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ARTICLE

STATE-IMPOSED NONFINANCIAL ELIGIBILITY CONDITIONS IN AFDC: CONFUSION IN SUPREME COURT DECISIONS AND A NEED FOR CONGRESSIONAL CLARIFICATION

FRED C. DOOLITTLE*

The federal and state governments have jointly administered the Aid to Families with Dependent Children program since 1935. As the program expanded and grew more complex over the years, disputes arose over the extent to which the states could impose their own nonfinancial eligibility conditions in addition to federal regulations. The Supreme Court entered the fray in the late 1960's and has been struggling with the issue ever since.

In this Article, Prof. Doolittle identifies what he sees as three distinct legal approaches used successively by the Court since 1968. He points out that continuing confusion has developed in the case law because of the Court's failure to sort out the various analytic strands in its decisions, and suggests the need for congressional clarification of the intended nature of the federal-state partnership.

Aid to Families with Dependent Children (AFDC), the nation's largest welfare program, distributes over one billion dollars a month to almost eleven million recipients.[1] From its inception in 1935 with the passage of the Social Security Act ("the Act"),[2] federal and state administrators have battled with recipient groups over proper program administration.[3] Despite this long record of discord, the federal courts have only recently

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1 Statistics on the AFDC program are published monthly in the *Social Security Bulletin*. The figures are from SOC. SECURITY BULL., May 1981, at 60-61.

2 Social Security Act of 1935, ch. 531, tit. IV, 49 Stat. 627 (codified as amended at 42 U.S.C. §§ 601-660 (1976)).

3 For discussion of the continuing controversy, see M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS (1970); J. HANDLER, REFORMING THE POOR (1972); J. HANDLER & E. HOLLINGSWORTH, THE DESERVING POOR (1971); G. STEINER, SOCIAL INSECURITY (1969); and Hoey, *Aid to Families with Dependent Children*, 202 ANNALS AM. ACAD. POL. & SOC. SCI. 74 (1939).

taken an active role in the dispute; with *King v. Smith*,[4] decided in 1968, the Supreme Court ushered in a decade of intense litigation over the details of state program administration.

This Article focuses on one type of legal dispute: recipient challenges to state nonfinancial eligibility requirements that allegedly conflict with the Social Security Act. The Social Security Act established a program of matching grants to states with AFDC programs meeting federal requirements.[5] The Act outlines a number of demographic and behavioral eligibility requirements,[6] defines the types of recipient income that can be counted against the grant amount, and sets guidelines for the calculation of aid. The crucial issue in the cases discussed in this Article is whether states are prevented from adding nonfinancial eligibility requirements not expressly authorized in the Social Security Act.

Constitutional challenges other than those based on the Supremacy Clause are not discussed in this Article because of their declining importance in social welfare litigation. Most early challenges to state AFDC requirements relied heavily on the Equal Protection Clause of the Constitution.[7] In the 1970 case of *Dandridge v. Williams*,[8] the Supreme Court unmistakably diminished the prospects for successful equal-protection challenges to state AFDC requirements: it held that classifications used by states in social welfare matters satisfy the Equal Protection Clause if they have some "reasonable basis."[9] Since

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4 392 U.S. 309 (1968).

5 42 U.S.C. § 603 (1976) establishes the federal matching rate for AFDC payments. The federal government pays five-sixths of the first $18 of every monthly payment per person. For payments above the first $18, the federal matching rate varies inversely with the income of the state. States which provide Medicaid services have the option of being funded under an alternate formula whereby the federal payment varies from 50% to 83% of total aid per person depending on the state's income. *See* 42 U.S.C. § 1318 (1976).

6 *See infra* text accompanying notes 17-33.

7 For an interesting discussion of these constitutional litigation strategies, see Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973).

8 397 U.S. 471 (1970).

9 *Dandridge* included a discussion of this equal-protection test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Dandridge, successful non-Supremacy Clause constitutional challenges to state AFDC practices have been rare.[10]

Challenges brought under the Supremacy Clause have continued, however, because the Court has had difficulty formulating precise guidelines for state nonfinancial eligibility requirements. In several cases decided between 1968 and 1971, the Court struck down a number of state eligibility requirements by relying on an analysis of the program's legislative purpose and a controversial reading of its legislative history.[11] Starting in 1971, however, the Court seemed to modify its previous doctrines and upheld several state requirements against recipient challenges.[12] Then, in the 1975 case of *Burns v. Alcala,*[13]

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426.

To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulations of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.

397 U.S. at 485.

10 There have been a few successful equal-protection challenges in AFDC cases since *Dandridge.* For example, in Whitfield v. Oliver, 399 F. Supp. 348 (D. Ala. 1975), plaintiffs successfully challenged Alabama's policy of paying AFDC recipients 55% of their need while paying Old Age Assistance recipients 100% of need. Plaintiffs were able to show racially discriminatory intent and the strict-scrutiny test was invoked. In Thorn v. Richardson, 4 Empl. Prac. Dec. (CCH) ¶ 7630 (N.D. Wash. Dec. 10, 1971), plaintiffs successfully challenged a state work incentive program on sex-discrimination grounds. There have been other sources of constitutional challenges to AFDC practices. In the early 1970's the Court developed the irrebuttable-presumption doctrine and struck down welfare regulations in United States Department of Agriculture v. Murry, 413 U.S. 508 (1973), a residency requirement in Vlandis v. Kline, 412 U.S. 441 (1973), and a child-custody rule in Stanley v. Illinois, 405 U.S. 645 (1972). Critics charged that the doctrine was really substantive due process in disguise. *See* Note, *Irrebuttable Presumptions: An Illusory Analysis,* 27 STAN. L. REV. 449 (1975). The Court severely limited the applicability of the doctrine in Weinberger v. Salfi, 422 U.S. 749 (1975). Plaintiffs have also raised constitutional challenges based on right to privacy. However, in Moore v. East Cleveland, 431 U.S. 494 (1977) a plurality of the Court identified a number of cases previously seen as establishing a right to privacy as in fact establishing a right to freedom from governmental interference in internal family matters.

11 *See infra* text accompanying notes 54-79.

12 *See infra* text accompanying notes 80-114.

13 420 U.S. 575 (1975).

the Court seemingly adopted a position which combined its two previous approaches.[14]

These cases merit scrutiny because they illustrate states' attempts to define the so-called "deserving poor."[15] In the United States, public assistance is not available to all poor people. Instead, society attempts to define a subset of the poor who are not "morally responsible" for their poverty. Historically, public assistance has been a local government function, and local attitudes have had a significant impact on eligibility requirements. State nonfinancial eligibility conditions are one important expression of local attitudes toward the poor and public assistance. In the cases discussed in this Article, the Court attempts to determine the extent to which a federal definition of the "deserving poor" can be imposed on the local jurisdictions which administer the program.

This Article is an attempt to clarify the ways in which the Court's treatment of statutory challenges to nonfinancial eligibility requirements has changed over time and to suggest methods for resolving future disputes of this type. The first section briefly describes the characteristics of the AFDC program and the types of issues posed by the litigation. The second section discusses Supreme Court decisions which have dealt with the question of state restrictions of AFDC eligibility. It attempts to trace the development of the Court's jurisprudence in this area. The third section analyzes the four tools of statutory interpretation and construction used by the Court: analysis of statutory language, legislative history, legislative purpose, and administrative interpretation. The final section summarizes the analysis and offers suggestions for future resolution of this type of legal dispute.

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14 *See infra* text accompanying notes 115-159.

15 See J. HANDLER & E. HOLLINGSWORTH, THE DESERVING POOR (1971) for a discussion. For a short review of the historical material, see F. Doolittle, Intergovernmental Relations in Federal Grant Programs: The Case of Aid for Families with Dependent Children 96 (December 1977) (unpublished Ph.D. dissertation, Dep't of Economics, University of California, Berkeley). For a recent example of this attitude, see GOVERNOR'S OFFICE, STATE OF CALIFORNIA, MEETING THE CHALLENGE: A RESPONSIBLE PROGRAM FOR WELFARE AND MEDI-CAL REFORM (1971); and GOVERNOR'S OFFICE, STATE OF CALIFORNIA, WELFARE REFORM IN CALIFORNIA . . . SHOWING THE WAY (1972).

I. The AFDC Program and the Nature of the Legal Disputes

A. *Federal Requirements*

Under Title IV-A of the Social Security Act,[16] federal matching grants are available to any state which has an Aid to Families with Dependent Children program conforming to federal requirements. In some aspects of program design, the states have considerable discretion; in others, the federal statute mandates a single approach. The federal government imposes five important requirements on state programs.

1. Required Basis of Deprivation of Parental Support

State programs must provide aid to children deprived of parental support because of a parent's "death, continued absence from the home, or physical or mental incapacity."[17] In addition, many states have established a voluntary program which recognizes a father's extended involuntary unemployment as a basis of deprivation of parental support.[18]

2. Age Requirements

State programs must provide aid for children up to the age of eighteen. Children aged eighteen to twenty may, at a state's option, receive aid if they regularly attend school and live with specified blood relatives known as "caretaker relatives."[19]

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16 42 U.S.C. § 601-610 (1976).

17 42 U.S.C. § 606(a)(1) (1976).

18 See 42 U.S.C. § 607 (1976) for details of the program. This section empowers the Secretary of Health and Human Services to set standards for defining unemployment and certain additional requirements for qualification under this program.

19 These requirements are contained in 42 U.S.C. § 606(a) (1976): "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) now is (A) under the age of eighteen,

3. State Administrative Requirements

The state program must be administered by a single state agency.[20] The state must allow all who wish to apply to do so, process applications with reasonable promptness,[21] and provide a fair hearing to those who wish to appeal agency actions.[22] In addition, the state must develop plans for providing birth-control services to all appropriate recipients,[23] for locating absent parents, and for enforcing support obligations.[24]

4. Income-Calculation Procedures[25]

In setting the level of aid, a state must take into account the income of any child or caretaker relative within the AFDC unit, except for the earnings of dependent children who are full-time students.[26] A state must also make allowances for the reasonable employment expenses of any workers.[27] In order to create a work incentive, the first thirty dollars earned each month and one-third of all income earned above the thirty dollars must be excluded from the income that is counted against the aid award.[28] A state may not count as available to the household the income of an individual outside the unit unless there is proof

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or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."

In October 1981, Congress made several changes in the AFDC age requirements and income-calculation procedures. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2301-2306, 2311, 95 Stat. 357, 843-46, 852-53 (amending 42 U.S.C. §§ 602, 606, 612). Because all of the litigation discussed here involves the program as it was before the changes made by the 1981 amendments, and because those changes do not affect the substance of the argument being made in this Article, statutory citations regarding the age requirements and income-calculation procedures are to the pre-amendment version of the *United States Code* .

20 42 U.S.C. § 602(a)(3) (1976).

21 42 U.S.C. § 602(a)(10) (1976).

22 42 U.S.C. § 602(a)(A) (1976).

23 42 U.S.C. § 602(a)(15) (1976).

24 These requirements were added in 1975 as part D of title IV-A of the Social Security Act. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (codified at 42 U.S.C. §§ 651-660 (1976)).

25 See *supra* note 19, second paragraph, regading an October 1981 amendment to the income-calculation procedures.

26 42 U.S.C. § 602(a)(7) (1976).

27 *Id.*

28 42 U.S.C. § 602(a)(8) (1976) reads in part:

of actual availability or there is a legal support obligation which would not cease if the recipient family lost its eligibility for welfare.[29]

5. Behavioral Requirements for Recipients

State programs must require that certain caretaker relatives participate in the Work Incentive Program.[30] In addition, all

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(8) . . .in making the determination under clause (7), the State agency —
(A) shall with respect to any month disregard —
(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college or university, or a course of vocational or technical training designed to fit him for gainful employment, and (ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by § 632(b)(2) and (3) of this title); and
(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable need of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;
except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of —
(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person —
(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or (ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or
(D) any of such persons specified in clause (i) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of the clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan.

29 45 C.F.R § 233.90(a)(1) (1980). In 1970, a substantially equivalent forerunner of § 233.90(a)(1) was upheld by the Supreme Court as a valid implementation of the Social Security Act. Lewis v. Martin, 397 U.S. 552 (1970).

30 *See* 42 U.S.C. § 602(a)(19) (1976).

recipients and applicants must be required to furnish Social Security numbers to the state,[31] assign the state any rights to support from an absent parent,[32] cooperate in establishing the paternity of any child born out of wedlock, and assist in securing support payments.[33]

B. *State Discretion*

While the requirements listed above must conform to federal standards, the Act expressly delegates some decisions to the states. Each state must set a standard of need, subject to the restrictions imposed by the cost-of-living adjustment mandated by 42 U:S.C. section 602(a)(23).[34] In addition, within broad guidelines, the states may establish their own grant-calculation procedures and maximum-aid scales.[35]

To receive federal funding, a state must also submit a state plan for its AFDC program. Once the Secretary of Health and Human Services (HHS)[36] has approved the plan, funding continues until there is a formal finding of a "failure to comply substantially" with any of the federal requirements listed in the statute.[37] If the Secretary makes such a finding, he must notify the state that some or all federal AFDC funding will be withheld until there is satisfactory proof of compliance.[38] However, the

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31 42 U.S.C. § 602(a)(25) (1976).

32 42 U.S.C. § 602(a)(26) (A) (1976).

33 42 U.S.C. § 602(a)(26) (B) (1976).

34 42 U.S.C. § 602(a)(7) (1976).

35 *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Rosado v. Wyman, 397 U.S. 397 (1970). For a more complete discussion of the various types of grant calculation systems see SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93RD CONG., 2D SESS., STUDIES IN PUBLIC WELFARE, PAPER NO. 20, HANDBOOK OF PUBLIC INCOME TRANSFER PROGRAMS 161-63 (1975).

36 Until 1980, the Secretary of HHS was the Secretary of Health, Education, and Welfare (HEW). With the enactment of the Department of Education Organization Act, Pub. L. No. 96-98, 93 Stat. 668 (1979), the U.S. Office of Education was removed from HEW and established as the U.S. Department of Education, and the remainder of HEW became the Department of Health and Human Services. *Id.* §§ 201, 301, 509, 601, 93 Stat. 671, 677,, 695, 696. HHS retained the AFDC jurisdiction that it had previously exercised as HEW. Thus, as far as AFDC is concerned, HEW and HHS are equivalent.

37 *See* 42 U.S.C. §§ 601, 604 (1976); 45 C.F.R. §§ 201-237 (1980).

38 42 U.S.C. § 604(a) (1976) reads:

> (a) In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds —

administrative and political realities of grant-in-aid programs make fund cutoffs extremely unlikely.[39]

Many state-imposed nonfinancial eligibility requirements fall into a kind of twilight zone: they are neither directly prohibited by the Act nor expressly permitted. The issue or the legality of such conditions presents unusual preemption problems. Federal preemption "is the invalidation of state legislation under the supremacy clause for incompatibility with a federal regulatory scheme."[40] Normally, the problem arises when a state and the federal government legislate in the same area without any explicit cooperative arrangement. In the grant-in-aid context, however, the federal government and the participating state do cooperate in sharing the costs of program administration and, to some extent, the policymaking power. While the Court has created a label for this situation — "cooperative federalism"[41] — it continues to struggle with the implications of the arrangement.

The deliberate sharing of responsibility between the states and the federal government in a grant-in-aid program has possible conflicting implications for preemption problems. One could argue that the states' policymaking power should not be restricted by any vague notion of federal legislative "occupation" of the field[42] or "potential conflicts" between state and federal policy decisions[43] because the states take an active and

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(1) that the plan has been so changed as to impose any residence requirement prohibited by § 602(b) of this title, or that in the administration of the plan any such prohibited requirement is imposed with the knowledge of such State agency, in a substantial number of cases; or (2) that in the administration of the plan there is a failure to comply substantially with any provision required by § 602(a) of this title to be included in the plan;

the Secretary shall notify such State agency that further payments will not be made to the State (or, payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

39 *See generally* M. DERTHICK, *supra* note 3; V.O. KEY, THE ADMINISTRATION OF FEDERAL GRANTS TO STATES (1937); G. STEINER, *supra* note 3.

40 *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 n.7 (1975) [hereinafter cited as *The Preemption Doctrine*].

41 This term was first used in King v. Smith, 392 U.S. 309, 316 (1968).

42 *See The Preemption Doctrine, supra* note 40, at 625, 626.

43 *See id.* at 626.

important part in the financing and administration of a government program. On the other hand, one could argue that states have in some sense entered into a contractual relationship with the federal government:[44] they have agreed to accept federal money in exchange for a promise to use it in specified ways. Thus, because of their "agreement," the states are less free to set their own policies than they would be if those policies were set independently of federal law.

II. Litigation on AFDC Nonfinancial Eligibility Requirements

The Court has written formal opinions in nine cases involving state-imposed nonfinancial eligibility requirements. These opinions may be grouped into three categories: those which are pro-federal (*King v. Smith,*[45] *Townsend v. Swank,*[46] *Carelson v. Remillard*[47]), those which support state interests (*Wyman v. James,*[48] *New York State Department of Social Services v. Dublino*[49]), and those which attempt to maintain a neutral stance (*Burns v. Alcala,*[50] *Philbrook v. Glodgett,*[51] *Batterton v. Francis,*[52] *Miller v. Youakim*[53]). Although the pro-federal and the pro-state groups of cases overlapped chronologically while the Court was changing its analysis, the categories help to illuminate the Court's varying approaches.

A. *The Pro-federal Cases*

King v. Smith involved a recipient's challenge to an Alabama regulation that denied AFDC eligibility to any family in which

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44 *See* F. Doolittle and S. Durbin, Judicial Constraint on AFIV Policymaking (April 1978) (research report for the Welfare and Employment Studies Project, Institute of Business and Economic Research, University of California, Berkeley).

45 392 U.S. 309 (1968).

46 404 U.S. 282 (1971).

47 406 U.S. 598 (1972).

48 400 U.S. 309 (1971).

49 413 U.S. 405 (1973).

50 420 U.S. 575 (1975).

51 421 U.S. 707 (1975).

52 432 U.S. 416 (1977).

53 440 U.S. 125 (1979).

the mother had "frequent or continuing" sexual relations with an "able-bodied man."[54] The state accomplished this goal by defining any regular male sexual partner of the mother as a "substitute father" regardless of whether he actually provided any financial support for the family or had any legal obligation to do so.[55] The family would thus become ineligible for assistance because the children were not deprived of "parental" support.[56]

The Court struck down the Alabama regulation, and held that the state could not alter the federal statutory definition of "parent" to include a "substitute father." A crucial element in the Court's decision was its interpretation of section 602(a)(10) of the Social Security Act, which requires that "aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . . ." This section, the Court argued, prevented the states from denying aid to anyone eligible under the federal statute.[57] The Court then rejected all of the state's justifications for the denial of assistance as inconsistent with federal requirements, and consequently found that the regulation was invalid because it violated section 602(a)(10).

The state had first attempted to justify the regulation as a legitimate measure to combat the "immorality" of mothers of needy dependent children.[58] The Court rejected this approach, holding that termination of assistance to a family due to "immorality" was inconsistent with the "paramount goal" of AFDC — the protection of dependent children.[59] Although acknowledging that such requirements were consistent with the original legislative intent,[60] the Court found that the "Flemming Ruling," incorporated into the statute in 1962,[61] prohibited states from

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54 392 U.S. at 313-14.

55 *Id.* at 314.

56 *See* 42 U.S.C. § 606(a) (1976), quoted *supra* note 19.

57 392 U.S. at 317, 333. This section was added in 1950 to prevent the use of waiting lists. *See* P. DEFOREST, L. RUBIN & A. WYNIA, LEGISLATIVE HISTORY OF THE AID TO DEPENDENT CHILDREN PROGRAM (1970) [hereinafter cited as DEFOREST]. The Court later acknowledged this confusion in Jefferson v. Hackney, 406 U.S. 535, 545 (1972).

58 392 U.S. at 320.

59 *Id.* at 325.

60 *Id.* at 320.

61 The Flemming Ruling was issued by Secretary of Health, Education, and Welfare Arthur S. Flemming. It provided that as of July 1, 1961,

> A State plan . . . may not impose an eligibility condition that would deny

combating a mother's immorality in ways which lead to the denial of support for needy dependent children. In arriving at this decision, the Court placed considerable weight on the legislative history of Congress's approval of the Ruling..[62]

The state also argued that the regulation simply clarified the definition of "parent" in a way which furthered the state's interest in controlling its expenditures, discouraging immorality, and treating informal and formal families alike.[63] The Court responded by analyzing the meaning of "parent" in the legislative history and the various uses of the term in the statute. Relying on somewhat circular reasoning, the Court held that Congress intended the word "parent" to "include only those persons with a legal duty of support."[64]

The Court's decision left a major question unanswered. Although the logic of the opinion suggested the possibility of general limits on the states' power to add eligibility conditions, it was unclear whether the Court was establishing a flat prohibition against any state requirements not authorized by the statute or merely striking down a particular requirement which was contrary to clearly expressed congressional intent. Since the Court's examination of the legislative history led to a fairly definite view of congressional intent regarding this particular restriction, the Court did not have to address the larger question of whether Congress intended to prohibit any requirement which would exclude recipients eligible under federal law.[65]

Townsend v. Swank,[66] decided in 1971, provided one set of answers to this question. The state of Illinois had chosen to participate in an optional AFDC program to provide aid to children aged eighteen to twenty, but only to those attending

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> assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve home conditions or to make arrangements for the child elsewhere.

The Ruling was cited by the Court in *King*, 392 U.S. at 322-23. Congress passed an amendment to the Social Security Act adopting the Flemming Ruling but postponing its effective date from July 1961 to September 1962. *See* Act of May 8, 1961, Pub. L. No. 87-31, § 4, 75 Stat. 75, 77 (creating 42 U.S.C. § 604(b)).

62 *See, e.g.*, 392 U.S. at 323-24.

63 *Id.* at 318, 327.

64 *Id.* at 327.

65 *See infra* text accompanying notes 69-71.

66 404 U.S. 282 (1971).

high school or vocational training school.[67] Since the federal statute expressly defines dependent children to include persons under twenty-one who are attending a college or university,[68] the Court held against the state.

Townsend is important for several reasons. First, the Court again cited section 602(a)(10) as a crucial aid in interpreting the statute.[69] Second, the Court refused to follow a regulation promulgated by the Department of Health, Education and Welfare (HEW) which "seemed to imply that states may to some extent vary eligibility requirements from federal standards."[70] Third, the Court was forced to discuss the proper interpretation of ambiguous or incomplete expressions of congressional intent. In responding to the problem of unclear expressions of intent, *Townsend* relied on *King* to establish a rebuttable presumption against state restrictions on eligibility:

> Thus, *King v. Smith* establishes that, at least in the absence of congressional authorization for the exclusion *clearly evidenced* from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.[71]

According to this view, the Court must first determine which individuals are eligible under federal AFDC standards. Next, it must decide whether Congress has made coverage of these individuals mandatory. The opinion placed a burden of proof on the states: they must show congressional authorization for any additional restriction. If Congress is silent on the issue, the statute mandates coverage.

Townsend demonstrates the importance of the presumption of coverage. In this case, the Court interpreted the meaning of

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67 *Id.* at 283.

68 42 U.S.C. § 606(a)(2)(B) (1976).

69 404 U.S. at 285, 286.

70 *Id.* at 286. 45 C.F.R § 233.10(a)(1) (1980) reads in part:

> The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in light of the provisions and purposes of the public assistance titles of the Social Security Act.

See *supra* note 36 regarding the relationship between HEW and the Department of Health and Human Services (HHS).

71 404 U.S. at 286 (emphasis added).

a section establishing optional coverage of eighteen- to twenty-year-olds. Even though Congress made coverage of this age group optional, the Court was unwilling to assume that states were also given the option to provide partial coverage to the group. Rather, the Court interpreted the option as an all-or-nothing choice for the states, since it could find no clear congressional intent to allow the states to draw any intermediate lines.

Carleson v. Remillard,[72] decided in the next year, illustrates how the presumption of coverage developed in *Townsend* influenced the courts' definition of federal AFDC standards. In this case, the state of California did not recognize absence caused by military service as a deprivation of parental support. The plaintiffs, a mother and child, were denied aid despite the fact that the absent father did not provide any income to his family.[73] The federal statute recognized the father's "continued absence from the home" as a deprivation of parental support and did not differentiate between reasons for the father's absence. Although HEW regulations did not limit reasons for absence,[74] the Department had approved numerous state plans which did.[75]

The Court acknowledged that a substantial amount of evidence suggested that Congress did not intend families with an absent father in the military to be eligible for AFDC, but it nevertheless held for the plaintiffs since Congress made no explicit statutory statement that such families were ineligible. Legislative reports stated that the program's primary purpose was to provide financial assistance to children "in families lacking a father's support."[76] The Court noted that the Senate report stated that "[t]hese are principally families with female heads who are widowed, divorced, or deserted."[77] Nonetheless, the Court struck down the California regulation because "it was not stated or implied that eligibility by virtue of a parent's 'continued absence' was limited to cases of divorce or desertion."[78] The Court noted its "vain" search of the Social Security

72 406 U.S. 598 (1972).
73 *Id.* at 599.
74 45 C.F.R. § 233.90(c)(1)(iii) (1980).
75 404 U.S. at 602.
76 *Id.*
77 *Id.*
78 *Id.*

Act for explicit authority to allow state variation in the definition of "continued absence."[79]

King, Townsend, and *Carleson* established the doctrine that states could exclude those within the federally eligible population only when there was "clear evidence" of congressional intent that coverage was not mandatory. The "clear evidence" standard appeared to require that congressional intent be divined from the statute itself, not from extrinsic evidence of Congress's state of mind.

B. *The Pro-state Cases*

Wyman v. James[80] was the first Supreme Court case to depart from the strong pro-federal stance discussed above. It is a confusing case because of both its timing (nearly a year before *Townsend*) and its reasoning. In *Wyman,* recipients challenged a New York requirement that established a scheduled "home visit" by a state welfare official during daytime hours as a condition to receive aid.[81] Although no mention is made of home visits in the Social Security Act, the Court upheld New York's requirement without any discussion of possible conflicts with the Act, choosing instead to address the constitutional issues posed by the plaintiff's Fourth Amendment challenge.[82] The Court first held that the visit was not a search for Fourth Amendment purposes since the visitation was not compelled; if an individual refused to give permission, the only response was termination of aid.[83] Even if the home visits were searches within the meaning of the Fourth Amendment, the Court continued, they would be reasonable and permissible without a warrant.[84] The Court based its finding of reasonableness on the public's interest in the protection of the dependent child, the

79 *Id.*

80 400 U.S. 309 (1971). *Wyman* was decided in January of 1971 and *Townsend* in December of 1971.

81 State regulations required a mandatory home visit at least every three months. *See* 400 U.S. at 311.

82 Possible statutory conflicts were mentioned in the dissent by Justice Marshall. He argued that requiring a home visit was contrary to HEW regulations designating the recipient the primary source of information and prohibiting entry into a recipient's home without permission. 400 U.S. at 342, 346 (1971) (Marshall, J., dissenting).

83 400 U.S. at 317-18.

84 *Id.* at 318-24.

need to ensure the proper use of public funds, the importance of the home visit in welfare administration, and the unobtrusiveness of the scheduled daytime meeting.[85] This reasoning indicates an implicit judicial recognition of legislative purposes which may conflict with the goal of providing aid to needy dependent children, which *King* had previously called the "paramount goal of the program." The Court also chose virtually to ignore HEW regulations making the recipient the primary source of information[86] and prohibiting entry into a recipient's home without actual consent.[87]

While the Court's unexpected constitutional analysis signaled controversial future changes in Fourth Amendment doctrine,[88] *Wyman* is probably best seen as an aberration caused by the Court's desire to justify a shift in Fourth Amendment jurisprudence. This conclusion is reinforced by the Court's hesitancy to cite *Wyman* for the proposition that states can further restrict federal eligibility guidelines.[89]

Although *Wyman* only implicitly suggests discontent with pro-federal doctrines, the Court's analysis in *New York State Department of Social Welfare v. Dublino*[90] represents an explicit rejection of the approach followed in the pro-federal cases. In *Dublino,* recipients challenged New York rules which presumed that certain recipients were employable. These recipients were required to conduct a job search and to give a progress report every two weeks in person at a welfare office. Failure either to cooperate or to accept a suitable job made the entire family

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85 *Id.*

86 The regulations made the recipient the primary source of information. Home visits were an alternate source to be used if the recipient refused or was unable to supply the needed information. *See* 400 U.S. at 311.

87 The regulation read: "The [state welfare] agency especially guards against violations of legal rights and common decencies in such areas as entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours. . . ." HEW HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV, § 2300(a); *see also id.* pt. IV, § 2400.

88 Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259 (1971); *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 258 (1971); Note, Wyman v. James: *Welfare Home Visits and a Strict Construction of the Fourth Amendment,* 66 NW. U.L. REV. 714 (1971).

89 *Wyman* has been cited as authority for the power of states to adopt eligibility conditions in only one Supreme Court case to date: New York State Department of Social Services v. Dublino, 413 U.S. 405, 422 (1973).

90 413 U.S. 405 (1973).

ineligible for aid.[91] Recipients argued that passage of the federal Work Incentive Program (WIN), which required certain employable recipients to register for manpower services, training, and employment as a condition of assistance,[92] preempted the field and prevented the states from enacting different work programs. The Court held, however, that the federal statute permitted the New York program. In its reasoning, the Court for the first time treated an AFDC case much like a routine federal preemption case, and cited previous preemption cases from unrelated fields.[93]

A brief history of Supreme Court federal preemption doctrine will help place *Dublino* in context.[94] The basic issue in preemption cases is whether state legislation unacceptably obstructs the accomplishment of the objectives of an act of Congress.[95] To find a state statute unconstitutional on these grounds, the Court must discover either a congressional intent to "occupy the field" with a comprehensive system of regulation or a conflict between federal and state regulations.[96] Several factors are important in finding occupation of a regulatory field, including specific evidence of congressional intent that the area be exclusively federally regulated; the enactment of a pervasive scheme of regulation; and the dominance of federal interests in the area being regulated (as in foreign relations).[97] Since conflict between federal and state regulations is often a matter of degree, the Court's view of proper state-federal relations heavily influences its preemption analysis.[98]

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91 *Id.* at 407. The Court quotes relevant parts of N.Y. Soc. Serv. Law § 131 (McKinney 1976).

92 *See* 42 U.S.C. § 630 (1976). The program is described in *Dublino*, 413 U.S. at 409.

93 *See, e.g.*, Engineers v. Chicago, R.I. and P.R. Co., 382 U.S. 423 (1966) (state regulation of train-crew sizes); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (pollution control); Schwartz v. Texas, 344 U.S. 199 (1952) (interpreting a section of the Federal Communications Act); Mintz v. Baldwin, 289 U.S. 346 (1933) (cattle inspection); and Savage v. Jones, 225 U.S. 501 (1912) (state statute requiring certain information on label of a product).

94 *See generally The Preemption Doctrine, supra* note 40.

95 See *id.* at 624 for a similar definition.

96 *Id.*

97 *Id.* at 625 (quoting Justice Douglas in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

98 *See, e.g, The Preemption Doctrine, supra* note 40, at 628.

One commentator has suggested that there are really two lines of preemption cases. One line, important from the mid 1930's until the 1950's, supported state interests by requiring a clear expression of congressional intent to occupy a regulatory field[99] or an actual conflict between federal and state statutes which affected an important part of the federal regulatory scheme.[100]

The second line of cases, dominant during the 1950's and early 1960's, supported federal interests. These cases did not require specific proof of congressional intent to preempt in order for the Court to find occupation of a regulatory field. In this second line of cases, the Court relied primarily on its own judgment as to whether the state statute "stands as an obstacle to the full purposes and objectives of Congress."[101] This change was based partly on a judicial recognition that Congress rarely has the time or foresight to consider many possible preemption problems;[102] the Court felt that inferring lack of intent to preempt from congressional silence was inappropriate.[103] In some cases the Court invalidated state regulation simply because of a potential conflict with federal legislation.[104]

In *Dublino,* the Burger Court made a clear choice between these two lines of preemption cases.[105] Acknowledging the importance of the grant-in-aid context, it argued that "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in pursuit of common purposes, the case for federal preemption becomes a less persuasive one."[106] The Court, therefore, held that federal preemption

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99 *See id.* at 626-28.

100 *Id.* at 628-30.

101 *Id.* at 630 (quoting from Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

102 *See, e.g.,* San Diego Building Trade Council v. Garmon, 359 U.S. 236, 240 (1959):

> Many of these problems probably could not have been, and at all events were not, foreseen by Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.

103 *See The Preemption Doctrine, supra* note 40, at 634.

104 *Id.* at 636.

105 The Burger Court made similar choices in other cases in its early years. *See, e.g.,* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117 (1973); and Goldstein v. California, 412 U.S. 546 (1973). For a discussion of these cases, see *The Preemption Doctrine, supra* note 40, at 639.

106 413 U.S. at 421; *see also id.* at 413.

would only be found where "there is a clear manifestation of [congressional] intention to do so."[107] In *Dublino,* the Court refused to infer congressional intent to occupy the field from the alleged comprehensive nature of the WIN program. It reasoned that modern social welfare legislation inevitably requires complex legislation,[108] and found the WIN program to be only a partial solution to the problems of work and training because of its limited coverage and limited funding levels.[109] The Court also rejected arguments based on potential conflicts between state and federal work programs, finding that the administration of the New York program avoided any major actual conflict.[110] The Court concluded that "conflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial." Violation of a "specific provision of the Social Security Act" must be found to void the state requirement.[111]

The reasoning adopted in the *Dublino* case was a clear change from the preemption presumption developed in *Townsend.* By requiring a "clear manifestation" of the intent to preempt, the Court ensured the rarity of such a finding. In addition, the Court recognized other legislative purposes, such as furthering recipient self-sufficiency,[112] which could conflict with the objective of providing assistance to needy children — the sole objective recognized in *King.* Contrary to the doctrine of *King* and *Townsend, Dublino* explicitly permitted the state to add non-financial eligibility conditions to control program expenditures.[113]

This recognition was overdue. Although the primary purpose of the AFDC program is to aid needy children, the statute does contain provisions intended to encourage self-sufficiency and to permit the government to recoup AFDC payments by requiring absent family members to fulfill their legal obligations.[114] These objectives are not always compatible. For example, recipients may refuse to comply with work or training requirements and lose benefits. Congress was aware of these conflicts

107 *Id.* at 413 (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)).
108 *Id.* at 415.
109 *Id.* at 418-19.
110 *Id.* at 421.
111 *Id.* at 423 n.29.
112 *See, e.g., id.* at 409, 413.
113 *Id.* at 413.
114 *See, e.g.,* 42 U.S.C. § 630 (1976) (statement of purpose).

when it authorized the program, and established a set of eligibility conditions which reflected its view of the proper balance between competing objectives.

C. *The "Neutral" Cases*

A third group of cases is essentially neutral between the two earlier approaches. In the 1975 case of *Burns v. Alcala,*[115] the Court rendered an opinion which discussed the federal definition of "child" and had general implications for state restrictions of eligibility. In *Burns,* Iowa had denied assistance to a woman pregnant with her first child. The woman challenged this denial, arguing that the term "child" could and should be interpreted to include unborn children in light of the program's goal of aiding needy children and a long-standing administrative interpretation of the statute. The Court rejected this argument, however, holding that the Social Security Act did not include unborn children among those eligible for AFDC benefits.[116]

In *Burns,* the Court strongly argued against the use of any presumptions in determining whether any given individual is or is not included within federal eligibility rules. The Court drew a distinction between presuming that Congress has made the federal eligibility requirements binding on the states, which was the approach followed in *King, Carleson,* and *Townsend,* and presuming that any given recipient is part of the federally eligible population when the Act's language is not clear, which is what the Court was asked to do in *Burns.* The Court stated:

> Several of the courts that have faced this issue have read *King, Townsend,* and *Carleson* to establish a special rule of construction applicable to the Social Security Act provisions governing AFDC eligibility. They have held that persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous. . . . This departure from ordinary principles of statutory interpretation is not supported by the Court's prior decisions.[117]

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115 420 U.S. 575 (1975).
116 *Id.* at 580-81.
117 *Id.* at 580 (citations omitted).

The Court then offered its approach to the issue:

> *King, Townsend,* and *Carleson* establish only that once the federal definition of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional. The method of analysis used to define the federal standard of eligibility is not different from that used in solving any other problem of statutory construction.[118]

In another part of the opinion, the Court offered a slightly different explanation of the proper test:

> The State must provide benefits to all individuals who meet the federal definition of "dependent child" and who are "needy" under state standards, unless they are excluded or aid is made optional by another provision of the Act. *New York Department of Social Services v. Dublino,* 413 U.S. 405, 421-422 (1973); *Carleson v. Remillard,* 406 U.S. 598 (1972); *Townsend v. Swank,* 404 U.S. 282 (1971); *King v. Smith,* 392 U.S. 309 (1968).[119]

The *Burns* approach represents an important change in the Court's position. First, the Court ordered the lower courts to avoid the use of presumptions, formal or informal, in defining federal standards of eligibility. As the Court notes, lower courts had been using informal presumptions on this issue even though none of the Court's opinions had required them to do so. Second, the Court seems to have once again modified the burden of proof used in deciding whether the states may add to the federal eligibility requirements. Previously, *Townsend* had created a rebuttable presumption of mandatory coverage by requiring "congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history."[120] Later, in *Dublino,* the Court seemed to reverse this presumption by requiring a "clear manifestation of congressional intention" to supersede the exercise of state power.[121] In *Burns* the Court moved back toward its earlier, pro-federal position by requiring "a clear indication that Congress meant

118 *Id.*
119 *Id.* at 578.
120 404 U.S. at 286.
121 413 U.S. at 413.

the coverage to be optional" before allowing the states to deny AFDC benefits to recipients who meet the federal standards.[122]

The Court found application of the *Burns* approach to the facts of the case relatively straightforward, since the majority felt definition of the federally eligible population posed few problems. The Court cited repeated uses of the word "child" in the Act in contexts which make sense only if referring to postnatal children.[123] The Court also argued that the Act was clearly intended to benefit postnatal children because the original purpose of AFDC was to provide aid to children who would otherwise have been placed in institutions.[124] The Court interpreted explicit congressional mention of unborn children in other titles of the Social Security Act as additional proof of its position.[125] Finally, the Court cited HEW's recently changed interpretation of the statute in support of its reasoning.[126] Due to this wealth of evidence, the Court encountered no serious difficulties in defining the federally eligible population without the use of presumptions.

Soon after *Burns,* the Court considered another nonfinancial eligibility case, *Philbrook v. Glodgett.*[127] In *Philbrook,* Vermont denied AFDC-Unemployed Father (AFDC-UF) eligibility to families with an unemployed father eligible for unemployment insurance benefits, whether or not he received them.[128] Recipients challenged this eligibility requirement as conflicting with the Act, which requires only that states deny aid "with respect to any week for which such child's father receives unemployment compensation under the law of a State or of the United States."[129] The plaintiffs argued that the legislative history of this provision implied a strict limit on state power.

The Court agreed that the Vermont practice conflicted with federal requirements and affirmed a lower-court injunction. It found the language of the statute so clear that it refused to be swayed by the state's policy argument that recipients should

122 420 U.S. at 580.
123 *Id.* at 581.
124 *Id.* at 581-82.
125 *Id.* at 583-84.
126 *Id.* at 584.
127 421 U.S. 707 (1975).
128 *Id.* at 712.
129 42 U.S.C. § 607(b)(2)(c)(ii) (1976).

be required to take advantage of other possible resources before receiving AFDC benefits.[130] The Court concluded that the plaintiffs were within the federally defined eligible population and that there was no clear indication that Congress meant coverage to be optional.

In *Philbrook,* as in *Burns,* the new interpretive approach was not put to a severe test. Because of a disagreement between the House and the Senate, there was an extensive legislative history on the meaning of the federal provision.[131] Without the history and the unusually clear language of the statute, the Court might have encountered difficulty in determining the reach of the federal eligibility rules without the use of any presumptions.[132]

Batterton v. Francis,[133] decided in 1977, demonstrates what may be a new willingness to defer to formal administrative interpretations of the federal statute. The plaintiffs argued that the Secretary of HEW had abused his discretion in issuing regulations defining "unemployment" for purposes of the AFDC-UF program. Section 607(a) of the Act reads in part: "The term 'dependent child' shall . . . include a needy child who . . . has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father . . . ."[134] This standard-setting power had been given to the Secretary as part of a withdrawal of definitional authority from the states in 1968.[135] In *Philbrook,* the Court had mentioned in dicta that "an important purpose of the 1968 amendments was to eliminate the variations in state definitions of unemployment."[136]

Under the original HEW regulation, the Secretary established only an hours-of-work test and did not expressly authorize state variation in other aspects of the definition.[137] In approving state plans, however, HEW allowed states to choose "a definition

130 421 U.S. at 715.
131 *Id.* at 715-19.
132 The Court's interpretation of this section was overturned the following year when Congress amended the statute to allow states to deny assistance to fathers who qualify to receive unemployment insurance benefits but refuse to do so. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 507, 90 Stat. 2667, 2688 (amending 42 U.S.C. § 607).
133 432 U.S. 416 (1977).
134 42 U.S.C. § 607(a) (1976).
135 432 U.S. at 419.
136 421 U.S. at 719.
137 432 U.S. at 422 n.6.

of unemployed father which imposes additional conditions relating to the reason for unemployment.''[138] In a 1972 case, *Davidson v. Francis*,[139] the Court had summarily affirmed a lower-court opinion which held that, while the Secretary has broad authority to define an unemployed father, the existing regulation provided only an hours-of-work test and thus prohibited the states from imposing additional requirements.

When HEW then modified its regulation to authorize state variation on this issue, a number of recipients sued to enjoin its operation.[140] The lower courts ruled for the plaintiffs on two grounds.[141] First, the courts held that persons discharged for misconduct were clearly unemployed within the meaning of the Act and additional requirements imposed by the states were invalid. Second, the courts held that although it was not clear whether persons on strike were unemployed, the HEW regulation was invalid because it allowed each state to decide whether to cover strikes and thus did not establish a uniform national standard.[142]

The Supreme Court, however, upheld the HEW regulation. The Court first stressed the importance of the congressional delegation of standard-setting authority to the Secretary and argued that this delegation gives the Secretary, rather than the courts, primary responsibility for interpreting the statute.[143] Therefore, the Court reasoned, it could overturn the regulation only if the Secretary ''exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law.' ''[144] While this somewhat circular test is not very enlightening, it does indicate that the Court believed that the regulation deserved more than normal deference and that it could not be overturned merely because the Court would have interpreted the statute differently.

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138 *Id.*

139 409 U.S. 904 (1972).

140 45 C.F.R. § 233.100(a)(1) (1980) reads:

> [A]t the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

141 432 U.S. at 423.

142 *Id.*

143 *Id.* at 425.

144 *Id.* at 426.

The Court rejected the plaintiffs' argument that the statutory language implied that the reason for the father's unemployment was irrelevant. Though section 607(a) charges the Secretary with formulating standards which define unemployment, the Court reasoned that the term "unemployment" is "often used in a specialized context where its meaning is other than simply not having a job." Specifically, the Court observed that "unemployment" is often used to mean "involuntary employment," as in Department of Labor unemployment statistics and state unemployment compensation programs. Since other sections of the statute indicate that AFDC-UF was not intended to provide assistance without regard to the reason a person is out of work, the Court found that consideration of the reasons for unemployment was consistent with the purposes of the program and within the discretion of the Secretary.[145]

The Court also rejected the plaintiffs' argument that variation among the states in the definition of unemployment was contrary to the statutory scheme. First, the Court pointed out that the original language of section 607(a) — "unemployment (as defined by the State)" — was changed to "unemployment (as determined in accordance with standards issued by the Secretary)." The Court held that this change implied that the Secretary's standard-setting authority was flexible enough to recognize local options in determining AFDC-UF eligibility.[146] Second, in examining the legislative history of the amendment, the Court concluded that while the change was intended to give the Secretary the "authority" to adopt a uniform standard, it did not compel him to do so.[147] Finally, the Court relied on its "understanding of the AFDC-UF program as involving the concept of cooperative federalism."[148] Since the program is voluntary, congressional requirements become counterproductive when the states object to them strongly enough to drop out of the program. Consequently, the Court concluded that it "should not lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local policies in determining eligibility."[149]

145 *Id.* at 427-29.
146 *Id.* at 430.
147 *Id.* at 431.
148 *Id.*
149 *Id.*

Batterton may be the type of case that will become increasingly common. Since 1971, when HEW voluntarily brought its grant-in-aid regulation-writing procedures under the Administrative Procedure Act,[150] HEW regulations have become more detailed. Congress has delegated to the Secretary standard-setting power in other key disputes,[151] and litigation has increasingly involved standard administrative-law issues.[152]

Batterton is significant for several reasons. It shows the Court's continued sympathy with state interests in preemption questions. The Court noted the special circumstances of grant-in-aid programs, and reasoned that requirements likely to deter state cooperation should not be inferred without a compelling rationale.[153] The case demonstrates a growing willingness to defer to formal regulations and, more importantly, to the agency's interpretation of those regulations. *Batterton* may signal a trend toward greater Supreme Court deference to HHS statutory interpretations, even in the absence of any specific delegation of standard-setting authority.

Miller v. Youakim,[154] a 1979 case, is the only recent case which sheds much light on *Batterton.* In *Youakim,* the plaintiffs successfully challenged an Illinois regulation excluding children who live with relatives other than their parents from the AFDC Foster Care Program (AFDC-FC). AFDC-FC authorizes subsidies for the care of children removed from their homes, placed in foster homes, or institutionalized. The key statutory provisions in *Youakim* require benefits for a child "in the foster family home of any individual" and define "foster family home" to include "a foster family home for children which is licensed by the State . . . or has been approved . . . as meeting the standards established for such licensing."[155]

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150 36 Fed. Reg. 2532 (1971). Most important is the notice-and-comment requirement of 5 U.S.C. § 551 (1976).

151 Recent amendments require the Secretary to define "good cause" exceptions to requirements that recipients cooperate in establishing the paternity of children born out of wedlock and in securing child-support payments. 42 U.S.C. § 602(a)(26) (1976).

152 *See, e.g.,* National Welfare Rights Organization v. Mathews, 533 F.2d 637 (D.C. Cir. 1976) and the litigation surrounding the requirements mentioned in the previous note; *cf.* Coe v. Mathews, 426 F. Supp. 774 (D.D.C. 1976), *cert. denied,* 431 U.S. 953 (1977).

153 432 U.S. at 431-32.

154 440 U.S. 125 (1979).

155 440 U.S. at 135 (quoting 42 U.S.C § 608 (1976)).

The plaintiffs had summary judgment entered against them in the district court on their claim that the state regulation violated the Equal Protection Clause of the Fourteenth Amendment. While the plaintiffs' appeal of this ruling was pending in the Supreme Court, HEW issued a formal interpretation of the statute and stated that children living with relatives were eligible for AFDC-FC if they otherwise met the statutory requirements. In light of this action, the Court vacated the judgment and directed the district court to consider whether the state regulation was consistent with the Social Security Act. On remand, the district court found that the state regulation violated the Act and ruled in favor of the plaintiffs.[156] The court of appeals affirmed the judgment.[157]

The Supreme Court began by arguing that the language of the Act clearly included children living with relatives among the eligible population. Relying upon *Burns, Carleson, Townsend,* and *King,* the Court then stated that aid must be provided to all eligible persons unless Congress clearly intended to make the standards permissive.[158] After reviewing the legislative history of the suitable-home requirement and the establishment of the AFDC-FC program, the Court found no congressional intent to differentiate between children living with relatives and children living with non-relatives.

Youakim is significant for two reasons. First, the Court felt that it could discern a single overriding goal of the program — "providing the best available care for all dependent children removed from their homes because they were neglected."[159] Although the foster-care program is a specialized program under the broad umbrella of AFDC, the Court displayed much less willingness to balance perceived conflicting goals than it had in analogous earlier cases. If this interpretation is valid, it suggests that the Court is retreating from the subjective inquiry required by *Dublino* and is searching for something closer to a black-letter rule.

Youakim also suggests the nature of the Court's likely future direction. In its decision, the Court described the HEW inter-

156 431 F. Supp. 40, 45 (N.D. Ill. 1976).
157 562 F.2d 483 (7th Cir. 1977).
158 440 U.S. at 133-34.
159 *Id.* at 139.

pretation of the statute as a "significant factor" in its decision. Such deference is neither inherently pro-state nor inherently pro-federal; it will give HHS considerable leeway to determine the extent of the uniformity which it will impose on the states.

III. Judicial Tools of Statutory Interpretation

Though the nine cases discussed above involve a variety of issues, the Court has relied on four basic tools of statutory interpretation: (1) analysis of the language of the statute; (2) analysis of the legislative history of the relevant statutory provisions; (3) analysis of the legislative purpose of the program; and (4) deference to agency interpretation of the statute. This section of the Article analyzes the Court's use of these techniques over time and evaluates the adequacy of each approach in resolving future disputes.

A. *Statutory Language*

The first tool of statutory interpretation used by the Court in these cases is careful attention to the wording of the law. In several cases, the Court has dealt in detail with the precise language of a section; the most notable example is *Philbrook v. Glodgett,*[160] dealing with the receipt of unemployment benefits.

In many AFDC disputes, however, attention to a particular section of the federal statute, while useful, will not provide definitive guidance. In several cases in which the decision did rely heavily on the statutory language, the Court did not confine its analysis to one particular section. For example, in *King v. Smith*[161] the Court analyzed the use of the word "parent" in various parts of the Act and attempted to develop a final interpretation which was appropriate for all contexts. The Court used a similar approach in *Burns v. Alcala*[162] to interpret the word "child."

The AFDC title of the Social Security Act program has fostered more than the usual amount of confusion over the meaning

160 421 U.S. 707 (1975).
161 392 U.S. 309 (1968).
162 420 U.S. 575 (1975).

of particular words. Nowhere in the entire AFDC title of the Social Security Act is there any technical language that has a generally accepted meaning as a term of art. Given HEW's history of rather loose administrative enforcement of the statute's provisions and the relatively recent participation of the courts in defining program requirements, the precise meaning of many crucial terms is only gradually being developed.

AFDC litigation rarely turns on the meaning of obscure or complex phrases; the dispute is usually over whether Congress intended a particular word to have a more limited meaning than in normal usage. In such cases, the Court will often examine the legislative history to determine if Congress intended to express any unusual meanings.

The nature of the legal disputes also limits the usefulness of detailed statutory analysis. Most cases concern attempts by the states to impose eligibility requirements which are not mentioned in the statute; at best, there is reference to a federal eligibility condition which is closely related to the disputed state requirement. The central issue is not what the statute says but rather whether the states can add eligibility conditions. The court normally has to go beyond an analysis of precise wording to interpret the meaning of legislative silence on an issue.

B. *Legislative History*

When confronted with ambiguity in a statute, courts often review the legislative history of the section. Ideally, a committee report or legislative debate will furnish a definitive statement of congressional intent regarding the issue at hand. Unfortunately, there is only sparse legislative history for most aspects of the AFDC program.

Although welfare in general was an intense political issue during debate over passage of the Act, federal aid for dependent children was not.[163] Since many states had already authorized mothers' pension programs, many political leaders felt that the problem of dependent children would be handled at the local

163 One of the prime reasons for the speedy consideration of the Social Security Act was the political support for an alternate program, the Townsend Plan, which the Roosevelt administration felt was ill-advised. *See generally* E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962).

level if the federal government provided temporary financial assistance.[164] President Franklin Roosevelt agreed with this view, arguing that the primary responsibility of the federal government was to combat unemployment caused by the national depression.[165]

Several other factors reinforced Roosevelt's position. First, although there was intense political pressure for federal involvement in unemployment and old-age assistance, there was considerable opposition to involvement in other relief activities.[166] Second, Roosevelt felt that the states should serve as laboratories for new techniques in areas such as aid to children where there was disagreement as to the proper approach.[167] Third, southern congressional representatives and senators exerted pressure for decentralized relief, since they felt that federal involvement would threaten states' rights and disturb established patterns of segregation. Since Roosevelt needed the support of these politicians to pass his social legislation, he did not wish to push for a comprehensive federal program.[168] Moreover, Roosevelt's advisers felt that the Supreme Court would overturn any program that led to federal involvement in what traditionally had been a local government function.[169]

This lack of presidential enthusiasm for a federal program for dependent children contrasted starkly with the opinions expressed by a committee of social workers and welfare experts appointed to advise the Committee on Economic Security. The advisory committee felt that the time was right to establish a federal general-relief program and eliminate many of the eligibility restrictions in the existing mothers' pension programs.[170] It also recommended that a permanent public welfare department be established in the federal government to equalize public-assistance benefits in the various states.[171]

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164 DEFOREST, *supra* note 57, at 22.

165 *Id.* at 28; A. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY 13 (1968). The following discussion is primarily based on chapter 2 of DEFOREST, *supra* note 57.

166 DEFOREST, *supra* note 57, at 24.

167 *See* A. ALTMEYER, *supra* note 165, at 11-12; J. PATTERSON, THE NEW DEAL AND THE STATES 90-91 (1969).

168 DEFOREST, *supra* note 57, at 26.

169 *Id.;* P. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES 33 (1936).

170 *Cf.* J. BROWN, PUBLIC RELIEF, 1929-1939, at 304 (1940).

171 *Id.* at 305.

The actual recommendations of the Committee on Economic Security called for a significant increase in federal action but fell short of the suggestions of the advisory committee. The Committee on Economic Security proposed a program of grants to be administered by the Federal Emergency Relief Administration.[172] Children under the age of sixteen would be eligible for aid if living in homes "in which there is no adult person, other than one needed to care for the child or children, who is able to work and provide the family with a reasonable subsistence compatible with decency and health."[173] States would be required to have a statewide plan approved by the federal administration and to provide a level of assistance which, when combined with family income, would allow "a reasonable subsistence compatible with health and decency."[174] Federal administrators would be given the power to define this requirement[175] and to set standards of administration for the program, including personnel policies.[176] Under the Committee bill, federal funds could be cut off, apparently without a hearing, if the administrator found a state out of conformity with federal requirements.[177]

These proposals called for more federal control than other grant-in-aid proposals and more federal involvement in public welfare than at any time before the Depression.[178] The federal government was to set standards of program administration, limit state-imposed eligibility requirements, and require minimum benefit levels. However, the proposal also signaled a retreat from the broad federal powers of the temporary Federal Emergency Relief Act, which authorized the federal government to take over the federal portion of a state welfare program if it was not being administered properly.[179]

The changes made by Congress in the Committee's proposal limited the power of the federal government in welfare and

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172 COMMITTEE ON ECONOMIC SECURITY, 74TH CONG., 1ST SESS., REPORT TO THE PRESIDENT (1935).

173 H.R. 4120, 73d Cong., 1st Sess. § 203 (1935).

174 P. DOUGLAS, *supra* note 169, at 57.

175 *Id.;* J. BROWN, *supra* note 170, at 307.

176 H.R. 4120, *supra* note 173, § 204; J. BROWN, *supra* note 170, at 209.

177 H.R. 4120, *supra* note 173, § 206(d).

178. *See generally* V.O. KEY, *supra* note 39.

179 J. BROWN, *supra* note 170, at 324-25.

increased the relative position of the states. Most important, Congress did not require that states provide aid sufficient to support a family in "decency and health" as recommended by the Committee on Economic Security.[180] This change came primarily at the urging of southern politicians who did not wish to have the federal government tell their states what aid they must provide to blacks.[181] Congress also prohibited federal control over "selection, tenure of office, and compensation of personnel."[182] The administration of the program was transferred from the activist Federal Emergency Relief Administration to the newly created Social Security Board.[183] A maximum monthly federal contribution of six dollars for the first child and four dollars for each additional child was imposed, with no aid furnished for the mother. Interestingly, however, Congress removed the ceiling on the total annual federal appropriation and eliminated all discretionary fund distribution intended to equalize aid across the states. One participant in the drafting of the bill has argued that these changes were evidence of a "distinct reaction to the authoritative regime of the FERA and its efforts to raise and maintain standards of relief."[184]

In the final version of the Social Security Act, the only recipient eligibility requirements were that the "dependent child" had to be under sixteen years of age, living with specified relatives, and deprived of parental care because of death, continuous absence, or incapacity of a parent.[185] The Act also prohibited the states from imposing a residence requirement of more than one year.[186] No other nonfinancial eligibility conditions were mentioned.

A recent study of the passage of the Social Security Act indicates that less than ten percent of all testimony concerned Aid to Families with Dependent Children.[187] Since many of the

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180 *See supra* text accompanying notes 172-75.
181 DEFOREST, *supra* note 57, at 27-49, 55.
182 H.R. 7260, 74th Cong., 1st Sess. § 402(a)(5) (1935).
183 J. BROWN, *supra* note 170, at 308; DEFOREST, *supra* note 57, at 69-70.
184 J. BROWN, *supra* note 170, at 308.
185 H.R. 7260, *supra* note 182, § 406.
186 *Id.* § 402(b).
187 DEFOREST, *supra* note 57, at ch. 2. This study contains a detailed breakdown of testimony presented by the Administration and the questions asked by the members of the committees that considered the bill. This breakdown reveals that AFDC received less attention than any other title in the bill; perhaps only one-fifth as many questions

phrases and provisions in the old-age programs were also used in the AFDC title, changes in the old-age sections were often mechanically included in the AFDC sections.[188]

The Senate and House reports accompanying the bill provide a detailed commentary on the meaning of each section. After discussing the statute's eligibility requirements, both stated that the state "may, furthermore, impose such other eligibility requirements — as to means, moral character, etc. — as it sees fit."[189] This statement of legislative intent clearly grants a wide-ranging policymaking power to the states. Though subsequent amendments and long-standing administrative interpretation and practice may have limited the state's control in certain areas,[190] Congress has never retreated from this general statement of relative power. The Court apparently misconstrued the nature of the original agreement regarding state-federal policymaking in the *Townsend* case when it held that states had authority only when Congress explicitly granted it.[191]

Amendments to the federal statute expanding the demographic coverage of the program and imposing behavioral requirements on recipients first appeared in the early 1950's.[192] Many of these amendments were passed in response to congressional concern about the growing number of welfare recipients. During the amendment process, there was more debate, and thus further expression of congressional intent. Even with this additional information, courts may still encounter problems in-

were directed toward AFDC as were directed toward the old-age and unemployment provision of the bill.

188 *Id.* at 47.

189 S. REP. No. 628, 74th Cong., 1st Sess. 36 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 24 (1935). These are the passages mentioned by the Court in King v. Smith, 392 U.S. at 321.

190 Most notably in the area of moral character. *See supra* text accompanying note 69. *But see* National Welfare Rights Organization v. Mathews, 533 F. 2d. 637 (D.C. Cir. 1976), in which the court held that regulations promulgated under the statute's broad grant of authority are valid if "reasonably related to the purposes of the enabling legislation."

191 *See supra* text accompanying notes 66-71.

192 In 1950, federal funding of aid for adult caretakers was added. *See* Social Security Act Amendments of 1950, ch. 809, § 322(a), 64 Stat. 477, 550 (amending 42 U.S.C. § 603(a)). In 1956 the list of permitted adult caretakers was expanded, and the requirement of school attendance was ended for children sixteen to eighteen. *See* Social Security Act Amendments of 1956, ch. 836, §§ 321, 322, 70 Stat. 807, 850 (amending 42 U.S.C. § 606). Regarding the establishment of the unemployed-parent program, see Act of May 8, 1961, Pub. L. No. 87-31, § 1, 75 Stat. 75 (adding 42 U.S.C. § 607). The WIN program was added in 1968. *See* Social Security Amendments of 1967, Pub. L. No. 90-248, § 204(a), 81 Stat. 821, 884 (1968) (adding 42 U.S.C. §§ 630-644).

terpreting Congress's intent because of the special political characteristics of grant-in-aid programs. Many commentators argue that federal lawmakers choose the grant-in-aid approach when they do not wish to make difficult program design decisions.[193] Rather than risk a major battle over controversial program characteristics (for example, work requirements) or take a position which will alienate any of their constituencies, legislators pass statutes which establish only the broad outlines of a program. A grant program may thus be born out of deliberately incomplete congressional issue-resolution.

The Court has rarely, if ever, resolved an eligibility dispute by finding a definitive statement of congressional intent in the history. In *Townsend,* the Court was forced to interpret the meaning of congressional silence on the issue;[194] in *Dublino,* the Court had to take judicial notice of facts which must have been known to Congress,[195] inquire into the way the programs were administered,[196] and, in the final analysis, rely on its notions of proper state-federal relations.

Due to this lack of definitive legislative history, eligibility decisions have repeatedly rested on burdens of proof or rebuttable presumptions regarding legislative silence on the legality of a state-imposed eligibility condition. In the early pro-federal cases, the Court based several decisions on a rebuttable presumption that state coverage of the federally eligible population was mandatory.[197] In *Dublino,* the Court reversed its position and reasoned that a state exclusion was invalid only if Congress had clearly stated that coverage of the excluded groups was mandatory or if the exclusion was unconstitutional.[198] A brief review of the legislative history suggests that this second position is more consistent with the intent of Congress in many program areas. Whatever one may think of the use of presumptions, the Court's experience suggests that without them it would be groping for nonexistent information and its holdings would be unpredictable.

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193 M. DERTHICK, *supra* note 3, at 195-96.

194 *See supra* note 71 and accompanying text.

195 For example, the Court noted the number of pre-existing state work programs. 413 U.S. at 414.

196 *Id.* at 421.

197 *See supra* text accompanying note 71.

198 *See supra* text accompanying note 90.

In light of these considerations, *Burns* is troubling.[199] By stressing that no presumptions should be used in arriving at a federal definition of the eligible population, the Court may well aggravate the problem of interpretation in future cases. In addition, the Court seems to have switched the burden of proof from the *Dublino* rebuttable presumption that federal eligibility rules must be followed by the states to another presumption: the *Townsend* presumption that state requirements excluding otherwise eligible persons from AFDC benefits are invalid unless there is clear evidence that Congress authorized the exclusion. Because of different wording of the test in two parts of the opinion, however, it is unclear how strong this second presumption is.[200]

C. *Legislative Purpose*

When the language of a statute and its legislative history fail to provide insight into congressional intent, courts often attempt to interpret a provision in light of the public policy interests that the law intends to serve. This interpretive tool played a crucial role in early AFDC cases such as *King v. Smith*.[201] More recently, the Court's view of the program's legislative purposes has limited the usefulness of this technique.

In the Social Security Act, Congress included an extensive discussion of the legislative purposes of the AFDC program:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized . . . .[202]

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199 *See supra* text accompanying note 115.
200 *See supra* text accompanying notes 118-19.
201 *See supra* text accompanying note 54.
202 42 U.S.C. § 601 (1976).

In the early AFDC cases, the Court clearly emphasized provision of financial assistance for needy children as the program's "paramount goal."[203] The Court thus had a clear standard by which to evaluate state eligibility requirements which might result in denial of aid. In *King,* for example, the Court struck down a sexual-abstinence requirement partially on this ground, and similar sentiments were expressed in *Carleson.*[204] While recognizing the state's interest in controlling the allocation of funds to the AFDC program, the Court stated that this goal should be accomplished through establishment of the level of benefits and the standard of need, rather than by restricting the eligible population.[205]

The Act recognizes in the "as far as practicable" clause that that varying financial and social conditions across states are an important constraint on the accomplishment of program goals. In addition to the obvious conflicts posed by budget limitations, program design involves other trade-offs. For example, the desirability of measures intended to increase recipient self-sufficiency must be balanced against the prospect that they will lead in some cases to a denial of financial assistance to a family, as *Dublino* illustrates.[206]

Difficulties in using legislative purpose as an interpretive technique first became apparent in *Wyman v. James.*[207] In this case, the Court recognized several legitimate governmental purposes that the AFDC program should serve.[208] For example, the Court upheld the legality of the mandatory home visit because it allowed the state to ensure "that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid."[209] Since this particular case involved a policy which

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203 *King*, 392 U.S. at 325.

204 Carleson v. Remillard, 406 U.S. at 603.

205 *King*, 392 U.S. at 318. *See also Townsend,* in which the Court stated:

> A State's interest in preserving the fiscal integrity of its welfare program by economically allocating limited AFDC resources may not be protected by the device of adopting eligibility requirements restricting the class of children made eligible by federal standards. That interest may be protected by the State's "undisputed power to set the level of benefits."

404 U.S. at 291 (citing *King*).

206 *See, e.g.,* Lewis v. Martin, 397 U.S. 552, 559 (1970), where the Court stated that the Act's "basic purpose" was "providing aid to 'needy' children except where there is a 'breadwinner' in the house."

207 400 U.S. 309 (1971).

208 *Id.* at 318-20.

209 *Id.* at 319.

led to denial of aid for an admittedly needy household, the Court assigned considerable weight to this state interest in the proper targeting of funds. *Wyman* also recognized the government's interest in integrating rehabilitation and counseling efforts with welfare programs, and it allowed interruption of financial assistance in order to achieve this aim.

Confusion increased in *Dublino,* for the Court appeared to reverse several of its earlier holdings by authorizing state eligibility requirements as a means of controlling state funding levels. In *Dublino,* the Court noted that Congress authorized the federal WIN program in order to increase further the self-sufficiency of recipients. The Court held that similar efforts at the state level were permissible. It also noted the financial constraints facing state and local governments.[210] In the past, the Court had always followed this type of observation with an admonition that state fiscal control came through control over need and benefit levels; in this case, however, the Court used the existence of financial constraints as part of an argument justifying state nonfinancial eligibility requirements.

By mid 1973 the Court had recognized at least five potentially conflicting governmental purposes to be served by the AFDC program. These purposes were: provision of financial assistance to needy children; maintenance of control over expenditures; assurance of proper recipient use of funds; provision of training programs and other services designed to increase self-sufficiency; and assurance of adequate work incentives. However, since neither Congress nor the Court has developed a ranking of these various government interests, legislative-purpose analysis is no longer useful in determining the legality of state eligibility conditions which serve some of these aims while hindering others.

It is possible that the Court can increase the usefulness of legislative-purpose analysis by gradually reinterpreting the goals of AFDC. In two recent cases, the Court has used legislative-purpose analysis to buttress its statutory interpretation and has narrowed its interpretation of the program's purpose. While interpreting the meaning of "child" in *Burns v. Alcala,*[211] the

210 413 U.S. at 413.
211 420 U.S. 575 (1975).

Court noted that the program was intended to aid only needy children living with specific relatives, not all needy children.[212] As part of its analysis of the Secretary's regulations defining unemployment in *Batterton v. Francis,*[213] the Court reinterpreted the purpose of the AFDC-UF program, concluding that Congress intended only to aid families in which the father was involuntarily unemployed.[214]

These cases illustrate the central problem in recognizing a variety of legislative goals. Congress provides little guidance for the trade-offs between objectives required by such a reinterpretation. The Court has no standards other than its own views, and hence the results of these balancing tests are highly unpredictable.

D. *Deference to Agency Interpretation*

In a number of decisions, the Court has expressed changing opinions about HHS's general approach to implementing the federal statute and varying deference to HHS's statutory interpretations. As the Court's view of the proper state-federal policymaking relationship has developed, its approach toward agency actions has also developed. A short history of the agency's regulatory policies can illuminate this progression.

From the passage of the Social Security Act until the late 1960's, federal administrators consistently expressed a belief that under the Act there were only a limited number of restrictions imposed on state program design. Public statements of heads of the Bureau of Public Assistance indicate that they felt states were free to act unless a practice or eligibility restriction was expressly prohibited by the terms of the federal statute, or unless a prohibition could logically be inferred from a grant of federal supervisory power in some area of program design.[215] Under this view, states could impose eligibility restrictions not contained in the federal statute. While the federal government

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212 *Id.* at 581-82.
213 432 U.S. 416 (1977).
214 *Id.* at 417-20.
215 C. McKinley & R. Frase, Launching Social Security (1970); Hoey, *supra* note 3; Note, *Welfare's Condition X,* 76 Yale L.J. 1222 (1967).

might try to persuade the states to drop those requirements, they could not be forced to do so.

Gradually, the federal administrators developed a nebulous standard, often called "Condition X,"[216] which governed approval of state plans. Under this standard, HEW would disapprove state eligibility requirements only when they violated the constitutional rights of recipients or were irrational in light of the purposes of the Act.[217]

HEW felt that it should not cut off funds as long as states complied with certain federal requirements, such as restrictions on the basis of deprivation, consideration of income and resources, and residency requirements. Certain other areas were expressly committed to state discretion, such as the level of benefits and the standard of need in the state. HEW also believed that many other program features were not clearly committed to the discretion of either the states or the federal government, but were to be hammered out through bargaining over the course of the grant-in-aid relationship. The Department recognized that since the states could set benefit levels or even drop out of the program, forcing states to spend more money on some aspect of the program could well lead to declines in spending in other areas. There was no clear allocation of decision-making power under the statute and no clear concept of the rights of the states, the federal government, or recipients under the program. Much depended on the outcome of the bargaining process. HEW tried to impose federal standards when it felt the issues were important and when it felt that the states would comply.

The Court first had occasion to comment on HEW's "regulatory" approach in *Rosado v. Wyman,* a 1970 case dealing with a congressionally ordered cost-of-living increase. The state argued that the federal statute gave HEW "primary jurisdiction" over statutory interpretation and enforcement.[218] However, the Court reasoned that the doctrine of "primary jurisdiction" did not apply to this case, as HEW procedures gave the petitioning AFDC recipients no opportunity to present their

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216 *See* Note, *supra* note 215.
217 *Id.* at 1224.
218 397 U.S. 397, 405-07 (1970).

case directly to the Department.[219] The concurring opinion also noted that "HEW has been extremely reluctant to apply the drastic sanction of cutting off federal funds to States that are not complying with federal law. Instead, HEW usually settles its differences with the offending States through informal negotiations."[220] The Court's perception of HEW as a slow-moving, unresponsive agency, insensitive to the desire for recipient involvement in enforcement, clearly contributed to the Court's willingness to open the door to a long line of AFDC cases in the federal courts.

In *Townsend,* the Court clearly rejected the basic premise behind "Condition X," namely, that some but not all state-imposed nonfinancial eligibility conditions were lawful:

> We recognize that HEW regulations seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished to "all eligible individuals."[221]

The Court's argument that there were clearly defined federal standards of eligibility which must be enforced was a clear rejection of HEW's bargaining approach.

Dublino represents an important shift in judicial attitude. The Court reasoned that the characteristics of the grant-in-aid structure made negotiated settlements of policy disputes proper in many, though not all, situations: "Conflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control."[222] *Dublino* recognized the difficulties of rigid enforcement of a vague and controversial federal policy in a voluntary program.[223] It partially accepted HEW's negotiation style, a stand which later cases have not repudiated.

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219 *Id.* at 420.
220 *Id.* at 426.
221 404 U.S. at 286.
222 413 U.S. at 423 n.29.
223 For a general discussion, see F. Doolittle, *supra* note 15.

The Court has not been consistent in its treatment of administrative interpretations of specific sections of the Act. In a number of early AFDC cases, the Court cited lack of a favorable agency interpretation in support of its argument, although it did not rely entirely on the agency's view. In *King v. Smith,*[224] the Court discussed in detail HEW policy leading up to the Flemming Ruling of 1961, a ruling which later received congressional support.[225] The Court pointed out that HEW had never formally approved the Alabama requirements disputed in the case.[226] In *Rosado v. Wyman,* the Court also included a discussion of HEW regulations which supported the Court's opinion.[227]

In *Lewis v. Martin,*[228] HEW regulations again played a crucial role. The case involved California's attempt to treat the income of a stepfather or other man in the household as available to the AFDC family without any inquiry into actual availability.[229] In rejecting this irrebuttable presumption, the Court cited the passage in *King v. Smith* which held that only people with a legal support obligation could be treated as parents. It then cited with approval HEW regulations which further limited the definition of "parent" to individuals with a support obligation of general applicability, and prohibited the state from assuming the availability of nonrecipients' income.[230] By limiting the def-

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224 *See supra* text accompanying notes 54-65.

225 *See supra* note 61.

226 392 U.S. at 326 n.23.

227 The Court stated:

> This reading is also buttressed by the fact that this construction has been placed on the statute by the Department of Health, Education and Welfare. While, in view of Congress' failure to track the Administration proposals and its substitution without comment of the present compromise section, HEW's construction commands less than the usual deference that may be accorded an administrative interpretation based on its expertise, it is entitled weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program which it administers.

397 U.S. 397, 415 (1970).

228 397 U.S. 552 (1970).

229 *Id.* at 554.

230 The regulation in question, then codified at 45 C.F.R. § 203.1 (now § 233.90(a)), read as follows:

> (a) A State plan for aid and services to needy families with children . . . must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremoniously married to the child's natural or adoptive parent and is legally obligated to support the child under a state law of general applicability

inition of "parent," the case went beyond the *King* holding, which dealt with a man with no legal relationship to the recipient household. The Court explicitly stated: "Nothing in this record shows that this administrative judgment does not correspond to the facts. We give HEW the deference due an agency charged with the administration of the Act."[231]

In later cases, the Court's decisions did not always agree with HEW interpretations. In *Wyman v. James,* the Court ignored HEW regulations which seemed to prohibit home visits without the recipient's consent by making the recipient the primary source of information.[232] In *Townsend,* the Court rejected an HEW regulation that "seemed to imply that States may to some extent vary eligibility requirements from the federal standards."[233] The Court found that this regulation was not entitled to judicial deference because it was inconsistent with the statutory requirement that "aid be furnished to all eligible individuals."[234] In *Carleson,* the Court encountered a situation in which HEW regulations stated one thing, but HEW practice allowed another: the regulations specifically stated that the continued parental absence for any reason was an acceptable basis of deprivation of support and listed active duty in the military as an example,[235] but HEW had also approved state plans making people in this category ineligible.[236] After examining other

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which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state.

The regulation was directed at state attempts to pass special support obligation laws that applied only to welfare families.

231 397 U.S. at 559.

232 *See supra* text accompanying note 80.

233 *See supra* text accompanying note 70.

234 *See supra* text accompanying note 69.

235 406 U.S. at 601. The regulations, 45 C.F.R. § 233.90(c)(1)(iii) (1980), read as follows:

> Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of the function of planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and may have left only recently or some time previously.

236 *Id.* at 602.

evidence, the Court approved the regulations and struck down the state restriction. Finally, in *Dublino,* the Court discovered no formal regulation addressing the issue of whether the WIN program preempted state work programs. The Court, however, found HEW's continued approval of state work programs persuasive in light of Congress's assumed knowledge of this practice.[237]

Burns and *Batterton* suggest a shift in judicial perspective which reflects a change in attitude toward the meaning of the statute and HEW's enforcement strategy. These cases explicitly rely on agency interpretations as the basis for their holdings. In *Burns,* the plaintiffs introduced evidence that HEW in the past had interpreted the phrase "dependent child" to include unborn children;[238] at trial, HEW was able to point to more recent interpretations which held that aid to the unborn was not part of the normal AFDC program.[239] In spite of the plaintiffs' arguments that this was a recent change, the Court chose to put considerable weight on the more recent HEW interpretation.

Batterton[240] illustrates how the Court treats informal HEW decisions and formal regulations differently. The Court had earlier affirmed a case striking down HEW approval of state plans which excluded the voluntarily unemployed even though the formal regulation did not authorize this practice. After amendment of the regulation to allow state variations in this area, the Court deferred to HEW's interpretation and approved the state regulations.

These cases raise the question of whether the Court's apparently increasing reliance on agency interpretation is a sensible approach. Court deference to agency rules seems most valid when Congress has expressly delegated interpretive authority to the agency. In less clear-cut cases, there may also be a justification for deference: a considerable body of research suggests that, in grant programs, Congress merely lays out the basics of program design.[241] It chooses the grant approach to avoid deciding detailed and potentially controversial questions

237 413 U.S. at 420.
238 420 U.S. at 584.
239 *Id.*
240 432 U.S. 416 (1977); *see supra* text accompanying note 133.
241 *See* M. DERTHICK, *supra* note 3.

with the expectation that federal and state administrators will negotiate remaining program requirements.

This understanding of grant programs implies a quite different view of the policymaking process in grant programs from that suggested in *King, Townsend,* and *Carleson.* These early cases implied that passage of the federal statute ended the federal policymaking process. All key program decisions were either spelled out in the statute or clearly left to the states. The Court gave little weight to the process of negotiation over the course of the program or to procedural issues of administrative law.

The alternative view suggested above implies that policymaking continues throughout the course of grant administration. Congress passes an enabling statute knowing it does not resolve key issues. It establishes an adminstrative structure knowing that federal and state administrators must negotiate the remaining program characteristics. According to this view, the implementation phase of grant programs assumes nearly as much importance as the initial enactment of the statute. Concern with the process of administrative decision-making becomes expected and legitimate. The Court should become less willing to find the answer to a legal controversy in legislative history or purpose and more willing to resolve disputes on procedural grounds.

If this recommendation is followed, the Court's decisions affecting the process of negotiation will assume new importance. The courts will, however, remain an important forum for resolution of disputes over state AFDC regulations. Since recipients cannot demand that HHS hold a hearing to assess a proposed regulation's compliance with the Social Security Act, they must rely on litigation to affect the negotiation process.

Conclusion

In the early AFDC cases — *King v. Smith, Townsend v. Swank,* and *Carleson v. Remillard* — the Supreme Court employed a relatively simple method of statutory interpretation. Realizing that in many cases the wording of the Social Security Act would not be conclusive, the Court developed interpretive approaches which relied on its view of the legislative history

and purpose of the Act. A strong presumption of mandatory coverage for all within the federal definition of eligibility was coupled with an emphasis on the single program goal of aiding needy children. This line of reasoning guaranteed that most state-imposed nonfinancial eligibility conditions would be found contrary to the federal statute, and therefore would be declared invalid.

The Court's approach to state restrictions on eligibility changed gradually as more cases arose. In *New York State Department of Social Services v. Dublino,* the Court apparently reversed the presumption of mandatory coverage and held that state restrictions would be struck down only when there was clear evidence of congressional intent to preempt state policymaking power. The case also recognized other policy goals, such as increasing the self-sufficiency of recipients, preventing fraud, and allowing states to control their own finances. Without any clear priorities among these various objectives, however, legislative-purpose analysis became relatively useless.

In recent cases, the Court has struggled to develop a consistent approach to statutory interpretation. In *Burns v. Alcala,* the Court strongly opposed the use of any presumption in determining the federal definition of the eligible population. At the same time, the Court seemed to resurrect a modified *Townsend* presumption that coverage of the federally eligible was mandatory absent evidence that Congress intended otherwise. Both *Burns* and *Batterton v. Francis* suggest an increasing reliance on formal agency interpretation in close cases. Experience will show whether this synthesis of past approaches is workable.

These doctrinal changes have accompanied, and have probably been motivated by, a change in the Court's view of proper state-federal relations in the AFDC program. It is unlikely that these changes came about because of the difficulty of applying the court's early doctrine to new situations; in fact, the doctrines were relatively simple to apply, the presumptions fairly strong, and the results reasonably predictable. Rather, changes in doctrine apparently grew out of changing majority views concerning the policymaking role of the states in grant programs.

The changes were advantageous, for it seems clear that the Court's original view of intergovernmental relations in the AFDC context was not the same as Congress's. In *King, Towns-*

end, and *Carleson,* the Court implied that it viewed the federal statute as something similar to a formal contract between the states and the federal government; all the terms of the agreement were contained in the document, and information on customary relations between the states and federal administrators was rarely relevant in interpreting federal requirements. According to this view, the statute clearly allocated each policy decision either to the states or to the federal government. A strong though rebuttable presumption of federal power was used to decide close cases.

Gradually the Court came to adopt a view that recognized the realities of grant-in-aid programs. In *Dublino,* the Court acknowledged the importance of negotiations in grant program design and suggested that state programs could differ from federal requirements and still receive federal funding. Though *Burns* suggests a retreat from some of the more extreme aspects of *Dublino,* it still accepts a large role for state-federal negotiation. This change in legal doctrine suggests that many important AFDC program design decisions may be made differently in the future.[242] Before 1968 and *King v. Smith,* HEW implemented the Act through informal negotiations between the federal administrative agency and the states. Not until the late 1960's did any AFDC regulations even appear in the *Code of Federal Regulations.*[243]

With *King v. Smith,* the role of federal-state administrative negotiations was severely limited. A much greater proportion of important policy decisions and statutory interpretations was subject to public scrutiny although most scrutiny took place in the course of litigation. Many important state policy decisions were greeted with lawsuits filed by recipient groups. For example, a study of the California Welfare Reform program, implemented by Governor Reagan in 1971, showed that nearly thirty lawsuits can be directly traced to various parts of the program revision.[244]

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242 *See* F. Doolittle, *supra* note 15.

243 In the course of implementing the 1967 amendments to the program, HEW began routinely to publish AFDC regulations in the *Federal Register.*

244 *See* M. Wiseman & F. Doolittle, The California Welfare Reform Act: A Litigation History (1976) (prepared for the Income Dynamics Project, University of California, Berkeley).

Recent changes in court doctrine, as seen in *Dublino, Burns,* and *Batterton,* suggest an expansion of the role of negotiation. As a result of this development, courts will be less receptive to substantive challenges of state restrictions. Recipient litigation strategy will probably shift toward attempts to influence the "bargaining" between the states and the federal government. Administrative interpretations will play a large role in deciding those substantive disputes which do end up in court.

Recipient groups may have a larger role in the negotiation process than in the pre-*King* days. Since *Rosado v. Wyman,*[245] recipients have had legal standing to sue states for nonconformity with federal requirements. This threat of litigation could be the mechanism which keeps state and federal administrators from reaching a settlement inconsistent with established legal doctrine. Since there is no way to make a binding agreement with recipient groups which would later prevent them from suing states, formal recipient participation in negotiations may not be the rule, but informal consultation could be quite important. Recipient groups therefore may find that they are most likely to have an impact on state AFDC rules when they make their views known during the policy-formulation stage, rather than waiting until after the regulations have been enacted.

Despite what appears to be a shift toward greater deference to HHS's views regarding the Social Security Act, there is still no clear congressional statement regarding the proper allocation of policymaking functions between the states and the federal government. This vacuum hinders both judicial efforts to interpret the statute and state efforts to implement the program.

This problem could be alleviated in at least two ways. One approach would be for Congress to change the AFDC program into a block-grant program that would give state and local governments much more discretion than they now have in the structuring and administration of AFDC. Two examples of federal programs that have embodied the block-grant approach are the Community Development Block Grant program[246] and the Comprehensive Employment and Training Act (CETA) program.[247]

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245 397 U.S. 397 (1970).
246 42 U.S.C. §§ 5301-5319 (1976 & Supp. III 1979).
247 29 U.S.C. §§ 801-999 (Supp. III 1979).

The 1981 amendments to the Social Security Act,[248] especially those dealing with work requirements, are a partial step in this direction. Some members of Congress may, however, be concerned about the possibility that states will enact requirements that are intrusive and operate to the disadvantage of minorities.

A preferable approach would be for Congress to attempt to clarify policymaking responsibilities within the existing administrative structure. One possible resolution would be to define those areas of the program for which federal requirements are mandatory and exclusive. This approach could lead to a general statement similar to that developed in *Townsend,* namely, that coverage of all federally eligible groups is mandatory unless there is an explicit statement in the statute to the contrary. Another possibility would be development of a list of specific areas in which the states had the power to add requirements. Congress could also attempt to clarify the legislative purpose of the program, although no detailed discussion of the various tradeoffs between goals would be likely to emerge from this debate.

The Court now has a more realistic view of the grant-in-aid process than it had in the initial cases, but it has yet to develop a predictable doctrine to replace the historically inaccurate *Townsend* approach. Congressional resolution of this legal confusion is needed, but clarity may be too much to expect; Congress may well have chosen the structure of the program precisely because it desired to avoid making clear statements about program details and the allocation of power.

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248 Examples of those amendments are §§ 2307-2308 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 846-50 (to be codified at 42 U.S.C. §§ 609, 614).

ARTICLE

PROTECTION FROM UNJUST DISCHARGES: AN ARBITRATION SCHEME

Kenneth C. Mennemeier*

*Non-unionized workers in this country have traditionally been considered at-will employees in the eyes of the law. Within the last few decades, however, attempts have been made to improve the precarious position of such employees and especially to protect them from capricious, retaliatory, or otherwise unjust discharges.** In this Article, Mr. Mennemeier discusses the relative merits of the various legislative enactments and judge-made doctrines that have been created to protect at-will employees from unjust discharges. He argues that the goals of efficiency and equity would be best served by the institution of an arbitration scheme designed to resolve discharge disputes between employees and employers. He then discusses the most important features of such a scheme and presents for consideration a bill, to be introduced in the Michigan legislature, that incorporates most of his ideas.*

American workers can claim little job security in comparison with their counterparts in other Western industrialized countries.[1] Even within the American workforce, employees enjoy dramatically disparate levels of protection against arbitrary dismissal and discipline.[2] At one end of the spectrum are public-sector employees and employees covered by collective-bargaining agreements. Generally, these employees may only be discharged for reasons that comply with a "just-cause" standard

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** A proposal for shielding employees against one form of employer retaliation was introduced in this publication last year. *See* Carroll, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35 (1981).

1 *See* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 508 (1976) ("The United States is one of the few industrial countries that does not provide general legal protection against unjust dismissals."); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1835-36 (1980).

2 *See* Summers, *supra* note 1, at 482-83; Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743, 768 (1979); Note, *supra* note 1, at 1816.

for dismissal.[3] Meanwhile, the majority of American workers occupy a much less protected position: they are "at-will" employees.[4] What little protection these workers receive comes from broadly framed federal statutes which protect them from discharge based on select characteristics, such as age, sex, race, and religion.[5] Some of these workers receive additional state protection against discharge resulting from assertions of statutory rights.[6] Nonetheless, the average American worker has little recognized right to retain his job.

Traditionally the law of job rights has been dominated by the "at-will" doctrine. Under this doctrine, the employer is free to discharge an employee whenever he pleases, even if his reasons are whimsical or capricious. This unbridled employer power has been counterbalanced by the employee's ability to leave his employment whenever he pleases.

Only in the past decade have state courts begun to recognize causes of action — based on both contract and tort principles — for wrongful or retaliatory discharge.[7] The New Hampshire Supreme Court's 1974 decision in *Monge v. Beebe Rubber Co.*[8] was the most publicized early judicial rejection of the at-will

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3 Federal civil-service employees are protected under the Civil Service Reform Act of 1978, § 204(a), 5 U.S.C. § 7503 (Supp. II 1978). *See generally* Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal,* 63 Nw. U.L. REV. 287, 290-307 (1968). State employees enjoy a variety of protections including tenure, civil-service, and even constitutional protections against unjust dismissal. *See, e.g.,* Elrod v. Burns, 427 U.S. 347 (1976). *See generally* J. WEISBERGER, JOB SECURITY AND PUBLIC EMPLOYEES (2d ed. 1973). Arbitration provisions, a common element of collective agreements, generally impose a "just cause" limitation on the employer's power to discharge. *See, e.g.,* Peerless Laundry Co., 51 Lab. Arb. 331 (1968). *See generally* M. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES 230-38 (1974).

4 *See* Summers, *supra* note 1, at 483; Note, *supra* note 1, at 1816.

5 *See infra* notes 45-53 and accompanying text.

6 *See, e.g.,* MO. ANN. STAT. § 287.730 (Vernon 1980) (Discharge or discrimination against anyone exercising his or her right to compensation is prohibited, and employees are authorized to bring civil actions against employers who impair their exercise of these rights.); N.J. STAT. ANN. § 34:15-39.1 (West 1980) (imposing fines and/or imprisonment on employers who discharge or discriminate against workers who make claims to workers' compensation benefits and requiring that such an employee be restored to his employment and compensated for any loss of wages arising out of the discrimination).

7 *See, e.g.,* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330 (1980) (tort action); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (tort action); Adler v. American Standard Corp., 432 A.2d 473 (Md. App. 1981); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (tort action); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (contract action); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (contract or tort action); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (tort action).

8 114 N.H. 130, 316 A.2d 549 (1974).

doctrine. In that case the court ruled that all employment contracts implicitly protect workers against terminations "motivated by bad faith or malice or based on retaliation . . ."[9] The court held that an employee who had been fired because she had refused her foreman's social advances had a cause of action for damages against her employer.

A more recent case which has received much attention is the 1980 decision of the New Jersey Supreme Court in *Pierce v. Ortho Pharmaceutical Corp.*[10] That court followed a line of reasoning similar to that found in *Monge* and recognized a cause of action where it was alleged that a discharge violated a "clear mandate of public policy."[11] These and other cases[12] have made it clear that there is an evolving judicial trend in favor of recognizing employee needs for and rights to job security.[13]

The need for employee protection has long been the subject of legal commentary.[14] Much recent writing has warmly embraced the judiciary's increasing responsiveness to this need.[15]

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9 114 N.H. at 133, 316 A.2d at 551.

10 84 N.J. 58, 417 A.2d 505 (1980).

11 84 N.J. at 72, 417 A.2d at 512.

12 *E.g.*, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

13 The trend, though strong, is not universal. Several states have declined opportunities to recognize causes of action for retaliatory discharge. *See, e.g.*, Martin v. Tapley, 360 So. 2d 708 (Ala. 1978) (employee allegedly discharged in retaliation for filing worker's compensation claim held not to have a cause of action); Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (employee allegedly fired for refusing to falsify medical records held not to have a cause of action); Segal v. Arrow Industrial Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978) (employee allegedly discharged in retaliation for filing worker's compensation claim held not to have a cause of action); Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979) (employee reported that his superior was soliciting and receiving kickbacks, no cause of action found); Ibris v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978) (employee had written a letter criticizing employer's policies and supporting another's claim for unemployment benefits; no cause of action found); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. 1977) (employee allegedly discharged upon announcing his intention to attend law school at night).

14 *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report*, 18 RUTGERS L. REV. 428 (1964); Peck, *Some Kind of Hearing for Persons Discharged from Private Employment*, 16 SAN DIEGO L. REV. 313 (1979); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *supra* note 1; *see also* Kelly v. Mississippi Valley Cas. Co., 397 So. 2d 874 (Miss. 1981); *cf.* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1981) (applying Georgia and/or Texas law).

15 *See, e.g.*, Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1464 (1975) (recognition of a common-law cause of

An examination of the literature on wrongful discharges produces a clear picture of agreement among the commentators that the law should provide workers with protection against unjust dismissals.[16] However, there is no consensus — in fact, there is little discussion at all in the literature — on the question of how best to provide such protection.[17] Most writers have limited their efforts to arguing that a need for protection exists.[18] The recent success of these efforts has accentuated the need to consider methods for ensuring that employees are adequately protected from wrongful discharge.

This Article proposes a means for providing such protection through the use of arbitration procedures. It will begin with a brief review of the recent literature on wrongful discharges. After examining the history and development of the at-will doctrine, the Article will consider how the doctrine has suffered piecemeal emasculation by legislative enactments, court decisions, and private-party contracts. Concluding that this emasculation argues for abrogation of the at-will doctrine, the Article will investigate possible means of providing additional protection to employees. After examining possible common-law and statutory solutions, the Article proposes the institution of state-mandated arbitration procedures.

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action is "sociably desirable"); Comment, *Kelsay v. Motorola, Inc. — A Remedy for the Abusively Discharged at Will Employee*, 1979 S.ILL. U.L.J. 563, 585 (1979) (recognition of cause of action for retaliatory discharge "is a major advance in the law"); Comment, *Tort Action for Retaliatory Discharge upon Filing Workmen's Compensation Claims*, 12 J. MAR. J. PRAC. & PROC. 659, 681 (1979) (creation of tort action "is a victory shared by all who have felt the imbalance and inequity of being in the employ of another"). *See also* 2A A. LARSON, WORKMEN'S COMPENSATION § 68.36 (Supp. 1979) (speaking specifically of discharges for filing workmen's compensation claims: "it is odd that such a decision was so long in coming").

16 *See* Note, *supra* note 1, at 1817; *see also* the authorities cited *supra* note 14.

17 Many scholars have been satisfied with first noting the lack of consideration as to what the *best* means of protection would be and then just proposing a judicially recognized cause of action as a possible solution. *See, e.g.*, Blades, *supra* note 14; Note, *supra* note 1; Note, *Non-Statutory Causes of Action for An Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743 (1979); Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552 (1980); and Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

18 *See, e.g.*, the last three Notes cited *supra* note 17; Comment, *Limiting the Employer's Absolute Right of Discharge*, 29 U. KAN. L. REV. 267 (1981).

I. THE PROBLEM

A. *The Common-Law Rule*

The common-law at-will doctrine has a pendulous history. It achieved immediate renown upon articulation nearly a century ago, soon gained constitutional recognition,[19] but has since been whittled to where its continued existence is subject to sharp criticism. The rule, however, "stubbornly survives."[20]

Treatise writer H. G. Wood first articulated the rule in 1877. "The rule [in America] is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof."[21] Despite the fact that none of the four cases Wood cited as authority supported him,[22] the rule achieved immediate acceptance. The rule's enthusiastic reception can only be explained in light of the political, social, and economic forces of the times.[23] America experienced unprecedented industrial growth and economic prosperity during the nineteenth century. During that period, economic growth was a value of the highest order; consequently, it was neither surprising nor unusual that other considerations were abandoned in order to promote this goal. Laissez-faire economic attitudes prevailed as big business brought a prosperity previously unknown to man.

Contract theory was well suited for promoting the values of the time. Its approach to relationships embodied in contractual

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19 *See* Adair v. United States, 208 U.S. 161 (1907); Coppage v. Kansas, 236 U.S. 1 (1915). In both cases, the Court invalidated legislation that limited the employer's right to hire and fire whom he wishes. This right was acknowledged as a constitutionally protected property right, protected by the 5th and 14th Amendments. This stature, however, was short-lived, as in 1937 the Court repudiated the constitutional sanctity of the employer's unfettered right to discharge. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court upheld the constitutionality of the National Labor Relations Act, expressly approving its protection of the right of employees to unionize free of intimidation and coercion by employees.

20 Summers, *supra* note 1, at 486. *See generally* Feinman, *The Development of the Employment at Will Rule,* 20 AM. J. LEGAL HIST. 118 (1976).

21 H. WOOD, TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877); *see also* Note, *supra* note 1, at 1825.

22 *See* Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 341 (1974).

23 For two much more detailed discussions of the history of the common-law rule, see Blades, *supra* note 14; Comment, *A Common Law Action for the Abusively Discharged Employee,* 26 HASTINGS L.J. 1435 (1975).

agreements was simple: the courts were to respect and enforce all agreements into which parties voluntarily entered. Because the employer and employee voluntarily agreed to work together, even employment relationships were cast in contractual terms.

Eventually, the principle of "mutuality of obligation" arose and became the legal underpinning of the at-will doctrine. Under that principle, where one party was not bound to a particular contractual provision or condition, neither was the other. Consequently, as it was thought that employees could not be required to serve against their will, courts refused to impose an analogous fixed term on employers. In other words, if an employer could not compel an employee to serve against his will, an employee could not compel an employer to continue his employment against the latter's will. The employee's only means of protection against arbitrary firing was to seek employment for a fixed term. However, it is highly doubtful that employers often agreed to the inclusion of such terms in employment contracts.[24] All too often, application of this contract theory to employment relationships contributed to complete employer domination of employees.

During this era of prosperity, employers grew in size as employees grew in number. The previously common master-servant or teacher-apprentice relationships became rarities. The law of master-servant, so often applied to employment relationships, fast became obsolete. In short, soon after contract law had begun to be regularly applied to employment relationships, those relationships outgrew the presumptions underlying that theory.[25]

B. *The Need for Protection*

Commentators have long argued that employees should be protected against arbitrary and ill-justified employer actions.

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24 *See* Note, *supra* note 1.

25 *See* Blades, *supra* note 14, at 1418 ("The industrial revolution made an anachronism of the absolute right of discharge by destroying the classical ideal of complete freedom of contract upon which it is based."). *See also* Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345 (1937) ("The system of 'free' contract described by the nineteenth-century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived and too harmonious to correspond with reality.").

The issue has been discussed from a variety of perspectives. Piecing together the works of these commentators produces a picture of an America where the results of industrialization have led to a society in which the at-will doctrine is no longer a satisfactory rule for the workplace.[26] An environment characterized by job immobility,[27] specialization,[28] and stigmatization,[29] when combined with employee interests in continuous employment at the same workplace, creates a situation in which the employee is highly vulnerable to all types of questionable employer demands.[30]

The case for protecting employee job security has already

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26 F. Tannenbaum in his book A PHILOSOPHY OF LABOR 9 (1951) ably makes the argument that America has become a "nation of employees" dependent upon others for "the substance of life." He traces the historical trend towards a narrowing of variety of options available to those seeking to earn their livelihood. The taming of the western frontier, industrialization, government regulation, the high cost of capital and technology, and the high cost of cultivatable land are all characterized as making both individual entrepreneurship and homesteading unrealistic means for earning a living.

27 Job immobility is caused by to a variety of forces. A high unemployment rate and its consequent link to a discharged individual's inability to locate new employment has combined with other factors, such as specialization of tasks, stigmatization, and workers' perceptions regarding their mobility to produce an inhospitable climate for mobility within the workforce of industrial workers. J. GALBRAITH, AMERICAN CAPITALISM 114 (2d ed. 1956); *see also* Blades, *supra* note 14, at 1405.

28 As an employee performs a single task or set of tasks for one employer, he frequently acquires skills which are not immediately applicable to other tasks and therefore not useful to other employers. Moreover, it is often less expensive to hire a younger, inexperienced worker and train him than to hire an experienced worker who requires retraining while carrying the higher price tag of the pay rate which he previously received and at which he has grown accustomed to living. An equally unattractive alternative would be to pay the employee at a lower rate and risk his potential dissatisfaction with his compensation.

29 Professor Peck suggests a bothersome scenario. Consider a grocery store clerk fired without explanation. When applying for employment elsewhere and unable to explain her dismissal, "[Y]ou know what the prospective employer is going to conclude . . . [He] will conclude that she had her hand in the till, and . . . [he] will not want to expose . . . [his] own till to such a risk." Peck, *Some Kind of Hearing, supra* note 14, at 313-14. Peck poses the same hypothetical in Peck, *Unjust Discharges From Employment, supra* note 14, at 4-6.

30 Discharged workers lose eligibility and priority for promotions since these are often based upon one's work record with an employer. A worker would have to prove himself with a new employer before being eligible for advancement. Moreover, this employee concern is greatly magnified in many American workplaces where the promotion schemes are based upon the number of years which the employee has spent with the company.

Self-esteem and the stature achieved among co-workers are examples of other employee interests that a worker loses when forced to leave one work setting and enter another. *See* KAHN, THE MEANING OF WORK: INTERPRETATION AND PROPOSAL FOR MEASUREMENT IN THE HUMAN MEANING OF SOCIAL CHANGE (A. Campbell & P. Converse eds. 1972); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 339-40 (1974).

been competently presented elsewhere — and, judging by the judicial response, that presentation has been persuasive.[31] Nevertheless, the most persistently advanced justification for the at-will doctrine needs to be directly addressed, albeit quite briefly. Some would argue that, insofar as the employment contract is a negotiated, voluntary agreement between employer and employee, the explicit or implicit at-will clause in the contract has the employee's bargained consent and should therefore bind him. However, the negotiation process by which the employee presumably agrees to enter the at-will relationship is a fiction.[32] The usual disparity between employers' and employees' bargaining strengths leaves workers with no choice but to accept proffered at-will terms. Moreover, any particular employee is likely to be more dependent on his employer for his well-being than the employer is on the employee.[33] This result follows from the employer's greater capacity both to bear and

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31 *See supra* note 7 and *infra* notes 54-60 and accompanying text.

32 One commentator contends that the inequality-of-bargaining-strength argument, which appears in the text, insufficiently explains the at-will term that exists in most employment relationships. *See* Note, *supra* note 1, at 1828-36. The Note argues that the at-will term is a consequence of an imperfect negotiation process. First, job applicants lack adequate information to assess the importance of a job-security clause. To assess the risk of discharge, workers would need information regarding the employer's history of discharging individuals. They would also need to anticipate or predict the disruptive effect job dismissal would have on their lives. People, however, tend not to consider such negative prospects during moments of good fortune, such as when one is agreeing to (negotiating?) the terms of new employment. Hence, we perceive both an inadequate availability of pertinent information and an incapacity to appraise adequately the information that is available. These informational "barriers" disrupt the negotiation process, in part causing "inefficient" results. *Id.* at 1830.

Second, the Note argues that transaction costs prohibit employers from negotiating anew the terms of employment with each new employee. It would be prohibitively expensive to negotiate terms with each employee. It would also be costly to store such information, and to retrieve it each time an employee raised a complaint. Instead, employers typically offer a package deal to each employee among a class of employees. Under this procedure, the content of each package and who receives what package becomes, because of uniformity of acceptance of these packages, common knowledge under the roof of a single employer. This unwillingness and incapacity to negotiate job-security clauses with each individual also causes imperfections in the contract-negotiation process.

33 The logic of any argument that points to disparate bargaining strengths as a basis for providing extra employee protection falters when the employer is a small and only marginally profitable operation. Consequently, any protection founded on such logic should not apply against employers in positions as equally insecure as that of the lone, non-unionized employee. This logic, however, does not apply against the points raised in the *Harvard Law Review* Note, *supra* note 32. Consequently, the scope of protection, to the extent that it is provided only against employers of a certain size, is open to debate. *See infra* notes 131-33 and accompanying text.

spread his costs,[34] as opposed to a worker's relative inability to bear and spread his. Consequently, an employee is more susceptible to injury by discharge than an employer is to injury caused by an employee's departure. Clearly, in a situation where one party enjoys a much stronger bargaining position than the other, little can be made of a "consent" by the weaker party.[35] The contrast between unionized and non-unionized workers vividly illustrates the significance of the poor bargaining position of the individual employee. Unions, which exercise bargaining strength comparable to that of large employers, are able to insist upon contract terms that either explicitly or implicitly include a just-cause requirement for termination.

Consideration of the factors causing employee vulnerability has led many commentators, jurists, and legislators to question the soundness of the at-will doctrine. Continued application of the doctrine to ordinary employees seems inevitable in light of the dichotomy that exists between unionized and non-unionized workers. The former enjoy just-cause protections while the latter are left to the uncertainty and discomfort caused by the constant threat of dismissal. A similar problem has been noted in the differing degrees of protection conferred upon public employees as opposed to at-will employees.[36] Those who have considered these disparities have almost uniformly concluded that no satisfactory justifications for these disparities exist.[37]

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34 An employer's costs include those incurred by leaving a position vacant and by having an increased need for overtime labor.

35 In the similar setting of commercial law, legislators and jurists have dealt with the same issue of disparity of bargaining strengths by abrogating the long-standing "caveat emptor" doctrine and imposing strict products liability. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 17, 1974).

The Uniform Commercial Code redresses the disparity in bargaining power between contractors with a variety of provisions. The Code authorizes courts to strike "unconscionable" clauses. U.C.C. § 2-302 (1977). It also imposes implied warranties of merchantability and fitness for a particular purpose in contracts for the sale of goods, ameliorating the harshness of the old "caveat emptor" rule. §§ 2-314, 2-315 (1977).

Similarly, Congress enacted the Dealer's Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976), "to remedy the manifest disparity in the ability of franchised [automobile] dealers . . . to bargain with . . . [automobile] manufacturers. H.R. REP. No. 2850, 84th Cong., 2d Sess. 1 (1956).

36 This disparate treatment has been questioned by Professor Peck and others. *See, e.g.*, Peck, *Some Kind of Hearing*, *supra* note 14, at 315.

37 *See id.* at 315; Note, *supra* note 1, at 1816; Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At-Will" Employment Relationship*, *supra* note 17, at 768.

Because the logical underpinnings for the old approach to employment relationships have been undermined as the needs of workers have changed, the law has a duty to realign itself in order to ensure greater responsiveness to the needs of the present-day employee.

Contract theory assumes that contracting parties, of comparable bargaining strength and with full information, could, through a negotiation process, achieve a mutually advantageous agreement. It is now clear that such a theory of law, which assumes all parties to be roughly equal in ability and willingness to negotiate the terms of agreement, should not be applied to situations where one party, because of superior bargaining strength, is able to offer take-it-or-leave-it terms to others and still find an adequate number of takers. "Freedom to contract" is not a useful concept where the contractors are possessed of such widely varying degrees of freedom.[38]

C. *The Recent Emasculation of The Common-Law At-Will Rule*

The passage of time has not left the at-will doctrine unscathed. Perhaps the most significant limitation upon employers' discretionary powers came with the passage of the National Labor Relations Act (NLRA) in 1935.[39] The NLRA protected workers from discipline in retaliation for "concerted activity."[40] Its underlying purpose was the promotion of employee collectivization in order to reduce industrial strife and labor unrest.[41] The NLRA's passage marked the beginning of a gradual emasculation of the at-will doctrine on three fronts. First, Congress

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38 *See supra* note 30. *Cf.* Coppage v. Kansas, 236 U.S. 1, 41 (1914) (Day, J., dissenting) ("[T]he fact that both parties are . . . competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality. . . ."), *quoting from* Holden v. Hardy, 169 U.S. 366, 397 (1907); *see also supra* note 25.

39 29 U.S.C. §§ 151-168 (1976). The NLRA survived a constitutional attack two years after its passage in NLRB v. Jones & Laughlin Corp., 301 U.S. 1 (1937). *See generally* Note, *supra* note 1, at 1818-24.

40 National Labor Relations Act §§ 7, 8(a), 29 U.S.C. §§ 157, 158(a) (1976).

41 For a discussion of the findings and declarations of policy behind the NLRA, see National Labor Relations Act § 1, 29 U.S.C. § 151 (1976).

and state legislatures have enacted numerous statutes that preclude dismissals based upon certain employee characteristics. Second, several state courts have recently allowed causes of action that, to varying degrees, recognize employee interests in job security. Finally, collective-bargaining agreements now almost universally include just-cause requirements for discharge, protecting employees against arbitrary exercise of the employer's power to discharge.

Thirty years ago, in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*,[42] the Supreme Court held that states have the authority to regulate the workplace and protect employees. The Court invited state legislatures to enact laws protecting employees against "injurious practices"[43] and "industrial conditions which they regard as offensive to the public welfare."[44] Response to this invitation has come on both the state and federal levels in the form of a sporadic parade of piecemeal legislation. Numerous statutory exceptions to the at-will doctrine have been enacted, placing limitations on the employer's absolute power of discharge. Race, color, religion, national origin, and sex have been recognized as illegitimate bases upon which to ground dismissal.[45] Other legislation restricts the employer's power to fire workers because of their age[46] or because they have been called as jurors.[47] Public employees have been given comprehensive statutory protection which includes a just-cause standard for dismissal.[48] Lawmakers

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42 335 U.S. 525, 536-37 (1949). *See generally* Comment, *Tort Action for Retaliatory Discharge*, *supra* note 15, 667-68 (1979).

43 335 U.S. at 536.

44 335 U.S. at 537.

45 *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976); ALASKA STAT. § 18.80.220 (1962); CAL. LAB. CODE § 1420(a) (Deering 1976); PA. STAT. ANN. tit. 43 § 955 (Purdon Supp. 1979-1980); ILL. REV. STAT. ch. 48, §§ 851 (1973).

46 The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976). *See also* Age Discrimination Act, ILL. REV. STAT. ch. 48, §§ 881-87 (1975); Teale v. Sears Roebuck & Co., 66 Ill. 2d 1, 359 N.E. 2d 473 (1976) (denying cause of action for employee discharged in violation of Age Discrimination Act), *overruled implicitly*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 185-86, 384 N.E.2d 353 (1978).

47 Jury System Improvement Act of 1978 § 6, 28 U.S.C. § 1875 (Supp. II 1978).

48 Civil Services Reform Act of 1978 § 204(a), 5 U.S.C. § 7503 (Supp. II 1978). *See generally* Chaturvedi, *supra* note 3, at 290-307 (1968). State employees enjoy a variety of protections. Several states have civil-service acts that protect state employees against dismissals except for just cause. *See, e.g.*, 71 PA. CONS. STAT. § 741.807 (Supp. 1979); *see also* Elrod v. Burns, 427 U.S. 347 (1976).

have also enacted legislation that protects employees against certain employment-related risks. For example, federal law protects employee health and safety,[49] and state workers' compensation laws assure recompense for injuries incurred while on the job.[50]

The drafters of these statutes realized that the laws would be meaningless gestures without some enforcement mechanism. Consequently, many of the acts contain criminal sanctions which expose employers to criminal liability if they interfere with employees' exercise of a statutorily granted right.[51] However, in the case of health and safety legislation, criminal sanctions against the employer do not help the employee who is disciplined for insisting on his statutory rights.[52] The employee faces a hard choice. If he refrains from exercising his statutory rights, he is left without the benefits which the legislature intended to confer upon him. On the other hand, if he asserts his rights and is disciplined, criminal prosecution of the former employer provides little consolation: the lack of a civil remedy leaves the worker jobless and uncompensated for resulting losses. Confronting an employee with this choice runs against the public policies that underlie the statutory enactments.[53] Without adequate penalties, such laws cannot effectively protect an employee from discrimination, harassment, and other abu-

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49 Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections at 5, 15, 18, 29, 42 and 49 U.S.C.); Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-941 (1976). Some states have enacted analogous legislation. *See, e.g.*, ILL. REV. STAT. ch. 48, § 137.1-137.23 (1977).

50 *See, e.g.*, ILL. REV. STAT. ch. 48, §§ 138.1-138.28 (1977); N.Y. WORKMEN'S COMPENSATION LAW §§ 1-425.8 (McKinney 1965 & Supp. 1981-1982); OHIO REV. CODE ANN. §§ 4123.01-4123.99 (Page 1980 & Supp. 1981).

51 *See, e.g.*, ILL. REV. STAT. ch. 48, § 138.4(h) (1977) (making discharge for filing workers' compensation claim a criminal offense, though providing no civil remedy).

52 The imposition of a small fine, enuring to the benefit of the State, does nothing to alleviate the plight of those employees who are threatened with retaliation and forego their rights, or those who lose their jobs when they proceed to file claims under the Act. It is conceivable . . . that some employers would risk the threat of criminal sanction in order to escape their responsibility under the Act.

Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 185, 384 N.E.2d 353 (1978). *Cf.* Glenn v. Clearmar's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal Rptr. 769, 772 (1961) (statute which allows employees to organize yet permits employers to discharge them for doing so provides "hollow protection").

53 *See* Comment, *Tort Action for Retaliatory Discharge*, *supra* note 15, at 673 ("To permit employers to force employees to choose between their jobs and compensation for injuries . . . is untenable and contrary to the public policy expressed in [workmen's compensation acts] . . . .").

sive treatment in the workplace. Current legislative efforts have been spotty at best, often leaving employees unprotected against many types of arbitrary discipline.

Several courts have attempted to supplement existing statutory protections with newly recognized common-law causes of action. Courts have premised recovery on both contract and tort theories. However, it is difficult to discern any consistent theoretical approach in this judicial attempt to carve out exceptions to the at-will rule.

Not until 1974 did a court recognize a cause of action based simply upon an employer's bad-faith dismissal of a claimant.[54] The New Hampshire Supreme Court ruled in *Monge*[55] that employment contracts contain implicit good-faith clauses, entitling the employee to damages in the event of employer breach. Since *Monge*, many new causes of action have been recognized. Using tort theories, courts have made recovery available under the rubrics of "prima facie" tort[56] and intentional infliction of emotional distress.[57] By far the most popular — and most vague — theory under which courts have recognized a cause of action is public policy.[58] Courts have found public policy articulated in numerous places[59] and have granted private rights of action

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54 *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A. 2d 549 (1974), *noted at* 26 HASTINGS L. J. 1435 (1975). Earlier cases had recognized a cause of action for dismissals that contravened statutorily declared public policy. *See, e.g.*, Petermann v. Intl. Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee dismissed for refusing to commit perjury); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (employee discharged for filing workers' compensation claim).

55 114 N.H. 130, 316 A.2d 549 (1974).

56 *See* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

57 *See* Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); Harless v. First Natl. Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

58 *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65, 417 A.2d 505, 509 (1980) ("Nearly all jurisdictions link the success of the wrongful [sic] discharged employee's action to proof that the discharge violated public policy."). *See, e.g.*, Petermann v. Intl. Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Jackson v. Minidoka, 98 Idaho 330, 563 P.2d 54 (1977); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. App. 1977); Sventko v. Kroger, 69 Mich. App. 644, 245 N.W.2d 151 (1976); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); and Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978). *But see* Hinrichs v. Tranquilaire Hospital, 352 So. 2d 1130 (Ala. 1977) (public policy is "too vague" a concept on which to ground a cause of action); Segal v. Arrow Industrial Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); and Martin V. Platt, 386 N.E.2d 1026 (Ind. App. 1979).

59 "The sources of public policy include legislation; administrative rules, regulation or decisions; and judicial decisions. In certain instances, a professional code of ethics

to employees disciplined in violation of that policy. In recognizing these causes of action, courts often provide the real protection left out by legislators.[60]

Not only have legislation and judicial activity eroded the at-will doctrine, but the parties to employment relationships have frequently done the same on their own accord. The advent of collective bargaining has introduced just-cause clauses into many employment contracts. One estimate suggests that 80% of all collective-bargaining agreements now require that there be just cause for a discharge.[61] Nevertheless, it is still true that less than 24% of the non-agricultural workforce works under the terms of a collective-bargaining agreement.[62] Consequently, despite this private introduction of just-cause protection into the workplace in some settings, the extent to which this protection has displaced the at-will doctrine has been nominal.

Clearly, legislative, judicial, and private activity has emasculated the once thriving at-will doctrine. The process of carving out exceptions to the doctrine, however, has not been comprehensive. The scope of the doctrine has been reduced on some fronts, but not others. The time has come to develop reforms that would comprehensively protect legitimate employee interests in job security while also respecting legitimate employer interests. After examining the relative merits of possible judicial and administrative reforms, this Article proposes an alternative comprehensive framework for reconciling employer and employee interests.

II. Some Available Methods for Providing Protection

While most recent scholarly comment has warmly embraced the judicial trend toward providing employees some measure

may contain an expression of public policy." Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

60 At least one court has cited the retaliatory-eviction action as analogous to an action for wrongful or retaliatory discharge. *See* Frampton v. Central Ind. Gas. Co., 260 Ind. 249, 252-53, 297 N.E.2d 425, 428 (1973). The conclusion that follows from the retaliatory-eviction analogy is that just as public policy now protects tenants from unjustified eviction from their living quarters or shelter, public policy should also protect workers from wrongful "eviction" from their jobs.

61 2 Collective Bargaining: Negotiations and Contracts (BNA) No. 876, at 40:1 (Dec. 28, 1978); *see also* Peck, *Unjust Discharges From Employment, supra* note 14, at 8; Summers, *supra* note 1, at 499-500.

62 U.S. Bureau of Labor Statistics Directory of National Unions and Employee Associations 59 (1979).

of relief from unjust discharges, relatively little comment has been directed at selecting the best method for providing this protection.[63] By making relief consistently available for employees following unjust discharges, courts and legislatures would accomplish three goals: they would deter unjust and wrongful discharges, they would provide compensation for wronged or injured workers, and they would provide for more general restraint of improper interference with employees' personal freedoms.[64]

Commentators have tendered several proposals for providing employees with greater protection from unjust discharges. Most have argued for judicial recognition of common-law causes of action. For example, one commentator has suggested that courts impose a common-law duty of good faith upon both the employer and the employee.[65] Another writer has suggested that courts recognize a cause of action for unjust discharge, but that they require employees to satisfy a high burden of proof. He has proposed that a plaintiff-employee be required to prove by clear and convincing evidence that the employer was motivated *solely* by reasons unconnected with a proper business interest.[66] A third commentator has recommended that courts simply and straightforwardly apply a "dismissal only for just cause" standard to employee discharges.[67]

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63 *See supra* notes 14-15 and accompanying text.

64 *See* Blades, *supra* note 14, at 1413-14. *See also* notes 22-25 *supra* and accompanying text.

65 Note, *supra* note 1, at 1836-44 (1980). Under such a system, the liability is theoretically placed on the party best able to avoid and distribute the significant social costs of unjustified job loss.

66 Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 569-71 (1980). The proposed test initially places burdens of proof and persuasion on the *employee*. The wisdom of this allocation of the risk of non-persuasion can be questioned. It might be argued that because the employer seeks to alter the status quo by terminating the employee he should bear the burden of proof. Moreover, the employer will probably have the most convenient access to the information needed to present his case. The Note attempts to mitigate the hardship of its test, remarking that "[A] showing of a bad faith reason for dismissal would shift the burden of coming forward to the employer to show that there was a legitimate reason for the firing." *Id.* at 571 n.114.

The question, then, arises as to what the standard for dismissal should be. Does it matter whether the employer acted with an improper motive if he also had legitimate business reasons for firing the employee? Would a single, legitimate business purpose justify a dismissal, regardless of other motives, or must the employer be totally free of any improper motives? The Note proposes the test most favorable to employers. A single, proper business motivation is sufficient to immunize the employer from allegations of "bad faith." *Id.* at 571. A possible rationale for this pro-employer standard is that it will neutralize the expected pro-employee jury sympathies.

67 Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 366-69

Other works have focused upon possible legislative responses to employee needs. One proposal includes a model statute which defines "retaliatory discharge" and then authorizes civil actions for compensatory and exemplary damages upon proof of retaliatory discharges.[68] The author reasons that this will enable courts to focus on what they do best — interpreting statutes rather than examining public policy.[69] Another commentator has proposed the legislative adoption of an arbitration scheme.[70] Both of these proposals for legislative solutions, as well as the above-mentioned commentaries which suggest judicial solutions, suffer from a common flaw: they fail to examine alternative means of effectively providing the desired employee protection.[71] Without a side-by-side comparison of the alternatives it is impossible to determine which method holds the most promise for being both efficient and effective. Any comparison must take procedural as well as substantive factors into account. Although frequently perceived as merely a means to an end, procedures alone can, and often do, destroy the very values meant to be protected by substantive law. Possible procedural alternatives include judicially recognized causes of action, statutorily recognized causes of action, creation of administrative agencies, and statutory institution of arbitration procedures. This Article will consider the merits of each of the alternatives and then will advocate the procedural solution that is found to be superior.

A. *The Shortcomings of a Common-Law Cause of Action*

Initially, judicial recognition of private causes of action would seem to be an acceptable means of providing the necessary

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(1974). A just-cause standard, it is noted, would be equivalent to implying a covenant of good faith and fair dealing in employment contracts. This would be analogous to contracts which require the personal satisfaction of the employer, in the performance of which employers must act in good faith.

68 Note, *Tort Remedy for Retaliatory Discharge: Illinois Workmen's Compensation Act Limits Employer's Power to Discharge Employees Terminable-At-Will*, 29 DE PAUL L. REV. 561, 579-81 (1980).

69 *Id.* at 579. The argument suggests that legislators not define "just cause," claiming it is an adequate standard from which the courts may develop their statutory interpretations. *See also* Blades, *supra* note 14, at 1423-33 (by enacting a statute, legislatures would leave courts "to perform the function, for which they are well suited, of giving reasoned elaboration to a broad statutory provision").

70 Summers, *supra* note 1.

71 For an exception to this generalization, *see* Blades, *supra* note 14, at 1431-34.

protection for workers. The courts have a longstanding tradition as a forum in which new causes of action are heard with a patient, if not always sympathetic, ear.[72] The judiciary is particularly able to adapt and respond to changing values and new needs. At present, this adaptability is evidenced by the variety of judicial responses to employee complaints.[73]

Moreover, some commentators contend that, regarding problems such as the one under consideration, legislative lethargy effectively dictates that the first responses come from the judiciary.[74] While a variety of forces lure legislators into motion, a number of others encourage inertia. It is difficult to imagine how the interests of individual employees could act as effective catalysts in the legislative process. There is little doubt that employers are content with the at-will doctrine,[75] and unions, the theoretical spokesmen for workers, cannot be expected to advocate and support legislation which offers protection primarily to non-unionized workers. Unions would realize that the enactment of such legislation would eliminate a significant motivation for workers to join unions — to obtain protection from arbitrary discipline.

Even with these factors in mind, to conclude that the courts offer the best mode of protection would be premature. Courts now offer the quickest means of protection in the individual case; recently discharged employees cannot reasonably expect timely legislative protection and have nowhere else to turn but to the courts. However, there exists an obligation to focus on more than the quickest means for protection — attention must be given to the most *effective* means of offering protection. In fact, several difficulties inhere in judicial recognition of common-law tort or contract actions.

Litigation is, by its very nature, a slow, costly, and formal process. These characteristics create difficulties for plaintiffs in unjust-dismissal actions. A discharged factory worker will

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72 *See* Geary v. United States Steel, 456 Pa. 171, 185, 193, 319 A.2d 174, 185 (1974) (Roberts, J., dissenting) ("Courts are duty-bound to fashion remedies for the changing circumstances of economic and social reality."). *See also* Note, *supra* note 1, at 1838 ("Courts themselves created the at will rule; it is therefore entirely appropriate that they now take the lead in modifying it.").

73 *See supra* notes 54-60 and accompanying text.

74 *See, e.g.*, Blades, *supra* note 14, at 1434 n.143.

75 This conclusion seems obvious, if only from the extremely vigorous force with which employers have opposed attempts to carve out exceptions to the doctrine in the past.

find little consolation in knowing that she can sue her employer when confronted with the prospect of weeks of unemployment, impending mortgage payments, and mounting household bills — all because she declined her foreman's sexual advances. Litigation does offer after-the-fact compensation and it does provide some deterrence. Yet, as a responsive and remedial measure it is unsatisfactory; it does little to ameliorate the sense of urgency created by sudden and unjustified job loss. Moreover, the difficulties that individuals might encounter in finding attorneys to take discharge cases in which minimal amounts are at stake and the long lag time between injury and compensation at law probably would severely limit the frequency with which discharged workers would or could make use of litigation as a remedy. Consequently, legal rights that have been violated might, as a practical matter, frequently not be vindicated.

A second difficulty in having courts deal with wrongful-discharge actions is that they lack the necessary expertise and perspective to deal aptly with labor questions.[76] Courts are not particularly well-suited for evaluating behavior in the workplace. For example, a judge unfamiliar with a given industry may be unable to determine whether a dismissal is justified by work-related reasons. In addition, employers commonly hire new workers on a probationary basis, after which their performance is evaluated. Any dispute-resolution process would have to account for this legitimate employer need. Questions might arise as to whether certain probationary periods are unduly long, effectively providing at-will employment in disguise. An appropriate limit will need to be designated. This too is the sort of line-drawing task[77] for which the courts are poorly designed.

The adversarial nature of litigation, especially in the labor setting, also detracts from the effectiveness of litigation as a response to the problem of unjust discharges. When workers

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76 M. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES 24 (1974) ("With the exception of certain specialized courts, judges hear a great variety of cases and are not usually experts in the particular subject matter brought before them."). *But see* Note, *supra* note 1, at 1838 ("Because courts have considerable expertise with similar employment relations problems, they possess sufficient expertise to resolve wrongful discharge disputes.").

77 The courts' legitimacy rests on the premise of reasoned and principled decision-making. Line-drawing decisions such as the appropriate length for probationary periods are necessarily arbitrary in nature and therefore, by definition, neither reasoned nor principled. Making such decisions would undermine judicial legitimacy.

and employers become adversaries, it is highly likely that they will sever their prior relationship. By the time a case gets to court, the parties may be more interested in avenging themselves or achieving a moral victory than in reaching a mutually acceptable result. Litigation has traditionally been an all-or-nothing process,[78] a process which too often merely creates winners and losers and which can effect little reconciliation between the parties. In labor settings, however, reconciliation between employer and employee is exactly what is usually most desirable. Procedures which preserve the employment relationship while the parties resolve their quarrel are usually the best means of resolving labor disputes. The trial process offers little opportunity to pursue such alternatives. The courtroom is an appropriate forum only for disputes in which the parties are completely alienated and the employment relationship has been irretrievably severed. As such, the litigation process has more appeal as a last resort than as a first step for resolving employment disputes.

A related deficiency of the judicial system is its lack of authority to mold the remedies or compromises best suited for particular disputes. When remedying employment disputes, a court's primary objective is usually to redress the injury with money damages. This is often the best a court of law can offer. But in discharge, a monetary award is incommensurate recompense for the suffering and injuries actually incurred.

Sharply contrasting with this situation is the breadth of available remedies under the National Labor Relations Act. That Act authorizes the National Labor Relations Board (NLRB) to provide reinstatement and awards of full or partial back-pay for improper dismissals.[79] In authorizing these remedies, Congress recognized the virtues of preserving the employment relationship whenever possible and desirable. Reinstatement spares

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78 Recognizing this, courts have devised ways to circumvent the all-or-nothing nature of litigation. First, courts frequently encourage the parties to settle their disputes, often doing so in pre-trial conferences held inside the judge's chambers. Courts presumably engage in this activity both to conserve judicial resources and to effectuate a "fair" resolution to the dispute. Second, the emerging concept of comparative negligence is also designed to alleviate the harshness of all-or-nothing results, but its effect on litigation is not widespread. At present, the trial process remains one rooted in the adversarial designations of "winner" and "loser."

79 National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1978).

discharged workers the grief of searching for a new job, the insecurities of adjusting to a new workplace, and the loss of self-esteem often caused by dismissal. Consequently, lawmakers should consider methods by which they can provide wrongly discharged workers with remedies similar to those available to workers protected by the NLRA — something more than monetary awards.[80]

An additional problem to be expected from the recently recognized common-law causes of action is the typical uncertainty and lack of uniformity which accompany developments in the common law. As indicated above,[81] courts often experiment with alternative theories of recovery. Some courts will shy away from granting relief altogether, finding none of the theories to their liking and, perhaps, fearing the embarrassment of reversal. And, of course, some judges will deny all recovery, expressing disapproval of the use of courts as mechanisms for effecting legal reforms.[82]

Such judicial meandering and hesitancy is admittedly part of the common-law tradition. But it has its costs. While courts debate whether and how they will acknowledge employee rights, unjustly discharged employees suffer various hardships. A lingering question is whether these inevitable consequences of a decision to allow common-law growth to occur should be endured when viable alternatives for minimizing such suffering exist.

For example, consider the jurisdictions which recognize a tort or contract action when the discharge in some way violates public policy. The New Jersey Supreme Court recently ruled

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80 Congressional creation of the NLRB was motivated by many of the same difficulties outlined above concerning judicial remedies for employment-settling disputes. The Board was created as an administrative body possessing the capability and expertise to hear labor disputes and provide adequate compromise solutions. Its jurisdiction is a narrow one; it deals exclusively with labor disputes. Nonetheless, within that setting its role is important, because in many instances it possesses the authority to preserve ruffled employment relationships. Following the institution of collective bargaining, employers and unions often agree contractually to submit their disputes to arbitrators. This widespread institution of arbitration reflects the hope that a quicker, less formal, and less contentious dispute-resolution mechanism can alleviate some of the problems inherent in having the judiciary react to disputes over dismissals.

81 *See supra* notes 54-60, and accompanying text.

82 *See, e.g.*, Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. App. 1979) (declining opportunity to recognize cause of action based on contravention of public policy because "[s]uch broad determinations should be left for the legislature").

that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy."[83] Public policy has justified the bringing of actions based on discharges made in retaliation for filing a workers' compensation claim,[84] for missing work to serve as a juror,[85] and for refusing to commit perjury.[86] However, the theory that public-policy violations provide a basis for recognizing tort or contract actions has its problems. First, the available sources of public policy must be identified.[87] Second, and more problematic, public policy provides little, if any, certainty regarding which discharges are actionable. The judiciary will have to acknowledge causes of action based on certain employer conduct on a case-by-case basis.[88] An additional problem with employing such a public-policy rationale is that some courts will altogether refuse to adopt the rationale because of its extreme ambiguity and vagueness.[89]

Finally, the public-policy rationale provides insufficient protection. Discharges may occur for reasons unrelated to specific public policies, other than the simple public interest in preventing unjust dismissals. For example, consider the employee discharged because of her refusal of her employer's sexual advances. A court wishing to find this discharge to be contrary to a clear articulation of public policy would be required to engage in extensive constructive efforts; use of the rationale in

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83 Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

84 *See, e.g.*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978); Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980); and Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976). *Cf.* Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (finding firing a "devise" and, therefore, in violation of workers' compensation statute).

85 *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978).

86 *See, e.g.*, Petermann v. Intl. Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

87 *See supra* note 59.

88 *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) ("Absent legislation, the judiciary must define the cause of action in case-by-case determinations.").

89 Hinrichs v. Tranquilaire Hospital, 352 So. 2d 1130 (Ala. 1977). *See also* Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979) ("[B]road determinations [of public policy] should be left for the legislature."); *cf.* Petermann v. Intl. Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959) (recognizing cause of action, but acknowledging that "[t]he term 'public policy' is inherently not subject to precise definition").

this way would bastardize the public-policy concept. Consider also the employee dismissed during a foreman's fit of rage. A court would be hard-pressed to present a convincing argument that public policy precludes discipline rooted in rage. Such a holding would reduce the public-policy doctrine to the assertion that all dismissals are illegitimate unless based on just cause. This formulation, in turn, would require the courts to make the kind of case-by-case determinations for which they lack the necessary expertise.[90] These inquiries either demonstrate that the rationale of "contrary to public policy" will fail to protect employees in every instance that warrants protection, or that the concept's use and application will expand to the point of meaninglessness.

The common-law system thus leaves much to be desired in its dealings with unjust discharges. Yet this review of the common law and its evolutionary process is not intended as a general condemnation of the common-law system. Its purpose is to make a much narrower point: the system has faults, and if an alternative exists which can sidestep the evolutionary process and other shortcomings of the judicial process, it should be employed. In order to determine whether the flaws inherent in a judicially administered system can be avoided, the alternatives to a common-law approach must also be evaluated as part of the search for the most desirable means of protecting employees from unjust discharge.

B. *Statutory Solutions*

Two different statutory solutions to the need for worker protection from unjust discharges are possible. One solution would be to authorize courts to entertain specific causes of action for unjust discharge. The other would be the creation of a new governmental agency or the expansion of an existing one to hear unjust-discharge complaints.

Some commentators have urged lawmakers to enact legislation that both defines and proscribes "retaliatory discharge."[91] A statute could describe the types of employer behavior that

90 *See supra* note 76 and accompanying text.
91 *See supra* notes 1 & 68.

legislators thought offensive, authorize discharged workers to bring private civil actions, and then establish a variety of remedies from which courts could choose. Such an enactment would have several virtues. Its primary benefit would be that of liberating the courts from having to make the threshold determination of whether employees should receive any sort of protection from unjust discharges. Once free of this duty, the courts could attend to tasks for which they are more aptly suited: they would be able to focus their efforts on discerning legislative intent and interpreting statutes. Conceivably, because courts are less reluctant to provide remedies when they have a statute as a point of departure than when they must decide for themselves whether to create new law, the effective scope of protection offered by such an approach could be quite broad. Consequently, a statutory authorization would do much to hasten the pace at which protection for employees is extended. Furthermore, specific statutory authorization for unjust-discharge suits would reduce the uncertainty now facing worker-plaintiffs. Prospective litigants would not have to worry about whether the courts will hear their cases, but merely whether their complaints fall within the statutory description of permitted claims.[92]

Despite the advantages of the approach just outlined, statutorily authorized causes of action are not the best means for providing job protection. Legislative enactment is not capable of solving all of the problems inherent in the previously discussed alternative — common-law recognition of a private cause of action.[93] The judicial process would still be involved, and it would remain burdensomely slow, formal, and expensive. Although litigation might ultimately enable employees to recoup much of the financial loss caused by dismissals, it would not alleviate the emotional and psychological injury caused by unwarranted job loss. Admittedly, legislation might authorize reinstatement as a possible remedy, but the utility of this remedy after weeks or months of litigation is doubtful. Legislators and

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92 Admittedly, for some prospective litigants this distinction will have little meaning, insofar as their efforts to characterize their claims so as to have them fit within a statutorily allowed category of claims will be identical to their efforts to get their claim heard. On the other hand, there will surely be a number of employees whose claims clearly fit within the statutory descriptions; for these prospective litigants the statute will provide assurance that their claims will be heard.

93 *See supra* notes 72-90 and accompanying text.

courts, in an effort to avoid this problem, could require that employers retain employees during the period when the litigation is pending; this, however, would work a hardship on both parties. Employers could be forced to carry workers for an extended period of time after dismissals which later prove to have been justified. Dissatisfied employees might become or remain unproductive or, even worse, might disrupt the workplace in retaliation for their employers' efforts to discharge them. Moreover, during the period in which employers and employees are in the adversarial posture required by litigation, any continuing relationship between them would be severely strained. The parties may behave contentiously out of stubbornness, pride, or, in the employer's case, simply a desire to remain in a posture which makes permanent reinstatement appear infeasible. The benefits lost through slow resolution of disputes are numerous. Consequently, the unavoidable delays inherent in judicial resolution of disputes make that process an unsatisfactory means for safeguarding employee job rights and interests.

Furthermore, although a statute may shorten the period needed by the judiciary to mold and develop the law, it cannot eliminate it. Since a statutory retaliatory-discharge cause of action would be a new development in the law, courts would need time to debate the reach of the statute. Legislative intent would remain open to question. A legislature, recognizing the need for flexibility in the new area, would compound those problems if it simply authorized the courts to establish a common law in the field and provided only general guidelines for doing so.[94] In any event, during the development of precedent,

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94 *See, e.g.*, P. AREEDA, ANTITRUST ANALYSIS 48-50 (3d ed. 1981). Professor Areeda finds the Sherman Act, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)) to be an example of legislation that gave the courts new and general jurisidiction. The courts were then required to develop applicable common law.

> Creation of a new federal jurisdiction inevitably required the courts to receive, apply, and develop "the common law" in the same way that a new jurisdiction customarily does. Perhaps the enactment of the Sherman Act itself could be taken as a legislative indication of the proper direction. . . . Thus, the Sherman Act may be seen not as a prohibition of any specific conduct but as a general authority to do what common-law courts usually do: to use certain customary techniques of judicial reasoning to consider the reasoning and results of other common-law courts, and to develop, refine and innovate in the dynamic common-law tradition.

P. AREEDA, *supra*, at 49-50.

courts would still have to feel their way towards establishing a coherent body of law.

A different statutory solution to the need for protection would be an administrative approach. The states and Congress have established a variety of agencies which already have their fingers in the labor pie. Workers' compensation commissions hear claims regarding job-related injuries.[95] Civil-rights commissions hear claims regarding discrimination in the workplace.[96] And several states have duplicated the federal NLRB model by instituting "little NLRB's."[97] Clearly, a variety of agencies are experienced at hearing and resolving disputes that arise between employers and workers.

By expanding the jurisdiction of an existing agency or by creating a new one, the states or Congress could confer authority on an administrative agency to deal with disputes arising out of contestable dismissals.[98] Such an agency would either have or gain experience in dealing with challenged dismissals, thus acquiring expertise. Moreover, these agencies would presumably have authority to provide a wider range of remedies than those available for the courts' use.[99]

On the other hand, the use of an administrative solution presents problems similar to those inherent in judicial attempts at resolution. First, administrative proceedings, while usually completed in a shorter time span than judicial proceedings, still

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95 *See* W. MALONE, M. PLANT, J. LITTLE, WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS, CASES AND MATERIALS 400 (2d ed. 1980).

96 Title VII of the Federal Civil Rights Act of 1964 established an Equal Employment Opportunity Commission, vesting it with authority to prevent discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-4 to 2000e-17 (1976 & Supp. III 1979). Numerous states also have administrative tribunals which enforce prohibitions against discrimination in employment. *See generally,* Bonfield, *The Origin and Development of American Fair Employment Legislation,* 52 IOWA L. REV. 1043 (1967) (a description of the development of both state and federal employment agencies).

97 *See, e.g.,* CONN. GEN. STAT. § 31-102; FLA. STAT. § 447.205; IOWA CODE ch. 20, § 5; MASS. GEN. LAWS ANN. ch. 23, § 90; MICH. COMP. LAWS § 423.3; ME. REV. STAT. ANN. tit. 26, ch. 3, § 968; PA. STAT. ANN. tit. 43, § 1101.501. *See also* ALASKA STAT. § 23.40.070–.40.260 (1972) (Public Employment Relations Act).

98 Professor Blades appears to have been the first to make this suggestion. *See* Blades, *supra* note 14, at 1433. Professor Peck repeated the suggestion several years later, though he gave it only scant attention. *See* Peck, *Some Kind of Hearing, supra* note 14, at 323.

99 *See* Blades, *supra* note 14, at 1433, stating that among the remedies available to the Equal Opportunity Commission are, for example, injunctive relief, reinstatement, and/or back pay — measures that courts have traditionally refused to take.

frequently involve substantial delay. Second, insofar as hearings before commissions are usually patterned on the adversarial courtroom model, many of the disadvantages inherent in the litigation process would surface once again.[100] Finally, the disadvantage of requiring the claimant to wait whatever length of time the process takes to reach completion before he can receive redress would loom large, especially as the inevitable search for procedural fairness and uniformity leads the agency to formalize its procedures. Time delays caused by these procedures would make an administrative process as ineffective as a judicial solution.

III. An Arbitration Scheme

A. *A System of Arbitration*

A system of arbitration would provide several advantages lacking in the methods of dispute resolution previously considered.[101] A well-devised system would be capable of protecting worker interests in job retention while also accommodating legitimate employer interests.[102] Arbitration would provide the efficiency lacking in other procedures without sacrificing accuracy. Arbitration would also provide protection to as many, if not more, workers than would other procedures. Arbitration would tend to be less formal, expensive, and time-consuming than either litigation or an administrative hearing process. Relaxation of formal rules of evidence and procedure and a lack of concern over constructing a record for review would conserve time, energy, and money for all parties involved. As a consequence of these savings, workers should find arbitration more

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100 The problems caused by proceedings of an adversarial nature are discussed *supra* at note 78 and accompanying text.

101 Commentators have praised the use of arbitration in resolving labor disputes. *See* Fleming, *Reflections on the Nature of Labor Arbitration*, 61 Mich. L. Rev. 1245 (1963); Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955); *see also* Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959). *But see* P. Hays, Labor Arbitration: A Dissenting View (1966); Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 Notre Dame Law. 138 (1961). For explanation and less normative discussions of arbitration, see F. Elkouri, How Arbitration Works (3d ed. 1973); M. Trotta, *supra* note 76.

102 *See* Cox, *supra* note 101.

attractive than litigation for resolving their disputes. This will induce workers to seek the protection and relief to which they are entitled.

In addition, because of its swiftness, arbitration would reduce the hostility in employer-employee disputes. The possibility of employer-employee reconciliation would typically be greatest in a situation characterized by prompt resolution of disputes.

The promised greater efficiency and acceptability of arbitration procedures follows from the specialized nature of the process. With the passage of time, arbitrators acquire experience at resolving a variety of labor disputes. They become acquainted with the particular needs and interests of specific bodies of employees and employers. They also gain familiarity with employment practices within a certain industry, field, or geographic region.[103] This accumulated experience enables arbitrators to approach employment disputes from a unique and highly advantageous perspective.[104] The parties will recognize this experience and will grow to trust the arbitrator's judgment. This, in turn, will make both employers and employees more willing to accept the results of the dispute-resolution process.[105]

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103 The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment . . . . The parties expect that his judgment of a particular grievance will reflect . . . such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed.

Steelworkers v. Warrior and Gulf Nav. Co., 363 U.S. 574, 582 (1960).

104 It is often thought that the goal of arbitration should be to reach the result that the parties would have reached if they were to sit down and discuss their differences. Familiarity with an industry, regional norms, and particular needs of the parties involved will enable arbitrators to better approximate the results at which the parties might independently arrive if they had been willing to negotiate with each other.

105 Professor Shulman instructs:

The important question is not whether the parties agree with the award but rather whether they accept it, not resentfully, but cordially and willingly. Again, it is not to be expected that each decision will be accepted with the same degree of cordiality. But general acceptance and satisfaction is an attainable ideal. Its attainment depends upon the parties' seriousness of purpose to make their system of self-government work, and their confidence in the arbitrator. That confidence will ensue if the arbitrator's work inspires the feeling that he has integrity, independence, and courage so that he is not susceptible to pressure, blandishment, or threat of economic loss; that he is intelligent enough to comprehend the parties' contentions and empathetic enough to understand their significance to them; that he is not easily hoodwinked by bluff or histrionics; that he makes earnest effort to inform himself

Institution of an arbitration procedure would also avoid the problem of common-law development that is an inevitable part of the judicial or administrative alternatives.[106] Unionized businesses and their employees have long used arbitration procedures for the resolution of grievances arising out of collective-bargaining agreements; these agreements typically preclude employee discipline without "just cause."[107] Presumably, conducting arbitration in accordance with these contractual just-cause standards has allowed individual arbitrators to develop standards and approaches which would be useful under a general statutory just-cause standard.[108] Only the same arbitrators could exploit the benefit of this past exposure and of their already-developed approaches to these questions.[109] Because so few of the numerous decisions rendered by arbitrators are reported, the learning-by-experience available to the arbitrators involved is not available to judges or administrators who might otherwise benefit from these proceedings. This situation differs from that found in the judicial setting, where the publication of reasoned opinions makes precedent a meaningful term, as judges can review the reasoning employed by other judges in similar cases in the past.

Arbitration law has also developed numerous approaches to legal problems which the courts or administrative bodies, in developing their own law, would have to re-create.[110] These include management's right to manage, the right of employees

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fully and does not go off half-cocked; and that his final judgment is the product of deliberation and reason so applied on the basis of the standards and the authority which they entrusted to him.

Shulman, *supra* note 101, at 1019.

106 *See supra* notes 79-90 and accompanying text.

107 *See* O. PHELPS, DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM 9-10 (1959).

108 [I]f there is one area of industrial relations around which is developing a kind of common law, it is the field of discharge for just cause. Of course, the principles of this "common law" are not binding precedents upon any arbitrator, but they tend to suggest the trend of the consensus concerning morality in the given area.

Ryan Aeronautical Co., 29 Lab. Arb. (BNA) 182, 185 (1957) (Spaulding, Arb.). *See generally* M. TROTTA, *supra* note 76, at 236-42.

109 Here, it is assumed that some of these experienced arbitrators would be available for statutory just-cause arbitrations. While it would be unlikely that they would be available in sufficient numbers to eliminate any need for training new individuals, they would provide the core upon which a corps of arbitrators, sufficient for both private and statutory purposes, could be developed.

110 Professor Summers reports that "On the bare words 'just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law." Summers, *supra* note 1, at 500.

to know what is prohibited, the right of employees to equal treatment, principles of procedural fairness, and principles of corrective discipline.[111] The present opportunity for exploiting both these approaches to some of the relevant legal problems and above-mentioned approaches to just-cause determinations further justifies the prompt institution of arbitration proceedings. Prompt action is imperative because the courts, by beginning a large-scale pursuit of a judicial common-law solution, may thereby lull the legislatures into adopting wait-and-see attitudes.

B. *The Institution of Arbitration*[112]

Any legislature that decided to institute a system of arbitration to protect employees from unjust discharges would have to make a number of decisions on subsidiary issues. The way in which these issues are solved will go a long way towards determining the general framework which a given arbitration scheme will take. In the Appendix is a draft of an unjust-discharge bill which is soon to be proposed in the Michigan legislature.[113] This statute provides a convenient reference point for considering how best to implement an arbitration system.

After several procedural and definitional sections, the Michigan bill explicitly prohibits all employee discharges, except those made for "just cause."[114] The bill, however, does not attempt to define "just cause." Rather than trying to reduce the "just cause" concept into a statutory definition, the bill leaves the matter open so that the exact contours of the concept can be developed in future arbitration proceedings. Until that time, past experiences with arbitration in the collective-bargaining context presumably will guide the development of a workable meaning of the phrase.[115]

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111 *See id.* at 501-08.

112 The format for the discussion in this section is borrowed from Professor Summers's thoughtful presentation in Summers, *supra* note 1, at 519-31. Therein, Professor Summers calls for the creation of a statutorily based arbitration scheme. Notwithstanding substantial similarities in analysis between the Summers presentation and the following discussion, the author assumes exclusive responsibility for the ideas and remarks contained herein.

113 The bill, hereinafter referred to as "Michigan bill," will most likely be introduced in spring 1982 by State Representative Perry Bullard of Michigan, who is chairman of the Michigan House Judiciary Committee.

114 Michigan bill § 4(1).

115 *See* Summers, *supra* note 1, at 521.

Section 5 of the bill begins to outline a two-tiered structure for settling discharge disputes. The discharged employee activates the process by filing a written complaint with Michigan's Employment Relations Commission.[116] The employee must file this complaint within thirty days after he receives notice of dismissal.[117] As a first step, the Michigan draft bill requires that the parties submit to mediation. Section 6(1) provides that immediately upon receipt of a written complaint, the Commission must appoint a mediator.[118] The mediation process continues for thirty days. If at the conclusion of this thirty-day period the parties remain deadlocked, section 6(3) provides that the employee may file a written request with the Commission for binding arbitration of the dispute.

The subsidiary issues inherent in the adoption of a system of arbitration provide the focal point for the remainder of this Article.

1. Which Employees Should Be Covered?

Statutory protection from unjust dismissals should not extend to all employees.[119] For example, it would be impractical to extend protection to the higher echelons of management, especially those in charge of establishing policy,[120] because these individuals are most directly responsible for an enterprise's profitability. A thriving business, as well as a struggling one,

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116 *See* MICH. COMP. LAWS ANN. §§ 423.1-423.30 (1978) (especially § 423.3).

117 *See* Michigan bill § 5(1). If the employer, however, fails to provide the employee with written notification of the discharge, the employee has 45 days within which to file. *Id.* § 5(2). If the employer fails to provide the employee with written notification of his or her right to arbitration and fails to post a copy of the act at the job site, the employee has one year within which to file. *Id.* § 5(3).

118 Another provision of Michigan law provides for state funding of the costs of mediation. MICH. COMP. LAWS § 423.20 (1970).

119 *See* Summers, *supra* note 1, at 524-26.

120 *See* Summers, *supra* note 1, at 526. Professor Summers agrees that certain managerial workers should be excluded from statutory protection. He notes, however, that this group of employees is smaller than the group labeled "supervisor". He notes that "foremen and other lower or middle management personnel are among those most in need of statutory protection against unjust dismissal." *Id.* The exclusion of supervisors from the NLRA's protection, he adds, "is based upon a potential conflict of interest in union-management relations that is not relevant under an unjust dismissal statute." *Id.* However, it should be noted that Professor Summers expresses the reservation that determining the appropriate "managerial group" for unjust dismissal purposes may be a very costly matter.

must retain the liberty to shuffle its higher managerial ranks in order to alter its course if "ownership" is to have any real meaning. Moreover, the performance of policymakers is by its nature less quantifiable than that of lower-level employees. The high degree of subjectivity involved in evaluating managerial decisions and the importance of owner-manager and manager-manager relationships to the proper functioning of an enterprise makes the extension of unjust-discharge protection to these employees infeasible.

The Michigan bill excludes "managerial" and "confidential" employees from the scope of its protection.[121] This exclusion follows the pattern found in the law of collective bargaining.[122] The propriety of the exclusion depends on whether the rationale for excluding employees from collective bargaining is applicable to the circumstances covered by an unjust-discharge statute.

In the context of the NLRA, managerial employees are denied organizational and collective-bargaining rights because "Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection."[123] This rationale for excluding management from collective bargaining differs markedly from the previously

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121 Michigan bill § 3(1). Section 3(1) also excludes individuals who have written employment contracts of not less than two years, if those contracts require not less than six months notice of termination.

122 This is evidenced by the resemblance between the statute's definition of these terms and the definitions given by the courts and the National Labor Relations Board. The statute defines "managerial employee" as "an employee who formulates and effectuates management policies by expressing and making operative the decision of his or her employer." *See* Michigan bill § 3(3). The NLRB uses the same definition in excluding managerial employees from the organizational and bargaining rights afforded by the National Labor Relations Act. *See* Palace Laundry Dry Cleaning, 75 N.L.R.B. 320, 323 n.4 (1947); *In re* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946). *See also* N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 288 (1974). The statute defines "confidential employee" as "an employee who assists and acts in a confidential capacity to a person who exercises managerial functions in the field of labor relations." *See* Michigan bill § 2(2). The NLRB uses the same definition in excluding confidential employees from collective-bargaining units composed of rank-and-file employees. *See* B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956); *In re* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946); ACF Industries, 115 NLRB 1106, 1110 (1956); Swift & Co., 124 N.L.R.B. 899, 900 (1959); Arlan's Dept. Store of Michigan, Inc., 131 N.L.R.B. 565, 568 (1961).

123 Retail Clerks Int'l. Assn. v. NLRB, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), *cert. denied*, 386 U.S. 1017 (1967); *see also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 281 n.11, 288 n.16 (1974).

suggested justifications[124] for excluding the higher echelons of management from the reach of just-cause protection. Consequently, if arbitrators were to apply the traditional meaning given to "managerial employee" in reaching decisions under an unjust-discharge statute, they might exclude individuals from the statute's protection merely because they could be considered managerial employees for the purpose of determining eligibility for membership in collective-bargaining units. If the legislature were to adopt a new term, or define "managerial employee" in a way which is distinct from the NLRA's traditional definition, arbitrators would be more likely to view exclusion questions in light of the purposes of an unjust-discharge bill, rather than relying on their past experiences with the similarly worded NLRA definition.

The Michigan unjust-discharge bill also imitates the NLRA with its "confidential employee" exclusion. The NLRB excludes confidential employees from collective-bargaining units composed of rank-and-file employees because of their close relationship with management.[125] This exclusion reflects the fear that these employees would utilize their special access to confidential information as an unfair bargaining tool. Confidential employees might coerce their employers into accepting demands by threatening to divulge certain sensitive information that they acquired only because management entrusted them with it. The NLRA also recognizes the possible conflict of interest which these employees might experience if they assume bargaining positions adverse to their employers' positions. On one hand, they would possess a powerful bargaining tool which, if put to use, would be of great value to their bargaining unit during contract negotiations. On the other, using confidential information for such purposes would irreparably damage their relationship with management, with the consequence that few within management would ever trust them with confidential information again. This latter result is unacceptable under the logic of the NLRA — the employer and his management team

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124 *See supra* note 120 and accompanying text.

125 *See* Ford Motor Co., 115 N.L.R.B. 722 (1956); Ford Motor Co., 66 N.L.R.B. 1317 (1946); ACF Industries, 115 N.L.R.B. 1106 (1956); Arlan's Dept. Store of Michigan, Inc., 131 N.L.R.B. 565; Swift & Co., 124 N.L.R.B. 899 (1959).

must have individuals to whom they can entrust confidential information without fear of betrayal.

This special access to confidential information, although justifying an exclusion of confidential employees from collective bargaining, does not justify the failure to extend unjust-discharge protection to these employees. In fact, this special access to information may be one of the best justifications for providing confidential employees with just-cause protections. Although employees could use confidential information to gain leverage in the bargaining context, no parallel problem exists in discharge cases.[126] If discharged, an employee might, in a fit of vindictiveness, release employer confidences. But it is the prevention of this sort of occurrence that the unjust-discharge statute has as its goal. Arbitration, by providing a relatively immediate hearing, would calm some of the employee's vindictiveness and thereby better protect the employer's confidences.

A third limit on the coverage of a discharge statute stems from employers' interests in having probationary periods for new employees. Employers need time to evaluate the performance, potential, and compatibility of new employees before deciding whether to take them on permanently. Extension of just-cause protection during this probationary period would unduly burden employers.[127] Several arguments support a refusal

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126 For example, consider the case of secretaries whose duties enable them to acquire information pertaining to their employer's labor relations matters. These persons will be excluded from bargaining units as confidential employees. *See* Moore-McCormack Lines, Inc., 181 N.L.R.B. 510, 512 (1970); National Cash Register Co., 168 N.L.R.B. 910, 912-13 (1968); Santa Fe Trail Transportation Co., 119 N.L.R.B. 1302 (1958); Rand McNally & Co., 62 N.L.R.B. 1485 (1945); American Smelting & Refining Co., 61 N.L.R.B. 506 (1945). However, there seems to be little reason for not extending protection against unjust discharges to them. Presumably, the employer has already considered the potential damage which the employee release of the confidential information might do to his business. The discharged employee seeking reinstatement or another remedy would experience no additional conflicts of interest beyond that of the straight discharged employee. Consequently, the employer's original calculations would be applicable to both situations.

127 Probationary employees would remain protected against discrimination for union activity. *See, e.g.*, NLRB v. Brezner Tanning Co., 141 F.2d 62 (1st Cir. 1944); Western Heritage Mobile Homes of Arizona, 187 N.L.R.B. 646 (1971). It might be argued that excluding probationary employees from the statutory protections will relegate them to at-will status. This need not be the case. If a probationary employee is fired under particularly egregious circumstances, the courts could still make available traditional causes of action *in tort* against the individual responsible for the employee's discharge. Making such a cause of action available would entitle the worker to seek relief, though it would leave the burden of proof upon the worker, thereby discouraging vexatious

to extend arbitrary-dismissal protection to employees from their first day on the job. First, during the initial weeks of work employees do not accrue the benefits that the law should seek to preserve for workers by precluding unjust discharges.[128] Second, by denying an employer the opportunity to experiment during a probationary period with employees whose competency is in doubt, a disproportionately harsh burden may be placed on certain groups within society. Those with limited schooling and/or criminal records are examples of the sort of workers for which the elimination of a probationary period could be expected to aggravate the already difficult problem of finding a job. Third, an employer needs a period during which he can formulate a judgment on the intangible factors, such as compatibility with other employees, that will affect the shop's overall performance. These intangibles, while a legitimate basis for an employer's hiring decisions, could not easily be evaluated by an arbitrator using a just-cause standard. Finally, the collective-bargaining agreements found in unionized industries typically provide for the same sort of probationary period discussed here. The usual length of this period is between three and nine months.[129] Presumably, statutorily specified periods should be of similar length; in fact, the Michigan bill's probationary period extends for six months.[130]

A final limitation on the coverage of an unjust-discharge statute might be based on the employer's size. The statute might not apply at all to those businesses employing only a small number of workers.[131] Indeed, section 3(2) of Michigan's unjust-discharge bill does just that by limiting "employer" status to those persons or organizations that employ ten or more persons. In contrast, Professor Summers contends that "[t]here is no reason in principle to deny employees protection because they have few fellow workers; indeed there is some indication that

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suits. Moreover, as an essential element to recovery, the worker would have to prove both damage and causation, unless he seeks only punitive damages.

128 *See supra* notes 26-38 and accompanying text.

129 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) No. 873, at 75:1 (Nov. 16, 1978). Seventy-four percent of all collective-bargaining agreements contain such clauses. The frequency of such clauses as a percentage of contracts is 22%, 17%, and 15% for 30-, 60-, and 90-day probationary periods, respectively.

130 *See* Michigan bill § 3(1).

131 *See* Summers, *supra* note 1, at 525.

the need for protection may be greatest in small establishments."[132] However, thoughtful reflection does uncover a rationale for treating small businesses differently from larger businesses. In a business which employs only a small number of workers, the employment relationship between those workers and the employer resembles the relationship between the employer and top-level employees in a large firm. Each worker thus may have as much impact on the course of a small business as managerial employees have on the direction of a giant corporation.

2. How Should the Arbitrator Be Selected?

Legislators will have two obvious concerns when considering arbitrator-selection procedures. First, the arbitrator should be an individual with expertise in the field of labor relations. Second, the arbitrator must be someone whose decision will be acceptable to the parties, and that means that the parties should be able to participate in the selection process. If the parties are involved, they will be unable to complain about bias or prejudice on the arbitrator's part without first having to admit their own error in selecting him.

The task of locating experienced and reputable arbitrators would not be a difficult one. A corps of experienced arbitrators currently exists, and information on each one's background and affiliations has already been put into published form.[133] Moreover, some states maintain a standing panel of arbitrators.[134] Admittedly, the enactment of an arbitration scheme would increase the overall need for arbitrators, thereby necessitating the training of many new arbitrators. Nevertheless, the existing corps of experienced arbitrators will provide an opportunity for learning by experience and through imitation, which will be essential for the training of these future arbitrators.[135]

The more difficult problem is devising a scheme which allows both parties to participate in the selection process while assuring a reasonably prompt selection. In the selection process, each

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132 *Id.*
133 *See generally* M. TROTTA, *supra* note 76, at 74-75.
134 *See, e.g.*, MICH. STAT. ANN. § 423.235 (1978).
135 *See supra* note 108 and accompanying text.

party will attempt to choose an arbitrator who it believes will rule in its favor. As the reputations of arbitrators develop and spread, occasions when the parties select the same arbitrator will become increasingly rare.

The Michigan unjust-discharge bill resolves this apparent dilemma. Section 7 of the bill requires that the state's Employment Relations Commission maintain a list of "impartial, competent, and reputable arbitrators." Upon receipt of a request for arbitration, the commission would prepare a list of three nominees and forward copies of that list to each party. Within five days, each party would have the option of peremptorily striking the name of one of the nominees. Following the expiration of this five-day period, the commission would then choose the arbitrator from the names which remain. This process strikes a balance: the procedure for peremptory strikes allows the parties to be involved in the selection process, while limitation of the pool of possible arbitrators ensures that the process will be swift.

The Michigan bill also contemplates the possibility that the nominees acceptable to both parties might decline or otherwise be unavailable to serve as arbitrators. In this event, section 7 directs the commission to appoint an arbitrator without submitting a new set of nominees to the parties. This rule, obviously proposed for efficiency purposes, might be questioned in light of the desirability of party participation in the selection process. However, the frequency with which this procedure will need to be employed might be negligible. Moreover, at some point the interest in prompt dispute resolution will supersede the interest of having the parties participate in the selection process.

3. What Disciplinary Actions Should Arbitrators Consider?

Apart from discharge, which is clearly the most severe disciplinary measure available to employers, there are numerous other forms of workplace discipline that employers might impose arbitrarily or unjustly. The goal of preventing abuses of those other forms of discipline deserves legislative attention. Legislative interest in these matters would not be based on the employee's right to retain his job, but rather on his rights of

privacy and personal freedom.[136] A statute which protects against only unjust discharges would be incapable of protecting these privacy rights and freedoms; employer threats of lesser disciplinary measures would hinder the exercise of these rights. Ideally, a statute could protect against all forms of arbitrary discipline.[137]

Extending the scope of protection beyond job-retention interests would not impose much of a theoretical burden on an arbitration system. Collective-bargaining agreements typically protect unionized employees from all forms of arbitrary discipline, not merely unjust discharges; consequently, arbitrators have already gained expertise at distinguishing incidents involving the use of justified discipline from those involving arbitrary discipline.[138] The remaining question is one of volume: could an arbitration system for at-will employees cope with the volume increase which its extension to disciplinary actions short of discharges would require? The drafters of the Michigan bill, if they considered the matter at all, have implicitly answered this question in the negative: that bill applies only in the event of discharge.[139] Of course, this scope limitation does not necessarily mean that the bill's drafters have found the case for protection of more than job-retention rights to be without merit. Instead, administrative concerns over the system's ability to handle the increased workload and/or political concerns over the bill's chances for passage may have motivated the drafters to restrict its coverage to discharge situations.

4. What Remedies Should be Available?

A unique and invaluable characteristic of arbitration, as compared with judicial procedures, is the former's greater flexibility in molding awards to balance the equities of particular cases.[140] Because judges cannot order specific performance of personal-

136 *See, e.g.*, Bell v. Faulkner, 75 S.W.2d 612 (Mo. App. 1934) (refusal to vote as directed in public election).

137 *See* Summers, *supra* note 1, at 526-29.

138 *Id.* at 527.

139 *See* Michigan bill §§ 2(3), 4(1).

140 *See* Summers, *supra* note 1, at 531.

service contracts, courts typically award damages as their exclusive remedy.[141] However, the Michigan bill gives arbitrators a broad range of remedies from which they may select. Section 11 of the bill provides that an arbitrator may order, among other things, discharge, discharge with severence pay, reinstatement with no back pay, reinstatement with partial back pay, or reinstatement with full back pay.

Reinstatement will not be an ideal remedy in every instance of unjust discharge.[142] Nor will it be as important to some workers as to others. A young and highly talented employee, although unjustly discharged, might prefer receiving severance pay and seeking employment elsewhere, rather than winning reinstatement in a job setting where his employer and/or supervisors might harbor hostile feelings toward him. On the other hand, for an employee nearing retirement, dismissal might be an unnecessarily severe form of discipline, even where the worker has acted unreasonably or wrongly. In these instances, reinstatement with no or only partial back pay would seem to be the appropriate remedy. The employee would be disciplined for his wrongdoing but not forced to incur the harsh consequences of sudden job loss. In these and other situations, the arbitrator would have the flexibility to consider the circumstances of each case and then mold appropriate penalties "to fit the offense and the offender."[143]

5. How Should Arbitration Awards be Reviewed?

Courts have already determined the standards by which they will review the decisions of arbitrators in the labor field. They refuse to review the merits underlying arbitration awards.[144] "Plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for

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141 5A CORBIN ON CONTRACTS § 1184 (1964).

142 *See* Getman, *Labor Arbitration and Dispute Resolution,* 88 YALE L.J. 916, 935-36 (1979).

143 Summers, *supra* note 1, at 531.

144 *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562-63 (1975); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 596 (1959); Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 294-95 (7th Cir. 1975). For a Congressional statement of the policies underlying this rule, see 29 U.S.C. § 173(d) (1976).

in reality it would almost never be final."[145] Instead, courts review arbitration hearings for procedural irregularities and will overturn a decision if such irregularities are shown. For example, instances of fraud, deceit, or bribery during the course of the arbitration process would justify court interference and an overturning of the arbitrator's decision.[146] In addition, courts review arbitration procedures to see if the arbitrator has exceeded his authority or if his award was "arbitrary or capricious."[147] A positive finding on either of these inquires would cause a court to set aside the arbitrator's award.

This same standard for review might be applied in the unjust-dismissal context. Here, too, courts could defer to the expertise and experience of arbitrators, only examining the process to assure its fair and proper operation. However, the Michigan bill departs from this approach. In section 13, it authorizes judicial review by trial courts: ". . . for the reason that the arbitrator was without or exceeded his or her jurisdiction; *the award is not supported by competent, material, and substantial evidence on the whole record;* or the award was procured by fraud, collusion, or other similar and unlawful means."[148] This "substantial evidence" test is a replica of the standard typically employed by courts when reviewing the decisions of administrative judges and agencies, and it gives courts a fairly wide mandate to look into the merits of the decision below.[149] The question of whether to adopt this standard depends upon one's faith in the expertise of arbitrators.

Before considering whether the substantial-evidence standard makes good sense in policy terms, the practical problems presented by the standard must be examined. Application of the substantial-evidence standard would require that a record of the proceeding be preserved. This is a potentially costly procedure, involving stenographers and transcribers, and any escalation of

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145 United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1959).

146 *See* Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 295 (7th Cir. 1975); Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

147 *See* Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 295 (7th Cir. 1975).

148 Michigan bill § 13 (emphasis added).

149 For a discussion of the scope of judicial review of administrative actions, see K. DAVIS, ADMINISTRATIVE LAW TREATISE 525-44 (3d ed. 1972).

the costs of arbitration would tend to make the process less attractive. However, the Michigan bill anticipates this problem and offers a solution. Section 10 instructs the arbitrator to tape-record the hearing and to preserve the recording as the official record of the proceeding.[150]

Second, using the substantial-evidence standard would prolong the adversarial phase of the parties' relationship.[151] The Michigan bill combats this problem by providing that "the pendency of a proceeding for review shall not stay automatically the award of an arbitrator.[152] Moreover, if the courts construe the standard so as to affirm most arbitration decisions, the parties will tend not to prolong their adversarial relationship by bringing appeals having only a remote likelihood of success. Nevertheless, even without such a lenient construction and regardless of the bill's no-stay provision, use of the substantial evidence standard of review risks delaying a final decision as perceived by the parties.

These practical concerns aside, consideration must be given to the theoretical propriety of adopting such a standard. Whether a substantial-evidence review standard is the best alternative will depend, ultimately, on the legislature's purpose in enacting an arbitration scheme. Such a standard obviously conflicts to some degree with assumptions about the expertise of arbitrators. If a legislature were to institute an arbitration system in hopes of taking advantage of that expertise, it would be inconsistent and self-defeating to permit such an expansive basis for review. If, however, the legislature elected to institute arbitration proceedings merely to relieve the burden on the courts by having a subsidiary system decide the "easy" cases, a substantial-evidence standard of review would not be inconsistent. Even with court review readily available, an arbitration system would offer a prompt, informal method for settling most disputes. A legislature might decide that these advantages are of paramount importance in the resolution of discharge disputes. Even under these circumstances, however, a narrow standard of review might be desirable; the less often an arbitration decision is

150 Michigan bill § 10(5).

151 For a discussion of the problems created by a prolonged adversarial relationship, see *supra* note 78 and accompanying text.

152 Michigan bill § 13.

overturned, the speedier the total dispute-resolution process will be.[153]

6. Who Should Bear the Costs of Arbitration?

The Michigan unjust-discharge bill, like typical collective-bargaining agreements, provides that the parties shall share equally in the costs of arbitration.[154] This provision may produce an unfortunate result: it may deter some workers from using the arbitration procedures which it provides. The relatively high cost[155] of pursuing an unjust-discharge claim, together with an uncertain likelihood of success, might persuade some workers to accept the status quo rather than going to the trouble and expense of arbitration.[156] Because employers are typically in a better position to absorb the costs, the overall impact of this division of costs between the parties would fall disproportionately on employees. In addition, the employer would be able to claim tax deductions for his expenses, whereas the employee would not.[157]

Alternatively, an arbitration scheme could provide that the state bear most of the costs associated with the arbitration process. Under such an arrangement, the parties would continue to bear the incidental costs of their representation — the costs of producing their witnesses and paying their lawyers. While the general argument that the state has traditionally borne the costs of dispute-resolution procedures would favor such a set-up, such a system arguably has two flaws. First, a simple economic argument might be put forth: that the expense of the state's picking up the tab for such a system is unacceptable. If the state shares in the cost of unjust-discharge arbitrations in the non-union setting, employers and employees covered by collective-bargaining agreements could also be expected to demand reimbursement for the similar costs which they incur.

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153 Michigan bill § 8(1).

154 An earlier draft provided that the state and the parties would each pay a third of the incidental costs of arbitration, while the state would bear the fixed costs.

155 This will be especially true in Michigan, where unemployment compensation is readily available.

156 *See* Michigan bill § 9(2).

157 26 U.S.C. §§ 162, 212 (1976).

Certainly, taxpayer reaction to these additional drains on a state's operating budget might, in and of itself, discourage a legislature from deviating from the parties-bear-their-own-costs scheme.

There is a second objection to state funding: subsidies would encourage employees to file frivolous claims. It is true that a system which imposed no costs on employee-users of the arbitration process might lend itself to abuse. Nevertheless, the legislature need not respond by imposing one-half (or any other specified proportion of) the total cost of the process on users. A "filing fee" requirement of a not-insubstantial amount would discourage most frivolous claims without silencing most meritorious claims.[158] A filing-fee arrangement might not deter as many meritless claims as would a full-fledged parties-split-all-the-costs system. And taxpayer opposition to anything but a parties-pay-all-the-costs system could be intense. But if a legislature acts consistently with the motivation that led it to protect employees against unjust discharges in the first place, it should at least consider the potential consequences of alternative cost-allocation schemes in light of how each would encourage as many meritorious claims as possible.

CONCLUSION

Numerous institutional obstacles will block any legislative effort to institute an arbitration system.[159] Employers will no doubt lobby against such a proposal, as they would against any proposal which limits their almost total discretion in the non-unionized workplace. Little support for such a proposal can be expected from unions, as it would not be in their self-interest to advocate legislation which would eradicate part of the incentive for workers to join and form unions. Finally, it is doubtful that otherwise unorganized workers could mount or sustain

158 Professor Summers proposes a similar solution. While recognizing that imposition of a flat fee, such as $100, would be a viable solution, he finds that a preferable solution would be to charge a fee that varies in accordance with claimant employees' earnings. *See* Summers, *supra* note 1, at 524.

159 Various characteristics of legislative bodies will obstruct statutory reform of the tort law, including legislative indifference, a lack of insight or expertise, and a susceptibility and exposure to well-organized lobbies and pressure groups. *See generally* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

a sufficiently vocal, potent, and persistent drive to see such legislation through to passage.[160]

Legislatures, however, are reactive by nature. Legal reform often begins in the courts, where it undergoes a process of erratic development. After this process has been underway for a period of time, legislators often respond by adopting, codifying, and sometimes modifying rights first recognized by the courts. If this pattern is to be repeated for employee rights to protection from unjust discharges, it appears that the time for legislative response is drawing near. In fact, Michigan has just such a response in the works; although the bill has not yet been enacted into law, it does represent a hope that systematic protection of the rights of all employees is not far off.[161]

APPENDIX

THE MICHIGAN UNJUST-DISCHARGE BILL

A bill to prohibit the unjust discharge of certain employees; to provide for mediation and final and binding arbitration of these disputes; to provide for the selection and payment of arbitrators and for their authority; to prescribe the procedure for certain hearings; and to provide for the enforcement and review of awards of arbitrators.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SEC. 1. For the purposes of this act, the words and phrases defined in sections 2 and 3 have the meanings ascribed to them in those sections.

SEC. 2. (1) "Commission" means the Employment Relations Commission, created by Act No. 176 of the Public Acts of 1939, as amended, being sections 423.1 to 423.30 of the Michigan Compiled Laws.

(2) "Confidential employee" means an employee who assists and acts in a confidential capacity to a person who exercises managerial functions in the field of labor relations.

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160 *See* Blades, *supra* note 14, at 1433-34.

161 For the full text of the bill, see the Appendix to this Article.

(3) "Discharge" means an involuntary dismissal from employment. Discharge includes a resignation or quit that results from an improper or unreasonable action or inaction of the employer.

SEC. 3. (1) "Employee" means a person who has worked for an employer for not less than 15 hours per week for 6 months and who is not protected by a collective bargaining agreement for a unit that has been certified by the National Labor Relations Board or the commission or recognized by an employer, or who is not protected by civil service or tenure against unjust discharge. Employee does not include a confidential employee, managerial employee, or a person who has a written employment contract of not less than 2 years and whose contract requires not less than 6 months' notice of termination.

(2) "Employer" means a person or an organization that employs not less than 10 persons.

(3) "Managerial employee" means an employee who formulates and effectuates management policies by expressing and making operative the decisions of his or her employer, and who has discretion in the performance of his or her job independent of his or her employer's established policy.

SEC. 4. (1) An employer shall not discharge an employee except for just cause.

(2) An employer who discharges an employee shall notify the employee orally at the time of discharge, and in writing by registered mail within 15 calendar days after the discharge, of all reasons for the discharge and of his or her right to request arbitration under this act.

SEC. 5. (1) An employee who believes that he or she has been discharged in violation of section 4(1) may file by registered mail a written complaint with the commission not later than 30 calendar days after receipt of the employer's written notification of discharge and right to arbitration as provided in section 4(2). The complaint shall contain the names, addresses, and telephone numbers of the employer and of the employee, the date of the discharge of the employee, and a short statement of the reason for the filing of the complaint.

(2) Except as provided in subsection (3), if an employer fails to provide the discharged employee with a written notification of his or her discharge and the reason for it, the discharged employee may file by registered mail a written complaint, as described in subsection (1), with the commission not later than 45 calendar days after his or her discharge.

(3) If an employer fails to notify, in writing, a discharged employee of his or her right to arbitration under this act, and if a copy of this act or a summary of this act has not been posted pursuant to section 17 in a prominent place in the work area for at least 6 months before the date of the employee's discharge, the discharged employee may

file by registered mail a written complaint, as described in subsection (1), with the commission not later than 1 year after his or her discharge.

SEC. 6. (1) Upon receipt of a complaint from a discharged employee, the commission immediately shall appoint a mediator to assist the employer and the discharged employee in attempting to resolve their dispute.

(2) If the dispute is not resolved within 30 calendar days after the commencement of mediation, the mediator shall explain to the employer and the discharged employee the purpose and process of final and binding arbitration, including each party's right to be represented by counsel at the arbitration hearing and to submit a posthearing brief, as well as the method of selecting and compensating the arbitrator, as described in sections 7 and 8.

(3) After the option of arbitration is made available to the discharged employee pursuant to subsection (2), the employee may request a continuance of mediation if he or she believes that a mutual resolution of the dispute is possible. If a mutual resolution is not likely, the discharged employee may file by registered mail a written request with the commission for arbitration of the dispute.

SEC. 7. Upon the request of a discharged employee, the commission immediately shall select from a list that it maintains of impartial, competent, and reputable arbitrators who are citizens of the United States and residents of this state, 3 persons as nominees for arbitrator. Within 5 days after receipt of the names of the nominees, the employer and the employee peremptorily may strike the name of 1 of the nominees. If the employer or employee does not return the list within the 5-day time period, then each person whose name appears on the list shall be considered to be acceptable to that party. Within 7 days after this 5-day time period, the commission shall designate 1 of the remaining nominees as the arbitrator. If each nominee who is considered to be acceptable by the employer and the employee declines or for any reason is not able to serve as arbitrator, then the director of the commission shall appoint an arbitrator from the general list of arbitrators that the commission maintains without the submission of any additional lists to the employer and the discharged employee.

SEC. 8. (1) The employer and the employee shall bear equally the fee and normal and necessary expenses of an arbitrator selected pursuant to section 7. Payment shall be made in compliance with rules promulgated by the commission pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws. An arbitrator selected pursuant to section 7, in addition to the normal and necessary expenses involved, may not assess a fee for more than twice the number of days in hearing.

(2) A party who produces a witness at the arbitration hearing shall

bear the expenses, if any, of that witness. Other expenses similarly shall be borne by the party incurring them.

SEC. 9. (1) Within 60 calendar days after his or her appointment, or within further additional periods to which the parties may agree, the arbitrator selected pursuant to section 7 shall call a hearing and shall give reasonable notice of the time and place of the hearing to the employer and the employee.

(2) The arbitration may proceed in the absence of an employer or employee who, after due notice, fails to be present at the hearing and who fails to obtain an adjournment of the hearing, as provided in subsection (3). An arbitrator shall not grant or deny a grievance solely on the default of a party. Rather, the arbitrator shall require the opposing party to submit evidence, as necessary, for the rendering of an award.

(3) The arbitrator, for good cause shown, may adjourn the hearing upon the request of a party or upon his or her own initiative, and shall adjourn the hearing when both parties agree to the adjournment.

SEC. 10. (1) The proceedings shall be informal. The arbitrator may conduct the hearing in whatever manner that he or she believes will permit the full and most expeditious presentation of the evidence and arguments of the employer and the employee. Technical rules of evidence shall not apply, and the competency of the evidence shall not be considered to be impaired by the informality of the proceedings. The employer and the employee, though, may not submit a new or different claim to the arbitrator after his or her appointment without the consent of the arbitrator and all other parties. The arbitrator may receive into evidence any oral or documentary evidence or other data that he or she considers to be relevant to the issues under consideration at the hearing, and the arbitrator shall request the submission of any evidence that he or she considers to be necessary for a proper understanding and determination of the issues in dispute.

(2) The arbitrator may administer oaths and require the attendance of witnesses and the production of books, papers, contracts, agreements, and documents that he or she considers to be material to a just determination of the issues in dispute. For this purpose, the arbitrator may issue subpoenas. If a person refuses to obey a subpoena, or to be sworn or to testify, or if a witness, party, or attorney is guilty of contempt while in attendance at a hearing, the arbitrator may, or the attorney general if requested shall, invoke the aid of the circuit court within the jurisdiction in which the hearing is being held, which court shall issue an appropriate order. The court may punish a failure to obey the order as contempt.

(3) Attendance at the hearing is limited. Authorized representatives of the employer and the employee may be present at the hearing. In addition, a person who has a direct interest in the arbitration award may attend the hearing. The arbitrator shall determine the propriety

of the attendance of other persons at the hearing. The arbitrator also shall have the power to require the retirement of a witness during the testimony of another witness.

(4) The employer, the employee, or both may request of the arbitrator, before the scheduled hearing date, that he or she arrange for a verbatim record of the proceedings to be made. If a transcript is made, that transcript shall be the official record of the proceeding. The transcript shall be made available to the arbitrator, and the arbitrator shall make the transcript available for inspection, at a designated time and place, by the employer and the employee. The party that requests that a verbatim record of the proceedings be made shall bear the total cost of the record. If the employer and the employee request that a verbatim record of the proceedings be made, then the employer and the employee shall bear equally the cost of the record.

(5) If an official transcript of the hearing, as described in subsection (4), is not made, the arbitrator shall tape-record the hearing, and that tape recording shall be the official record of the proceeding.

(6) The employer, the employee, or both may submit a posthearing brief before a specified date agreed upon at the close of the hearing by the arbitrator, the employer, and the employee.

SEC. 11. (1) Within 30 calendar days after the close of the hearing, or within further additional periods to which the parties may agree, the arbitrator, based upon the issues and evidence presented to him or her, shall render a signed opinion and award. The arbitrator shall deliver by registered mail a copy of the opinion and award to the employer, the employee, and the commission.

(2) Some of the remedies from which the arbitrator may select are the following:

(a) the sustainment of the discharge;

(b) reinstatement of the discharged employee with no back pay;

(c) reinstatement of the discharged employee with partial back pay;

(d) reinstatement of the discharged employee with full back pay;

(e) a severance payment.

(3) If the employer and the employee settle their dispute during the course of the arbitration proceeding, the arbitrator, upon their request, may set forth the terms of the settlement in the award.

SEC. 12. An award of the arbitrator shall be final and binding upon the employer and the employee and may be enforced, at the instance of either the employer or the employee, in the circuit court for the county in which the dispute arose or in which the employee resides.

SEC. 13. The circuit court for the county in which the dispute arose or in which the employee resides may review an award of the arbitrator, but only for the reason that the arbitrator was without or

exceeded his or her jurisdiction; the award is not supported by competent, material, and substantial evidence on the whole record; or the award was procured by fraud, collusion, or other similar and unlawful means. The pendency of a proceeding for review shall not stay automatically the award of the arbitrator.

SEC. 14. If an employer or an employee wilfully disobeys or offers resistance to a lawful order of enforcement issued by the circuit court, then the employer or the employee, whichever is appropriate, may be held in contempt. The punishment for each day that the contempt persists may be a fine, fixed at the discretion of the court, in an amount not to exceed $250.00 per day.

SEC. 15. This act shall not supersede an employer's grievance procedure that provides for impartial and final and binding arbitration of discharge grievances. Upon the request of an employer or employee, the commission shall determine whether or not an employer's grievance procedure meets this standard.

SEC. 16. If a discharged employee files or has filed an action against his or her former employer in a court of this state or of the United States, that employee is barred from seeking relief for that same issue under this act.

SEC. 17. An employer shall post a copy of this act or a summary of this act in a prominent place in the work area.

ARTICLE

THE SAGEBRUSH REBELLION: A SIMPLISTIC RESPONSE TO THE COMPLEX PROBLEMS OF FEDERAL LAND MANAGEMENT*

RICHARD M. MOLLISON**
RICHARD W. EDDY, JR.***

The "Sagebrush Rebellion" is a political movement with widespread support in several western states. Its adherents seek to force the transfer of federally owned public lands to the states in which the lands lie — or at least to pressure federal authorities into greater responsiveness to western concerns. The "rebels" have pursued their objectives in three different forums: the federal courts, state legislatures, and Congress.

In this Article, Mollison and Eddy evaluate the rebels' legal claims and analyze state statutes and proposed federal legislation on the subject. They then suggest that the movement's goals would be best served if it focused its efforts on changing the administrative process by which the federal government manages public lands.

One-third of the United States — some 760 million acres — belongs to the federal government.[1] For the thirteen western-most states, the statistics are even more dramatic: the government owns ninety percent of Alaska[2] and eighty-six percent of Nevada. One observer has called Nevada "an archipelago of tiny islands of private lands in a Sargasso Sea of federal lands."[3]

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* An earlier version of this Article appeared in ENVIRONMENTAL COMMENT, June 1981. This Article does not necessarily reflect the views of the United States Navy.

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1 PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 19, 22, 27-28 (1970) [hereinafter cited as PLLRC].

2 BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1977), *reprinted in* Congressional Research Service, Proposed Transfer of Certain Federal Lands to the Western States: An Examination of Pertinent History, Laws, Agencies and Relations 11 (Dec. 1979) [hereinafter cited as CRS].

3 Nevada Attorney General's Office, Public Trust Conference 1 (Sept. 1980) (an unpublished memorandum) [hereinafter cited as Public Trust Conference]. On the other

The public lands in Nevada alone represent an area twice the size of New York State.[4] In other western states the percentage of public land, while smaller, is nevertheless substantial.

There is nothing new about this federal ownership of land. The federal government has been in the real-estate business since the thirteen original states ceded some 233 million acres to the central government following the American Revolution.[5] Beginning in 1964, however, the official federal policy toward the public lands changed dramatically. The new policy, signaled by three major pieces of legislation in 1964[6] and embodied in its fullest form by the Federal Land Policy and Management Act of 1976 (FLPMA),[7] was one of active management and regulation of public lands coupled with the announced intention of permanent federal ownership of those lands.

That policy stirred deep resentment among many Westerners and engendered a political movement in the western states, called by its supporters the "Sagebrush Rebellion." The rebels characterize themselves as the victims of a number of federal land-use decisions made without their participation. Many of those land-use decisions directly limit western development, especially those imposing strict environmental, wildlife, and preservation regulations; restricting grazing and mineral leasing and extraction; curtailing water project construction; limiting state and local government revenues through federal deprivation of an adequate tax base; and asserting open-ended federally

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hand, the population distribution within the United States is not uniform. The PLLRC took account of this fact:

> The public lands must also be viewed in the context of their location relative to the population of the nation. Of the 11 contiguous western states only two, California and Washington, have population densities equal to or exceeding the national average. The other nine western states have population densities substantially less than that of Maine, the most lightly populated state east of the Mississippi. In fact, two of them have a density of about one-tenth that of Maine and four or more have a density less than one-third that of Maine.
>
> Alaska, of course, is not comparable to any of the other states, and it is difficult to make any meaningful comparison with Alaska's sparse population. But it can be noted that the population density of Alaska is now about one-tenth that of the United States at the time of the first census in 1790.

PLLRC, *supra* note 1, at 22.

4 PLLRC, *supra* note 1, at 22.

5 *Id.* at 19; P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49-74 (1968).

6 *See infra* text accompanying notes 15-20.

7 43 U.S.C. §§ 1701-1782 (1976 & Supp. III 1979).

reserved water rights.[8] Other land-use decisions, however, presented quite opposite concerns that the West would be sacrificed in the development of synthetic fuels[9] or the MX missile program.[10]

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8 Respondent's Petition for Rehearing at 26-39, Andrus v. Utah, 446 U.S. 500, *reh'g denied,* 448 U.S. 907 (1980); *see, e.g., The Angry West vs. the Rest,* NEWSWEEK, Sept. 17, 1979, at 32 [hereinafter cited as NEWSWEEK]; Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?,* 1980 UTAH L. REV. 505, 509-11; Hamilton, *"Sagebrush Rebellion?" High Noon? Says Who?,* N.Y. Times, Oct. 22, 1979, at A21, col. 1; Hornblower, *The Sagebrush Revolution: Westerners Fight U.S. Restrictions on Federal Lands,* Wash. Post, Nov. 11, 1979, at B3, col. 1; Salisbury, *Sagebrush rebels see open range in Reagan's victory,* Christian Sci. Monitor, Nov. 18, 1980, at 1, col. 1; Seldner, *The Sagebrush Rebellion,* Nat'l L.J., Sept. 1, 1980, at 1, col. 1; Zonana, *Nevada's Bid to Take Over U.S. Lands Wins Support in Other Western States,* Wall St. J., Sept. 21, 1979, at 24, col. 2 (quoting Mr. Brent Calkin, Southwest field coordinator of the Sierra Club); J. Chomski & C. Brooks, The Sagebrush Rebellion: A Concise Analysis of the History, the Law and Politics of Public Land in the United States 3-4 (Jan. 1980) (an analysis prepared for the State of Alaska Legislative Affairs Agency); Utah Agricultural Experiment Station, An Economic Evaluation of the Transfer of the Federal Lands in Utah to State Ownership 1-2 (May 1980) (a report submitted to the Four Corners Regional Commission) [hereinafter cited as Economic Evaluation]; Hall, America's Energy and Mineral Resources — Why States Should Manage Our Public Lands, Western Coalition on Public Lands, Coalition Comments 7-8 (Apr. 1980) (Ms. Hall is the Administrator of the Nevada Division of Mineral Resources); Address by Sen. Orrin Hatch, Meeting of Utah Cattlemen's Association (Dec. 6, 1979); Address by Sen. Orrin Hatch, Meeting of Utah Soil Conservation Officials, in Salt Lake City (Nov. 9, 1979). The following reflects a local expression of frustration over just one issue, wilderness study areas:

> The wilderness issue has exacerbated what a Salt Lake City newspaper calls "a permanent state of emotional insurrection against the federal government in southern Utah." Miners come to public hearings with guns strapped on their belts. A county commissioner told a BLM meeting, "I'm getting to the point where I'll blow up bridges, ruins and vehicles. We're going to start a revolution." An environmentalist was nearly shoved off a canyon cliff by two wilderness opponents during a BLM-guided tour.
>
> So far, BLM has placed 5.5 million acres in Utah — more than a quarter of its land here — in an "intensive inventory" to determine if Congress should designate it as wilderness. Such a designation would mean no road building, no expansion of motorized recreation and a phaseout of mining.
>
> Ron Steele, a Moab electrician, is an active member of the Western Association of Land Users, a local group formed to fight BLM.
>
> "Gene Day [BLM district manager] is a hard-core environmentalist," Steele says. "He's wiping us out. There isn't one thing that any of us here uses that doesn't come from the land. We play on it, hunt deer, fish, get lumber. They're denying us the right of our lifestyle."

Hornblower, *supra.*

9 NEWSWEEK, *supra* note 8, at 32-33, 40.

10 *See, e.g.,* Note, *supra* note 8, at 510; Seldner, *supra* note 8, at 26; Address by Nevada State Senator Norman Glaser, Annual Western Conference of the Council of State Governments, in Jackson, Wyoming (Sept. 30, 1980). "A preliminary environmental impact statement on the MX missile indicates the giant weapons system could trigger widespread inflation and a boom and bust economy in Utah and Nevada." Wash. Post, Dec. 13, 1980, at A24, col. 1.

Opponents of the movement dispute the rebels' characterization of their cause. Some critics describe it as "a thinly veiled attempt to open the public lands to . . . special interest exploitation"[11] and "a repeat of past attempts to steal public lands and their resources."[12]

Neither assessment is completely accurate. The central issue is which group of users will receive the lion's share of the benefits from public lands. The public lands can be a tremendous source of natural resources: grazing land, timber reserves, mineral, oil, gas, and coal deposits. Much of the lands can also provide opportunities for recreation, with great potential profits for those who create recreational facilities. But the lands can also remain or become wilderness preserves. Because these uses frequently conflict, determinations of priorities must be made, and the rebellion is a manifestation of loss of clout by those who benefited from those decisions in the past.[13]

Traditionally, the federal government, as the nation's largest landowner since 1783, chose to dispose of public landholdings in order to finance government and encourage the nation's development. Thus, By the 1960's most of the land acquired through the Treaty of Paris, which marked the end of the American Revolution, and by the Louisiana Purchase had long since passed into private hands. Policies toward the vast lands acquired later from Mexico and Russia similarly had promoted private ownership and economic development.[14]

However, in 1964, Congress took three major steps toward permanent retention and active federal management of the public lands. First, Congress passed the Wilderness Act,[15] establishing a National Wilderness Preservation System composed

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11 Andrus, *The Attack on Federal Lands,* Wall St. J., Dec. 5, 1979, at 27, col. 4 (Mr. Andrus was Secretary of the Interior in the Carter Administration).

12 Shay, *The Sagebrush Rebellion,* SIERRA, Jan.-Feb. 1980, at 31 (Mr. Shay is the Sierra Club's public-lands representative for California and Nevada).

13 Economic Evaluation, *supra* note 8, at 3; Note, *supra* note 8, at 509-10.

14 This is not to say that public-lands policy has not been a source of friction between state and federal authorities before. For example, between 1828 and 1933, Alabama, Illinois, Indiana, Louisiana, and Missouri each requested Congress to cede outright the public lands to the states; in 1891, the First National Irrigation Congress demanded the same. *See* P. GATES & R. SWENSON, *supra* note 5, at 9. Outright cession was not accomplished although land grant policies were liberalized. *Id.* at 18; J. Chomski & C. Brooks, *supra* note 8, at 22; Economic Evaluation, *supra* note 8, at 11.

15 Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131–1136 (1976 & Supp. III 1979)).

of those reserved lands designated as "Wilderness Areas."[16] Second, Congress established the Public Land Law Review Commission (PLLRC) to "study existing statutes and regulations governing the retention, management and disposition of the public lands" and "to recommend such modifications in existing laws, regulations, policies and practices as [would], in the judgment of the Commission, best serve to carry out" Congress's declared policy of retention, management or disposition of the public lands "in a manner to provide the maximum benefit for the general public."[17] Third, under the Classification and Multiple Use Act,[18] Congress directed the Secretary of the Interior to classify for retention or disposal the lands administered by the Bureau of Land Management (BLM), the agency responsible for public-land management.[19] By 1970, when the Act expired, BLM had classified over ninety percent of the lands for retention.[20]

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16 16 U.S.C. §§ 1132-1133 (1976); CRS, *supra* note 2, at 7. The Council on Environmental Quality describes the Wilderness Act program as follows:

> *The Wilderness Act of 1964* . . . called for preservation of forest lands with pristine characteristics by designation as Wilderness Areas. Pursuant to the Act, the [Forest Service (FS)] conducted a second wilderness review entitled RARE II (Roadless Area Review and Evaluation) which involved an accelerated special planning and management effort. Some 62 million acres of publicly owned land in 37 states were surveyed. On January 4, 1979, FS recommended 36 million acres for timbering and resource development, 15 million acres for wilderness and 11 million acres for further study. The decision pleased neither the environmentalists nor the resource development interests. Congressional approval is needed for wilderness designation, and it is expected that the confrontation between 'environment versus development' that RARE II has generated will continue to be one of the most debated natural resource issues. It is apparent that FS planning and management tasks have become extremely complex in the face of divergent management goals.

Council on Environmental Quality, Land and Natural Resources Management: An Analysis of Selected Federal Policies, Programs, and Planning Mechanisms IV-5 (Feb. 1979) [hereinafter cited as CEQ]. One hundred areas have been designated by Congress. 16 U.S.C. § 1132 (1976 & Supp. III 1979). In the 96th Congress, 10 bills were introduced to designate additional lands as wilderness areas. J. Chomski & C. Brooks, *supra* note 8, at 81-82.

17 Act of Sept. 19, 1964, Pub. L. No. 88-606, §§ 1, 4, 78 Stat. 982, 983. On June 20, 1970, PLLRC submitted to the President and Congress its report containing 137 recommendations. PLLRC, *supra* note 8; CRS, *supra* note 2, at 8.

18 Act of Sept. 19, 1964, Pub. L. No. 88-607, 78 Stat. 986.

19 *Id.* § 1(b). BLM manages 460 million acres of unreserved, unappropriated lands. *See, e.g.*, CRS, *supra* note 2, at 11.

20 CRS, *supra* note 2, at 8. The Act expired on December 20, 1970, six months after PLLRC submitted its report. 43 U.S.C. § 1427 (1976). The Council on Environmental Quality describes the Act this way:

> The . . . Act . . . directed that lands be classified for retention or disposal and that those retained were to be managed to provide for the multiple use of

In the meantime, Nevada presented to the bipartisan PLLRC "a well-documented request for a land grant of six million acres to be selected by the state over a period of 20 years."[21] Arizona made a similar request. The PLLRC responded by recommending against additional land grants, observing:

> The legislatures of two states, Arizona and Nevada, have adopted resolutions favoring additional grants of land. While plausible arguments have been advanced by them, and conceivably might be made by some other states as well, we are convinced that such requests could not be considered unless Congress were willing to reopen the whole matter of disparities among the 28 other states that have received public land grants. At the time of admission to the Union, each state in effect entered into a compact with the United States setting forth the terms of its admission, and we do not believe they should be disturbed.[22]

In fact, in its report PLLRC concluded that future disposals of federal lands should be in small quantities only and should be based on a determination of which ownership, federal or non-federal, would achieve maximum benefit for the general public.[23]

Undaunted, the Nevada legislature, in 1975, passed a resolution "directing the [Nevada Legislative Commission] to study the various possible means whereby the citizens of Nevada may derive greater benefit from the public lands within the state retained by the federal government."[24] The resolution authorized the Commission to: first, request that Congress grant more lands; second, request that Congress permit greater state participation in federal land management decisions; and third, institute legal action to vindicate Nevada's claims.[25] In November

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resources. These were to include outdoor recreation, livestock grazing, fish and wildlife development, timber production, watershed protection, mineral production, wilderness preservation, occupancy, and preservation of public values. BLM's mission was significantly clarified by this grant of authority, but the Act was arguably only a temporary mandate. The *Federal Land Policy and Management Act of 1976* (FLPMA) perpetuated BLM land administration. CEQ, *supra* note 16, at IV-2.

21 LEGISLATIVE COMMISSION, NEVADA LEGISLATIVE COUNSEL BUREAU, MEANS OF DERIVING ADDITIONAL STATE BENEFITS FROM PUBLIC LANDS 17 (1976) [hereinafter cited as LEGISLATIVE COMMISSION].

22 PLLRC, *supra* note 1, at 243-44.

23 *Id.* at 1.

24 Nev. S. Con. Res. 35, 58th Sess., 1975 Nev. Stat. 1954, *reprinted in* LEGISLATIVE COMMISSION, *supra* note 21, at 1-2.

25 *Id.*

1976, the Commission submitted its report, together with twelve recommendations and a memorandum of law.[26] The Commission recommended that the legislature appoint a select committee to work toward a greater state role in federal lands management and adopt "a resolution urging the state attorney general to assert, in the normal course of litigation, all possible claims the State of Nevada has to the public lands within its borders."[27]

Then, in 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA),[28] giving BLM a long-awaited charter for its management of approximately 460 million acres of public domain.[29] FLPMA, an outgrowth of PLLRC's efforts to bring order to federal land laws,[30] provided that "the public lands be retained in Federal ownership, unless as a result of the planning procedure provided for in . . . [the] Act, it is determined that disposal of a particular parcel will serve the national interest."[31] Since then, BLM has "abandoned decades of indifference to become an aggressive master" of lands under its administration.[32]

Enactment of FLPMA brought to a boil all the tensions simmering in the West; the hope of overturning the Act's policy of presumptive federal retention of the public-domain lands is the rebellion's rallying point.[33]

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26 LEGISLATIVE COMMISSION, *supra* note 21, at 6-7. The memorandum of law was candidly pessimistic:

> Legal precedent as laid down by the Supreme Court is contrary to the argument presented in this memorandum that disposition of the public lands was intended by the framers of the Constitution to be mandatory. Thus, a petition in equity by the State of Nevada for removal of Congress from trusteeship over the public lands may be plainly unsubstantial.

Id. app. b, at 66-67. A legal analysis prepared by the Office of the Nevada Attorney General in May, 1977, and titled "Equal Footing Doctrine and its Application by Congress and the Courts" is also guarded in its assessment of the probability of the state's success in litigation. *E.g., id.* at 63.

27 LEGISLATIVE COMMISSION, *supra* note 21, at 6-7.

28 Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. §§ 1701-1782 (1976 & Supp. III 1979)).

29 CRS, *supra* note 2, at 9; CEQ, *supra* note 16, at IV-1, IV-2.

30 CRS, *supra* note 2, at 9; J. Chomski & C. Brooks, *supra* note 8, at 2-3.

31 43 U.S.C. § 1701(a) (1976). For a general description of the Act, see *infra* note 33.

32 NEWSWEEK, *supra* note 8, at 32; Hornblower, *supra* note 8, at B3, col. 1.

33 *See, e.g.*, Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C.D. L. REV. 317, 341 (1980); NEWSWEEK, *supra* note 8, at 32; Hornblower, *supra* note 8; Economic Evaluation, *supra* note 8, at 1-2 (quoting Mr. Verne Hamre, former Regional Forester for the Forest Service Intermountain Region); Public Trust Conference, *supra* note 3, at 1. FLPMA, of course, did considerably more than declare a policy of presumptive retention. CEQ describes the Act this way:

In 1978, the Nevada legislature passed a statute laying claim to the public-domain lands in the state, and the state attorney general began to assert the Sagebrush Rebellion thesis in litigation.[34] Since then, other western states have taken up the cudgel.[35] In order to coordinate their activities, in the spring of 1978 the Western Conference of the Council of State Governments and the Western Interstate Region of the National Association of Counties agreed to form the Western Coalition on Public Lands. The Nevada Legislative Counsel Bureau serves as a clearinghouse for the coalition.[36]

The rebels adopted a tripartite strategy in their effort to wrest control of the public lands from the federal government. First, the rebel states have asserted in the federal courts that they have a legal right under the United States Constitution to the public lands.[37] Second, the rebels have proposed and, in some

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> Also known as the BLM Organic Act, FLPMA is a comprehensive statement of BLM land use control. Among its declared policies is that public lands should be retained in Federal ownership unless disposal will serve the national interest. In pursuit of this policy, all public lands and resources are to be inventoried periodically; all previous land classifications are to be reviewed; and all land use decisions are to be the result of a land use planning process. When resources or land are to be disposed of, or utilized, efforts are to be made to assure a fair market value return to the United States. Guidelines for land use planning and management are to be designed to assure attainment of multiple use and sustained yield. Furthermore, such planning and management activities are to be undertaken so as to protect the environmental, ecological, scientific, scenic, historical, air, atmospheric, and water resource values of the public domain. To this end, areas of critical environmental concern are to be identified and protected through regulation and planning, as soon as possible. Other regulations are to be issued which establish uniform procedures for acquisition, disposal, exchange, and withdrawal of public lands.
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> . . . .
>
> FLPMA also substantially limits the . . . [power of the Executive branch of government to withdraw lands from entry as public domain], previously a very important land use control power and one fraught with controversy . . . .
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> . . . .
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> . . . The BLM is also directed by . . . FLPMA . . . to conduct a survey of those roadless areas of public lands consisting of 5,000 acres or more, identified in the land inventories as having wilderness attributes. During this review, these lands are to be administered to an extent consistent with existing utilization so as not to impair the suitability of such areas for wilderness preservation.

CEQ, *supra* note 16, at IV-2. For a taste of the controversy generated by the designation of wilderness study areas, see *infra* note 60.

34 Western Coalition on Public Lands, Coalition Comments 1, 2 (Oct. 1979).

35 *See supra* note 14; *infra* text accompanying notes 118-41.

36 Western Coalition on Public Lands, Coalition Comments 1, 2 (Oct. 1979).

37 *See infra* text accompanying notes 53-117.

instances,[38] pushed through legislation in western states laying claim to the public lands. Third, their representatives in Congress have introduced legislation that would transfer vast amounts of the public lands to the states.[39]

As we shall see, the lawsuits have shaky legal foundations, and the rebels have already suffered a major setback in the courts.[40] Because the state legislation appears to violate both the states' and the federal constitutions,[41] the statutes likewise cannot possibly achieve their stated purpose of forcing transfer of the public domain. Nevertheless, the litigation and state legislation are important, because they serve both to publicize the rebellion and to pressure Congress and the federal authorities to heed western demands.

This strategy may have already achieved some success with the Reagan Administration and the new Republican majority in the Senate.[42] Rebellion opponents have suggested that the rebellion's impact has already registered with BLM.[43]

The Reagan Administration's attitude toward the Sagebrush Rebellion is unclear. Although President Reagan expressed sympathy for the Sagebrush Rebellion during his presidential campaign,[44] he has not indicated support for a wholesale transfer

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38 *See infra* text accompanying notes 118-41.

39 *See infra* text accompanying notes 147-63.

40 Nevada *ex rel.* Nevada State Board of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981).

41 *See infra* text accompanying notes 138-141.

42 Sen. James McClure (R-Idaho), the chairman of the Senate Committee on Energy and Natural Resources, has expressed a desire for an increased state role in federal lands management and was successful in adding to a continuing appropriations resolution a provision giving Congress veto power over decisions by the Secretary of Interior to add to the wild and scenic rivers system. Sinclair, *The Stars Take Bows as the 96th Show Folds,* Wash. Post, Dec. 8, 1980, at A8, col. 5; United States Chamber of Commerce, It's Your Business (Mar. 25, 1980) (a television production), *reprinted in* Western Coalition on Public Lands, Coalition Comments 5 (Aug. 1980).

43 Salisbury, *supra* note 8, at 7 (quoting Mr. Bill Meiners, one of the founders of Save Our Public Lands, Inc., an anti-rebellion group); Shay, *supra* note 12, at 31.

44 In the summer of his 1980 presidential campaign, President Reagan was reported to have said to an audience in Salt Lake City, "I happen to be one who cheers and supports the sagebrush rebellion. Count me in as a rebel." Salisbury, *supra* note 8. In November 1980, President-elect Reagan sent a telegram to a Salt Lake City conference of the League for the Advancement of States Equal Rights (LASER), a "nonprofit foundation engaged in creating a broad base of public support in favor of divesting the federal government of the public domain." The telegram read in part: "Please convey my best wishes to all my fellow 'Sagebrush Rebels.' I renew my pledge to work toward a 'sagebrush solution.' My administration will work to insure that the states have an equitable share of public lands and their natural resources." Hamre, *LASER: Rolling Out the Big Guns,* AM. FORESTS, Mar. 1981, at 26. *See also supra* note 42.

of the public domain to state ownership. Indeed, the Administration position thus far appears to oppose such transfer.

Secretary of the Interior James Watt, the Administration's chief policy adviser and spokesman regarding public lands, has embraced the rebellion,[45] but he has not supported wholesale land transfers without consideration. Instead, he prefers to improve administration of the federal lands while retaining federal ownership. That position was illustrated by his response to Utah's recent proposal to exchange four million acres of comparatively valueless state-owned land for a similar acreage of federal land of recognized worth. Under the state's proposal the state lands offered for exchange would be considered as having "non-traditional values."[46] While Secretary Watt was reported to have "agreed in principle"[47] to an exchange, he also recognized that such a valuation for purposes of a land exchange is not authorized by law, and that before any such exchange could occur, Congress would have to act. Secretary Watt expressed both his recognition of the legal aspects of the matter and his own policy orientation by saying, "I only support an equal value trade. That's what's in the law. If Congress wants to change that, they can."[48]

Secretary Watt has chosen to approach the Sagebrush Rebellion through management of federal lands under a "good neighbor policy,"[49] and his approach seems to have taken a good deal of the wind out of the rebellion's sails.[50] Watt has acted to ease tensions between the federal and state governments by staffing DOI with Westerners who favor increased development and decreased federal regulation, beginning transfer of small quantities of lands to states and localities, and eliminating federal preemption of state water rights.[51] These

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45 *See Watt Defuses a Rebellion,* NEWSWEEK, Sept. 21, 1981, at 43. At the annual conference of western governors in Jackson Hole, Wyoming, Watt stated, "The President continues to be a sagebrush rebel and so does Jim Watt. But while I continue to be a rebel, I hope to be a rebel without a cause." *Id.*

46 Omang, *Interior Considers Changes to Trading Land With Western States,* Wash. Post, May 31, 1981, at A8, col. 1.

47 *Id.*

48 *Id.*

49 Prochnau, *Out in the Sagebrush, Watt Still Rides High,* Wash. Post, July 26, 1981, at A1, col. 4.

50 *See* Reese, *Watt Defuses a Rebellion,* NEWSWEEK, Sept. 21, 1981, at 43.

51 *Id.*

largely symbolic actions have dissipated much of the rebels' anger, and some Sagebrush rebels believe that, with the election of President Reagan and the appointment of Secretary Watt, the rebellion has achieved its purpose.[52]

Nevertheless the rebels have not slackened their efforts to force transfer of the public lands to the states. This Article seeks to evaluate the merits of statutes they have pushed through various state legislatures, and of the legislation they have proposed in Congress. It will then suggest an alternative framework for state participation in the management of public lands and resources. This proposal, modeled largely on the mechanisms for state participation found in the Clean Air Act and Clean Water Act, would permit state management and regulation of selected public-land resources under federal guidelines and supervision.

I. The Rebellion's Legal Foundations

The three prongs of the rebels' attack all claim their justification from three legal assertions ultimately derived from the proposition that continued federal control of unreserved, unappropriated public lands unconstitutionally curbs the states' right of sovereignty. Although the state statutes do not actually require a legal justification, the legislation at issue here typically recites these theses as legislative findings.[53] The federal proposals also present these justifications in their preambles.[54]

The three justifications are: first, that the equal-footing doctrine guarantees the western states economic and proprietary equality as well as political equality; second, that the Property Clause of the United States Constitution impresses the federal

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52 Senator Paul Laxalt (R-Nev.), Donna Carlson-West (Republican state legislator who was a leader of Arizona's legislative contribution to the rebellion), Governor Richard D. Lamm (D-Colo.), and Norman Glaser (Democratic state senator who led Nevada's legislative contribution) are among those who believe that the Sagebrush Rebellion has fulfilled its purpose. *Id.* Former Bureau of Land Management Director Frank Gregg has been quoted as saying that the proponents of the Sagebrush Rebellion have "succeeded beyond their wildest dreams." 127 Cong. Rec. E3868 (daily ed. July 31, 1981) (remarks of Rep. Santini).

53 *See, e.g., infra* text accompanying notes 118-41. For a good discussion of these issues, see Leshy, *supra* note 33.

54 *See infra* text accompanying notes 145-47.

government with an implied duty to sell or transfer the public domain; and third, that federal retention of the public domain unconstitutionally impairs the western states' ability to function within the federal system. Let us examine these justifications in turn.

First, the rebels assert that perpetual federal ownership and control of the public-domain lands deprives the public-land states of the expectancy of and right to political, economic and proprietary equality as states, guaranteed to them under the equal-footing doctrine. Vastly unequal federal landholdings among the states underlie the rebels' use of this theory. The federal government held no land in the original thirteen states and disposed of its holdings in the Midwest and South soon after those states were admitted into the Union.[55] By contrast, the federal government has retained enormous tracts in the public-land states of the West. Thus, the Sagebrush rebels argue that the public-land states were admitted to the Union on less than equal footing with the other states.[56]

The legal theory supporting the equal-footing doctrine is rooted in Virginia's 1784 cession of lands in the Northwest Territory, the Northwest Ordinance of 1787,[57] and the enabling legislation of every new state since Tennessee's admission in 1796.[58] The Supreme Court gave the doctrine constitutional status in its 1845 decision, *Pollard's Lessee v. Hagan*.[59] There the Court held that, as a matter of constitutional law, new states join the Union on an equal footing with the original thirteen

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55 PLLRC, *supra* note 1, at 19, 22, 27-28; P. GATES & R. SWENSON, *supra* note 5, at 121-300.

56 For the most venerable exposition of the equal-footing doctrine, see Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See also* Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 833 (1980).

57 Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 523 (1951).

58 *Id.;* Office of the Nevada Attorney General, Equal Footing Doctrine and Its Application by Congress and the Courts 19 (May 1977) (an unpublished memorandum). For a list of citations to state enabling legislation, see Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 416 n.104 (1970). The Northwest Ordinance of 1787, which provided for civil government in the Northwest Territory and the admission of new states therefrom to the confederacy, was reenacted by the First Congress in 1789 after the adoption of the Constitution. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

59 44 U.S. (3 How.) 212 (1845).

states and succeed to all the rights of sovereignty enjoyed by them, specifically including the title to beds of navigable waters.[60]

The Sagebrush rebels' reliance on *Pollard's Lessee* to support their equal-footing doctrine, however, is unjustified in light of subsequent adjudications. While the specific holding in *Pollard's Lessee,* that title to beds of navigable waterways passes to the states on admission, has held up, [61] the doctrine's effect on state property rights vis-à-vis the federal government has not been extended from the beds of navigable waterways to public lands in general.[62] Since *Pollard's Lessee,* the Supreme Court has explained that the equal-footing doctrine refers to political standing and sovereignty, not to economic stature.[63] Thus, the

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60 *Id.* at 223, 228-230. *Pollard's Lessee* is cited with approval in Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977). *See* Note, *supra* note 56, at 833. In fact, nine years earlier, the Court had achieved the same result in Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 735 (1836), on the basis of the equal-footing doctrine; however, *Pollard's Lessee v. Hagan,* with its substantial exposition, has become the leading case regarding the equal-footing doctrine as it relates to state title to the beds of navigable waterways.

61 *See, e.g.,* Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

62 The lack of expansion of the equal-footing doctrine to embrace other property interests than the beds of navigable waterways may be due in part to the historical accident under which the doctrine came to be applied to them in the first place. The history of the doctrine in this regard has been described this way:

> The bifurcated system of state ownership of the beds and federal ownership of the flow is an historical accident resulting from the absence of a federal sovereign at the time of the Revolutionary War. Great Britain transferred ownership of the flow and the beds to the original states, since a federal sovereign with power to hold land did not exist at that time. Ownership of the *flow* was subsequently transferred to the federal government by virtue of the Commerce Clause [of the United States Constitution]. Ownership of the *beds* underlying navigable waters remained a sovereignty attribute of the original states, and the equal footing doctrine served merely to guarantee that such ownership also became a sovereignty attribute of newly admitted states.
>
> . . . Ownership of beds underlying navigable waters is a necessary incident of *state* sovereignty only because the public commerce interest involved, when coupled with the historical accident noted above, compels that result. Mere analogy to state ownership of navigable water beds does not support Nevada's assertion that ownership of the public domain is a necessary incident of state sovereignty, because the lands are not imbued with the same commerce interest as the flow and underlying beds of navigable water. . . .

Note, *supra* note 8, at 522 (emphasis in original, footnotes omitted).

In other words, the equal-footing doctrine applies to beds of navigable waters only because of unusual circumstances, and it is impractical to generalize the application of the doctrine to other property interests, such as public lands. For a case which discusses state title to the beds of navigable waters in connection with commerce and attributes of sovereignty, see United States v. Oregon, 295 U.S. 1, 14 (1935).

63 United States v. Texas, 339 U.S. 707 (1950). Here the Court adjudicated the title

doctrine may not be used to eliminate economic equalities among states, such as varying amounts of federally owned land.[64]

Second, the rebels argue that the federal lands are held in a temporary public trust and that the federal government has an implied duty to sell or transfer those holdings to the states. The rebels support this theory with dicta from *Pollard's Lessee* in which the Court observed that the title to public lands in the new states remained *temporarily* in the United States, pending their sale.[65] Thus, reliance on the apparently inapplicable de-

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to the bed of the marginal sea. In regard to the equal-footing doctrine, Mr. Justice Douglas, writing for a 4-3 majority, observed:

> The "equal footing" clause [in statehood enabling legislation] has long been held to refer to political rights and to sovereignty. *It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal government; others were sovereigns of their soil. . . . The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.*

339 U.S. at 716 (emphasis added, citations omitted).

64 *Id.*

65 The dispute in *Pollard's Lessee v. Hagan* only concerned title to the bed of the navigable Mobile River in Alabama. Alabama had been carved out of lands ceded to the United States by Georgia. With respect to the temporary nature of the United States public landholdings, the Court noted:

> When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, *except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it.* Nothing remained to the United States, according to the terms of the agreement, but the public lands.
>
> The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the Union, must be admitted, and remain unquestioned, *except so far as they are temporarily deprived of control over the public lands.*
>
> . . . [The right of the United States to the public lands] originates in voluntary surrender, made by several of the old states, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of Revolution. *The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.*

44 U.S. (3 How.) at 223-24 (emphasis added). The lands in the West were acquired from foreign powers — France, Great Britain and Mexico — and while a policy of land disposition prevailed until late in the last century, it did not stand on the basis of a compact between the federal government and the original thirteen states to retire the

cision in *Pollard's Lessee* is a common element of the Sagebrush Rebellion's equal-footing and temporary-public-trust theories.[66]

But the rebels point to the Property Clause for additional support of their temporary-public-trust theory. That clause provides, "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[67] The rebels emphasize the "dispose of" language in the clause and its historical development.[68] On its face, however, the clause does not appear to mandate sale or transfer of the public domain, and while there may exist historical support for the rebellion's interpretation of the Property Clause,[69] the Supreme Court rejected that interpretation as early as 1840. In *United States v. Gratiot*[70] the Court disapproved an argument that the term "to dispose of" in the Property Clause meant the public lands were to be sold and not held by the United States.[71] *Gratiot* was cited with approval in the Supreme Court's recent *Kleppe v. New Mexico* decision as support for Congress's plenary power over federal property.[72]

Moreover, seventy years ago the equal-footing and temporary-public-trust theories were urged on the Supreme Court and

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Revolutionary War debt. At times there were even surpluses. P. GATES & R. SWENSON, *supra* note 5, at 11, 75-86. It would seem now, as then, the disposition of the public lands should be accomplished in the best interest of the entire nation, and as the public's surrogate, Congress should decide how that interest is best served through retention, lease, sale, or transfer. It appears Congress has taken those steps in the FLPMA.

66 The proponents of the "rebellion" cite as additional authority Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), which observed that the United States had no constitutional authority to hold lands for any purpose other than the eventual creation of new states. But the *Dred Scott* decision, which affirmed the legality of slavery, has fallen into disrepute, and in any event its qualification of Congress's power under the Property Clause has not held up. J. Chomski & C. Brooks, *supra* note 8, at 115-116.

67 U.S. CONST., art. 4, § 3, cl. 2.

68 Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 14, Nevada *ex rel.* Nevada State Board of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981) [hereinafter cited as Nevada Memorandum]; LEGISLATIVE COMMISSION, *supra* note 21, app. b, at 31-33.

69 LEGISLATIVE COMMISSION, *supra* note 21, app. b, at 31-33; Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding,* 28 TEX. L. REV. 43, 58 (1949).

70 39 U.S. (14 Pet.) 526 (1840).

71 *Id.* at 532-34 (defendant's arguments); *id.* at 537-39 (holding Congress's power over federal property is without limitation and includes the power not only to sell, but also to lease).

72 426 U.S. 529, 536, 539-40, 541 n.10.

were rejected by it. In *United States v.. Light*,[73] decided in 1911, the appellant, a cattleman who had been enjoined not to trespass with his herd on a forest reserve in Colorado, contended that the federal government "holds public lands in trust for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the States in which they are situated and that withdrawal of lands for the purpose of creating forest reserves violates this trust and denies to the States in which such reserves are established the equality with other States to which they are entitled."[74] The attorney general of Colorado joined in the brief. In response, the Supreme Court observed, first, that the federal government could "withhold or reserve the [public lands] indefinitely"; second, that "[a]ll the public lands of the nation are held in trust for the people of the whole country"; third, that Congress, not the courts, determines how this trust should be administered; and fourth, that "the courts cannot compel [Congress] to set aside the lands for settlement" or specify how they are to be used.[75]

Although the lands in *Light* had been reserved,[76] the principles announced in *Light* clearly apply to unreserved lands as well. In fact, fourteen years before the *Light* decision, the Supreme Court observed in *Camfield v. United States*[77] that the federal government, as proprietor, could sell unreserved lands or withhold them from sale,[78] just as any private owner might deal with his land.

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73 220 U.S. 523 (1911).

74 *Id.* at 530.

75 *Id.* at 536-37.

76 Reserved lands are withdrawn from availability for sale, settlement, or other disposition and limited to certain uses by regulatory action.

77 167 U.S. 518 (1897) (suit to enjoin fencing of private lands adjacent to public lands in such a fashion as to close in the public lands and preclude access thereto).

78 *Id.* at 524. The proponents of the Sagebrush Rebellion apparently do not quarrel now with the federal government's power to reserve lands or its power to sell or transfer them, but they do contend that the federal government cannot hold unreserved, unappropriated lands permanently; that is, such lands must be disposed of or withdrawn from the public domain for authorized purposes and only such purposes. Public Trust Conference, *supra* note 3, at 11; Nevada Memorandum, *supra* note 68, at 14, 31. Both *United States v. Light* and *Camfield v. United States* contradict that assertion.

In essence the rebellion's proponents concede that property-holding is a legitimate exercise of powers constitutionally conferred upon Congress, but contend that inaction must be justified affirmatively by Congress. The authors are not aware of any instance wherein the courts have compelled Congress to legislate anything, much less an explanation for taking no action with respect to the exercise of one of its powers. Assuming such were the case, Congress could apparently satisfy the proponents of the rebellion

Both *Light* and *Camfield* remain persuasive authority today. In *Kleppe v. New Mexico*,[79] decided in 1976, the Supreme Court cited *Light* and *Camfield* with approval in holding that Congress's power over public lands under the Property Clause is "without limitation."[80] Therefore, when Congress exercises this power to preserve wildlife on the public domain, as it has done with the Wild Free-roaming Horses and Burros Act,[81] inconsistent state statutes "must recede" under the Supremacy Clause of the Constitution.[82] Thus, *Kleppe*, in asserting that "Congress exercises the powers both of a proprietor and of a legislature over the public domain,"[83] announced a virtually

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by reserving all of the public lands, and under *United States v. Light* there would be no judicial review of that decision. In any event, Congress addressed the issue of retention and disposal in the FLPMA and provided procedures and a broad standard whereby the retention/disposal determinations would be made. It is highly unlikely the courts would now undertake the functions of the Land Office, now BLM, and substitute their judgment.

Undeniably, the early policy of the United States was one of disposal, primarily for revenue generation. Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836); P. GATES & R. SWENSON, *supra* note 5, at 121-218; Note, *supra* note 8, at 506. Disposal presumptively was then in the national interest. It would not appear that the Constitution, the organic document that it is, has had woven into its fabric an inflexible, unalterable policy of property disposal, which, according to the branch of government charged by the Constitution to legislate over such matters, is no longer presumptively in the national interest. Likely no court has the capacity to determine what is in the national interest with respect to 460 million acres of land and how that interest may best be served. Such is the work of Congress and an agency in the executive branch of government.

One explanation of why the rebellion limits its claim to the unreserved lands may be that in *Pollard's Lessee v. Hagan* the Court applies temporary-trust and equal-footing language only to unreserved lands — that is, lands the federal government had agreed to transfer in accordance with contracts of cession with the original states. Another reason may be that a claim to the reserved lands would include the National Parks, generally considered to be a national treasure, and such a claim might provoke backlash. In any event the resources on BLM lands are apparently quite generous.

79 426 U.S. 529 (1976). *Kleppe* is considered one of the causes of the Sagebrush Rebellion. Respondent's Petition for Rehearing at 38, Andrus v. Utah, 446 U.S. 500 (1980), *reh'g denied*, 448 U.S. 907 (1980); Seldner, *supra* note 8, at 26.

80 426 U.S. at 539.

81 16 U.S.C. § 1331 (1976 & Supp. III 1979).

82 U.S. CONST. art. 6, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See* 426 U.S. at 536, 538-40, 541 n.10. The Court also stated that "[a]nd while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Id.* at 539 (citations omitted) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

83 426 U.S. at 540.

unlimited congressional power, far beyond that exercised by private landowners.

Third, the rebels cite *National League of Cities v. Usery*[84] as support for the proposition that federal retention of public lands impairs the sovereign rights of the states. In *National League of Cities,* the Supreme Court held that Congress had impaired the states' "ability to function effectively in a federal system,"[85] in contravention of the federal system of government embodied in the Constitution and expressly declared in the Tenth Amendment, when it exercised its commerce power[86] to extend coverage of the minimum-wage and maximum-hour provisions of the Fair Labor Standards Act[87] to state employees.[88] Although Congress had acted within its enumerated powers, the Court found that the "exercise of congressional authority does not comport with the federal system of government embodied in the Constitution" when it operates "to *directly* displace the States' freedom to structure integral operations in areas of traditional governmental functions."[89] Rebels urge that the exercise of congressional power under the Property Clause is subject to the same limitation.[90]

The decision suggests a potential obstacle, however, to extending its reasoning to the exercise of power under the Property Clause. The Court cautioned that it expressed "no view as to whether different results might obtain" if integral operations of state governments were affected by other exercises of congressional authority, such as the spending power.[91] Thus, it is not obvious that a *National League of Cities* analysis would apply to congressional exercise of Property Clause powers over federal lands.

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84 426 U.S. 833 (1976).

85 *Id.* at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

86 U.S. CONST. art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

87 29 U.S.C. § 203(d) (1976).

88 426 U.S. at 842, 852. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

89 426 U.S. at 852 (emphasis added). *Coyle v. Oklahoma* is quoted with approval. *Id.* at 845.

90 Nevada Memorandum, *supra* note 68, at 35.

91 426 U.S. at 852 n.17.

Furthermore, *National League of Cities* cannot be read in isolation if it is to be applied to the exercise of Congress's powers under the Property Clause. It must be read with *Kleppe,* in which New Mexico urged that the Wild and Free-roaming Horses and Burros Act abridged traditional state powers over wildlife. There, the Court declined to apply the analysis of *National League of Cities* and did not subordinate the federal law, enacted on the strength of the Property Clause, to state law.[92]

Analysis of the Court's reasoning in both cases suggests the development of a consistent doctrine that sharply undermines the legal theory relied upon by the Sagebrush Rebellion. In *National League of Cities,* the federal government was affirmatively intruding into a matter most fundamental to state operations — the state's relationship to its employees. The state's freedom to make certain employment-practices decisions was *directly* displaced. In *Kleppe,* on the other hand, the federal government regulated activity on its own property. If the state's freedom to act as a sovereign entity was displaced, it was done *indirectly.* Since federal ownership and management of public lands does not dictate state decisions about those lands, the federal control at most indirectly compromises state sovereignty by preventing states from making any decisions at all about the public land within their borders.

Thus, for the rebels to turn *Kleppe* plus *National League of Cities* to their own use, they can only argue that the vast reach of federal power under the Property Clause thoroughly undermines the sovereignty of public-land states.

But institutional factors also limit application of the state-sovereignty theory. Even if Property Clause powers were exercised to impair unconstitutionally the state's ability to function effectively in the federal system, transfer of public lands to the states does not follow because other remedies, such as altering the management of public lands, are available.[93] Moreover, if

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92 *Id.* at 845-46. The Court left room for state regulation in the absence of federal legislation. *Id.* at 843.

93 For a discussion of how *National League of Cities v. Usery* might limit the exercise of the property power, see Note, *supra* note 56, at 828-32. Additionally, the federal government makes payments to local governments in lieu of taxes they might otherwise receive for the lands held in federal ownership. "For fiscal year 1979, BLM

the federal government may hold and manage some property,[94] it is highly unlikely that the courts would or could enter the thicket of the federal government's management responsibilities as a property owner and sovereign, sort through various land-use policies and options in a milieu of complex circumstances, comprehensively determine which policies and uses impair the state's sovereign abilities in a federal system, and apportion them between state and federal governments on the basis of an articulable principle.

These problems of institutional competence apply to the rebellion's equal-footing and public-trust theories as well. All states have equal access to the process for electing Congress and the President. In fact, some western states have a proportionately larger voice, due to equal representation in the Senate in spite of their relatively small populations. All exercise sovereignty and dominion over substantial lands within their political boundaries. If this does not constitute equal footing, at what point does one of the western states achieve it? What is the norm for federal landholdings against which the equality of the thirteen westernmost will be judged? Is it Rhode Island? Is it an average of the thirteen original states? Does the norm look to non-federal acreage, value of the non-federal land, population of the state, or non-federal acreage per capita? And what court has the authority or the capacity to undertake this inquiry? Thus, the "legal" theories urged in support of the Sagebrush Rebellion are in the constitutional sense political questions to be resolved, if they have not been resolved already, by Congress and the executive branch.

The rebels face another obstacle. Beginning with Louisiana in 1811, the admission of virtually every state has been conditioned by a stipulation in the appropriate enabling legislation

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paid a total amount of $103.9 million 'in lieu of tax payments' to 1,600 government units with certain tax-exempt Federal lands within their boundaries." CRS, *supra* note 2, at 39. These payments are in addition to payments made by BLM and other agencies to the state and local governments "as their share of revenues derived from leasing the public lands." *Id.* (citing Department of the Interior News Release, Local Governments Receive Federal Funds for Tax-Exempt Federal Lands (Sept. 24, 1979)). "In total, over $600 million was paid under various federally administered programs — over 60% of which was paid for BLM lands." *Id.* These payments serve in part to defuse the argument that federal landholdings sap the local tax base.

94 This point is apparently conceded by the rebellion. *See supra* note 78.

that the new state forever disclaim title to the public lands not granted by the federal government to the state.[95] This condition has been met by state constitutional provisions, legislation, or judicial decision.[96] Notwithstanding the rebellion's assertion that these conditions were extorted,[97] the Supreme Court has upheld their validity.[98] Whether or not such conditions are technically necessary or have legal efficacy, opponents of the rebellion can argue that the western states have waived their constitutional objections to federal land ownership within their borders.

II. LITIGATION

The rebels have utilized litigation challenging federal ownership of the public lands to promote their political cause before Congress and the Department of the Interior. This approach has serious risks. Litigation, if pursued in the wrong case or before the wrong court, could undermine the movement's legal doctrine.

Despite public statements regarding intentions to file an original-jurisdiction suit before the U.S. Supreme Court,[99] only

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95 P. GATES & R. SWENSON, *supra* note 5, at 285-318; J. Chomski & C. Brooks, *supra* note 8, at 119-20; Leighty, *supra* note 58.

96 The necessity or efficacy of these compactual arrangements has been doubted, since, among other reasons, Congress had constitutional power over these lands anyway. Leighty, *supra* note 58, at 417-18; *see, e.g.*, Coyle v. Oklahoma, 221 U.S. 559, 570 (1911). In this case the Supreme Court held, in invalidating a compactual arrangement requiring Oklahoma to obtain the United States' assent to relocate its capital, that the federal government could not expand its political powers beyond the limits of the Constitution through the device of a compact with new states:

> The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

221 U.S. at 572. This case "illustrates the application by the Court of the equal footing doctrine in a political context." Nevada Memorandum, *supra* note 68, at 12.

97 J. Chomski & C. Brooks, *supra* note 8, at 119-20; Address by Nevada State Senator Glaser, *supra* note 10.

98 United States v. Texas, 339 U.S. 707 (1950); Stearns v. Minnesota, 179 U.S. 223, 245 (1900). As recently as May 1980, the Supreme Court in *Andrus v. Utah* observed that the school land grants tendered to Utah in its enabling legislation, when accepted, created a compactual arrangement: "As Utah correctly emphasizes, the school lands grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties." 446 U.S. at 507.

99 Salisbury, *supra* note 8 (quoting Mr. R. Erickson of the Nevada Legislative Council); Zonana, *supra* note 8.

"water-testing" actions in the lower courts have been litigated. To date, no case has required divestiture of federal lands.[100] On the contrary, the authorities indicate that the federal government may hold the public domain indefinitely, if Congress wishes. And despite the care being taken to choose the right turf on which to vindicate the Sagebrush ethic without great risk, the rebellion suffered a major defeat in the recent "Sagebrush Rebellion case."

On April 25, 1978, Nevada filed *Nevada ex rel. Nevada State Board of Agriculture v. United States,*[101] the Sagebrush Rebellion case, in federal district court in Reno, Nevada.[102] Initially, Nevada sought to compel the Secretary of the Interior to rescind a 1964 notice effectively withdrawing public lands in Nevada from entry under the Desert Lands Act.[103] While the litigation was pending, Secretary of the Interior Cecil Andrus rescinded the order. Nevada amended its complaint on August 9, 1979, and then sought, among other relief, a declaration that the FLPMA's permanent retention policy is not constitutionally valid. Nevada contended that the United States held public lands within the state pursuant to a temporary public trust whose object was to transfer the lands to the state, and that the equal-footing doctrine also mandated transfer. The United States moved to dismiss the amended complaint on the grounds that a congressional policy does not present a justiciable controversy and that in any event the state's claim is not meritorious, citing *Kleppe*. On March 31, 1981, the district court issued a memorandum opinion. While concluding that a justiciable controversy existed and that Nevada had standing to sue, the court ruled Nevada lacked a legal basis for its claims.

Nevada relied on *Pollard's Lessee v. Hagan,*[104] for the proposition that the United States has a trust obligation to dispose of public-domain lands. In response, the court declared that

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100 Note, *supra* note 8, at 518-19.

101 Nevada *ex rel.* Nevada State Board of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981).

102 J. Chomski & C. Brooks, *supra* note 8, at 93.

103 The notice recites that the withdrawal was accomplished at Nevada's request. 29 Fed. Reg. 7294 (1964). The Desert Land Act is codified at 43 U.S.C. §§ 321-339 (1976).

104 *See supra* text accompanying notes 59-66.

"[u]nfortunately for the plaintiff herein, the U.S. Supreme Court has greatly weakened the *Pollard's Lessee* case as precedent supportive of the plaintiff's arguments,"[105] citing *Dred Scott v. Sanford*[106] and *Gratiot*.[107] Furthermore, the court noted that *Pollard's Lessee* applies only to beds of navigable waters.[108]

The court also strongly rejected the state's equal-footing claim that the extent of state land ownership was a crucial factor in achieving an "equal footing" with other states:

> Federal regulation which is otherwise valid is not a violation of the "equal footing" doctrine merely because its impact may differ between various states because of geographic and economic reasons. *Island Airlines, Incorporated v. C.A.B.*, 363 F.2d 120 (9th Cir. 1966). The doctrine applies only to political rights and sovereignty; it does not cover economic matters, for there never has been equality among the states in that sense. *United States v. Texas,* 339 U.S. 707 (1950). Said case points out that, when they entered the Union, some states contained large tracts of land belonging to the federal government, whereas others had none. "The requirement of equal footing was designed not to wipe out these diversities but to create parity as respects political standing and sovereignty." *Id.*, at 716. Accordingly, Congress may cede property to one state without a corresponding cession to all states. Concurring op. of Reed, J., in *Alabama v. Texas,* 347 U.S. 272 (1954). The equal footing doctrine does not affect Congress' power to dispose of federal property. *Ibid.*[109]

The court noted that Nevada, like other states, had been admitted to the Union subject to the usual disclaimer of title to the public domain, and that under *Kleppe,* the Property Clause "entrusts Congress with power over the public land without limitations; it is not for the courts to say how that trust shall be administered, but for Congress to determine."[110] Finally, the court stated that under *Light* and *Camfield,* "the U.S. Government may sell public land or withhold it from sale."[111]

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105 Nevada v. United States, 512 F. Supp. at 171.
106 60 U.S. (19 How.) 393 (1856). *See also supra* note 66.
107 39 U.S. (14 Pet.) 526 (1840).
108 Nevada v. United States, 512 F. Supp. at 171.
109 *Id.*
110 *Id.* at 172.
111 *Id.*

Following dismissal of the action, Nevada filed a motion for reconsideration. This motion reiterated Nevada's previous arguments and took issue with the soundness of the district court's decision. On July 20, 1981, the court denied the motion.[112] The judge commended the state's attorney for his diligence, thoroughness, presentation, and "creativity of thinking," and noted that those qualities reflected a "sincere belief in the righteousness of his client's cause."[113] Nevertheless, recognizing that law, and not righteousness, is the standard against which the rebellion must be measured, the court remained "convinced that controlling legal precedent"[114] disposed of the matter entirely. The case has not been appealed.[115].

Had the court dismissed the case on grounds not going to the legal merits of the claim, the rebels could have argued that the government was erecting technical defenses in an effort to avoid getting at the real issues. Such a disposition of the case would have left untouched the rebellion's legal underpinnings and increased its prospects for success on ultimate appeal to the Supreme Court. Instead, the rebellion's legal theory was rejected head-on. Consequently, the outcome of the Sagebrush Rebellion case must constitute a serious setback.

The rebels suffered a second defeat, this time in the Supreme Court, in *Andrus v. Utah,*[116] a case involving Utah's school-lands indemnity selections. Upon admission new states were granted specific sections of each township for support of schools. Since not all of the lands had been surveyed and some may have already been disposed of, the new states were permitted to select other sections to "indemnify" them for the original sections ultimately not available. Utah wanted to select on an "equal acreage" basis. Using this method, Utah would be able to obtain acreage equal to that lost, but richer in minerals. The Department of Interior, however, only permitted selection on an "equal value" basis. In litigation over the correct basis for the indemnity selections, Utah used the equal-footing

112 Nevada v. United States, Civ. No. 78-77-ECR (D. Nev. July 20, 1981) (denial of petition for reconsideration).

113 *Id.*

114 *Id.*

115 Interview with Mr. Gerald Fish, United States Department of Justice Attorney, Washington, D.C. (Aug. 28, 1981).

116 446 U.S. 500 (1980).

doctrine as the foundation of its claim. The Supreme Court ruled against Utah on statutory grounds.

In its petition for rehearing to the Supreme Court, Utah argued that the "Court's [May 1980] opinion will fan the flames of the Sagebrush Rebellion." The petition went on to suggest rhetorically that "[c]ertainly there must be serious and substantial grievances against the Federal Government that have prompted this Western Declaration of Independence from this omnipresent, oppressive and suffocating proprietary presence." Finally, Utah catalogued other instances in which the state believed its sovereignty had been abused by the claims and actions of the federal government.[117] But Utah failed to supply objective data demonstrating how the current public-land management scheme impairs effective state government in Utah.

Clearly, the phrase "flames of the Sagebrush Rebellion" is not a legal argument and the Supreme Court does not rule on the basis of public criticism. This feature of the petition was a feeble attempt to politicize the Supreme Court on these issues and did nothing to advance the states' cause on the basis of reason and principle.

In view of the constitutional strength of the precedents supporting continued federal ownership of the public domain, the Sagebrush rebels should abandon their efforts on the judicial front. These attempts will almost certainly fail as they failed in Nevada's Sagebrush Rebellion case. More defeats could only further demonstrate the fundamental weakness of the rebels' legal premises and erode whatever political credibility the rebels now enjoy. The purpose of publicizing the rebellion has now been served. Concentrating on influencing federal action directly would be more to the point.

III. State Sagebrush Legislation

In addition to instituting legal action to test their claims, the rebels have sought to publicize their cause, and perhaps to create additional opportunities for court action, through state legislation asserting title to the public lands.

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117 Respondent's Petition for Rehearing, Andrus v. Utah, 446 U.S. 500 (1980), *reh'g denied*, 448 U.S. 907 (1980).

Arizona, Nevada, New Mexico, Utah, and Wyoming have enacted legislation claiming title to the public domain within their respective boundaries.[118] California and Colorado have passed measures calling for studies of federal land ownership.[119] Hawaii, with only 10 percent federal ownership,[120] passed a sympathy resolution.[121] With one exception, all of this legislation was enacted in 1980.

Not all efforts in this regard have been successful. In 1979, the California legislature passed a full-scale Sagebrush bill, but Governor Jerry Brown vetoed it. His veto was not overridden.[122] A narrower measure calling for studies passed in 1980, and Governor Brown allowed it to become law without his signature.[123] In Washington, a Sagebrush Rebellion measure was enacted; however, it was contingent upon voter approval of a constitutional amendment revoking the state's disclaimer to the unappropriated public lands.[124] The proposed amendment failed in the November 1980 elections.[125] More recently, Montana rejected state legislation seeking transfer of the public lands to the state.[126]

The Nevada act, passed in 1979, is the prototype for the other full-scale Sagebrush bills. This act: (1) asserts that Nevada has a legal and moral claim to the unreserved, unappropriated public lands within the state; (2) declares these public-domain lands to be the property of Nevada; (3) claims for Nevada the proceeds of any sale of the public domain; (4) requires the public lands to be held by the Division of State Lands, Department

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118 ARIZ. REV. STAT. ANN. §§ 37-901 to 37-909 (West Supp. 1980-1981); NEV. REV. STAT. §§ 321.596-.599 (1979); N.M. STAT. ANN. §§ 19-15-1 to 19-15-10 (Supp. 1980); UTAH CODE ANN. §§ 65-11-1 to 65-11-9 (Supp. 1980); WYO. STAT. ANN. 36-12-10 (Supp. 1980).

119 Act of July 29, 1980, ch. 831, § 2, 1980 Cal. Legis. Serv. 2636 (West) (codified at CAL. PUB. RES. CODE § 6201.5 note (West Supp. 1981)) [hereinafter cited as California act]; Western Coalition on Public Lands, Coalition Comments 8 (Mar. 1980).

120 DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 10 (1977), *reprinted in* Note, *supra* note 8, at 507.

121 Western Coalition on Public Lands, Coalition Comments 6 (Nov. 1980).

122 *Id.* at 7; Seldner, *supra* note 8, at 27, col. 1; J. Chomski & C. Brooks, *supra* note 8, at 84.

123 California act, *supra* note 119; Western Coalition on Public Lands, Coalition Comments 7 (Nov. 1980).

124 Act of Mar. 10, 1980, ch. 116, 1980 Wash. Laws 358.

125 Salisbury, *supra* note 8, at 7, col. 6.

126 *See What's Behind the Sagebrush Rebellion?*, NAT'L WILDLIFE, Aug.-Sept. 1981, at 31, 34.

of Conservation and Resources, to be managed "under principles of multiple use which provide the greatest benefit to the people of Nevada"; (5) prohibits transfer of public lands unless authorized by an act of the state legislature passed after July 1, 1979; (6) requires that any use, management, or disposal of the public lands be accomplished with written authorization of the state lands registrar; (7) creates a board of review to oversee the state lands registrar; and (8) appropriates $250,000 to the state attorney general to support litigation arising out of the act.[127]

The Utah act is similar. That act makes a self-executing claim to the public domain. It provides that attempting "to exercise jurisdiction over the public land contrary to the laws of" the state shall be a misdemeanor.[128] This provision could be used to prosecute BLM personnel in order to test the act's constitutionality. However, the act also provides that the duties of the state agencies and officials responsible for administering the public lands under the act do not vest until the act's constitutionality is adjudicated.[129] Although the act authorizes the state attorney general to bring an action against the United States,[130] he has not yet done so. Hence, no state official is lawfully exercising jurisdiction over these lands; the criminal provisions, therefore, cannot be legally enforced.

The Wyoming act, like Utah's, purports to make it a crime for any person to attempt to exercise jurisdiction over the lands covered by the act in a manner not permitted by it. The Wyoming act, however, unlike the Utah act, makes it a felony,[131] and becomes effective immediately.[132]

The Arizona act, passed over the governor's veto on April 15, 1980, is also modeled after the Nevada measure. It goes beyond the Nevada act, however, by placing on the general tax rolls all federal lands acquired by gift, purchase, exchange or

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127 Act of June 2, 1979, ch. 633, 1979 Nev. Stat. 1362 (codified at NEV. REV. STAT. §§ 321.596-.599 (1979)).

128 UTAH CODE ANN. § 65-11-9 (Supp. 1981).

129 UTAH CODE ANN. § 65-11-7(6) (Supp. 1981). This act has no present legal affect. Note, *supra* note 8, at 514. "Utah's Governor Matheson considers it to be little more than 'a resolution or a statement of policy.'" *Id.*

130 UTAH CODE ANN. § 65-11-8 (Supp. 1981).

131 WYO. STAT. § 36-12-108(c) (Supp. 1981).

132 Act of Mar. 10, 1980, ch. 53, § 3, 1980 Wyo. Sess. Laws 265, 267.

eminent domain before the effective date of the act, to be subject to taxation beginning January 1, 1981, unless the state legislature specifically consents to federal ownership.[133] This provision does not, of course, apply to the public domain, which Arizona now claims. In addition, it appears Arizona has already consented to acquisition of all property acquired by the United States for military purposes.[134]

The New Mexico act contains a taxing provision similar to that of Arizona.[135] New Mexico likewise has already consented to federal acquisition of a number of monuments and military reservations.[136]

All of these full-scale Sagebrush Rebellion acts claim for the states the unreserved, unappropriated federal lands within their respective borders. All create state agencies and offices for the administration of the public lands under principles of multiple use, and all have positioned the states to obtain title to the lands should any of the bills currently pending in Congress become law.[137]

But if Congress does not take appropriate action to transfer the public domain, the state acts will be null and void, for the federal enabling legislation of these states conditioned admission on the states' disclaiming forever title to the public domain. That condition was met by the adoption of appropriate provisions in their constitutions.[138] These disclaimers remain irrev-

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133 ARIZ. REV. STAT. ANN. § 37-907 (West Supp. 1980-1981).

134 *Id.* § 26-251.

135 N.M. STAT. ANN. § 19-15-7 (Supp. 1981). The New Mexico act also appears to be unconstitutional from both a federal and a state standpoint. *See* 36 Stat. 557 (1910); N.M. CONST. art. VIII, § 3, art. XXI, § 2; Irwin v. Wright, 258 U.S. 219 (1922); Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

136 N.M. STAT. ANN. §§ 19-2-2 to 19-2-11 (1978).

137 It appears that some additional state legislation would be required to satisfy the requirements of those bills (discussed in the text above). Also, former Secretary of the Interior Andrus suggested that there are state constitutional barriers to a balanced state management of public lands. He suggested that Idaho, for example, must manage its state lands for the highest return to the school endowment fund. Andrus, *supra* note 11. The rebels dispute this claim. Western Coalition on Public Lands, Coalition Comments 4 (Jan. 1980). Although a detailed analysis of the respective state constitutions for this purpose is beyond the scope of this Article, it would seem that if there is any genuine dispute on this score, Congress could assure itself that the lands transferred could be managed by the states in accordance with the multiple-use principles enunciated in the bill, by requiring the federal land transfer board, as a precondition to transfer, to obtain the opinion of the Attorney General that the applicant state has the requisite powers. For discussion of the board, see text accompanying notes 144 & 154-59.

138 ARIZ. CONST. art. XX, § 4; N.M. CONST. art. XXI, § 2; NEV. CONST. "Ordinance";

ocable unless Congress assents. This legislation therefore contravenes the constitutions of the states themselves. Furthermore, the acts contravene the Property Clause and the enabling legislation, both of which are supreme to state laws or constitutions.

The consequences of a state's attempt to revoke a covenant upon which it was admitted are unclear. There are several possibilities. First, the state might revert to territorial status and forfeit representation in Congress and participation in the electoral process. Second, title to lands granted to the states upon admission might revert to the federal government. If already sold by the state, title to them might be clouded. Third, payments made by the federal government to the states in lieu of taxes they might otherwise receive if the lands were in private ownership might terminate. This concern was significant enough to cause the Nevada Attorney General to meet with the Deputy Solicitor of the Department of Interior after passage of the Nevada Sagebrush act in order to urge the Department to continue the "in-lieu" payments to Nevada local governments. The Department readily agreed.[139] Most probably, the states will not suffer these consequences since the ordinances they incorporated into their constitutions are irrevocable.

The Nevada legislature is considering additional action.[140] First, it is considering legislation to guarantee state payments in lieu of those the local governments now receive from the federal government. Second, it is considering a requirement that the public lands sold off to private parties have perpetual easements preserving public access. Finally, Nevada intends to revoke its blanket consent to federal acquisition of property within the state. Previously, this consent has been granted in contemplation of article I, section 8, clause 17 of the United States Constitution, which provides that Congress has the power to exercise legislative jurisdiction over places purchased with the consent of the legislatures of the states in which they are located. But whether the state consents to acquisition is largely

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UTAH CONST. art. III, § 2; WYO. CONST. art. 21, § 26. *See also* Memorandum of the Legislative Reference Service, Library of Congress to Hon. Carl Hayden, Revocation of provisions of Arizona's irrevocable ordinance in 1927 (Apr. 9, 1956).

139 Interview with Mr. Paul Smyth, Attorney, Solicitor's Office, United States Department of the Interior, Washington, D.C. (Oct. 25, 1980).

140 Western Coalition on Public Lands, Coalition Comments 8 (Nov. 1980).

immaterial. If Nevada consents, the federal government exercises exclusive legislative jurisdiction. If Nevada does not consent, then Nevada legislative jurisdiction extends over the property. In either case, Nevada may not tax the property. Furthermore, Nevada laws potentially affecting management cannot supersede federal law, since, as *Kleppe* demonstrates, inconsistent state law must recede in the face of federal legislation.[141]

IV. Sagebrush Rebellion Bills in Congress

The central strategy of the Sagebrush Rebellion is to enact federal legislation to transfer ownership of the public lands to the states. Federal land ownership and use is an area of substantial congressional concern; more than sixty bills on this subject were introduced in the Ninety-sixth Congress.[142] Three Sagebrush Rebellion bills dealt explicitly with wholesale transfer of public lands to the states, but no hearings were held on these measures.[143]

On May 20, 1981, Sen. Orrin G. Hatch (R-Utah) and Rep. Jim Santini (D-Nev.) introduced substantially identical Sagebrush Rebellion bills in the Ninety-seventh Congress. The bills, both titled the "Public Land Reform Act of 1981," provide for transfer of federally owned lands in the West to the states in

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141 Congressional jurisdiction over lands owned by the federal government is a question of constitutional proportions. *See supra* text accompanying notes 79, 80, 82, 96. In *Kleppe v. New Mexico* the Supreme Court specifically rejected the argument that in the absence of state consent to acquisition Congress lacks the power to act contrary to state law. Whether or not the state has or has not consented to exclusive legislative jurisdiction in the federal government, the Property Clause still gives the federal government power to override state legislation. In other words, New Mexico, like the authors of these bills, confuses Congress's powers over federal property under the Property Clause and the exclusive legislative jurisdiction it derives over property acquired with the consent of the state under art. I, § 8, cl. 17 of the Constitution. 426 U.S. at 541-43.

142 J. Chomski & C. Brooks, *supra* note 8, at 73. The bills can be divided into seven categories: Sagebrush Rebellion; "in-lieu" payments; archaeological guidelines; resource development; wilderness proposals; federal land acquisition; and Alaska lands and related issues. *Id.*

143 *See* H.R. 7837, 96th Cong., 2d Sess. (1980) (introduced by Rep. Jim Santini (D-Nev.), 126 Cong. Rec. H6534 (daily ed. July 25, 1980)); H.R. 5662, 96th Cong., 1st Sess. (1979) (introduced by Rep. Donald E. Young (R-Alaska), 125 Cong. Rec. H9460 (daily ed. Oct. 19, 1979)); S. 1680, 96th Cong., 1st Sess. (1979) (introduced by Sen. Orrin G. Hatch (R-Utah), 125 Cong. Rec. S11,665 (daily ed. Aug. 3, 1979).

which those lands are located. These transfers would be effected by federal land transfer boards upon the condition that the applicant states have in existence a state land management agency to manage the lands "in conformity with established concepts of multiple use and sustained yield." The Santini bill, H.R. 3655, would only permit transfer of the unreserved, unappropriated federal lands — that is, the public-domain lands — in the thirteen westernmost states. The Hatch bill, S. 1245, would make forest reserves, in addition to the public domain, available for transfer.

These bills contain some improvements over the Ninety-sixth Congress versions; they contain substantially revised statements of policy, provisions for revestment of title in the state if the state conveys lands contrary to the requirements of the bills, and provisions for relieving the states of the burdens of disclaimers of title found in their enabling acts.[144] Nevertheless, serious inadequacies remain.

Title I of both bills sets out congressional findings and declarations of policy which are the premise for the proposed legislative action. These provisions, which rarely receive close attention, are thorough statements of the legal and policy rationales supporting the Sagebrush Rebellion. But close examination reveals that these statements are based on invalid assumptions.

Section 102 of the bills states that "in the absence of . . . Federal domain within their borders, the legislative authority of such States would extend over all lands therein to the same extent as over similar property currently in State of private ownership. . . ." This statement merely expresses the obvious, however, because states naturally exercise legislative authority over state and privately owned land, while the extent of state authority over federal lands is constitutionally limited.[145] The drafters then declare that "it is no longer useful or necessary for the United States *to hold all unreserved and unappropriated public lands in trust for the States . . . in which such lands are situated.*"[146] While these findings recite the popular theme of

144 *See supra* text accompanying notes 95-98.

145 *See supra* note 141.

146 H.R. 3655, 97th Cong., 1st Sess. § 102 (1981); S. 1245, 97th Cong., 1st Sess. § 102 (1981).

the Sagebrush Rebellion, their underlying legal assumptions are invalid. As a matter of constitutional law, public lands are held in trust for the benefit of the whole country, not for the sole benefit of the states in which the lands are located.[147] *Pollard's Lessee* would at most support a notion that the public-domain lands were to be sold off, not given to the states. In any event, although the stated rationale may be invalid, Congress has plenary power over the lands and in fact has made land grants to the states in the past.

Finally, the bills directly conflict with the FLPMA policy of presumptive retention of the public-domain lands.[148] Section 103 states that the policy of the Act is to transfer "all unreserved and unappropriated public lands presently held in trust for the States in which such lands are situated to state ownership in accordance with the conditions and stipulations of this Act and as expeditiously as possible."[149]

These policy statements are dogmatic assertions and rewrites of history based on invalid assumptions. Rather than making the legislation a vindictive diatribe of the Sagebrush Rebellion ethic and rhetoric, a better approach would be to declare that it is in the interest of the affected states and the nation as a whole to transfer title to the states. This approach assumes that there would be explicit factual support for this declaration and that passage of the bills, not merely introduction of legislation for the purpose of carrying on the debate, is the desired political goal. Nonetheless, the policy statements of the bills should not detract from their truly important features.

The lands available for transfer to the states under the bills would be determined by their definition of "unreserved unappropriated public lands." The bills permit states to seek the transfer of all or part of lands owned by the United States in the thirteen westernmost states, with the exception of:
(1) national parks, monuments, wildlife and bird sanctuaries;
(2) wilderness areas;
(3) military reservations and Indian reservations;

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147 United States v. Light, 220 U.S. 523 (1911).
148 *See supra* text accompanying notes 85-87.
149 H.R. 3655, 97th Cong., 1st Sess. § 103 (1981); S. 1245, 97th Cong., 1st Sess. § 103 (1981).

(4) lands essential to projects of the Corps of Engineers and the United States Water and Power Resources Service;
(5) lands essential to the United States highway system;
(6) shipyards, docks, defense related properties, and federal government buildings;
(7) lands selected by Native Corporations in Alaska; and
(8) national forests (H.R. 3655 only).[150]

To summarize, the transferable lands would be public-domain lands, and perhaps national forest lands, depending upon the version of the bill in question.[151]

Title III sets forth the prerequisites that the applicant states must meet in order to qualify for transfer of the lands. The applicant state must establish a land management agency which would manage the lands in accordance with mandatory state laws which:
(1) require that the agency hold and manage conveyed lands "in trust for the ultimate benefit and use of all the people of the United States" in accordance with "established concepts of multiple use and sustained yield";
(2) declare state ownership of all public lands of the state, including mineral and water rights, subject to prior non-federal reservations or appropriations;
(3) recognize pre-existing non-federal rights in the lands transferred;
(4) require a continuing inventory and study of public lands in the state to enhance their use and management;
(5) continue payments in lieu of taxes to local governments;
(6) provide for no-cost transfer of easements, rights-of-way, permits, and licenses to the federal government; and
(7) continue to administer lands in accordance with any pre-existing obligation imposed by treaty or interstate compact.[152]

The first requirement expresses a fundamental philosophical conflict with the entire theme of the Sagebrush Rebellion and the overall purpose of the bills insofar as it would require the

150 *Id.* § 104.
151 This definition closely follows those in the 96th Congress bills. H.R. 7837, 96th Cong., 2d Sess. § 104 (1980); H.R. 5662, 96th Cong., 1st Sess. § 104 (1979); S. 1680, 96th Cong., 1st Sess. § 104 (1979).
152 H.R. 3655, 97th Cong., 1st Sess. § 301(b) (1981); S. 1245, 97th Cong., 1st Sess. § 301(b) (1981).

states to hold and manage conveyed lands "in trust for the ultimate benefit and use of all the people of the United States." This statement implicitly recognizes the *United States v. Light* concept that, to the extent public lands are held in trust, they are so held for the benefit of the entire population of the United States.[153] Under this concept, the states would merely become successor trustees, and the rebels might find their condition only marginally improved by the legislation. Extending this same concept a step further, the trustee states might acquire an obligation to turn over to the general treasury of the United States all revenues in excess of the costs of management. Certainly nothing in the bills expressly requires such payments by the states into the general treasury. The bills are conceptually muddled and the drafters seem to be uncertain about how far they really want to go in responding to the Sagebrush Rebellion.

Title II of the bills establishes procedures whereby the states may acquire the public lands. Federal land transfer boards are to be formed for each state after its governor submits an application to the President for transfer of the lands. Each board would be composed of a chairman appointed by the President; the Secretaries of Interior, Agriculture, and Defense, or their designees; and three members appointed by the President from a list of nominees submitted by the governor of the applicant state. The board would be the sole administrative authority considering the application; for example, action under the legislation is exempted explicitly from the requirements for environmental impact statements under the National Environmental Policy Act.[154]

Although the bills do not specify what the applications must contain, presumably an application would identify the lands being sought. If the board's determination is limited to deciding whether the application and applicant are in compliance with the Public Land Reform Act, the board's function would be ministerial. But the lands sought by the state must be those which are subject to transfer under the Act. In other words, the lands sought must be "unreserved unappropriated public lands," as defined in the legislation, that do not fall within a

153 220 U.S. 523 (1911).

154 H.R. 3655, 97th Cong., 1st Sess. § 201(f) (1981); S. 1245, 97th Cong., 1st Sess. § 201(f) (1981).

specific exception. The close definitional issues inherent in the "lands essential"/"lands necessary" exceptions seem to transform the board's otherwise ministerial role into an adjudicatory one. For example, is a million-acre watershed *essential* to a flood control or irrigation project? How much land would be *necessary* for the MX missile system? These provisions carry great potential for disagreement between the states and the federal government.

After a public-comment period of not more than ninety days, the board would vote on the application.[155] If a majority of the board concludes that the requirements of the Act are satisfied, the board must transfer the lands to the state land management agency within twenty-four months. The bills contemplate that the conveyances will be made "without consideration other than mutual convenants entered into under this act." If the board determines that the state's application is deficient, it must notify the applicant state within thirty days of the determination. The state is then free to make new applications within the ten-year effective period of the Act.

The bills establish administrative procedures to resolve the inevitable disputes arising under the legislation.[156] The right to an administrative determination by the board extends not only to states, but also to individuals and corporations. In addition, the states have the right to petition for board reconsideration of adverse determinations on the state's applications. This adjudicatory function of the board could prove highly complex, time-consuming, and litigation-provoking.

The bills provide for judicial review of final decisions of the board before the federal court of appeals for the circuit in which the affected lands are located.[157] Judicial review is limited to the administrative record and the standard of review is whether the board's findings are "supported by substantial evidence on the record considered as a whole."[158] If the board's findings fail to meet the statutory test, the only relief provided by the Act is a remand to the board "for such further action as the court may direct."[159]

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155 The chairman would vote only in case of a tie. *Id.* § 201.
156 *Id.* §§ 202, 203.
157 *Id.* § 204.
158 *Id.*
159 *Id.*

Since the board's functions are specified in the bills, presumably the only further action the court could direct would be further proceedings in accordance with the bills. The machinery of the Act relating to board action and judicial review is heavily weighted in favor of ultimate conveyance to the states. Once the board determines that the application meets the requirements of the Act, it has no discretion in deciding whether to convey lands to the applicant state. The provision for judicial review, as a practical matter, does no more than assure the completeness of the applications and assure that the land does not fall within one of the limited exceptions to the transfer provision. If the bills are enacted, "unreserved unappropriated public lands" will be available to the states simply for the asking.

Title IV governs state management of the lands after conveyance by the board. States may transfer to privte parties the lands conveyed by the board if one of three stated criteria are met:

(1) state management is difficult and uneconomic due to location or other characteristics;

(2) the lands are no longer needed to fulfill the purpose for which they were acquired or any other public purpose; or,

(3) transfer would serve "important objectives," including economic development.[160]

If a court determines that a transfer by the state is not in accordance with these criteria, title to the property would revert to the state. But the provision is little more than a verbal gesture to those who fear that states would simply convey large amounts of land to generate quick revenue. The criteria are so broad that any conceivable conveyance deemed desirable by the state land managment agency could be tailored to fit the conditions, and it is doubtful that a court would ever find them unsatisfied.

Once the states receive title to the lands, they would be free to manage the lands as they pleased. The states must meet threshold "conditions and requirements" in their applications for transfer of the lands, but, except for criminal penalties for conflict-of-interest violations, the bills impose no other sanctions on state management. The bills make no provision for

160 *Id.* §§ 401-403.

reversion to the federal government for failure to manage the lands properly or failure to fulfill "public trust" responsibilities.

Title V contains miscellaneous provisions. One provision attempts to resolve conflicts that may arise out of state disclaimers of title to public lands. This provision is significant in that it would provide the necessary congressional consent to modification of the original conditions of statehood.[161] Another section consents to interstate compacts concerning management of the lands, contingent upon board approval.[162] Finally, Title V directs that, within ninety days after enactment of the bill, the Secretary of the Interior must begin a government study of the relative costs and benefits of state and federal land management.[163]

The purpose of the study is unclear, although the thrust of this requirement seems to be consistent with the themes of both the Reagan Administration and the Sagebrush Rebellion that the federal government is part of the nation's problems. If this study were to be completed prior to congressional action, it could provide important information about the necessity and desirability of transferring public lands to the states. But because the Act would by itself set up the machinery for the transfer and effect the conveyance of the public domain to the states, the study would be redundant. Once the land transfer boards are in place and the conveyance machinery is rolling, the states certainly would no longer care about the outcome of such a study. Furthermore, the provision imposes substantial burdens on the Department of Interior that are only slightly mitigated by language allowing pre-existing federal studies to be used for this purpose. The inclusion of the study requirement suggests that even the drafters and sponsors of the bill are not yet sure that Sagebrush legislation is a good idea, and that they are still searching for data to support the bold findings and policy statements in the opening sections of the bills.

V. Legislative Proposals

The pending legislation would not establish a viable process for meeting the objectives of the Sagebrush rebels. The rebels

161 *See supra* text accompanying notes 95-98.

162 H.R. 3655, 97th Cong., 1st Sess. § 502 (1981); S. 1245, 97th Cong., 1st Sess. § 502 (1981).

163 *Id.* § 504.

should consider mechanisms short of gratuitous conveyance on a grand scale to achieve serious congressional movement toward state control over the public lands.

Legislation seeking to dictate whether the public-domain lands should be transferred to the states in which they are located should be based on the best interests of the whole country — as Congress can best determine them. The present federal/non-federal land configurations were the product of this deliberative process. But circumstances may change, and old formulas developed many years ago may not be holding up. If the whole country is better served by resource management at the hands of those states in which resources are located, federal landholdings should be transferred to them. In fact, the bills pending before the Ninety-seventh Congress found that "historically, federal land management policies have failed to provide for the timely and effective development of federally-owned resources which are critical to the national economy; this failure is institutional."[164] The states claiming to be aggrieved should demonstrate how efficient resource management is being impaired[165] so that the remedy could be tailored to meet the ill.

Western states will find it difficult to meet this burden. A reasonable goal for the rebels is to obtain greater control over federal land management policy[166] rather than outright ownership of the lands. This effort could be focused on either new legislation or greater utilization of existing powers under the FLPMA.

Two federal pollution-control programs, although not without their own problems, are possible alternative legislative approaches that could be applied to public-land management. The Clean Air Act[167] and the Clean Water Act[168] regulate two val-

164 H.R. 7837, H.R. 5662, and S. 1680, *supra* note 143.

165 There are strong arguments, however, that absolute transfer or disposal of the lands is in the national interest. First, the public-land states are already receiving a substantial share of the federal land-source revenues and the part they do not receive is consumed by the federal government in administrative costs. Second, the states administer natural resources more efficiently. Third, the political cycle of the federal government is perpetually out of phase with the resource development cycle. Fourth, decentralization of the resource management responsibility will over the long haul stabilize resource development in the United States. Telephone interview with Mr. James Black, Legislative Assistant to Sen. Orrin Hatch (Dec. 4, 1980).

166 Note, *supra* note 8, at 533.

167 42 U.S.C. §§ 7401-7626 (Supp. III 1979).

168 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

uable environmental commodities under the control of the federal government, the air and the navigable waters, that are analogous to federal lands. The Acts' central feature is a requirement that polluters acquire permits before discharging pollutants.

These highly developed federal regulatory schemes are designed to operate in an atmosphere of federal-state cooperation and partnership. Pursuant to the Acts, Congress sets national goals, but management of the quality of the air and navigable waters can be transferred in varying degrees to the state governments. The regulatory program can then be tailored to meet local needs. In fact, the state regulations even apply to federal facilities to the extent that federal agencies must pay the same fees and fines as private parties for activities covered by the programs.[169] States must meet explicit criteria before they may assume administration and enforcement of the regulatory program in lieu of administration and enforcement by the federal government. The federal government retains a degree of oversight, and it has authority to resume its regulatory functions under appropriate circumstances.

The Clean Water Act regulates the discharge of pollutants from point sources into the navigable waters. The Act prohibits discharges except those allowed by permits issued pursuant to the Act.[170] These permits require compliance with specified effluent limitations, which may include restrictions on quantities, rates, and concentrations of pollutants discharged from point sources, and schedules of compliance.[171] Effluent limitations are generally set by the federal Environmental Protection Agency (EPA)[172] but states may impose their own standards if they are more stringent than the federal standards.[173] EPA must develop information and guidelines to identify the technological standards necessary to meet the effluent limitations.[174]

The Act recognizes the rights of states to participate in water pollution control, and "to plan the development and use . . .

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169 *Id.* § 1323.
170 *Id.* § 1311 (1976 & Supp. III 1979).
171 *Id.* § 1362(11) (1976).
172 *Id.*
173 *Id.* § 1370.
174 *Id.* § 1314 (1976 & Supp. III 1979).

of land and water resources . . ."[175] in consultation with EPA. Specifically, the Act contemplates that the states will develop water quality standards and implementation plans for achieving the standards.[176]

The National Pollutant Discharge Elimination System (NPDES) permit program[177] is the central feature of the Clean Water Act's partnership between the states and the federal government.[178] The NPDES permit program establishes procedures whereby polluters can obtain, from EPA or the state, a permit to discharge pollutants and avoid the general prohibition of the Act.[179] These permits must implement the effluent limitations which must be met by the point source covered by the permit.

The authority to implement the NPDES permit program rests primarily with EPA, but the states play a key role.[180] EPA develops a permit program for each state during the transition period before the state develops its own program.[181] Then, EPA must suspend its program[182] and transfer regulatory authority to the states when certain statutory criteria are met.[183] Even where EPA has not transferred NPDES permit authority to the states, the states play a key management role. States have the right to issue a water quality certification declaring that an EPA-issued permit will not degrade the quality of the receiving waters within the state. This certification authority gives the state veto power over the issuance of permits by EPA. If the state objects to the issuance of an NPDES permit by EPA, the state can refuse to issue the water quality certification.[184]

The federal government retains substantial enforcement authority. EPA has the power under the Act to enforce both the

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175 *Id.* § 1251(b) (Supp. III 1979).

176 *Id.* § 1313 (1976). The states designate water bodies for a specified use and determine the ambient levels of pollutants that allow this use. Then, discharges are permitted only to the extent that the ambient standards will not be exceeded. *Id.*

177 Two other provisions of the Act are noteworthy. States manage the Act's Title II construction grants program for municipally owned sewage treatment plants. *Id.* §§ 1342, 1344 (1976 & Supp. III 1979). Section 404 establishes a permit program for the discharge of dredged fill material into the navigable waters. *Id.* § 1344.

178 *Id.* § 1342.

179 *Id.* §§ 1311, 1362(14).

180 S. REP. No. 414, 92d Cong., 1st Sess. 71 (1971); 187 CONG. REC. 3845 (1971) (comments of Sen. Muskie); *see* 33 U.S.C. § 1251(b) (Supp. III 1979).

181 33 U.S.C. § 1342(a) (1976 & Supp. III 1979).

182 *Id.* § 1342(c) (Supp. III 1979).

183 *Id.* § 1342(b) (1976 & Supp. III 1979).

184 *Id.* § 1341.

Act and permit conditions and limitations, even where NPDES permit authority has been transferred to the states.[185] If EPA finds that the state is not administering the program in accordance with the Act, EPA may withdraw its approval of the state program. EPA can also object to the issuance of individual permits under a state-operated NPDES program.[186] In cases where state enforcement is so inadequate as to reflect a general failure of the state to meet its enforcement responsibilities, EPA can step in and assume all enforcement activities in the state,[187] independently of and without withdrawing its approval of the state's NPDES program.[188]

The Clean Air Act operates in a similar fashion. In enacting this statute, Congress found that air pollution is a problem of national scope, but "that the prevention and control of air pollution at its source is the primary responsibility of *state and local governments.*"[189] Under the Act, EPA divides the country into Air Quality Control Regions,[190] establishes air quality criteria,[191] and adopts National Ambient Air Quality Standards.[192] Each state must develop and administer a State Implementation Plan (SIP) to achieve these national standards.[193] The SIP must establish emissions limitations, including "schedules and timetables for compliance,"[194] and permit systems to enable regulation of the pollutant discharges by individual sources. Both EPA and the state may proceed against noncomplying polluters through civil and criminal actions.[195] The Act allows monitoring, inspections, and entry by EPA or by the state.[196]

The Clean Air Act includes a provision for noncompliance penalties that has no counterpart in the Clean Water Act.[197] EPA or the state may issue a notice of noncompliance to a source of air pollution which is not in compliance with emission

185 *Id.* § 1319.
186 *Id.* § 1342.
187 *Id.* § 1319.
188 *Id.* § 1342.
189 42 U.S.C. § 7401 (Supp. III 1979) (emphasis added).
190 *Id.* § 7407.
191 *Id.* § 7408.
192 *Id.* § 7409.
193 *Id.* § 7410.
194 *Id.*
195 *Id.* § 7413.
196 *Id.* § 7414.
197 *Id.* § 7420.

limitations or an applicable SIP. Either the offending source may then compute and pay its noncompliance penalty according to the program requirements, or it may avail itself of proceedings to demonstrate that it has not violated any applicable requirements or that it is entitled to an exemption. The amount of the penalty is supposed to equal the economic benefit that accrued to the polluter as a result of the noncompliance. If EPA issues the notice of noncompliance, then the noncompliance penalty is payable to the United States Treasury. If the state issues the notice, the penalty is payable to the state. Since the amount of these penalties, particularly for large industrial polluters, may be substantial, the program provides attractive financial motivation for states to take the program and administer it with vigor. Thus, the Act has a built-in incentive to encourage states to carry out those responsibilities found by Congress to rest primarily in state and local governments. The noncompliance-penalty program is delegable to the states apart from other delegations of authority under the Act.

These examples illustrate how Congress has given states substantial authority to control the use of two "federal" environmental commodities, the air and navigable waters, and to reap potentially substantial benefits from their control. It is not conceptually difficult to envision such delegations of authority to regulate the use of the environmental commodity of principal concern in this Article — federal lands. The federal lands, like the air and the navigable waters, are critical resources that must be conserved and allocated. Their management is a major national concern, but depends, to a large extent, on local activities.

If the quality of environmental necessities such as air and water can be entrusted to the management of a state, the management responsibilities for federal lands and their resources could be delegated similarly. To be sure, a federal program providing for such delegation would be vast and complex, but the air and water programs function reasonably well despite their complexity. Criticisms of the Acts focus on the substantive regulations and the compliance deadlines, accepting the framework for federal-state interaction as a desirable structure.[198] This

198 *See, e.g.*, Ayres, *Enforcement of Air Pollution Controls on Stationary Sources under the Clean Air Amendments of 1970*, 4 ECOLOGY L.Q. 441 (1975) (economic impacts

alternative land-management mechanism ought to be explored before embarking upon a program of massive transfers of the public domain out of federal ownership.

A delegable regulatory authority could be established within a statutory framework which generally makes federal land resources available to the states for use and management upon meeting statutory criteria to the satisfaction of the Secretary of the Interior (or the Secretary of Agriculture, in the case of national forests). The state could be given authority to issue permits and licenses for use of the land or exploitation of particular surface resources or subsurface mineral deposits. Such permits and licenses could be based on federal land-use standards or federal specifications for a given category of permits or licenses, similar to the Clean Air Act and Clean Water Act systems wherein permits must be issued in compliance with federally prescribed parameters. To the extent that the permitted or licensed activity generates fees, rents, or royalties, the state could be permitted to retain the portion that Congress determines to be the state's fair share under the established principle that the public domain and its resources belong to all the people of the United States.

The state programs would naturally have to meet criteria analogous to those applicable in the air and water contexts; for example, the program must obtain authority to enforce permit and license requirements through civil and criminal sanctions. Failure of a state to meet its program responsibilities according to statutory criteria would trigger a withdrawal of the state's regulatory authority by the responsible federal agency.

At the outset, Congress should proceed cautiously. For example, Congress should limit the type of resources which it designates for state management. Initially, it might only delegate management of renewable resources, such as forests, range-

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and problems with control technology); Chevrow, *Implementing the Clean Air Act in Los Angeles: the Duty to Achieve the Impossible*, 4 ECOLOGY L.Q. 537 (1975) (burden of strict substantive regulations and compliance deadlines); McKinnon, *The Federal Water Pollution Control Act — Industrial Challenges to Effluent Limitations*, 7 B.C. ENVTL. AFF. L. REV. 545, 545-46 (1979) (economic consequences are the key basis for industrial challenges to effluent limitations); Strelow, *Reviewing the Clean Air Act*, 4 ECOLOGY L.Q. 583 (1975) (need for amendments with emphasis on the substantive provisions; only brief mention of a need for minor adjustment to the federal-state partnership).

lands, and wildlife resources, which most states are already equipped to regulate and manage, rather than non-renewable energy and mineral resources. The current FLPMA inventory-and-planning process could serve as a foundation for both federal and state programs. Later, Congress might find that divestiture of some lands, substantially under state management as a result of delegations to them of federal regulatory authority, would be in the national interest. At least such a determination would be based on practical experience and a clear policy choice, not on the overextended legal theories of the Sagebrush Rebellion.

These intermediate transfers could be effected by amendments to the FLPMA and would not require a major legislative effort. For example, disposal of grazing lands could be effected by such an amendment, and would be desirable not only because of local expertise but because, as the PLLRC noted:

> [I]t would reduce Federal administrative costs. More importantly, it would place the management and use of the forage resources in the hands of those who normally manage productive resources in a free enterprise economy and thus provide an incentive for the investment needed to make these lands fully productive. In private ownership, economic efficiency could tend to cause the lands to move into the hands of more efficient operators and thus lower the cost of livestock and improve the health of the industry.[199]

Other possible amendments to the FLPMA, such as creation of regional commissions and citizen advisory boards,[200] could provide for increased state control over federal land management in general, and would encourage comprehensive regional land-use planning similar to that established under the Water Resources Planning Act of 1965.[201]

In the absence of newly enacted legislation, the Sagebrush rebels can focus on actively utilizing the FLPMA-established rights that allow state involvement in public-land management after adoption of a land-use plan.[202] FLPMA requires BLM to coordinate public land-use planning with the planning and man-

199 PLLRC, *supra* note 1, at 115.
200 Note, *supra* note 8, at 533.
201 PLLRC, *supra* note 1, at 64.
202 Note, *supra* note 8, at 531.

agement programs of state and local governments,[203] requires state participation in the land-management decision process,[204] and requires conveyances in accordance with state interest.[205] The BLM regulations give additional assurances that the interests of affected western states will be accommodated in federal management decisions. The BLM must allow "meaningful public involvement" by state and local government officials, must act consistently with state and local plans "to the maximum extent [the Secretary] finds consistent with Federal law and the purpose of this Act," and must resolve any inconsistencies "to the extent practical."[206] Although states do not have veto power over federal plans,[207] the FLPMA substantially enlarged the opportunities for state influence over federal management in ways that have not been widely recognized or utilized.[208]

At the outset, states should develop their own land-use plan that meets the requirements of the FLPMA; the objectives of the plan must be consistent with federal law, plans must be based on concepts of multiple use and sustained yield,[209] and areas with special environmental value should be protected.[210] Then, states should "exercise their authority to consult with [the Secretary] on land-use planning policy and, in so doing, enlighten him as to the existence of a plan."[211]

CONCLUSION

The Sagebrush Rebellion is a political phenomenon — a marriage of diverse interests in the political and economic struggle for control of federal lands and the potential wealth inherent in those lands. The causes of the rebellion are as diverse as the emotions it arouses, and the rebels have adopted a multi-faceted strategy in their attempt to wrest control of the public lands from the federal government.

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203 43 U.S.C. §§ 1712(c)(9), 1718 (1976 & Supp. III 1979).
204 *Id.* §§ 1712(f), 1739.
205 *Id.* §§ 1713(a)(3), 1718, 1720, 1721(c).
206 43 C.F.R. § 1601.4-1, 4-3 (1980).
207 Haslam, *Federal and State Cooperation in the Management of Public Lands*, 5 J. CONTEMP. L. 149, 160-61 (1978).
208 Leshy, *supra* note 33, at 349.
209 43 U.S.C. § 1702(a)(7) (1976 & Supp. III 1979).
210 *Id.* § 1702(a)(6); Haslam, *supra* note 207, at 162.
211 Haslam, *supra* note 207, at 162.

The legal underpinnings of the Sagebrush Rebellion are tenuous at best, but they are apparently perceived by rebellion proponents as having some value. They provide at least an arguable basis upon which the rebellion can campaign. And the litigation efforts of the rebellion may give it an appearance of legitimacy. But the legal premise will, of course, continue to have value only as long as it is not repudiated in legal proceedings. If final repudiation comes, the real land use and management issues, which exist quite apart from the rebellion's legal theories, may get lost in the shuffle.

The victory sought by the Sagebrush Rebellion will not be realized in the courts. If realized at all, it will be in Congress or in the federal agencies charged with responsibility for administering public lands. In short, for the rebels the solution must be a political one. The political goal will more likely be achieved by concentrating on influencing the administrative decision-making process rather than by pursuing the current multi-faceted strategy.[212]

Legislative efforts should not focus on the Ninety-seventh Congress bills, which unrealistically seek virtually unqualified transfer of most public lands to the states. Instead, the Sagebrush rebels would do better to seek legislation modeled on the mechanisms for state participation in environmental resource decision-making found in the Clean Air Act and the Clean Water Act. This scheme would permit state management and regulation of certain public land resources under federal guidelines and supervision. Consequently, the Sagebrush rebels would have realistic chances for success with a statute establishing a public-land management process that balances state and federal interests. In the interim, states should seek fully to exercise their rights established by the FLPMA.

Most probably the Reagan Administration will continue to soften, if not silence, the angry voices in the West, at least for a time. The push for a new approach to federal land management likewise may abate. But the nature of the federal system and the extent of federal landholdings in the West make it probable that intergovernmental conflict will reemerge to produce another version of the Sagebrush Rebellion.

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212 *See generally* Note, *supra* note 8, at 533.

NOTE

A MODEL YOUTH DIFFERENTIAL AMENDMENT: REDUCING YOUTH UNEMPLOYMENT THROUGH A LOWER MINIMUM WAGE FOR THE YOUNG

DAVID H. SOLOMON*

The unemployment rate for youths has reached disturbingly high levels in recent years and continues to increase. In this Note, Mr. Solomon argues that the federal minimum wage established by the Fair Labor Standards Act is one cause of youth unemployment and that lowering the minimum wage for youths will help to ease this problem. He proposes amending the Act to create a "youth differential," which would allow employers to pay lower wages to youths than to adults.

In explaining the need for his proposal, Mr. Solomon examines the current Fair Labor Standards Act provisions which permit the payment of a lower minimum wage to certain groups of workers and describes how these provisions have done little to ease youth unemployment. He also examines past attempts in Congress to enact a youth differential and shows how the amendment advocated by this Note improves on these proposals. He argues that the enactment of his proposal would be a beneficial addition to the battle against youth unemployment because it would induce employers to hire more youths but would also successfully guard against reductions in the employment and earnings of older workers.

The problem of youth unemployment in the United States is manifest, but its solution continues to evade policymakers. The official unemployment figures published by the Bureau of Labor Statistics (BLS) indicate the severity of the problem. During 1981, the unemployment rate for youths aged sixteen through nineteen averaged 19.6%,[1] more than twice the average rate of

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1 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, VOL. 29, No. 1, at 154 (1982). This figure is the average of the seasonally adjusted quarterly rates of unemployment. The BLS arrives at the unemployment rate by dividing the number unemployed by the civilian labor force, the latter figure equaling the total number of those employed and unemployed. *Id.* at 201. The BLS classifies as unemployed a person who, although available for work, does not work during the week of its survey and who has made "specific efforts" to find a job within the last four weeks. *Id.* These statistics include all youths who meet these criteria, whether they are students seeking full-time employment during vacations or part-time employment during the school year or non-students seeking employment. Unless otherwise indicated, the term "youths" in this section will refer to individuals aged 16 through 19.

7.6% for the general civilian population.[2] This means that an average of 1.7 million youths were seeking but could not obtain employment.[3] An average of 121,000 more had stopped looking for a job during the fourth quarter of 1981 because they believed they could not find one.[4] Painting an even bleaker picture, a BLS report has concluded that the Bureau's statistics understate the extent of youth unemployment because of the failure to count all the youths in the labor force.[5]

These figures are troubling because youth unemployment has serious long-term effects on our society. Unemployment not only leads to immediate financial hardship, but also results in a failure to gain necessary work experience — a failure which may reduce earnings in the future.[6] The failure to find work also affects the attitudes of the unemployed, thereby contributing to a loss of enthusiasm and self-confidence by youths.[7] Prolonged unemployment may lead a youth to develop unstable work patterns and unstable family relationships;[8] in the extreme cases these problems can lead to criminal activities and to early childbearing, the latter of which may lead in turn to poverty and dependence on welfare.[9]

Programs initiated by the federal government to reduce youth unemployment have not offered a comprehensive solution to the problem. In fiscal year 1980 alone, Congress appropriated

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2 *Id.* at 154.

3 *Id.* The exact number was 1,733,000.

4 *Id.* at 48. This number is not seasonally adjusted.

5 N.Y. Times, Feb. 29, 1980, at A1, col. 5. The article states that the BLS arrived at this conclusion in an unpublished report on persons aged 16 through 21. The report was prepared for the Labor Department by the Center for Human Research of Ohio State University.

6 National Commission for Employment Policy Staff, *Youth Employment Policies for the 1980s,* in HOUSE COMM. ON EDUCATION AND LABOR, 96TH CONG., 2D SESS., PROBLEMS OF YOUTH UNEMPLOYMENT 13 (Comm. Print 1980).

7 CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, BACKGROUND PAPER NO. 13, POLICY OPTIONS FOR THE TEENAGE UNEMPLOYMENT PROBLEM 12 (1976) [hereinafter cited as CBO POLICY OPTIONS].

8 *Id.* at 14.

9 National Commission for Employment Policy Staff, *supra* note 6, at 13. Some economists have suggested that youth unemployment may not be as serious a social problem as is often assumed. *See, e.g.,* Becker & Hills, *Today's Teenage Unemployed — Tomorrow's Working Poor?,* MONTHLY LAB. REV., Jan. 1979, at 69, 70; D. BELL, THE MINIMUM WAGE RECONSIDERED 11-13 (Rand Paper Series P-5230, 1974); R. Freeman & D. Wise, NBER [National Bureau of Economic Research] Summary Report: Youth Unemployment 18 (NBER Conference Paper, 1979).

$4.7 billion for the training and hiring of youths,[10] but these programs have at best acted as stopgap measures to slow the increase in the youth unemployment rate.[11] This rate, which has remained above 10% since 1954,[12] averaged 14.5% in the 1960's,[13] climbed to an average of 16.8% in the 1970's,[14] and climbed again to 17.8% in 1980.[15] While growth in the teenage population may have exacerbated youth unemployment,[16] the youth unemployment rate has stayed high even though the number of teenagers as a proportion of the general population peaked in 1975.[17] The Congressional Budget Office (CBO) has warned that the future decline in the size of the youth population "is not likely to have a dramatic effect on youth unemployment rates."[18] The future therefore promises a continuation of the

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10 P. Irwin & I. Rashkow, Employment and Education: Youth Act of 1980, at 5 (Issue Brief No. IB80045, Congressional Research Service, Library of Congress, 1980). These funds went to six youth programs and three general programs with youth components. The youth programs were the Jobs Corps, the Summer Youth Employment Program, the Youth Community Conservation and Improvement Projects, the Youth Employment and Training Projects, the Youth Incentive Entitlement Pilot Projects, and the Young Adult Conservation Corps. The general programs were the Comprehensive Employment and Training Act (commonly known as CETA), the United States Employment Service, and the Work Incentive Program (commonly known as WIN).

11 A study by the Congressional Budget Office has concluded that the federal job-creation programs have generated few long-term gains in earnings or employment for their participants. CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, BUDGET ISSUE PAPER FOR FISCAL YEAR 1981, YOUTH EMPLOYMENT AND EDUCATION: POSSIBLE FEDERAL APPROACHES 22-23 [hereinafter cited as CBO YOUTH EMPLOYMENT AND EDUCATION]. The limitation of these programs to short-term jobs prevented youths from acquiring the skills and habits needed for subsequent employment. *Id.* at xii. Training programs appear to be more effective in increasing employability and earnings. *Id.* at 25; National Commission for Employment Policy Staff, *supra* note 6, at 17-18. However, even these programs have "serious problems," including their lack of proper equipment, their failure to coordinate training with local employment needs, and their limitation of on-the-job training to a small number of positions. CBO YOUTH EMPLOYMENT AND EDUCATION, *supra*, at 25-26.

12 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2070, HANDBOOK OF LABOR STATISTICS 1979, at 67 (1980) [hereinafter cited as HANDBOOK OF LABOR STATISTICS 1979].

13 *Id.*

14 *Id.* (source for unemployment rates through 1977); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, VOL. 27, No. 10, at 61 (1980) (source for unemployment rates in 1978 and 1979).

15 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, VOL. 28, No. 7, at 64 (1981).

16 *See* CBO POLICY OPTIONS, *supra* note 7, at 16. The paper estimated that the increase in the number of youths aged 16 through 19 may have added as much as 3.9 percentage points to the teenage unemployment rate between 1954 and 1975. *Id.*

17 *Id.* at 84.

18 CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, BUDGET ISSUE PAPER FOR FISCAL YEAR 1979, YOUTH UNEMPLOYMENT: THE OUTLOOK AND SOME POLICY STRATEGIES 12

high unemployment rates of the past in the absence of new governmental action.

One proposal for such action has been the enactment by Congress of a "youth differential," which would create a lower minimum wage for youths than for adults. The idea of a youth differential has gained considerable support among members of both the Democratic and Republican parties, but no bill embodying it has been enacted into law. The House of Representatives passed youth differential bills in 1966[19] and in 1972,[20] and the House and the Senate both came close to passing youth differential amendments in 1977.[21] President Ronald Reagan has expressed his support for a youth differential,[22] and Senator Orrin Hatch (R-Utah), chairman of the Senate Labor and Human Resources Committee, has introduced a youth differential bill in the current Congress.[23]

While differing with these other proposals, this Note advocates the enactment of a youth differential to combat the stubborn problem of youth unemployment. Section I describes the considerable theoretical and statistical support for the conclusion that a minimum wage increases youth unemployment over what it would otherwise be. The studies discussed in section I demonstrate how lowering the minimum wage for youths can increase their employment by lowering the costs of their labor.

Section II discusses how this theory of a wage differential has been translated into congressional action. This section explains the provisions of section 14 of the Fair Labor Standards Act (FLSA), which permits a lower minimum wage to be paid

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(1978) [hereinafter cited as CBO OUTLOOK AND POLICY STRATEGIES]. Experience has thus proven incorrect the optimistic prediction made by the House Education and Labor Committee in 1971 that the problem of youth unemployment would ease with the passage of the 1970's. *See* HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS OF 1971, H.R. REP. NO. 672, 92d Cong., 1st Sess. 30 (1971) [hereinafter cited as 1971 HOUSE REPORT]. For a similar prediction, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 1657, YOUTH UNEMPLOYMENT AND MINIMUM WAGES 189 (1970) [hereinafter cited as YOUTH UNEMPLOYMENT AND MINIMUM WAGES].

19 H.R. 13,712, 89th Cong., 2d Sess. § 501(a)(4), 112 CONG. REC. 11,639 (1966) [hereinafter cited as 1966 House bill]. Passage of the bill was recorded at 112 CONG. REC. 11,653 (1966).

20 H.R. 7130, 92nd Cong., 2nd Sess. § 301, 118 CONG. REC. 16,845 (1972) [hereinafter cited as 1972 House bill]. The House passed the bill at 118 CONG. REC. 16,873 (1972).

21 123 CONG. REC. 29,463-64, 32,886 (1977).

22 Boston Globe, Oct. 12, 1980, at 2, col. 4.

23 S. 348, 97th Cong., 1st Sess. (1981), 127 CONG. REC. S811 (daily ed. Jan. 30, 1981) [hereinafter cited as 1981 Hatch bill].

to students, learners, and apprentices.[24] These provisions evince an intent on the part of Congress to allow special treatment of youths disadvantaged by the minimum wage, but are too limited to give the relief which a general youth differential would supply. Section II also describes in more detail the legislative histories of past youth differential proposals as a prelude to discussing the youth differential advocated by this Note.

Section III sets forth the basic provisions of this Note's proposal and explains how they meet the major criticisms levied against a lower minimum wage for youths: its discrimination against young workers and the opportunity for its abuse by employers seeking either to replace more highly paid workers or to reduce the wages of youths currently employed. The Appendix contains the text of the proposal, a Model Youth Differential Amendment.

I. The Correlation Between the Minimum Wage and Youth Unemployment

Economic theory and statistical evidence together establish that the minimum wage is a major cause of youth unemployment. While other factors contribute to the inability of youths to find jobs,[25] for example, racial discrimination,[26] this Note

24 29 U.S.C. § 214 (1976 & Supp. III 1979). This section also sets a lower minimum wage for handicapped persons. This Note does not discuss this special wage rate for the handicapped because, unlike the others, it is geared neither directly nor indirectly to the wages of young workers.

25 National Commission for Employment Policy Staff, *supra* note 6, at 12-13. The staff organized a list of 17 causes into three areas: the lack of jobs, the characteristics of youths, and the weaknesses in the mechanisms for matching job-seekers with job openings. The first category included the minimum wage, the state of the economy, youths' preferences for higher-paying jobs, discrimination, an imbalance between the types of jobs employers need to fill and the qualifications of youths, the growth in the size of the youth labor force, and the growth in the number of female and undocumented workers. The second category encompassed the lack of basic reading, writing, and mathematical skills, poor credentials, the unwillingness to accept the kinds of jobs for which youths are qualified, lack of initiative, poor attitudes, and lack of work experience. The third category listed lack of knowledge of the world of work, of the way to look for work, and of the way to conduct oneself in a job interview, as well as the lack of good job networks. *See also* CBO Policy Options, *supra* note 7, at ix-x. The CBO classified the causes of youth unemployment as variations in the supply and demand for labor or as structural factors, one of which was the minimum wage.

26 In the fourth quarter of 1981, an average of 42.2% of black youths aged 16 through 19 were unemployed, but 19.3% of white youths of the same age were unemployed. Telephone interview with John Stinson, Labor Economist in the Bureau of Labor

focuses solely on one cause — the minimum wage. The Model Amendment is designed to eliminate the component of youth unemployment caused by the minimum wage because that cause is readily identified and easily corrected. Commentators agree that reducing the minimum wage for youths would increase the number of job openings. According to the CBO, "[t]here is a general consensus that the minimum wage reduces employment [for teenagers] somewhat below what it would otherwise be . . . ."[27] The New York Times has reported that economists agree "on one central point: The minimum wage means fewer jobs for the young . . . ."[28]

A. *Theoretical Underpinnings*

The theory of the correlation between the minimum wage and youth unemployment is a simple one. A minimum wage increases the costs of employing low-wage workers and induces employers to substitute other productive inputs for this kind of labor.[29] Employment of low-wage workers falls as employers

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Statistics (Jan. 8, 1982)(The Bureau compiles but does not separately publish statistics on the unemployment of black youths.); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, VOL. 29, No. 1, at 34 (1982). These figures are consistent with the finding that the unemployment rate for blacks historically has remained approximately twice as large as the rate for whites. *See* Betsey, *Differences in Unemployment Experience Between Blacks and Whites,* 68 AM. ECON. REV. 192 (1978); Loury, *Economics of Affirmative Action: Is Equal Opportunity Enough?,* 71 AM. ECON. REV. 122, 123 (1981). Demographic differences in the races account for approximately half of the difference in these rates, Betsey, *supra;* M. FELDSTEIN & D. ELLWOOD, TEENAGE UNEMPLOYMENT: WHAT IS THE PROBLEM? 4 (Harvard Institute of Economic Research Discussion Paper No. 730, 1979), and discrimination reportedly accounts for the other half. R. HELFGOTT, LABOR ECONOMICS 337 (1974). Although a youth differential cannot eliminate racial discrimination in employment, it is important to note that some economists have concluded that the disemployment effects of the minimum wage are felt most heavily by blacks. *Id.* at 312; Iden, *The Labor Force Experience of Black Youths: A Review,* MONTHLY LAB. REV., Aug., 1980, at 10, 13; Kosters & Welch, *The Effects of Minimum Wages on the Distribution of Changes in Aggregate Employment,* 62 AM. ECON. REV. 323, 330 (1972); West, *The Unsinkable Minimum Wage,* 11 POLICY REV. 83, 84 (1980).

27 CBO POLICY OPTIONS, *supra* note 7, at 34.

28 N.Y. Times, May 5, 1979, at A10, col. 3.

29 1 MINIMUM WAGE STUDY COMMISSION, REPORT OF THE MINIMUM WAGE STUDY COMMISSION 31-32 (1981). The Minimum Wage Study Commission is a federal commission created by the Fair Labor Standards Amendments of 1977 to study the "social, political, and economic ramifications" of the minimum wage requirements of the Fair Labor Standards Act of 1938. Pub. L. No. 95-151, § 2(e), 91 Stat. 1245, 1246-47 (codified at 29 U.S.C. § 204 note (Supp. III 1979)).

decide to employ fewer of them or to keep the same number at fewer hours per week. Employers replace low-wage workers by hiring more high-skilled workers or by making greater investments in capital.[30]

Young workers are particularly vulnerable to this substitution process because the costs of their employment are likely to be high.[31] The costs of training and supervising youths will often be significant because they are typically inexperienced and require extensive on-the-job training.[32] In the words of a paper prepared for the Congressional Research Service (CRS), these teenagers "have the least to offer in the labor market. They lack job skills and work discipline. They need extra training, more instruction, greater supervision — all of which are costly to employers."[33] A minimum wage prevents youths from lowering the costs of their employment by offering to work for a salary lower than the legally mandated minimum.[34] A youth differential is therefore sound in theory because it aims to increase the amount of youth labor demanded by employers by decreasing the costs of that labor.[35]

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30 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 31-32.

31 *See* CBO POLICY OPTIONS, *supra* note 7, at 33. In addition to salaries, labor costs include payroll taxes, worker's compensation contributions, fringe benefits, and recruiting and training costs. *Id.*

32 *See* National Commission for Employment Policy Staff, *supra* note 6, at 12-13.

33 J. Fulton, Should the Federal Minimum Wage Be Lower For Youths Than Adults? An Inquiry with Pro and Con Arguments 37 (Congressional Research Service, Library of Congress, 1973). The paper presented the statement as typical of the supporters of a youth differential, and not necessarily as the view of the author or the CRS. *See also* 1971 HOUSE REPORT, *supra* note 18, at 96 ("Minority Views").

34 *See* National Commission for Employment Policy Staff, *supra* note 6, at 12-13. The study found that wage floors cause youth unemployment because "they limit the degree to which youths can move ahead in the queue by offering to work for lower wages." *Id.*

35 This analysis assumes that the amount of labor supplied by youths will not drop by a large amount with the creation of a youth minimum wage. Several studies indicate that the assumption is justified. The BLS concluded in 1967 and again in 1980 that youths were willing to work for wages below the minimum then in effect. YOUTH UNEMPLOYMENT AND MINIMUM WAGES, *supra* note 18, at 185; N.Y. Times, Feb. 29, 1980, at A14, col. 6. A survey by the Dade County Consumer Advocate's Office in Miami, Florida, reached the same conclusion. Wall St. J., Feb. 9, 1977, at 1, col. 6. These findings are consistent with statistics on wages actually paid to youths. In 1973, 22.3% of employed teenagers worked for less than the minimum wage. Gramlich, *Impact of Minimum Wages on Other Wages, Employment, and Family Incomes*, 1976 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 409, 447. In 1974, 28.9% of workers aged 16 through 19 worked for wages below the minimum wage. F. WELCH, MINIMUM WAGES: ISSUES AND EVIDENCE 20 (Rand Paper Series P-5999, 1978). This number fell to 15.4% in 1975. Welch notes, however, that it is impossible to determine how much of this

B. *Statistical Support*

Economists' studies of the statistical relationship between the minimum wage and youth unemployment indicate that a youth differential will work in practice to reduce the level of youth unemployment. This conclusion follows from the finding made in nearly all the studies published since 1970 that a statistically significant relationship exists between increases in the minimum wage and either decreases in youth employment or increases in youth unemployment.[36] Three studies have found this correlation through their examination of the effects of actual minimum-wage laws. Gramlich's 1976 study for the Brookings Institution, probably the most comprehensive work in the literature,[37] concluded that the 1974 increase in the minimum wage of twenty-five percent[38] boosted the teenage unemployment rate by two percentage points.[39] Ragan's 1977 study of the Fair Labor Standards Amendments of 1966 found that the twelve percent increase in the minimum wage mandated by that act[40] increased teenage unemployment by 3.8 percentage points.[41] Similarly, state minimum-wage laws were found to produce a similar effect by reducing the employment of youths in large cities by five percent.[42]

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decrease resulted from wage increases and how much resulted from lost jobs. *Id.* at 19.

36 This Note examines only those studies published after 1969 because many studies through the 1960's were flawed by drawing conclusions directly from changes in the youth unemployment rate without factoring in other variables. S. LEVITAN & R. BELOUS, MORE THAN SUBSISTENCE: MINIMUM WAGES FOR THE WORKING POOR 56 (1979) [hereinafter cited as MORE THAN SUBSISTENCE]. The recent studies are more refined because they use newer sources for their data and more sophisticated techniques in estimation. Zell, *The Minimum Wage and Youth Unemployment*, ECON. REV. FED. RESERVE BANK KAN. CITY, Jan. 1978, at 3, 12. Economists have examined the relationship between the minimum wage and youth unemployment for some time. *See, e.g.*, Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358 (1946).

37 *See* Zell, *supra* note 36, at 13.

38 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 2, 88 Stat. 55.

39 Gramlich, *supra* note 35, at 442, n.30.

40 Pub. L. No. 89-601, § 301, 80 Stat. 830 (current version at 29 U.S.C. § 202 (1976 & Supp. III 1979)).

41 Ragan, *Minimum Wages and the Youth Labor Market*, 59 REV. ECON. & STAT. 129, 136 (1977).

42 Katz, *Teenage Employment Effects of State Minimum Wages*, 8 J. HUM. RESOURCES 250 (1973). Since 1960, the time of this study, the impact of state minimum-wage laws has declined as the coverage of the federal minimum wage has expanded. J. Fulton, *supra* note 33, at 17; YOUTH UNEMPLOYMENT AND MINIMUM WAGES, *supra* note 18, at 187.

Other studies, which estimate the effects of hypothetical minimum-wage increases, agree on the existence of a correlation between the minimum wage and youth unemployment or employment, but disagree on its extent. A survey of the literature prepared for the Minimum Wage Study Commission stated that studies had generally found a ten percent minimum-wage increase to reduce teenage employment by anywhere from one to six percent.[43] Hamermesh has concluded that a ten percent minimum-wage increase would reduce teenage employment by approximately one percent,[44] and an analysis by the Commission staff of a study by Meyer and Wise showed that the same increase would lead to a 3.6% decrease in teenage employment.[45] The Commission staff itself found that a ten percent increase would reduce youth employment by either 1.0 or 1.8%.[46] Similarly, two studies by Adie have found that a ten percent increase in the minimum wage would boost teenage unemployment by one-half of a percentage point.[47] The staff of the Commission has estimated that an increase in the teenage unemployment rate of one-tenth of a percentage point would result from a ten percent minimum-wage increase.[48] Predictions as to the effect of a twenty-five percent increase in the minimum wage include the estimate by Levitan and Belous that youth employment would decline by 3.5 to 5.5%,[49] and the CBO's summary of recent studies indicating a three to six percent drop

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43 Brown, Gilroy & Kohen, *Effects of the Minimum Wage on Youth Employment and Unemployment*, cited in 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 38, 42. The differences in the findings resulted from the methodology used.

44 Hamermesh, *Employment Demand, the Minimum Wage, and Labor Costs*, cited in 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 40.

45 Meyer & Wise, *Discontinuous Distinctions and Missing Persons: The Minimum Wage and Unemployed Youth*, cited in 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 42-43.

46 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 38, 39 n.11. The report gives both figures without explanation.

47 Adie, *Teen-Age Unemployment and Real Federal Minimum Wages*, 81 J. POL. ECON. 435, 439 (1973); Adie & Chapin, *Teenage Unemployment Effects of Federal Minimum Wages*, 1970 PROC. TWENTY-THIRD ANNUAL MEETING INDUS. REL. RESEARCH A. 117, 121.

48 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 38.

49 Levitan & Belous, *The Minimum Wage Today: How Well Does It Work?*, MONTHLY LAB. REV., July 1979, at 69, 70. This finding is especially significant because Levitan and Belous have criticized the theory of the relationship between the minimum wage and youth unemployment. *See* MORE THAN SUBSISTENCE, *supra* note 36, at 95 passim.

in youth employment.[50] Studies made by Betsey and Dunson,[51] Mincer,[52] Moore,[53] and Welch and his collaborators[54] have also found that higher minimum-wage rates would contribute to a reduction in youth employment or an increase in youth unemployment.[55]

In contrast, only three studies have found no such correlation, and their conclusions are limited. Lovell found "tentatively" and "reluctantly" that the minimum wage has "no impact" on teenage unemployment.[56] Cotterill and Wadycki saw "little evidence" that higher minimum-wage rates reduce youth employment, but confined their study to retail trade establishments in selected urban areas between 1961 and 1967.[57] A 1970 BLS study by Kaitz found no evidence to support "confident conclusions about the effect of minimum wage laws on the employment experience of teenagers,"[58] but stated that "it should not be concluded that minimum wage laws have no effect" on teenage unemployment.[59]

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50 CBO POLICY OPTIONS, *supra* note 7, at 34-35.

51 Betsey & Dunson, *Federal Minimum Wage Laws and the Employment of Minority Youth*, 71 AM. ECON. REV. 379 (1981).

52 Mincer, *Unemployment Effects of Minimum Wages*, 84 J. POL. ECON. 87 (1976).

53 Moore, *The Effect of Minimum Wages on Teenage Unemployment Rates*, 79 J. POL. ECON. 897 (1971).

54 F. WELCH, *supra* note 35; Kosters & Welch, *supra* note 26; F. Welch, Minimum Wage Legislation in the United States (Technical Analysis Paper No. 4, Office of Evaluation, Office of the Assistant Secretary for Policy, Evaluation and Research, U.S. Dep't of Labor, 1973), *reprinted in* EVALUATING THE LABOR-MARKET EFFECTS OF SOCIAL PROGRAMS 1 (O. Ashenfelter & J. Blum eds. 1976) *and in* 12 ECON. INQUIRY 285 (1974); Welch & Cunningham, *Effects of Minimum Wages on the Level and Age Composition of Youth Employment*, 60 REV. ECON. & STAT. 140 (1978).

55 A survey of the United States Employment Service offices provides additional support for the existence of the correlation. Forty-three percent of the offices in the survey believed that employers would hire "appreciably more" youths aged 16 to 17 if they could pay a lower minimum wage, and 25% believed the same to be true for youths aged 18 to 19. Wingeard, *Employment Service Local Office Experience in Serving Teenagers During June 1969*, in YOUTH UNEMPLOYMENT AND MINIMUM WAGES, *supra* note 18, at 78-79. Additionally, "indirect evidence" from European countries suggests that lower wage rates are "essential to the achievement of full employment for youth." Piercy, *Youth Wage Rate Schemes in Western Europe and Canada and Their Effect on Youth Unemployment*, in YOUTH UNEMPLOYMENT AND MINIMUM WAGES, *supra* note 18, at 135-36. *See also* CBO POLICY OPTIONS, *supra* note 7, at xiv, 56.

56 Lovell, *The Minimum Wage, Teenage Unemployment, and the Business Cycle*, 10 W. ECON. J. 414, 426 (1972).

57 Cotterill & Wadycki, *Teenagers and the Minimum Wage in Retail Trade*, 11 J. HUM. RESOURCES 69, 79 (1976).

58 Kaitz, *Experience of the Past*, in YOUTH UNEMPLOYMENT AND MINIMUM WAGES, *supra* note 18, at 30, 45.

59 *Id.* It has been suggested that Lovell and Kaitz reached different conclusions from the other studies because their studies, unlike the others, included a variable for the increase in the supply of youth labor through population growth. *See* CBO POLICY

Two inherent biases in the unemployment data help to account for the varying findings on the effect of a minimum-wage increase. First, the BLS statistics do not count as unemployed the number of youths who stop looking for work.[60] An increase in minimum-wage rates and the consequent decrease in job opportunities could cause so many youths to withdraw from the labor force that neither the number of youths "unemployed" nor the youth unemployment rate would drop.[61] Conversely, a youth differential might attract so many youths back into the work force that the youth unemployment rate would not drop, but the number of youths employed would be much greater. This possibility explains the finding of a small effect on the youth unemployment rate in some studies.[62]

Second, an unemployment rate does not indicate how many hours each employee works[63] and hence does not reflect the fact that minimum wages force teenagers from full-time to part-time employment.[64] Gramlich, pointing to this factor, has stated:

> If this is why disemployment is so slight, the most reasonable verdict is that teenagers have more to lose than to gain from higher minimum wages: they appear to be forced out of the better jobs, denied full-time work, and paid lower hourly wage rates; and all these developments are probably detrimental to their income prospects in both the short and the long run.[65]

OPTIONS, *supra* note 7, at 37; MORE THAN SUBSISTENCE, *supra* note 36, at 95; Goldfarb, *The Policy Content of Quantitative Minimum Wage Research*, 1974 PROC. TWENTY-SEVENTH ANNUAL WINTER MEETING INDUS. REL. RESEARCH A. 261, 263-64. However, Gramlich and Ragan have found a significant relationship between the minimum wage and youth unemployment while including a variable for the changing size of the youth labor force. Gramlich, *supra* note 35; Ragan, *supra* note 41.

60 *See supra* note 1.

61 To illustrate, imagine a stable youth population of 500,000, 400,000 of whom are employed and 100,000 of whom are unemployed. The unemployment rate is 20%. If a minimum-wage increase caused 48,000 youths to lose their jobs and 60,000 to leave the labor force, 88,000 youths would be unemployed, and 440,000 would remain in the labor force. The unemployment rate would therefore remain at 20% although 48,000 fewer youths would be working than previously. In fact, the number of youths officially unemployed would drop by 12,000 — from 100,000 to 88,000.

62 The Minimum Wage Study Commission recommended against the enactment of a youth differential and claimed that it had a limited potential for reducing the unemployment rate because it would attract additional workers into the labor force. 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 57. This position ignores the benefit to those youths who enter the labor market and obtain employment.

63 *See supra* note 1.

64 Gramlich, *supra* note 35, at 442-43. Gramlich suggested this as the reason that the disemployment effects of the minimum wage appear to be "relatively slight" in some studies. *Id.*

65 *Id.*

It follows that if a minimum wage reduces teenage employment, a youth differential will increase it. An analysis by Hamermesh supports this conclusion. He estimated that lowering the minimum wage for youths by twenty-five percent would increase youth employment by three percent, or 250,000 jobs.[66] Another analysis of the same data concluded that a twenty-five percent youth differential would increase youth employment by four to five percent, or 400,000 to 450,000 jobs.[67] If 450,000 such jobs were taken by unemployed youths, the youth unemployment rate would drop from 21.7 to 16.4%.[68]

II. Wage Differentials Enacted and Proposed

This relationship between the minimum wage and youth unemployment has not gone unnoticed by the federal government. Congress has acted to enable employers to pay special wage rates to "learners," "apprentices," and "students," with certain limitations.[69] Despite the failure of these programs to provide a lower minimum wage for a large number of youths, Congress has resisted the persistent attempts by proponents of a youth differential to enact a differential wage available to all youths.

A. *Existing Wage Differentials*

Under present law, an employer may pay a worker at a wage rate lower than the legal minimum if he qualifies under any of three categories: learner, apprentice, or student. The exceptions

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66 Hamermesh, *supra* note 44, at 47.

67 1 Minimum Wage Study Commission, *supra* note 29, at 47. The Commission staff made this analysis.

68 These calculations are based on the BLS finding that 6,609,000 youths between the ages of 16 and 19 were employed and 1,832,000 were unemployed in December 1981. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings, Vol. 29, No. 1, at 33 (1982). The Commission report itself adopts a range of 2.5 to 5% as the increase in youth employment that would result from a 25% differential. 1 Minimum Wage Study Commission, *supra* note 29, at 48. It also predicts a 1.5 to 3% increase in youth employment from a 15% differential. *Id.*

69 29 U.S.C. § 214(a), (b) (1976 & Supp. III 1979).

for learners and apprentices are both intended to encourage the employment of inexperienced workers who are not yet valuable enough to earn the minimum wage.[70] Both categories originated in section 14 of the Fair Labor Standards Act of 1938,[71] which, in its current form, authorizes the Secretary of Labor to issue special certificates to employers that permit the payment of a lower minimum wage.[72] Rather than defining these two categories of workers,[73] the act instructs the Secretary to issue certificates and to promulgate regulations "to the extent necessary to prevent curtailment of opportunities for employment . . . . "[74] The Secretary has the discretion, in granting certificates, to prescribe "limitations as to time, number, proportion, and length of service."[75]

The Labor Department has used its authority under the statute to circumscribe the potentially broad reach of these provisions. Labor Department regulations have divided the learner program into two distinct categories: "student-learners" and "learners."[76] The student-learner classification permits a wage rate of seventy-five percent of the minimum wage[77] for any student "who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a bona fide vocational training program."[78] As a condition

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70 For a description of the purposes of these programs, see Walling v. Portland Terminal Co., 330 U.S. 148, 151-52 (1947).

71 Pub. L. No. 75-718, § 14, 52 Stat. 1060, 1068 (current version at 29 U.S.C. § 214(a) (1976)).

72 29 U.S.C. § 214(a) (1976). The Wage and Hour Administrator of the Labor Department had this authority under the Act as originally passed. Fair Labor Standards Act of 1938, at § 14.

73 *See* 29 U.S.C. § 214(a) (1976). The legislative history as well does not provide a definition of learners or apprentices. *See* HOUSE COMM. ON LABOR, FAIR LABOR STANDARDS ACT OF 1938, H.R. REP. No. 2182, 75th Cong., 3d Sess. (1938); HOUSE COMM. ON LABOR, FAIR LABOR STANDARDS ACT, H.R. REP. No. 1452, 75th Cong., 1st Sess. (1937); 83 CONG. REC. 7283-326, 7373-450 (1938) (House debate).

74 29 U.S.C. § 214(a) (1976).

75 *Id.* Organized labor registered the only opposition to the enactment of these provisions. The American Federation of Labor maintained that "all of these workers should be paid the minimum rate provided for under the Act." American Federation of Labor, Report of the Executive Council to the Annual Convention 156 (1938). *See also* 81 CONG. REC. 7896 (1937) (copy of letter from John Possehl, General President of the International Union of Operating Engineers, to William Green, President of the American Federation of Labor, objecting to the inclusion of the classification of learner).

76 29 C.F.R. §§ 520, 522 (1980).

77 *Id.* § 520.6(a).

78 *Id.* § 520.2(a).

for the issuance of the certificates necessary for individual students, the regulations also require that the contemplated employment meet four critieria: it (1) must be "necessary to prevent curtailment of opportunities for employment"; (2) must not have "the effect of displacing a worker employed in the establishment"; (3) must require "a sufficient degree of skill to necessitate a substantial learning period"; and (4) must not depress the wages or working standards for similar work done by adults.[79] The Secretary issued certificates for the employment of an average of only 5343 student-learners from fiscal years 1977 through 1980.[80]

Much like those for student-learners, certificates in the learner subcategory are available only if (1) "[a]n adequate supply of qualified workers is not available"; (2) "the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment"; and (3) the issuance of the certificate will not depress wages or working standards for similar work done by adults.[81] The differential wage and other certification conditions vary among the covered industries.[82] The issuance of learner certificates during fiscal years 1977 through 1980 permitted the employment of an average of only 937 workers.[83]

The Labor Department has administered the apprenticeship program even more restrictively than the learner program. The regulations governing the apprenticeship exception to the minimum wage[84] have so limited its reach that in 1980 only 17 workers, all residing in Puerto Rico, received apprenticeship

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79 *Id.* § 520.5. The certificates are generally effective for one school year. *Id.* § 520.8.

80 EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT 1979, at 42 (1979) (source for certificates authorized in 1977 and 1978) [hereinafter cited as MINIMUM WAGE AND MAXIMUM HOURS 1979]; EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT 1980, at 36 (1981) (source for certificates authorized in 1979 and 1980) [hereinafter cited as MINIMUM WAGE AND MAXIMUM HOURS 1980].

81 29 C.F.R. § 522.5(a), (c) (1980). The learner certificates are valid for one year. *Id.* § 522.6(b).

82 *See id.* §§ 522.21-.105.

83 MINIMUM WAGE AND MAXIMUM HOURS 1979, *supra* note 80, at 42 (source for certificates authorized in 1977 and 1978); MINIMUM WAGE AND MAXIMUM HOURS 1980, *supra* note 80, at 36 (source for certificates authorized in 1979 and 1980).

84 29 C.F.R. § 521 (1980).

certificates.[85] This result followed from the Labor Department's policy, contrary to the goal of the FLSA, of "not promoting apprenticeship programs on the mainland which provide a starting rate below the statutory minimum . . . ."[86]

The most widely used of the three certification programs has been the student differential, first enacted in the Fair Labor Standards Amendments of 1961.[87] This program currently allows employers to pay eighty-five percent of the minimum wage to students working in retail, service, or agricultural jobs or employed by their institutions of higher education.[88] A student can work at the special rate only part-time during the school term or full-time during school vacations.[89] As with the learner and apprentice differentials, the Secretary of Labor must issue special certificates, in accordance with regulations promulgated by him,[90] before an employer can pay the lower rate.[91] The Secretary can allow the student differential to operate generally only "to the extent necessary in order to prevent curtailment

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85 MINIMUM WAGE AND MAXIMUM HOURS 1980, *supra* note 80, at 36.

86 EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, WORKER CERTIFICATION UNDER SECTION 14 OF THE FAIR LABOR STANDARDS ACT 33 (1976).

87 Pub. L. No. 87-30, § 11, 75 Stat. 65, 74 (current version at 29 U.S.C. § 214(b) (1976 & Supp. III 1979)). Secretary of Labor Arthur Goldberg and the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) opposed this bill on the ground that it would result in the displacement of adult workers by youths. *Amendments to the Fair Labor Standards Act: Hearings on S. 256, S. 879, and S. 895 Before the Subcomm. on Labor of the Senate Labor and Public Welfare Comm.*, 87th Cong., 1st Sess. 43, 225-26 (1961).

88 29 U.S.C. § 214(b) (1976 & Supp. III 1979). The Fair Labor Standards Amendments of 1966 added the specific differential rate. Pub. L. No. 89-601, § 501, 80 Stat. 830, 843. The 1961 Amendments had merely expanded the authority to issue differential-wage certificates to include the employment of "full-time students outside of their school hours in any retail or service establishment: *Provided*, that such employment is not of the type ordinarily given to a full-time employee . . . ." Fair Labor Standards Amendments of 1961, at § 11. Congressman Richard Ottinger (D-N.Y.) offered a floor amendment to lower the student rate to 75% in order further to encourage student employment, but it lost by voice vote. 112 CONG. REC. 11,640 (1966).

89 29 U.S.C. § 214(b) (1976 & Supp. III 1979). Part-time employment is limited to twenty hours of work per week. The 1966 Amendments restricted the total number of hours which could be worked in a particular establishment under the student differential to the number of hours worked by students as a percentage of all the hours worked in the establishment prior to the 1961 Amendments. Fair Labor Standards Amendments of 1966, at § 501. The Fair Labor Standards Amendments of 1974 changed the base for calculating this percentage to a more current one. Pub. L. No. 93-259, § 24(a), 88 Stat. 55, 70-71 (current version at 29 U.S.C. § 214(b)(1)(B) (1976 & Supp. III 1979)).

90 29 C.F.R. § 519 (1980).

91 29 U.S.C. § 214(b) (1976 & Supp. III 1979).

of opportunities for employment."[92] He cannot grant a certificate in any case unless he finds that the "employment will not create a substantial probability of reducing the full-time employment opportunities" of other workers,[93] except that an employer may hire up to six students at the special rate without meeting this requirement.[94] Labor Department regulations provide that the certificates will be effective for only one year[95] and that no student already employed when the certificate is issued shall have his wages reduced by virtue of certification.[96] The differential applies to all eligible full-time students, regardless of age.[97]

The student differential has proven more successful than the differentials for learners and apprentices in reaching youths willing to work at a wage lower than the current minimum. From 1977 through 1980, the Secretary issued certificates authorizing the employment of an average of approximately 470,000 students at the special rate.[98] Nonetheless, the student differential has not proven sufficient to reduce or even to halt the steadily increasing rate of youth unemployment.[99]

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92 *Id.*

93 *Id.*

94 *Id.* The 1974 Amendments introduced this exemption, allowing the employer himself to certify that "the employment of such student will not reduce the full-time employment opportunities" of other workers. Fair Labor Standards Amendments of 1974, at § 24(a) (current version at 29 U.S.C. § 214(b) (1976 & Supp. III 1979)). The 1974 Amendments also eliminated altogether this requirement of certification for institutions of higher education hiring their own students. *Id.* (current version at 29 U.S.C. § 214(b)(4) (1976 & Supp. III 1979)). Labor Department regulations have nevertheless incorporated the same "non-reduction" requirement for institutions of higher education as provided in the statute for retail, service, and agricultural employers. 29 C.F.R. §§ 519.5, 519.15 (1980).

95 *Id.* §§ 519.6(a), 519.16(a).

96 *Id.* §§ 519.5(h), 519.15(h).

97 29 U.S.C. § 214(b) (1976 & Supp. III 1979).

98 MINIMUM WAGE AND MAXIMUM HOURS 1979, *supra* note 80, at 42 (source for certificates authorized in 1977 and 1978); MINIMUM WAGE AND MAXIMUM HOURS 1980, *supra* note 80, at 42 (source for certificates authorized in 1979 and 1980). However, a study has reported that only 42% of the hours authorized for students at the special rate were actually used for such employment. Schloss, *Study of Full-Time Student and Learner Certification Programs Under the Fair Labor Standards Act*, in YOUTH UNEMPLOYMENT AND MINIMUM WAGES, *supra* note 18, at 107. This study was conducted in 1970, before the expansion of the student program in 1974, which may have affected the use of the certificates. The same study found that employers used the special rate for only 33% of the hours authorized for learners. *Id.* See *infra* note 213 for a further explanation of this failure to use the authorized rate.

99 *See supra* notes 12-15 and accompanying text.

B. *Legislative Histories of Proposed Youth Differentials*

The attempts by some members of Congress to go beyond these limited wage differentials and to legislate a more sweeping youth differential began in 1966. In that year the House Education and Labor Committee proposed,[100] and the House adopted,[101] a general youth differential as part of the Fair Labor Standards Amendments of 1966. The bill allowed employers to pay youths under the age of twenty-one seventy-five percent of the minimum wage during the first six weeks of a youth's ployment career."[102] Through this provision, the Committee intended to "encourage employment opportunities for young people in an activity directed toward their careers."[103] The proposal generated no controversy in the House. No mention of the youth differential occurred during House debate on the passage of the 1966 Amendments.[104] Congressmen also remained silent on the youth differential during House debate on the Conference Report,[105] which had deleted the provision without explanation.[106]

The next push for a youth differential began in 1971 in the Ninety-second Congress. In that year, Secretary of Labor James Hodgson, acting on behalf of the Nixon Administration, proposed that Congress establish a youth minimum wage at eighty percent of the minimum wage.[107] The differential wage was to

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100 *See* HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS OF 1966, H.R. REP. NO. 1366, 89th Cong., 2d Sess. 35, 74 (1966) [hereinafter cited as 1966 HOUSE REPORT].

101 112 CONG. REC. 11,653 (1966).

102 1966 House bill, *supra* note 19, at § 501(a)(4). The Education and Labor Committee recognized that it would be difficult for an employer to determine "with precision the ultimate career of an employee. A reasonable and practical interpretation taking into consideration the employee's education and skill levels should be given to the term." 1966 HOUSE REPORT, *supra* note 100, at 35.

103 *Id.*

104 *See* 112 CONG. REC. 11,273-309, 11,360-406, 11,605-53 (1966). The House defeated by voice vote a floor amendment offered by Congressman Weston Vivian (D-Mich.). 112 CONG. REC. 11,641 (1966). The amendment would have created an additional twelve-week period at 85% of the minimum wage. *Id.* at 11,640 [hereinafter cited as Vivian amendment].

105 *See* 112 CONG. REC. 21,934-49 (1966).

106 H. REP. NO. 2004, 89th Cong., 2d Sess. 21, *reprinted in part in* 1966 U.S. CODE CONG. & AD. NEWS 3047, 3052.

107 *To Amend the Fair Labor Standards Act of 1938: Hearings on H.R. 7130 Before the General Subcomm. on Labor of the House Education and Labor Comm.*, 92d

apply to full-time students and youths under the age of eighteen without limit and to youths aged eighteen and nineteen only for the first six months of their employment.[108] The House Education and Labor Committee rejected the Hodgson proposal.[109] It claimed that a youth differential "would violate the basic objective of the [Fair Labor Standards] Act" and that it "would contribute to rather than ease the critical problem of unemployment, including unemployment of youths . . . ."[110] The Committee seemed to doubt whether youth unemployment existed as a problem independently of race and expected in any event that the declining number of youths in the population would eliminate the problem by the end of the 1970's.[111]

The full House reversed the decision of the Education and Labor Committee and passed a substitute bill offered by Congressman John Erlenborn (R-Ill.).[112] The bill contained a youth differential setting a minimum wage for youths under eighteen and for full-time students under twenty-one at eighty percent of the minimum wage.[113] The provisions for the differential eliminated the requirement of certification of students and made no distinction between part-time and full-time jobs.[114] The bill did require the Secretary of Labor "to prescribe standards and requirements to insure that this subsection will not create a

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Cong., 1st Sess. 550 (1971) (statement of Secretary Hodgson) [hereinafter cited as *1971 House Hearings*]. This proposal is hereinafter cited as the Hodgson proposal.

108 *Id.*

109 1971 HOUSE REPORT, *supra* note 18, at 29.

110 *Id.*

111 *Id. But see supra* note 18 and accompanying text. Nine Republicans and one Democrat on the Committee expressed support for a youth differential. 1971 House Report, *supra* note 18, at 99, 109 ("Minority Views" and "Views of Congressman Mazzoli"). The AFL-CIO strongly opposed the youth differential. Its president, George Meany, had argued: "If a job is worth doing, it is worth a fair wage — no less than the federal minimum wage, regardless of who is doing the job." *To Amend the Fair Labor Standards Act: Hearings on H.R. 10948 and H.R. 17596 Before the General Subcomm. on Labor of the House Education and Labor Comm.*, 91st Cong., 2d Sess., pt. 2, at 237 (1971) [hereinafter cited as *1970 House Hearings*]. Congressman Romano Mazzoli (D-Ky.) questioned this argument by pointing to the "additional training and supervision" required by youths under the age of 18 and to "the critical need for job opportunities among this age group." 1971 HOUSE REPORT, *supra* note 18, at 109.

112 1972 House bill, *supra* note 20, 118 CONG. REC. 16,844-46 (1972). The House first adopted the substitute, 118 CONG. REC. 16,872, and then passed the bill, *id.* at 16,873. The Erlenborn bill was similar to one proposed by the Republicans on the Education and Labor Committee. *See* 1971 HOUSE REPORT, supra note 18, at 99 ("Minority Views") [hereinafter cited as 1971 Republican proposal].

113 1972 House bill, *supra* note 20, at § 301.

114 *Id.*

substantial probability of reducing the full-time employment opportunities" of other workers.[115] The youth differential contained in the bill came to a separate vote on an amendment to delete it, offered by Congressman William Ford (D-Mich.).[116] The House rejected the amendment by a 170-227 vote.[117]

The Erlenborn bill did not become law, however, because the Senate rejected a similar youth differential amendment, offered by Senator James Buckley (Conserv.-N.Y.),[118] and failed to include a youth differential in the final version of its bill.[119] In response, the House refused to let the bill go to the Conference Committee[120] because it feared that its conferees would not uphold the House's provision for a youth differential.[121] The two houses remained deadlocked for the remainder of the Ninety-second Congress.

The conflicts continued into the Ninety-third Congress as the House and Senate again considered several proposals for a youth differential, including one put forth by Secretary of Labor Peter Brennan for the Nixon Administration.[122] As in previous

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115 *Id.*

116 118 CONG. REC. 16,859 (1972). Congressman Ford stated that "[t]here is no evidence whatsoever to support the contention of the Erlenborn substitute that a youth subminimum wage will encourage employment opportunities for that group," and added that the proposal represented the "bold continuation of the isolation and discrimination against a selective group of American workers." *Id.* at 16,859-60.

117 *Id.* at 16,861-62. The support for the youth differential came largely from a coalition of Republicans and southern Democrats. While northern Democrats voted 136-21 in favor of the Ford amendment, Republicans and southern Democrats voted against the amendment by margins of 19-146 and 15-60, respectively. 28 CONG. Q. ALM. 31-H (1972).

118 118 CONG. REC. 24,740 (1972). The amendment proposed a wage rate of 80% of the minimum wage for youths under 18 and for full-time students aged 18 and 19. *Id.* at 24,734 [hereinafter cited as 1972 Buckley amendment]. The special rate for non-students would apply only for the first six months of their employment. *Id.* The Senate defeated the amendment by a 36-54 vote, as only one northern Democrat supported it. 28 CONG. Q. ALM. 43-S (1972).

119 118 CONG. REC. 23,954-65, 24,237-60, 24,389-434, 24,697-758 (1972) (Senate debate).

120 *Id.* at 26,156, 33,509 (1972).

121 28 CONG. Q. ALM. 361 (1972). According to one observer, negotiations to get the bill to the Conference Committee broke down because Congressmen John Dent (D-Pa.) and Carl Perkins (D-Ky.), the chairmen of the General Subcommittee on Labor and the full Education and Labor Committee, respectively, refused to "buck labor interests on the youth provisions." *Id.*

122 *Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the General Subcomm. on Labor of the House Education and Labor Comm.*, 93d Cong., 1st Sess. 262 (1973) [hereinafter cited as *1973 House Hearings*]. Under this proposal, youths under 18 could have received 80% of the minimum wage for their first 20 weeks on a job. Full-time students under 21 could have worked at 85%

years,[123] the AFL-CIO was the foremost opponent of any wage differential, largely on the ground that "a subminimum wage for teenagers would permit unscrupulous employers to fire fathers and hire teenagers at a lower rate of pay."[124] Both the House Education and Labor Committee and the Senate Labor and Public Welfare Committee declined to include a youth differential in their versions of the contemplated amendments to the Fair Labor Standards Act,[125] and both the House[126] and the Senate[127] rejected youth differential amendments offered on the floor. President Richard Nixon vetoed the bill which did emerge from Congress and gave as one reason its failure to include a youth differential.[128] The House's failure to override the veto[129] precipitated months of compromise attempts.[130] The Fair Labor Standards Amendments of 1974 became law when Congress and the President agreed on legislation which did not include a youth differential.[131]

In the course of the process leading to the enactment of the Fair Labor Standards Amendments of 1977,[132] Congress once

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of the minimum wage for 20 hours per week during the school term and full-time during vacations. To avoid displacement of adult workers, an employer could have used the special rate for no more than six of his employees or 12% of his work force, whichever was higher. *Id.* This proposal is hereinafter cited as the Brennan proposal.

123 *See supra* notes 75, 87, 111 & 121.

124 *1973 House Hearings, supra* note 122, at 90 (testimony of Andrew J. Biemiller, Director of the Legislation Department of the AFL-CIO).

125 HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS OF 1973, H.R. REP. No. 232, 93d Cong., 1st Sess. 91-92 (1973) ("Minority Views"); SENATE COMM. ON LABOR AND PUBLIC WELFARE, FAIR LABOR STANDARDS AMENDMENTS OF 1973, S. REP. No. 300, 93d Cong., 1st Sess. 128 (1973) ("Minority Views").

126 119 CONG. REC. 18,372-73 (1973) [hereinafter cited as Anderson amendment]. Congressman John Anderson (R-Ill.) offered the amendment, which lost by a 199-215 vote. *Id.* at 18,374-75. Only 10 Northern Democrats supported the amendment. 29 CONG. Q. ALM. 44-H (1973).

127 119 CONG. REC. 24,774 (1973) [hereinafter cited as 1973 Buckley amendment]. The Senate turned down the amendment, proposed by Senator Buckley, by voice vote. *Id.* at 24,787.

128 R. NIXON, *Veto of the Minimum Wage Bill,* in PUB. PAPERS 1973, at 748 (1975).

129 119 CONG. REC. 30,292 (1973). The vote was 259-164.

130 The efforts failed for several months because of the AFL-CIO's intractable opposition to a youth differential. N.Y. Times, Mar. 2, 1974, at A30, col. 1; N.Y. Times, Feb. 9, 1974, at A28, col. 1; N.Y. Times, Sept. 7, 1973, at A30, col. 1. The House Education and Labor Committee made one minor attempt at compromise by suggesting a pilot program with a differential wage. HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS OF 1974, H.R. REP. No. 913, 93d Cong., 2d Sess. 37-38, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2811, 2846-47. The pilot program was never put into operation.

131 Pub. L. No. 93-259, 88 Stat. 55.

132 Pub. L. No. 95-151, 91 Stat. 1245 (codified at 29 U.S.C. §§ 201-217 (Supp. III 1979)).

again took up the issue of the desirability of a youth differential.[133] Significantly, some northern Democrats began to play an active role in pressing for a youth differential. Congressmen Robert Cornell (D-Wis.) and Paul Simon (D.-Ill.), both liberal Democrats,[134] jointly sponsored a youth differential in the House Education and Labor Committee.[135] Of equal significance, black leaders such as Tom Bradley, mayor of Los Angeles, and Kenneth Gibson, mayor of Newark, New Jersey, announced their support of a youth differential.[136]

After the House Education and Labor Committee excluded a youth differential from the bill amending the FLSA,[137] Congressmen Cornell, Simon, Erlenborn, and John Anderson (R-Ill.) jointly sponsored a bipartisan youth differential amendment.[138] The amendment would have permitted a special rate of eighty-five percent of the minimum wage for youths under nineteen, solely in their first six months of employment, and

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133 Between 1974 and 1977, Congress took no action on wage differentials. The House Subcommittee on Labor Standards, the successor to the General Subcommittee on Labor, did hold one day of hearings in 1976 on legislation introduced by Congressman James O'Hara (D-Mich.) to abolish the student differential. *Bill to Repeal Subminimum Wage Provisions for Full-Time Students: Hearings on H.R. 12596 Before the Subcomm. on Labor Standards of the House Education and Labor Comm.*, 94th Cong., 2d Sess. (1976). The bill generated little support among members of the subcommittee, *see id. passim*, and the subcommittee took no action on it.

134 In 1977 Simon received an 85% rating and Cornell a 95% rating from Americans for Democratic Action, a liberal lobby group. 34 CONG. Q. WEEKLY REP. 914-15 (1978).

135 HOUSE COMM. ON EDUCATION AND LABOR, THE FAIR LABOR STANDARDS AMENDMENTS OF 1977, H.R. REP. No. 521, 95th Cong., 1st Sess. 55, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3201, 3243 ("Additional Views of Mr. Simon") [hereinafter cited as 1977 HOUSE REPORT]. Organized labor and its allies continued their vociferous opposition to the youth differential. Andrew Biemiller called the idea "sheer nonsense." *Fair Labor Standards Amendments of 1977: Hearings on H.R. 3744 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 8 (1977) [hereinafter cited as *1977 House Hearings*]. Secretary of Labor Ray Marshall also "vigorously" opposed the youth differential, largely because of the possibility of displacement of adult workers. *Id.* at 492.

136 123 CONG. REC. 29,458 (1977) (remarks of Congressman Simon). The Congressional Black Caucus, Vernon Jordan of the Urban League, and Clarence Mitchell of the National Association for the Advancement of Colored People continued to oppose a youth differential. W. Whittaker, The Youth Subminimum Wage Issue: Background, Analysis, Proposals, and Pro/Con Discussion 34 (Congressional Research Service, Library of Congress, 1977).

137 1977 HOUSE REPORT, *supra* note 135, at 55, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3243-44 ("Additional Views of Mr. Simon"). The Committee defeated two youth differential amendments: one offered by Congressmen Cornell and Simon, *id.*, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3243 [hereinafter cited as Cornell-Simon committee amendment], and one offered by Congressman Erlenborn, *id.* at 60, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3247 ("Minority Views") [hereinafter cited as 1977 Erlenborn committee amendment].

138 123 CONG. REC. 29,453 (1977) [hereinafter cited as Cornell-Simon amendment].

for full-time students.[139] It also prohibited the following actions by an employer: (1) employing youths at the special rate for a longer period than allowed; (2) engaging in a pattern and practice of substituting younger workers paid below the minimum wage for older workers paid above the minimum wage; and (3) engaging in a pattern and practice of firing youths after six months in order to hire other youths at the special rate.[140] The House rejected the amendment by a 210-211 vote, with Speaker Thomas ("Tip") O'Neill (D-Mass.) voting against it to break a tie.[141]

The Senate defeated four youth differential amendments in 1977.[142] The closest vote came on an amendment which was offered by Senator Pete Domenici (R-N.M.)[143] and which differed from the Cornell-Simon amendment only in setting more stringent penalties for employers' violations of its provisions.[144] The Senate defeated the Domenici amendment by a 44-49 vote.[145]

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139 *Id.* The proposal required no certification prior to the hiring of either youths or students at the special rate. Students were required, however, to show their prospective employers written proof of their student status before the lower rate could apply. *Id.*

140 *Id.* In the House debate, Congressman Cornell compared the amendment to the existing wage differentials: "In a sense all youths 18 and under are apprentices or learners as they enter the labor market without the necessary training and experience for most jobs. This amendment would encourage employers to hire such people at this subminimum rate during a period of job learning." *Id.* Congressman Ronald Dellums (D-Cal.) strongly opposed the proposal as allowing displacement and discrimination and as being overly experimental. *Id.* at 29,461.

141 *Id.* at 29,463-64. Four Democrats had switched their votes from "aye" to "no" to produce the tie. *Id.* at 29,464. Northern Democrats voted 33-156 against the amendment; Republicans voted 130-12 and southern Democrats 47-43 in favor of the amendment. 33 CONG. Q. ALM. 150-H (1977).

142 123 CONG. REC. 32,864, 32,871, 32,882, 32,886 (1977). The Senate Human Resources Committee, successor to the Labor and Public Welfare Committee, had rejected inclusion of a youth minimum wage in the bill amending the FLSA. SENATE COMM. ON HUMAN RESOURCES, FAIR LABOR STANDARDS AMENDMENTS OF 1977, S. REP. No. 440, 95th Cong., 1st Sess. (1977) [hereinafter cited as 1977 SENATE REPORT].

143 123 CONG. REC. 32,883 (1977) [hereinafter cited as Domenici amendment]. The other amendments were offered by Senators James McClure (R-Idaho), *id.* at 32,860-61 [hereinafter cited as McClure amendment], Adlai Stevenson (D-Ill.), *id.* at 32,864-65 [hereinafter cited as 1977 Stevenson amendment], and Richard Schweiker (R-Pa.), *id.* at 32,872 [hereinafter cited as Schweiker amendment].

144 *Id.* at 32,883. The Domenici amendment added special fines of up to $2,500 for the first offense and up to $10,000 for subsequent offenses. *Id.*

145 *Id.* at 32,886. The voting took the same pattern as the other votes on proposals for a youth differential. Twenty-eight Republicans and twelve southern Democrats supported the amendment, but only four of the forty northern Democrats voting joined with them. 33 CONG. Q. ALM. 78-S (1977).

Interest in a youth differential has continued since 1977 into the Ninety-seventh Congress and the Reagan Administration, but the level of related legislative activity has diminished. Congress did not act on the sizeable number of youth differential proposals introduced through 1980[146] and has yet to act on the bills introduced in this session.[147] Despite the announced support of President Reagan and Senator Hatch[148] and "widespread support in Congress,"[149] the youth differential appeared to lose political steam early in the Ninety-seventh Congress.[150] As a result, youths and employers are no closer than before to being able to take advantage of a general differential wage.

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146 After the passage of the 1977 Amendments in the Ninety-fifth Congress, Congressman Simon introduced what had been the Cornell-Simon amendment, H.R. 10,452, 95th Cong., 2d Sess. (1978), *summarized at* 124 CONG. REC. 143-44 (1978) [hereinafter cited as 1978 Simon bill], and Congressman Steven Symms (R-Idaho) introduced a bill to make the minimum wage wholly inapplicable to youths under 21, H.R. 13,632, 95th Cong., 2d Sess. (1978) [hereinafter cited as Symms bill]. During the Ninety-sixth Congress, Congressmen Erlenborn, James Jones (D-Okla.), and Carroll Campbell (R-S.C.) and Senators Hatch and Stevenson all introduced youth differential proposals. H.R. 5080, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 Erlenborn bill]; H.R. 1970, 96th Cong., 1st Sess. (1979) [hereinafter cited as Jones bill]; H.R. 5692, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 Campbell bill]; S. 1025, 96th Cong., 1st Sess., *summarized at* 125 CONG. REC. S4813-14 (daily ed. Apr. 26, 1979) [hereinafter cited as 1979 Hatch bill]; S. 1107, 96th Cong., 1st Sess., *summarized at* 125 CONG. REC. S5599-600 (daily ed. May 9, 1979) [hereinafter cited as 1979 Stevenson bill].

147 Congressmen Campbell and Simon reintroduced their legislation, as did Senator Hatch. H.R. 157, 97th Cong., 1st Sess. (1981) [hereinafter cited as 1981 Campbell bill]; H.R. 2001, 97th Cong., 1st Sess. (1981) [hereinafter cited as 1981 Simon bill]; 1981 Hatch bill, *supra* note 23. Congressmen Jon Hinson (R-Miss.) and Larry McDonald (D-Ga.) and Senators Charles Percy (R-Ill.) and Don Nickles (R-Okla.) have made new proposals. H.R. 1068, 97th Cong., 1st Sess. (1981) [hereinafter cited as Hinson bill]; H.R. 2995, 97th Cong., 1st Sess. (1981) [hereinafter cited as McDonald bill]; S. 430, 97th Cong., 1st Sess., 127 CONG. REC. S1094 (daily ed. Feb. 5, 1981) [hereinafter cited as Percy bill]; S. 658, 97th Cong., 1st Sess. (1981) [hereinafter cited as Nickles bill]. The Subcommittee on Labor of the Senate Committee on Labor and Human Resources did hold hearings on March 24 and 25 on the bills introduced in this session by Senators Hatch, Percy, and Nickles. *Youth Opportunity Wage Act of 1981: Hearings on S. 348 Before the Subcomm. on Labor of the Senate Labor and Human Resources Comm.*, 97th Cong., 1st Sess. (1981). However, the Subcommittee had not acted on and had no plans to act on the bills at the time this Note went to press. Telephone interview with Jean Lee, Secretary to the Subcommittee on Labor (Dec. 1, 1981).

148 *See supra* notes 22–23 and accompanying text.

149 Donnelly, *Backers Wary: Youth Subminimum Pay Fate Tied to Adult Wage Floor*, 39 CONG. Q. WEEKLY REP. 420 (1981).

150 *Id.* The causes for the slowing of momentum included fears by business groups that a youth differential would intensify demands for increases in the adult minimum wage or encourage unionization drives, and "adamant opposition" from unions and their congressional allies. *Id.; A Balky Assault on Minimum Wages*, NEWSWEEK, March 30, 1981, at 75.

III. A Model Youth Differential Amendment

Congress should act to break this political logjam and go beyond existing wage differentials by enacting the Model Youth Differential Amendment, as set forth in the Appendix. The Model Amendment draws on the correlation between the minimum wage and youth unemployment to devise a youth differential which will induce the employment of youths, but avoid the mistakes made in drafting other wage differentials. The Model Amendment would amend section 14(b) of the Fair Labor Standards Act of 1938[151] to allow employers to pay youths under the age of twenty at a wage rate set at eighty-five percent of the minimum wage.[152] An employer could use the youth minimum wage created by the Amendment for an average of ten workers or fifteen percent of his work force, whichever is higher.[153] The Model Amendment prohibits an employer from discharging any worker for the purpose of hiring a youth at the special rate,[154] and also prohibits him from using the special rate to reduce the wages of a person employed prior to or at the time of the Amendment's effective date.[155] The Amendment requires no certification by the Secretary of Labor,[156] but does call for an employer paying the youth rate to make reports to the Secretary in order that the Secretary may enforce the prohibitions of the Amendment.[157] The Model Amendment also directs the Secretary to report to Congress within four years on the impact of its provisions on youth and adult employment.[158] The differential will remain in effect for only five years, subject to reenactment by Congress.[159]

As the following discussion indicates, these measures will enable youths and employers to reap the benefits of a lower minimum wage applicable to all youths while guarding against the abuses to which a youth differential is subject. The drafting

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151 29 U.S.C. § 214(b) (1976 & Supp. III 1979).
152 Model Amendment § 1 (proposed FLSA § 14(b)(1)(A)).
153 *Id.* (proposed FLSA § 14(b)(4)(A)).
154 *Id.* (proposed FLSA § 14(b)(3)).
155 *Id.* (proposed FLSA § 14(b)(2)).
156 *Id.* (proposed FLSA § 14(b)(1)(B)).
157 *Id.* (proposed FLSA § 14(b)(5)).
158 *Id.* § 6.
159 *Id.* § 5.

of the Model Amendment aims to minimize three particular problems inherent in all youth differentials: undue discrimination against youths, the displacement of current employees by youths paid at the special rate, and the reduction of wages paid to currently employed youths.

A. *Discrimination Against Youths*

A common argument against any youth differential is that by its terms it discriminates against youths. Congressman Ronald Dellums (D-Cal.), for example, argued against the Cornell-Simon amendment by claiming:

> It is age chauvinism. It is discrimination. . . . If we cannot discriminate on the basis of race, if we cannot discriminate on the basis of sex, then why do we set up a situation that says because one happens to be a number of years of age, he has to work for another level of income?[160]

It is obvious that the Model Amendment does allow differences in treatment on the basis of age because its central purpose is to permit an employer to pay lower wages to a young worker than he could pay to an adult. However, a peremptory denunciation of this provision as age discrimination ignores the social benefit to be gained by tuning public policy to the needs of the different groups within the polity. Attention to age in social and economic programs is neither uncommon[161] nor illegal per se.[162] Instead of blindly condemning the youth differential,

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160 123 CONG. REC. 29,461 (1977); *see also 1970 House Hearings, supra* note 111, at 239 (testimony of George Meany); 118 CONG. REC. 16,860 (1972) (comments of Congressman Ford).

161 *See supra* note 10 and accompanying text (describing federal spending for youths of $4.7 billion).

162 Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), held that a state may determine policy on the basis of age if the age classification is rationally related to achieving a legitimate state purpose. The Supreme Court found that a law retiring uniformed state police officers at age fifty does not deny them equal protection of the laws under the Fourteenth Amendment. It is possible to imagine a claim that special federal youth employment programs violate the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (current version at 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979)), but the cases have reported none, and a court would not likely sustain such a claim against a youth differential. The Model Amendment would not be vulnerable to attack under the Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 728 (current version at 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979)), because it does not entail the expenditure of federal funds.

one should examine its provisions carefully to determine whether its discriminatory effects are tolerable, or even desirable.

As a preliminary matter, it is important to note what the Model Amendment does and does not do. Contrary to Congressman Dellums's claim, it does not mandate a scheme of age discrimination; rather, it allows employers and youths to avail themselves of a lower wage. Like the existing student differential[163] and all the youth differentials proposed in Congress,[164] nothing in the Model Amendment would prohibit employers from hiring youths at wages above the special rate. In order to ensure that employers, employees, and policymakers are not misled, the Model Amendment states: "Nothing in this subsection shall be interpreted to limit any employer's authority to employ persons covered under this subsection at wages higher than those provided by this subsection."[165]

In allowing a differential wage to be paid, the Model Amendment aims not to discriminate against, but to work for, the benefit of young workers. As discussed in section I,[166] a youth differential would lead employers to hire youths, thereby providing them not only with added income, but also with work experience and training. These gains will serve to enhance a youth's prospective earnings.[167] In the view of one economist, "Early work experiences, even in the most menial of tasks, aid the individual in the acquisition of skills and attitudes that will make him a more valuable employee in the future."[168] G. Wil-

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163 29 U.S.C. § 214(b) (1976 & Supp. III 1979).

164 *See* McDonald bill, *supra* note 147; 1981 Simon bill, *supra* note 147; Nickles bill, *supra* note 147; Percy bill, *supra* note 147; 1981 Hatch bill, *supra* note 23; Hinson bill, *supra* note 147; 1981 Campbell bill, *supra* note 147; 1979 Campbell bill, *supra* note 146; Jones bill, *supra* note 146; 1979 Stevenson bill, *supra* note 146; 1979 Hatch bill, *supra* note 146; 1979 Erlenborn bill, *supra* note 146; Symms bill, *supra* note 146; 1978 Simon bill, *supra* note 146; 1972 House bill, *supra* note 20; 1966 House bill, *supra* note 19; Brennan proposal, *supra* note 122; Hodgson proposal, *supra* note 107; 1977 Erlenborn committee amendment, *supra* note 137; Cornell-Simon committee amendment, *supra* note 137; 1971 Republican proposal, *supra* note 112; Domenici amendment, *supra* note 143; Schweiker amendment, *supra* note 143; 1977 Stevenson amendment, *supra* note 143; McClure amendment, *supra* note 143; Cornell-Simon amendment, *supra* note 138; 1973 Buckley amendment, *supra* note 127; Anderson amendment, *supra* note 126; 1972 Buckley amendment, *supra* note 118; Vivian amendment, *supra* note 104.

165 Model Amendment § 1 (proposed FLSA § 14(b)(6)).

166 *See supra* notes 29-35 & 66-68 and accompanying text.

167 Lazear, *Age, Experience, and Wage Growth*, 66 AM. ECON. REV. 548 (1976).

168 JOINT ECONOMIC COMM., 95TH CONG., 1ST SESS., YOUTH AND MINORITY UNEMPLOYMENT 3 (Comm. Print 1977) (prepared by Walter E. Williams). Williams states that such early work experiences

liam Miller, former Chairman of the Board of Governors of the Federal Reserve System, supported the youth differential for this reason; he pointed to the difficulty that youths have in finding their first job and commented:

> But after they do get a job and have had it a few years, they progress very well. They can take up their place in society with well-paying jobs. It is in their own self-interest to get that first work experience, even at a differential wage. . . . They learn what work is and what responsibility is. They learn what it means to be part of the team and to produce.[169]

In providing for a uniform youth differential, the Model Amendment may treat youths differently from adults, but it would end the student differential's discrimination against non-students. Under current law,[170] a nineteen-year-old college student may work at a lower wage and thus may secure employment more easily than a nineteen-year-old who has left school and is seeking to support himself. Congress sought this result because of its apprehension that students might leave school if they were able to find jobs as non-students. The fear, as expressed by Congressman John Dent (D-Pa.), one of the originators of the student differential, was that "the kids would get a job and pick up a motorcycle or something and want to keep it, and come September, they would not go to school if we let them get a substandard wage."[171] The student differential elim-

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(1) teach individuals effective job search techniques; (2) teach effective work habits such as promptness, respect for superiors and other work habits; (3) provide self-respect and confidence that comes from being financially independent or semi-independent; (4) provide the valuable opportunity to make mistakes at a time when mistakes are not as likely to be as costly as they would be when the worker has dependents counting on him for a continuous source of income.

Id.

169 *The 1978 Midyear Review of the Economy: Hearings Before the Joint Economic Comm.*, 95th Cong., 2d Sess. (1978) (testimony of G. William Miller). *But see* MORE THAN SUBSISTENCE, *supra* note 36, at 108, where Levitan and Belous argue that "young workers often can land only dead-end jobs, such as in the fast-food industry, which do not provide training leading to better jobs"; *see also* 1977 SENATE REPORT, *supra* note 142, at 30. However, a teenager who works at a fast-food restaurant could learn cooking skills which might lead him on the path to becoming a commercial cook. He could also learn organizational skills which might lead him into the management of the franchise or elsewhere. Furthermore, simply the experience of learning to work at regular hours and responding to supervision would be helpful in a variety of jobs.

170 29 U.S.C. § 214(b) (1976 & Supp. III 1979).

171 *1973 House Hearings, supra* note 122, at 100-01. Dent also declared that he

inates this possibility by requiring that youths remain as full-time students to continue their eligibility for the special rate.

Keeping youths in school may be a worthy policy, but despite the existence of the student differential, 5.2 million individuals aged sixteen through nineteen were not enrolled in school in 1979.[172] More than four million of these teenagers were eighteen or nineteen years old,[173] and many of these youths must have decided to seek full-time employment rather than continue their education beyond high school. The student differential discriminates against these non-student youths because it allows students a wider range of options in seeking employment.[174] In operation, the student differential has benefited college students, who have accounted for more than half the students working under the program,[175] rather than the poorer youths more in need of help. As stated by Senator Adlai Stevenson (D-Ill.), who proposed that a youth differential entirely replace the existing student differential,[176] "The rationale for enhancing the employment prospects of students, in the words of the statute, is 'to prevent curtailment of opportunities for employment.' That rationale is laudable, but it makes more sense for those less fortunate than the law's beneficiaries."[177] The student differential denies its lower wages to the youths most in need of assistance and most likely to benefit from a differential wage. Allowing all college students to work at a special rate ignores the statistics demonstrating that the unemployment problem is less serious for older youths.[178] It also ignores the evidence showing that the disemployment effects of the minimum wage

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would refuse to allow youths to be enticed by employers and pushed by their parents into jobs "because they are bringing in a little extra money to the home." *Id.* at 267.

172 Adapted from BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 42 (1979).

173 *Id.*

174 *See generally* 125 CONG. REC. S5600 (daily ed. May 9, 1979); 123 CONG. REC. 32,866 (1977) (comments of Senator Stevenson). Correlatively, the report of the Minimum Wage Study Commission states: "A youth differential would encourage reverse substitution among teenagers by undoing the 'advantage' that FTS [full-time student] certification gives to students. That would increase the employment of non-student teenagers, who are on average from less affluent families, at the expense of [school-] enrolled teenagers, who are on average more affluent." 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 49.

175 MINIMUM WAGE AND MAXIMUM HOURS 1979, *supra* note 80, at 40.

176 1979 Stevenson bill, *supra* note 146, at § 2(a).

177 125 CONG. REC. S5600 (daily ed. May 9, 1979).

178 HANDBOOK OF LABOR STATISTICS 1979, *supra* note 12, at 175.

are less significant for individuals aged twenty to twenty-four than for those aged sixteen to nineteen.[179]

Following Senator Stevenson's approach, the Model Amendment would eliminate the student differential and replace it with a wage differential limited to all youths under twenty, without regard to student status.[180] This approach differs from most youth differential proposals, which have made special provision for full-time students.[181] The Model Amendment also sets no limit on the number of hours which youths can work at the special rate.[182] Limiting all youths to twenty hours of work per week, as the student differential now does for students during the school term,[183] would perpetuate the discrimination against poor youths, who must work longer hours to support themselves. Applying such a limitation to students alone would tempt them to leave school to search for full-time employment; this result would be contrary to the goal of encouraging youths to remain in school. Additionally, the youths themselves are better able than Congress to judge what amount of work is appropriate for their individual circumstances.

The Model Amendment ensures that its solicitude for the needs of poor youths will not become an ironic burden for them by imposing a greater hardship on youths than on adults. This possibility is at the heart of the argument that a youth differential discriminates against the young. Opponents of a youth differential legitimately may fear that it would allow employers to pay wages lower than necessary to provide a decent standard of living for a young worker and his dependents.[184] However, a closer analysis shows that this fear is unfounded when applied to the Model Amendment.

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179 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 41.

180 Model Amendment § 1.

181 *See* 1981 Simon bill, *supra* note 147, at § 1; 1981 Hatch bill, *supra* note 23, at § 2(a); Hinson bill, *supra* note 147, at § 2(a); 1981 Campbell bill, *supra* note 147, at § 2(a); 1979 Campbell bill, *supra* note 146, at § 2(a); Jones bill, *supra* note 146, at § 2(a); 1979 Hatch bill, *supra* note 146, at § 2(a); 1979 Erlenborn bill, *supra* note 146, at § 2(a); 1972 House bill, *supra* note 20, at § 301; 1966 House bill, *supra* note 19, at § 501(a)(4); Brennan proposal, *supra* note 122; Hodgson proposal, *supra* note 107; 1971 Republican proposal, *supra* note 112; Domenici amendment, *supra* note 143; Schweiker amendment, *supra* note 143; Cornell-Simon amendment, *supra* note 138; Anderson amendment, *supra* note 126; 1972 Buckley amendment, *supra* note 118.

182 Model Amendment § 1. The Model Amendment has no effect on child labor laws. *Id.* (proposed FLSA § 14(b)(1)(A)).

183 29 U.S.C. § 214(b)(4)(A) (1976 & Supp. III 1979).

A youth differential may lead employers to pay lower wages to youths, but it will not inexorably lead young workers into undue hardship. Poverty is not a static condition; the poverty line varies according to family size.[185] In 1980, for example, the poverty line for a family of four was $8385, but only $4184 for a single person.[186] If a full-time worker earning the 1980 minimum wage of $3.10 per hour[187] had provided the sole income for the family of four, that family would have fallen below the poverty line; the worker's annual income would have totaled $6448, or seventy-seven percent of the poverty level. The same income for a single worker, though, would have put him at 154% of the poverty level because he does not incur the additional expenses necessary to care for others besides himself.

The Model Amendment draws on this relationship between poverty and family size to continue to fulfill what has been one of the central purposes of the minimum wage: to attack poverty.[188] By setting the differential wage at eighty-five percent of the minimum wage and limiting its use to youths under twenty,[189] the Model Amendment allows almost every youth eligible for the special rate to reach the relevant poverty line if he works forty hours per week at that rate.[190]

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184 *See, e.g.*, 1977 HOUSE REPORT, *supra* note 135, at 14, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3215.

185 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-60, No. 127, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1980 (Advance Report) 28 (1981). This Note takes the poverty line, set by the federal government, as the authoritative determination of what constitutes undue hardship.

186 *Id.* The figures for 1980 are the most recent ones available.

187 Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, § 2(a), 91 Stat. 1245 (codified at 29 U.S.C. § 206(a)(1) (Supp. III 1979)). This calculation and the ones which follow assume that the employee works forty hours per week for fifty-two weeks per year.

188 President Franklin Roosevelt declared in his message to Congress accompanying the proposed Fair Labor Standards Act that "our objective is to improve . . . the standard of living of those who are now undernourished, poorly clad, and ill-housed." HOUSE COMM. ON LABOR, FAIR LABOR STANDARDS ACT, H. REP. No. 1452, 75th Cong., 1st Sess. 7 (1937). Similarly, during congressional debate on the bill, supporters referred to it as setting "a minimum standard of decent living," 81 CONG. REC. 7793 (1937) (remarks of Senator Borah), and as "simply giving them [the poor] a chance to live, a chance to buy the necessities of life." 83 CONG. REC. 7281 (1938) (remarks of Congresswoman Norton).

189 Model Amendment § 1 (proposed FLSA § 14(b)(1)(A)).

190 This analysis assumes that the minimum wage on which the 85% rate is based continues to keep pace with inflation and remains no lower than the current level in real terms. If Congress does not continue to adjust the minimum wage for inflation,

The choice of eighty-five percent for the special rate, the rate most often proposed for youth differentials,[191] guarantees that a full-time youth worker supporting himself and one other person will provide an annual income for this household[192] above the poverty level. A worker earning eighty-five percent of the 1980 minimum wage ($3.10) would have had an annual salary of $5481. This amount is equivalent to 131% of the 1980 poverty level for one person ($4184) and 103% of the poverty level for a family of two ($5338).[193]

Restricting the differential to youths under twenty[194] makes certain that very few individuals supporting more than one person in addition to themselves would be working at the special rate. The Model Amendment seeks to keep the number of these individuals to a minimum because its differential wage would

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more youths will fall below an increasingly high poverty level, which is adjusted annually for inflation. The Fair Labor Standards Amendments of 1977 did increase the minimum wage to its current rate of $3.35 per hour, which became effective on January 1, 1981. Pub. L. No. 95-151, § 2(a), 91 Stat. 1245 (codified at 29 U.S.C. § 206(a)(1) (Supp. III 1979).

191 *See* 1981 Simon bill, *supra* note 147, at § 1; Percy bill, *supra* note 147, at § 2(a); Hinson bill, *supra* note 147, at § 2(a); 1981 Campbell bill, *supra* note 147, at § 2(a); 1979 Campbell bill, *supra* note 146, at § 2(a); 1979 Jones bill, *supra* note 146, at § 2(a); 1979 Stevenson bill, *supra* note 146, at § 2(a); 1979 Erlenborn bill, *supra* note 146, at § 2(a); 1978 Simon bill, *supra* note 146; Domenici amendment, *supra* note 143; 1973 Buckley amendment, *supra* note 127; Vivian amendment, *supra* note 104. *But cf.* Anderson amendment, *supra* note 126 (80% rate); 1981 Hatch bill, *supra* note 23, at § 2(a) (75% rate); Symms bill, *supra* note 146 (minimum wage made wholly inapplicable to youths). Little justification has been offered for the choice of one specific rate over another.

192 "A household includes the related family members and all the unrelated persons, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone in a housing unit, or a group of unrelated persons living as partners, is also counted as a household." BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATON REPORTS SERIES P-20, NO. 349, MARITAL STATUS AND LIVING ARRANGEMENTS 56 (1980) [hereinafter cited as MARITAL STATUS AND LIVING ARRANGEMENTS].

193 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-60, NO. 127, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1980 (Advance Report) 28 (1981). Additionally, the willingness of employers and employees to use the 85% student differential rate suggests that this rate gives sufficient incentives to employers to hire youths and sufficient incentives to youths to take the jobs. *See supra* note 98 and accompanying text. *But see* Wingeard, *supra* note 55, at 79 (suggesting that a rate lower than 65% might be necessary to create these incentives for employers). A BLS study has also concluded that the likelihood that youths will use a youth minimum wage declines as they grow older. N.Y. Times, Feb. 29, 1980, at A1, col. 5.

194 *Cf., e.g.*, 1981 Simon bill, *supra* note 147, at § 1 (cutoff at age 19); Percy bill, *supra* note 147, at § 2(a) (cutoff at age 20); Symms bill, *supra* note 146 (cutoff at age 21). The proponents of the various cutoff ages have not provided theoretical or practical justifications for their choices.

not suffice to keep households of more than two persons above the poverty level. The same income of $5481 earned at the special rate would have amounted to only eighty-four percent of the poverty level for a family of three ($6539).[195] Teenagers will rarely provide for families of this size, however, because they have considerably fewer support obligations than even their immediate elders. While twenty-nine percent of persons aged twenty to twenty-four are heads of households, only 2.5%, or 607,000, of all those under age twenty are household heads.[196] This figure includes youths living alone, who account for nearly one-third of this number.[197] The teenagers who are not heads of households, 97.5% of the total, are neither solely responsible for the support of another, nor totally dependent on their own earnings to keep themselves above the poverty level. The Model Amendment will not force into poverty even the small number of youths who must support at least two others because it does not prevent youths from being paid wages higher than the differential wage.[198]

B. *Displacement of Currently Employed Workers*

Beyond providing for a differential wage and guarding against its potentially undesirable effects on the youths covered by it, a youth differential proposal must also guard against a negative impact on those not eligible for the youth rate. The opponents of the youth differential argue most commonly that employers will fire their current workers who can be paid no lower than the minimum wage and replace them with youths who can be paid the differential wage, solely to take advantage of the lower

195 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-60, No. 127, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1980 (Advance Report) 28 (1981).

196 MARITAL STATUS AND LIVING ARRANGEMENTS, *supra* note 192, at 29-31.

197 *Id.* Only 416,000 youths under 20, or 1.7% of the total number, are heads of households with at least two persons in them. The number of youths heading households of more than two persons must be smaller than this number, but no further statistics on this question appear to be available. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, UNITED STATES SUMMARY, pt. 1, §§ 1, 2 (1973); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1979); MARITAL STATUS AND LIVING ARRANGEMENTS, *supra* note 192.

198 Model Amendment § 1 (proposed FLSA § 14(b)(6)).

rate.[199] An employer might seek to reduce costs by replacing both adult workers and youths who had been paid the differential wage, but who have grown too old for it to apply.

The structure of the labor market provides a barrier against a thoroughgoing substitution of older workers, however. The fact that the job markets for youths and adults are to some degree different will minimize the likelihood of adult displacement. As a rule, adults are members of the "primary" labor market, which offers higher wages, better working conditions, and more stable employment than the "secondary" or "peripheral" labor market into which youths fall.[200] To the extent that these markets are separate, youths and adults will compete for jobs among themselves rather than with workers in the other group. Research does indicate that the existence of this dual labor market would limit the displacement of adult workers which might occur with the enactment of a youth differential.[201]

Nevertheless, some displacement is bound to occur because the labor market is not entirely segmented. Minimizing this displacement is necessary to make a youth differential politically palatable to the Congressmen who must enact it. It is also necessary to achieve the Model Amendment's goal of alleviating

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199 *See 1977 House Hearings, supra* note 135, at 492 (testimony of Secretary of Labor Marshall); *1970 House Hearings, supra* note 111, at 239 (testimony of George Meany); *Minimum Wage-Hour Amendments: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Education and Labor Comm.*, 89th Cong., 1st Sess. 117 (1965) (letter from the Wage and Hour and Public Contracts Divisions of the Department of Labor); 1977 SENATE REPORT, *supra* note 142, at 29; 123 CONG. REC. 29,461 (1977) (remarks of Congressman Dellums); CBO OUTLOOK AND POLICY STRATEGIES, *supra* note 18, at 31; CBO YOUTH EMPLOYMENT AND EDUCATION, *supra* note 11, at 75; 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 57-58. *See also To Amend the Fair Labor Standards Act: Hearings on H.R. 3935 Before the Special Subcomm. on Labor of the House Education and Labor Comm.*, 87th Cong., 1st Sess. 112 (1961) (testimony of Secretary of Labor Goldberg); 1 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, YOUTH UNEMPLOYMENT: A REPORT ON THE HIGH LEVEL CONFERENCE 48 (1978); F. Welch, Minimum Wage Legislation in the United States, *supra* note 54, at 36; N.Y. Times, May 5, 1979, at A10, col. 3 (quoting Lyle Gramley, a member of the Council of Economic Advisers).

200 S. LEVITAN, G. MANGUM, & R. MARSHALL, HUMAN RESOURCES AND LABOR MARKETS: LABOR AND MANPOWER IN THE AMERICAN ECONOMY 55-56, 126-28 (1976).

201 West, *supra* note 26, at 87 (referring, without citation, to studies by Carlson and by Goldfarb and Yezer). West states that their research "suggests that there is only very limited substitutability of youths for adults in practice. The question, it seems, is one of a trade-off between a small number of adult jobs and a larger number of teenage jobs." *Id.* A majority of the U.S. Employment Service offices in Wingeard's survey predicted that lowering the minimum wage for teenagers would have minimal adverse effects on other workers. Wingeard, *supra* note 55, at 85.

the unemployment problem, not merely shifting it from youths to adults. The injustice done to workers fired solely because of the existence of a youth differential weighs heavily against the social benefit gained from increasing the employment of youths. A youth differential proposal must perform an untidy task — balancing the gain for youths against the harm to adults. This balancing is made all the more difficult because neither the proponents nor the opponents of the youth differential have defined what amount of displacement would be acceptable and what amount unacceptable. The statistical studies have provided little assistance because they give no firm estimates of the displacement which a youth differential would occasion.[202]

Unlike the other wage differentials proposed and enacted,[203] the Model Amendment provides separate measures to counter the two types of displacement: the firing of workers to hire youths at the differential wage, which will be referred to as "direct displacement," and the more gradual shift in an employer's work force to young workers through filling vacancies and new positions with employees hired at the youth rate, which will be referred to as "indirect displacement." Departing also from the vagueness of its counterparts, the Model Amendment provides clear standards to facilitate the policing of its prohibitions and to encourage employers to make legitimate use of the special rate.

1. Direct Displacement

The Model Amendment outlaws direct displacement in specific terms: "No employer shall discharge any employee for the

202 CBO YOUTH EMPLOYMENT AND EDUCATION, *supra* note 11, at 75 n.19; CBO POLICY OPTIONS, *supra* note 7, at 38. The variation in the findings of two studies illustrates this lack of conclusive data. The staff of the Minimum Wage Study Commission estimated, on the basis of Hamermesh's data, that a 25% youth differential would result in a loss of 50,000 to 150,000 adult jobs against a gain of 400,000 to 450,000 youth jobs. 1 MINIMUM WAGE STUDY COMMISSION, *supra* note 29, at 47. An earlier study by Dr. Allan Fisher for the Labor Department found that a 15% youth differential would create 800,000 to 900,000 youth jobs, but would result in the displacement of 500,000 adults. The study, entitled "Adult Disemployment Effects of a Youth Minimum Wage Differential," is mentioned, without full citation, in Levitan, *Coping with Teenage Unemployment*, in CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, REPORT OF THE CONGRESSIONAL BUDGET OFFICE CONFERENCE ON THE TEENAGE UNEMPLOYMENT PROBLEM: WHAT ARE THE OPTIONS? 65 (1976), and is reprinted in part, again without full citation, at 123 CONG. REC. 32,863 (1977).

203 *See supra* notes 69 & 164.

purpose of employing a person under the age of twenty pursuant to this subsection."[204] This language is broad enough to outlaw both the immediate discharge of adult workers and the dismissal of youths working at the special rate upon their reaching the age of twenty. The Model Amendment[205] enforces this prohibition by making a violation of this and every other provision of the Amendment a prohibited act under section 15 of the FLSA[206] and therefore punishable by the penalties set forth in section 16 of the FLSA.[207] These sections make every violator subject to a fine of up to $10,000, or six months in prison, and liable for the payment of back pay at the minimum wage rate and an additional amount for liquidated damages.[208] The Model Amendment adds that any worker illegally discharged shall be reinstated if he so desires.[209]

This language in the Model Amendment marks a clean break from the more diffuse attempts to control displacement under the student differential program and other youth differential proposals. The primary form of control over direct displacement under the student differential is the requirement that before an employer can hire a student at the special rate, the Secretary of Labor certify that the "employment of such student will not create a substantial probability of reducing the full-time employment opportunities" of other workers.[210]

The vagueness of this language insures that it will not deal effectively with the problem of direct displacement.[211] If an

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204 Model Amendment § 1 (proposed FLSA § 14(b)(3)). This provision is not intended to require employers to prove the existence of good cause for firing their employees. If either an employee or the Labor Department challenges a dismissal, the employer would only have to prove a reason for the discharge other than a desire to take advantage of the youth differential.

205 Model Amendment §§ 2, 3.

206 29 U.S.C. § 215 (1976).

207 *Id.* § 216 (1976 & Supp. III 1979).

208 *Id.* §§ 215, 216 (as amended by Model Amendment §§ 2, 3). The Act requires that the employer provide back pay only at the rate of the minimum wage, not the wages actually earned by the discharged employee, because the employer could have legally lowered the employee's wage to the minimum wage.

209 Model Amendment § 3(c).

210 29 U.S.C. § 214(b) (1976 & Supp. III 1979); 29 C.F.R. §§ 519.5(b), 519.15(b) (1980). An employer can receive certification by attesting that this standard is met if he seeks to employ six or fewer students at the special rate, 29 U.S.C. § 214(b) (1976 & Supp. III 1979); 29 C.F.R. § 519.4(a) (1980), but the problems with the standard remain. In addition, the employer now bears the uncertainty of the standard and must take care not to violate the Act by misinterpreting it.

211 For a similar approach, with similar difficulties, see the youth differential bill passed by the House in 1972, which ordered the Secretary of Labor to "prescribe

employer fires an adult worker and applies to the Secretary for permission to hire a student at the special rate, it is not clear that the student's employment would reduce the "full-time employment opportunities" of the adult worker. It was the firing of the adult which did so, not the subsequent hiring of the student, and it may be hard to prove any connection between the two events. Furthermore, nothing in the FLSA provides the Secretary with information sufficient for him to judge whether an employer is terminating older workers in order to replace them with students. Even if an employer waits until receiving certification to hire students before he fires the adults, the discharged employees may remain unprotected. At the time of his decision, the Secretary still would have no firm basis on which to determine whether the hiring of students will substantially reduce the employment opportunities of the adults.[212]

Apart from the question of the proper standard to be used, the certification process itself may prove so confusing that it discourages employers from using the special rate. As the Joint Economic Committee has stated in regard to private-sector incentives in general, "the amount of financial incentive alone will not determine an employer's willingness to hire structurally unemployed individuals. Paperwork burdens . . . and administrative costs can prevent employer participation in a private sector initiative regardless of financial incentives."[213] With respect to the student differential in particular, former Secretary of Labor Hodgson concluded that certification "has proven puzzling, time-consuming and costly for employers, often discouraging the furtherance of its original intent."[214]

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standards and requirements to insure that this subsection will not create a substantial probability of reducing the full-time employment opportunities" of other workers. 1972 House bill, *supra* note 20, at § 301.

212 The student differential also attempts to control displacement through certification by requiring that the Secretary authorize student employment in a particular establishment only for the number of hours worked by students and other employees in that and similar establishments at various times. 29 U.S.C. § 214(b)(1)(B) (1976); 29 C.F.R. § 519.6 (1980). This requirement might work in theory, but in practice it is so complex as to be essentially unintelligible to most employers. As a result, the provision can only be enforced loosely or discourage employers from applying for certification.

213 JOINT ECONOMIC COMMITTEE, THE EFFECTS OF STRUCTURAL EMPLOYMENT AND TRAINING PROGRAMS ON INFLATION AND UNEMPLOYMENT, S. REP. No. 51, 96th Cong., 1st Sess. 31 (1979).

214 *1971 House Hearings*, *supra* note 107, at 550. The Senate Labor and Public Welfare Committee has pointed to the fact that many employers do not fully use the

Because of the failure of this process, the Model Amendment provides explicitly: "No prior or special certification by the Secretary of Labor shall be required for employment pursuant to this subsection."[215] The Amendment instead allows the Secretary to determine an employer's compliance with its dictates by requiring that all employers paying the special rate make reports to the Secretary under penalty of perjury.[216] These reports, which must be made every six months, must include a list of the persons discharged by the employer within that period of time, accompanied by a statement of the reason for each discharge.[217] The Model Amendment[218] makes any violation of the reporting requirements a violation of section 15 of the FLSA,[219] bringing into force the penalties of section 16 of the FLSA.[220]

These provisions improve on the student differential program in several ways. First, besides helping to deter employer misconduct, the reports will give the Secretary the information he needs in order to respond to complaints made by discharged employees and to instigate investigations on his own authority. Second, the Model Amendment simplifies the relevant inquiry, although the difficulties of proof will persist. It is easier to inquire into the existence of an unlawful intent after the discharge has taken place than it is to guess about the probability of the occurrence of that discharge beforehand. Third, the Model Amendment reduces the paperwork burdens on employers by requiring a standard report every six months instead of requiring a new application for certification whenever an em-

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certificates they have applied for and received, *see* Schloss, *supra* note 98, at 107, as proof that the certification process is not a burden. In this view, employers applied for certificates "even when they had no immediate need." SENATE COMM. ON LABOR AND PUBLIC WELFARE, FAIR LABOR STANDARDS AMENDMENTS OF 1973, S. REP. No. 300, 93d Cong., 1st Sess. 50 (1973). The BLS study which reported this under-utilization also found, however, that the main reason for employers' failure to use the certificates was that their establishments were already completely staffed. Schloss, *supra* note 98, at 107.

215 Model Amendment § 1 (proposed FLSA § 14(b)(1)(B)).

216 *Id.* (proposed FLSA § 14(b)(5)). The Model Amendment gives the Secretary the authority to issue regulations governing these reports. *Id.*

217 *Id.* (proposed FLSA § 14(b)(5)(A)(iv)).

218 *Id.* § 3.

219 29 U.S.C. § 215 (1976).

220 *Id.* § 216 (1976 & Supp. III 1979). See *supra* text accompanying note 207 for a description of these penalties.

ployer seeks to increase his authorized employment of students at the special rate. The language of the Model Amendment ensures that the reporting requirements will not become more burdensome in the future because it limits the Secretary's authority to request information to the items specified in the Amendment.[221]

2. Indirect Displacement

Controlling the indirect displacement of workers not eligible for the youth differential is more problematic than preventing direct displacement because it looks to a period of an employer's operations rather than to individual hiring and firing decisions. Determining what amount of indirect displacement is permissible and policing the standard settled upon are more difficult than for direct displacement. Further, while it is easy to identify the straightforward trade of one adult worker for one youth, it is difficult to determine whether an employer is shifting the composition of his work force from older to younger workers. The underlying assumption condemning both practices is the same, however. Youths paid the differential wage should hold jobs created by virtue of the youth differential, and an employer should not be able to use its enactment to replace adults with youths, however gradually the replacement takes place.

The certification process of the student differential provides no better control over indirect displacement than it does over direct displacement, although its standard applies more clearly to the former. The vagueness of its wording gives no principled basis for deciding what is an intolerable level of indirect displacement. The student differential gives the Secretary of Labor the unbridled power to decide when the probability of reducing the employment of other workers will be "substantial" and to refuse certification for students on the basis of this finding. Employers can look to no clear standards indicating what level of employment at the special rate will be approved.

The Cornell-Simon amendment of 1977 rejected this certification procedure and directly prohibited two sorts of employer

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221 Model Amendment § 1 (proposed FLSA § 14(b)(5)(A)).

action. The amendment made it a violation of the FLSA for an employer using the youth differential to engage in a "pattern and practice" of "substituting younger workers employed at less than the minimum wage for older workers employed at or above the minimum wage" or of "terminating the employment of youth employees after [the period of the youth differential's applicability] . . . and employing other youth employees . . . in order to gain continual advantage" of the differential wage.[222] This language has become the most commonly offered solution to the displacement problem and has been incorporated into several subsequent proposals.[223]

Despite its widespread acceptance, the impact this proposal would have on indirect displacement is ambiguous. It divides into two groups all workers with the common problem of being too old to be eligible for the lower wage, and it gives inadequate protection to each group. The prohibition against "substituting" older workers could be interpreted to extend only to the instances in which adults are dismissed and replaced by youths, not to the gradual change in the age of the employer's workers. Even if "substituting" were interpreted to include indirect displacement, it is not clear what amount of indirect displacement would rise to the level of a "pattern and practice." As with the student differential, neither the Secretary nor employers would be able to act with confidence. The second half of the Cornell-Simon amendment, superfluous if one gives a broad reading to the first half, requires constant vigilance on the part of the Secretary. The amendment protects a youth fired because the wage differential no longer applies to him only if the youth hired in his place works until the differential no longer applies to him and then is also fired.[224]

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222 Cornell-Simon amendment, *supra* note 138.

223 *See, e.g.*, Percy bill, *supra* note 147, at § 2(a); 1981 Hatch bill, *supra* note 23, at § 2(a); Hinson bill, *supra* note 147, at § 2(a); 1981 Campbell bill, *supra* note 147, at § 2(a); 1979 Stevenson bill, *supra* note 146, at § 2(a); 1979 Hatch bill, *supra* note 146, at § 2(a); Domenici amendment, *supra* note 143; Schweiker amendment, *supra* note 143; McClure amendment, *supra* note 143.

224 The limited protection which these provisions would offer against direct displacement is apparent. It is impossible to find a "pattern and practice" if the employer terminates only one adult worker and almost as difficult to find if he fires two or three. No worker should have to wait for his employer's exploitation of others before he can seek redress for an unjust discharge. These mistakes in drafting are obviously painful to the author of this Note, who, as legislative assistant to Congressman Simon, was one of the principal drafters of the Cornell-Simon amendment.

The 1973 proposal of Secretary Brennan took a more direct approach. He suggested that an employer be limited to using the special rate for no more than six youths, or twelve percent of his work force, whichever was higher.[225] While this prohibition would not prevent by itself a certain amount of direct displacement, it would set a clear limit for the tolerable level of indirect displacement. In this respect it improves on the fuzzy standards of the student differential and the Cornell-Simon amendment. Although these specific limits have no empirical or theoretical base,[226] their fixed nature is preferable to the uncertainties of the prohibitions of the student differential.

The Model Amendment follows the approach of this plan and contains indirect displacement by limiting use of the youth differential. The Amendment provides: "No employer shall, during a six-month period, employ at the rate provided in this subsection more than an average of ten employees or a number of employees equivalent to an average of more than fifteen per centum of his work force, whichever is higher."[227] In order both to assist the Secretary in enforcing this measure and to encourage employers to adhere to it, employers paying the special rate must include in the reports to the Secretary required by the Model Amendment figures on the average number of youths employed at this rate and the average percentage of their work force which this number represents.[228]

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225 Brennan proposal, *supra* note 122. Congressman Anderson took a similar approach in his 1973 proposal. Anderson amendment, *supra* note 126.

226 Secretary Brennan did not provide such a base in his testimony. *See 1973 House Hearings, supra* note 122, at 259-85.

227 Model Amendment § 1 (proposed FLSA § 14(b)(4)). In addition to limiting displacement, this provision would prevent employers who rely heavily on young workers from reaping a windfall through being able to pay every teenage employee at the special rate. These employers would not be disadvantaged by this limitation because they would in fact be gaining the ability to pay a lower wage to some youths and because they could reserve use of the differential to newcomers on the job. As these workers gained the skills which made them worth the minimum wage, their wages could be increased, and those more recently employed could be paid the differential wage. In no event could an employer use the youth differential to reduce the wages of his current employees. *See infra* note 232 and accompanying text.

228 Model Amendment § 1 (proposed FLSA § 14(b)(5)(A)(ii)). The Model Amendment uses averages to avoid discouraging employers from paying the special rate. Unaveraged figures would require detailed record-keeping by employers to make sure that their use of the special rate never climbed above permissible levels, even for one day.

While the precise figures chosen for these limits cannot be justified in detail, they should permit a significant increase in youth employment without undue harm to adult employment. This uncertainty over specifics is one of the main reasons the Model Amendment provides that its youth differential program will automatically lapse after five years, unless Congress expressly reauthorizes the program.[229] The current provision will prevent extreme abuses of the youth differential through both direct and indirect displacement and will give Congress a benchmark by which to judge the effectiveness of the Model Amendment in minimizing the adverse effects of a youth differential. If indirect displacement reaches an unacceptable level, Congress can amend the Model Amendment to lower the number of jobs which can be filled at the special rate, try an entirely different approach, or let the Model Amendment lapse.[230] In order to assist Congress in measuring the amount of displacement and in choosing among these alternatives, the Model Amendment requires the Secretary of Labor to issue within four years a report describing the effects of the program and giving his recommendations for its continuation or amendment.[231] The information contained in the employers' reports will help the Secretary evaluate the provisions of the Amendment dealing with displacement.

C. *Reduction of Wages of Currently Employed Youths*

The third problem raised by a youth differential, the possibility that an employer will use the differential to lower the wages of a youth already employed by him, is similar to the problem of displacement. In both cases the employer is exploiting an opportunity to increase his profits by lowering the

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229 *Id.* § 5; *cf.* Percy bill, *supra* note 147, at § 3(a) (limiting the duration of its youth differential to three years).

230 This scheme is consistent with Gramlich's suggestion that "it seems eminently feasible to introduce this differential gradually, monitoring the internal substitution and stopping when and if adult disemployment becomes too great." Gramlich, *supra* note 35, at 450.

231 Model Amendment § 6. This report should be able to give more adequate statistics than are now available.

wages he pays. No youths benefit by the creation of additional jobs, and individual youths are hurt directly by a reduction in their income. Since the employer's action does not amount to a discharge of the youth, however, a youth differential proposal must make special provision to prevent this type of abuse. The Model Amendment states: "No persons shall be employed pursuant to this subsection by any employer by whom he is employed on the effective data of this subsection or by whom he has been employed prior to the effective date of this subsection."[232] The Amendment implements this provision by mandating that the employer's reports to the Secretary include a list of the youths employed at the special rate and the dates on which they have been employed by the same employer at any wage rate.[233]

This provision of the Model Amendment improves on the measures employed in the student differential program and other youth differential proposals to counter this problem. The Labor Department regulations governing the student differential prohibit the lowering of wages of current student workers: "Certificates will not be issued where such issuance will result in a reduction of the wage rate paid to a current employee."[234] Similarly, the Cornell-Simon amendment provided that its youth differential "shall not apply to any youth employee . . . who is currently employed by an employer at a rate of at least the minimum wage."[235] Neither of these provisions explicitly covers the situation in which an employer fires a teenager earning the minimum wage or more before the effective date of the youth differential and subsequently rehires him at the youth rate. The Model Amendment's prohibition extends to this possibility by including youths "employed prior to the effective date of this subsection."[236]

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232 *Id.* § 1 (proposed FLSA § 14(b)(2)).

233 *Id.* (proposed FLSA § 14(b)(5)(A)(i)).

234 29 C.F.R. § 519.15(h) (1980).

235 Cornell-Simon amendment, *supra* note 138. *See also* 1979 Stevenson bill, *supra* note 146, at § 2(a); Domenici amendment, *supra* note 143; Schweiker amendment, *supra* note 143; 1977 Stevenson amendment, *supra* note 143.

236 Model Amendment § 1 (proposed FLSA § 14(b)(2)). The AFL-CIO has made two other arguments against the youth differential. The first is that it would increase the profits of employers who would pay the lower wages. *1970 House Hearings, supra* note 111, at 239 (testimony of George Meany). It is difficult to see the harm in this

D. *Miscellaneous Provisions*

The Model Amendment allows youths to work at the differential rate until they reach the age of twenty.[237] It rejects any other limitation on the length of coverage, as suggested in proposals to end a youth's eligibility for the special rate after six weeks[238] or six months.[239] The youth differential does presume that its lower wages should not apply indefinitely to a worker because he will gain enough experience to be worth the full minimum wage. However, this change will not necessarily take place after six months or any set length of time. In fact, the student differential program sets no limit on the length of time an otherwise eligible student can continue to work at the differential rate.[240] The apparent assumptions are that it may take a considerable length of time for students to merit higher pay and that the law should impose no arbitrary limit on this process. Setting the limit too low might alienate young workers misled into believing that they have marketable skills at the minimum wage at a time when they do not.

Omitting a limitation on coverage also avoids a variety of other problems. If the limit applied to the youth, employers would have to inquire into a potential employee's employment

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result since the Model Amendment guards against an employer's exploitation of his workers. The second is that a youth differential would cause "a loss in dignity in the work performed by teenagers . . . ." *Id.; cf.* Hamermesh, *Subsidies for Jobs in the Private Sector*, in CREATING JOBS: PUBLIC EMPLOYMENT PROGRAMS AND WAGE SUBSIDIES 110 (J. Palmer ed. 1978) (arguing that wage subsidies are in general self-defeating because they identify their recipients as unproductive workers). However, a youth will probably feel more dignified if he has a job than if he is unemployed, even if his wage is lower than that of an adult. A youth minimum wage will not stigmatize youths as inferior workers whom employers will not want to hire because it will add no information to the market's perception of the youth labor force. *See id.* at 116 ("Comments by Gramlich").

237 Model Amendment § 1 (proposed FLSA § 14(b)(1)(A)).

238 *See* 1966 House bill, *supra* note 19, at § 501(a)(4).

239 *See, e.g.*, 1981 Simon bill, *supra* note 147, at § 1; Percy bill, *supra* note 147, at § 2(a); 1981 Hatch bill, *supra* note 23, at § 2(a); Hinson bill, *supra* note 147, at § 2(a); Domenici amendment, *supra* note 143; Cornell-Simon amendment, *supra* note 138. *But cf.* Anderson amendment, *supra* note 126 (20 weeks); Vivian amendment, *supra* note 104 (18 weeks). The recent trend has been to lengthen the period of coverage, and some bills have proposed no limitation other than the age cutoff. *See* 1979 Stevenson bill, *supra* note 146; Symms bill, *supra* note 146.

240 29 U.S.C. § 214(b) (1976 & Supp. III 1979). The regulations do provide that student certificates are good for only one year, but they are renewable without limitation. 29 C.F.R. §§ 519.6, 519.16 (1980).

history. The potential for fraud would be great. If, on the other hand, the limit applied to the employer, youths who switched from one employer to another during the period of coverage would be treated differently from the youths who remained six months in the same job.[241]

The Model Amendment also sets no limits on the application of the youth differential to all the fields of employment in which youths are otherwise eligible to work under the Fair Labor Standards Act,[242] as has every youth differential proposal.[243] There is no clear reason for the current limitation of the student differential to students with jobs in the retail, service, agricultural, and higher-education fields.[244] Indeed, evidence suggests that adult displacement would be negligible were a youth differential to apply to construction, manufacturing, and government jobs.[245]

Handling two final details, the Model Amendment includes special language integrating the youth differential with the existing special rates for Puerto Rico and the Virgin Islands to create a fifteen percent differential between the minimum wage and the youth minimum wage in those places.[246] The Amendment also makes a technical change in the exemptions section of the FLSA so that the youth differential will be incorporated into the entire text of the FLSA.[247]

CONCLUSION

It is undeniable that youth unemployment is a serious problem in the United States. The operation of the economy and of government programs has failed to provide work for a steadily increasing number of youths; at present, more than one out of every five youths between the ages of sixteen and nineteen is unemployed.[248] The growing unemployment among youths pre-

241 *See generally* W. Whittaker, *supra* note 136, at 50-51.

242 Model Amendment § 1. The FLSA contains certain limitations on the use of child labor, especially in hazardous industries. 29 U.S.C. §§ 203, 212 (1976).

243 *See supra* note 164.

244 29 U.S.C. § 214(b) (1976 & Supp. III 1979).

245 Wingeard, *supra* note 55, at 85.

246 Model Amendment § 1 (proposed FLSA § 14(b)(1)(A)).

247 *Id.* § 4.

248 In December 1981, the seasonally adjusted rate was 21.7%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, VOL. 29, No. 1, at 35 (1982).

sents a challenge to policymakers to develop new governmental initiatives.

One initiative should be the enactment of a lower minimum wage for youths than for adults, and the Model Amendment proposed by this Note shows the form which this action should take. A youth differential is not the intellectual property of one political party or one political ideology, but a proposal which makes sense intuitively; it will ease the youth unemployment problem by inducing employers to hire more youths, whose labor is made less expensive. The economists' studies cited in this Note bear out this intuition. As related in section I, they have found that a minimum wage decreases employment and that a youth differential would increase the employment of youths over what it would otherwise be.

The Fair Labor Standards Act, as presently amended, and the legislative histories of the proposed youth differentials show the base upon which Congress must build in enacting a youth differential. Congress has repeatedly rejected attempts to enact a differential wage available to all youths. The student differential and other wage differentials which Congress has created have not gone far enough in aiding the employment of youths. The Model Amendment responds to the criticisms levied against past youth differential proposals and contains specific provisions that accomplish everything a youth differential should do while preventing everything a youth differential should avoid. The Model Amendment is one government program which will help youths as much as possible with a minimum of undesirable side effects.

APPENDIX

A Model Youth Differential Amendment

Sec. 1. Section 14(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 214(b)) is amended to read as follows:

"(b)(1)(A) An employer may employ any person who has not attained the age of twenty at a wage rate not less than 85 per centum of the otherwise applicable minimum wage rate in effect under section 6 (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), provided that such employment is in compliance with otherwise applicable child labor laws.

"(B) No prior or special certification by the Secretary of Labor shall be required for employment pursuant to this subsection.

"(2) No person shall be employed pursuant to this subsection by any employer by whom he is employed on the effective date of this subsection or by whom he has been employed prior to the effective date of this subsection.

"(3) No employer shall discharge any employee for the purpose of employing a person under the age of twenty pursuant to this subsection.

"(4)(A) No employer shall, during a six-month period, employ at the rate provided in this subsection more than an average of ten employees or a number of employees equivalent to an average of more than 15 per centum of his work force, whichever is higher.

"(B) The dates for any such six-month period shall be congruent with the dates established by the Secretary for the reporting requirements of paragraph (5) of this subsection.

"(5)(A) In order to insure compliance with the provisions of this subsection, any employer who, during the previous six months, has employed persons pursuant to this subsection, shall provide to the Secretary, under penalty of perjury, the following information, pursuant to regulations to be issued by the Secretary:

"(i) a list of the persons employed by the employer pursuant to this subsection during the previous six months, and the dates they have been employed, at any wage rate, by that employer,

"(ii) the average number of persons employed by the employer pursuant to this subsection during the previous six months and the percentage of his average total work force represented by this number,

"(iii) the birth date of the persons employed by the employer pursuant to this subsection during the previous six months, through reference to a source of information approved by the Secretary pursuant to the provisions of subparagraph (B), and

"(iv) a list of persons who were discharged by the employer during the previous six months, with an indication of the reason for each such discharge.

"(B) For the purposes of this paragraph, a source of information relative to age shall be approved by the Secretary if it is not a statement from the person whose age is at issue, and is:

"(i) a valid license to operate a motor vehicle,

"(ii) a certified copy of a birth certificate, or

"(iii) any other form of proof of age approved by the Secretary in regulations issued pursuant to this subsection.

"(6) Nothing in this subsection shall be interpreted to limit any employer's authority to employ persons covered under this subsection at wages higher than those provided by this subsection."

SEC. 2. Section 15(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 215(a)) is amended as follows:

(a) Paragraph (1), immediately following the numeral "6," strike the word "or" and insert in lieu thereof the symbol ",";
(b) Paragraph (1), immediately following the numeral "7," insert "or section 214";
(c) Paragraph (2), immediately following the numeral "6," strike the word "or" and insert in lieu thereof the symbol ",";
(d) Paragraph (2), immediately following the numeral "7," insert "or section 214".

Comment: Upon amendment, this subsection of the Act will read as follows:*

"§ 215. PROHIBITED ACTS; PRIMA FACIE EVIDENCE

"(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, [or] section 207 *or section 214* of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; . . . ;

"(2) to violate any of the provisions of section 206, [or] section 207 *or section 214* of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title; . . . ."

SEC. 3. Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 216(b)) is amended as follows:
(a) Immediately following the numeral "6" strike the word "or" and insert in lieu thereof the symbol ",";
(b) Immediately following the numeral "7" insert the following: ", or section 214, or any of the provisions of any regulation, order or certificate of the Secretary issued under section 214";
(c) Immediately following the first sentence that ends with the word "damages" insert the following new sentence: "Any employer who discharges any employee in violation of the provisions of section 214 shall be required, in addition, to reinstate such employee if the employee so desires."

Comment: Upon amendment, this subsection of the Act will read as follows:*

"§ 216. PENALTIES; CIVIL AND CRIMINAL LIABILITY; . . .

"(b) Any employer who violates the provisions of section 206, [or] section 207, *or section 214, or any of the provisions*

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* In the passage tha follows, the Amendment adds the italicized material, deletes the bracketed material, and leaves the rest of the material unchanged.

> *of any regulation, order, or certificate of the Secretary issued under section 214* of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. *Any employer who discharges any employee in violation of the provisions of section 214 shall be required, in addition, to reinstate such employee if the employee so desires.* An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . ."

SEC. 4. Section 13(a)(7) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 213(a)(7)) is amended to read as follows:

"(7) any employee to the extent that such employee is exempted by the provisions of section 214, or any of the provisions of any regulation, order or certificate of the Secretary issued under section 214 of this title;".

> *Comment*: The subsection of the Act will be affected as follows:*
>
> "§ 213. EXEMPTIONS
>
> "(a) The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to —
>
> "(7) any employee to the extent that such employee is exempted by *the provisions of section 214, or any of the provisions of any* regulation[s], order or certificate of the Secretary issued under section 214 of this title."

SEC. 5. The provisions of sections 1, 2, and 3 of this Amendment shall remain in effect for five years subsequent to the date on which they take effect, at which time they shall cease to be in effect.

SEC. 6. No later than four years after the effective date of this Amendment, and additionally as he deems appropriate, the Secretary shall report to the Congress on the impact of this Amendment on employment and unemployment among youths and adults, and shall make recommendations to the Congress on the continuation or improvement of the program authorized under this Amendment.

SEC. 7. This Amendment may be referred to as "The Model Youth Differential Amendment."

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* In the passage that follows, the Amendment adds the italicized material, deletes the bracketed material, and leaves the rest of the material unchanged.

NOTE

TOWARD A DEFINITION OF "TENDER OFFER"

IDA C. WURCZINGER*

The Williams Act regulates tender offers but nowhere defines what they are. In this Article, Ms. Wurczinger reviews judicial, administrative, and legislative attempts to overcome that statutory omission. She contrasts the "conventional" tender offer with transactions that, because of their predominantly open-market or privately negotiated character, are on the borderline of what arguably should be regulated as a tender offer. She uses this contrast to illustrate her argument that judicial attempts to define tender offer are confused and unsatisfactory because of a fundamental, though unacknowledged, conflict between the twin goals of the Williams Act: to protect the investor's decision-making function and to avoid obstructing those transactions that increase efficiency in the use of economic resources.

She then outlines and critiques two recent attempts to define the term "tender offer," one administrative and the other legislative: the Securities and Exchange Commission's proposed rule 14d-1(b) and the Commission's proposed Williams Act amendment (an amendment developed by the Commission and sponsored by Senators Proxmire, Williams, and Sarbanes). She concludes that a legislative amendment would be preferable to administrative rule-making as a method for defining the scope of the tender offer provisions. However, whereas the Commission's proposed amendment would designate a purchaser's percentage of ownership and the number of sellers as determinants of whether a purchase plan is a tender offer, Ms. Wurczinger argues that an amendment should instead focus on the purchaser's behavior in designating which types of purchase plans are to be regulated as tender offers.

In subjecting tender offers to federal regulation without defining them,[1] the Williams Act[2] creates a dilemma for securities

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1 The portion of the relevant congressional report which comes closest to defining a tender offer states:

> the offer normally consists of a bid by an individual or group to buy shares of a company — usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met.

H.R. REP. No. 1711, 90th Cong., 2d Sess. 1, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811. The Committee's use of the word "normally" suggests that the legislators did not wish to be too precise in their definition of the term. *Cf.* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973).

2 Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-

lawyers advising clients who plan to acquire a substantial percentage of a corporation's stock. Prior to the execution of any stock purchase plan which could arguably be labeled a tender offer,[3] the acquirer must either undertake full and costly compliance with the Williams Act's requirements[4] or risk being subjected to sanctions and a possible divestiture order for having failed to comply with the Act in executing a tender offer. Thoughtful analysis of judicial precedent and of Securities and

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(e), 78n(d)-(f) (1976)). The Williams Act amended the Securities Exchange Act of 1934; it created sections 13(d), 13(e), 14(d), 14(e), and 14(f) of the 1934 Act.

3 While there is apparently no one uniformly agreed-upon formulation, a tender offer may generally be defined as a mechanism through which a company, an individual, or a group of persons attempts to obtain control of a publicly held corporation (the "target company") by making a public offer or solicitation to purchase, during a fixed period of time, all or a portion of a class or classes of that corporation's stock at a specified price or upon specified terms. While this technique has been commonly used in England for years, it was not until the 1960's that it came into frequent use in the United States. *See* E. ARANOW & H. EINHORN, *supra* note 1, at iv, 70.

4 *See* 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976) and rules and regulations promulgated by the Commission pursuant to its authority thereunder, 17 C.F.R. §§ 240.13d-.13e, .14d-.14f (1981). Section 14(d) and the rules and regulations promulgated thereunder apply to the "use of the mails or by any means of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer of, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after the consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class . . . ." *See* 15 U.S.C. § 78n(d)(1)(1976). The main characteristics of the regulatory scheme provided by section 14(d) and these rules and regulations are the requirement that the bidder in a tender offer make certain disclosures to the target company and its shareholders and file a Schedule 14D with the Commission at the time copies of the solicitation are first published, sent or given to security holders; the requirement that, in tender offers for less than all of the equity securities of a class, the bidder accept tenders on a pro rata basis; the requirement that any increase in the consideration offered be extended to all tendering shareholders; and the requirement that tendering shareholders be permitted to withdraw their tendered shares within 15 business days after the initiation of the offer and 60 days after the date of the original offer if the tender offerer has not yet paid for the securities prior to this time. *Id.* § 78n(d)-(f); 17 C.F.R. § 240.14d-.14f (1981). Tender offers are also subject to section 14(e), the broad antifraud provision, which applies "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." 15 U.S.C. § 78n(e) (1976). This section makes it unlawful for any person to make any untrue statement of a material fact or to omit to state any necessary fact or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer. *Id.* The application of section 14(e) is not contingent upon whether, after consummation of the tender offer, the bidder would be the beneficial owner of more than 5 percent of the class of equity securities or whether the equity security is registered pursuant to section 12 of the Securities Exchange Act of 1934. Its scope is, thus, broader than that of section 14(d) and the rules and regulations promulgated thereunder.

Exchange Commission pronouncements has proven to be unhelpful in determining whether a proposed method of stock acquisition constitutes a tender offer. In many cases courts, relying on the remedial purposes of the Williams Act, have construed the term "tender offer" to extend well beyond previous judicial constructions of that term.[5] In addition, the Commission has deliberately declined to define the term "tender offer" in order to prevent purchasers whose transactions may arguably warrant federal regulation from structuring those transactions so as to evade the application of sections 14(d) and 14(e).[6]

Recently, however, the call from the courts[7] and the commentators[8] for guidance in this area has prompted the Commission to make two attempts at defining the term: one in the form of a proposed rule[9] and the other in the form of a proposed legislative amendment to section 14(d).[10] At this time neither

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5 *See, e.g.*, Wellman v Dickinson, 475 F. Supp. 783, 825 (S.D.N.Y. 1979). Judge Carter construed the tender offer provisions of the Williams Act "to encompass all methods of takeover by a large-scale stock purchase program."

6 *See, e.g.*, SEC Exchange Act Release No. 15,548 (Feb. 5, 1979), [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,935, in which the Commission reaffirmed its position that the term should be left undefined "[i]n recognition of the dynamic nature of tender offers and the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes . . . ."

Sections 14(d) and 14(e) are part of the Securities Exchange Act of 1934, as amended. *See supra* note 2. Throughout this Article, references to sections created by the Williams Act use the section numbering found in the 1934 Act rather than that found in the Williams Act itself.

7 *See, e.g.*, Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979), in which the court referred to a "crippling uncertainty in an area in which practitioners should be entitled to be guided by reasonably clear rules of the road."

8 *See* E. ARANOW & H. EINHORN, *supra* note 1, at 76; Moylan, *Exploring the Tender Offer Provisions of the Federal Securities Laws*, 43 GEO. WASH. L. REV. 551, 588 (1975); Block & Schwarzfeld, *Curbing the Unregulated Tender Offer*, 6 SEC. REG. L.J. 133 (1978); Symposium, *The Urge to Merge*, 35 BUS. LAW. 1417, 1443-45 (1980) (remarks of Commissioner Greene).

9 *See* SEC Exchange Act Release No. 16,385 (Dec. 6, 1979); 44 Fed. Reg. 70,349 (1979) (proposed rule 14d-1(b)(1)).

10 *See* SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 96TH CONG., 2D SESS., SECURITIES AND EXCHANGE COMMISSION REPORT ON TENDER OFFER LAWS (prepared by the Commission for use of the Committee) (Comm. Print 1980); and proposed section 14(d)(1)(B) amending section 14(d) of the Securities Exchange Act of 1934.

Mention should also be made of a third attempt to define tender offer. As part of its scheme for unifying the various statutes which now govern federal securities practice, the American Law Institute's proposed Federal Securities Code defines tender offer according to a numerical test based upon the number of solicitees involved in a purchase program. The main definitional provision, ALI Fed. Sec. Code § 202(166)(A), reads as follows:

of the Commission's proposals has been adopted. The courts continue to define the term "tender offer" on a case-by-case basis.

This Article approaches the problem of defining the term "tender offer" from the viewpoint that reliance upon judicial construction of the term fails to respond to the primary concern of securities lawyers advising clients who plan to acquire a substantial percentage of a corporation's stock: the need for a relatively high degree of certainty at the planning stage as to whether the proposed method of stock acquisition constitutes a tender offer. Part I discusses the various tests developed by the courts for determining whether a stock purchase plan constitutes a tender offer and the positions taken by the Commission in its releases, amicus briefs, and administrative rulings. A trend toward broader construction of the term "tender offer," particularly on the part of the Commission, emerges. This trend is counter-balanced by several cases in which the courts held that fidelity to the intent of the Williams Act sponsors requires that tender offer regulation be limited where it would impede the economic efficiency of the market for corporate shares.[11] The cases show that, when confronted with a method of stock acquisition which cannot practicably be subjected to the tender offer provisions, the courts have had to make the difficult determination as to whether investor-protection concerns substantially outweigh the economic-efficiency concerns at issue.

(A) GENERAL. — "Tender offer" means an offer to buy a security, or a solicitation of an offer to sell a security, that is directed to more than thirty-five persons, unless —

(i) it (I) is incidental to the execution of a buy order by a broker, or to a purchase by a dealer, who performs no more than the usual function of a broker or dealer, or (II) does no more than state an intention to make such an offer or solicitation; and (ii) it satisfies any additional considerations that the Commission imposes by rule.

While this proposal does have the virtue of establishing a bright-line rule for distinguishing most privately negotiated transactions from tender offers, it delegates the more difficult problems of refining its definition to the Commission's rule-making authority. Since this Article principally focuses upon transactions which are not easily characterized for purposes of the tender offer provisions, it will deal directly with the Commission's proposed attempts to define the term without further discussion of the Federal Securities Code approach.

11 *See, e.g.*, Stromfeld v. Great Atlantic & Pacific Tea Co., 484 F. Supp. 1264 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 563 (2d Cir. 1980); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773 (S.D.N.Y. 1979); Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part as* (aff'd as to issue of compliance with the Williams Act), 584 F.2d 1195 (2d Cir. 1978).

The resulting conflict in the legal standards applied by the courts shows that the courts are not the forum in which this tension should be resolved.

Parts II and III examine the Commission's attempts to provide prospective criteria for the application of the tender offer provisions in terms of their responsiveness to the problem of providing safeguards to ensure informed decision-making on the part of target-company shareholders confronted with an offer to purchase their shares while avoiding wholesale federal regulation of the market for corporate shares. The tests set forth in the Commission's proposed rule and legislative amendment are applied to the fact patterns of several cases in which the courts have wrestled with this tension, and the results are compared.

I. The Criteria Developed for Defining A Tender Offer Under the Case-By-Case Approach

The legislative history of the Williams Act indicates the type of transaction with which the Act's drafters were primarily concerned:

> the offer normally consists of a bid by an individual or group to buy shares of a company — usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met.[12]

This type of stock purchase plan has come to be known as the "conventional tender offer." While the Act's drafters may not have intended to restrict the protections of sections 14(d) and 14(e) to such purchase plans, it is clear from the legislative history that those sections were not intended to be applied on a per se basis to all stock purchase plans which effectuate a shift in corporate control. During the congressional hearings on the bill, Senator Williams, one of the Act's sponsors, stated that substantial privately negotiated and open-market purchase plans, while raising some of the investor-protection concerns

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12 *See supra* note 2.

which prompted the enactment of the Williams Act, should not be subjected to pre-acquisition disclosure and regulation because it would upset "the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoid prematurely disclosing the terms of privately negotiated transactions."[13] Williams thus recognized that it would be impracticable to subject certain stock acquisition plans to the tender offer provisions and that the market for corporate shares would suffer as a result of wholesale regulation of such transactions as tender offers.

The Commission took the first step toward extending the coverage of the tender offer provisions to open-market purchase plans only one month after the Williams Act became effective. In an Exchange Act Release,[14] the Commission announced that "special bids" would be considered tender offers within the meaning of sections 14(d) and 14(e). A special bid is a stock-market device for handling the purchase of blocks of securities too large to be readily accommodated in the regular auction market. Via the market tape, the bidder announces a price (which typically is substantially above the market price) and states the number of shares sought. Sales to responding shareholders are then consummated immediately on the exchange floor.[15]

The Commission's decision to consider the special bid a tender offer went beyond the paradigm of a conventional tender offer in several respects. Sales under a special bid take place on the exchange floor; thus, only professional brokers who arguably are sufficiently sophisticated to make an informed divestment choice are involved in a decision-making capacity. Furthermore, the special bid is not conditioned upon the purchaser's acquisition of a minimum number of shares. Unlike the shareholder in a conventional tender offer, who relinquishes his shares with no guarantee that they will be taken up, the seller in a special bid is assured of receiving payment contemporaneously with the relinquishment of his shares. Finally, the market tape bid is the only "solicitation" involved in the special

13 113 CONG. REC. 856 (1967).
14 SEC Exchange Act Release No. 8392 (Aug. 30, 1968); 33 Fed. Reg. 14,109 (1968).
15 *Id.*

bid. The type of pressure selling tactics which characterize unregulated tender offers[16] are totally absent from the special bid.

The first judicial extension of the coverage of the tender offer provisions occurred in the case of *Cattlemen's Investment Company v. Fears.*[17] The transaction at issue involved a solicitation of virtually all of the equity shareholders in a publicly held company through the use of private contacts such as letters, telephone calls, and personal visits. There was no public announcement of an offer to purchase; however, the court held that where the private contacts are "active and widespread" such solicitation is tantamount to a public tender offer.[18] As later applied, the "active and widespread solicitation" test requires that the court ascertain the extent of the potential purchaser's private contacts with target-company shareholders with regard to the total number of shareholders contacted and their total percentage of stock ownership in the target company in order to determine whether these characteristics of the purchase plan warrant its regulation as a tender offer.[19] The test does not consider whether a premium was offered, whether there was a time limitation, or whether there was a limit on the number of shares sought to be purchased.

In the subsequently reported cases, the term "active and widespread" has not been applied in any case where the aggregate stock held by the shareholders contacted comprised less than one-third of the target company's outstanding stock.[20] Because the number of shareholders contacted in these cases has

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16 *Hearings on H.R. 14,475, S. 510 Before the Subcomm. on Commerce and Finance of the House Interstate and Foreign Commerce Comm.*, 90th Cong., 2d Sess. 16 (1968) (remarks of Chairman Cohen).

17 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation,* No. 72-152 (W.D. Okla. May 8, 1972). Before the district court decision, the SEC staff had already concluded that the *Fears* solicitations constituted a tender offer. *See* Cattlemen's Investment Co., [1971-72 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,775 (SEC staff letter, Jan. 4, 1972).

18 343 F. Supp. at 1252.

19 *See* Financial General Bankshares, Inc. v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403 (D.D.C. 1978), *aff'd on reconsideration, id.* at ¶ 96,511 (D.D.C. 1978); S-G Securities v. Fuqua Investment Co., 466 F. Supp. 1114 (D. Mass. 1978), *petition for reconsideration denied,* 466 F. Supp. 1132 (D. Mass. 1979); Hoover Co. v. Fuqua Industries, Inc., [1979-80 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979).

20 *Id.*

generally ranged between twelve and sixty,[21] the issue remains open as to whether solicitations directed at a substantially higher number of solicitees, whose total holdings compose less than one-third of a particular class of the target company's stock, would be characterized as "active and widespread." Dicta in at least one decision indicates that the number of shareholders contacted by the purchaser would ordinarily be accorded less weight than their total percentage of stock ownership.[22]

The courts later adopted the "widespread public announcement" test as a standard to be applied where there is no private communication with target-company shareholders but the acquirer publicly communicates his intention to make a substantial purchase of target-company stock. In *S-G Securities v. Fuqua Investment Co.*,[23] the prospective purchaser's public announcement of his intention to make a substantial acquisition of S-G Securities stock, in combination with his subsequent consummation of a series of purchases of such stock, was held to warrant the characterization of the transaction as a tender offer. The fact that the purchaser was able to consummate a series of rapid and substantial purchases following his public announcements was taken to indicate (a) that the announcements did have the effect of a solicitation in stimulating offers by target-company shareholders to sell their stock, and (b) that the

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21 *See* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 (N.D. Ill. 1973), *dismissed with prejudice*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (settlement) (40 solicitees); D-Z Investment Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974) (24 solicitees); Financial General Bankshares, Inc. v. Lance, [1978-1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403 (D.D.C. 1978) *aff'd on reconsideration, id.* at ¶ 96,511 (D.D.C. 1978) (between 10 and 30 solicitees); Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part* (aff'd as to issue of compliance with the Williams Act), 584 F.2d 1195 (2d Cir. 1978) (12 solicitees).

22 Hoover Co. v. Fuqua Industries, Inc., [1979-80 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979). The court held that the solicitation via private contacts of 100 members of the Hoover family, who owned a total of 41 percent of the company's voting stock, were geographically dispersed, and had little or no contact with the daily operation of the company, was "the equivalent of a solicitation of all the public shareholders." The court rejected the contention that the family should be regarded as one unit and the solicitations as a series of private negotiations with this unit.

23 466 F. Supp. 1114 (D. Mass. 1978), *petition for reconsideration denied*, 466 F. Supp. 1132 (D. Mass. 1979). Before this case the SEC in a staff reply letter had refused to express an opinion as to whether a similar transaction was a regulated tender offer. *See* L.S.L. Corp., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,715 (Jan. 8, 1974).

purchaser, in accepting these offers, intended his announcements to have this effect.[24]

Although the "active and widespread solicitation" and the "widespread public announcement" tests have never been given clear numerical bounds, both are objective tests: a solicitation falling within the test is presumptively a tender offer, without reference to the effect upon particular target-company shareholders. The type of transaction that would be characterized as a tender offer under either of these tests has been considered by the courts and the commentators to create the same effect as a conventional tender offer — that is, the creation of divestment pressure under circumstances which inhibit informed decision-making on the part of target-company shareholders.[25] Where large numbers of shareholders are privately contacted by the prospective purchaser and informed of his plan to acquire a substantial interest in their corporation or where the same message is communicated through a public announcement followed by substantial private and open-market purchases, the shareholder may feel pressured to sell his stock at an inflated price before the purchaser has acquired the desired percentage of stock and before the buying program terminates. Essentially, he is faced with "Hobson's Choice" because, if the shareholder does not sell and the buying program is successful, he may then find himself locked into a company under an unknown new management with the opportunity of selling his shares only at a lower price.[26]

Another test which has been applied by the courts, the "shareholder impact" test,[27] relies upon subjective criteria in determining whether a stock purchase plan constitutes a tender offer. The courts' inquiry under this test focuses upon the percentage of the shareholders' respective individual holdings and their investor sophistication in order to determine whether they were able to exercise sufficient bargaining power to protect their interests when confronted with the prospective purchaser's offer.[28]

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24 466 F. Supp. at 1126-27.

25 *See Hearings on H.R. 14,475, supra* note 16.

26 *See* E. ARANOW & H. EINHORN, *supra* note 1.

27 The "shareholder impact" test was first proposed in a student note. *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

28 Several commentators have suggested that the consideration of the nature of the

For example, in *Nachman Corp. v. Halfred, Inc.*[29] the court characterized the forty solicitees, all of whom were either directors, management, or substantial shareholders of the target company, as a "powerful group" able to force the purchaser to increase his offering price.[30] *Nachman* indicates that where the status of the selling shareholders confers substantial bargaining power vis-à-vis the purchaser and where there is evidence that this bargaining power was utilized, the transactions involved will be found to have been privately negotiated purchases and will not be characterized as a tender offer.[31] Thus, the application of the "shareholder impact" test has provided the rationale for the exclusion of transactions involving a sizeable number of solicitees from the tender offer provisions in those cases where the sellers played an active role in determining the terms of the transaction and the transaction was one which arguably would not have been undertaken at all if subjected to regulation as a tender offer.

The "active and widespread solicitation," "widespread public announcement," and "shareholder impact" tests, though diverse in application, have a common rationale: all three presume that the primary purpose of the Williams Act is to protect the investor's decision-making function. Legislative history and Supreme Court interpretations of other portions of the Act sup-

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particular solicitees involved in the transaction, in terms of their bargaining power and sophistication, is a misapplication of the "shareholder impact" test. These commentators would interpret the test to require that the court look only at the features of the transaction involved and its capability of impairing the decision-making function of the average shareholder. *See, e.g.*, Moylan, *supra* note 8, at 579.

Nevertheless, the nature of the solicitees involved in the transaction has been a prominent factor in the courts' application of the test. *See, e.g.*, Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 (N.D. Ill. 1973), *dismissed with prejudice*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (settlement); D-Z Investment Co. v. Holloway [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974); Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part* (aff'd as to issue of compliance with the Williams Act), 584 F.2d 1195 (2d Cir. 1978).

29 [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 (N.D. Ill. 1973), *dismissed with prejudice*, [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (settlement).

30 [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973).

31 *See supra* note 28.

port this view.[32] Moreover, the Act's substantive provisions clearly indicate that ensuring that shareholders have sufficient time and information with which to make a rational decision regarding an offer to purchase their shares constitutes a paramount statutory goal.[33] An important limitation is also present, though implicit, in the Williams Act. By structuring the Act's provisions in a manner which makes it impracticable to apply those provisions to open-market trading activities and negotiated deals, the drafters expressed an intent that the Act should not be applied to regulate all changes in share ownership as tender offers.[34]

In an opinion that implicitly recognized this limitation upon the scope of the tender offer provisions, the Second Circuit recently declined to follow the trend toward a broad construction of the term "tender offer" in *Kennecott Copper Corp. v. Curtiss-Wright Corp.*[35] The court of appeals affirmed a lower-court decision that a face-to-face solicitation directed at a total

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32 *See, e.g.*, 113 CONG. REC. 854-55 (1967) ("The purpose of this bill S. 510 is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case."); Piper v. Chris-Craft Industries, 430 U.S. 1, 28 (1976) (in which the Court stated in holding that a tender offeror does not have standing to sue under the Williams Act, "The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect shareholders of target companies.").

33 The main characteristics of the regulatory scheme provided by section 14(d) and these rules and regulations are the requirement that the bidder in a tender offer make certain disclosures to the target company and its shareholders; the requirement that, in tender offers for less than all of the equity securities of a class, the bidder accept tenders on a pro rata basis; the requirement that any increase in the consideration offered be extended to all tendering shareholders; and the requirement that tendering shareholders be permitted to withdraw their tendered shares within 15 business days after the initiation of the offer and 60 days after the date of the original offer if the tender offeror has not yet paid for the securities before this time. 15 U.S.C. 78n(d)-(f) (1976); 17 C.F.R. § 240.14d-.14f (1981).

34 Senator Williams stated, with respect to the disclosure provisions of section 14(d)(1), that:

> [s]ubstantial open market or privately negotiated purchases of shares may . . . relate to shifts in control of which investors should be aware. While some people might say that this information should be filed before the securities are acquired, disclosure after the transactions avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoid prematurely disclosing the terms of privately negotiated transactions.

113 CONG. REC. 856, 857 (1967).

35 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part* (aff'd as to issue of compliance with the Williams Act), 584 F.2d 1195 (2d Cir. 1978).

of twelve financial institutions and individual shareholders holding large equity positions, combined with purchases on national stock exchanges, was not a tender offer. While the district court had made its ruling using the "shareholder impact" test, the court of appeals relied upon the much narrower conventional definition of a tender offer. It held that because the purchaser did not offer a substantial premium above market price or establish a deadline for the tendering of shares for purchase, the off-market sales did not meet the criteria for finding the existence of a tender offer.[36] As for the open-market sales, the court noted that "it is by now equally well settled that market purchases of stock, however aggressive, do not constitute a tender offer."[37] In fact, the higher court criticized both the "active and widespread" and the "shareholder impact" tests as violating the implied limits of the Williams Act.[38]

This narrower construction of the term "tender offer" was also applied in *Brascan Ltd. v. Edper Equities Ltd.*,[39] in which the court condemned the *S-G Securities* "widespread public announcement" test as well as the *Cattlemen's* "active and widespread solicitation" test. The court also refused to base its holding on the "flexible factors" criteria urged by the Commission in its *amicus* brief.[40] The court opined that the Commission's interpretation of the scope of the term "tender offer" went beyond the implied limitations of the tender offer provisions and warned that the practical consequences of adopting such an interpretation would be that no large-scale acquisitions

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36 584 F.2d at 1206.
37 *Id.*
38 *Id.* at 1207.
39 477 F. Supp. 773 (S.D.N.Y. 1979).
40 *Id.* at 791. The factors recommended by the Commission are as follows:
(1) whether there is an active and widespread solicitation of public shareholders;
(2) whether the solicitation is made for a substantial percentage of the issuer's stock;
(3) whether the offer to purchase is made at a premium over the prevailing market price;
(4) whether the terms of the offer are firm rather than negotiable;
(5) whether the offer is contingent on the tender of a fixed minimum number of shares, and, perhaps, subject to a ceiling of a fixed maximum number to be purchased;
(6) whether the offer is open for only a limited period of time;
(7) whether the offerees are subjected to pressure to sell their stock; and
(8) whether public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of target-company securities. *Id.* at 791 n.13.

could be executed except by the method of conventional tender offers (accompanied by the statutorily required pre-acquisition disclosures).[41]

Both the *Kennecott Copper* and the *Brascan* cases represent a partial reversal of the courts' prior inclination to adopt a broad construction of the term "tender offer." The tension between the narrow construction of the term adopted in these cases and the broad construction advocated by the Commission and previously applied by some courts is evident in the two recent decisions of *Wellman v. Dickinson*[42] and *Stromfeld v. Great Atlantic and Pacific Tea Company*.[43] *Wellman v. Dickinson* involved the solicitation, via private contacts during two consecutive nights, of thirty-nine shareholders whose holdings accounted for approximately 34% of the target company's voting stock.[44] The court, ostensibly following *Kennecott Copper*, characterized the transactions as a conventional tender offer despite the absence of publicity and the fact that there was a high level of sophistication among the selling shareholders.[45] Moreover, the court noted in dicta that, if the transaction had been nonconventional, it would have employed the Commission's "flexible factors" analysis.[46] These factors, however, incorporate the "active and widespread" and "shareholder impact" tests, both of which the court of appeals explicitly rejected in *Kennecott*.[47]

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41 *Id.* 790–91. Similarly, another court sought to limit the open-market implications of the "widespread public announcement" test in Chromalloy American Corp. v. Sun Chemical Corp., 474 F. Supp. 1341 (E.D. Mo.), *aff'd*, 611 F.2d 240 (8th Cir. 1979). The prospective purchaser in Chromalloy engaged an investment brokerage firm and instructed it to purchase over an 18-month period a percentage of the daily trading volume in the target company's stock with no solicitation, no premiums and no off-market purchases. The court found it likely that the purchaser had an intent to gain control of the target company at the time that the purchases were initiated. Nevertheless, due to the absence of solicitation, premiums, a time limit, and a minimum-purchase contingency, the court stated that "there is no way defendants' purchases could be considered a tender offer" within the meaning of the Williams Act. *Id.* at 1346-47. The court thus refused to consider a prior-established though unpublicized intent to gain control of the target company equivalent in effect to a widespread public announcement.

42 475 F. Supp. 783 (S.D.N.Y. 1979).

43 484 F. Supp. 1264 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 563 (2d Cir. 1980).

44 475 F. Supp. at 809-10.

45 *Id.* at 820-21.

46 *Id.*

47 See *infra* text accompanying notes 35-38.

In *Stromfeld v. Great Atlantic and Pacific Tea Company*, the purchaser's contacts with and purchases from seven shareholders, who owned a total of 30% of the target company's stock with options to acquire an additional 12%, were held to constitute a privately negotiated transaction.[48] The court applied the Commission's "flexible factors" test but noted the objections to the test which were raised by the *Brascan* court and appeared to adopt the narrow construction of the term "tender offer" applied by both the *Brascan* and *Kennecott Copper* courts.[49] The *Stromfeld* court's citing of contradictory sources signals an effort to dismiss the plaintiff's actions on the broadest possible ground so as to avoid an appeal based upon the particular test applied by the court.

As is evident, the current case law exhibits two divergent views of the proper construction of the term "tender offer." The view reflected in *Cattlemen's, S-G Securities*, and *Wellman* holds that because the primary purpose of the Williams Act is to ensure adequate time and information for decision-making on the part of target-company shareholders confronted with an offer to purchase their shares, the provisions of the Act, including the term "tender offer," must be construed broadly. The view reflected in *Kennecott Copper* and *Brascan*, however, argues that the Act is implicitly limited in purpose and is not intended, and cannot be applied, to regulate all plans for the purchase of substantial percentages of stock in a target company.

The Commission's recent administrative action against Paine, Webber, Jackson & Curtis, Inc. indicates that it has not adopted the view of the *Kennecott Copper* and *Brascan* courts. On December 9, 1981, the Commission instituted a public administrative proceeding against Paine Webber, a brokerage firm, alleging that, in June 1980, Paine Webber "willfully violated and willfully aided and abetted a violation of Section 14(d)" by failing to comply with that section's tender offer provisions in connection with a block purchase of 9.9% of the stock of Diamond International Company on behalf of Simpson Paper Com-

48 484 F. Supp. 1264 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 563 (2d Cir. 1980).
49 *Id.* at 1272.

pany.[50] If the Commission's action is successful, it would represent the broadest construction to date, by either the Commission or the courts, of the term "tender offer."

II. A Rule-Making Alternative for Defining Tender Offers

A. *The Commission's Proposed Rule 14d-1(b)(1)*

The Commission's release of its proposed definition of the term "tender offer" for comment, in December 1979, represented its first attempt in the eleven years since the enactment of the Williams Act[51] to provide a comprehensive set of guidelines for determining which stock purchase plans constitute tender offers.[52] The Commission has structured the proposed definition in a two-tier format.

Under the first tier, proposed rule 14d-1(b)(1)(i), a transaction is a tender offer if it consists of:

> (1) one or more offers to purchase or solicitations of offers to sell securities of a single class;

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50 *See* SEC Exchange Act Release No. 18,318 (Dec. 9, 1981), SEC Administrative Proceedings File No. 3-6074. The events that led to the Commission's action were as follows:

Diamond International Company was the target of a public tender offer commenced on or about May 14, 1980, by Cavenham (UK), an English company owned and controlled by Generale Occidentale. Simpson Paper Company had unsuccessfully proposed a friendly tender offer for 51% of Diamond International's outstanding common stock in early June 1980. Shortly thereafter, Simpson Paper instructed Paine Webber to proceed with the acquisition of exactly 9.9% of Diamond International's outstanding common stock (10% or more would have triggered the Hart-Scott-Rodino Act's filing requirements) in one block so as to avoid bidding up the price.

Paine Webber immediately undertook an extensive solicitation of broker-dealers in an attempt to assemble a block of shares in Diamond International for purchase on the New York Stock Exchange. After an unsuccessful effort to execute a block trade for such shares on the NYSE, Paine Webber contacted each of the sellers and obtained sell orders to execute a block trade on the Pacific Stock Exchange. Some proration of sell orders occurred before and after the execution of the trade; however, sell orders for accounts in Paine Webber's arbitrage and international departments were executed in full. The successful execution of the block trade on the Pacific Stock Exchange resulted in the acquisition of 9.9% of Diamond International's outstanding common stock for Simpson Paper from 34 different shareholders of record representing over 200 different beneficial shareholders including at least 175 individual shareholders. *See, e.g., Block Trade Engineered by Paine Webber Violated Tender Offer Rules, SEC Charges,* Sec. Reg. & L. Rep. (BNA), No. 633, at A-7 (Dec. 16, 1981).

51 In the past the Commission had deliberately shied away from defining tender offer and had sought to administer the Williams Act flexibly and in a manner consistent with its purposes. [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 (June 25, 1979).

52 44 Fed. Reg. 70,349 (1979). Proposed rule 14d-1(b)(1) would amend 17 C.F.R. § 240.14d-1 (1979).

(2) during any 45-day period;
(3) directed to more than 10 persons; and
(4) seeking the acquisition of more than 5% of the class of securities.[53]

Under the more flexible guidelines of the second tier, proposed rule 14d-1(b)(1)(ii), a transaction is deemed a tender offer if the following three conditions are met:

(1) the offers to purchase or the solicitations of offers to sell are disseminated in a widespread manner;
(2) the price offered represents a premium in excess of the greater of 5% of or $2 above the current market price of the securities being sought; and
(3) the offers do not provide for a meaningful opportunity to negotiate the price and terms.[54]

The Commission[55] and several commentators[56] have noted that the two-tier test would result in the characterization of certain purportedly privately negotiated and open-market purchases, as well as block trades, as tender offers. To avoid bringing all open-market purchases within the definition of tender offer, the Commission has provided an exemption from the tier-one test.[57] Certain transactions by brokers and their customers and dealers are exempt if the following conditions are met:

(1) neither the person making the offers nor the broker or dealer solicits or arranges for the solicitation of any order to sell;
(2) the broker or dealer performs only the customary functions of a broker or dealer; and
(3) the broker or dealer receives no more than the broker's usual and customary commission or the dealer's usual and customary mark-up for executing the trade.[58]

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53 *Id.* at 70,350.
54 *Id.* at 70,351.
55 SEC Exchange Act Release No. 16,385 (Dec. 6, 1979); 44 Fed. Reg. 70,349 (1979).
56 *See, e.g.*, Lesser, Hein & Feich, *New Tender Rules: Detailed & Broad Ranging*, N.Y.L.J., Dec. 17, 1979, at 25, col. 2, in which the authors contend that "[t]he proposed definition, and particularly the second test, which applies even to purchases of less than 5 percent, could inject uncertainties into what heretofore have been viewed as normal block trading activities." *See also* Frome, *Buying & Selling Securities — Expanded Definition of Tender Offer*, N.Y.L.J., Feb. 29, 1980, at 1, col. 1.
57 44 Fed. Reg. 70,350 (1979).
58 *Id.*

The exemption is apparently aimed at differentiating between genuine open-market purchases and those "merely disguised as such by being consummated on the floor of the exchange." The Commission contends that the term "tender offer" must be construed so as to cover these latter transactions because many stock acquisition plans, such as the "widespread solicitation of members of one family"[59] and the "various forms of massive open market purchase programs,"[60] have been deliberately structured as privately negotiated or open-market purchases in order to evade the application of the tender offer provisions. The possibility of such evasion would be substantially eliminated by the proposed definition. Because a transaction would be considered a tender offer if it satisfied all of the criteria of either tier,[61] a transaction deliberately structured so as to avoid characterization as a tender offer under the objective formulae of the first tier could still be characterized as a tender offer under the more subjective criteria of the second tier.

The Commission's expansion of the definition of the term "tender offer" to cover certain privately negotiated and open-market purchase plans which were not heretofore considered tender offers raises the issue of whether the Commission would be exceeding its statutory authority under the Williams Act in promulgating the proposed rule.[62] An extended discussion of the Commission's statutory authority to adopt the proposed

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59 *Id.* This is an apparent reference to the case of Hoover Co. v. Fuqua Industries, Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979), in which the defendant-purchaser had contacted 100 members of the Hoover family, who owned a total of 41 percent of the target company's stock and were geographically dispersed throughout the country. *See supra* text accompanying notes 18-22.

60 *Id.* This is an apparent reference to the case of Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773 (S.D.N.Y. 1979), in which the plaintiffs, and the Commission in its *amicus* brief, unsuccessfully argued that the defendant's open-market purchases of approximately 25 percent of the target company's stock over a two-day period should be characterized as a tender offer. *See supra* text accompanying notes 39-41.

61 SEC Exchange Act Release No. 16,385 (Dec. 6, 1979); 44 Fed. Reg. 70,349 (1979).

62 Section 14(d)(8) delegates authority to the Commission to exempt "by rules or regulations or by order [any tender offer which the Commission regards] as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of [the Act]." 15 U.S.C. § 78n(d)(8) (1976). Congress provided the Commission with authority to develop a definition, at least in the negative sense, either piecemeal by order or summarily by

definition in its present form is beyond the scope of this Article. It is worth noting, however, that the issue is likely to arise in connection with the court's application of the two-tier test in the event of its adoption by the Commission.

B. *The Operation of Proposed Rule 14d-1(b)(1)*

The tier-one test does not place an absolute limit on the number of solicitees who may be contacted during the purchase program, or their total percentage of stock ownership.[63] The main focus is on the time period during which solicitation takes place. Although the Commission offers no rationale for its selection of a 45-day period, limiting the number of solicitations which may be made during this relatively short period furthers two objectives. First, it excludes from the definition of tender offer those transactions in which the number of investors involved at any one time is too small to warrant regulation under the tender offer provisions.[64] In addition, by limiting through its tier-two analysis the opportunities for prospective purchasers to achieve their percentage goals without being subjected to tender offer provisions, the proposed definition ensures that those solicitees who are contacted during the 45-day period will be able to exert that degree of bargaining power which characterizes a privately negotiated transaction. In this manner, the proposal protects the decision-making position of investors.

Of course, the prospective purchaser may choose to extend his program over many months, avoiding the tier-one definition by restricting to ten the number of solicitees he contacts during any 45-day period. Even if he seeks to accumulate a substantial percentage of target-company stock through this technique, such a program would not present the same investor-protection

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rule excluding certain transactions from the tender offer provisions. *See, e.g.*, Murphy, *Cash Tender Offers: A Proposed Definition*, 31 U. FLA. L. REV. 694, 704 (1979).

63 However, the prospective purchaser's contacts may be so extensive as to constitute "widespread dissemination" of his offer under tier two. *See* 44 Fed. Reg. 70,349 (1979).

64 For comparison, see rule 14a-2(b)(1), which exempts from the proxy rules "any solicitation made otherwise than on behalf of the issuer where the total number of persons solicited is not more than ten." 17 C.F.R. § 240.14a-2(b)(1) (1981).

concerns as the "blitzkrieg" acquisition that is the focus of the first tier of the test.[65] The extended period during which the solicitations would take place should normally give the target company's management sufficient time to recognize and respond to the takeover and provide investors with sufficient time to make an informed divestment decision.

As noted above, even if the program is not characterized as a tender offer under the first tier, it might be characterized as such under the more subjective criteria of the second tier.[66] The tier-two test draws its meaning from current case law. The Commission has indicated that the criterion of "widespread dissemination" will be interpreted in a manner consistent with the tests developed by the courts for distinguishing between private and public offers to purchase shares.[67] Thus, if publicity initiated by the prospective purchaser is involved, the "widespread public announcement" test of *S-G Securities, Inc. v. Fuqua Investment Co.*[68] would presumably be applied. If private contacts with the target company's shareholders are involved, the "active and widespread solicitation" test of *Cattlemen's Investment Co. v. Fears*[69] would presumably be applied.

Although the Commission has given no indication of the appropriate standard for determining whether there was an absence of a "meaningful opportunity to negotiate the price and terms," that determination is likely to involve an inquiry into

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65 *See, e.g.*, Moylan, *supra* note 8, at 582 ("A general characteristic of tender offers is their relatively short duration."). *See also In re* EZ Painter Corp., [1971-1978 Transfer Binder] BLUE SKY L. REP. (CCH) ¶ 71,063 (Wis. Comm'r of Sec. 1973).

66 *See* proposed rule 14(d)(1)(ii), 44 Fed. Reg. 70,349 (1979).

67 *See* SEC Exchange Act Release No. 16,385 (Dec. 6, 1979); 44 Fed. Reg. 70,351 & n.16 (1979). With respect to condition (1) of the tier-two test, the Commission states:

> While this requirement could be satisfied through public announcements by means of newspaper advertisements or press releases, the absence of such announcements would not be determinative. A tender offer may be widely disseminated by other means, including telephone solicitations, the use of the mails and personal visits to security holders.

Id. at 70,351 (footnotes omitted).

68 466 F. Supp. 1114 (D. Mass. 1978). *See supra* text accompanying notes 23-24.

69 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, No. 72-152 (W.D. Okla. May 8, 1972). *See also* Hoover Co. v. Fuqua Industries, Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979); Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979). The Commission's citation of *Wellman* and *Hoover* as appropriate judicial constructions of "widespread" accepts the liberal interpretation of the *Cattlemen*'s test in these cases. *See supra* text accompanying notes 17-24. *See also* 44 Fed. Reg. 70,351 n.16 (1979).

the purchaser's manner of solicitation under the rationale employed in connection with the "shareholder impact" test.[70]

The promulgation of proposed rule 14d-1(b)(1) could affect the outcome of many future cases. For example, in a fact situation similar to that in *Wellman v. Dickinson*,[71] the number of solicitees contacted within a short time and their total percentage of target-company stock ownership would satisfy tier one's criteria.[72] A consideration of the tactics employed by the prospective purchaser in defining the plan as a tender offer would be unnecessary.[73] Characterization as a tender offer under the tier-one test would be equally likely in cases such as *D-Z Investment Co. v. Holloway*[74] and *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,[75] which involved solicitation within a 45-day period of more than ten solicitees owning more than 5% of the target company's stock.[76] In such cases, the limitation of solicitation either to large shareholders, management and directors with substantial bargaining power[77] or to sophisticated

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70 *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979) (communication of fixed terms concerning price, minimum number of shares sought, and extension of offers for only a short period of time held to preclude opportunity for negotiation by solicitees and to pressure them into making "hasty, uninformed decisions"); *supra* text accompanying notes 27-31 (discussion of "shareholder impact" test).

71 475 F. Supp. 783 (S.D.N.Y. 1979).

72 At least 30 of the solicitees involved in *Wellman* were institutional investors contacted over the same two-day period. *Id.* at 824. The holdings solicited amounted to 34 percent of total shares.

73 The tier-one test would considerably reduce the evidentiary burden of the plaintiffs attacking such a transaction for noncompliance with section 14(d). Extensive testimony concerning the defendant's manner of solicitation and its impact upon the solicitees would be unnecessary. Only two factual findings would be relied on to determine whether the transaction constituted a tender offer: whether more than 10 shareholders were contacted during a 45-day period and whether the total percentage of target-company stock held by these shareholders exceeded five percent. In *Wellman*, the court effectively disposed of these two issues in one paragraph. 475 F. Supp. at 824. Its discussion of the purchaser's manner of solicitation, of the impact upon the solicitees, and of the contravention of the remedial purposes of the Williams Act spanned nine pages. 475 F. Supp. at 817-26.

74 [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974).

75 584 F.2d 1195 (2d Cir. 1978).

76 *See* D-Z Investment Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974) (24 shareholders owning more than 8 percent of target company's stock solicited in connection with private purchases; entire program of private and open-market purchases spanned three months); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978) (12 shareholders solicited in connection with private purchases; entire program of private and open-market purchases netted 9.9% of target company's stock and spanned 43 trading days).

77 *Cf.* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 (N.D. Ill. 1973), *dismissed with prejudice*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (solicitation limited to

institutional and individual holders[78] would no longer serve to exempt the transaction from characterization as a tender offer.[79]

Because the tier-one test does not differentiate between privately negotiated transactions and open-market purchases, it effectively reverses the holding in *Brascan Ltd. v. Edper Equities Ltd.*[80] The Court there held, alternatively, that solicitations directed solely at institutional and large individual holders, for the purpose of negotiating the price and terms of a subsequent block trade on the market, do not constitute a tender offer.[81] If the Commission's rule is adopted, the nature of the solicitees and the manner of solicitation would not shield the transaction from characterization as a tender offer once the conditions of tier one had been satisfied.[82] In addition, the assembling of a

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directors, management, and substantial shareholders of target company's stock held not to constitute a tender offer because the solicitees had substantial bargaining power; dismissed after defendant divested itself of all shares of stock in plaintiff corporation). *See supra* text accompanying notes 29-31.

Under the tier-one test, solicitee bargaining power vis-à-vis the purchaser would be irrevelant to whether solicitation by a purchaser would constitute a tender offer. Under this test, the solicitation in *Nachman* would be exempted from treatment as a tender offer because the solicitees held a total of less than 5 percent of the target-company stock — not because they had substantial bargaining power.

78 *See, e.g.*, D-Z Investment Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974) (solicitation involving only 24 "sophisticated" institutional and individual holders held to constitute a privately negotiated transaction); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978) (12 knowledgeable institutional solicitees were "able to fend for themselves" and thus did not need the protection of the tender offer provisions); *see also* text accompanying notes 35-38.

79 The Commission has, however, indicated that it may introduce some flexibility into the "ten persons with 45 days" condition of tier one by considering certain persons, such as members of a tightly knit family, as a single "person" under the test. 44 Fed. Reg. 70,350 n.11 (1979). In such a case, the relationship among the solicitees would become a relevant consideration under the tier-one test. Furthermore, it should be open for the purchaser to argue that relationships among shareholders other than familial ones, such as the formation of a selling group, are relevant to the determination of what constitutes a "person" for purposes of the tier-one test. *Cf.* Stromfeld v. Great Atlantic & Pacific Tea Co., 484 F. Supp. 1264 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 563 (2d Cir. 1980).

80 477 F. Supp. 773 (S.D.N.Y. 1979).

81 The definition would also reverse the holding of *Brascan* that merely because the prospective purchaser was a customer of the broker, the broker could not be said to have solicited selling shareholders on his behalf. *Id.* at 790. The terms of the exemption clearly indicate that off-the-floor contacts by a broker with selling shareholders would be deemed to be solicitations on behalf of the customer seeking the particular securities those sellers hold. *See* 44 Fed. Reg. 70,349 (1979). Thus, in *Brascan*, the broker's off-the-floor contacts, over a two-day period, with between 30 and 50 institutional holders and 12 large individual holders of target-company stock owning an aggregate of at least 25% of that stock would constitute a tender offer under the tier-one test.

82 The nature of the solicitees may, however, become relevant in determining the actual number of "persons" solicited. *See supra* note 79; 44 Fed. Reg. 70,350 n.11 (1979).

block trade, whereby a broker merely asks whether shareholders are willing to sell their stock and subsequently consummates a series of purchases from willing sellers on the exchange floor, as was done in *Kennecott Copper*, would be characterized as a tender offer if more than ten persons owning more than 5% of a particular class of the target company's stock were contacted during any 45-day period — again, without regard to the manner of solicitation or the nature of the solicitees.

An issue that arises in connection with the exemption to the tier-one test is the proper construction of the term "solicitation." The Commission's construction of the term implies that the exemption is intended to be available only for those purchase programs which are initiated and consummated entirely on the exchange floor. Communication by the prospective purchaser or his broker with persons off the floor for the purpose of obtaining a block of shares on the exchange is likely to be considered solicitation.[83] It is, therefore, unlikely that a prospective purchaser contemplating a series of large block trades could utilize the tier-one exemption because communication between the parties involved in such trades normally occurs off the floor with the exchange serving merely as a conduit for the execution of the trade.[84]

Furthermore, in the case of both exchange and over-the-counter purchases, the term "solicitation" includes those situations where the prospective purchaser has "directly or indirectly publicly announced or stated that it intends or is about to engage in a substantial purchase program."[85] The Commission has thus adopted the "widespread public announcement" test of *S-G Securities* in the context of open-market purchase programs.[86] By using the language "announced or stated," how-

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83 44 Fed. Reg. 70,349 (1979).

84 *See, e.g.*, Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979), in which the brokerage firm contacted between 30 and 50 institutional investors and approximately 12 individual investors off the floor in order to collect a large block of target-company stock and negotiate the terms of the trade, which was later executed on the American Stock Exchange.

85 44 Fed. Reg. 70,351 (1979).

86 This is consistent with the court's holding in that case that both open-market and private purchases, consummated after the public announcements, were in violation of section 14(d) due to the purchaser's non-compliance with the tender offer provisions. 466 F. Supp. at 1126-27.

Presumably, the Commission's use of the word "substantial" would refer to any series of purchases through which the acquirer would surpass the 5% threshold in

ever, the Commission appears to restrict the test to cases where either the prospective purchaser or his agent has actually initiated publicity or spread rumors of a purchase program. Rumors attributable solely to the purchaser's buying activity, and initiated by those not acting under his control, are unlikely to be solicitations under the definition.[87]

In theory, purchase programs that meet the tier-one exemption could be tender offers under tier-two criteria; but in practice, an open-market purchase program that qualifies for the exemption from tier one is not likely to be a tender offer under tier two.[88] The consummation of the purchases at the current market price would preclude the finding of the premium, a component of the tier-two test. In addition, the execution of the program with no accompanying solicitation or purchaser-initiated publicity would preclude the finding that the offers were disseminated in a widespread manner, another essential component of the tier-two test.

C. *Concluding Observations on the Proposed Rule*

The primary advantage of the Commission's proposed rule is the formulation of specific tests for determining the coverage of the tender offer provisions that may be applied by securities lawyers and prospective purchasers at the planning stage of the transaction.[89] Tier one of the proposed rule and its exemption for certain open-market purchases represents a shift from the use of subjective criteria that are heavily dependent upon the factual findings of a particular court to the use of clear-cut and easily applied objective criteria. Through reliance upon this test, prospective purchasers in most instances would be able to determine whether they would be required to effectuate their privately negotiated or open-market purchases in compliance with

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section 14(d). *See* 15 U.S.C. § 78n(d)(1) (1976); *supra* text accompanying notes 20-24 (discussion of the substantiality issue in connection with the *S-G Securities* test).

87 This issue had been left open by S-G Securities v. Fuqua Investment Co., 466 F. Supp. at 1114, and Financial General Bankshares, Inc. v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403 (D.D.C. 1978), *aff'd on reconsideration*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,511 (D.D.C. 1978).

88 Thus, it would appear that an across-the-board exemption from both tier one and tier two would be more appropriate for those open-market purchases which meet the necessary conditions.

89 *See generally supra* text accompanying notes 3-5.

section 14(d) and the rules and regulations promulgated thereunder.[90]

The simple and objective criteria of tier one would also reduce the evidentiary burden of plaintiffs attacking those transactions that appear to meet the necessary conditions for characterizing a series of purchases as a tender offer.[91] A reduced evidentiary burden benefits target-company shareholders and purchasers alike because it facilitates more rapid resolution of the issue by the courts and, thus, permits the purchaser to continue his stock acquisition plan either by complying with the Williams Act or, if he has been adjudicated as not having made a tender offer, by continuing his purchases.

When considering the desirability of the tier-one test, however, the benefits of its objectivity and simplicity must be balanced against the consequences of the application of its criteria. One cannot question the result when the test is applied to characterize as a tender offer a two-day solicitation as extensive and one-sided as that involved in the *Wellman* case.[92] The tier-one test would compel the same result, however, in the case of a substantially negotiated transaction involving only twelve shareholders owning slightly more than 5% of the target company's stock.[93] Thus, the test extends the tender offer provisions substantially beyond those transactions that present the investor-protection concerns underlying the Williams Act.[94] The

90 *See* 15 U.S.C. § 78m(d)-(e), 78n(d)-(f) (1976); 17 C.F.R. §§ 240.13d-.13e, .14d-.14f (1981), discussed *supra* note 4. The two-tier test would diminish the predictive value of the tier-one test only in those cases where solicitations falling outside of tier one are, nevertheless, so extensive in terms of the number of solicitees involved and their total percentage of equity ownership as to constitute "widespread dissemination" and involve both a substantial premium and the absence of an opportunity for negotiation. The prospective purchaser should be able to determine, on the basis of prior judicial precedent, whether his transaction would fall within tier two.

91 *See supra* note 73.

92 *See supra* notes 45 & 46 and accompanying text.

93 This was the type of transaction involved in the privately negotiated purchases in Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part,* (aff'd as to issue of compliance with the Williams Act) 584 F.2d 1195 (2d Cir. 1978).

94 *See supra* note 16. A restriction of the over-inclusive nature of the tier-one test would not necessarily require reintroduction of subjective criteria such as the "shareholder impact" test. An increase in the threshold number of solicitees for triggering the test might be sufficient. *See, e.g.*, E. ARANOW & H. EINHORN, *supra* note 1, at 6 (suggesting that there be a rebuttable presumption that transactions involving 35 or fewer solicitees are private); ALI Fed. Sec. Code, § 202(166)(A) (adopting the 35-solicitee threshold for distinguishing between privately negotiated transactions and a tender offer).

Commission appears to be overreacting to the problem of purportedly privately negotiated and open-market purchase plans which are actually disguised tender offers and, in doing so, impeding the economic efficiency of the market for corporate shares.

Even if one accepts the premise that a transaction satisfying the criteria of tier one warrants regulation as a tender offer, there remains a substantial gap in the regulatory scheme due to the manner in which the 5% threshold of that tier is applied.[95] A 30% shareholder intending to gain "negative control"[96] of the target company would be able to solicit an unlimited number of small shareholders and yet avoid characterization of his plan as a tender offer if the aggregate percentage of shares held by the solicitees did not exceed 5%.[97] Due to the small percentage of target-company stock involved, this transaction would also be likely to fail to satisfy the "widespread dissemination" criterion of the tier-two test.[98] However, if there are a substantial

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95 Condition (4) of tier one requires that the offer itself seek more than 5% of a particular class of the target company's securities. Thus, the percentage of target-company securities held by the offeror at the time the offer is made is irrelevant in determining whether the transaction constitutes a tender offer. *See* SEC Exchange Act Release No. 16,385 (Dec. 6, 1979); 44 Fed. Reg. 70,350 n.12 (1979). *Compare* 17 C.F.R. § 240.14d-1 (1981) *with* 15 U.S.C. § 78n(d)(1) (1976), which subjects any tender offer resulting in the acquirer's ownership of more than 5% of a particular class of the target company's securities to the substantive requirements of section 14(d) and the regulations promulgated thereunder.

96 The significance of solicitation directed at the acquisition of at least one-third of a particular class of the target company's stock lies in the offeror's ability to acquire "negative control." Major corporate decisions such as merger, liquidation, or sale of assets typically require a two-thirds vote of affirmation by the shareholders. *See* W. CARY, CORPORATIONS 231 (4th ed. 1969). Thus, the acquirer would be able to block the consummation of such transactions. Furthermore, even if the corporate bylaws do not require a two-thirds affirmative vote for such transactions, a one-third block would be difficult to overcome in the normal proxy contest. *Id.* At least one commentator has suggested that a solicitation extending to more than 35 shareholders, whose total holdings would confer negative control over the target company, should be characterized as widespread. *See* Murphy, *supra* note 62, at 716.

97 *See, e.g.*, Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 (N.D. Ill. 1973), *dismissed with prejudice,* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (settlement). In *Nachman,* the court found that the status of the solicitees (either directors, management, or substantial shareholders of the target company) conferred considerable bargaining power vis-à-vis the offeror and that such bargaining power was, in fact, exercised in order to increase the price at which the stock was sold. Given the Commission's rejection of the self-protection approach in its proposed definition, however, there would appear to be no reason for exempting such a solicitation from the tender offer provisions.

98 For the text of proposed rule 14d-1(b)(1)(ii), which embodies the tier-two test, see *supra* text accompanying note 54. For an indication of how the courts might construe the "widespread dissemination" criterion, see *supra* text accompanying notes 18-26

number of small shareholders involved in such a transaction, it would arguably present investor-protection concerns that warrant the characterization of the transaction as a tender offer.

In comparison with the far-reaching tier-one test, the tier-two test essentially affirms the prior judicial application of the "active and widespread solicitation" and "widespread public announcement" tests in determining whether a transaction constitutes a tender offer.[99] Its purpose appears to be to provide an opportunity for the courts retroactively to apply a subjective analysis to those transactions which do not constitute a tender offer under the tier-one test. The necessity for this type of "backstop" is questionable in light of the problems inherent in a retroactive case-by-case determination of whether a transaction constitutes a tender offer and the divergent interpretation that the courts have applied to the term. Furthermore, the efficacy of the tier-two test as a flexible standard for characterizing transactions as tender offers, when they have been deliberately structured so as to avoid the tier-one test, is undermined by tier two's inclusion of an arbitrary and substantial premium standard that may not be met in cases involving offers to purchase low-priced stock.[100] Thus, the tier-two test provides the prospective

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(discussion of analogous standards in the current law: the "active and widespread solicitation and "widespread public announcement" tests).

99 *Id.*

100 The tier-two test requires that the premium offered be in excess of the "greater of 5% of or $2 above the current market price of the securities sought." 44 Fed. Reg. 70,351 (1979). "Current market price" is defined as "the higher of the last sale price or the highest current independent bid." *Id.* at 70,350 n.14. The Commission offers no rationale for the inclusion of this objective condition in the otherwise subjective tier-two test or for the choice of the particular threshold increment above market price. The premium condition could, however, reduce the efficacy of the tier-two test in subjecting programs involving low-priced stock to the tender offer provisions even where such programs are widespread and provide no meaningful opportunity for negotiation, since all three conditions of the tier-two test must be satisfied before such programs would be characterized as tender offers.

For instance, in order to satisfy the premium condition, the price offered by the prospective purchaser would have to be in excess of $2 in any case where the market of the target company's stock is less than $40 per share. (Since 5% of $40 per share is $2, only at a market price above $40 would a 5% premium be greater than $2.) Thus, if the market price of the target company's stock is $5, the purchase program would be characterized as a tender offer only if the prospective purchaser offered a price of at least 7 and 1/8 per share — a 40% premium above market price. Note, *Defining Tender Offers: Resolving a Decade of Dilemma,* 54 ST. JOHN'S L. REV. 520, 548-49 (1980). A study of the premiums offered in actual tender offers, during the period from 1975-1977, reveals that the average premium was at least 10% lower than this. *See* Austin, *Study Reveals Trends in Tactics, Premiums, Success in Offers,* N.Y.L.J., June

purchaser with a ready means for evading the tender offer provisions merely by setting the price offered below the premium threshold and actually ties the hands of the courts once the purchaser has done so.

While the proposed rule is a significant and welcome attempt to provide both the courts and the private sector with a set of comprehensive guidelines for determining the coverage of the tender offer provisions, there remains substantial room for revision. Any further rule-making attempt to close the regulatory gaps in this area would, like the proposed rule 14d-1(b)(1), almost certainly encounter serious problems with the issue of the Commission's statutory authority.[101] Therefore, a legislative amendment to the Williams Act, defining the coverage of the tender offer provisions, is preferable to the rule-making approach. The Commission's latest proposal for such an amendment is discussed below.

III. The Commission's Legislative Proposal for a Broader Regulatory Scheme Covering "Statutory Offers"

In the summer of 1979, Senators Proxmire, Williams, and Sarbanes of the Senate Banking Committee requested the Commission's views regarding the need for new legislation to "deal adequately with the changing techniques which are being employed to attempt to circumvent the safeguards created by the Congress . . . to govern the conduct of tender offers, such as open market or privately-negotiated purchases . . . ."[102] The Commission's response, issued just three months after its proposed rule 14d-1(b)(1) defining tender offers, called for a major

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12, 1978, at 35. Although more recent data on tender offer premiums is not available, this study does reveal a downward trend in premiums from the early 1970's.

101 *See supra* notes 56 & 62 and accompanying text.

102 Letter from Senators William Proxmire, Harrison Williams, and Paul Sarbanes to Harold Williams, Chairman of the Securities and Exchange Commission (July 3, 1979), Sec. Reg. & L. Rep. (BNA) No. 542, Special Supplement at 4 (Feb. 27, 1980). The other issues which the Committee requested that the Commission address were the role of banks in tender offers, issuer repurchases, the filing requirements of section 13(d), the "best price" rule in section 14(d)(7), the relationship between state and federal tender offer rules, and the enforcement of the Williams Act through private rights of action. *Id.* at 3-4.

legislative revision of section 14(d),[103] a revision that was designed to provide a more clearly defined federal role in regulating the acquisition of substantial stock interests in public corporations.[104]

The proposed amendment extends the coverage of the substantive provisions of the Williams Act[105] to all "statutory offers," a term broadly defined as any offer or series of offers to acquire any class of covered equity securities[106] by a person who is or could thereby become the owner of more than 10%[107] of that class of covered equity securities.[108] Thus, the proposed

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103 *See* Memorandum of the Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs Proposing Amendments to the Williams Act (February 15, 1980), SEC. REG. & L. REP. (BNA) No. 542, Special Supplement at 25-29 (Feb. 27, 1980) [hereinafter cited as SEC Memorandum].

Several commentators have suggested that the Commission's proposed legislative reform reflects the Commission's doubts concerning its authority to promulgate rules defining the term "tender offer" as extensively as did proposed rule 14d-1(b)(1). *See* Fettner, *Corporate Takeover Legislation: An Overview*, 52 N.Y. ST. B.J. 475, 477, (1980).

104 SEC Memorandum, *supra* note 103, at 25.

105 *See* 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976) and regulations promulgated by the Commission pursuant to its authority thereunder, 17 C.F.R. §§ 240.13d-.13e, .14d-.14f (1981), discussed *supra* note 4. The proposed amendment would incorporate into the statute the Commission's rules regarding disclosure, minimum offering period, purchase of deposited securities, issuer response to the offer, and amendments to the statutory-offer materials. *See* SEC Memorandum, *supra* note 103, at 22 (proposed sections 14(d)(3)(A)-(F), 14(d)(4)(A)-(B)).

106 *See id.*, proposed section 14(d)(1)(B), at 21. Section 13(d)(1) of the proposed bill provides that the term "covered equity securities" includes the following:

(a) equity securities registered pursuant to section 12 of the Securities and Exchange Act of 1934;
(b) equity securities of insurance companies which would have been required to be registered under the Securities and Exchange Act of 1934 except for their exemption from that requirement under section 12(g)(2)(G) of that Act;
(c) equity securities issued by a closed investment company registered under the Investment Company Act of 1940; and
(d) equity securities issued by parties required to file reports pursuant to section 15(d) of the 1934 Act where such equity securities have been the subject of a registration statement filed under the Securities Act of 1933 and where those securities continue to be held of record by more than 300 persons.

Securities in the first three classes above comprise those securities covered by the present section 14(d), which provides that transactions resulting in a person's ownership of more than 5% of those securities will be treated as tender offers under the Williams Act. *See* 15 U.S.C. § 78n(d)(1) (1976).

107 According to the Commission, ten percent represents "a level of ownership at which the ability to exert or influence control may ordinarily be presumed." SEC Memorandum, *supra* note 103, at 23.

108 *Id.* at 21. The full text of the new proposed section 14(d)(1)(B), which would replace the present section 14(d)(1), is as follows:

amendment focuses on the percentage of stock ownership to be attained through a stock purchase plan rather than the means through which the purchase plan is executed.

There are a number of exceptions to the Commission's broad definition of a statutory offer in its proposed amendment. The most significant is its exemption for "privately negotiated transaction[s]." Under proposed section 14(d)(1)(B)(v), a purchaser may acquire an unlimited percentage of the target company's securities, so long as he acquires the securities from no more than ten persons within any twelve-month period and does so in privately negotiated transactions.[109]

Two aspects of this exemption are worth noting because they are likely to generate debate as to the availability of the exemption to shield substantial solicitation campaigns from the provisions regulating statutory offers. For one, the exemption is concerned only with the number of shareholders who actually sell.[110] The prospective purchaser can apparently solicit an unlimited number of target-company shareholders during the course of his purchase program, provided that sales are consummated with no more than ten such shareholders within a

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Statutory offer means an offer or offers to acquire securities of a class described in section 13(d)(1) of this title, made, directly or indirectly, by a person, other than the issuer thereof, if that person is or upon consummation of such offer or offers could become the beneficial owner of more than 10 percent of the class, except that the term shall not include:

(i) any offer to acquire the beneficial ownership of securities pursuant to a statutory merger or consolidation;

(ii) any offer to acquire the beneficial ownership of securities made by means of a solicitation solely of a proxy to vote securities beneficially owned by another person;

(iii) any offer to acquire the beneficial ownership of a security if the acquisition of the beneficial ownership of such security, together with all other acquisitions by the same person, directly or indirectly, of the beneficial ownership of securities of the same class during the preceding twelve months, does not exceed 2 percent of that class;

(iv) any offer to acquire the beneficial ownership of securities from the issuer thereof;

(v) any offer to acquire the beneficial ownership of securities in a privately negotiated transaction; *provided, however,* that no person shall acquire the beneficial ownership of securities in reliance upon this provision from more than 10 persons, directly or indirectly, in any period of 12 consecutive months; *provided further,* that for purposes of this provision, the Commission may, as it deems necessary and appropriate in the public interest or for the protection of investors, by rule or regulation, prescribe means of determining the identity and number of the person or persons from whom the beneficial ownership of securities is acquired. [Emphasis added.]

109 *Id.* at 21. See *supra* note 108 for the text of the proposed section.

twelve-month period. Furthermore, the exemption does not require consideration of the type of solicitation tactics employed by the purchaser in order to achieve the desired percentage of the target company's stock. Thus, it could be argued that these two aspects of the exemption are inconsistent with the goals that the Williams Act was designed to further because, notwithstanding extensive solicitation or pressure tactics, the exemption permits the execution of any purchase program ultimately involving fewer than ten sellers without federal regulatory scrutiny.

The Commission appears to reason that while the purpose of the Williams Act is to permit all stockholders to participate in the transfer of substantial blocks of shares,[111] transactions in which no more than ten stockholders ultimately sell their shares simply do not warrant the imposition of the full regulatory scheme governing statutory offers. It is true that transactions involving such a small number of sellers are not likely to subvert the substantive-fairness considerations which appear to underlie the proposed amendment. If such a transaction is directed at acquiring a substantial percentage of the target company's stock, the price will likely contain a premium element.[112] Where the number of shareholders involved is small, such a premium may represent the justifiable incremental value which attaches to their individual ownership of a substantial share block.[113]

An elementary flaw in this rationale, however, is that it does not take into account cases in which sales to fewer than ten shareholders were preceded by publicity, widespread private

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110 In contrast, the Commission's proposed rule 14d-1(b)(1)(i) limits the number of solicitees who may be contacted in any purchase program directed at the acquisition of more than *5%* of a class of covered equity securities to ten during any 45-day period. SEC Exchange Act Release No. 16,385 (Dec. 6, 1979); 44 Fed. Reg. 70,349. For the text of the rule, see text accompanying note 53.

111 *See* SEC Memorandum, *supra* note 103, at 24.

112 *See, e.g.*, Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 HARV. J. ON LEGIS. 431, 469 (1968): "The element of a large investment block represents merely a compression of time. If the offeror were to purchase a substantially similar block of stock on the market over a period of time, the force of his interest would cause a general rise in the market price of the stock. What he offers the shareholder . . . is an investment increment representing the value to him of avoiding the cost of a gradual market rise. The control premium is that amount he is willing to pay for the control potentialities of a large block of stock, whether it is in the form of later active control, influence of corporate policies, or sale of control."

113 *Id.*

contacts, or pressure tactics affecting a much larger number of target-company shareholders. In such cases, courts would probably conclude that the transaction in question either was not private or was not negotiated. For example, an exemption under proposed section 14(d)(1)(B)(v) should not be available, by definition, where a purchase program has been preceded or accompanied by publicity. Where such publicity occurs, there is likely to be pressure on target-company shareholders to sell.[114] The disclosure requirements of the Williams Act were designed to provide information to all shareholders in the target company in such a situation because the publicity could potentially impose divestment pressure upon all of them.[115] Current case law also subjects programs involving widespread private solicitation of target-company shareholders to the Williams Act's tender offer provisions.[116] A similar result should be achieved under section 14(d)(1)(B)(v) to preclude characterization of a widespread solicitation of sellers as private. Furthermore, the use of tactics such as presenting offerees with fixed terms and a short time period in which to respond to an offer should preclude characterization of the purchases as "negotiated."[117]

It is questionable, however, whether the exemption would be construed to even permit such judicial scrutiny of purportedly privately negotiated purchases in cases involving fewer than ten selling shareholders. Thus, as presently drafted, proposed section 14(d)(1)(B)(v) could potentially tie the hands of both the courts and the Commission in determining what types of be-

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114 *See, e.g.*, S-G Securities v. Fuqua Investment Co., 466 F. Supp. 1114 (D. Mass. 1978), *petition for reconsideration denied,* 466 F. Supp. 1132 (D. Mass. 1978). For discussion of the "widespread public announcement" test as applied in the context of privately negotiated purchases, see *supra* text accompanying notes 23-26.

115 *Id.*

116 *See, e.g.*, Cattlemen's Investment Co. v. Fears, 343 F. Supp. 1248, 1251-52 (W.D. Okla. 1972), in which the Court said:

> The activities of the defendant set out in the complaint and not denied by the defendant, i.e. an active and widespread solicitation of public shareholders in person, over the telephone and through the mails, contain potential dangers which Section 14(d) of the statute is intended to alleviate. The defendant, in not complying with the statute, deprived shareholders of information prescribed by the Rule, which information was material to their investment decisions . . . . In truth, the contracts utilized by the defendant seem even more designed than a general newspaper advertisement . . . to force a shareholder into making a hurried investment decision without access to information . . . ."

117 *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783, 818-21 (S.D.N.Y. 1979).

havior will be permitted in connection with non-statutory-offer transactions.

Furthermore, if prospective purchasers could consummate sales with up to ten financial institutions, each administering numerous small-investor accounts, the exemption would not be justified even under the Commission's rationale. In such a situation, no individual investor commands enough stock to warrant a premium, yet all the individual accounts together do command such a premium. As a result, investors in such institutions could command a premium solely because of their inclusion within the institutional selling group. This outcome discriminates against small investors who are not members of the selling group. Thus, it clearly does raise concerns about substantive fairness.[118]

The Commission has indicated that in applying the ten-seller limitation, each member of a selling group may be counted individually.[119] This approach is clearly warranted because it would ensure that, whenever the accumulation of a substantial share block requires that more than ten shareholders' holdings be aggregated, the premium would be offered to all target-company shareholders pursuant to a statutory offer in compliance with section 14(d). The purchaser could, therefore, be expected to offer a premium based upon the substantiality of each individual's holdings rather than the group's holdings or to focus upon groups composed of relatively few shareholders owning a substantial percentage of the target company's stock.

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118 *See* Block & Schwarzfeld, *Curbing the Unregulated Tender Offer*, 6 SEC. REG. L.J. 133, 149-150 (1978), in which the authors argue that the payment of a control premium to institutions which absent the existence of a control block would not have control violates "the policy of 'fair and equal treatment of all security holders' that underlies the Williams Act's regulation of tender offers" (quoting SEC Exchange Act Release No. 14,234 (Dec. 7, 1977)). *See also* New York Stock Exchange Manual A179-A180 ("The Exchange believes it is important that all stockholders of a company be given an opportunity to participate on equal terms in any offer made which may affect the rights or benefits of such shareholders.").

119 *See* SEC Memorandum, *supra* note 103, at 26 ("For example, the Commission might determine that when securities are purchased from the trust department of a bank, each individual trust actually selling securities is to be regarded as a selling person for the purposes of proposed section 14(d)(1)(B)(v)."). *But see* the Commission's commentary to its proposed rule 14d-1(b)(1)(i), in which it indicates that in certain circumstances solicitees having a special relationship, such as the members of a tightly knit family, might be counted as one "person" for purposes of the rule, *supra* note 79.

Under the proposed amendment, all open-market purchases that would increase the purchaser's holdings above the 10% threshold are subject to regulation as statutory offers[120] with the exception of transactions falling within the language of proposed section 14(d)(1)(B)(v).[121] Thus, the amendment shifts the emphasis from the purchaser's conduct and from its effect upon the target company's shareholders to the effect that the stock purchase, if ultimately consummated, would have upon the concentration of shareholder interests within the target company.[122]

Irrespective of whether such a change in focus is wise, the 10% rule is overbroad with reference to its own purpose. Although the 10% rule is based upon the Commission's presumption that 10% is the level of share ownership at which ability to control or influence a company arises,[123] it would be applied even in those cases where there are other stockholders with blocks of stock representing more than 10% of the shares of the company.[124] Thus, the provisions on statutory offers may

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120 The current holdings of a prospective purchaser are included in the percentage calculation by which an open-market purchase program is deemed to be a statutory offer. Thus the proposed amendment would have its most far-reaching effect on programs initiated by current target-company shareholders seeking to increase their holdings.

In contrast, condition (4) of tier one of the Commission's proposed rule 14d-1(b)(1) focuses upon the percentage of the particular class of securities sought in the offer and does not include the current holdings of the prospective purchaser in the calculation of its 5% threshold. Furthermore, tier one of the proposed rule would exempt offers by a broker and his customer or a dealer on an exchange or in the over-the-counter market at the current market price if (1) neither the purchaser nor the broker or dealer solicits or arranges for the solicitation of any order to sell and (2) the broker or dealer performs only the customary functions of a broker or dealer and receives no more than the usual and customary commission or mark-up for executing the trade. *See supra* notes 53 & 55-58 and accompanying text.

121 See SEC Memorandum, *supra* note 103, at 21 (proposed section 14(d)(1)(B), reprinted *supra* note 108).

122 The commentary to the proposed amendment indicates that the Commission's primary concern was with the *rapid* concentration of a substantial interest in the target company. *Id.* at 25 ("the proposal would require that a person seeking rapidly to gain such an interest . . . do so by means of a statutory offer"). The definition of "statutory offer," however, does not distinguish between the accumulation of a 10% interest over a few weeks and the accumulation of that same interest over 12 months. *Id.* at 21.

123 *See* SEC Memorandum, *supra* note 103, at 25.

124 The use of such a low-percentage trigger raises a strong possibility that larger concentrations of target-company stock may exist in the hands of other shareholders, thereby vitiating the contention that the regulatory scheme of the proposed amendment is directed at purchase programs initiated for the purpose of acquiring "control". *See*

be triggered under the amendment even where there is no possibility of the purchaser's gaining control of the corporation.

As was discussed in connection with the amendment's exemption for privately negotiated purchases, the 10% rule's focus upon the concentration effects of a stock purchase plan and its disregard of the means used to effect that purchase plan run counter to the goal of protecting investors through adequate disclosure and insulation from undue pressure.[125] That a rigid application of the 10% rule could lead to results contrary to the Act's purposes is readily apparent from an examination of the potential outcomes of the *Chromalloy*[126] and *Kennecott* cases (in which there were very different types of purchase programs) under both proposed rule 14d-1(b)(1) and proposed amendment 14(d)(1)(B)(v).

In *Chromalloy* the defendant-purchaser had engaged in an open-market purchase program directed at the eventual acquisition of 20% of the target company's stock.[127] Over an eighteen-month period, he acquired more than 10% of that stock through a series of open-market purchases and one block trade. The open-market purchases were conducted without publicity and in a manner which prevented a surge in either the trading volume or the market price of the target company's stock, thereby avoiding the rush atmosphere typical of a concerted buying program.[128] The court in *Chromalloy* found that the investor-protection concerns raised by such a program, in terms of the divestment decision with which target-company shareholders were presented, were no different from those which arise in any open-market trading transaction. Thus, the court held that

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Fogelson, Wenig & Friedman, *SEC's Proposed Amendments to the Williams Act*, N.Y.L.J., March 14, 1980, at 1. *Cf.* section 2(a)(9) of the Investment Advisers Act of 1940, which creates a rebuttable presumption of control at the 25% level. The 10% figure has, however, been focused upon as the level at which access to inside information is ordinarily presumed and is thus used in section 16 of the Securities Exchange Act of 1934 as the trigger for the insider-trading provisions.

125 *See supra* text accompanying notes 109-18.

126 Chromalloy American Corp. v. Sun Chemical Corp., 474 F. Supp. 1341, 1345 (E.D. Mo. 1979).

127 *Id.*

128 The brokerage firm, employed by the prospective purchaser, was instructed to buy a percentage of the daily volume in trading of the target company's stock with no solicitations, no premiums, and no off-market purchases so as to avoid sudden fluctuations in the stock's trading volume and market price. 474 F. Supp. at 1344.

the purchaser was not engaged in a tender offer and declined to subject its future purchases to the requirements of section 14(d).[129]

A similar result would be achieved under the Commission's proposed rule 14d-1(b)(1)(i), which characterizes a genuine open-market transaction as one involving no solicitation, no premiums, and the enlistment of a broker or dealer only in his usual capacity with no extraordinary compensation. Under the proposed amendment, however, once the purchaser's ownership of a particular class of target-company stock crossed the 10% threshold, the statutory-offer provisions would be triggered. The purchaser would then be required to make a formal offer to all target-company shareholders in order to further increase his holdings by more than 2% over the next twelve months — even if the manner of increasing such holdings involved the same series of small purchases on the open market over an extended period of time.

In *Kennecott*, the purchaser's open-market purchases of slightly less than 10% of the target company's stock were conducted over a 43-day period and involved off-the-floor solicitation of fifty target-company shareholders.[130] The trading activity precipitated by the defendant's program was so intense that on seventeen of the forty-three days, the defendant's purchases exceeded 50% of the daily trading volume on the New York Stock Exchange.[131] In what was, perhaps, an overly broad interpretation of the drafters' intent to exclude open-market purchase programs from the tender offer provisions of the Williams Act, the court held that the aggressive and rapid nature of the purchases was insufficient to warrant regulating them as a tender offer.[132] It further held that off-the-floor solicitations,

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129 474 F. Supp. at 1346-47. The court did, however, require that the purchaser amend its previously filed Schedule 13D to reflect its intention to gain control of the target company or, at least, to exercise substantial influence over its policies through the accumulation of a 20% share interest. To the extent that the purchaser's open-market activities differed from the ordinary trading transaction by virtue of their ultimate goal, disclosure under section 13(d) was considered adequate protection for target-company shareholders.

130 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part* (aff'd as to issue of compliance with the Williams Act), 584 F.2d 1195 (2d Cir. 1978).

131 *Id.* at 961.

132 *Id.*

imposing no discernible pressure upon the solicitees, would not change this conclusion.[133]

The Commission's proposed rule 14d-1(b) would treat the *Kennecott* program somewhat differently. Regardless of their impact, the off-the-floor contacts would be considered solicitations of offers to sell and, consequently, would be subject to tier one's "ten solicitees within 45 days" limitation. Moreover, the purchaser's intention to acquire more than 5% of the target company's stock and its extension of the offer beyond the ten-solicitee limitation would result in the regulation of the purchases as a tender offer under the tier-one test.

Under the proposed legislative amendment, however, this rapid series of substantial open-market purchases would be exempt from the statutory-offer provisions of section 14(d) due to the purchaser's accumulation of less than 10% of the target company's stock. The anti-fraud provision of section 14(e) would be the only available means of protection for target-company shareholders.[134] Given that section's limited focus upon fraudulent activities, it would not provide adequate protection against the pressured decision-making prompted by such extraordinary trading — specifically, the divestment pressure created when a temporary surge in trading volume or (more likely) market price of the target company's stock exerts coercive pressure on target-company shareholders. Consequently, the 10% rule injects into the proposed amendment a degree of arbitrariness that detracts from the achievement of coherent policy goals. The hypothetical outcomes of the *Chromalloy* and *Kennecott* cases under proposed section 14(d)(1)(B)(v) indicate that the amendment is under-inclusive and over-inclusive at the same time.

The proposed amendment is defective on at least three grounds. First, in allowing solicitation of an unlimited number of target-company shareholders during the course of a purchase program, the amendment does not take into account the potential use of pressure tactics which may interfere adversely

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133 *Id.*

134 Proposed section 14(e) would be triggered by any series of purchases resulting in the purchaser's ownership of more than 5% of the class of securities sought. *See* SEC Memorandum, *supra* note 103, at 22.

with the shareholders' decision-making process. Second, the amendment's exemption for privately negotiated purchases is drafted in a way that also appears to preclude both the Commission and the courts from scrutinizing the means used by the purchaser to achieve the desired percentage of target-company stock. Third, the 10% threshold for statutory offers in the proposed amendment is over-inclusive with regard to the potential concentration effects of a stock purchase plan and under-inclusive in failing to take into account the means by which the purchases are effectuated.

CONCLUSION

The judiciary's attempt, through case-by-case adjudication, to determine which types of privately negotiated and open-market purchases constitute tender offers provides an indication of the two features which are crucial to formulating an effective categorical definition at the legislative and administrative levels: the provision of substantial certainty for prospective purchasers at the planning stage and the avoidance of a legislative or administrative commitment to either an over-inclusive or an under-inclusive interpretation of the coverage of the tender offer provisions. The need for substantial certainty emerges from a consideration of several of the cases discussed in this Article. For instance, had the purchasers in *Wellman* or *S-G Securities* been aware of the potential consequences of the manner in which they conducted their solicitations, they might have structured their transactions differently and avoided characterization of the programs as tender offers. The regulatory gap which results from an under-inclusive interpretation of the coverage of the tender offer provisions is demonstrated by the courts' reliance upon the self-protection doctrine to shield transactions involving a considerable number of solicitees, such as those involved in the *Brascan* and *Nachman* cases, from characterization as tender offers. The judiciary's awareness of the restrictive effect that an over-inclusive interpretation of these provisions would have on open-market trading is implicit in the *Kennecott* and *Brascan* courts' reluctance to characterize any open-market purchase program as a tender offer.

Both of the Commission's proposals would to some extent rely upon objective criteria in order to determine whether a particular transaction constitutes a tender offer. Hence, they would provide considerable certainty for prospective purchasers at the planning stages of their transactions. The over-inclusive nature of the Commission's proposed rule 14d-1(b)(1)(i), however, raises the issue of whether the Commission has been delegated the statutory authority to extend the tender offer provisions to transactions that had heretofore been considered privately negotiated and open-market purchases that were intended to be exempt from those provisions. Given the judicial precedent to date, any explicit attempt to extend the coverage of the tender offer provisions solely through rule-making is likely to face similar challenges on statutory grounds.

The Commission's proposed legislative amendment would resolve the delegation issue by specifically giving the Commission authority to delineate the scope of the tender offer provisions. As has been discussed, this approach toward defining the scope of the tender offer provisions is superior to rule-making. The current amendment is unsatisfactory, however, because it does not look to the purchaser's behavior in the marketplace. The 10% threshold for statutory offers in the proposed amendment is over-inclusive with regard to potential concentration effects and fails to scrutinize the manner in which purchases are effected. In permitting an unlimited number of shareholders to be solicited and in exempting privately negotiated purchases, the amendment potentially excludes from regulation a broad range of pressure tactics of the type the Williams Act was intended to control.

Moreover, the criteria used in the Commission's proposed rules and proposed amendment are troublesome because they necessitate the use of contradictory elements of objectivity and subjectivity. The Commission has sought to use proposed rule 14d-1(b)(1)(ii) (the tier-two test) to provide subjective, flexible guidelines to temper the arbitrariness of the objective standards in proposed rule 14d-1(b)(1)(i) (the tier-one test). While the Commission's legislative amendment embodies objective standards, its terms require subjective interpretation. Both in the proposed rules and in the proposed amendment, these subjective elements generate uncertainty that undermines the efficacy of the proposals.

The contradictions embodied in the Commission's proposals are symptomatic of the need for two seemingly inconsistent characteristics — certainty and flexibility — in the statutory definition of tender offer. These two characteristics can be reconciled and attained through the enactment of a legislative amendment that would establish presumptive objective guidelines for distinguishing between statutory tender offers and unregulated purchases of target-company stock. The guidelines would provide that a transaction would not be classified as a statutory tender offer if it satisfied each of the following conditions: first, the purchase offer would not be publicized; second, the purchaser would not have private contacts with more than a specified number of target-company shareholders within a specified period; third, the premium offered for the target-company stock would not exceed a specified percentage of the market price of the stock; and fourth, the purchaser would provide sellers of the target-company stock a meaningful opportunity to negotiate price and other terms of the offer. If the transaction failed to satisfy any of the four conditions, it would be presumptively classified as a statutory tender offer; the classification could be rebutted upon a showing of substantial evidence that there was no undue disinvestment pressure exerted on target-company shareholders.

These presumptive guidelines may offer the best possible combination of certainty and flexibility. They would provide a measure of certainty for a purchaser at the planning stage in an acquisition of a substantial percentage of a target company's stock. Full compliance with the guidelines would provide a "safe harbor" for the purchaser. If a purchaser chose to pursue target-company stock using tactics outside of the guidelines, he would have to be willing to bear the risk of failing to rebut the presumptions created by the guidelines. Furthermore, the fact that the guidelines embody rebuttable presumptions and not fixed standards would give the Commission and the courts reasonable flexibility for determining what constitutes a tender offer in an individual case, thereby allowing them to inject into the process a key ingredient — common sense.

This type of legislative amendment, through its focus on the behavior of the purchaser and through its use of presumptive guidelines, would be preferable to the Commission's current

proposals. It would be more responsive to the investor-protection concerns underlying the regulation of statutory tender offers. It would also be more consistent with the intent of the Act's sponsors: only those means of stock acquisition that are likely to impede investor-related decision-making should be regulated.

BOOK REVIEWS

ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE. By *Daniel R. Mandelker*. New York: McGraw-Hill Book Co., 1981. Pp. xii, 162, index. $24.95 cloth.

*Review By Steven Stark**

A little more than a decade after Earth Day, the environmental movement appears to be in trouble. The President ran on a platform to weaken the nation's environmental laws; his Secretary of the Interior has spent his recent career fighting the environmental policies of more progressive administrations. The congressional debate over reauthorization of the federal Clean Air Act does not focus on mechanisms to deal with new problems, such as acid rain, but on which portions of the Act should be compromised to appease conservative interests.[1] The Supreme Court, after embracing the "environmental ethic" during the first half of the 1970's, has embarked on a hasty retreat.[2] While it is too early for professors to begin teaching "The History of Environmental Law," it is not necessary to be a member of the Sierra Club to know that environmental protection has seen better days.

Close behind the backtracking column of judges and Sunbelt Congressmen is a new generation of legal scholars anxious to explain why the environmental movement has failed. Ten years ago legal scholarship was weighted heavily in favor of environmental interests, with authors arguing in favor of a constitutional basis for environmentalism, or even for giving trees standing.[3] Now the journal articles anxiously compare "costs and benefits," and conclude that the technically naive environmentalists wanted too much, too soon, at too high a cost.

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1 *See, e.g.*, Mosher, *Clean Air Act an Inviting Target for Industry Critics Next Year*, 12 NAT'L J. 1927 (1980).

2 *See, e.g.*, Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

3 *Compare* Stone, *Should Trees Have Standing? — Towards Legal Rights for Natural Objects*, 45 So. CALIF. L. REV. 450 (1972) *and* Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545 (1975) *with* Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1455 (1980).

Daniel Mandelker is no James Watt, and his book is not a blueprint for the paving of America. Still, *Environment and Equity* is ultimately a litany of excuses for courts to refuse to take action in environmental cases. To his credit, Mandelker discusses why environmental land-use regulation is necessary, how courts misconstrue Fifth and Fourteenth Amendment "takings" cases, and the ways in which courts deal with exclusionary-zoning issues. One of his theses — that recent environmental laws constitute a radically different form of regulation from traditional land-use programs like zoning — while not new, is insightful. One problem he raises — that courts "will not readily accept the distributive role required by environmental land controls" (p. 2) — is an intriguing concept. But having identified this essential problem, Mandelker provides few explanations for its existence; his discussion of the problem offers little more than traditional conservative rhetoric and maxims about judicial restraint.

Thus, for example, Mandelker writes that "[e]nvironmentalists and housing advocates politicize the courts to recognize environmental and equity values" (p. 55). Surely Mandelker realizes that "politicize" is a buzz-word, intended to imply an improper use of the courts. He never clarifies why it is a "politicization" of the legal process to ask a court to enforce the mandates of the National Environmental Policy Act (NEPA)[4] and not a similar politicization to ask a court to ignore the law.

Similarly, at another point, Mandelker writes that environmentalists "seek judicial remedies to bypass the political process in which the objectives they seek are imperfectly realized and difficult to obtain" (p. 56). Again, this is a misleading statement. Environmentalists do not seek to expand a court's role more than other social advocates, nor do they attempt to bypass political processes. In the past fifteen years, on the federal level alone, Congress by overwhelming margins has passed several comprehensive statutes to deal with environmental concerns.[5]

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4 42 U.S.C. §§ 4321-4369 (1976 & Supp. II 1978).

5 These statutes include the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in 42 U.S.C. §§ 7401-7642 (Supp. II 1978)); The Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in 42 U.S.C. §§ 6901-6987 (1976 & Supp. II 1978)); and the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978)).

Public opinion polls show continued support for strong governmental involvement in this area. When environmentalists have turned to the courts for action, typically in cases involving the laws, they have done so primarily to enforce the gains they have already won at the legislative level.[6]

Mandelker's chapter-long discussion of how the courts have interpreted NEPA is typical of the book's deficiencies. Mandelker, as others have done before him, correctly observes that the Burger Court has cut back on the scope of the protections afforded by NEPA. He is justified in his description of NEPA as a statute that demands a somewhat "activist" judicial role in its implementation. But he is incorrect in his conclusion that the Burger Court's restrictive interpretations are justified. Mandelker writes that courts "are properly cautious when interpreting ambiguous constitutional and statutory directives whose environmental message is not clear" (p. 126). But given the clear directives of NEPA, it is difficult to understand exactly what it is that Mandelker finds ambiguous in that statute. Congress could not have been much clearer when it drafted a statute which said, for example, that all federal laws and policies were to be interpreted and administered in accordance with the policies of NEPA, which include attaining "the widest range of beneficial uses of the environment without degradation [or] risk to health or safety . . . ."[7] Even if there is some ambiguous language in the statute, as there is in any law, it is disingenuous to assume that all vagueness should be resolved in favor of cutting back on the protections embodied in the law.

The Burger Court has placed limitations on constitutional and statutory protections in a number of areas, including the environment, under the guise of judicial restraint.[8] Yet, at least in the environmental area, the Burger Court's retreat cannot be justified in the manner Mandelker and others might prefer.

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6 A look at the case docket of any of the major public-interest environmental groups reveals that most of their litigation is aimed at enforcing provisions in acts already passed by Congress. A good example is the plethora of litigation surrounding efforts to lease tracts both onshore and offshore for oil and mineral development. *See, e.g.*, Conservation Law Foundation of New England, Inc. v. Andrus, 623 F.2d 712 (1st Cir. 1979).

7 42 U.S.C. § 4331(b)(3) (1976).

8 *See, e.g.*, Pennhurst State Sch. & Hospital v. Halderman, 101 S. Ct. 1531 (1981); Rizzo v. Goode, 423 U.S. 362 (1976).

It is not improper judicial activism for a court to fulfill its responsibility to enforce a statute or a constitutional provision because a court feels that the popular consensus that led to its passage was ill-informed or mistaken. There are valid questions that can be raised about the environmental movement and the regulatory apparatus that has been constructed to protect our lands, air, and water. But hiding behind the rhetoric of judicial restraint, as Mandelker unfortunately has done in much of the book, will not provide any answers.

THE COLLAPSE OF WELFARE REFORM: POLITICAL INSTITUTIONS, POLICY, AND THE POOR IN CANADA AND THE UNITED STATES. By *Christopher Leman*. Cambridge, Ma.: The MIT Press, 1980. Pp. xvii, 292, notes, index. $19.95 cloth.

*Review By Larry A. Bakken**

This book outlines recent efforts in Canada and the United States to extend cash welfare payments to additional persons within each country. A comparative study, the book provides useful insights into the politics and the social policymaking of each country. Although the two countries' attempts to solve welfare policy problems have much in common, the author contends that socio-economic factors were not in and of themselves decisive in the failure of American and Canadian welfare reform proposals in the 70's. Leman suggests that political factors were primarily responsible for the proposals' demise even though the national political institutions of Canada and the United States are quite different. Despite differences in style and in substantive approaches to policymaking, the two countries reached similar results in welfare reform: neither country was able to alter significantly its existing welfare programs during this period. The author's analysis of why an expanded public assistance program was not enacted by either country should be of interest to lawyers, political scientists and public administrators; the analysis indicates that neither the Canadian method

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of deductive policymaking nor the inductive policymaking found in the United States is successful in resolving certain social problems.

Leman examines problems and concerns common to the welfare crises in Canada and the United States. The attempt to extend the cash welfare payments appeared when each country was already experiencing expanding welfare rolls and expanding costs, and when many citizens were concerned with the increasing number of public assistance programs. The author argues, however, that even though the United States and Canada have similar social and economic structures, their proposed solutions to a given problem reflected not these similarities but the structural differences within the political institutions.

The author provides considerable historical and demographic information about the poverty policies of Canada and the United States. Benefits in the two countries are similarly distributed; the primary beneficiaries are the aged. Single-parent families receive less support than the aged but more than other welfare recipients. Leman suggests that the favored status of the aged and the single-parent family is not a result of these groups' political strength but is due instead to their political appeal for the rest of the society. The poor, unfortunately, do not have an effective input into the policymaking process of either country; welfare recipients do not campaign, petition government officials, or engage in cooperative interest-group activities. The most effective political weapon, the threat of disruption, is unavailable to the poor because it requires leadership, a quality that is exceedingly scarce in these groups of individuals.

Although similar in form, proposals in these countries to extend their welfare programs had different rationales and origins. In the United States, President Nixon responded to a perceived welfare problem and pleas from high-level planners by proposing a guaranteed-income program. The central government in Canada, on the other hand, responded similarly to a quite different political stimulus — a crisis in intergovernmental relations. Nixon's unexpected proposal came during a time of growing resentment towards welfare recipients in society, accompanied by an effort on the part of government staff members to solve welfare problems with a negative income tax. In addition, Nixon hoped to embarrass the Democratic Party in the United States

and take personal credit for the proposal if it were successful. By contrast, in Canada, individual provinces began considering a cash-assistance welfare alternative prior to federal government involvement. The people of Canada were also favorably disposed to some form of guaranteed income. The federal government in Canada, in a defensive move, began work on a program which extended welfare payments to new groups.

Following his discussion of the origins of the recent welfare proposals, the author devotes a considerable portion of his book to the legislative history of Nixon's Family Assistance Plan, the Carter Program for Better Jobs and Income, and the Canadian Social Security Review. The legislative battles preceding the ultimate failure of the extended welfare reform programs are of interest because they illustrate institutional differences between the central governments in the United States and Canada.

The primary difference between the central governments, according to Leman, lies in their approaches to policymaking. Canada utilizes a "deductive" approach which allows only limited lobbying and pressure for change from external groups. An "inductive" approach to policymaking is used in the United States; this approach provides numerous opportunities for various groups to amend, counteract, and generally influence policy decisions. Failure of the welfare reform efforts in both countries reflects the strengths and weaknesses of policymaking in each. Canadian policymakers did achieve agreement on the basic principles of an expanded welfare program but failed to reach a consensus on questions of finance and jurisdiction. The deductive approach thus encourages general agreement, but it interferes with the ultimate success of a proposal when outside interests are unable to help build support for a program after internal consensus has collapsed. In the United States, policymakers could not agree on the basic principles of reform and, therefore, the inductive approach encouraged an eventual deadlock.

In general, the Canadian style of decision-making leaves little room for the diverse interests and unusual coalitions found in U.S. politics. Instead, the Canadian style encourages accommodation and promotes rational decisions. The author suggests, however, that the Canadian system may actually have greater difficulty in dealing with practical operational questions than does an inductive approach.

The openness of U.S. policymaking, which allows, encourages, and may even require participation by outsiders, results in a richer, more pragmatic debate. Consensus was reached in the United States on some of the more practical aspects of the welfare reform proposal; however, compromise was necessary to gain final approval. Even so, this approval was not a general agreement as to the necessity of a program to aid the working poor. The inability of America's political leaders to gather sufficient support for their proposals reflects the major weakness of the inductive approach to political decision-making.

Past welfare policies, public attitudes, and design problems in the welfare reform proposals contributed to their failure. In the United States, single-parent families and racial minorities have historically been subject to more public backlash than aged welfare recipients. The Nixon proposal granted almost unlimited benefits and work incentives to these disfavored groups, yet the public believed they should be treated less generously than the historically favored recipients. Canada, on the other hand, has traditionally protected these two categories of welfare recipients by providing for them in the same welfare programs which benefit the more popular recipients. The Canadian welfare reform proposal avoided the backlash problem by providing two levels of support: one level of supplementation for employable persons, and a second, basic support program for unemployable persons. The Canadian proposal did not encounter problems until the implementation stage was reached — should the two tiers be administered separately or as a whole? The author concludes that whatever approach to policy decision-making is used, the policymakers and program designers must be cognizant of the political acceptability of the program as well as the technical problems of implementation.

In spite of the failure of the comprehensive welfare reform proposals, there has been continued growth in welfare benefits within each country. However, the failure of the welfare reform efforts appears to reflect a shift in "welfare politics." Both countries have curtailed efforts to expand welfare benefits. The public attitude toward welfare assistance has become less favorable on both sides of the border. Instead of approving incremental changes in the future, both countries will probably seek benefit reductions or the removal of certain recipients from the welfare rolls. The citizens of Canada and the United States

are increasingly concerned with welfare fraud, nonenforcement of child support orders, and the use of work requirements in welfare programs. This shift in public opinion reflects an increasingly conservative attitude toward welfare programs in general. Indeed, in matters of welfare policy, the conservative outlook has become prevalent in the United States and, to a lesser degree, in Canada as well.

Mr. Leman's book has made a significant contribution to the understanding of social welfare reform and, perhaps more important, to the understanding of the different institutional structures of policymaking in the United States and Canada. The book also indicates how those differences will influence welfare reform legislation during the decade ahead — a time of predicted budgetary problems. In the United States, considerable pressure to alter welfare programs will probably come from outside interest groups, while changes in the Canadian welfare program will be influenced primarily by the political party in power and, to some degree, the individual Canadian provinces. Consequently, narrowly focused and somewhat inconsistent changes will likely occur in the United States, whereas in Canada the central government will be able to maintain a more controlled response to proposed welfare reform. The difference suggests a more volatile future for welfare legislation in the United States than in Canada.

RECENT PUBLICATIONS

THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER. Edited by *Kenneth I. Winston*. Durham, N.C.: Duke University Press, 1981. Pp. 313, appendix, bibliography, index. $19.75 cloth.

Kenneth Winston has done the legal community, both practitioners and scholars, a great service in collecting and editing this posthumous volume of Lon L. Fuller's essays. Fuller, the late Carter Professor of General Jurisprudence at Harvard Law School, was one of the most renowned of legal philosophers, and this volume gives readers an enlightening sense of his extensive scholarship and incisive analytic philosophy.

For those already familiar with Fuller's philosophy, this collection will bring no surprises — all but one of the essays have already been delivered as lectures or published in journals or books. What this new volume does achieve, however, is a cohesive sense of Fuller's thought. Winston has drawn together essays on such disparate issues as adjudication, mediation, the legislative process, and legal education in order to elucidate Fuller's overall conception of law and legal institutions.

Fuller's central area of concern was a field he named "eunomics" and defined as "the science, theory, or study of good order and workable social arrangements." Law, Fuller said, is the architecture that makes workable arrangements possible.

This interdependence between law and society has long been recognized by lawyers well-versed in contract law, civil remedies, and criminal sanctions. Where Fuller broke new ground, however, was in defining "law" liberally. He saw law as including all means of social ordering, even those traditionally considered extra-legal. For example, to Fuller, arbitration in labor-management disputes is properly a part of the practice of law. Even "customary law" — those rules that govern society implicitly without being articulated in a strict legal code — are, in Fuller's formulation, integral to the legal function.

Fuller would extend the expertise of the lawyer into areas other than litigation; he was very aware that litigation represents only one method for ordering social relations. Fuller pointed

out that the lawyer's proper role is to construct social arrangements. As a consequence, a lawyer must be prepared to mediate disputes or formulate laws as well as to seek relief in the courts. Ideally, he believed, the law should maintain flexibility and vitality in all social situations.

Fuller therefore objected to teaching law solely through the case method because he felt it was not appropriately sensitive to the psychological and economic roles of the lawyer. He wanted law to be taught not simply as a body of appellate cases, but as a multidisciplinary approach to solving social disputes. To Fuller, the function of the law included the role of the juror-citizen, the judge, and the cop on the corner, as well as the lawyer; thus, the competent lawyer should have grounding in the social sciences, especially psychology and economics.

Fuller's ideas have had some impact on the law school curriculum; in addition to the standard course-work, courses in clinical practice are now being offered. Even more encouraging, basic courses in property and criminal law now reflect Fuller's concern with the social processes that precede and accompany an emerging legal doctrine. Fuller gives life to his theoretical analyses with illustrations drawn from his experience as a labor arbitrator and from his extensive knowledge of philosophy, the social sciences, and legal history. In crisp, elegant prose, Fuller makes perceptive analyses that are both informative and stimulating.

Fuller's one failing is his penchant for models. Models are attractive because of their simplicity; unfortunately, they miss complexities that are crucial to the issue. For example, Fuller suggests eight "laws" of human association, one of which states that in almost all human associations there exist both shared commitment and formalized rules of organization. This neat articulation does not, however, seem to add significantly to Fuller's thoughtful treatment of tribal custom, community associations, or other social arrangements. His subtle discussion of the dynamics of human association seems to lie outside the scope of such broad "laws."

Except for this predilection for models, Fuller wastes not a word. In these essays he argues with courage and clarity for greater flexibility and diversity in the way lawyers order social arrangements. Winston, in his editorial notes and introduction,

provides a good interpretive background for Fuller's work. This volume is both an excellent grounding for the novice and a very useful reference for those well-versed in Fuller's philosophy.

Hemmie Chang

THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE. By *Lester C. Thurow*. New York: Penguin Books, 1981. Pp. 230, notes, index. $4.95 paper.

When economists argue, they usually point fingers at one another. Lester Thurow is an exception. He blames our economic woes not on flawed models or fallacious assumptions, but on political paralysis. He assures us there *are* solutions to the problems of inflation, energy shortages, slow economic growth, environmental decay, and distributional inequities; however, he asserts that our political system is incapable of implementing these solutions.

Every economic solution requires some group of citizens to accept a reduction in their standard of living. Even solutions which have a net positive effect impose large losses on certain segments of society. When an economy stops producing significant increases in real income, any public policy which benefits one group requires an equal sacrifice by some other group. When there are economic winners, there must also be economic losers — a zero-sum game. Thurow claims that our political process is incapable of allocating these economic losses. The solutions exist, but the power to impose them does not. "Instead of having two parties, we have a system where each elected official is his own party and is free to establish his own platform" (p. 212). Significant economic proposals are not implemented because party ties evaporate when constituencies are threatened.

The validity of this political analysis has been shaken by the Reagan Administration. Reagan has imposed significant economic costs on the poor and minorities. Although Thurow did not think such budget cuts were *politically* possible, his *eco-*

nomic analysis still applies. Indeed, Reagan's economic package is the classic zero-sum situation; there are clear winners and clear losers.

Thurow applies his zero-sum analysis in a lucid examination of several current economic maladies: energy, inflation, environmental, and income disparity problems. Our energy problems are caused not by scarcity, says Thurow, but by a reliance on an oil supply controlled by a foreign cartel. Nonreliance on foreign oil would be desirable even if the energy substitute were more expensive; the extra cost would buy stability and security. Yet any alternative energy proposal is intensely opposed by groups whose standard of living would decline if the proposal were adopted. Suppose an alternative to our current predicament would be gasification of western coal. Coal gasification requires water. Since water is scarce in Wyoming and Montana, no individual wants to give up the water for use in a project which primarily benefits the rest of the country. If we transport coal to the water-rich East for gasification, in whose backyard will the slag heaps be dumped? Regardless of which energy alternative we pursue, we face the zero-sum problem — while beneficial to the nation as a whole, energy independence requires a reduction in some group's standard of living.

Thurow considers the "paradigm zero-sum game" (p. 42). Two things happen when prices rise: someone pays more and someone else earns more. To stop inflation, the government must lower some group's income to counteract upward price shocks. This is exactly what government is not capable of doing. All groups in society want inflation reduced, but none is willing to accept a reduction in its own income to help cure inflation.

Unable or unwilling to restrain either prices or incomes directly, both the Carter and Reagan Administrations have used a restrictive monetary policy to fight inflation. Such a strategy ignores the zero-sum problem; both wages and prices are extremely resistant to downward pressures. Thurow estimates that a thirty-percent unemployment rate is necessary to moderate wage demands. Firms, faced with excess capacity, will cut production before dropping prices. Thus, we have a standoff where neither labor nor business is willing to accept the losses necessary to reduce inflation. A restrictive monetary policy not only fails to mitigate inflation, but exacerbates other economic

problems. Idle capacity discourages new investment and thus slows productivity growth. Instead of solving a zero-sum problem, a restrictive monetary policy creates a negative-sum problem.

How much we allow environmental concerns to limit economic growth is also a zero-sum issue. Environmentalism is an economic matter, not just an ethical one. Environmental conditions are just as much a part of our standard of living as the number of cars in our garage. Yet we do not ordinarily think of clean air and clean water as commodities because they have no explicit price tag. (Thurow speculates that our dismal economic record would be brighter if measurements of GNP accounted for our improved environmental quality.) Regardless of how inaccurately we value environmental conditions, environmentalism is a zero-sum game; for example, those regions suffering from acid rain do not reap the benefits of burning cheap coal. Someone wins; someone else loses.

Thurow predicts increasingly inequitable income distributions in the 1980's. Low-income families have, in the past, been able to maintain their distributive share of income for two reasons. First, there has been a dramatic rise in welfare transfer payments. Second, a large number of wives from low-income families have entered the labor market to supplement family incomes. Neither of these factors can continue to help low-income families achieve greater equity. A significant reduction in the amount and number of transfer payments has occurred under the Reagan Administration and, although wives continue to enter the labor market, an increasing percentage of these wives come from upper-middle-class families. The supplemental income these women earn will only exacerbate income disparity. Achieving a more equitable income distribution is an especially difficult zero-sum problem because winners and losers can be so easily identified. The relative increase in one group's income must correspond to a decrease in another group's relative income.

In light of Thurow's skill in analyzing issues, his proposed remedies are disappointing and meager. Where Thurow makes specific proposals, he shows little appreciation of the political realities he emphasizes in his examination of economic problems. For example, Thurow proposes the elimination of the

corporate income tax. He argues that the tax is unjust (a low-income shareholder can be taxed at rates up to forty-six percent) and inefficient (debt capital is favored over equity capital because interest payments on debt capital are tax-deductible). Thurow suggests that instead of taxing corporate profits directly, the government should tax each shareholder directly on his pro rata share of the corporate income. Thurow also advocates government-guaranteed employment, (i.e., making government the employer of last resort), arguing that such a step would help lessen income disparity by utilizing unemployed workers. As desirable as these policies may be, they are equally unlikely.

The Zero-Sum Society may be short on answers, but Thurow clarifies and illuminates an array of issues with an uncanny knack for asking the right questions. Indeed, this book is for the person who *thinks* he has all the answers. Thurow will prove him wrong.

David T. Young

NONPROLIFERATION AND U.S. FOREIGN POLICY. Edited by *Joseph Yager*. Washington, D.C.: The Brookings Institution, 1980. Pp. xii, 438, index, tables. $22.95 cloth, $8.95 paper.

The problems of integrating nuclear nonproliferation objectives into U.S. foreign policy have become increasingly apparent during the past decade. Although the United States Government has opposed the spread of nuclear weapons since the dawn of the nuclear age, the book's contributors believe that U.S. nonproliferation policy has reached a turning point. They question whether the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the safeguards administered by the International Atomic Energy Agency (IAEA) can control the spread of nuclear weapons. Assuming a negative answer, various foreign-policy options are examined; recommendations are made to improve the international system of safeguards on civil nuclear energy facilities and to promote international stability. The former recommendation is considered in detail in a more recently published book by Joseph Yager, *International Cooperation in*

Nuclear Energy (1981). To a large extent the two books are interdependent. The foreign-policy justifications for improved international safeguards and bilateral solutions to the problems are developed in *Nonproliferation and U.S. Foreign Policy,* while the theory behind the inadequacy of current IAEA safeguards and the ways in which they can be improved through new multinational agreements are discussed in *International Cooperation in Nuclear Energy.*

Nonproliferation and U.S. Foreign Policy is a valuable addition to the literature on nuclear nonproliferation primarily because it considers the issue in the context of global foreign policy. Forming such an integrated international policy is difficult and requires a wide range of knowledge. By utilizing a group-author approach the book is able to provide a timely, in-depth study of a complex issue under rapidly changing world conditions.

However, the group approach is not without drawbacks. Although the policy recommendations are a cooperative effort, the five authors separately examine the conditions affecting foreign policy in five regions of the world. The different approaches and styles used by each author fragment the book and make comparisons between regions difficult. For example, the reader cannot determine if the emphasis placed on some factors is due to the individual author's bias or to the unique characteristics of a particular region. Overall, though, the regional policy recommendations are interwoven to form a remarkably tight-knit finished product.

The book contains an intensive analysis of ten countries that have the ability to build nuclear weapons within the next ten years and includes a less thorough analysis of several Arab countries; the analyses are done on a regional basis (Japan, South Korea and Taiwan; India, Pakistan and Iran; Israel, Egypt and other Arab nations; Brazil and Argentina; and South Africa). The largest single portion of the book is devoted to analyzing India, Pakistan and Iran (authors of this section are Henry S. Rowan and Richard Brody), and it is this section which exhibits the best combination of comprehensiveness and readability. This regional analysis is especially important because it may portend the results of present nonproliferation policy in other developing countries; India has a "peaceful" nuclear

bomb and Pakistan appears to be developing one. Unfortunately, the lessons to be learned from the qualified failure of nuclear nonproliferation policy in Southern Asia are not applied to other regions. Questions raised in this section of the book should be asked elsewhere: for example, why would a country with no economic justification for reprocessing (Pakistan) invest so heavily in reprocessing technology since reprocessing facilities produce plutonium which can be used to make bombs? Answers to this question tell a great deal about a nation's motives.

The book's strength lies in the questions it raises and the analytical processes it uses, but they are not emphasized enough. Although policy recommendations are dependent on rapidly changing world conditions, the questions raised and the analytical processes used remain valid over a broader range of conditions and a longer span of time. Although policy recommendations are important, questions which should be asked and analytical approaches which should be applied to nonproliferation issues are equally important. The book would benefit from an increased emphasis in these areas.

The book's major weakness is its failure to sufficiently examine questions in a context outside the region in which they arose. The global implications of Argentina and Brazil obtaining nuclear technology without adequate safeguards need to be examined. The "bomb in the basement" or near-nuclear weapon strategy which both Israel and South Africa may be utilizing is never really dealt with — is this strategy appealing to other nations?

In the end, only general solutions to nonproliferation issues are offered and they are frequently rejected: positive inducements (economic aid) are not cost-effective (p. 408), and negative counterincentives have limited utility because they work only against nations already dependent upon the United States (p. 409). For the short term, the authors suggest that the most promising nonproliferation strategies are to alleviate national security fears through the promotion of a more secure international environment and to improve nuclear safeguards through international agreements. Over the long term, time is working against nonproliferation and, although this is not explicitly stated in the book, the United States needs to prepare foreign-

policy options for the day when third-world nations are also armed with nuclear weapons.

Richard Gaskins, Jr.

THE U.S. STEEL INDUSTRY IN RECURRENT CRISIS. By *Robert W. Crandall.* Washington, D.C.: The Brookings Institution, 1981. Pp. xiii, 184, appendices, index. $19.95 cloth, $7.95 paper.

Many reasons have been cited for the decline of the U.S. steel industry — lack of trade protection, low productivity, pollution controls, and governmental regulation. In his book *The U.S. Steel Industry in Recurrent Crisis*, Robert Crandall concludes that although these factors did play a role, the true cause of the decline is found in the most basic premise of competition: the producers with the lowest total costs will succeed, and the others will fail.

The author makes this point by analyzing the competition between United States and Japanese steel industries. Shipping improvement during the 1950's enabled the Japanese to purchase raw materials at prices equal to or lower than those paid by U.S. steel manufacturers. Japanese labor costs were also substantially lower. Coupling these Japanese cost advantages with Japan's plant-size and efficiency advantages — the consequence of post-World War II steel industry constructions — resulted in a staggering difference in per-unit cost.

Crandall, using his own set of econometric equations, finds that the lower costs of the Japanese producers were reflected in lower U.S. import prices. These lower prices allowed the Japanese to gain an increasing share of the U.S. market. "Competitive market forces have eroded the U.S. producers' share of the price-sensitive portion of the U.S. steel market. . . . There was nothing U.S. producers could have done to reverse the trend. They were simply the victims of market and technological forces." (P. 71.)

Crandall's analysis of possible solutions to the steel crisis is equally discouraging: the rate of return on investment is far too

low to justify expansion, modernization is economically questionable, and trade protection has proven ineffective and possibly counterproductive.

Nevertheless, Crandall's arguments are a refreshing change from the overblown rhetoric usually heard on the issue. The work is well-documented and provides relevant historical background. Crandall's use of econometrics supports his analysis but results in some heavy reading.

The book explains some of the recent changes in the steel industry. Low rates of return caused by foreign competition account for the failure in the last twenty-five years of U.S. producers to build additional steel-producing capacity. More specifically, Crandall's thesis explains U.S. Steel's decision to shift its resources out of the steel industry and into more profitable ventures.

From a broader perspective, this book's analysis is applicable to all industries that are suffering from competition. If an overseas producer has a substantial input-cost advantage, domestic manufacturers should not continue to invest in modernization that offers no significant competitive advantage. While this premise is an accepted part of economic theory, it is often overlooked in favor of the more politically appealing options. Crandall has ably demonstrated that the competitive forces still operate in world trade, at least insofar as the steel industry is concerned.

Joseph D. Olivieri

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THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS. By *Herbert Kaufman.* Washington, D.C.: The Brookings Institution, 1981. Pp. xii, 220, appendices, bibliography, index. $22.95 cloth, $8.95 paper.

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