 Economic projections considered by Congress in 1965 grossly underestimated the eventual costs of the programs. With regard to Medicare, for example, the following table illustrates the magnitude of the disparity:

Year	Projected Expenditure* (in millions of dollars)	Actual Expenditure** (in millions of dollars)
1966	$ 818	$ 64
1967	1,799	2,597
1968	2,001	3,815
1969	2,221	4,758
1970	2,465	4,953
1971	2,700	5,592
1972	2,946	6,276
1975	2,657	10,612
Total	$17,607	$38,667

* DIVISION OF THE ACTUARY, SOC. SEC. AD., U.S. DEP'T OF HEW, ACTUARIAL COST ESTIMATES FOR HOSPITAL INSURANCE ACT OF 1965 AND SOCIAL SECURITY AMENDMENTS OF 1965, ACTUARIAL STUDY No. 59 (1965) at 39, Table 7; *Medical Care for the Aged:*

enacted, Congress had become acutely concerned with their rapidly rising costs.[88] Indeed, during the entire decade of the seventies, the primary focus of every major piece of federal health-care legislation was the reduction of costs and the control of federal expenditures.

The federal government had three general policy options available for battling hospital-care cost inflation: one option was to reduce the demand for hospital care; a second was to adjust the supply of services; the third option involved implementation of government price controls. Before the end of the seventies, all three strategies had been attempted.

A. *Reducing Demand*

At least in part because Medicare and Medicaid have been perceived as entitlement programs, curbing patient demand has been the least pursued of the cost-control options. Congress has, however, enacted several major demand-reducing programs, the most important of which is the Professional Standards Review Organizations (PSRO) system, established in 1972.[89] Under this system, all Medicare and Medicaid hospital cases are subject to review by a PSRO panel of physicians[90]

Executive Hearings on H. R. 1 and Other Bills Involving This Subject Matter Before the House Comm. on Ways and Means, 89th Cong., 1st Sess. 9 (1965) (study introduced into hearing by Wilbur Mills); *but see id.* at 897 (memorandum from Robert Myers).

** 43 Soc. Sec. Bull., Aug. 1980, at 24, Table M7 (rounded sums of the yearly figures in the "Expenditures" columns).

For an illustration of the intricacies involved in budgetary projections, *see* Tyson & Jehl, *On the Development of Medical Assistance Projection Models,* in The Medicaid Experience 205 (A. Spiegel ed. 1979). For a discussion of the reasons behind the unanticipated cost of Medicaid and possible reforms, *see* Davis, *Achievements and Problems of Medicaid,* 91 Pub. Health Rep. 309 (1976).

88 In 1972 several major changes were made in the Medicare and Medicaid programs in an attempt to curtail inflation. The Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (codified in scattered sections of 42 U.S.C.), increased the supplementary medical insurance deductible (§ 204); established authority to charge premiums to some Medicaid recipients (§ 208); set up payment limitations on hospital costs (§ 223), physician services (§ 224), and nursing home care (§ 225); and shifted teaching physicians from fee-for-service to "reasonable cost" reimbursement (§ 227). The Amendments relieved the states of their previous duty to expand their Medicaid programs (§ 230), and permitted states to reduce or eliminate existing benefits (§ 231). The Amendments also encouraged utilization review of Medicaid services (§ 207) and of hospital stays (§ 237) and disallowed payment for hospital care deemed unnecessary by the utilization review process (§ 238).

89 Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) (codified, as amended, at 42 U.S.C. §§ 1320c to 1320c-19 (1972)).

90 *See generally* Havighurst & Blumstein, *Coping with Quality/Cost Trade Offs in*

who operate as a geographically limited, quasi-public organization and who consider the appropriateness and quality of the care provided. While the PSROs' statutory authority is quite broad,[91] their actual activity has been limited for the most part to policing the need for hospital admissions and the length of hospital stays.[92] In emphasizing this monitoring power, the federal government has attempted to reduce costs by limiting the total number of inpatient days[93] utilized by Medicare and Medicaid beneficiaries.

A second federal effort to reduce demand involves the expenditure of substantial funds for health-education activities.[94] These activities include education in preventive health practices (for example, exercise, nutritious diet, and proper hygiene) and instruction on how to make wise use of health-care resources. They are intended to discourage needless use of the health-care system[95] and have received much attention because of their hypothesized, but as yet unproved, ability to reduce expenditures.[96]

A third demand-reducing effort involves the development of alternatives to fee-for-service billing and hospital-based care.

Medical Care: The Role of PSROs, 70 Nw. U. L. Rev. 6 (1975); Pearson and Abernethy, *A Qualitative Assessment of Previous Efforts to Contain Hospital Costs,* 5 J. Health Politics, Policy & L. 120, 134–36 (1980).

91 The statute seems to contemplate full and exclusive review responsibility under the Medicare, Medicaid, and Maternal and Child Health programs. 42 U.S.C. § 1320c-2 (1976). The PSRO Program Manual gives PSRO's "full responsibility for all decisions having to do with quality, necessity and appropriateness of services" they review. Office of Professional Standards Review, U.S. Dep't of Health, Education & Welfare, PSRO Program Manual, § 701 (1974).

92 Some of the more innovative PSROs have expanded their scope of review and are concerned themselves with the amount of ancillary testing ordered during a hospitalization, and the appropriateness of various therapeutic procedures. Telephone conversation with Mike Davis, Division of Data Planning, Office of PSROs, Baltimore, Maryland (Sept. 1980).

93 An inpatient day is defined as a day of care charged to a beneficiary for inpatient hospital services. 1 Medicare & Medicaid Guide (CCH) ¶ 1263.

94 *See generally* DuVal & Ben Boer, *Consumer Health Education,* in Regulating Health Care: The Struggle For Control 168 (A. Levin ed. 1980); A. Somers, Health Care in Transition: Directions for the Future 79-85 (1971) (calling for the creation of a permanent National Council on Health Education as a national center for interest, expertise, promotion, and evaluation in all areas of actual or potential health education). In the nongovernmental sector there are proposals to include courses on the economic dimensions of medical practice in medical-school curricula, in order to develop cost-consciousness in the nation's future physicians. *See* Praiss & Gjerde, *Cost Containment Through Medical Education,* 244 J. Am. Med. A. 53 (1980).

95 *See, e.g.,* U.S. Public Health Service, Dep't of Health, Education & Welfare, Forward Plan for Health 69–71 (1976).

96 *See* DuVal & Ben Boer, *supra* note 94, at 178.

The most prominent of these alternatives is the health maintenance organization (HMO), which receives substantial federal assistance under the Health Maintenance Organizations Act of 1973.[97] An HMO functions as a self-sustaining corporate entity that delivers care to a closed number of participants under a fixed-fee contract; thus, its salaried physicians have incentives to provide more care in clinical settings than in hospitals. Accordingly, HMOs are viewed as more efficient and less costly than the traditional office-based fee-for-service arrangement, where a physician works in conjunction with a community hospital. Indeed, federal interest in HMOs has been particularly strong because HMO subscribers tend to spend markedly shorter periods in hospitals than do conventional fee-for-service patients.[98]

Curtailment of hospital admissions for surgery is a fourth demand-reducing strategy that has been pursued by the federal government. Responding to empirical evidence that excessive surgery was being performed[99] and that all surgery brings with it the increased likelihood of more disease,[100] Congress has attempted to reduce the frequency of unnecessary surgery. Medicare now operates a second-opinion-before-surgery program, in which a second physician may be reimbursed for making an independent judgment concerning a Medicare patient's need for surgery. In the case of a conflict between the first two physicians' opinions, the program pays for a third physician's opinion as well.[101]

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97 42 U.S.C. § 300e (Supp. V 1975). *See generally* Kissam & Johnson, *State HMO Laws and the Theory of Limited Reformmongering*, 25 KAN. L. REV. 21 (1976).

98 *See, e.g.*, Barthel, *D.C. Project Analyzes Medicaid Costs in HMO Setting*, in THE MEDICAID EXPERIENCE 225, at 228 (A. Spiegel ed. 1979). *But see* D'Onfrio & Mullen, *Consumer Problems with Prepaid Health Plans in California: Implications for Service Medicaid Recipients Through Health Maintenance Organizations*, in THE MEDICAID EXPERIENCE 361 (A. Spiegel ed. 1979) (warning to public health officials of the problems of applying HMO concept to programs for the poor).

99 Blackstone, *Misallocation of Medical Resources: The Problem of Excessive Surgery*, 22 PUB. POLICY 329 (1974).

100 Schlicke, *Doctor, Is this Operation Necessary?*, 134 AM. J. SURG. 3-12 (1977). *But see* Pauly, *What is Unnecessary Surgery?* 57 MILBANK MEMORIAL FUND Q. 95 (1979) (indicating that public-policy arguments are misleading because one cannot definitely predict whether surgery is necessary or not, and suggesting the need for a clearer definition of "unnecessary" surgery; author offers definition based on economist's notion of patient costs versus benefits).

101 1 MEDICARE & MEDICAID GUIDE (CCH) ¶ 3110.77 (1979). *See also* Massachusetts Dep't of Pub. Welfare, *Mandated Second Opinions for Elective Surgery in Massachusetts*, in THE MEDICAID EXPERIENCE 177 (A. Spiegel ed. 1979) (description of the first

Emphasizing primary care has been a fifth way in which the federal government has sought to mitigate demand-based pressures on prices. Federal initiatives focusing on children's health[102] and on the training of primary-care practitioners[103] are the two most important examples of this approach. Both initiatives are based on the theory that early intervention in the life cycle and in the disease process will reduce the probability of high-cost chronic disability, thereby reducing total health-care costs.[104]

A sixth demand-reducing effort by the federal government involves the use of deductible and co-payment mechanisms, by which a beneficiary must contribute to the payment for care.[105] These mechanisms have long been a standard provision of private insurance policies. The 1965 Medicare legislation required beneficiaries to pay deductibles and to pay a given percentage of the rest of their health-care bills. Since 1965, Congress has significantly increased the deductibles for hospital benefits under Medicare, in part to deter indiscriminate, wasteful use of hospital care.[106] Despite inconclusive evidence that

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Medicaid second-opinion program to be implemented). *But see* Gertman et al., *Second Opinions for Elective Surgery: the Mandatory Medicaid Program in Massachusetts*, 302 NEW ENG. J. MED. 1169 (1980) (suggesting that the second-opinion program has *not* reduced the incidence of surgery).

102 *See, e.g.*, Foltz & Brown, *State Response to Federal Policy: Children, EPSDT, and the Medicaid Muddle*, 13 MED. CARE 630 (1975) (reasons the program for Early and Periodic Screening, Diagnosis and Treatment was not successful in Connecticut).

103 *See generally* Case et al., *Description of Primary Care*, 294 NEW ENG. J. MED. 283, 284 (1976); Haggerty & Janeway, *Family Medicine — Fad or for Real?*, 291 NEW ENG. J. MED. 337, 360 (1974); Lemaitre et al., *Primary Health Care*, 298 NEW ENG. J. MED. 918, 919 (1978); Scheffler et al., *Manpower Policy for Primary Health Care*, 298 NEW ENG. J. MED. 1058 (1978); Stern et al., *Graduate Education in Primary Care: An Economic Analysis*, 297 NEW ENG. J. MED. 638 (1977).

104 *See, e.g.*, U.S. PUBLIC HEALTH SERVICE, *supra* note 95, at 73–74.

105 Under the deductible requirement, which applies to both Medicare Part A (hospital benefits) and Part B (physician fees), the beneficiary as of 1980 had to pay the first $180 of an hospitalization, *see* 1 MEDICARE & MEDICAID GUIDE (CCH) ¶ 1251.34 (1979), and the first $60 of each year's fees paid to physicians. *Id.* at ¶ 3182.

The co-insurance requirement makes the beneficiary share in the cost of care provided, again in both Part A and Part B. For example, as of 1980, Medicare-covered persons receiving inpatient care had to pay $45 per day after the first 60 days of care, *id.* at ¶ 1251.11, and 20 percent of all physician charges after the deductible amount was exhausted. *Id.* at ¶ 3182. Similar co-payment requirements exist in state Medicaid programs. As to the history of the first state to develop such requirements, California, see R. STEVENS & R. STEVENS, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID 290-93 (1974).

106 *See generally* H. SOMERS & A. SOMERS, MEDICARE AND THE HOSPITALS: ISSUES AND PROSPECTS 21-22 (1967). For an example of the statutory hurdles involved in imposition of co-payments with respect to certain mandatory services upon Medicaid beneficiaries,

the demand for attention is reduced by placing persons at personal financial risk,[107] deductibles and co-payment requirements enjoy substantial support.[108]

B. *Adjusting Supply*

Perhaps more effort has been expended on reducing price inflation by changing the supply side of the market than by attempting to curtail demand. Government undertakings in this area have taken three directions: increasing the supply of physicians, promoting the training of non-physicians to perform certain medical services, and preventing health-care providers from making capital expenditures for unnecessary new facilities.

For a time, funding the education of physicians was one of the federal government's most prominent supply-side programs. Subsequent to the enactment of the Medicare and Medicaid programs,[109] it seemed evident that increased government funding had increased patient access such that prices were being bid up as the market attempted to allocate a relatively small supply of physicians to meet the demand.[110] It was hoped that training more physicians would stimulate price competition and thereby mitigate a leading cause of post-Medicare inflation. The Health Professions Educational Assistance Act of 1963[111] and its prog-

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see Crane v. Mathews, 417 F. Supp. 532 (N.D. Ga. 1976). *But cf.* Helms, Newhouse & Phelps, *Copayments and Demand for Medical Care: the California Medicaid Experience*, 9 BELL J. ECON. 192 (1978) (suggesting co-payments for ambulatory services in a welfare population may be self-defeating as a method for controlling costs since it results in increased use of hospital services).

107 *See* Phelps & Newhouse, Coinsurance and the Demand for Medical Services 43–45 (Rand Corp. Rep. No. R-964-1-OEO/NC, 1974).

108 Rep. Al Ullman (D., Ore.) on October 30, 1979 introduced the Health Cost Restraint Act of 1979 (H.R. 5740) which would limit the amount an employer could pay tax-free toward employee health benefits. H.R. 5740, 96th Cong., 1st Sess., 125 CONG. REC. H9970 (1979). Employees choosing a low-cost plan below this statutory ceiling would receive a rebate of the amount saved; employees desiring a higher-cost plan would be required to pay, out-of-pocket, the excess over the statutory limit. The bill is but one illustration of cost-sharing devices to give consumers some choices on economic bases. A similar proposal, the National Health Care Reform Act (H. R. 7527), was unveiled in June 1980 by Reps. Richard Gephardt (D., Mo.) and David Stockman (R., Mich.). H.R. 7527, 96th Cong., 1st Sess., 125 CONG. REC. H4618 (1980).

109 See the statutory citations at note 70 *supra*.

110 *See, e.g.*, Roberts & Bogue, *supra* note 1, at 666.

111 Health Professions Educational Assistance Act of 1963, Pub. L. No. 88-129, 77 Stat. 164 (1963).

eny[112] provided hundreds of millions of dollars to medical schools through direct grants and through financial-aid grants to students. Due, at least in part, to these enactments, medical schools between 1960 and 1979 more than doubled their total annual number of graduates, from 7,508 to 16,044.[113]

As the federal government attempted to increase the number of physicians, it also sought to expand the role of other medical-care personnel. The Comprehensive Health Manpower Training Act of 1971[114] began an ambitious program of support for the expanded training and clinical placement of nurse practitioners, midwives, physician assistants, and others who could substitute for physicians in the provision of relatively routine patient care.

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112 Health Professions Educational Assistance Amendments of 1965, Pub. L. No. 89-290, 79 Stat. 1057; Health Manpower Act of 1968, Pub. L. No. 90-490, 82 Stat. 773; Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, 85 Stat. 431; Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, 90 Stat. 2243. *See generally* M. MILLMAN, POLITICS AND THE EXPANDING PHYSICIAN SUPPLY (1980) (an analysis of the interaction between the federal government and the principal medical institutions cooperating to increase the supply of physicians).

113 *See* OFFICE OF TECHNOLOGY ASSESSMENT, FORECASTS OF PHYSICIAN SUPPLY AND REQUIREMENTS, Apr. 1980, at 18. The Congressional Office of Technological Assessment, however, is now predicting there will be as many as 185,000 more physicians than needed in the year 1990. HEALTH LAW. NEWS REP., May 1980, at 8. *See also* Cohn, *Cuts in Schooling Urged to Prevent Doctor Surplus,* Washington Post, Oct. 1, 1980, at Al, col. 3.

Perhaps even more important than the raw numerical increase in numbers of graduates is the concurrent increase in the proportion of doctors to the general population. The table below illustrates this occurrence:

Item*	1950	1955	1960	1965	1970	1974	1975	1976	1977
Physicians**									
number, in thousands	233	255	275	305	348	394	409	426	438
rate per 100,000 population***	149	150	148	153	166	182	188	194	198
Medical Schools****									
number	85	87	91	93	107	121	123	123	134
graduates, in thousands	5.9	7.4	7.5	7.8	8.8	12.2	13.4	14.3	15.3
Newly Licensed Physicians*****									
number	(NA)	(NA)	8,030	9,147	11,032	16,706	16,859	17,724	18,175
percent of total active M.D.'s	(NA)	(NA)	(NA)	3.3	3.5	4.8	4.6	4.7	4.6

NA=Not Available.

* Source = BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1979 STATISTICAL ABSTRACT OF THE UNITED STATES 106, at Table 158 (1979).

** Includes doctors of medicine and osteopathy.

*** Based on Bureau of the Census resident population estimates.

**** Includes osteopathic schools.

***** Includes graduates of Canadian and foreign medical schools.

114 Public Health Service Act §§ 772(a)(3), 774(a)(1)(C) (codified at 42 U.S.C. §§ 295f-2(a)(3), 295f-4(a)(1)(C) (1976); 42 U.S.C. § 295f-2(a)(3) was amended and § 295f-4(a)(1)(C) repealed by Pub. L. 94-484, 90 Stat. 2293 (1976)).

The federal government's commitment to the training of more physicians has been abandoned in the face of evidence indicating that an increase in the physician supply has not significantly reduced prices.[115] Rather than pushing prices down, increases in the supply of physicians have seemed only to increase the frequency with which physicians provide health-care services to their patients; supply apparently creates its own demand. This phenomenon is partly explained by the role of insurance reimbursements in shielding consumers from the true cost of physicians' services. It is partially explained also by reimbursement mechanisms that pay physicians for their services on a contractual basis according to a pre-established fee schedule. Some commentators have argued that fees are not adjusted downward because physicians control the determination of fee schedules, either expressly through Blue Cross and other insurance organizations that are run by physicians or implicitly through the development of community-wide prevailing-rate schedules.[116]

Partly in recognition of supply-induced demand in health care, the federal government in 1974 embarked upon a major program of "health planning." The National Health Planning and Resource Development Act[117] established a multi-level system of planning agencies in part for "[t]he identification and discontinuance of duplicative or unneeded services and facilities."[118] These agencies, which involve both federal and state participation, are nominally intent on achieving a rational adjustment of health-care facilities to the level of need; however, they have focused primarily on eliminating excess hospital beds and retarding the spread of expensive new technology. Although the health-planning program in large measure was intended to insure that new facilities would be distributed equitably, it has become the principal governmental means of restricting unnecessary

115 Lave, Lave & Leinhardt, *Medical Manpower Models: Need, Demand and Supply*, in ECONOMICS IN HEALTH CARE 77, 85-86 (1977), *reprinted with permission of the Blue Cross Association.*

116 Regarding the clear historical connection between Blue Shield plans and state and local medical societies, and manners in which the market could be potentially monopolized, see Sloan & Feldman, *Competition Among Physicians*, in FEDERAL TRADE COMMISSION, COMPETITION IN THE HEALTH CARE SECTOR: PAST, PRESENT, AND FUTURE 90 (W. Greenberg ed. 1978) (suggesting that effective price-fixing arrangements among individual physicians within a local market are unlikely).

117 42 U.S.C. § 300k (1976).

118 42 U.S.C. § 300k-2(a)(12) (1976).

expansion of facilities.[119] In this sense, the program is a sharp reversal of the policy embodied in the Hill-Burton hospital-construction program.

C. *Direct Price Controls*

Insofar as short-run manipulation of supply and demand has not substantially reduced health-care cost inflation, direct price controls warrant serious consideration. While price controls conflict with our traditional commitment to free-market mechanisms for the distribution of goods and services, the perceived intractability of health-care price inflation since 1965 has caused the federal government to enact two programs directly setting health-care prices and to consider a third.

The first such program was part of the Economic Stabilization Program established by President Nixon.[120] From August 1971 to April 1974, virtually all wages and prices in the economy were frozen and regulated.[121] Due to the "unique nature" of health-care providers, special regulations were developed to adjust the controlled level of wages and prices in the hospital industry.[122] In retrospect, these regulations seem to have been

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119 Under the Act, first-level planning is done by nonprofit corporations known as Health Systems Agencies (HSAs), which are funded by the federal government to develop and carry out local planning agendas. 42 U.S.C § 3001 (1976). Within state governments, Health Planning and Development Agencies prepare goals and pursue a statewide health facilities and services agenda. 42 U.S.C. § 300m-2(a)(2) (1976). The state-level agencies make decisions regarding the need for new institutional health facilities and services proposed by the HSAs. 42 U.S.C. § 300m-2(a)(5) (1976). The state-level planning agencies are advised by Statewide Health Coordinating Councils. 42 U.S.C §§300m-2(a)(3), 300m-3(c) (1976).

120 Basic features of the price-control program and theoretical aspects of price control in general are discussed in Mills, *Some Lessons of Price Controls in 1971-1973*, 6 BELL J. ECON. 3 (1975). Mills concludes that the government's setting of prices below market levels was not conducive to economic stabilization for competitive product and labor markets with a reasonably elastic supply; however, in non-competitive markets or in cases of inelastic supply and situations with excessive demand, government intervention to stabilize prices in the short run did contribute to some extent to economic stability.

121 *But see* Neely, *Why Wage-Price Controls Fail: A "Theory of the Second Best" Approach to Inflation Control*, 79 W. VA. L. REV. 1, 3 (1976) (arguing that the process of equitably establishing wage rates is so complex that it is impossible to achieve optimally low inflation and near-full employment through direct controls over the entire economy; instead, the appropriate approach would be to impose wage-price controls in a limited number of industries in combination with restrained use of monetary tools to lower inflation to an acceptable though imperfect level).

122 6 C.F.R. § 300.18 (1979).

effective in reducing hospital workers' wages but not in curtailing other components of hospital costs.[123] As shown in Figure 1 above, however, the rate of inflation of hospital-care prices did decline sharply between 1971 and 1974.

The federal government's second program of direct price-setting was embodied in section 223 of the 1972 amendments to the Social Security Act.[124] The amendments established federal administrative authority to set limits on the amount that Medicare would reimburse hospitals for routine services. These limits are established prospectively so that health-care providers have the opportunity to avoid making capital expenditures or performing services that would cause charges to exceed the limits. Under section 223, hospitals are grouped according to size and geographic region, and limits are set on the per diem costs payable to hospitals in each group.[125] This program has been the keystone of the federal attempt to contain Medicare expenditures, and still serves as the most important federal restraint on cost increases.

In 1977, the Carter Administration proposed a permanent nationwide program for setting hospital prices and limiting hospital capital expenditures.[126] Declaring hospital costs to be its foremost domestic-policy target, the Administration proposed a ceiling on each hospital's gross revenues and the eventual limitation of hospitals' aggregate capital expenditures.[127] Confronted by immediate opposition, not only from the hospital industry but also from organized labor, the Administration proposed amendments to "pass through" increases in non-supervisory wages.[128] Because non-supervisory labor costs account

123 Ginsburg, *Impact of the Economic Stabilization Program on Hospitals: An Analysis with Aggregate Data,* in HOSPITAL COST CONTAINMENT 293 (M. Zubkoff et al. eds. 1978). *But see* Furst & Dunkelberg, *Study Shows ESP Reduced Hospital's Profitability,* HOSPITAL PROGRESS, Aug. 1978, at 59 (descriptive evidence that hospital profits in North and South Carolina fell during the Economic Stabilization Program).

124 Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972).

125 Thus, for example, a hospital with 800 beds in Boston will not be reimbursed in excess of $145.06 per day for Medicare beneficiaries during its fiscal year beginning on or after July 1, 1980. 4 MEDICARE & MEDICAID GUIDE (CCH) ¶ 18,992 (1980).

126 *President's Hospital Cost Containment Proposal of 1977: Joint Hearings on H.R. 6575 Before the Subcomm. on Health of the House Comm. on Ways and Means and the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. 374 (1977). *See generally* Inglehart, *The Carter Cure,* 9 NAT'L J. 323 (1977).

127 Note, *Hospital Cost Control: Single-Edged Initiatives for a Two-Sided Problem,* 15 HARV. J. ON LEGIS. 603 (1978).

128 *See* Iglehart, *The Hill Turns to Hospital Costs,* 9 NAT'L J. 685 (1977).

for a large proportion of total operating costs, the pass-through provision greatly reduced the extent to which the Carter proposal would have established any meaningful control on hospital prices. The Administration's acquiescence on this issue was regarded as a signal to Congress that the Administration might not be very serious about hospital-cost containment. While gaining the support of organized labor, the Administration lost ground among those who considered rapid wage escalation to be a major element of the hospital-cost problem.[129] The concession to labor also heightened the hospital industry's expectation that the proposed limitation on capital expenditures might be negotiable. Largely as the result of strong pressure from the hospital industry,[130] the Carter proposal died in committeee in the closing days of the Ninety-fifth Congress.[131]

In March of 1979, the Carter Administration offered H.R. 2626, a completely redrafted and more sophisticated version of its previous proposal. Encouraged by its previous victory, the hospital industry increased its resistance and, despite the extraordinary commitment to the bill on the part of the Administration and the House leadership, the bill was substantially watered down by amendments before it passed the House in 1979. Rather than establishing mandatory controls, as originally proposed, the House-approved version of the bill sought to restrain price increases by offering federal grants to states to

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129 As expressed by Otis G. Pike, Congressman of New York present at the joint hearing on H.R. 6575 in May 1977: "... the removal of the cap on labor costs doesn't make any sense if you are really trying to control total costs.... It is there to help assuage the political clientele that it represents so that we can pass the bill." *President's Hospital Cost Containment Proposal, H.R. 6575: Joint Hearing Before the Subcomm. on Health of the House Comm. on Ways and Means, and the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. 374 (1977).

130 A description of the major health pressure groups, their goals, and typical legislative response to their lobbying efforts is set forth in Feldstein, *The Political Environment of Regulation,* in REGULATING HEALTH CARE: THE STRUGGLE FOR CONTROL 6 (A. Levin ed. 1980); *see also* R. ALFORD, HEALTH CARE POLITICS: IDEOLOGICAL AND INTEREST GROUP BARRIERS TO REFORM (1975) (suggesting that at stake in the present health-care system are powerful and strategically located interests which effectively resist change).

131 On Oct. 11, 1978, the Senate approved, 64-22, the Medicare-Medicaid Administrative & Reimbursement Reform Act, including the Nelson Amendment, as appended to H.R. 5285. H.R. 5285, 95th Cong., 2nd Sess., 124 CONG. REC. S18402 (1978). However, this "compromise" measure (H.R. 5285, 95th Cong., 2nd Sess., 124 CONG. REC. S18368 (1978)), which would have imposed mandatory controls only if the voluntary efforts failed, was never acted upon by the House.

develop their own cost-control programs.[132] The bill was never considered by the Senate.

V. State Activity To Curtail Cost Inflation

Concurrently with the federal initiatives described above, states have adopted two strategies for reducing health-care cost inflation. The first is to institute cutbacks in Medicaid programs so as to reduce their overall cost. The second is to impose direct controls on hospital prices.

A. *The Cut-Back Strategy*

The most common administrative device for protecting state budgetary resources from the Medicaid appetite has been program curtailment. Under the 1972 Social Security Amendments, the states were relieved of statutory duties to progressively broaden the scope of services covered by Medicaid and to expand eligibility.[133] It appears that as many states have begun to reduce their Medicaid program benefits,[134] the concern over budget constraints may have eclipsed the commitment to a comprehensive program to improve access to health care for the poor. The cut-backs in benefits have provoked extensive litigation, brought primarily by persons who have lost benefits.[135] Many, though not all, of the ensuing court decisions have upheld states in their cut-back efforts.[136]

132 Under the bill, the cost-control programs could rely on mandatory, legislatively adopted guidelines or on the health-care industry's own "voluntary effort" to restrain costs. For further details, *see* 125 Cong. Rec. E5141-42 (daily ed. Oct. 18, 1979) (remarks of Rep. Gephardt).

133 *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 230, 86 Stat. 1410 (repealing § 1903(e); states no longer required to broaden scope of services and eligibility); *id.* at § 231 (repealing § 1902(d); states no longer required to obtain approval of the Secretary of HEW before being permitted to reduce scope of or terminate services under their plans).

134 Slayton, *State Treasury Bare, Some Medical Programs Find,* 4 Forum (Health Care Financing Ad.) 23, 24 (1980).

135 *See generally* Blong & Butler, *Developments in Medicaid Cutback Remedies,* 5 Clearinghouse Rev. 723 (1972).

136 Dodson v. Parham, 427 F. Supp. 97, 104 ("[N]umerous decisions ... have recognized the relative flexibility and discretion of the state to design Medicaid benefit programs tailored to meet the needs and demands of that particular state, including the level of benefits."). *See, e.g.,* Benton v. Rhodes, 586 F.2d 1 (6th Cir. 1978), *cert. denied,* 440 U.S 973 (1979) (nothing in Federal or state constitutions gives prospective recipients of optional benefits a constitutional right to their perpetual continuance);

Controlling the number of recipients, through more careful monitoring of eligibility applications as well as more stringent examination of income and assets, is perhaps a more effective way to reduce Medicaid expenditures than is reducing the range of benefits. Many states have reduced the number of recipients simply by failing to increase the qualifying income threshold rapidly enough to keep up with the general rate of increase in prices and wages.[137]

B. *Intervention in Price-Setting*

Using regulation of public-utility rates as a guide, a number of states have established programs to regulate increases in health-care prices. (See Table 1.) These programs differ radically as to the degree of control the state exercises over hospital prices. Those involving the weakest form of price control are the rate-disclosure programs, under which hospitals are free to set their own charges but are required to make a public filing of their rates and budgets. A slightly stronger form of price control is conducted in the rate-review programs, under which hospitals are required by statute to submit their rates and budgets to state agency review. Although the rate-reviewing agency cannot compel hospitals to make any rate adjustments, it can issue public statements criticizing rates that it finds objectionable. The strongest form of price control is embodied in the rate-setting programs, which forbid hospitals from raising rates without first obtaining approval from the state's rate-setting agency. Whereas the rate-disclosure and rate-review programs

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Budnicki v. Beal, 450 F. Supp. 546 (E.D. Pa. 1978) (state allowed to terminate optional orthopedic-shoe program upon compliance with notice-and-hearing requirements because the program was optional and was being abused by recipients, and because state monetary resources were low).

137 *See* HEALTH CARE FINANCING AD., U.S. DEP'T OF HEW, DATA ON THE MEDICAID PROGRAM: ELIGIBILITY, SERVICES, EXPENDITURES 36 (1979) (although payments of benefits in constant dollars — *i.e.*, those adjusted so as to discount the effects of inflation— have remained virtually unchanged from 1968 through 1978, the adjustment device (the Medical Care Price Index) is often slow to respond to actual general medical care prices). As in many instances in which one program change brings about unintended effects in other areas, however, program cutbacks in Medicaid benefit levels and eligibility have contributed to another problem. The financial distress currently being experienced by a number of urban hospitals, particularly municipally owned institutions, can be linked primarily to shrinking Medicaid coverage for the poor. G. Schieber, S. Kilstein & C. Sanders, A Background Paper on Financially Troubled Hospitals 2 (Offices of Legislation and Human Services, 1980).

TABLE 1
SELECTED STATE PROGRAMS FOR CONTROLLING HEALTH-CARE PRICES

State	Type of Program	Agency Administering the Program	Payment Sources Subject to Mandatory Rate-Setting	Statutory Citation
Arizona	Rate Review	Dept. of Health Services and local HSAs	—	ARIZ. REV. STAT. ANN. tit. 36, §§ 401(7), 436-436.03 (West 1974 & Supp. 1980-1981)
Arkansas	Rate Disclosure	State Dept. of Revenues	—	ARK. STAT. ANN. tit. 82, §§ 360-361, 365-366 (1976 & Supp. 1981)
California	Rate Disclosure	California Health Facilities Commission	—	CAL. SAFETY & HEALTH CODE §§ 440-442.6 (West 1979 & Supp. 1981)
Connecticut	Rate-Setting	Commission on Hospitals and Health Care	Charge-based sources (including Blue Cross)	CONN. GEN. STAT. ANN. tit. 19, §§ 73a-73r (West 1977 & Supp. 1981)
Florida	Rate Review	Hospital Cost Containment Board	—	FLA. STAT. ANN. §§ 395.501-395.514 (West Supp. 1981)

Illinois	Rate-Setting	Health Finance Authority	Theoretically all sources (including Blue Cross, Medicare, Medicaid, and self-payment), but binding upon hospitals only as long as each state agency and major federal program pays in accordance with rates approved by the Authority	ILL. ANN. STAT. ch. 111½, §§ 161-177 (Smith-Hurd Supp. 1981-1982)
Maine	Rate Review	Health Facilities Cost Review Board	—	ME. REV. STAT. ANN. tit. 22, §§ 351-370 (1980 & Supp. 1980-1981)
Maryland	Rate-Setting	Health Services Cost Review Commission	All sources (including Blue Cross, Medicare, Medicaid, and self-payment)	MD. ANN. CODE art. 43, §§ 568H-568Y (1980)
Massachusetts	Rate-Setting	Massachusetts Rate Setting Commission	Blue Cross, self-payment, and Medicaid	MASS. ANN. LAWS ch. 6A, §§ 31-39 (Law. Co-op 1980 & Supp. 1981)
Minnesota	Rate Review	Dept. of Health and Minn. Hospital Association	—	MINN. STAT. ANN. §§ 144.695-144.703 (West Supp. 1981)
New Jersey	Rate-Setting	Hospital Rate Setting Commission	Medicaid, Blue Cross, and self-payment	N.J. STAT. ANN. §§ 26:2H-2(e), 26:2H-18 to 26:2H-18.3 (West Supp. 1981-1982)

TABLE 1 (CONTINUED)
SELECTED STATE PROGRAMS FOR CONTROLLING HEALTH-CARE PRICES

State	Type of Program	Agency Administering the Program	Payment Sources Subject to Mandatory Rate-Setting	Statutory Citation
New York	Rate-Setting	Department of Health	Medicaid, Blue Cross, and self-payment	N.Y. PUB. HEALTH LAW §§ 2800-2807 (McKinney 1977 & Supp. 1980-1981)
Oregon	Rate Review	State Health Planning and Development Agency	—	OR. REV. STAT. §§ 442.400-442.450 (1979)
Rhode Island	Rate-Setting	Dept. of Business Regulation	Blue Cross and Medicaid	R.I. GEN. LAWS § 27-19-6 (1979)
Virginia	Rate Review	Virginia Health Services Cost Review Commission	—	VA. CODE tit. 9, §§ 156-166 (1978 & Supp. 1981)
Washington	Rate-Setting	Washington State Hospital Commission	All sources except Medicaid and Medicare; Blue Cross only on an experimental basis	WASH. REV. CODE ANN. §§ 70.39.010-70.39.200 (1975 & Supp. 1981)

Wisconsin	Rate-Setting	Wisconsin Hospital Association, Blue Cross of Wisconsin, and the State Department of Health and Social Services	All sources (or as provided by contract between health-care providers and the state)	WIS. STAT. ANN. § 146.60 (West Supp. 1980-1981)

Source: Author's compilation.

rely on voluntary price restraint among hospitals, the rate-setting programs impose mandatory controls.

There is no evidence to show that either rate-disclosure programs or rate-review programs have achieved any significant reductions in health-care cost inflation. Moreover, insofar as those two types of programs rely ultimately on nothing stronger than exhortation, both are extremely unlikely to succeed in achieving more than marginal reductions in the rate of health-care cost inflation.

By contrast, state-administered rate-setting programs have made substantial progress in fighting inflation, particularly where they wield rate-setting authority over most health-care expenses and have been administered by a state agency for at least three years. Six states — Connecticut, Maryland, Massachusetts, New Jersey, New York, and Washington — have rate-setting programs that meet the following criteria: more than half of the non-Medicare hospital expenses in the state are collected from the fees that are subject to mandatory rate-setting administered by the state; and the state's rate-setting agency has been regulating rates since 1976 or earlier.[138] As Figure 4 shows, between 1975 and 1978 each of those states cut between five and nine percentage points from the rate at which hospital expenses per patient admission had been rising. As shown in Figure 5, the six states as a whole cut almost eight percentage points from that rate. Meanwhile, in the remaining forty-four states and the District of Columbia, the overall rate of increase in expenses per admission dropped about four percentage points; that is, those other states made only slightly more than half as much progress in trimming that inflation rate as did the six rate-setting states.[139]

In assessing data on the effectiveness of various states' rate-setting programs, one should pay close attention to the locus, the scope, and the duration of the rate-setting authority exercised under each program. If rate-setting authority were delegated to a non-governmental body such as Blue Cross or a state hospital association, the rate-setting process probably would be

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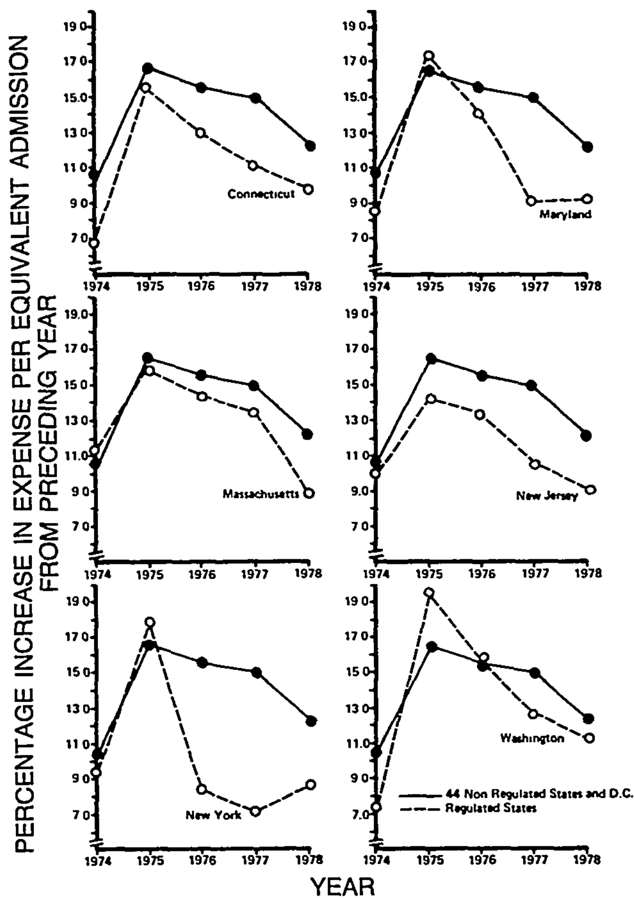
138 Biles, Schramm & Atkinson, *Hospital Cost Inflation under State Rate-Setting Programs,* 303 New Eng. J. Med. 665 (1980).

139 *Id.* at 666-667; Congressional Budget Office, Controlling Rising Hospital Costs 55-64 (1979).

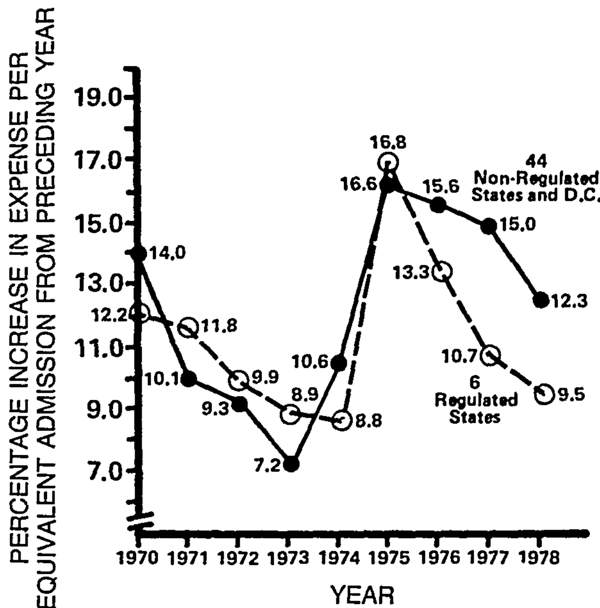
FIGURE 4
ANNUAL PERCENTAGE INCREASES IN EXPENSE PER EQUIVALENT ADMISSION (EPEA) FOR EACH RATE-SETTING STATE COMPARED WITH INCREASES IN EPEA FOR NON-RATE-SETTING STATES, 1974-1978



Source: Biles, Schramm & Atkinson, *Hospital Cost Inflation under State Rate-Setting Programs,* 303 NEW ENG. J. MED. 667 (1980).

subjected to greater conflicts of interest than if the authority were exercised by an independent state agency. The conflicts of interest could, in undermining the objectivity of the rate-setting process, also skew the results. If the rate-setting agency's scope were too narrow — for example, if only ten percent of the hospital charges in the state were subject to mandatory rate

FIGURE 5
ANNUAL PERCENTAGE INCREASES IN EXPENSE PER EQUIVALENT ADMISSION (EPEA) OF RATE-SETTING AND NON-RATE-SETTING STATES, 1970-1978



Source: Biles, Schramm & Atkinson, *Hospital Cost Inflation under State Rate-Setting Programs*, 303 NEW ENG. J. MED. 667 (1980).

schedules set by the agency — then the agency could not make much progress in curbing the state's overall rate of health-care cost inflation, even if it made dramatic progress in curbing all costs within its jurisdiction. When detractors of rate-setting[140] evaluate such programs purely on the basis of data taken only one or two years after inception, they run the risk of misconceiving the longer-term effects of rate-setting.[141] The initial pro-

140 For examples of such detractors, *see* Noll, *The Consequences of Public Utility Regulation of Hospitals*, CONTROLS ON HEALTH CARE 25-78 (1975); Enthoven, *Consumer Choice Health Plan: Inflation and Inequity in Health Care Today: Alternatives for Cost Control and an Analysis of Proposals for National Health Insurance*, 298 NEW ENG. J. MED. 650-58 (1978).

141 Several authorities view the evidence regarding the effectiveness of state regulation as inconclusive. *See, e.g.*, Bauer, *Hospital Rate Setting — This Way to Salvation?*, 55 MILBANK MEMORIAL FUND Q. 117, 152 (1977); Berry, *Prospective Rate Reimbursement and Cost Containment: Formula Reimbursement in New York*, 13 INQUIRY 288 (1976); Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1417, 1428 (1980); Dowling, *Hospital Rate Setting Programs: How, and How Well, Do They Work?*, 6 TOPICS IN HEALTH CARE FINANCING 15 (1979); Gaus &

cess of determining fair and reasonable rates for a wide range of hospital services takes time — more than a mere one or two years.

VI. A Proposal for a Comprehensive Program of Hospital-Cost Containment

The continuing explosion in the cost of health care could be subdued by the establishment of independent state regulatory agencies with consolidated authority over hospital revenues and rates, hospital licenses, and the capital expenditures of hospitals and other health-care providers. A specific, detailed proposal for such an agency is presented in the model statute in the Appendix to this Article. The statute would create a State Hospital Cost Containment Commission with unified regulatory authority over hospital finances. Adoption of this statute by a large number of states would lead to major gains in the nationwide fight against health-care cost inflation.

The proposed statute stresses improvement in competition and cost-awareness as the preferred means of bringing the cost of hospital care under control. For example, the statute establishes a limit on the size of a state's hospital industry, but at the same time preserves the opportunity for new types of health-care providers and new competition to enter the market. It also attempts to eliminate the common practice of cross-subsidization of services within hospitals, a practice that shelters some patients from the true cost of their care. The statute would increase competitiveness and cost-awareness in health care to a degree that would be impossible, in the short run, without government intervention. As the "sunset" provision[142] implicitly recognizes, however, the statute is not a long-run solution to the problem of health-care cost inflation; the health-care system's lack of competitiveness and its disregard of costs cannot be more than minimally corrected without fundamental reform in health-care financing. The model statute offers a means for keeping health-care costs from spiraling out of control during the wait for that fundamental reform to take effect.

Hellinger, *Results of Prospective Reimbursement*, 3 Topics in Health Care Financing 3 (1976).

142 Section 407 of the model statute.

A. *Major Elements of the Model Hospital Cost Containment Act*

1. State-Based Rather than Federal Regulation

Although a comprehensive and unified federal cost-containment program might prove effective,[143] a state-based strategy offers two advantages. The first is the superior adaptability of state-administered programs to unique regional and local problems. For example, the magnitude of health-care cost inflation varies considerably from state to state.[144] In the densely populated northeastern states, where state economies are weaker and hospital care is more expensive than in most other states, there is a greater demand for health care. In those same states, relatively liberal Medicaid programs have created an acute financial burden as tax bases have declined and as rising unemployment has expanded the Medicaid eligibility rolls.[145] Furthermore, the institutional and clinical aspects of health care vary enormously from state to state. For example, the rate of hospital admissions varies from a high of 25.6 per 1000 to a low of 12.0 per 1000.[146] Also, the average length of a hospital stay varies among the states from 11.1 days to 5.1 days.[147] Cost-containment programs developed and administered on a statewide basis would almost certainly be more sensitive to such variations than would a centrally administered federal program.

A second advantage of state-based hospital-cost containment is that much of the power over hospital capital expenditures resides in state or local authorities. The decision to invest in

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143 *Hospital Cost Containment Act of 1977: Hearings on H.R. 8121 and H.R. 6575 Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., lst Sess. 107-15 (1977) (statement of Dr. Karen Davis); *Hospital Cost Containment Act of 1977: Hearings on S.1391 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 134-53 (1977) (statement of Hon. Joseph A. Califano, Jr.).

144 B. Biles, C. Schramm & G. Atkinson, Hospital Cost Inflation under Rate Setting Programs: The Record (Technical Paper No. 1, Johns Hopkins Center for Hospital Finance & Management) at Figure 1.

145 Differences in eligibility factors and scope of care provided under each state's Medicaid program are set out in [1979, 1980] 3 MEDICARE & MEDICAID GUIDE (CCH) ¶¶ 15,550-15,660. Variations in the optional services covered throughout the country are presented graphically at ¶ 15,504.

146 G. Anderson, Variations in Per Capita Community Hospital Expenditures, at Table 1 (1978) (unpublished paper, Office of the Deputy Assistant Secretary, U.S. Dep't of Health and Human Services, undated).

147 *Id.*

new construction and equipment for hospitals is a matter now determined almost exclusively by hospital trustees, local investment banks, and, in many states in which public bonds underwrite hospital debt equity, appointed state officials.[148] As discussed above, there is a dramatic linkage between increases in hospital capital expenditures and increases in prices.[149] State-based programs would more easily and more effectively respond to the state and local problems of excessive capital spending than could the federal government. Such programs would have more success in establishing an effective capital-planning system that would be responsive to the relationship between capital expenditures and the overall price level of hospital care.

2. The Statewide Hospital Revenue Limit

One of the principal reasons for regulating the market for hospital care is to limit the resources that hospitals expend. This goal cannot be achieved without limiting the annual growth of hospital revenues. As provided by section 201 of the statute, the Statewide Total Hospital Revenue Limit would control the overall level of revenues collected by hospitals. Insofar as the initial determination of this overall limit constitutes a political decision, it should be made by the state legislature rather than an administrative agency.[150] Accordingly, section 201 requires the legislature to set the Hospital Revenue Limit for the first year of the statute's operation; in subsequent years, this revenue ceiling would be adjusted by the Hospital Cost Containment Commission, using an appropriate index of hospital costs. Under the statute, the index must take into account changes in the state's population so that the size of the hospital industry can be adjusted accordingly. Likewise, the index must reflect technological changes that, depending on the substitution effects,[151] may make hospital care more or less expensive.

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148 Telephone Conversation with Ms. Carol Costine, Kidder Peabody (May 26, 1981).

149 D. Schneider, Economic Impact and Project Selection Methodology for Certificate of Need, Final Report to New York State Health Planning Commission, at 2 (May 12, 1980) (mimeograph, Rensselaer Polytechnic Institute, Schenectady, N.Y.).

150 1 AM. JUR. *Administrative Law* §§ 103, 104 (1962).

151 Moloney & Rogers, *Medical Technology — A Different View of the Contentious Debate over Costs*, 301 NEW ENG. J. MED. 1413, 1417 (1979).

3. Rate Schedules for Individual Hospitals

Under sections 202 and 205, the Hospital Cost Containment Commission would approve specific rate schedules for each hospital in the state. These rate-setting provisions are the key elements of the statute because prices paid are or should be the managerial focal point of the hospital. Along with quality, price is one of the two major influences on informed consumer behavior.

a. *Rate-Based Incentives for Hospital Efficiency* Under the model act, the Commission would set each hospital's rates at levels sufficient to support each hospital's occupancy level (a volume measure based on projections from historical occupancy data) and its case mix (a measure necessary to account for differences among hospitals in the nature, severity, and types of cases treated). By setting rates prospectively, the Commission would impose implicit budget constraints on the hospital's methods of providing particular services. These constraints would give hospital administrators new incentives to eliminate waste and to improve cost-effectiveness; they would make hospitals, rather than patients and insurers, bear any excess of treatment cost over Commission-approved price. Positive incentives could be built into the system, as they have been in Maryland,[152] whereby hospitals in which efficiency has reduced costs below Commission-approved rates are entitled to retain a share of the difference for discretionary use within the hospital.

b. *Equitable Treatment of Consumers* Section 202(a) requires, among other things, that rates be "set equitably among all purchasers or classes of purchasers of health care, without undue discrimination or preference." One aspect of equitable rate-setting would be the eventual elimination of cross-subsidization among services provided within the hospital.[153] Outpatient services, for example, commonly run at a loss and are

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152 *See, e.g.*, MARYLAND HOSPITAL EDUCATION INSTITUTE, 2 GUIDE TO RATE REVIEW IN MARYLAND HOSPITALS 24-27 (1979).

153 Cross-subsidization occurs when a gain from one hospital department is used to offset a loss in another department. Tiscornia, *Management Implications of Prospective Rate Setting*, 3 TOPICS IN HEALTH CARE FINANCING 113, 119 (1976).

But see Harris, *Pricing Rules for Hospitals*, 10 BELL J. ECON 224 (1979) (hospital practice of cross-subsidization can play a critical role in compensating for distortions and inequities in existing health-insurance coverage).

subsidized by patients of other departments.[154] Without this subsidy and the artificial price reduction that results, many patients who now seek hospital outpatient care for minor ailments would instead seek attention from other providers, such as private physicians in office settings, whose costs of delivering such care are lower.[155] Thus, the model act would promote the expansion of non-hospital services that are more efficient and economical than their cross-subsidized hospital counterparts.

The elimination of discounts given by hospitals to various classes of payors would be a second aspect of equitable rate-setting under the model statute. Under contractual arrangements with Blue Cross, the nation's largest health-care insurer, hospitals routinely treat Blue Cross patients at discount rates. Also, Medicare pays for treatment at rates which it determines for each hospital, rates which are lower than those charged to cash-paying patients.[156] Similarly, in most states, Medicaid also pays at some discounted rate.[157] Because Medicare and Medicaid reimbursement is significantly lower than for other patients, many hospitals and their attending physicians are dissuaded from treating Medicare and Medicaid patients. By making the reimbursement level equal among all payors, hospitals will have no reason to engage in selection among patients according to payment source.

c. *Financial Stability for the Hospital Industry* Several aspects of the model act hold the promise of making the hospital industry more financially stable than it is now. The statute's principal source of financial stability is its requirement that rates be set equitably among the various health-care purchasers. Implicit in the elimination of discounts to specific payors is the

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154 E. KAITZ, PRICING POLICY AND COST BEHAVIOR IN THE HOSPITAL INDUSTRY (1968); Davis, *Economic Theories of Behavior in Nonprofit, Private Hospitals,* 24 ECON. & BUS. BULL. 1, 113 (1972); Harris, *supra* note 153, at 224.

155 In Maryland, for example, the average cost of an intermediate-length office visit to a private general practioner, exclusive of laboratory costs, is $13.00, as compared to an average cost of $46.44 for an emergency room visit. Maryland Health Services Cost Review Commission Rate Report, at 10 (May 1, 1981) (unpublished report on file with Maryland Health Services Cost Review Commission).

156 The amount payable by the program is reduced by the applicable deductibles and co-insurance. *See* 42 C.F.R. §§ 405.110, 405.113, 405.115 (1979). For the current deductible and co-insurance requirements, *see* 1 MEDICARE & MEDICAID GUIDE (CCH) ¶¶ 1251, 3182 (1979). *See also* note 105 *supra*.

157 Cost-sharing provisions in state Medicaid programs are authorized subject to certain limitations. *See* 42 C.F.R. §§ 447.50-447.59 (1979); 3 MEDICARE & MEDICAID GUIDE (CCH) ¶¶ 14,731 (1979).

requirement that bad-debt expenses be shared equally among all payors. Currently, participation in the funding of bad debt, which arises from patients who are not covered by health insurance or who fail to pay for other reasons, varies greatly from payor to payor. In most states, Blue Cross plans agree to include in their negotiated rates some bad-debt expense arising from non-Blue Cross patients. This concession has been one of the reasons traditionally offered for the existence of a Blue Cross discount.[158] Commercial insurers, most of whom prefer to indemnify their insureds, thus allowing the patient to pay full hospital charges, participate in bad debt to the extent that the hospital includes such expenses in its charges. As mentioned above, Medicare and Medicaid generally do not participate in funding bad-debt expenses,[159] although statutory authority exists to permit their participation.[160] In states in which rate-setting agencies exist, Medicare and Medicaid may agree to reimburse hospitals at the same rate as other payors; however, to the extent that rates charged by all hospitals reflect an accommodation of bad-debt expense, both programs may support indirectly some sharing of bad debt.[161]

Insofar as it alleviates the onerous burden that bad debt poses to individual hospitals, the financial stability of the hospital industry is advanced by a uniform sharing of such expenses among payors. Inner-city hospitals, for example, because they care for more uninsured and poor patients, experience much greater bad debt than do other hospitals.[162] When all payors are required to share in the cost of bad debt, the burden is spread among all insureds. This sharing of the bad-debt burden is achieved when all purchasers at any given hospital are required to pay according to the same fee schedule, and when the fee schedule is adjusted upward at the hospitals that bear a greater burden of uncompensated care.

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158 MARYLAND HOSPITAL EDUCATION INSTITUTE, A GUIDE TO RATE REVIEW IN MARYLAND HOSPITALS 4-5 (1978).

159 The programs do not consider bad-debt expenses to be reimbursable as allowable costs, with the exception of bad debts attributable to a beneficiary's failure to pay deductible and co-insurance amounts. *See* 42 C.F.R. § 405.420 (1979); 1 MEDICARE & MEDICAID GUIDE (CCH) ¶ 5203 (1979).

160 Social Security Amendments of 1972, Pub. L. No. 92-603, § 222(a), 42 U.S.C. § 1395f (1976).

161 Medicare has agreed to pay based on a uniform set of rates only in Maryland, New Jersey, and the Rochester area of New York.

162 *See* Schieber et al., *supra* note 137.

When the burden of bad debt is spread among all payors, individual hospitals are protected from the risk of an inordinate burden of uncompensated care. This protection, as provided by the model statute, will cause a number of hospitals to experience a significant improvement in their financial status and will insure against a systematic bias against continued operation of hospitals in poor neighborhoods.[163] Taking a systemwide view of hospital finances throughout all institutions, and armed with the ability to spread the burden of bad debt, the Hospital Cost Containment Commission could assure the hospital industry of increased fiscal stability that would promote an equitable distribution of facilities.

4. Unification of Capital Planning and Hospital-Licensing with Rate-Setting

Section 301 grants the Commission the authority to plan hospital capital investment. Closely connected to this authority is the power to license hospitals. Taken together, these powers mean that the Commission controls entry into and exit from the hospital industry and determines where new hospitals will be built and which hospitals should be renovated and kept technologically up-to-date.

a. *Terms of the Unification* Section 301 merges the state's planning authority, as established under the federal health-planning law,[164] with the Commission's rate-setting authority. Consolidation of rate-setting and capital investment control is necessary in order to overcome the current system's tendency on occasion to give competing or conflicting signals to health-care institutions. In jurisdictions where a rate-setting agency coexists with the federally sponsored planning agency, hospitals have been able to play one agency against another in order to serve their own interests and to frustrate legislative purposes.

Section 302 recognizes the link between hospital capital investment and operating budgets and mandates establishment of

163 Many cities have experienced major relocations of hospitals from inner-city neighborhoods to suburban locations, leaving some areas with inadequate access to inpatient facilities. *See, e.g.*, Schramm & Greene, *A New Role for Municipal Hospitals in the Delivery of Primary Care*, J. AMBULATORY CARE MANAGEMENT, May 1981, at 50-51.

164 42 U.S.C. §§ 300k-300t (1976).

a Statewide Total Health Care Providers' Capital Expenditure Limit. Because every dollar spent on hospital capital expenditures yields an annual demand for operating funds several times greater than the amount needed for debt service,[165] the establishment of a statewide capital expenditure limit means that the Commission can control some of the long-run pressure on hospital prices. The statewide capital expenditure limit is determined annually by the Commission within the constraints imposed by the legislature's decision on the size of the state's hospital sector.[166]

The consolidation of rate-setting and capital planning functions would enable the Commission to accomplish ends that would be impossible for any agency having authority over either function alone. For example, the Commission may determine that the need for hospital care is acute in certain areas and that the population has migrated away from existing facilities in other areas. Through its rate-setting authority, the Commission could indemnify hospitals that might seek to move but are immobilized by unpaid debt. This ability to develop a method of inducing relocations through rate-setting strategies is impossible without unification of the two authorities.

Finally, section 301(f) gives the Commission the power to issue and revoke hospital operating licenses. This authority is necessary to insure that the Commission can make health-care providers responsive to the changing needs of the community. For example, inner-city hospitals often stand as shells in areas that are blighted or no longer residential, yet are ofttimes unable to move or to close because of outdated obligations (for example, the direction of a trust), perceived need of some population, or even institutional inertia. Only by having the power to deny operating licenses to unnecessary facilities can the Commission ultimately effect a responsive placement of physical facilities.

b. *Importance of the Unification of Functions for Developing Market-Based Incentives* Quite clearly, the statute makes decisions regarding new hospital construction subservient to the systemwide revenue goal spelled out by the legislature. In the face of such a priority system, the Commission can take several steps to encourage market forces to emerge in the state with

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165 *See* D. Schneider, *supra* note 149, at 2.
166 *Id.*

regard to the supply and demand for medical attention. For example, if excess hospital capacity exists, the Commission may set systemwide rates low enough that inefficient hospitals are forced to close. The market will determine which hospitals remain as patients choose on the basis of price, quality and convenience. In areas where insufficient hospital capacity exists, the Commission might encourage the growth of HMOs, which appear to have a systematic ability to keep hospital admissions rates low.[167] And, in areas where hospital capacity appears appropriate to existing demand, the Commission may stimulate competition by, for example, promoting the growth of non-hospital providers such as same-day surgical centers.

5. Minimal Regulatory Interference

One of the most important aspects of the model act is its minimal government interference with internal hospital organization and decision-making. Indeed, incursions into the realm of managerial discretion are limited to requirements for uniform record-keeping and for the elimination of cross-subsidies within the hospital. Aside from these requirements, regulatory intervention stops at the door of the hospital. The Commission sets rates and approves new capital expenditures, but within those parameters, hospital decision-makers are free to act. This approach insures that trustees, administrators and physicians continue to make decisions requiring professional judgement, decisions that regulators are generally unequipped to make. Accordingly, hospitals can readjust resource use internally rather than looking to the Commission for detailed direction. The pressure of externally set budget constraints may yield new power relationships regarding which interest groups ultimately control resource allocation within the hospital.[168]

6. Overcoming Common Regulatory Defects

Regulatory schemes are commonly subject to three major criticisms: decision-making delays ("regulatory lag") that are

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167 See notes 97 to 98 and accompanying text, *supra*.

168 Harris, *The Internal Organization of Hospitals: Some Economic Implications*, 8 BELL J. ECON. 467, 480-81 (1977).

costly to the regulated industry;[169] failure to appreciate the operating constraints of the regulated industry, which can lead to the development of inappropriate regulation;[170] and "capture" by the regulated industry, resulting in the sacrifice of consumer interests for the benefit of the regulated industry.[171] The statutory scheme embodied in the model act attempts to avoid each of those traditional shortcomings.

a. *Overcoming Regulatory Lag* The protection against regulatory lag[172] is simple. The statute establishes unambiguous deadlines by which the regulatory process must be complete. For example, section 206 requires the Commission to issue a final rate determination within ninety days after the initial schedule of rates is proposed by the Commission's staff. This initial schedule becomes final through the device of an order nisi within sixty days, provided there is no objection. To modify rate schedules, the Commission must hold hearings and promulgate a final rate order within 120 days from the filing of a rate-change request.

Sections 201 and 302, which establish the statewide revenue limit and the capital-expenditures limit, respectively, are equally indicative of the act's spirit of prompt decision-making and also show its intent to stimulate increased responsibility in hospital managers. Each section requires the Commission to set the

169 *See, e.g.*, Havighurst, *Federal Regulation of the Health Care Delivery System—Foreword*, 6 U. TOL. L. REV. 583-84 (1975).

170 *See, e.g.*, Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549-609 (1979).

171 *See, e.g.*, E. HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 213, 397 (1936); Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture,"* 6 POL'Y SCI. 302-03 (1975); D. TRUMAN, THE GOVERNMENTAL PROCESS 417-21 (2d ed. 1971).

172 Regulatory lag is the inevitable delay that is involved in the downward adjustment of rate levels that produce excessive rates of return and in the upward adjustments ordinarily called for if profits are too low. However, when held within reasonable bounds, regulatory lag itself may serve as positive encouragement of efficiency. *See* A. KAHN, 2 THE ECONOMICS OF REGULATION 48, 56-57, 59-60 (1971). An illustration of this phenomenon is found in a model describing the effect of regulatory lag on the behavior of a profit-maximizing monopoly subject to rate-of-return regulation (albeit, one not entirely analogous to the hospital industry), discussed by Bailey and Coleman in *The Effect of Lagged Regulation in an Averch-Johnson Model*, 2 BELL J. ECON. 278 (1971). Their analysis revealed the following findings. First, when the regulator sets the fair rate of return to *exceed* the cost of capital, then firms encountering regulatory lag will less often overcapitalize and will have a higher level of output than firms which do not encounter significant regulatory lag. Second, when the regulator sets the rate of return so that it exactly *equals* the cost of capital, firms facing lag again will exhibit minimum-cost maximum-output production; firms not facing lag, however, will be indifferent among all operating points at which they earn no profits. *Id.* at 291-92.

relevant limit sixty days prior to the period in which the limit will apply. This requirement insures that the industry will be informed of the resource constraints that will apply during the upcoming period.

b. *Maintaining Open Communications* The model act is explicit in its objective of establishing and maintaining open, constructive communication between regulator and regulatee. Such communication contrasts with the hostile, litigation-prone relationships that have arisen between regulator and regulatee under several existing state plans, most notably New York's.[173] The Commission and the regulated institutions should always seek to achieve the same goal: providing quality health care as efficiently as possible. Because our experience with price and capital-expenditure regulation in hospitals has been so brief, and the approaches taken in several jurisdictions so diverse, a free flow of information between hospitals and the Commission seems critical.[174] Just as agency personnel must develop an intimate working knowledge of the hospital, the hospital must understand the goals and methods of the agency and the social expectations imposed upon it by statute.

Public participation in this regulatory process is of obvious importance. The reduction of the societal commitment to unrestrained growth in the hospital industry requires active public participation in order to make the use of hospital resources more economical. As consumers become more discriminating, hospitals will become more responsive to competitive market forces. To this end, the Commission might distribute data on differences in rates, measures of quality, and the anticipated capital improvement plans of various hospitals. Equipped with more information, consumers can be expected to act in more rational ways and to impress their preferences upon hospitals and the regulatory agency.

c. *Preventing Regulatory "Capture"* Regulatory capture — the harnessing of an agency to serve the interests of the

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173 Gambino, *Hospital Costs under State Rate-Setting Programs,* 304 NEW ENG. J. MED. 429-30 (1981).

174 CONGRESSIONAL BUDGET OFFICE, CONTROLLING RISING BUDGET COSTS 59 (1979). Ongoing industry (regulatee) participation, at least on a consultation basis, is but one of the criteria recommended by the AHA in order to create an effective regulatory process. *See* SPECIAL COMMITTEE ON THE REGULATORY PROCESS, AHA, HOSPITAL REGULATION 29-32, 104-09 (1977).

group whose activity the agency was created to monitor — is a long-recognized threat.[175] The model act provides several means to protect the Commission from such a fate. The first is consumer membership on the Commission. Sections 101(a) and 103(b) provide for a relatively small Commission of part-time members appointed by the Governor for fixed terms. The commissioners are to be drawn principally from the ranks of consumers, thus ensuring that industry representatives are always in a minority.

A second anti-capture feature of the model act is provision of a professional, politically independent staff. The staff is exempt from the state's civil-service structure and serves at the pleasure of the Commission. It is thus insulated from pressures that might be applied through the executive branch. Furthermore, in serving under part-time commissioners, the staff is more likely to develop expertise and to maintain objectivity than it would be under a full-time Commission. Full-time commissioners may be more likely to hold gubernatorial sinecures than the part-time "citizen" commissioners envisioned in the model act.

The objectivity and independence of both Commission members and staff are further advanced by the Commission's funding source, which, as provided by section 105(c), is independent from the state's general revenues. This financial independence protects the Commission from pressure exerted by the Governor or individual legislators who otherwise might attempt to retaliate for decisions that are not to their liking or the liking of industry forces.

Although citizen-commissioners, professional staff, and independent funding all work to preserve the agency from capture by the hospital industry, the Commission's ability to function in the consumer's interest ultimately is guaranteed only by cooperation from the Governor and the legislative leadership. As the Commission exercises its regulatory authority, it will encounter formidable political pressure to accomodate the interests of the hospital industry, which has not functioned in a market situation and will not, without protest, submit to a regulatory regime that has as its goals the increased market power of consumers and, implicitly, the adjustment of resource allo-

175 *See* D. TRUMAN, *supra* note 171.

cation. The Commission will succeed in its mission only to the extent the Governor and the legislature are genuinely committed to the goals embodied in the model act.

7. The Commission's Jurisdiction and Life Cycle

a. *Jurisdiction* The rate-setting jurisdiction of the Commission is limited to non-federal acute-care hospitals, as provided in section 101(b). In addition, the act specifically excludes federally owned hospitals, mental hospitals, and nursing homes. Although federal hospitals might comply voluntarily with state-promulgated guidelines, the state lacks constitutional authority to impose any cost-containment regulations on them. Moreover, because they serve a specialized population (mainly military veterans), federal hospitals do not significantly influence the states' hospital industries. The market for mental hospitals and nursing homes, which typically require extended stays, is also markedly different from the market for acute inpatient care. Generally, acute care is fully insured, but psychiatric hospitalizations and nursing-home stays are not. While the market for acute hospital care appears relatively homogeneous to the consumer,[176] the markets for both psychiatric hospitalization and nursing-home care offer a wide range of services at a wide range of prices. Hence, in selecting a psychiatric hospital or a nursing home, consumers have substantial opportunity to make informed evaluations of competing suppliers with regard to the type and quality of facilities, the duration of the stay, and the price.

For purposes of regulating capital expenditures, however, section 303(a) provides that the jurisdiction of the Commission extends beyond hospitals. No health-care provider may make a capital expenditure in excess of $100,000 without Commission approval. This provision permits the Commission to restrict the proliferation of high-cost technology in physicians' offices and other provider settings. Presumably, as more suppliers enter the market for health care, the Commission will be less inter-

176 Except, perhaps, for a notion of community reputation, most consumers make few comparisons among hospitals. Their choice is typically restricted, moreover, to those institutions in which their doctor has staff privileges. Roberts & Bogue, *supra* note 1, at 656-57.

ested in directly guiding the growth of the physical facilities. It may be, for example, that the Commission will encourage development of HMOs, same-day surgical centers, and new forms of primary care, thereby forcing hospitals and hospital physicians to become increasingly price-competitive in order to preserve their market shares. To become more price-competitive, hospitals and hospital physicians would become less wasteful in making capital expenditures, even if the Commission readily granted approval to capital-expenditure proposals.

b. *The Commission's Life Cycle* In that the Commission is a transitory step toward curbing the exceptionally inflationary tendencies of the health-care market, section 407 provides for a "sunset" date specified by the legislature. The most desirable long-term means of preventing wasteful health-care expenditures and of subduing inflation in health-care prices is to give providers and consumers market-based incentives to use health-care resources efficiently and economically and to hold prices down. As discussed above, such incentives are nearly non-existent in our present system of distribution: principally because of the way health care is financed, through private and government insurance mechanisms that insulate consumers from true costs, patients seek excessive amounts of care. The problem is compounded by the institutional inertia of hospitals and insurance companies, which prosper under the current cost-reimbursement arrangement, and by the fact that physicians have incentives to use unnecessarily high amounts of resources in their care of patients.[177] The problem is made even worse by the market-distorting subsidies that federal income tax laws channel into health-care expenditures.[178]

The creation of vigorous competition in price, quality and service would resolve many of the problems existing in the provision of health care today. The preliminary development of a competitive, cost-conscious market in hospital and health care is the key task of the Commission. The temporary intrusion of

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177 *See, e.g.*, Schroeder & Showstack, *supra* note 32.

178 *See* I.R.C. §§ 104-106 (compensation for injuries or sickness, payments from accident and health plans funded by an individual's employer, and contributions by an individual's employer to accident and health plans are for tax purposes excluded from the individual's gross income); I.R.C. § 213 (medical and dental expenses allowable as a deduction from an individual's taxable income).

state government into the hospital industry holds hope for effecting both short-run savings in aggregate resource expenditure, and long-run reorganization of the market.

Because of its consolidated authority over prices and capital expenditures, the Commission should be able to stimulate pro-competitive reorganizations. Competition in the health-care industry generally would increase as the Commission used its authority to promote nonhospital surgical centers, HMOs and physician group practices that contract with patients to provide care on a pre-paid basis, and other alternatives to hospitals. Meanwhile, the Commission's role in publicizing information about hospital prices and quality should increase competition among hospitals. In addition, the Commission might use rate incentives to stimulate the development of hospital-based insurance plans under which the hospital agrees with groups of patients to provide care for a fixed, pre-paid fee. Similarly, third-party payors might limit a choice of hospital for their insureds to hospitals offering the lowest-price contracts. These reforms are but some of the pro-competitive arrangements that could emerge. Even without major changes in federal Medicare reimbursement procedures, the Commission can greatly stimulate the emergence of many more efficiency-inducing incentives in a state's health-care sector than presently exist. Once the state-established reforms are in place or a major national reform of health-care financing is accomplished, the regulatory interlude envisioned by the model act can be concluded as directed by the sunset provision.

B. *The Political Feasibility of the Model Statute*

In the absence of an effective non-governmental cost-containment program, the problem of health-care cost inflation is likely to become even more serious than it is now. Because of governmental commitments to fund Medicare and Medicaid, rising costs will place ever-increasing burdens on federal and state budgets. As a result, in the next few years hospital-cost containment may become a political imperative not only as a means of making health care more affordable for individuals

and private organizations, but also as a means of reducing federal and state budgetary deficits.

The advent of the Reagan Administration and its aversion to government regulation will, in the short run, militate against the reforms embodied in the model act.[179] As health-care costs continue to rise, however, cost containment may well gain formidable political support. If the political pressure for balanced budgets and for inflation control continues, the visibility of the health-care component of the economy will undoubtedly generate pressure for some type of controls. Also, regulatory cost containment may be the only politically feasible method for alleviating the steadily increasing burden that health-care funding commitments have placed on government budgets. (See Table 2.) While it may reduce funding for the Medicaid population, the Reagan Administration and Congress will find it exceedingly difficult to break the implicit social contract that Medicare has established with middle-class elderly Americans. In seeking a suitable trade-off between reducing benefits to citizens and pressuring hospitals to perform more efficiently, the Administration and Congress may find themselves politically constrained to develop an aggressive governmental program for hospital-cost containment.

In the eyes of the Reagan Administration and many other foes of regulation, state-based hospital-cost containment efforts such as those embodied in the model act would offer an appealing alternative to federal intervention. As more of the burden for administering federally financed health programs falls to the states under the explicitly understood limit on federal resources, there can be little doubt that the federal government will be less concerned with the states' administrative solutions. As increased responsibility falls to the states under the Administration's block-grant programs, governors and state legislatures will become increasingly visible in their struggles to strike acceptable balances between controlling budgetary expenditures and serving the health-care needs of the poor and the elderly. State governments will also feel increasing pressure from middle-class Americans as disproportionate health-care cost inflation makes itself felt in the form of higher insurance premiums,

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179 *See, e.g.*, Scalia, *Regulatory Reform—The Game Has Changed*, 5 REGULATION 13 (1981); Clark, *More Power to OMB*, 13 NAT'L J. 424 (1981.)

TABLE 2
FEDERAL BUDGET: SOME SELECTED SEGMENTS

		Federal Expenditures on Health		Other Federal Expenditures as a Percentage of Total Federal Outlays			
	Year	In Millions of Dollars	As a Percentage of Total Federal Outlays	Income Security	Defense	Energy	Transportation
(Actual Expenditures)	1970	13,051	6.64%	21.91%	39.96%	.50%	3.56%
	1971	14,716	6.96	21.22	35.86	.49	3.18
	1972	17,467	7.53	27.55	32.99	.55	3.62
	1973	18,832	7.62	29.53	30.17	.48	3.67
	1974	22,073	8.19	31.32	28.85	.31	3.40
	1975	27,648	8.48	33.30	26.23	.66	3.18
	1976	33,448	9.13	34.77	24.41	.85	3.67
	Transition*	8,721	9.21	34.62	23.55	.84	3.49
	1977	38,785	9.51	34.25	24.21	1.04	3.63
	1978	43,676	9.69	32.43	23.33	1.30	3.43
	1979	49,614	10.05	32.45	23.84	1.39	3.54
(Estimates)	1980	56,563	10.04	33.88	23.13	1.38	3.48
	1981	62,449	10.14	35.73	23.75	1.32	3.27
	1982+	74,000	10.79	36.74	23.32	1.02	3.21
	1983	85,000	11.38	37.08	23.29	.94	3.08
	1984	96,000	11.90	37.42	23.54	.87	2.97
	1985	109,000	12.46	37.71	23.43	.80	2.86

* Under provisions of the Congressional Budget Act of 1974, the fiscal year for the Federal Government shifted beginning with fiscal year 1977. Through fiscal year 1976, the fiscal year was on a July 1-June 30 basis; since October 1976 (fiscal year 1977) the fiscal year has been on an October 1-September 30 basis. The 3-month period from July 1, 1976 through September 30, 1976 is a separate fiscal period known as the transition quarter. ECONOMIC REPORT OF THE PRESIDENT, Jan. 1980, at 286.

\+ Projected outlays for 1982 and beyond are taken from FIVE YEAR BUDGET PROJECTIONS: FISCAL YEARS 1981-1985, A REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE BUDGET—PART II (1980). Figures for fiscal years 1970-81 are from ECONOMIC REPORT OF THE PRESIDENT, Jan. 1980, at 284-85.

larger deductibles, and higher taxes. The option of creating a professional, politically neutral, expert, and effective cost-containment agency will become increasingly attractive from both a political and a fiscal perspective. Thus, on those grounds as well as on grounds of economic desirability, the model act's program for state-based hospital-cost containment may offer the nation's best hope for bringing the problem of health-care cost inflation under control.

APPENDIX

A MODEL STATE HOSPITAL COST CONTAINMENT STATUTE

TITLE I. THE HOSPITAL COST CONTAINMENT COMMISSION

Section 101. Creation, Nature, and Jurisdiction of the State Hospital Cost Containment Commission
Section 102. The Commission's Composition, Appointment, Term of Members, Quorum, Compensation, and Expenses
Section 103. The Executive Director and Staff; Powers Generally
Section 104. General Counsel
Section 105. Powers Generally; Budget Expenses of the Commission
Section 106. Procedure; Burden of Proof; Orders and Decisions; Appeals; Fines
Section 107. Annual Report

TITLE II. SETTING OF REVENUE LIMIT AND RATE SCHEDULES

Section 201. Statewide Total Hospital Revenue Limit
Section 202. Rate-Setting Power Generally
Section 203. Uniform System of Accounts and Financial Reporting
Section 204. Hospital Annual Financial Reporting
Section 205. Rate Determination; Initial Schedule of Rates; Interim Rates; Adjusting Rates for Inflation
Section 206. Procedures for Obtaining Initial Rate Schedule; Procedures for Adjustments and Revisions of Rate Schedule
Section 207. Public Disclosure of Hospital Financial Data
Section 208. Monitoring of Conflicts of Interest

TITLE III. CAPITAL PLANNING AND LICENSING

Section 301. Designation of the Commission as the State's Health Planning Agency and Hospital Licensing Agency
Section 302. Statewide Total Health Care Providers' Capital Expenditure Limit
Section 303. Certification of Capital Expenditure Projects

TITLE IV. SHORT TITLE; START-UP PERIOD; SEVERABILITY; REVISION OF STATE BONDING-AUTHORITY LAW AND STATE ANTITRUST LAW; EFFECTIVE DATE; SUNSET

Section 401. Short Title
Section 402. Start-Up Period
Section 403. Severability
Section 404. Revision of State Bonding-Authority Law
Section 405. Revision of State Antitrust Law
Section 406. Effective Date
Section 407. Sunset

TITLE I. THE HOSPITAL COST CONTAINMENT COMMISSION

Section 101. *Creation, Nature, and Jurisdiction of the State Hospital Cost Containment Commission*

(a) The Governor shall create the Hospital Cost Containment Commission (the "Commission"), an independent executive agency. The Commission shall regulate the fees of hospitals throughout the state as provided in Title II. The Commission shall also limit capital expenditures by hospitals and other providers of health care as required by Title III.

> *Comment:* The Act establishes an independent Commission rather than giving rate-setting authority to the State Secretary of Health. The Commission can obtain broader advice, act faster, and remain more politically insulated than most state health departments.

(b) The term "hospital" as used in this Act means any institution that provides medical or surgical care to sick or injured persons but that does not fall under any of the following categories:

(1) institutions owned or operated by the Federal Government;
(2) institutions that provide medical and surgical care only as part of a specialized program for the treatment of mental or nervous disorders;
(3) institutions that provide medical and surgical care only as part of a specialized program for the long-term maintenance of the aged and of other persons suffering from irreversible infirmities; and
(4) institutions certified by the First Church of Christ, Scientist, of Boston, Massachusetts.

Comment: Elsewhere in the Act, section 101(b)'s definition of "hospital" serves to identify the health-care institutions that fall within the Commission's regulatory jurisdiction. In general, institutions that are characterized as "hospitals" in everyday speech are included in section 101(b)'s definition. So are many other institutions that in everyday speech are not referred to as hospitals but that involve physicians in a group practice of health care or that involve a hospital-like consolidation of health-care resources.

However, the definition excludes some institutions from the Commission's hospital-oriented regulations. Federally owned and operated institutions are exempt because of the Supremacy Clause of the United States Constitution. Section 101(b)(2) excludes mental hospitals and other mental institutions. Section 101(b)(3) excludes nursing homes, the market for which is so different from that of hospitals as to require an entirely different regulatory approach. In excluding institutions certified by the Christian Scientist Church, section 101(b)(4) recognizes that the practice of Christian Science does not engender the same concerns over hospital costs raised by conventional medicine.

Section 102. ***The Commission's Composition, Appointment, Term of Members, Quorum, Compensation, and Expenses***

(a) The Commission shall consist of seven members appointed by the Governor. The appointees shall be persons conversant with the problems of health care. At least four members shall have no fiduciary or pecuniary interest in the management or policy of any hospital. The terms of the initial appointees shall be staggered: four shall be appointed for a term of four years; two for a term of three years; and one for a term of one year. Thereafter, all appointments shall be for a term of four years each, except that a member appointed to fill a vacancy in an unexpired term shall serve only for the remainder of that term. No member shall be appointed to more than two consecutive terms.

(b) The Governor shall annually select a chairperson. In turn, the newly designated chairperson shall select a vice-chairperson. Meetings shall be called by the chairperson or by any four members. All meetings of the Commission shall be announced in advance and opened to the public, except when conducting business of an executive nature.

(c) Four members constitute a quorum. No action of the Commission shall be effective without the concurrence of at least four members.

(d) Members of the Commission shall receive compensation as may

be provided for in the budget. This compensation shall include a salary and also reimbursement for all necessary and proper expenses that the members incur in performance of their duties.

> *Comment:* This section establishes that the Commission will consist of part-time members drawn from the community at large. The influence of consumers is ensured in the composition of the Commission. While the chairperson's position is strong relative to that of the other commissioners, the part-time nature of the appointments suggests a strong staff role.

Section 103. *The Executive Director and Staff; Powers Generally*

(a) The Commission shall appoint an Executive Director, who shall perform any and all duties and functions prescribed by the Commission. The Commission shall employ such other staff as it considers necessary and has provided for in the budget. The Commission may contract with anyone other than Commission members for any services that may be necessary to carry out its activities.

(b) The Executive Director is the chief administrative officer of the Commission and shall be subject to the directions of the Commission. The Executive Director, the Deputy Director(s), and the principal section chiefs shall serve at the pleasure of the Commission.

> *Comment:* Section 103(b) ensures the Commission a staff independent of the state's civil-service system. This independence is necessary for two reasons. First, persons possessing the professional expertise needed for the Commission staff are likely to refuse to join the staff unless they receive higher salaries than are often provided for in civil-service wage structures. Second, the Commission should have flexibility to establish standards of performance above those that are achieved by most state bureaucracies.

Section 104. *General Counsel*

(a) The Commission shall appoint a General Counsel to serve at the pleasure of the Commission.

(b) The General Counsel may initiate and defend actions on the Commission's behalf in all courts.

(c) In all matters adjudicated by the Commission, the General Counsel shall advise the Commission, but the Executive Director and the staff shall represent themselves in all such matters.

> *Comment:* The requirement that the staff represent itself is designed to ensure that adjudicative hearings before the Commission do not become overly legalistic.

Section 105. ***Powers Generally; Budget Expenses of the Commission***

(a) In addition to the powers granted to the Commission elsewhere in this Act, the Commission may:

(1) adopt, amend, and repeal rules and regulations pertaining to the exercise of powers conferred by this Act, subject to the provisions of the Administrative Procedure Act, [cite to state law];

(2) hold public hearings, conduct investigations, and require the filing of information relevant to matters affecting the cost of services in institutions regulated by the Commission pursuant to Title II or Title III of this Act;

(3) subpoena witnesses, papers, records, documents, and all other data sources relevant to matters affecting the cost of services in institutions regulated by the Commission pursuant to Title II or Title III of this Act;

(4) administer oaths or affirmations in its hearings or investigations;

(5) create committees from its membership, and appoint advisory committees consisting of members, other individuals, and representatives of interested public and private groups and organizations;

(6) solicit, receive, and accept grants, payments, and other funds and advances from any governmental body, corporation, or person; and enter into agreements with respect to such grants, payments, funds and advances, including agreements that involve the undertaking of studies, plans, demonstrations, or projects; and

(7) exercise all other powers that are necessary to carry out the express purposes of this Act.

Comment: Section 105(a)(5) permits the Commission to establish committees to advise it on technical matters as well as general issues being contemplated by the Commission. Using such authority, the Maryland Commission has established an Industry Advisory Committee that acts as an important conduit of informal communications to and from the Commission.

The language of section 105(a)(6) permits the Commission to participate in federal studies, to sell data, and to co-sponsor or participate in studies with the hospital industry for purposes that will advance the goals of the Commission.

(b) The Commission's budget shall include all sums necessary to support the activities of the Commission, the Executive Director, the staff, and the General Counsel. The Executive Director shall annually prepare a preliminary budget for the next fiscal year. The Commission shall decide the final budget after considering the preliminary budget prepared by the Executive Director and comments from the public. The Commission shall hold a public hearing designed to elicit com-

ments from all interested parties. It shall adopt the final budget at least sixty days before the beginning of the fiscal year.

(c) All costs and expenses of the Commission shall be included in the State budget and paid from the State treasury. In turn, the State treasury will be fully reimbursed as provided by the following guidelines:

(1) The total of all costs and expenses of the Commission shall be borne by the institutions subject to the Commission's jurisdiction.

(2) Obligation for payment of this total shall be apportioned among individual institutions on a pro-rata basis using each institution's gross revenues as reported under the authority of Title II, section 203(a) of this Act. However, no individual institution shall be obligated to pay more than one percent of its gross revenues toward funding of the Commission.

(3) At least thirty days before the beginning of the fiscal year the Conmission shall calculate the amount to be paid by each institution and shall notify each institution of its assessed obligation.

(4) Each institution shall pay one half of its annual obligation before the beginning of the fiscal year and one half before the beginning of the final half of the fiscal year. Penalties for late payment, not to exceed twenty percent of the obligation, may be assessed by the Commission.

> *Comment:* This subsection establishes an implicit taxing authority in the Commission. The Commission is protected from political pressure by having its own source of support.

(d) Budgeted funds unexpended at the close of the fiscal year shall be applied as an offset to the budget for the next fiscal year.

Section 106. *Procedure; Burden of Proof; Orders and Decisions; Appeals; Fines*

(a) Proceedings before the Commission shall be governed by rules that the Commission may establish from time to time. The Commission shall be free to establish such rules of evidence and procedure as it deems necessary. Any action of the Commission is valid if it complies substantially with the requirements of this Act and is not vitiated by late filing or any other technical deficiencies.

(b) In a proceeding before the Commission, the burden of proof shall be on the institution or institutions seeking Commission approval of budgets, prices, and capital expenditures higher than those the Commission has previously permitted.

> *Comment:* To ensure efficient administration of the Act, it is critical that the burden of proof be on the institution(s). To provide otherwise would operate as an implicit limitation on the legislative delegation.

(c) Every decision and order of the Commission shall be in writing and shall be maintained in the Commission's offices. Furthermore, every decision and order, as well as the complete record for each matter pending before the Commission, shall be made available for public inspection, with the exception that the Commission shall maintain the confidentiality of:

(1) records and data, the disclosure of which would constitute an unwarranted invasion of a person's privacy with respect to his work performance or his level of earnings; and

(2) the Commission's own records and data that relate materially to its participation in a judicial proceeding.

(d) Any person aggrieved by a final determination of the Commission may appeal therefrom to the first-level appellate court of the State. The Commission shall be a necessary party to any appeal at all levels of the appeal, whether administrative or judicial.

(e) The Commission may appeal an administrative or judicial decision affecting any of its final determinations, rules, or regulations to a higher level for further review. Any aggrieved party or interested person may intervene or participate in an appeal, at any level thereof, upon grant or leave by the appropriate agency or court.

(f) The Commission shall require the filing within specified deadlines of all reports, statements, and disclosures as provided for in this Act. The Commission also may adopt regulations concerning penalties for failure to file as required. These penalties shall not be part of the institution's allowed costs in the determination of its regulated rates as provided for in Title II, section 202(a) below.

(g) Any willful failure to file any report or statement required by this Act is a misdemeanor, punishable on conviction by a fine not exceeding [State's maximum fine for a misdemeanor].

Section 107. *Annual Report*

(a) Within thirty days of the close of a fiscal year, the Commission shall prepare and transmit to the Governor a report of its operations and activities for that fiscal year. This report shall include summaries of all reports made by the institutions subject to this Act, together with facts, suggestions, and policy recommendations the Commission considers necessary.

TITLE II. SETTING OF REVENUE LIMIT AND RATE SCHEDULES

Section 201. *Statewide Total Hospital Revenue Limit*

At least sixty days prior to the start of each fiscal year, beginning two years from the effective date of this Act, the Commission shall

promulgate a Statewide Total Hospital Revenue Limit applicable to that fiscal year. The promulgated limit shall not exceed $[to be determined by the legislature] for the initial year; for subsequent fiscal years, the annual Statewide Total Hospital Revenue Limit may not exceed that sum multiplied by the ratio of the value of an appropriate index of hospital costs on January 1 of the preceding calendar year to the value of that index on January 1 of the year in which the Act was passed, with adjustments for changes in the State's population. The index of hospital costs shall be determined by the Commission after public hearing and shall reasonably allow for costs reflecting changes in medical technology.

> *Comment:* The Act requires the legislature to make a political determination of what resources will be expended on hospitals each year by the state's population. This Act recognizes as legitimate and necessary the legislature's task of allocating resources to health care where the free market fails to facilitate purposeful distribution of resources between health care and other social needs.
>
> Once the legislature decides the size of the hospital industry's total budget, the Commission adjusts the sum annually to account for changes in inflation, population, and technology.

Section 202. *Rate-Setting Power Generally*

(a) Two years from the effective date of this Act, the Commission shall have the power to initiate reviews or investigations of hospital rates and to establish and to approve such rates as may be necessary to assure all health-care purchasers that (1) the total costs of the hospital are reasonably related to its total services; (2) the hospital's aggregate rates are reasonably related to its aggregate costs; (3) rates are set equitably among all purchasers or classes of purchasers of health care without undue discrimination or preference; and (4) total revenues for all hospitals in the State do not exceed the hospital revenue limit established under section 201 above.

> *Comment:* This section provides for authority to set hospital rates and budgets after a two-year start-up period, the details of which are laid out in Title IV. The rate-setting authority specifies that costs of hospital services shall be reasonably related to the rates charged for them, in light of the hospital's total budget. The budget reflected in rates is compiled by determining a level of utilization (using average occupancy times the number of beds, adjusted for case-mix) and developing rates that permit the hospital to function effectively.

The section requires the Commission to establish rates that are equitable among all purchasers (Medicaid, Blue Cross, commercial carriers, self-paying patients, and Medicare, where the federal government is willing to submit to Commission jurisdiction). It thereby enables the Commission to distribute bad-debt costs throughout the hospital system by making all purchasers share the bad-debt expense of any one institution and by spreading such risk expenses over all insured persons. Under current Medicare and Medicaid regulations, the federal government does not share bad-debt expenses.

(b) No hospital shall charge for services at a rate other than those established by order of the Commission in accordance with the procedures established below.

(c) The Commission shall develop and apply any reasonable, relevant, or generally accepted methods in determining rates for each institution subject to this Act.

(d) In the interest of promoting the most efficient and effective use of hospital service, the Commission may adopt and approve various methods of rate determination. The Commission may also adopt experimental methods of charges and payment so long as these methods are in the public interest and consistent with the purposes of this Act.

Comment: This subsection allows the Commission flexibility to experiment with different methods of rate-setting. Thus, the Commission may establish rates using methods that vary from hospital to hospital.

(e) All determinations, orders, and decisions of the Commission with respect to rates shall be prospective.

Comment: The Commission, by establishing prospective rates, establishes an implicit annual budget for the hospital within which it must operate or be at risk for overruns.

(f) In determining rates for non-profit hospitals subject to this Act, the Commission shall establish reasonable rates that will permit the institution to render effective and efficient service in the public interest.

Comment: For non-profit institutions, rates must be set in a reasonable manner. However, the Commission has authority to establish a reasonableness test with regard to effectiveness and efficiency of service delivered by the hospital. The Commission can inquire into the quality of care under its general duty to protect the public interest. Thus, assuming efficient yet satisfactory performance on the part of a hospital, the Commission-set rates should be sufficient to preserve the hos-

pital's solvency. Should the Commission determine that a hospital is unable to render a particular service efficiently or satisfactorily, or should the Commission find that the provision of that service by the hospital is unnecessary in view of community need and other health care available in the community, then the Commission may order termination of the service. See section 301(f).

(g) In determining rates for proprietary hospitals subject to this Act, the Commission shall establish reasonable rates that will permit the institution to render effective and efficient service in the public interest and that shall suffice to provide a fair return to owners based upon the value of the institution's investment in hospital resources.

Comment: As in public-utility regulation, the measure of reasonableness in setting proprietary rates is return on equity. In the case of non-profit hospitals, the Commission may exercise authority over the quality of services rendered. Thus, again assuming efficient performance on the part of the hospital, Commission-set rates should suffice to sustain the hospital's solvency.

Note that there is no separate subsection applicable to government-owned hospitals. These hospitals are considered "non-profit" and are treated in section 202 (f).

Section 203. *Uniform System of Accounts and Financial Reporting*

(a) After holding public hearings and consulting with appropriate advisory committees, the Commission shall direct hospitals to use a uniform system of accounting and financial reporting. This system shall include such cost-allocation and revenue-allocation methods as the Commission may prescribe for health-care institutions to use in recording their revenues, expenses, other income and other outlays, assets, liabilities, and units of service. All institutions subject to this Act shall adopt the system for the fiscal year beginning on or after twelve months from the date of passage.

(b) The Commission may modify the accounting and reporting system in order to allow for differences in the scope or type of services and in financial structure among the various categories, sizes, or types of institutions subject to this Act.

Comment: Uniform accounting is necessary to gather comparable data for establishing equitable rates, for developing a method to set hospital rates on the basis of percentile measures of operating costs and revenues, and for judging the perfor-

mance of the Commission in terms of the increase in aggregate rates in the state each year. This subsection allows the Commission to establish groupings of hospitals by size, location, etc., for purposes of rate comparisons. See section 205(c).

Section 204. ***Hospital Annual Financial Reporting***

(a) Every year, or more frequently as specified by the Commission, every institution under the jurisdiction of this Act shall file with the Commission the following financial statements or reports:

(1) a balance sheet detailing the assets, liabilities, and net worth of the institution for its fiscal year;

(2) a statement of income and expenses for the fiscal year;

(3) such other reports as the Commission may prescribe.

These statements and reports are to be prepared in a format prescribed by the Commission.

(b) The Commission shall require that each hospital's financial reports be certified by a certified public accountant who is independent from the hospital. The Commission may also require officials of the institution to attest that these reports have, to the best of their knowledge and belief, been prepared truthfully and in accordance with the prescribed system of accounting and reporting.

Comment: Subsections (a) and (b) require annual summaries of the hospital's financial position. Because of the required uniformity in their systems of account, as prescribed in section 203(a) above, the information will be comparable from hospital to hospital. Subsection (b) provides that hospital administrators and trustees may be required to testify to the accuracy of the annual statement prepared by the accountant. This requirement ensures that hospitals are conscious of the importance of accuracy of information to the rate-setting functions of the Commission and that all parties are expressly responsible should the hospital offer fraudulent data to the Commission in an attempt to obtain higher rates.

(c) In general, all reports filed under this section shall be open to public inspection at the offices of the Commission. However, using the least restrictive means practicable, the Commission shall ensure that public access to these reports does not breach the confidentiality of privileged medical information, of privileged information on an individual's work performance or earnings, or of other information the disclosure of which would constitute an unwarranted invasion of an individual's personal privacy.

(d) If a further investigation is considered necessary or desirable to verify the accuracy of information in reports made by institutions

under this section, the Commission shall have the authority to examine further any records and accounts as the Commission may by regulation provide. As part of such an examination, the Commission may conduct a full or partial audit of all such records and accounts.

> *Comment:* There should be no disclosure of the salaries of an institution's named individual employees to the general public. This restriction is in keeping with the 1979 Amendments to 42 U.S.C. § 300 m-1(b)(6).

Section 205. *Rate Determination; Initial Schedule of Rates; Interim Rates; Adjusting Rates for Inflation*

(A) Two years from the effective date of this Act, the Commission shall establish for each hospital an initial schedule of rates. The Commission's procedure for determining the initial schedule of rates shall be subject to the requirements of section 206(a). In establishing the initial schedule of rates, the Commission shall provide funds sufficient to operate all services appropriately rendered by the hospital at the date of passage of this Act.

(b) Starting two years after the effective date of this Act and continuing until either a year passes or the initial schedule of rates has been established for each hospital, the Commission may adopt for each hospital interim rates that enable the hospital to render efficient and effective service in the public interest without risk of insolvency.

> *Comment:* In exercising its authority to set interim rates, the Commission may employ any rate-setting method that guarantees the solvency of each hospital. For example, it could freeze rates until the initial schedule is determined and adjust for losses due to inflation or labor-contract settlements in the initial rate. Or, it could subject rates to a partial freeze, allowing rates at hospitals without an initial schedule to be adjusted automatically every three months to reflect changes in the Consumer Price Index. Subject to the solvency requirement, the Commission may choose from a wide range of formulas for setting interim rates. No guarantee of solvency is provided after the interim period.

(c) The Commission may compare hospitals in determining the reasonableness of rates and the effectiveness and efficiency of a hospital's ability to render care.

> *Comment:* This subsection gives the Commission the authority to establish reasonableness criteria using percentile statistical "screens." For example, the Commission may determine that, with regard to the cost related to a medical and surgical bed

day, any institution reporting costs below the eightieth percentile is presumptively reasonable.

(d) After determining the initial schedule of rates for an institution, the Commission may from time to time adjust the rates to account for any of the following factors:

(1) changes in the hospital's mix of patients with regard to severity of illness;

(2) changes in the costs of goods and services purchased by the hospital; or

(3) changes in the mix of goods and services used in providing diagnoses and treatment that result from technological advances.

Routine changes in a hospital's use of technology shall never be found to warrant an upward adjustment in rates. Major capital expenditures for such changes must be approved pursuant to Title III. Any rate-schedule adjustment made to account for inflation in the cost of goods, services, and technology shall conform to a Commission-set formula that equitably reflects changes in the prices all institutions subject to the provisions of this Act must pay. In devising the inflation-adjustment formula, the Commission shall, wherever possible, use appropriate price-change and wage-change measures published by the Bureau of Labor Statistics, U.S. Department of Labor.

Comment: For services covered in the initial schedule of rates, adjustments for inflation may be made through automatic amendments to the Commission's initial rate order. Wherever possible, the Commission should adjust cost estimates using a formula based on well-accepted indices of inflation actually faced by the hospital. For services not provided for in the initial rate schedule, the hospital must apply for a revision of the rate schedule so that new services enter into the basic rates as they are approved, as provided in section 206(b) below.

Section 206. *Procedures for Obtaining Initial Rate Schedule; Procedures for Adjustments and Revisions of Rate Schedule*

(a) The Executive Director shall propose the initial schedule of rates for approval by the Commission. A hospital may contest its proposed schedule as provided in subsection (c) below. In a contested-schedule proceeding, the Commission shall issue a final order on the initial rate schedule within ninety days after the Executive Director first submits the proposed initial schedule. If no notice of contest is filed and if the Commission does not disapprove or modify the proposed initial schedule, the schedule shall go into effect sixty days from the date it was submitted by the Executive Director.

Comment: The initial schedule of rates becomes effective without action by the Commission, by operation of an order nisi. The hospital may, of course, contest the proposed order.

(b) After the issuance of an order establishing an initial rate schedule for a hospital, the hospital may petition the Commission for rates to cover new services, new technology, and capital construction expenditures, in accordance with the provisions of subsection (c). New services, new technology, or new construction that is subject to regulation under Title III, but that has not already been approved by the Commission, shall be disregarded as a justification for increases in rates.

(c) After the issuance of an order establishing the initial rate schedule or of any order revising the schedule as provided in subsection (b), no hospital may change or amend its rate schedule except in accordance with the following procedure:

(1) Any request for a change in rate schedules must be filed in writing with supporting documents. After receiving such a request, the Commission may hold a public hearing if it deems it necessary. Within 45 days after receipt of the request, the Commission shall publicly announce the time and location of any hearing it will hold. The Commission's review of the request for a rate change shall be completed and an order shall be promulgated within 120 days from the date the request was filed. Any proposed change shall go into effect upon the date specified in the order.

(2) Regardless of whether the Commission holds a public hearing on a request for a rate change, it shall receive evidence filed by any interested party supporting or opposing the proposed change. If the Commission holds a hearing, it may hear witnesses. The hearing may be conducted without compliance with the formal rules of evidence.

(3) At any time during the period between a hospital's filing a request for a rate change and the Commission's final decision on the request, the Commission may extend provisional approval to any part of the requested change. This provisional approval shall be superseded by the Commission's final decision on the request.

(d) The Commission may open a proceeding against any hospital at any time with regard to the reasonableness of the hospital's rates or with regard to the hospital's efficiency and effectiveness in rendering health care.

Comment: Subsection (d) reserves the power to the Commission to initiate rate hearings.

(e) Upon finding that a hospital has charged patients rates not approved by the Commission or later shown to have been excessive or

unreasonable, the Commission may prescribe rebates to individuals or may prospectively reduce the hospital's rates so as to distribute a general rebate equal to the aggregate total of the overcharge.

Section 207. *Public Disclosure of Hospital Financial Data*

The Commission shall be empowered to publish and disseminate any information that would be useful to consumers in making informed choices about hospitals. To compile such information, the Commission from time to time shall investigate and analyze hospitals' costs and fees, their financial condition, or any other appropriate related matters.

Section 208. *Monitoring of Conflicts of Interest*

(a) Every person who is a trustee, director, or officer of an institution subject to this Act shall annually submit to the Commission a written statement of extensive transactions between the institution and any partnership, firm, corporation, or other business entity in which the person is an employee, partner, director, or officer, or in whose capital account or stock the person is a beneficial owner of a three-percent or greater interest. For purposes of this subsection, transactions between a health care institution and a business entity are "extensive" if their actual or imputed value or worth totals $10,000 or more for a fiscal year or if the total amount of the contract price, consideration, and other advances by the institution on account of the transactions is $10,000 or more for the fiscal year.

> *Comment:* The Commission is empowered to monitor potential conflicts of interest by imposing on hospital trustees, directors, and officers a duty of disclosure.

(b) Every report or statement required by this section shall be made under oath or affirmation and subject to penalties of perjury.

TITLE III. CAPITAL PLANNING AND LICENSING

Section 301. *Designation of the Commission as the State's Health Planning Agency and Hospital Licensing Agency*

(a) [Chapter __, Title __, or Article __] of the laws of the State, providing for the creation and powers of a state health planning and development agency, is hereby repealed.

(b) The Commission is hereby designated as the State's Health Planning and Development Agency as provided by section 1521 of the

United States Public Health Service Act, as amended, and it shall carry out and perform all the functions set out in section 1523 of that Act.

> *Comment:* The Commission is empowered to act as the statewide health-planning agency in accordance with the National Health Planning and Resources Development Act of 1974 (Public Law 93-641). This single provision establishes the Commission as the unified rate-setting and planning agency. Under section 1523 (codified at 42 U.S.C. § 300m-2 (1976)), the Commission would also act as the agency with power over certificate-of-need applications for new hospital projects.

(c) The Commission shall serve as the planning agency designated in the agreement between the State and the Secretary of the Department of Health and Human Services pursuant to 42 U.S.C. § 1320a-1 (1976), in which the use of federal funds for capital expenditures is limited to those projects approved by the planning agency.

> *Comment:* If the state has entered into an agreement envisioned by section 1122 of the Social Security Act, Pub. L. No. 92-603, Title II, § 221(a), 86 Stat. 1386 (1972), the Commission will succeed any former planning agency as the locus of decision-making. Thereafter, should the Commission pursuant to its Title II planning powers disapprove any capital project, the federal government shall refuse to fund depreciation and interest expenses related to the project if it proceeds without approval.

(d) [Chapter __, Title __, or Article __] of the Laws of the State is hereby revised to establish in the Commission the authority to issue all licenses to open or continue the operation of any institution subject to the provisions of this Act. That [Chapter, Title, or Article] is further revised to reflect the Commission's exclusive authority over the granting of such licenses.

> *Comment:* This subsection completes the grant of authority to the Commission of all state interest in the operation of hospitals.

(e) [Chapter __, Title __, or Article __] of the Laws of the State pertaining to the licensing of hospitals is further amended by adding to section [__] thereof (relating to grounds for revocation of licenses) the phrase "and, for failure to comply with any order of the Commission."

> *Comment:* This subsection grants the Commission authority to revoke licenses as a sanction for non-compliance.

(f) The Commission, after determining that an institution no longer serves a significant need in providing care in the community and that its continued existence is not in the public interest, and after consulting with the Statewide Health Coordinating Council and holding public hearings, may revoke the institution's license.

> *Comment:* This subsection gives the Commission authority to close unnecessary facilities. No such authority exists under the federal health-planning laws. Thus, no systematic plan of eliminating targeted hospitals may be pursued under existing law. The experienced pattern of hospital closure has been random, letting bankruptcy rather than community need determine which hospitals are to be shut.

(g) This Act does not affect proceedings that were begun or rights or powers that could have been enforced at any time before this Act's effective date.

Section 302. *Statewide Total Health Care Providers' Capital-Expenditure Limit*

At least sixty days prior to the start of each fiscal year, beginning two years from the effective date of this Act, the Commission shall establish the Statewide Total Health Care Providers' Capital Expenditure Limit for that fiscal year.

> *Comment:* Under this subsection, the Commission determines how much capital construction is appropriate for all the hospitals in the state each year in light of a systemwide budget limit.
>
> A revenue limit and a construction limit are provided together to ensure that the Commission focuses on the relationship between new construction and total revenue required to operate the system. See Section 201. The Commission may set the capital-expenditure amount once the legislature has set the revenue limit, since new construction will directly affect the resources necessary to support the statewide system.

Section 303. *Certification of Capital Expenditure Projects*

(a) Except for institutions owned or operated by the federal government, each provider of health care in the State must notify the Commission of any plans to make a capital expenditure in excess of $100,000.

(1) The Commission shall approve or disapprove these capital-spending plans according to the following guidelines:

(A) The Commission shall not approve any project whose cost it finds unreasonable in light of expected benefits and expected impact on health-care charges to patients.

(B) The aggregate amount of capital expenditures approved by the Commission on a case-by-case basis during a fiscal year shall not exceed the limit promulgated by the Commission for the fiscal year.

(C) The Commission shall specify the amount approved in each order approving capital expenditures.

Comment: This subsection expands the jurisdiction of the Commission to physicians' offices, nursing homes, HMOs, and independent clinics for the purpose of limiting capital expenditures. This provision contemplates controlling the proliferation of high-cost ancillary testing equipment (such as CT scanners) in non-hospital settings.

(2) Where the cost of a project exceeds $10,000,000, the Commission may, at its discretion, charge portions of the approved outlay against capital-expenditure limits of immediately subsequent years. However, the Commission may not allocate more than $10,000,000 of the cost of a project approved during a fiscal year to any subsequent year.

Comment: This provision protects the Commission against having to limit its construction approval in some years to only one or two particularly large projects. For example, if the expenditure limit in one year were $60 million, approval of an $80 million project to rebuild a large hospital would not preempt all other projects under consideration.

(b) Any hospital or other health-care provider seeking approval for a capital project as required in section 303(a) must petition the Commission for certification 180 days before executing a contract for the contemplated project. The procedure for adjudicating petitions for approval of capital expenditures is governed by Title I, section 106.

(c) All petitions for certification of a capital project shall include a statement evaluating the project's likely effect on health-care costs. The Commission shall adopt regulations specifying the contents of the cost-impact statement. The statement shall include, in addition to an estimate of the total cost, a projection of the effect the project or purchase will have on the following:

(1) total patient-care budget;
(2) total number of admissions;
(3) total number of patient-days;

(4) total number of outpatient visits; and
(5) other data as the Commission may specify.

The cost-impact statement shall show projections for the first, second, and fifth years after the date the institution proposes for making the project available to deliver patient care.

(c) Any individual or organization may challenge or support the capital-expenditure application of any health-care provider by giving due notice to the Commission within 30 days of the submission of the petition at issue. Any notice of challenge or support must be accompanied by a cost-impact statement showing how the project at issue will affect the institution offering challenge or support.

(d) The Commission shall give preference to petitions for projects that promote economy or minimize economic burdens in health care, or that satisfy needs identified as priorities in the State's health plan.

TITLE IV. SHORT TITLE; START-UP PERIOD; SEVERABILITY; REVISION OF STATE BONDING-AUTHORITY LAW AND STATE ANTITRUST LAW; EFFECTIVE DATE; SUNSET

Section 401. *Short Title*

This Act shall be known as the "Comprehensive Hospital Cost Containment Act of 19__."

Section 402. *Start-Up Period*

(a) Immediately upon the effective date of this Act, the Commission shall compile all relevant financial and accounting data in order to have available the statistical information necessary for a proper and thorough review of rates. This compilation shall include data on necessary operating expenses, on bad-debt expenses incurred in rendering services to patients who cannot or do not pay, on properly incurred interest charges, and on reasonable depreciation expenses based on the expected useful life of real property and capital equipment. The Commission shall also obtain from each institution a current rate schedule as well as any subsequent amendments to that schedule.

(b) From the effective date of the Act until the date two years after the Act's passage, the Commission shall examine rate-setting methods used by other regulatory commissions in the State and by hospital rate-setting agencies in other States. The information so obtained shall serve to enlighten the Commission's use of its rate-making authority, which vests in the Commission on the date two years after the passage of this Act.

Section 403. *Severability*

If any part or provision of this Act or the application thereof is adjudged to be invalid, it is to be severed from the rest of the Act. Invalidation shall be confined to the particular provision or application directly at issue in the controversy in which the judgment is rendered. The judgment shall not affect or impair the validity of the remainder of the Act. Nor shall it impair the application of the Act to other persons or circumstances.

> *Comment:* Because the otherwise separate powers of rate-making, budget-setting, planning, and licensing are joined under the Commission, it is extremely important that those powers are not all extinguished by the invalidation of one of the powers.

Section 404. *Revision of State Bonding-Authority Law*

[The state law relating to publicly bonded indebtedness] shall be revised to provide that any hospital-related bond issue for which the approval of [the state bonding agency] is sought shall not be approved without a written order of the Commission providing that revenues appropriate to the aggregate debt service to arise under the issue shall be reflected in Commission-established rates for the institution seeking such a bond issue.

> *Comment:* With the rapid increase in reliance on public equity offerings to underwrite hospital capital projects, it is necessary to tie the public bond underwriting agency's decision to the Commission's planning and rate-setting roles. This subsection requires that the bonding agency have a "comfort" order from the Commission before approving the offering.

Section 405. *Revision of State Antitrust Law*

[The state law relating to antitrust violations] shall be revised to exempt any combination or merger of hospitals or other individual or corporate providers of medical attention or health care from its provisions.

> *Comment:* The Commission may urge hospitals, group practices, non-hospital-related clinics, or other health-care providers to consolidate. Such mergers have on occasion been resisted on antitrust grounds.

Section 406. *Effective Date*

This Act shall become effective on [date].

Section 407. *Sunset*

This Act and all amendments to it will cease to be law on [date], unless extended by legislation enacted before the termination date.

NOTE

THE CONSTITUTIONALITY OF REGULATING INDEPENDENT EXPENDITURE COMMITTEES IN PUBLICLY FUNDED PRESIDENTIAL CAMPAIGNS

ANNE V. SIMONETT*

In Buckley v. Valeo, *the Supreme Court struck down congressional limits on independent expenditures made by individuals on behalf of candidates for federal elective office as violative of the First Amendment guarantee of free speech. Not at issue in* Buckley, *however, was a provision of the Presidential Election Campaign Fund Act that imposes a $1000 limit on the independent expenditures of political committees on behalf of publicly funded presidential candidates. The Supreme Court has recently noted probable jurisdiction in* Common Cause v. Schmitt *to decide whether such a restriction is constitutional.*

In this Note, the author argues that committee expenditures of contributed funds, where the contributors have no control over spending decisions, do not constitute the "direct political expression" accorded maximal First Amendment protection in Buckley, *and that even if they did, amount limitations may be justified under traditional principles of "time, place, or manner" regulation, or as serving the compelling governmental interest of ensuring compliance by candidates and their supporters with the conditions imposed on the acceptance of public campaign funds.*

Introduction

Uncontrolled campaign spending has opened the democratic process to actual and apparent corruption in the form of improper political favors offered in return for campaign contributions. In the early 1970's, Congress established a regulatory scheme to control federal campaign contributions and spending, and to provide for public funding of presidential campaigns in return for candidates' promises not to accept or spend private campaign contributions.

One result of the public financing scheme has been the development of so-called "independent expenditure committees" as a means of providing campaign support for the candidate

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beyond the allotted amount of public funds. Congressional attempts to regulate independent expenditures have in the past been struck down as violative of the First Amendment guarantee of freedom of speech. Next term, the Supreme Court will decide whether the spending of independent expenditure committees is distinguishable from that of individuals and informal groups, and whether the continued viability of public campaign financing demands the imposition of limits on some expenditures, even if made independently of the candidate.

I. CONSTITUTIONAL BACKGROUND

Regulation of federal electoral campaign financing has had a short but eventful history. The Federal Election Campaign Act (FECA)[1] and the Presidential Election Campaign Fund Act (Fund Act),[2] both initially enacted in 1971, continue to regulate federal election campaigns despite three separate series of congressional amendments,[3] and a major constitutional challenge in 1976.[4] Both statutes were intended to neutralize the actual and potential corruptive influence of large amounts of money on the integrity of the electoral process.[5] To that end, they impose limits on the amounts of contributions to and expenditures by and on behalf of candidates, impose reporting and disclosure requirements, and, in addition, provide access to voluntarily designated taxpayer funds which relieve presidential candidates from the often degrading and compromising burden of fund raising.[6] Both acts are administered and enforced by an independent executive agency, the Federal Election Commission (FEC).

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1 The Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.* (1971).

2 Chapter 95 of subtitle H, I.R.C. §§ 9001 *et seq.*, provides the mechanism by which the Treasury distributes taxpayer dollars to major party candidates who meet the eligibility criteria and agree to certain conditions. Chapter 96 of subtitle H, I.R.C. §§ 9031 *et seq.*, provides for matching funds to candidates in the presidential primaries and employs different eligibility criteria.

3 Both acts were amended in 1974, 1976, and 1979. Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974); Pub. L. No. 94-283, 90 Stat. 475 (May 11, 1976); Pub. L. No. 96-187, 93 Stat. 1368 (Jan. 8, 1980).

4 Buckley v. Valeo, 424 U.S. 1 (1976).

5 *See, e.g.*, S. REP. No. 689, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5587, 5590-92.

6 The late Senator Hubert Humphrey termed fund-raising as "the most demeaning, disgusting, depressing, and disenchanting part of politics." 119 CONG. REC. 14985 (daily ed. July 28, 1973), *quoted in* Bang v. Chase, 442 F. Supp. 758, 765 (D. Minn. 1977).

In *Buckley v. Valeo,*[7] the Supreme Court was confronted with the 1974 amendments to FECA, which, among other things, imposed limits on both contributions to and expenditures on behalf of candidates for federal office. Individuals and groups were prohibited from contributing more than $1000 to any one candidate[8] and from spending more than $1000 to advocate the election or defeat of a specific candidate, whether or not the expenditure was made in consultation with the candidate or his official campaign committee.[9]

In *Buckley,* the Supreme Court sustained the FECA contribution limits against First Amendment challenge, reasoning that a political contribution, though within the realm of protected activity, was "speech" once-removed, in that "the transformation of contributions into political debate involves speech by someone other than the contributor."[10] The limitations imposed were held to be but an incidental restriction on the First Amendment rights of the contributor, and were justified by the government's interest in preventing the corruption or appearance of corruption that large contributions impart to the electoral process.[11]

The expenditure limitations of FECA, however, were found to be a "direct and substantial restraint" on the First Amendment rights of the spender.[12] Whereas a contribution is but "money potentially available to promote political expression," an expenditure constitutes "direct political expression."[13] The Court found no sufficiently compelling governmental interest to justify infringement of this core First Amendment activity.[14] It did sustain, however, the congressional definition of coordinated expenditures as "contributions,"[15] and thus limited the

7 424 U.S. 1 (1976).

8 Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. § 101(a) (1974) (repealed 1976)).

9 Pub. L. No. 93-443, 88 Stat. 1265 (codified at 2 U.S.C. § 101(a) (1974) (repealed 1976)).

10 424 U.S. at 21.

11 "To the extent that large contributions are given to secure a political quid pro quo from current and potential office-holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27.

12 *Id.* at 39.

13 *Id.* at 22.

14 *Id.* at 45-49.

15 An expenditure "made by any person in conjunction, consultation, or concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents" is considered to be a contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(1) (1977).

constitutional holding to the protection of "independent" expenditures only.[16] The absence of any evidence of "prearrangement and coordination of an expenditure with the candidate or his agent" was said to sufficiently alleviate the "danger that expenditures will be given as a quid pro quo for improper commitments from the candidates."[17]

Also at issue in *Buckley* was the constitutionality of the Fund Act and, by reference, its imposition of both a contribution ban and an expenditure ceiling on candidates eligible for public financing under the Act.[18] The Court found public financing of federal elections to be a valid exercise of congressional power under the general welfare clause,[19] in furtherance of the governmental goals of "reduc[ing] the deleterious influence of large contributions on our political process, . . . facilitat[ing] communication by candidates with the electorate, . . . and free[ing] candidates from the rigors of fundraising."[20] The conditions attached to the grant were said not to contravene the candidate's otherwise unlimited First Amendment right to solicit and spend the money of his supporters,[21] because the decision to accept public money is a voluntary one[22] which "furthers, not abridges, pertinent First Amendment values."[23]

Not at issue in *Buckley* was section 9012(f) of the Fund Act,

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16 424 U.S. at 46-47.

17 *Id.* at 47.

18 Major party presidential candidates become eligible for public funds by certifying to the FEC that they will not spend more than the amount of public funding received on "qualified campaign expenses" and that they have not and will not accept private contributions to defray those expenses. I.R.C. § 9003(b). "Qualified campaign expenses" include all general election campaign expenses incurred after the nomination, and before 30 days after the date of the election or for "property, services, or facilities used during such period." I.R.C. § 9002(11). Legal and accounting fees incurred to ensure compliance with FECA and the Fund Act are exempted. 11 C.F.R. § 140.11(e) (1980).

19 424 U.S. at 90.

20 *Id.* at 91.

21 The act's aggregate limit on candidate spending of both personal and solicited funds had been struck down earlier in the opinion. *Id.* at 55-56.

22 *Id.* at 57 n.65.

23 *Id.* at 93. The Court has recently reaffirmed the constitutionality of both the contribution ban and the expenditure ceiling as permissible and necessary conditions to the public financing scheme. Republican Nat'l Comm. v. FEC, 100 S. Ct. 1639 (1980), *aff'g summarily*, 487 F. Supp. 280 (S.D.N.Y. 1980) (three-judge court). The lower court held that the conditions imposed violated the First Amendment rights of neither the candidate nor his supporters, and that even if there was some burden on otherwise protected rights, it was justified by the "compelling state interest" in vindicating the goals of public financing. 487 F. Supp. at 285-86.

which prohibits "any political committee[24] which is not an authorized committee"[25] from incurring expenditures over $1000 to further the election of a publicly funded candidate.[26] Although the provision, which survived the post-*Buckley* amendments, carries substantial penalties,[27] several non-authorized committees were formed in the spring of 1980 to independently solicit and spend a projected $30 to 50 million on behalf of the publicly funded Republican candidate for President, Ronald Reagan. These self-styled "independent expenditure committees" were immediately challenged by Common Cause and the FEC, who sought both declaratory and injunctive relief on the basis of section 9012(f). In the consolidated cases of *Common Cause v. Schmitt* and *FEC v. Americans for Change*,[28] a three-judge district court struck down section 9012(f), holding that the committees have a protected First Amendment right to make unlimited independent expenditures and that the agreement of a candidate seeking public funds to forego private contributions and limit his expenditures is not binding on his supporters so long as they act independently.[29]

The decision was appealed,[30] and the Supreme Court has agreed[31] to decide whether the independent expenditures of these committees on behalf of a publicly funded candidate fall

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24 A "political committee" is defined by the Fund Act as "any committee, association, or organization . . . which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence, the nomination or election of one or more individuals to Federal, State or local Elective public office." I.R.C. § 9002(9).

25 An "authorized committee" is one "authorized in writing by [the] candidate to incur expenses to further the election of [the] candidate." I.R.C. § 9002(1).

26 "[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1000." I.R.C. § 9012(f)(1). The statutory exceptions are not relevant here. The $1000 ceiling presently imposed in section 9012(f)(1) is probably too low, given the rate of inflation since its enactment in 1971, but an increase is solely a matter of congressional discretion. *Buckley*, 424 U.S. at 30, 83.

27 Political committees may be fined up to $5000 and committee officers and members may be fined up to $5000 or imprisoned for up to a year, or both. I.R.C. § 9012(f)(3).

28 Common Cause v. Schmitt, Civ. No. 80-1609 (D.D.C., filed Sept. 30, 1980) (consolidating FEC v. Americans for Change, Civ. No. 80-1754), *reprinted in* [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9138, at 51,068.

29 *Id.* at 51,072 ("The candidate's decision cannot bind his or her supporters outside the official campaign.").

30 *Id.*, *appeal docketed*, No. 80-847, 49 U.S.L.W. 3429 (Nov. 25, 1980).

31 *Id.*, *prob. juris. noted*, 49 U.S.L.W. 3616 (Feb. 23, 1981).

within the First Amendment protection accorded expenditures in *Buckley*. The case is expected to be argued in the fall of 1981.[32]

It is the contention of this Note that the lower-court decision in *Schmitt* should be reversed, and that neither the First Amendment nor the decision in *Buckley v. Valeo* prevents the Supreme Court from upholding restrictions on the spending of independent expenditure committees as a constitutional exercise of congressional power. This contention is based on the thesis that only where there is a *direct link* between the money spent and the personal expression of the source of the funds — in other words, the "direct political expression" protected in *Buckley*[33] — should we subject amount limitations to rigorous judicial scrutiny and require compelling governmental justification for interference with this core First Amendment right of free speech. As that direct link is missing when independent expenditures are financed by contributions over which the contributor has no control, the presence of a substantial governmental interest should be sufficient to justify purely quantitative restrictions on those expenditures. As such, money spent by a political committee and raised by mass solicitation should be entitled to no greater First Amendment protection than that accorded the symbolic speech of contributions.

Even if all campaign expenditures are accorded maximal First Amendment protection, expenditure limits should be considered akin to traditionally permitted "time, place, or manner" restrictions. The governmental interests at stake are not causally connected to the ideological content of the financed speech and therefore incidental infringement on otherwise protected speech should be justified by a balancing of the interests involved.

In *Schmitt*, the governmental interest in preserving the goals of public financing should provide substantial justification for imposing committee expenditure limits in publicly funded presidential campaigns. Indeed, the need to ensure compliance by both the publicly funded candidate and his supporters with the conditions imposed on the grant of taxpayer money may be seen as sufficiently compelling to satisfy even the strictest scru-

32 N.Y. Times, Feb. 24, 1981, § B, at 15, col. 1.
33 424 U.S. at 22.

tiny should the expenditures at issue in *Schmitt* be found to be entitled to full First Amendment protection.

Even beyond the public-funding context at issue in *Schmitt,* however, the public has a substantial, even compelling, stake in preventing the danger that large expenditures on behalf of a candidate will enable the spender to exert improper influence over the candidate, to extract a future quid pro quo solely on the basis of financial support during the campaign. Narrowly drawn amount limitations in service of this goal should be sustained even under strict scrutiny. At the very least, however, the danger of either the direct or indirect compromise of a candidate should be considered sufficiently substantial to justify limits on expenditures not within the core of protected personal expression.

II. Independent Expenditure Committees

By early June of 1980, there were five major "independent" political committees publicly committed to raise and spend a projected $35.5 to 50.5 million in support of the candidacy of Ronald Reagan for President.[34] Two were newly formed groups, both headed by prominent Republicans. Americans for Change (AFC) was headed by Senator Harrison Schmitt of New Mexico and counted Melvin Laird, Claire Boothe Luce, George Romney, James Edwards, and John Harmer among its charter members.[35] Americans for an Effective Presidency (AEP) was founded by former Nixon and Ford administration officials, including Robert Finch and Winton Blount. The remaining committees were separate "projects" of three established political organizations: "Citizens for Reagan in 80" was a project of the Fund for a Conservative Majority (FCM); "Americans for Reagan"

34 At least one of these committees publicly admitted that its sole reason for organizing was "because the Reagan campaign cannot accept your contribution." Unless otherwise noted, the facts referred to in the text are taken from the Federal Election Commission's Statement of Material Facts as to which there is No Genuine Dispute filed in connection with FEC v. Americans for Change, Civ. No. 80-1754 (D.D.C., filed Sept. 30, 1980).

35 *See* Wash. Post, June 6, 1980, at 1, col. 2. Mr. Edwards, formerly Governor of South Carolina, was appointed Secretary of Energy by President-elect Reagan in December, 1980. Mr. Harmer was the Lieutenant-Governor of California under Mr. Reagan.

was a project of Senator Jesse Helms' North Carolina Congressional Club (NCCC), and the "Ronald Reagan Victory Fund" was established by the National Conservative Political Action Committee (NCPAC).

Both the "independent expenditure committees" and committees such as FCM and NCPAC fall within the Fund Act's definition of a "political committee" only to the extent that they solicit contributions or make expenditures on behalf of a particular presidential candidate.[36] Neither the Fund Act nor FECA restricts expenditures made to vindicate issue-oriented ideological views as opposed to those made to further the election of a clearly identified candidate,[37] a distinction of constitutional importance. While Congress has undoubted power to regulate federal electoral campaigns,[38] its power to restrict speech unrelated to the election of a candidate requires independent justification.[39]

Several of the "independent" committees had been active during the primaries on Governor Reagan's behalf, and to some observers were the decisive factor in enabling the continuance of the campaign effort in states where the Governor had reached the spending limit for candidates receiving primary matching funds.[40] As Governor Reagan's nomination became a virtual

36 I.R.C. § 9002(9).

37 Only expenditures "expressly advocating the election or defeat of a clearly identified candidate," 2 U.S.C. §§ 431(17), 434(c) (1980); 11 C.F.R. § 109.1 (1980), as opposed to issue-oriented expenditures, are subject to FECA.

38 *Buckley*, 424 U.S. at 13.

39 Thus, in *Buckley*, the fact that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *id.* at 42, led the Court to restrict the applicability of the act to only those communications containing "explicit and unambiguous reference" to the candidate's election or defeat, *id.* at 43. With the invalidation of the expenditure limit at issue in *Buckley*, the distinction became relevant only to the reporting and disclosure requirements, which currently require both individuals and committees to report any independent expenditure over $200. 2 U.S.C. § 434(b)(4)(H) (1980). *See, e.g.*, FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980) (publishing the voting record of a candidate is implied rather than express advocacy and thus not required to be reported as an independent expenditure under FECA); *see also* FEC v. American Fed. of State, County and Municipal Employees, 471 F. Supp. 315, 316 (D.D.C. 1979) (A poster depicting then-President Gerald Ford wearing a button reading "Pardon Me" and embracing former President Richard Nixon held not to be express advocacy of Ford's defeat).

40 *See, e.g.*, 38 CONG. Q. WEEKLY REP. 1635, 1639 (1980). *See also* FEC Statement, *supra* note 34, at ¶ 55 (NCPAC solicitation letter dated May 15, 1980, informing potential contributors that "Governor Reagan's campaign is desperately short of funds going into crucial May-June primaries," and that contributions to NCPAC would prevent Governor Reagan from losing "valuable momentum").

certainty, the committees mobilized for the general election. Active contribution solicitation programs were initiated and arrangements made for the use in the general campaign of professional speechwriters, pollsters, public relations and advertising specialists, and television and other media experts.[41]

Although the committees adamantly maintained that they were operating independently of the official Reagan campaign[42] the press provided an easy method of exchanging information,[43] and the frequent flaunting of close ties with the candidate and the Republican Party often seemed to belie asserted independence.[44] Although the attempts to enjoin committee activity during the campaign were unsuccessful,[45] the attendant litigation seemed to significantly chill potential contributors. Whereas independent groups had initially projected spending $30 to 50 million on behalf of Governor Reagan, only $10 million was actually spent.[46]

But $10 million — one third of the $29.4 million alloted presidential candidates by the Fund Act in 1980[47] — can make a

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41 FEC Statement, note 34 *supra*.

42 The inevitable frustration with the legal requirements surfaced on at least one occasion. During an interview of the Republic National Convention, Senator Helms discussed the NCCC's efforts on behalf of Governor Reagan: "Well, as you may know, we have had an independent effort going on in North Carolina. The law forbids me to consult with him [Reagan] and it's been an awkward situation. I've had to, sort of, talk indirectly with Paul Laxalt and hope that he would pass along, uh, and I think the messages have gotten through all right." Interview with Sander Vanocur of ABC News, July 16, 1980, *quoted in* Brief for Petitioner at 30, Carter-Mondale Reelection Comm. v. FEC, Civ. Nos. 80-1841, 80-1842 (D.C. Cir., filed Sept. 12, 1980).

43 It was reported in the New York Times that the treasurer of the Fund for a Conservative Majority (FCM) admitted to being able to "know what the Reagan campaign strategy is from the newspapers." N.Y. Times, June 30, 1980, § B, at 13, col. 1. *See also* Wash. Star, June 2, 1980, § A, at 10, col. 6.

44 For example, FCM solicitation mailings prior to the Republican convention included a survey entitled "Reagan's Running Mate Survey" which asked "Who should Reagan ask to run with him? You can help make this decision by sending us the enclosed survey as soon as you complete it." FEC Statement, *supra* note 34, at ¶ 20. One NCPAC solicitation letter closed with the statement "Whatever you can send I know Governor Reagan would deeply appreciate it." *Id.* at ¶ 55.

45 In addition to the suits by Common Cause and the FEC, the Carter-Mondale Reelection Committee challenged before the FEC the asserted independence of the committees in an attempt to prevent certification of Governor Reagan as eligible for public funding. In the Matter of the Complaint of the Carter-Mondale Reelection Committee, FEC Matter Under Review (MUR) No. 1252 (1980).

46 Data compiled by the FEC and the Citizens' Research Foundation as reported in N.Y. Times, Nov. 23, 1980, § E, at 3, col. 1. Independent expenditure committees spent only $100,000 on behalf of Jimmy Carter during the campaign. Thus, although this Note addresses the committees in non-partisan terms, the "independent expenditure committee" of 1980 was a Republican phenomenon.

47 The amount reserved for presidential candidates out of the taxpayer-designated

significant difference in a candidate's campaign. It is therefore no exaggeration to say that the results of the pending judicial scrutiny of independent expenditure committees will have a major effect on the financing of future presidential campaigns. The unrestricted availability of millions of additional dollars encourages candidates not only to make strategic allowance for such spending, but to make every effort to ensure that it will be of maximum benefit. For example, the presence of prominent and seasoned party regulars at the forefront of the "independent" committees lowers the risk that overall official campaign strategy will be compromised. Even when such efforts fall within existing legal notions of independence,[48] they threaten the integrity of the entire public financing scheme. Where the candidate's promise not to accept private contributions or make expenditures over the allotted amount carries little or no risk, the taxpayer-designated funds become the unintended functional equivalent of an outright grant.

III. Classifying Expenditures Under the First Amendment

The first step in the constitutional inquiry is to determine the extent to which a form of campaign activity is entitled to First Amendment protection.[49] In *Buckley,* the Court distinguished

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funds is determined by reference to FECA, which establishes a base figure adjustable to the current consumer price index. 2 U.S.C. §§ 441a(b)(1)(B), 441a(c) (1977).

48 Non-independence is predominantly a factual inquiry, made with reference to common law doctrines of agency, concert, and conspiracy, and thus often dependent on circumstantial inferences resistant to formal proof. Apt comparison might well be made here to antitrust "combination" theories. It has been said that communication among oligopolists "does not depend on any letters, meetings, or one-to-one communication. Seriatim public speeches or interviews with the press could be just as effective." P. Areeda, Antitrust Analysis 230 (2d ed. 1974). Yet, "consciously parallel" behavior, without more, has not yet been held to warrant a finding of agreement. *See* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

49 Thus phrased, the question is distinct from whether committees per se have First Amendment rights. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individuals").

The nature of the committee *qua* committee is not at issue here, but rather the *type* of activity engaged in, activity that would be subject to the same First Amendment scrutiny regardless of its source. "[T]he question must be whether [the statute] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776.

Bellotti struck down a state statute prohibiting corporate spending to influence referenda. The Court was careful to distinguish, however, between referenda and electoral contests, in that "[t]he risk ot corruption perceived in cases involving candidate

contributions and expenditures as two very different types of political activity when viewed from the perspective of the First Amendment.

An unexpended contribution is communicative only insofar as it is a "symbolic act" signifying ideological support of the recipient, with the amount having no independent constitutional significance.[50] Any regulation directed at the amount of a contribution is, outside of functional prohibition,[51] non-content-related, for it leaves the expressive act of giving itself untouched, and "does not in any way infringe the contributor's freedom to discuss candidates and issues."[52]

Making a direct expenditure to vindicate one's own political viewpoint, on the other hand, is the exercise of that "freedom to discuss candidates and issues." Thus, the Court in *Buckley* was unwilling to categorize the expenditure of money per se as conduct separable from the content of the financed message.[53] Unable to separate the enabling expenditure from the communicative nature of the act itself, the Court concluded that amount limitations prevent a measure of fully protected speech.[54]

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elections simply is not present in a popular vote on a public issue." *Id.* at 790 (citations and footnote omitted). Such a compelling state interest has subsequently been held to justify FECA's prohibition of corporate electoral spending. FEC v. National Right to Work Comm., Civ. Nos. 77-2175, 78-0315 (D.D.C., filed April 24, 1980), *reprinted in* [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9122, at 50,922, 50,948; *see also* FED v. Weinsten, 462 F. Supp. 234 (S.D.N.Y. 1978).

50 "The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." Buckley v. Valeo, 424 U.S. at 21.

51 "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30.

52 *Id.* at 21. There is some debate as to the extent to which the Court in *Buckley* applied strict scrutiny to contributions limits. *Compare* Let's Help Florida v. Smathers, 453 F. Supp. 1003, 1010 (N.D. Fla. 1978) (strict scrutiny applied to contribution *limits*) *with* Parcell v. State of Kansas, 468 F. Supp. 1274, 1280-81 (D. Kan. 1979) (contribution limits "fall without the scope" of the First Amendment). Given that there can be no "right" to contribute per se, in that the candidate is under no obligation to accept the contribution, *see Republican Nat'l Comm.*, 487 F. Supp. at 286, it would seem most logical to apply strict scrutiny only to the core expressive act of giving, and then only when it is governed by the mutual consent of contributor and recipient. *See* California Medical Ass'n v. FEC, Civ. No. 79-4426 (9th Cir., filed May 23, 1980), *reprinted in* [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9127, at 50,960, *jur. post.* 49 U.S.L.W. 3245 (Oct. 6, 1980), *argued* 49 U.S.L.W. 3529 (Jan. 19, 1981) ("*Buckley* establishes that the constitutional justification required depends in part upon the degree to which the essentials of a constitutional right are exposed to regulation in the particular case."); [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9127, at 50,993.

53 "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16.

54 *Id.* at 16-19.

Limitations on expenditures by other than the source of the funds,[55] however, were not at issue in *Buckley*. Such expenditures *are* capable of bifurcation, in that the actual "speech" is once-removed from its funding. A direct expenditure can thus be constitutionally distinguished from an expenditure financed by a contribution.[56] Only when the "speaker" is spending his own money can we be completely sure in a constitutional sense that it is his voice that is being heard, entitling the expenditure to the maximum First Amendment protection.[57] This is the type of "direct political expression" the First Amendment was intended to protect,[58] and that was accorded maximum protection in *Buckley*.[59] Where the speaker whose message is being financed does not determine its content, the result is "filtered speech." Whereas the content of the actual message remains fully protected, as the committee status of the speaker does not change the status of the speech itself,[60] the ability to separate the source of the money from the source of the message should justify the imposition of purely monetary amount limitations if such limits serve a substantial governmental interest.

Similarly, limits on expenditures by a candidate that are financed by the contributions of his supporters should be ac-

55 *Buckley* did address and invalidate the aggregate expenditure ceilings the act imposed on non-publicly funded federal candidates. *Id.* at 54-57.

56 *See California Medical Ass'n*, [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9127, at 50,993 (Greater deference is given to "legislative balancing in the sphere of contribution regulation than in the case of limitations on expenditures unrelated to contributions.").

57 In the words of the Ninth Circuit: "*Buckley* stands for the further proposition that spending is entitled to the maximum protection when the speaker and the spender are one and the same. At that point the individual and idiomatic character of political speech is at its highest, for the articulation of the ideas is by the one who originates the speech. By contrast, the donee of a contributor has the power to distort, alter, or transform the contributor's message." *Id.* at 50,992 (citation omitted).

58 *See Belloti*, 435 U.S. at 807 (White, J., dissenting) ("Ideas which are not a product of individual choice are entitled to less First Amendment protection.") The majority in *Bellotti* rejected this "suggestion" by Justice White, citing the First Amendment's dual role in not only "fostering individual self-expression," but in "affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783. But the majority itself recognized that particular First Amendment guarantees may indeed be "purely personal" and thus not available to corporations and like entities. *Id.* at 778 n.14. This Note does not argue that the right to make political expenditures is such a "purely personal" guarantee; only that the more attenuated the relationship of the expenditure to the personal expression of the source of the funds, the less compelling is an argument for maximal First Amendment protection.

59 *See* Cox, *Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 60-61 (1980) (*Buckley* can be read "to deal only with expenditures made to reach more or larger audiences for one's personal expression.").

60 *Bellotti*, 435 U.S. at 777.

corded lesser scrutiny than those made with his own personal funds. In *Buckley,* the Court struck down FECA's imposition of an indiscriminate aggregate limit on candidate expenditures.[61] The Court rejected the governmental interests in preventing circumvention of contribution limits, equalizing the financial resources of candidates, and reducing the "allegedly skyrocketing costs of political campaigns" as insufficient to justify the aggregate limit.[62] It is unclear exactly what level of scrutiny the Court was applying, perhaps because there was no attempt made to distinguish between contributed and personal funds. Under the foregoing analysis, those expenditures financed by contributed funds would be subject to amount limitations in service of an important or substantial governmental interest. But, absent voluntary acceptance of a ceiling in return for public funds, limitations on personally financed candidate expenditures would be subject to higher scrutiny, as would attempts to limit the direct expenditures of individuals and groups on his behalf.

The problem, of course, is drawing the lines necessary to identify "direct" expression, for the use of a committee vehicle does not per se reduce the level of First Amendment protection. It has been proposed that maximum protection be accorded to "individuals and informal, unorganized groups, or even more narrowly to expenditures made by individuals and groups to enlarge the audience for personal expression."[63] The words "informal" and "unorganized" present definitional problems of their own, and the very real need to pool money to make effective expenditures necessarily affects our understanding of "personal" expression.

In *Common Cause v. Schmitt* the district court sought to characterize the independent expenditure committees as agents of their contributors. "Political committees . . . are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors."[64] But, while it is possible that a

61 *Buckley,* 424 U.S. at 54-57.

62 *Id.* at 56-57.

63 *Id.* at 69.

64 *Schmitt,* [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9138, at 51,073.

contributor "understands and expects" that his money will be used to vindicate his particular ideological beliefs by furthering the election of his candidate, there is no guarantee that this will in fact be the case, because the committee is acting independently of the candidate, as well as of the contributor.

Instructive analogy can be made to *FEC v. National Right to Work Committee (NRWC),*[65] in which the "membership exception" to FECA's prohibition of corporate solicitation from anyone but shareholders and executive or administrative personnel was upheld. The exception allows corporations without capital stock or other "membership organizations" to solicit political contributions from its "members" only.[66] The NRWC claimed that a newly solicited contributor was a "member" within the statute.[67] The court rightly rejected this argument, holding that "membership" encompasses "interest and rights"[68] and "assumes some right to participate in the organization's direction. . . ."[69] Similarly, without some degree of control by contributors, whether or not they are formally labeled "members,"[70] over the spending decision of a political committee, the more attenuated the claim of agency becomes.[71]

In *Schmitt,* the district court rejected the idea that participation in the actual spending decision could have any constitutional importance: "To require that contributors to political committees literally draft their own television and other public

65 Civ. No. 77-2175 (D.D.C., filed April 24, 1980), *reprinted in id.* ¶ 9122, at 50,922.

66 2 U.S.C. § 441b(b)(4)(C) (1977).

67 At least one of the 1980 independent expenditure committees, Americans for the Effective Presidency, made a similar claim. AEP's promotional literature declared that every one of its contributors automatically became a "member" by contributing. Statement by Americans for an Effective Presidency, *supra* note 42, Exhibit B, at 3.

68 National Right to Work Committee, [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9122, at 50,943.

69 *Id.* at 50,944.

70 The statement in *Buckley* that "[o]ur past decisions have not drawn fine lines between contributors and members but have treated them interchangeably," 424 U.S. at 66, would seem merely to reflect a desire to avoid rigid labels, rather than an intent to disavow any interest in the level of participation of committee supporters.

71 *Cf.* Democratic Senatorial Campaign Comm. v. FEC, Civ. No. 80-2074 (D.C. Cir., filed Oct. 9, 1980), *reprinted in* [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9137, at 51,053, *cert. granted* 49 U.S.L.W. 3643 (Mar. 2, 1981). The court held that a state party committee cannot delegate its federal election spending authority to a Senate campaign committee. Despite common ideology and intent to spend the funds on behalf of the same senatorial candidate, the transfer of funds was held not to be the equivalent of an agency relationship, as the recipient did not "contro[l] the funds from start to finish — from raising to spending . . . . [T]he state committee may have no voice in the way funds are spent. Nor is this a difference that is obviously without consequence. When the [Senate committee] pays the piper, it will call the tune." *Id.* at 51,059.

messages is naive . . . . First Amendment rights are not merely coextensive with [contributors'] actual participation in drafting specific language."[72] Such a requirement, in the court's view, would make professionalism itself suspect. But control over an expenditure may be distinguished from its implementation. There is nothing to prevent individuals or informal groups from hiring professionals to implement their spending decisions, as the use of true agents does not negate the quality and content control of principals.

Admittedly, the focus of the court's opinion in *Schmitt* was its concern that limitations on independent committee spending would deny individuals the efficiency benefits of joint expenditures.[73] The court found such limits to impermissibly infringe the contributor's First Amendment rights of association, with the "associational tie" being the "desire to affirm publicly their political viewpoint held in common."[74]

But the court acknowledged that the First Amendment right of association extended only as far as the committee vindicates the rights of its contributors.[75] While "[e]ffective advocacy of both public and private points of view . . . is undeniably *enhanced* by group association,"[76] the associational vehicle does not itself acquire *new* substantive rights.[77] An individual has a right to amplify or enhance his speech so as to increase the audience for his personal expression, but where that direct personal expression is missing because the individual has no control over the content of the message, imposing limitations on the resulting expenditures does not violate associational rights.[78] Only where the "speakers" are also participants in the spending

72 *Schmitt*, [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9138, at 51,073.

73 "There can be little doubt that an economy of scale enhances the informational impact of larger units of communication." *Id.* at 51,073.

74 *Id.* That shared political viewpoint, however, becomes increasingly attenuated as the number of contributors increases, and the court was able to characterize it with no more specificity than "an understanding and community of political interest." *Id.* at 51,073.

75 *Id.* at 51,073.

76 NAACP v. Alabama, 357 U.S. 449, 460 (1957) (emphasis added).

77 *See* Buckley v. Valeo, 424 U.S. at 75. "[T]he right of associational privacy . . . derives from the rights of the organization's members to advocate their personal points of view in the most effective way."

78 Even if amount limitations on the spending of political committees were found to infringe on a contributor's protected right of association to amplify his voice, they may be sustained "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25.

decisions,[79] is interference with the committee "simultaneously an interference with the freedom of its adherents."[80] Thus, if the Supreme Court were to accept the lower court's characterization of independent expenditure committees as "pooling agents" who are merely "speak[ing] the language of their members and contributors," the committees' expenditures would arguably be on a constitutional par with those made by the individual himself. But if, as argued above, the expenditure is financed by a contribution over which the contributor has no control, the more apt constitutional comparison is to the less protected status of a contribution, for which purely quantitative restrictions are subject to a lower level of scrutiny.

IV. Expenditure Limits as Akin to "Time, Place, or Manner" Regulation

Even if all expenditures are found to be entitled to maximal First Amendment protection, amount limitations may be classified as the constitutional equivalent of "time, place, or manner" restrictions; that is, the limits serve sufficiently important governmental interests in preventing harms unrelated to ideological content to justify quantitative restriction of the financed message.[81]

Traditional time, place, and manner regulation recognizes "that various methods of speech, regardless of their content, may frustrate legitimate governmental goals,"[82] and that such restrictions are valid when they "serve a significant governmental interest and leave ample alternative channels for communication."[83] "Nonideological consequences"[84] or "noncom-

79 *Cf. Buckley*, 424 U.S. at 22 (limits on contributions to committees justified as they "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates").

80 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion); *see also Buckley*, 424 U.S. at 22.

81 *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

82 Consolidated Edison Co. v. Public Service Comm'n, 100 S. Ct. 2326, 2332 (1980).

83 *Id.; see, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding volume restrictions on sound trucks); *see also Buckley*, 424 U.S. at 18 ("[T]he government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication.").

84 Cox, *supra* note 59, at 49.

municative impact"[85] of protected speech may be regulated where a balancing[86] of interests favors a content-neutral restriction that furthers a "significant,"[87] "important,"[88] or "substantial"[89] governmental interest in averting a harm that does not causally flow from the communicative nature of the speech.[90]

The Court's refusal in *Buckley* to see expenditure limits as akin to time, place, or manner restrictions was based on its concern that some of the interests served by the act were not content-neutral, in that the limits were "in some measure"[91] directed at curbing the quantity of political speech itself.[92] This, however, is true of *all* time, place, or manner restrictions — "some measure" of speech will always be prevented. But where the restriction is *ideologically* neutral, as are quantitative limitations on expenditures, or decibel level limitations on sound trucks, it may be justified by the interest it serves.

Thus, with regard to campaign-expenditure limitations, the measure of communication suppressed by the limitation is justified by the governmental interests in preventing circumvention of contribution limits, in averting the appearance of corruptive quid pro quos that particular expenditures may invoke, and in policing the aggregate-expenditure limit imposed on publicly funded candidates. All of these interests are content-neutral in

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85 United States v. O'Brien, 391 U.S. 367, 382 (1968).

86 Ely, *supra* note 81, at 1501; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 682-84 (1978).

87 *Consolidated Edison Co.*, 100 S. Ct. at 2332.

88 *Buckley*, 424 U.S. at 18; *O'Brien*, 391 U.S. at 376.

89 *O'Brien*, 391 U.S. at 377 ("important or substantial"); *see* Cox, *supra* note 59, at 59.

90 As such, cases invalidating regulation keyed to content are inapposite. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (city ordinance prohibiting drive-in movie theaters to exhibit films containing nudity struck down as impermissible censorship of protected content); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (schools cannot suspend students for wearing black armbands to protest the Vietnam War). In *Tinker*, the Court indicated that a prophylactic regulation prohibiting the wearing of armbands would be justified by a showing that such activity "would materially and substantially disrupt the work and discipline of the school," *id.* at 513, as the need to maintain school discipline exists independently of the ideological content of any particular student demonstration.

91 *Buckley*, 424 U.S. at 17, *quoting O'Brien*, 391 U.S. at 382.

92 "The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups." 424 U.S. at 17.

that they are directed at evils that do not arise in response to the actual content of the message being communicated. Any measure of campaign speech prevented in service of these content-neutral goals is surely justified by a balancing of the interests involved. Furthermore, should the Court be willing to recognize the distinction between speech financed directly and that financed indirectly by the contributions of others, the latter may be seen as even more amenable to content-neutral regulation, as lesser protected speech will have correspondingly lesser weight in any judicial balancing of First Amendment interests and the asserted governmental goals.

V. Justifying Amount Limitations on Campaign Expenditures

In applying strict scrutiny to the expenditure limits at issue in *Buckley,* the Supreme Court found no sufficiently compelling governmental interest to justify the restriction. Whereas the Court has found the lesser scrutiny applicable to contribution limits satisfied by the need to combat the danger that large contributions might improperly influence the candidate, it saw no "present" danger that large independent expenditures might also appear improper.[93]

In *Schmitt,* the lower court, finding independent expenditures by political committees to be the type of personal expression given maximal First Amendment protection in *Buckley,* applied strict scrutiny to the section 9012(f) prohibition of any committee spending over $1000 on behalf of a publicly funded presidential candidate.[94] Citing *Buckley,* the court found that the actual or apparent ability of the committees to exact an improper quid pro quo from the candidate was not sufficient to justify the restriction.[95] While the court did not explicitly address the possibility that strict scrutiny might be satisfied by the interest in protecting the public's investment in the campaign by ensuring candidate compliance with the conditions attached to acceptance of the public funds, it seemed to reject the argument

93 424 U.S. at 46.
94 *Schmitt,* [1980] 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9138, at 51,071.
95 *Id.* at 51,076.

by the assertion that "[t]he candidate's decision . . . cannot bind his or her supporters outside the official campaign."[96]

Even if the court in *Schmitt* was correct in applying strict scrutiny to the committee expenditures, its reflexive reliance on *Buckley* for the proposition that large expenditures can never raise a specter of corruption comparable to that raised by large contributions was misplaced.

The Court's insistence in *Buckley* that fear of an improper quid pro quo was the only governmental interest found sufficiently compelling to justify restriction of campaign activity — and then only contributions,[97] not expenditures — should not preclude reconsideration of other governmental interests in the light of political developments since *Buckley*.[98] The then-undeveloped role of the political committee established by seasoned party regulars for the sole purpose of making "independent" expenditures was not at issue in *Buckley*.

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96 *Id.* at 51,072.

97 The only contribution limits at issue in *Buckley* were those applied to contributions made directly to the candidate. The Supreme Court has just this term, however, heard argument on the question of whether contributions may be limited at all where the recipient is a political action committee rather than a candidate or his authorized campaign committee. *California Medical Ass'n*, [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9127, at 50,960. The Ninth Circuit rejected the argument that the inability of the committees *themselves* to reward supporters with improper quid pro quos on behalf of candidates should make such contributions immune from regulation. The court held that the lesser scrutiny accorded contribution limits in *Buckley* was satisfied by the governmental interests in preventing circumvention by individuals of the limits on direct candidate contributions and in further preventing "the fact or appearance of excessive ties between a committee or its donors, on the one hand, and direct contributions to candidates on the other." *Id.* at 50,994.

The court did not address the independent expenditure committee phenomenon; its focus was entirely on special interest political action committees, i.e., single- and multi-interest committees whose activities are not only not restricted to independent expenditures, but may not even include them. In a footnote, the court separately considered contributions made to enable independent expenditures by committees with "a broad and diverse constituency of supporters" and those made to a committee which "precisely mirrors the views of a narrowly-defined constituency of committee supporters," and found no distinction as far as the constitutional status of contributors is concerned. *Id.* at 50,991 n.5. Although the argument might be made that a contribution to a single-candidate committee making independent expenditures is closer to core personal expression than that made to a multi-candidate group, it might equally be argued that because a candidate-specific contribution to a committee is the clearest way to circumvent the candidate contribution limits, it should be attributed not only to the individual's candidate-contribution limit, as is currently done, but also directly to the candidate's contribution limit. As such the expenditure of the money by the committee is presumptively non-independent and thus within the statutory definition of contribution.

98 The Court itself in *Buckley* recognized the necessarily qualified nature of its decision: "the independent advocacy restricted by the provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46 (emphasis added).

The taint of the corruptive quid pro quo cannot categorically be restricted to contributions and non-independent expenditures. The candidate — and the public — may perceive that a debt is owed even when an expenditure is technically independent.[99] Were Congress, for example, to choose to regulate a particular type of expenditure as likely to give rise to the perception that a political debt is owed, it is difficult to see on what basis a court could find a quid pro quo to be per se impossible.[100] Such regulation would, of course, have to be narrowly drawn,[101] so that protected activity not reasonably giving the appearance of corruption would not be unconstitutionally infringed. Thus, the prohibition against the independent committee spending currently contained in section 9012(f) could be seen as too broad in that it fails on its face to distinguish between committees over which contributors exercise some control over spending decisions and those whose spending is financed by the mass solicitation at issue in *Schmitt.*

But perhaps the most compelling justification for sustaining the Fund Act's expenditure limit on independent expenditure committees at issue in *Schmitt* is the governmental need to preserve the taxpayers' investment in presidential campaigns by ensuring candidate compliance with the conditions attached to the optional grant. There was no direct First Amendment challenge made in *Buckley* to the contribution ban and expenditure ceiling imposed on eligible candidates for public financing. The Court did find, however, that to condition the otherwise voluntary decision by the candidate to forego private fundraising was a valid exercise of congressional power in the

99 *See* Cox, *supra* note 59, at 69 ("large expenditures to elect a specific candidate may create a corrupting obligation even though the spending is independently undertaken").

100 This is not to suggest that the Court should defer to Congress on a political expertise rationale, *see Bellotti,* 435 U.S. at 804 (White, J., dissenting); *see also* FEC v. Weinsten, 462 F. Supp. at 249 ("It is difficult to imagine an area of public concern where a legislative decision should be entitled to greater weight."). To the contrary, the possibilities for partisan abuse make it an area intrinsically amenable to judicial scrutiny. *See generally* ELY, DEMOCRACY AND DISTRUST (1980); *See also The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 186 (1976) ("The Court's unique immunity from such conflicts of interest suggests that it should view congressional adjustments in the electoral process with skepticism rather than deference.").

101 "The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." Central Hudson Gas v. Public Service Comm'n, 100 S. Ct. 2343, 2351 (1980) (citation omitted).

service of the "significant" governmental interests served by public financing in general of "eliminating the improper influence of large private contributions," "relieving major party Presidential candidates from the rigors of soliciting contributions,"[102] and in enhancing a candidate's ability to communicate with the electorate.[103]

Any fear that such a conditional grant violated the First Amendment rights of either the candidate or his supporters was resolved in *Republican National Committee v. FEC.*[104] In *Republican National Committee,* a three-judge district court held, following *Buckley,* that there was no burden on the rights of the candidate, and that should such a burden be found, the conditions were justified by the compelling governmental interest in preserving the integrity of a financing scheme that itself served significant governmental goals.[105] The court further found that the conditions did not impermissibly infringe the rights of the candidate's supporters. By applying the lesser scrutiny accorded contributions in *Buckley* and by balancing the "important or substantial" governmental interests unrelated to content with the "incidental restriction on alleged First Amendment freedoms," the court upheld the Fund Act's deprivation of the right of individuals or committees to contribute to the candidate of their choice.[106] The candidate's expenditure ceiling was sim-

102 424 U.S. at 57 n.65, 95-96.

103 *Id.* at 91-93.

104 100 S. Ct. 1639 (1980), *aff'g summarily,* 487 F. Supp. 280 (S.D.N.Y. 1980) (three-judge court).

105 487 F. Supp. at 285. "If a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated." *Id.*

106 *Id.* at 286. "There is nothing improper or unusual in recognizing that a candidate rather than his or her supporters should control the method of financing the campaign. In this respect the statute simply reflects the basic right of any person to accept or reject campaign contributions from any other person or committee, or not to run for office at all." In *Buckley,* the Court had emphasized the "important role of contributions in financing political campaigns" and acknowledged the "severe impact" that contribution limits might have on the ability of candidates to "amas[s] the resources necessary for effective advocacy." It concluded, however, that the statutory limits would not have any "dramatic adverse effect" on campaign funding, as it was reasonable to require solicitation from a greater number of people. 424 U.S. at 21-22. It therefore follows logically that where the candidate has *already* amassed the necessary resources, through acceptance of public funding, we should be proportionately less concerned about restricting the money available through private contributions. Absent the consent of the candidate, the potential contributor with alternative means of expression and association available has no First Amendment claim. Not only are supporters free to make those contributions permitted by the Fund Act, *see* note 18 *supra* (contributions

ilarly found not to violate the First Amendment rights of supporters, *as there was no claim made that the candidate's supporters were prevented from making independent expenditures,* and the court correctly noted that non-independent expenditures had never been protected.[107] In other words, the relationship between the section 9003 candidate-expenditure ceiling and the section 9012(f) ceiling on committee independent expenditures was not before the court.[108] It is precisely this relationship, however, that is at issue in *Schmitt.*[109] Here, even if amount limitations on the independent expenditures of supporters are subject to strict scrutiny, the governmental interest in ensuring compliance with conditions constitutionally imposed on the candidate should be seen as sufficiently compelling to justify infringing any protected rights of his supporters where they remain free to make unlimited direct personal expenditures.[110] As the 1980 campaign experience illustrated, there is no less restrictive means to ensure that the conditions do not become mere formalities, rendering the taxpayer-designated funds the functional equivalent of an outright grant.

Currently, the presidential nominees of major parties may request public financing immediately upon their nomination, at which time or shortly thereafter, they certify in writing their

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to defray certain legal and accounting fees and expenses incurred after thirty days after the general election, i.e., "wind-up" expenses, are allowed); 11 C.F.R. §§ 140.11(e), 141.3 (1980), but they may make unlimited direct personal expenditures, either alone or in conjunction with others.

107 487 F. Supp. at 286.

108 The *Republican Nat'l Comm.* case was brought following the 1976 presidential campaign, in which independent expenditure committees played no significant role. It is also worth noting that the 1976 election was the first for which public funds were available, and that in its decision on January 30, 1976, in *Buckley,* the Supreme Court noted its "present lack of knowledge of the practical effects of public financing." 424 U.S. at 101.

109 Thus, the conclusion of the district court in *Schmitt* that *Republican Nat'l Comm.* "would appear to mean that the restrictions associated with public funding (*e.g.,* no private contributions, expenditure ceilings, *etc.*) are permissible only because the rights of supporters are left untouched," [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9138, at 51,072, is not only a misreading of *Republican Nat'l Comm.,* but seems to proceed from the premise that supporters exist independently of candidates. Carried to the extreme, a candidate might be prevented from withdrawing from a race altogether for fear of impermissibly compromising the "rights" of his supporters to spend on his behalf.

110 This continued availability of alternative means of communication is a relevant factor in balancing First Amendment interests against legitimate governmental goals. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564, 575-76 (1973); Pell v. Procunier, 417 U.S. 817, 823-24 (1974).

willingness to abide by the ban on private contributions and the expenditure ceiling, and request certification by the FEC to the Treasury of their formal eligibility for the funds.[111] Upon receipt of that certification, the Treasury automatically disburses the funds.[112] Subsequent policing of the conditions is the responsibility of the FEC.

Enforcement of those conditions inevitably involves FEC scrutiny of the campaign activity of the candidate's supporters, since, under FECA, non-independent expenditures are considered to be simultaneously a contribution by the spender[113] and an expenditure by the candidate. "It would be so reported by both."[114] The non-independent expenditure thus renders the candidate in violation of both the contribution ban and the expenditure ceiling.

On July 2, 1980, the Carter-Mondale Reelection Committee filed a complaint with the FEC,[115] alleging that the activity of the "independent" expenditure committees was in fact not independent, and that contributions to and expenditures by these committees were attributable to Reagan himself. Because the committees were acting in anticipation of the post-nomination general-election campaign effort, Carter-Mondale argued that Reagan was ineligible for public funding and asked that the allegations be investigated by the FEC prior to Reagan's nomination and prior to any formal certification authorizing disbursement of the funds.[116] Failure of the FEC to act on the complaint prior to certifying Reagan as eligible to receive public funds prompted Carter-Mondale to petition the District of Columbia Circuit Court of Appeals to set aside the certification as arbitrary and capricious and contrary to law.[117] Carter-Mondale contended that the FEC was obligated to conduct a pre-certification investigation where "substantial questions" were

111 I.R.C. § 9003(b).

112 I.R.C. § 9006(b).

113 2 U.S.C. § 441a(a)(7)(B)(i) (1977).

114 S. REP. No. 689, 93d Cong., 2d Sess. 18 (1974), *quoted with approval* in *Buckley*, 424 U.S. at 46-47 n.53.

115 *See* note 46 *supra*.

116 The statute requires the FEC to reduce the amount for which it certifies the candidate as eligible by any contributions received prior to certification for use in defraying general election qualified campaign expenses. I.R.C. § 9004(b)(1).

117 Carter-Mondale Reelection Comm. v. FEC, Civ. Nos. 80-1841, 80-1842 (D.C. Cir., filed Sept. 12, 1980), *reprinted in* [1980] 2 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9132, at 51,034.

raised regarding the candidate's compliance with the eligibility requirements.[119] A three-judge panel dismissed the petition as premature, holding that the FEC has exclusive jurisdiction prior to the issuance of any final order on an administrative complaint or the expiration of the statutory time period, whichever occurs first,[119] and that, in any event, the FEC has virtually unreviewable discretion due to "the extremely delicate nature of the tremendous power entrusted to it."[120]

Not only did the court withhold judicial review of the FEC's decision to certify Governor Reagan as eligible for public funding, but it indicated that the FEC itself did not have the power to delay that certification once the objective criteria for eligibility were met by the candidate.[121] The court saw the agreement to abide by the contribution ban and expenditure ceiling as "largely future-looking" and thus enforcement as dependent "on investigations conducted after certification."[122]

The non-independence of supporter expenditures necessary to compromise the agreement of the candidate is difficult to prove;[123] moreover, litigation realities make it virtually impos-

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118 Plaintiff's Memorandum in Support of Petition for Review at 46, *id.*

119 *Carter-Mondale, id.* at 51,036.

120 *Id.* at 51,038. The concurring opinion of Judge Wald, however, found a statutory base in the Fund Act for a "very brief investigation of the charges before a certification is made," when "submitted materials suggest on their face that the candidate intends to violate or has knowingly violated the eligibility requirements for public funding." *Id.* at 51,044 (Wald, J., concurring).

121 *Id.* at 51,037-38.

122 *Id.* at 51,038 n.8.

123 *See* note 48 *supra.* The FEC has attempted, however, to identify situations where a presumption of non-independence might reasonably be made. For example, an expenditure made by or through a past or current officer or employee of an authorized committee is presumptively non-independent. 11 C.F.R. § 109.1(b)(4)(i)(B) (1980). *See* FEC Advisory Opinion 1980-116 (Nov. 14, 1980), *reprinted in* [1980] 1 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 5565, at 10,695 (committees using the services of those who have received or will receive reimbursement from an authorized campaign committee are precluded from making independent expenditures, regardless of whether they are reimbursed by the nonauthorized committee). Application of this presumption by the FEC has been markedly inconsistent. *Contrast* FEC Opinion Request #777 (Dec. 7, 1976) (Ford volunteer's prior campaign involvement made his expenditures presumptively non-independent despite no evidence of actual contact) *with* FEC Matter Under Review (MUR) 203.203a (1977) (American Conservative Union expenditures were found independent even though several ACU board members were officials on the authorized Citizens for Reagan Committee.)

Similarly, the common use of advertising, polling, consulting, fund-raising and media time buying firms has been found to create a common agency relationship that presumptively renders the "independent" committee expenditures contributions-in-

sible for the FEC to complete the necessary investigation and assess the applicable penalties[124] prior to the election itself. In fact, the Fund Act itself provides only for post-election audits of the qualified campaign expenses of publicly funded presidential candidates with required repayment of the public funds to the extent private contributions were accepted or excess expenditures made.[125] Post-election audits, however, are at best of doubtful utility. Watergate notwithstanding, the odds against a victor being prosecuted for "stealing" the election are as unlikely as the loser being prosecuted by the administration of the victor.[126]

Seen in this light, the section 9012(f) ceiling on independent expenditures by political committees on behalf of publicly funded candidates can be seen as congressional recognition of the need to supplement the enforcement jurisdiction of the FEC over the conditions imposed on publicly funded candidates. Given the political and practical realities, there is no less restrictive means of vindicating the compelling governmental interest in holding both the candidate and his supporters[127] during the campaign itself to total expenditures no greater than the federal allotment. As such, policing the conditions attached to the federal grant is a governmental interest capable of justifying an infringement of even the most protected First Amendment rights.

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kind. FEC Advisory Opinion 1979-80 (March 12, 1980), *reprinted in* [1980] 1 FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 5469, at 10,525 (response to a request by the National Conservative Political Action Committee).

124 The criminal penalties for violation of the contribution ban or expenditure ceiling are a fine of not more than $5000 or imprisonment of not more than one year or both. I.R.C. § 9012. There is no provision for pre-election repayment of the public money, *i.e.*, to the extent private contributions are received or excess expenditures made.

125 I.R.C. § 9007.

126 *Compare Buckley*, 424 U.S. at 68 n.82: "the public interest in sources of campaign funds is likely to be at its peak during the campaign period; that is the time when improper influences are most likely to be brought to light."

127 Although § 9012(f) might be seen as underinclusive in its exemption of individual independent expenditures on behalf of publicly funded candidates, it may simply reflect the congressional belief that pooled money represents a greater threat of compromising the candidate's expenditure ceiling, and that organized committees, often formed by seasoned political operatives, present a greater likelihood of non-independence. *See Bellotti*, 435 U.S. at 777-78 n.13 (reserving the question of "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities").

Conclusion

There is currently widespread dissatisfaction with the campaign financing laws. Candidates chafe at the limit on contributions and the burdensome reporting and disclosure requirements, and opponents of regulation attempt to invoke an absolutism[128] in the First Amendment that has long been rejected by the Supreme Court.[129] Others acknowledge the confusion spawned by *Buckley* and worry that the unwillingness of the Court to date to face political and economic realities has "do[ne] more to enhance the political power of money than to promote the goals of the first amendment."[130]

Money "talks" in many ways and not all of them are, nor should be, protected. The purpose of this Note has been to attempt to provide criteria to determine when campaign expenditures should be protected, and when protected, whether sufficient justification exists to impose amount limitations.

To that end, this Note has argued that campaign expenditures representing less than a direct link between the personal expression of the source of the funds and the actual expenditure should be accorded proportionately less protection, such that amount limitations require only a substantial governmental interest as justification. In any event, amount restrictions on all expenditures may be seen as akin to traditional "time, place, or manner" restrictions serving governmental interests unrelated to the ideological content of the financed message.

Substantial justificatory government interests exist to satisfy any lesser scrutiny or interest-balancing test, with one interest — the preservation and enforcement of the goals and conditions attendant to public financing — sufficiently compelling to satisfy even the most rigorous scrutiny.

It is difficult to understand how the First Amendment could ever be thought to allow the compromise of the very process it was designed to protect. Although it may well be too late to attempt equalization of financial access to the electorate during

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128 *See, e.g.*, Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373, 374 n.3 (1980) (noting with approval the assertion of Professor Ralph K. Winter during the oral argument of *Buckley* that "[t]he greatest campaign reform law ever enacted was the first amendment").

129 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

130 Cox, *supra* note 59, at 55-56.

a campaign,[131] it must never be too late to ensure the equal access of all citizens, regardless of their ability to make contributions or expenditures on behalf of candidates, to that candidate, once he or she is elected. Political speech may well be first among equals under the First Amendment, but the democratic process it serves remains viable only if its elected officials answer to people, not money.

Editor's Note:
As this issue went to press, the Supreme Court handed down the decision of California Medical Association v. Federal Election Commission, *49 U.S.L.W. 4842 (June 26, 1981). The decision upholds FECA's limitation on the amount unincorporated associations can contribute to multicandidate political committees; however, the majority was split in its reasoning. Justice Marshall, joined by Justices Brennan, White, and Stevens, agree with the author of this Note that "speech by proxy" through contributions to a political committee is "not the sort of political advocacy . . . entitled to full First Amendment protection."* Id. *at 4846. Justice Blackmun, concurring, would afford full protection to contribution activity, but would allow the $5,000 limitation as no broader than necessary to vindicate governmental interests in preventing corruption. Further, he would limit this holding to multicandidate political committees, and would not allow limitations on contributions to independent expenditure committees.* Id. *at 4848. Justice Stewart, joined by the Chief Justice and Justices Powell and Rehnquist, dissent on jurisdictional grounds, not reaching the issue of the validity of FECA's contribution limitations. Thus, it appears that significant questions remain to be resolved when* Common Cause v. Schmitt, *No. 80-847, comes before the Court in the upcoming term.*

131 "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." Buckley v. Valeo, 424 U.S. at 48-49.

RECENT PUBLICATIONS

SOVIET-AMERICAN RELATIONS IN THE 1980'S: SUPERPOWER POLITICS AND EAST-WEST TRADE. By *Lawrence T. Caldwell & William Diebold, Jr.* New York: McGraw-Hill, 1980's Project/Council on Foreign Relations, 1981. Pp. xvi, 314, appendices, index. $7.95.

"Power is an elusive concept. Everyone recognizes it as the currency of politics, but there is little agreement on what it is" (p. 37). With this caveat, Lawrence Caldwell and William Diebold, Jr. attempt to analyze future relations between the United States and the Soviet Union in a changing international system. The political and economic relationships between the two superpowers are so essential to global stability, they point out, that no effort to examine the world's future can fail to focus on them.

Soviet-American Relations in the 1980's focuses primarily on the Soviet Union's role in international affairs, on the potential for American influence on the course of Soviet foreign policy, and on growth in East-West trade. In the first part of the book, Lawrence Caldwell addresses issues of political, economic, and military power which influence Soviet-American relations. He discusses Soviet modernism and orthodoxy, conflict and cooperation, strategies of economic interaction, and geopolitical competition. William Diebold, Jr. examines the role of the East European countries in the world economy. He discusses aspects such as the problems in trade and industrial cooperation and efforts to solve problems in the areas of food, energy, raw materials, and technology transfer, as well as the roles to be played by international organizations.

The authors decry the tendency of policy-makers to make do with outmoded arrangements and to improvise rather than to question fundamental assumptions concerning accepted approaches to foreign policy questions. They urge a serious reconsideration of the basic tenets of the foreign-policy establishment in order to initiate a move towards a more stable world order. One need not, however, agree with each of the authors' assertions in order to benefit from this informed analysis of the challenges that lie ahead in the sphere of foreign policy.

Soviet-American Relations in the 1980's begins with the prem-

ise that Soviet foreign policy has always influenced the world order. Caldwell acknowledges that the Western concept of world order is challenged by the Soviet official doctrine predicting the inevitable victory of socialism over imperialism and capitalism. Recognizing that it is pointless to try to reconcile these diverging world views, he concludes that it is vitally important to understand how, in practical terms, the two superpowers can regulate their political and economic relations, reduce risks of conflict, and widen cooperation. Caldwell sees an evolving world order in which the U.S.S.R. will become more involved in the international economy. He suggests that, due to their economic dependence on the outside world, the Soviets may be forced to abide by certain, albeit poorly defined, rules of conduct.

In assessing the state of Soviet-American relations in the 1980s, the authors are relatively sanguine in their perception of a gradual trend away from conflict and towards cooperation. They assert, however, that the Soviet leaders must take into account American policy developments. This book was written before the 1980 presidential election and therefore does not address the recent shift in the official American line.

The Reagan administration has already proven that it places a high priority on defense spending and ideological conflict with the U.S.S.R., and thereby reinforces the position of the "hawks" in the Kremlin. Nevertheless, the book's final prescription is clear: American policy-makers have an interest in strengthening the hand of the Kremlin moderates seeking internal reform and a renewal of ties with the West. The authors recommend that Soviet participation in the world economy be encouraged. Such involvement, they conclude, will put the Soviet leadership continually to the test of responsible conduct.

Matthew J. Goldman

BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION. By *Lori B. Andrews.* Chicago: The ABA Press, 1980. Pp. vii, 87, appendices.

Birth of a Salesman is the last in a series of manuals discussing major issues confronting the organized legal profession

in the United States. As Staff Director of the American Bar Association Commission on Advertising, Ms. Andrews is well-situated to present views from all sides on the delicate question of advertising and solicitation by lawyers, and she does so in this brief text in an informative, anecdotal, and, ultimately, highly readable style.

Ms. Andrews opens with an historical and legal background of lawyer advertising. Notwithstanding a careful and sound analysis of the landmark Supreme Court decision in *Bates v. State Bar of Arizona* and related cases, her discussion is best when describing examples of flamboyant or innovative advertising campaigns, no doubt culled from her experience on the ABA commission. She argues that advertising and promotional ventures, particularly in the high-volume practice of a legal clinic, may foster "new forms of delivering routine, reasonably priced professional services," and lead to the creation of "better-informed consumers of legal services" (p. 11). Recent advertising campaigns have featured stunts such as sky-writers and decorated hearses seeking clients for low-cost "no frills" wills, personalized tee-shirts, as well as the more usual techniques of television and radio spots and direct-mail campaigns. She further notes that the new-found right to advertise has been taken in at least one instance with a sense of humor: a Chicago attorney advertised his availability to perform "routine" railroad reorganizations for "around $1,500,000" (p. 12).

On the serious side of the advertising question, Ms. Andrews demonstrates that a well-planned campaign can have significant results, particularly for legal clinics or the small practitioner. She comments on market planning, message content, and style of effective advertising programs, and discusses briefly the state regulatory mechanisms that govern content, media use, and format. Finally, she ties the advertising issue to the closely related question of lawyer solicitation.

In light of her evident expertise and enthusiasm for her subject, it is regrettable that Ms. Andrews does not offer a serious analysis of the impact of a liberal advertising policy on the public and the legal profession. The question of specialization is closely tied to advertising, yet she does not even raise it. Certain technical flaws also mar the impact of her work: no citations are provided for the few cases to which she refers, and the *Bates* decision is cited in full only in the appendix.

While traditional practitioners may blanch at the thought of appearing in television spots, one thing is certain: lawyer advertising is here to stay. *Birth of a Salesman* is a useful, even entertaining, guidebook to this new aspect of legal practice. One hopes that it will also serve as a springboard to continued serious discussion of the issues legal advertising presents for the profession and the public.

Elizabeth S. Stong

BOOKS RECEIVED

ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME. By *Terence G. Ison*. London: Croom Helm, 1981. Pp. xii, 201, notes, index. $37.50.

APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS. By *Louis René Beres*. Chicago: University of Chicago Press, 1980. Pp. xvi, 315, notes, index. $20.00.

BALANCED BUDGETS, FISCAL RESPONSIBILITY AND THE CONSTITUTION. By *Richard E. Wagner* and *Robert D. Tollison*. San Francisco: Cato Institute, 1980. Pp. xii, 49. $4.00 paper.

BLACK REPRESENTATION AND URBAN POLICY. By *Albert K. Karnig* and *Susan Welch*. Chicago: University of Chicago Press, 1980. Pp. xiii, 179, notes, references, index. $20.00.

CONSTITUTIONAL LAW: CASES AND COMMENTS. By *Peter Woll*. Englewood Cliffs, N.J.: Prentice-Hall, 1981. Pp. xxxii, 923. $24.50.

THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY. By *Mel Roman* and *William Haddad*. Middlesex, England: Penguin Books, 1978. Pp. 215, notes, index. $3.95 paper.

DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825. By *William E. Nelson*. Chapel Hill, N.C.: University of North Carolina Press, 1981. Pp. xi, 212, notes, index. $19.50.

ECONOMIC STABILIZATION IN DEVELOPING COUNTRIES. Edited by *William R. Cline* and *Sidney Weintraub*. Washington, D.C.: The Brookings Institution, 1981. Pp. xv, 517, index.

THE ECONOMICS OF TAXATION. Edited by *Henry J. Aaron* and *Michael J. Boskin*. Washington, D.C.: The Brookings Instititition, 1980. Pp. xviii, 418, index. $17.95 cloth, $6.95 paper.

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HANDBOOK OF CRIMINAL JUSTICE EVALUATION. Edited by *Malcolm W. Klein* and *Katherine S. Teilmann*. Beverly Hills, Ca.: Sage Publications, 1980. Pp. 693, indices. $39.95.

HIGH IN AMERICA: THE TRUE STORY BEHIND NORML AND THE POLITICS OF MARIJUANA. By *Patrick Anderson*. New York: Viking Press, 1981. Pp. 328, index. $13.95.

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