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HARVARD JOURNAL ON LEGISLATION

ESSAY

AN INTRODUCTION TO THE POLITICS OF RECONCILIATION

HOWARD H. BAKER, JR.*

When the Congressional Budget and Impoundment Control Act of 1974 was enacted, two of its principal goals were the establishment of an orderly system of determining congressional budget priorities and the establishment of a method of dealing with controversies between the legislative and executive branches of the federal government over spending mandates and impoundment powers.

Of the numerous enforcement procedures in the Act, one of the most notable is that of reconciliation. During debate in the House and the Senate on the Budget Act, the reconciliation provision generated little controversy, but its wide-ranging ramifications have since generated a great deal of debate. Reconciliation is a procedure by which expenditures and revenues are brought in line with congressional budget policies. Under the Budget Act, reconciliation occurs pursuant to the Second Budget Resolution for the forthcoming fiscal year, or any revision thereof. To facilitate prompt action on the reconciliation bill, restrictive procedures relating to the time allotted for floor debate and germaneness of amendments are provided in the law. The reconciliation bill is a response by the committees to instructions issued by Congress in the budget resolution. When more than one committee in each House is instructed, the budget committees play a ministerial role by packaging the committee responses (without making substantive changes) and reporting them in an omnibus bill to the floor.

In 1975, when the reconciliation process was first successfully employed, it was used to expedite the consideration of a tax measure. In 1980, it was used to reduce spending for certain entitlement programs and to raise revenues, thereby reducing the deficit by eight billion dollars. The 1980 reconciliation leg-

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islation also reduced certain authorizations that operate like entitlement programs.

In 1981, with a new administration in office and a new majority installed in the Senate, the use of reconciliation was expanded significantly. Nearly thirty committees participated in reconciliation in 1981, and the legislation enacted into law (Public Law number 97-35) as a result of the reconciliation achieved savings of about $130 billion over three years. By any standard, it was one of the most sweeping legislative measures in history. In 1982, reconciliation procedures were used to facilitate not only further spending cuts but also enactment of a controversial but much needed revenue enhancement measure.

A more recent example of the advantages of the reconciliation process was in evidence during the debate on the Tax Equity and Fiscal Responsibility Act of 1982. Senator Robert Dole, Chairman of the Finance Committee, was able to discourage amendments that would have eliminated specific revenue increases in that bill. He argued successfully that the revenue that would be lost as a result of the amendments could not be made up by floor amendments that proposed other kinds of taxes, because those amendments, although aimed at the broad purposes of the bill, would be considered non-germane under the reconciliation procedures. Managing a bill in the Senate with time limitations and germaneness protections accords significant power to a committee and its chairman.

The 1981 reconciliation bill, which encompassed legislative language from thirteen different committees in response to savings instructions mandated by the Senate, produced a legislative result that would have been impossible to achieve if each committee had reported an individual bill on subject matter solely within its own jurisdiction. By using a procedure that permitted packaging of the savings, Congress was able to consider President Reagan's economic program as a whole, resistant to the type of special interest pressures that would have scuttled the savings if they had been proposed in piecemeal fashion.

The reasons underlying the emergence of reconciliation as a tool for implementing budgetary and economic policies are clear. Since 1980, Congress has faced tremendous strains in the federal budget that have compelled substantial deficit-reduction efforts. Realistically, Congress could not have met these chal-

lenges without resorting to extraordinary procedures. Reconciliation offers expedited procedural provisions that supersede the normal operations of the Senate rules and that enable diverse legislation to be considered as part of one package.

The following Essay, written by two members of my staff, is an account of how and why reconciliation was employed in 1981 to enact the spending reductions requested by the President. I will state here, as I have stated on the Senate floor, that the decision to use reconciliation to achieve budget cuts was one in which I participated and that I supported actively. Asserting a broad, new direction to economic policy in the United States required a procedure equal to the magnitude of the task. Such was the premise that underlay the use of reconciliation in 1981, and such was the procedure upon which the Senate's and the country's hope for a fresh economic beginning was constructed.

RECONCILING AN IRRECONCILABLE BUDGET: THE NEW POLITICS OF THE BUDGET PROCESS

JAMES A. MILLER*
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The United States Senate's use of reconciliation instructions in the first concurrent budget resolution in the spring of 1981 was a dramatic and revolutionary maneuver that became the legislative cornerstone for President Ronald Reagan's economic program and resulted in the largest budgetary reduction measure in the nation's history. Reconciliation is a process used by Congress to reconcile amounts determined by tax, spending, and debt legislation for a given fiscal year with the ceilings enacted in the required second concurrent resolution on the budget of that year. Changes to laws, bills, and resolutions are required to conform with the binding totals for budget authority, revenues, and the public debt, and are incorporated in either a reconciliation resolution or a reconciliation bill.

The strategy for the use of reconciliation in 1981 was developed by a small circle of congressional and White House players, all of whom were aware of, and interested in achieving, the following goals: (1) the adherence to the President's campaign pledge to make substantial reductions in the growth of the federal budget, (2) the creation of a legislative vehicle that would not fall apart in the Democratically controlled House of Representatives or be stymied in the Senate by an obdurate minority, (3) the launching of the administration's honeymoon with Congress on a fast track that would create momentum analogous to President Franklin Roosevelt's first one hundred days, and (4) the conception of a public relations mechanism that would both encourage skeptical members of Congress to "join the team" and enable the electorate to witness the fulfillment of the "new majority's" pledges.

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To this day, reconciliation remains a complex, controversial, and often misunderstood procedure that elicits a wide range of responses from individuals depending on their party allegiance, institutional concerns, committee assignments, and political education. There are strong indications that the Ninety-eighth Congress will be swamped by measures seeking to strengthen, to modify, or even to do away with reconciliation; yet a consistent theme that survives the gamut of reactions to reconciliation is that in 1981 it became a more powerful force than it was originally thought to be. More important, its ramifications are probably the most far-reaching in the legislative arena.

This Essay is an account of the use of reconciliation in 1981 as a tool to achieve the Reagan administration's goals. Part I details how the reconciliation process was first created in 1974 and briefly summarizes its subsequent use. Part II describes the radically different budgetary policy that was adopted by the newly installed Reagan administration in 1981. The events leading to the decision to use reconciliation as the strategy for achieving the President's budgetary policies are examined in Part III.

Part IV of the Essay concerns the implementation of the reconciliation policy. This Part consists of three sections. The first section describes how Senate Majority Leader Howard Baker built a team capable of using the reconciliation strategy, the second section details the timing of that strategy, and the third section gives an account of the public relations strategy employed by the White House to get its program through the Congress.

Part V provides a detailed description of action in both the Senate and the House on the budget resolution. Following that description, the Essay details in Part VI the efforts by the White House and by the Senate Republican leadership to eliminate extraneous items and pet projects that were incorporated in many Senate committee budget reports and also outlines the procedural and substantive battles that took place in the House. Part VII deals with the reconciliation conference that was convened to resolve the differences between the House and Senate budget bills, the success of that conference, and the final passage of a budget bill. The final part of the Essay, Part VIII, presents

the conclusions that can be drawn from the use of reconciliation in the historic 1981 budget battle.

I. The Creation of the Reconciliation Process

In 1974, Congress passed the Congressional Budget and Impoundment Control Act[1] in order to assert more authority over the budget process. Many experts believe that the Act was an attempt to wrest control of the budget away from President Richard Nixon. The Act established a new congressional budget process, a Budget Committee in each chamber, the Congressional Budget Office, and a procedure which gave Congress control over the impoundment of funds by the Executive Branch.

The 1974 Budget Act was regarded by many observers both on and off Capitol Hill as an improvement of the budget decisionmaking process. There was hope that the Act would serve as a flexible blueprint for formulating economic policy in the future. The vehicle for such flexibility was the Act's establishment of a timetable whereby the two Budget Committees report a first concurrent resolution on the budget to their respective chambers by April 15. This resolution sets targets for total federal revenues, expenditures, and the deficit or surplus. These figures are advisory in nature. In the autumn, Congress is required to adopt a second concurrent resolution that establishes binding ceilings on expenditures and a floor under revenues. After the adoption of the second budget resolution, a point of order may be raised against any legislation that goes above the expenditure ceiling or below the revenue floor. Consequently, any revision in expenditures and revenue levels can be made only through the adoption of another budget resolution.

One of the provisions of the 1974 Budget Act created a procedure for reconciliation. The procedures for reconciliation are set forth in section 310 of the Act. This section received surprisingly little attention during the floor debate on the Act. Section 310(c) of the Act provides that if more than one com-

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[1] Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in scattered sections of 31 U.S.C. (1976 & Supp. IV 1980)).

mittee of the House or the Senate is directed to determine and to recommend changes in compliance with the reconciliation instructions, each committee so directed must submit such recommendations to its respective Budget Committee. The Budget Committee is then empowered to report a reconciliation bill, but the Committee is prohibited from making substantive changes in the recommended language. This section also details debate and time limitations which in effect place a twenty-hour limit on debate of the bill, with further limitations on the maximum time allocated to debate on amendments.

Senate Parliamentarian Robert Dove, who was one of the chief drafters of the Act, notes that inherent in section 310 is a double-edged sword: "When we wrote the Act," says Dove, "we knew it would be a fight to the death among the three Committees—Finance, Budget, and Appropriations—and frankly, we all thought Budget would lose."

The restrictive reconciliation procedures were first used in 1975 by Finance Committee Chairman Russell Long (D-La.) to facilitate consideration of a revenue bill. The maneuver was not a bona fide use of reconciliation, but rather was a means of protecting the legislation from non-germane amendments. It was not until 1980 that reconciliation was used again. Senate Parliamentarian Dove recalls, "Five years later, the party in power, the Democrats, used the reconciliation instructions again in a new and dramatic way. It was used in connection with the resolution calling for a balanced budget in fiscal year 1981 that was adopted in 1980 when the Democrats were in control of the House, the Senate, and the White House." This 1980 resolution affected several standing committees of the Senate by increasing the influence of the Budget Committee over appropriations and authorization legislation and produced deficit reductions amounting to about eight billion dollars.

In the Ninety-seventh Congress, with a Republican majority in control of the Senate, the reconciliation procedures were used again, but in a totally different way. One of the first of many ironic twists to the reconciliation story was that a procedure set in place by the framers of the 1974 Budget Act later was turned against their legislative interests.

II. The Reagan Administration's Adoption of a New Budgetary Policy

On May 22, 1980, Congressman Robert Michel (R-Ill.), who would later become Republican leader in the House, asked to enter into the record an article written by his colleague, Congressman David Stockman (R-Mich.). Representative Michel praised the article as "one of the most perceptive and complete analyses of the 1981 budget we have seen to date," and one that was "prepared by Mr. Stockman as a rebuttal to all of those mythmakers who insist upon leaving this great Trojan horse we call a balanced budget at the doorstep of each and every American taxpayer."[2] The article, entitled *The Giaimo Balanced Budget: A Trojan Horse by any Other Name*, and the Stockman-Gramm proposals that followed it, caught the attention of presidential candidate Ronald Reagan.

In his book, *The Education of David Stockman and Other Americans*, William Greider discusses the beginnings of this policy realignment:

> When orthodoxy fails, the political effects are destablizing. Washington was weary and frustrated by the erratic policymaking, epitomized most dramatically by Jimmy Carter's last year in office when he seemed to change direction every other month (and managed to combine both a recession and double digit inflation). Carter's Council of Economic Advisors, dominated by middle of the road Keynesians, had been wrong every quarter for four years in its prognosis and predictions. If the old expertise was wrong, then perhaps it was time for new experts.[3]

On October 23, 1980, candidate Reagan announced the formation of twenty-three domestic and economic policy task forces that would investigate possible policy initiatives and recommendations. The Spending Control Task Force was under the direction of Caspar Weinberger, former Secretary of the Department of Health, Education and Welfare (HEW) and former Director of the Office of Management and Budget (OMB).

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[2] 126 CONG. REC. H4197 (daily ed. May 22, 1980) (statement of Rep. Michel).

[3] W. GREIDER, THE EDUCATION OF DAVID STOCKMAN AND OTHER AMERICANS 96 (1982).

Weinberger asked William Taft, his former aide at OMB and HEW, to compile a preliminary list of potential budget reductions. Robert Fulton, a member of the minority staff of the Senate Budget Committee, was asked to assist. Fulton had long been an advocate of budgetary reductions, and was known on both sides of the aisle as a cautious, highly informed expert on the federal budget.

Weinberger requested that the first cuts be made primarily in fiscal year 1981. The Budget Committee staff submitted to Weinberger, through Taft, several alternative lists of proposed reductions. The final version accepted by Weinberger identified outlay reduction possibilities totaling $29 billion for fiscal year 1981, $43 billion for fiscal year 1982, and $50 billion for fiscal year 1983. The focus at that time, recalls Fulton, was on "*which* cuts, rather than on how could the cuts be achieved."

After the Republicans gained control of the Senate in the 1980 elections, Senator Peter Domenici (R-N.M.) became the new Budget Committee Chairman. He quickly moved to name Steven Bell as Staff Director of the Budget Committee. Bell, who had been a Budget Committee analyst and Domenici's press secretary, had an intense enthusiasm for strategies, memos, and battles. Domenici immediately sent Bell to the meetings of the Spending Control Task Force to find out "what the hell is going on."

David Stockman, heir apparent to the directorship of OMB, was at this time just beginning to formulate his own ideas about a new economic policy for the administration. Stockman's first worry concerned the House of Representatives, because, as a former Congressman, he was all too aware that the committees and the parliamentary majority of the Democratically controlled House were the two biggest obstacles capable of blocking the implementation of a new economic policy. He quickly searched for a way to circumvent, rather than confront, the House committees. "We wanted," said Stockman, "something big and new and rolling fast to break down parochial resistance."

The challenge, as Stockman saw it, was to meld a Republican administration, a Republican-controlled Senate, and an ad hoc majority block of Republicans and conservative Democrats in the House into a workable consensus. As a result, one of the

most important elements of the overall strategy was formulated: the Senate would act first on the President's program and thereby place pressure on the House.

Budget Committee Staff Director Bell focused on the developments to date in a December 26, 1981 memorandum to Budget Director Stockman. In an attempt to summarize possible options, Bell wrote:

> In order to dramatize the debate on spending, you propose to tie spending restraint to the debt limit bill soon to come before the Congress. In brief you will tell Congress that the White House will support a bill that enlarges the public debt ceiling, but the size of the increase in the ceiling will only get the government through the next 100 days. If Congress shows palpable progress on spending restraint, through approval of our restraint package, then we will accommodate a slightly larger debt ceiling later in the year.

However, by the time the memorandum reached Stockman, this strategy had become unattractive. Stockman at that point realized that it would be impossible to get the debt-limit bill out of the Democratically controlled House Ways and Means Committee.

III. The Decision to Use Reconciliation as the Strategy for the New Budget

The use of reconciliation as a strategy for the implementation of the Reagan economic program was discussed for the first time on paper in a January 2, 1981 memorandum from Bell to Chairman Domenici. The idea of using reconciliation had surfaced almost a month earlier, and it was becoming quite popular in what was still a small circle of planners.

On the evening of January 4, 1981, Senate Majority Leader Howard Baker (R-Tenn.) hosted a dinner at his home for future White House Chief of Staff James Baker, David Stockman, future Treasury Secretary Donald Regan, and Senators Robert Dole (R-Kan.), Peter Domenici, Mark Hatfield (R-Or.), the future chairmen of the three major fiscal committees in the Senate, and Paul Laxalt (R-Nev.). The purpose of the dinner meeting was to discuss the major initiatives that the newly elected Reagan administration should address in the first session of the

Ninety-seventh Congress. It was agreed that a program to stop the growth of, or even reduce, federal government spending should be the principal focus of the new administration's legislative program. Of those present at the meeting, only Domenici and Stockman realized even the general dimensions of the task being undertaken. Domenici and Stockman, of course, knew the contents of the "black book of cuts" being developed by the Senate Budget Committee staff and the OMB transition staff now under Stockman. Had the proposed package of reductions been examined, it would have been clear to all that success would be difficult at best under a traditional legislative strategy. It was further agreed that this new economic plan would have to be moved quickly before the new President's "honeymoon" with the press, the public, and Congress was over.

At this dinner two decisions were made that were to have a long-lasting impact on the Ninety-seventh Congress. First, the Republican leaders recognized the need for a new and acceptable parliamentary strategy that would be capable of moving forward the cumbersome legislative package. Second, the administration would have to avoid becoming sidetracked from this program by controversial nominations or by legislative maneuvering on the so-called "social issues," such as abortion, busing, and school prayer. Restoring order to the economy was the first priority. Majority Leader Baker, upon consideration of the Senate's crowded schedule, decided to turn to the social issues only after the economic legislation was passed.

The argument that reconciliation should be the new parliamentary strategy to implement the President's program was made at the dinner by Senator Domenici in an effective and well prepared presentation. He argued that the House and Senate Budget Committees could promote action on the President's legislative agenda by incorporating reconciliation instructions into the revised budget resolution for fiscal year 1981.

One advantage of using reconciliation was that it allowed the "packaging" of substantial reductions in the budget. The reconciliation process allowed the Senate to instruct its committees to achieve particular savings within their respective areas of expertise. The committees then would be given deadlines to report their legislation back to the Budget Committee. The Budget Committee thereafter would combine the various legis-

lative pieces into what is called a reconciliation package and report an omnibus bill to the floor.

Packaging was an advantage because it could be emphasized that all government programs would *equally* be required to make the necessary budgetary sacrifices. The minimum number of votes would be taken for the passage of the omnibus bill, which would reduce the political vulnerability of members of Congress. Packaging also would minimize the exposure of Congressmen to interest groups who could delay or even destroy the process of formulating a new budgetary policy. The schedule of events would be controlled in each House by a central entity—the Budget Committees—rather than fragmented into many pieces and farmed out to various committees. Thus, pressure could be mounted against recalcitrant committees by noting that their attitudes were threatening a bill of major national importance.

Another perceived advantage to reconciliation was that packaging the legislation into a single bill would expedite the legislative process; Congress would abandon its customary practice of considering policies in piecemeal fashion, and would enact the President's plan in one decisive stroke. Timing was an important factor because Republican leaders believed that the President's "honeymoon" with the electorate would be short-lived.

Senator Baker saw reconciliation as a natural follow-up to his efforts to build a Republican team on the issue of the nation's economy. He saw advantage in a "single battle," which would have to take place because of the time and germaneness limitations of the Budget Act. This strategy would reduce the political opportunities available to those who opposed the President and would prevent much of the politicking that could occur on the Republican side of the aisle.

One final element of the reconciliation process made it the overwhelming choice of Baker, Domenici, and the White House leadership: as Stockman had predicted, it had become clear that, regardless of the Senate's support for the President's program, the House of Representatives would not cooperate if Speaker Thomas O'Neill (D-Mass.) had his way. Despite the good-faith efforts of House Budget Committee Chairman James Jones (D-Okla.), there was much political posturing by the House Democratic leadership. The Republican strategists thought that with

any parliamentary strategy other than reconciliation, the economic program would be bogged down by the House leadership without the possibility that the electorate, which was demanding action on the budget, would be agitated. A reconciliation bill, however, could force the House to act. Unlike any other revenue or appropriation measure, it constitutionally could originate in the Senate. When the Senate acted first on the reconciliation package, it would thereby pressure the House to cooperate.

Reconciliation proved to be the decisive strategy. After passage of the President's economic package, Bell and Domenici would tell others that "the most important decision on reconciliation was Howard Baker agreeing to use that as the procedure to carry out the program."

IV. Implementing the Reconciliation Strategy

A. *Building the Team*

As the effects of the spending cuts began to be understood by others in Congress, Senator Baker received many requests to modify the embryonic economic program. Various elements of the program were facing opposition because of their political implications, their legislative complexity, or their perceived intrusion on committee jurisdictions. While Senator Baker sympathized with some of these complaints, he took a more philosophical approach based upon the recent landslide victory of President Reagan. He believed that it was "President Reagan's turn." Although many older "Washington hands" would not have taken so bold a first step, Senator Baker was convinced that once formulated, the economic program would become the centerpiece of the Republican-controlled Senate's legislative efforts to assist the new President.

Senator Baker gradually began to understand that early and aggressive action on the economy would require that Senate Republicans, especially the new committee chairmen, be united in this effort. Almost immediately he began efforts to shore up this group's trust in, and sense of responsibility toward, Budget Committee Chairman Domenici. Senator Baker knew from past budget battles, such as those that had occurred between Sena-

tors Russell Long and Edmund Muskie (D-Me.) during the Tax Reform Act of 1976, that divisiveness among committee chairmen could protract debate on budget matters. In this case, Senator Baker knew that divisiveness could kill the entire economic program.

In the weekly chairmen's meetings, trust and cooperation grew as Senators Baker and Domenici gradually perfected the plan of attack. In these meetings, Baker encouraged Domenici to work with the other chairmen whenever tempers flared or controversies developed over jurisdiction or policy matters. Within a few weeks, this effort was successful in developing an *esprit de corps* among the committee chairmen on the budget issue, thus building Domenici's confidence in both himself and the process of which he was in charge.

In late January 1981, Senator Baker met in his office with Domenici, Stockman, and James Baker. They conclusively determined that reconciliation would be adopted as the approach for implementing the new budget policy. In retrospect, it is apparent that the House leadership, recognizing that the Senate would act first and decisively by using the reconciliation procedures, accepted the fact that the President's program would have to be considered.

B. *Timing the Strategy*

Ordinarily, budget proposals submitted by a president for an upcoming fiscal year are considered by the House and Senate Budget Committees in mid-to-late April, and a comprehensive first budget resolution is reported by these Committees to the floor by May 15. Budget Director Stockman, Senators Domenici and Baker, and some Budget Committee Democrats were not prepared to wait that long to get the ball rolling on the President's program. Instead, Republican leaders formulated a plan for the Senate to offer reconciliation in the framework of a resolution revising the second budget resolution of fiscal year 1981, which was passed in December of 1980.

This revision would contain, at the very least, instructions for the Appropriations Committee to rescind funds already approved for fiscal year 1981 (then in progress), and instructions

for spending committees to make cuts in programs budgeted for the upcoming fiscal years. The instructions, moreover, would contain "sense of the Senate" language calling for committees to proceed with reconciliation changes without waiting for the House to act. The Budget Committee, conceivably, could begin "mark-up," or drafting work, on the instructions in early March, and report the amended second resolution (or, as it was labelled, the third budget resolution for fiscal year 1981) to the Senate floor within one to two weeks. No matter what the House did—and the eyes of the media would focus on the swift action of the Senate—committees would have their spending-reduction instructions by early April.

The Budget Act gives the House Budget Committee until April 15 to report a first resolution on the budget. Assuming the House agreed to a reconciliation bill, the House and Senate Budget Committees would meet in conference to finalize the savings mandated by the instructions. The Budget Committees would "ride herd" over the committees as they attempted to comply with the instructions, and by mid-June would present an omnibus reconciliation bill to the House and Senate floors. The goal was to complete action on the reconciliation bill before the July Fourth congressional recess.

C. *The Public Relations Strategy*

In the few weeks before the initiation of mark-up by the Senate Budget Committee, the administration put together a complete media blitz to focus public attention on the necessity of cutting federal expenditures. This public relations strategy was imperative, given the extent of the cuts. The administration had dramatically reduced the budget that President Jimmy Carter had submitted before leaving office. Indeed, the White House had proposed deep budgetary cuts that incorporated many of the recommendations that were contained in the "black book of cuts" that had been compiled by Stockman and the Senate Budget Committee.

The administration, at the urging of Senators Baker and Domenici, capped the media blitz with a prime time nationally televised speech in which President Reagan predicted economic

disaster if the Congress did not take immediate action in support of his proposed budget. Senators Baker and Domenici, using the political support built by the administration, thereupon spearheaded a Senate effort to expedite consideration of the President's economic program. To the consternation of some conservative groups, they argued that the budget should have priority over all other legislative concerns.

V. Action on the Budget Resolution

A. *The Senate*

Action in the Senate on the budget resolution began in late February, and the Senate Budget Committee began mark-up in the second week of March. The early work that had been done to build a Republican team on the budget issue fostered a spirit of cooperation among the committee chairmen. Further aiding the effort was the fact that many fiscally conservative Democrats supported their Republican colleagues. In particular, Senator Ernest Hollings (D-S.C.), ranking Democratic member of the Senate Budget Committee, played a major role in the initiation of the budget-cutting effort, although he would later come to criticize the Republican program.

The Budget Committee's task of developing reconciliation instructions was made even more difficult than it might have been by the fact that the Reagan budget did not specify where future savings would occur. The Committee's budget showed substantial deficits in fiscal years 1983 and 1984, and the administration did not identify where additional spending reductions would be made. These unspecified spending reductions were referred to as "magic asterisks." They were criticized by Democrats who complained about the high deficits and who accused the administration and Domenici of "hiding" more draconian domestic program cuts.

Another, but less significant, skirmish was fought over whether the Budget Act permitted multi-year reconciliation instructions to be reported for consideration by both the Senate and the House. The Senate Budget Committee overwhelmingly

approved multi-year reconciliation instructions. A February 16, 1981 Committee memorandum concluded that "it would be impossible to achieve the goals of the Act if budgeting were to be pursued one year at a time."

Another problematic issue concerned the type of instructions that were to be given in the resolution to the authorizing committees. Many Senators questioned whether the Budget Committee could require authorizing committees to make budget cuts in discretionary programs. Some believed that such a mandate would make the Budget Committee the "committee of limitations" in the Congress. This became the major parliamentary issue during the debate of the resolution on the Senate floor.

After a short debate, the Senate Budget Committee adopted the reconciliation resolution on March 23, 1981. This measure, Senate Concurrent Resolution 9, revised the second budget resolution for fiscal year 1981 (adopted towards the end of the Ninety-sixth Congress) by imposing reconciliation instructions on fourteen selected committees for fiscal years 1981 through 1983. This resolution would achieve a savings of $36.4 billion in outlays for fiscal year 1983.

Passage of the reconciliation resolution in the full Senate became the next priority. The Republican leadership consequently commenced the political maneuvering that would be required. On the Senate floor there were many amendments to restore funds to domestic programs, from veterans' services to child nutrition, that had been cut back by the committees in support of the President's new program. Some Senators, although intending to support the President on the final budget vote, sought to curry favor with a large number of special interest groups that were seeking to ensure funding in their particular areas of interest. Most of the amendments, however, were defeated by significant margins. It had become clear to all that the defeat of these amendments was necessary to prevent the President's program from becoming a shambles.

Senator Baker had repeatedly stressed in the weekly chairmen's meetings and in other private meetings concerning this legislation that it was important for Republicans to stick together on these very controversial issues because the "perception of whether Republicans could govern the country was ultimately

at stake." This argument, along with the desire of all Republican Senators to be a part of the "President's team," struck a responsive chord.

The most controversial issue during the floor debate of the resolution was whether its instructions could require changes in authorizing legislation. The budget resolution instructed committees to make cuts in authorizations. Authorizations, unlike appropriations, entitlements, and other forms of direct spending, do not provide an agency with funds. They are the substantive laws that create programs and establish the policies governing their operation. In a budgetary sense, authorizations sanction the subsequent appropriation of funds for specified purposes and set an overall limit on financial commitments. Since Congress had set in motion a budgetary policy which mandated large spending reductions, but exempted defense spending and "social safety net" entitlements from these cuts, it was imperative to reduce spending in the discretionary programs normally funded by annual appropriations. However, if reconciliation was limited to reducing expenditures through changes in existing law, it would have been impossible to obtain cuts in discretionary programs since the appropriation laws had not been enacted. Prospective cuts in discretionary programs, therefore, could be made only if the authorizations sanctioning future appropriations were reduced. Reductions in authorizations accounted for more than two-thirds of the savings required under reconciliation.

The Senate Republican leadership and the White House were extremely concerned about a potential floor fight over these instructions. This battle would be sure to slow the momentum that had been built behind the economic program. It also would provide those who wished to defeat the program an opportunity to vote against the program for reasons that would not be understood by the press and the general public.

Both Martin Gold, counsel to the Majority Leader and an expert on parliamentary procedures, and the staff of the Senate Budget Committee had informed the Senate Republican leadership that the Senate Parliamentarian would advise the Senate that the language in the instructions would be out of order. The offending phrase was a direction to committees "to modify programs." The Parliamentarian felt that such specificity violated

the requirements of the Budget Act. The Majority Leader wanted to avoid, at all costs, an easy "up or down" vote on the parliamentary ruling. Thus, the staffs of Senators Baker and Domenici began an effort to work out with the Parliamentarian acceptable language that would avoid a floor confrontation. The negotiations produced a modified instruction that deleted the offensive language. The revised instructions required authorizing committees to change entitlement laws and "to report changes in laws within the jurisdiction of that committee sufficient to reduce appropriations levels so as to achieve savings."

After he received the modified instructions, Senator Baker went to the Senate floor. To facilitate Senate consideration of the reconciliation legislation, the reconciliation instructions embodied in Senate Concurrent Resolution 9 were incorporated into the first budget resolution for fiscal year 1982. The Senate approved the first resolution on April 2, 1981, by a vote of 88–10. Immediately after passage, the Senate committees began work on meeting these instructions. This occurred even before the House took any action on reconciliation. Republican Senators hoped that this Senate activity would force the House to move forward on this matter.

After the floor vote, Senator Hatfield, Chairman of the Senate Appropriations Committee and a vocal opponent of this new exercise of authority by the Budget Committee, sought to have the Parliamentarian clarify his judgment that removal of the language "to modify programs" made the resolution clean on its face. Senator Hatfield contended that the Parliamentarian's focus on the language and not the results of the language had allowed the fusion of "two very fundamental rules of Senate committees into one committee action [consideration of spending legislation and consideration of discretionary program authorization]." "Some of us," Hatfield remarked, "perhaps were not aware that this kind of power could be exercised by the Budget Committee."[4]

Looking back at the debate over the instructions, Parliamentarian Dove comments: "There were a number of hard decisions to be made; one of which was to advise the Budget Committee that its legislative instructions as worded were not in order. The

[4] 127 CONG. REC. S2753–56 (daily ed. Mar. 26, 1981) (statement of Sen. Hatfield).

Committee subsequently modified those instructions as a result of that advice. I also advised the Chairman of the Appropriations Committee through the Chair that one year reconciliation was not precluded by the Budget Act, and therefore a point of order would not lie. That was a hard decision."

Keith Kennedy, Staff Director of the Senate Appropriations Committee, remembers the Hatfield confrontation with the Parliamentarian. "We weren't exactly pleased with the way things were developing on the floor. The flair was there, but the Chairman still supported the resolution, because, by God, he wanted to be on the team."

B. *The House*

House action on the budget resolution was not placed on the "fast track," because House Budget Committee Chairman Jones preferred to move according to the customary schedule. There were two principal high points in the House consideration of the first budget resolution. The first was the formulation of the Gramm-Latta Amendment. The Amendment was seen as the major alternative to the Budget Committee proposal, and had the backing of the administration, since it implemented most of the President's recommendations. When this substitute did not prevail in Committee, the scene was set for a major confrontation between the President and the House of Representatives. On April 28, 1981, a few days before the House considered the resolution, President Reagan entered the fray by addressing a joint sesssion of Congress and by calling for approval of the Gramm-Latta substitute as the responsible proposal that would lead America back to economic stability. The public's response to the President's address was nothing short of phenomenal, with many congressional offices receiving hundreds of telephone calls supporting the President. On May 7, 1981, after a complicated debate which considered several other substitute bills, the Gramm-Latta Amendment was approved by a seventy-seven vote margin (253–176).

The second high point of the House deliberation concerned instructions on discretionary authorization. The fears of the authorizing and appropriating committees in the House were

even greater than those of the corresponding Senate committees. Representative Jones had not wanted a resolution that contained instructions on discretionary authorization, even though he supported reconciliation in principle. House critics of reconciliation charged that the Ninety-seventh Congress was dismantling years of hard-fought legislation by using the reconciliation process. "This is an incipient tyranny. A popular President is attempting to tyrannize a whole Congress, a whole people," said Representative Richard Bolling (D-Mo.), Chairman of the House Rules Committee.[5] Notwithstanding this criticism, under the Gramm-Latta substitute, the House instructed its committees to cut authorizations as well as regular expenditures and appropriations.

On April 16, 1981, the House Budget Committee reported House Concurrent Resolution 115, which contained reconciliation instructions for fiscal years 1982–1984. The resolution was passed in the House on May 7, 1981. Meanwhile, in the Senate, the Budget Committee reported Senate Concurrent Resolution 19, the first budget resolution for 1982, on May 1, 1981, and the Senate passed the measure on May 12, 1981. This resolution incorporated the reconciliation instructions of Senate Concurrent Resolution 9 for fiscal years 1981–1983, which the Senate had adopted previously, and added further instructions for fiscal year 1984. The House and Senate reached a final agreement on the conference report on May 21, 1981, instructing fifteen House and fourteen Senate committees to submit recommendations.

VI. Eliminating Extraneous Items and Pet Projects

With the budget plan now finally in place, committees in the House and in the Senate worked feverishly to meet their reconciliation instructions. At this point it became apparent, particularly to the committee chairmen, that reconciliation could become the best single vehicle for moving "pet" legislative projects. Items included in the reconciliation package would be protected under the time limitations and germaneness requirements of the Budget Act. Many of the committees consequently

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[5] Roberts, *Rules Chairman Says Reagan Uses Budget as a Method to Tyrannize*, N.Y. Times, June 17, 1981, at A25, col. 1.

added new budgetary provisions that they believed Congress would never approve unless sheltered under the umbrella of reconciliation.

Weighing against the acceptance of these pet projects, however, were the drastic reductions in spending that had to be made by the committees. These reductions required major policy changes. Many of the categorical grant programs simply could not be sustained with such a low cash flow. Further complicating this task of cutting expenditures was the fact that there were major philosophical differences in how the changes to meet the self-imposed budget constraints were to be made, particularly in those domestic programs involving health and human services. Both the Senate Republican leadership and the White House wanted to create a series of block grants to the states that would result in the elimination of a number of categorical grant programs in education and in health services, but the block grant idea faced strong resistance in the Senate and House committees. Meanwhile, the public was demanding that the budget constraints be met, so these committees attempted to make the peg fit the hole.

The use of the reconciliation process by some of the Senate committees to include funding for pet programs ultimately led to a confrontation on the Senate floor. On June 16, 1981, Majority Leader Baker met with Senator Robert Byrd (D-W.Va.), the Minority Leader of the Senate, to discuss the issue of extraneous matters which were contained in portions of the Omnibus Reconciliation Act (S. 1377). Senator Baker believed that if this problem were not addressed, floor consideration of the package would be delayed or possibly terminated. He and Senator Byrd agreed to try to work out a joint leadership amendment to remedy the problem. The Senate leaders asked the Senate Budget Committee staff to identify extraneous provisions in the reconciliation bill. In making the review, the Committee used the following criteria to determine if a provision was "clearly extraneous":

> (1) Provisions which have no direct effects on spending and which are not essential to achieving savings.
> (2) Provisions which increase spending and are not related to savings provisions.
> (3) Provisions which extend authorizations without saving money, and are not related to savings provisions.

(4) Provisions which invade another committee's jurisdiction, whether or not they save money.

The Senate Budget Committee staff concluded that eight of the thirteen titles presented no difficulties, but that problems did exist in the remaining five titles. Thus, nearly half of the committees had attached riders to the reconciliation vehicles.

It also was becoming apparent to the Senate leadership that some of the Senate committee chairmen intended to fight to keep the extraneous riders which they had attached to the reconciliation bill. Despite these chairmen's objections, an amendment was drafted by Senator Baker that would eliminate the extraneous riders. S. 1377 had been reported by the Senate Budget Committee on June 17, 1981. Consideration of S. 1377 by the full Senate began on June 22, 1981. The first order of business was the Baker Amendment, which was adopted easily. This Amendment was approved following a compromise between Senators Baker and Byrd which allowed those Senators interested in seeing extraneous provisions attached to the bill to let their provisions be deleted by the leadership amendment if they could offer them again on the Senate floor as amendments to the omnibus bill.

The omnibus bill consisted of the legislative recommendations from all fourteen committees pursuant to section 302 of the budget resolution. The Budget Committee, in accordance with the Budget Act, had compiled the recommendations into a single omnibus bill. When the bill was considered between June 22 and June 25, 1981, thirty-four amendments were added to the measure.

Most of the amendments—other than those relating to the Baker Amendment—raised the same issues that had been debated earlier during consideration of the budget resolution. Several Democrats offered politically popular amendments seeking to restore funds in the reconciliation bill, but a coalition of Republicans and conservative Democrats held the line and forced the Senate to adhere to the limitations required in the budget resolution. This struggle did raise, however, a still unanswered question: Would the use of the reconciliation process result in the Senate considering the same issues several times in completing its budgetary responsibilities—during debate on the budget resolution, again during consideration of the recon-

ciliation bill, and again in the context of debate on the relevant appropriations bill?

On June 19, 1981, H.R. 3982, a bill containing the legislative recommendations from each of the fifteen House committees, was reported from the House Budget Committee. Like its counterpart in the Senate, the House Budget Committee assembled its reports, with significant revisions, into an omnibus bill. On June 18, the Chairman of the House Budget Committee introduced H.R. 3964, an alternative reconciliation bill. This measure was identical to H.R. 3982 except for some minor changes.

The House began consideration of the reconciliation bill on June 25, 1981. Prior to the actual debate on the bill, however, members of the House engaged in substantial procedural and substantive posturing. The House Rules Committee reported out H. Res. 169, a "rule" that attempted to substitute its own version of a budget bill and attach to that version various amendments and procedural measures.

The version of the rule put before the House by the Rules Committee was rejected, but H. Res. 169 later was adopted in amended form. This amended rule made H.R. 3964 in order as an amendment in the nature of a substitute, omitted some proposed modifications, and allowed other amendments to be offered. The amended rule also permitted a motion to recommit, with or without instructions.

On June 26, 1981, the House adopted the amendment (the text of H.R. 3964) in the nature of a substitute, as modified by the amendments proposed by Representative Delbert Latta (R-Ohio). Then the House passed the bill, H.R. 3982, as amended.

H.R. 3982, as passed, contained sixteen titles. All fifteen titles of H.R. 3964 were incorporated into H.R. 3982 as passed, but titles I, III, V, X, XII, and XV were revised by the Latta Amendments. The Latta Amendments also added a new title, Title XVI, relating to block grants.

VII. The Reconciliation Conference

The completion of work on their budget packages by both the House and the Senate raised the issue of whether to bring the packages to conference. The passage of the Gramm-Latta sub-

stitute was a major accomplishment for the administration and House Republicans. The process, however, had been difficult. The passage had involved innumerable political commitments by those seeking approval of the Gramm-Latta substitute. It also required the formation of fragile voting coalitions; many planners, particularly David Stockman, did not believe these coalitions would endure or could be rebuilt for the vote on the conference report. Consequently, the administration undertook a major campaign to persuade the Senate to accept the House bill.

Many Senators, however, felt the Senate had passed a better bill. On July 17, 1981, the President called Senator Baker and urged that he accept the House version. Senator Baker agreed to assess the possibilities of the House bill passing in the Senate.

The following day, Majority Leader Baker called an emergency meeting of the committee chairmen to discuss the President's request. He discovered that the chairmen had information that many House members had been relying on a conference to correct errors and omissions in the hastily prepared House bill. Moreover, the chairmen told Senator Baker that they believed that in almost every respect the Senate bill was closer to the President's proposed program. In a dramatic vote, the chairmen unanimously decided that the Senate would go to conference. Their choice was made easier when Martin Gold discovered a 1916 precedent holding that if a conference failed, the option remained for the House with the conference papers to accept the other House's version of the bill.[6]

The result was the largest legislative conference in history. It involved seventeen House committees and thirteen Senate committees; 184 House members and 72 Senate members participated. To enhance the likelihood of the conference's success, it was agreed by the participants that some ground rules should be adopted. Congressman Michel, House Minority Leader, informed Senate Majority Leader Baker that the House Democratic leadership would not obstruct the conference. Senator Baker therefore proposed to House Speaker O'Neill a set of

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[6] 53 CONG. REC. 10,409, 11,123 (1916); *see* F. RIDDICK, SENATE PROCEDURE: PRECEDENTS AND PRACTICE, S. DOC. NO. 2, 97th Cong., 1st Sess. 381 (1981).

conference rules and a series of "Leadership Understandings" to expedite consideration of the budget bills.

The conference rules and the leadership understandings underscore the complexity of the problems inherent in such a large conference.

RULES FOR RECONCILIATION CONFERENCE

1. Budget Committee conferees are general conferees. They may attend and vote in any of the sub-conferences.
2. Proxies are permissible.
3. Sub-conference members may vote on only those issues within the sub-conference for which they were appointed.
4. Sub-conferences will be convened by the responsible House committee chairmen.
5. The conference agreement should be limited to matters in either the Senate or House bills or related therein.
6. Each sub-conference will prepare its portion of the joint statement of the managers and the legislative language to be included in the conference report.
7. All provisions agreed upon by the conferees will be priced by the Congressional Budget Office. Sub-conferences are therefore urged to work closely with CBO from the outset. Scoring will follow the same conventions that were used by CBO in the scoring of the House and Senate reconciliation bills.
8. Signature sheets and language for the conference substitute and the joint statement of managers will be collected by the House and Senate Budget Committees staffs and assembled by those staffs in conjunction with the House and Senate Legislative Counsel.
9. The conference will not be concluded until a majority of the general conferees from the House and the Senate sign the conference report in their capacity as general conferees.
10. All sub-conferences are requested to notify the appropriate House or Senate Budget Committee in advance as to the time and place of sub-conference meetings. If possible, notice should be 24 hours prior to sub-conference meetings. House and Senate Budget Committees will post sub-conference schedules in a prominent place.

LEADERSHIP UNDERSTANDINGS

1. The Senate will amend the House bill with an amendment in the nature of a substitute.
2. A majority of the conferees appointed for each sub-conference will be members who supported the reconciliation bill on final passage.

> 3. Sub-conferees will not reopen provisions which are the same in both bills and are urged to agree on substantially identical provisions.
> 4. The leadership of both Houses will make every effort to get conference agreements on all issues, as quickly as possible.
> 5. Assuming that the conference reaches full agreement on a conference substitute, the House leadership will support a rule which moves the conference report in order and waives all necessary points of order.

The most significant controversy at this point was deciding exactly what authority "general conferees" from the Budget Committee had under Rule 1. Thus, the jurisdictional conflict again surfaced concerning the implied authority of the Budget Committee to oversee the affairs of the other committees under the Budget Act. A floor colloquy between Senators Packwood and Domenici, however, ended the conflict; the general conferees would be permitted to participate in a sub-conference only at the request of the chairman of that sub-conference.

With these agreements in place on July 13, the Senate passed H.R. 3982, after substituting the text of S. 1377 for the text of the House-passed bill, and requested a conference with the House. The following day, the Senate agreed to a motion instructing Senate conferees to insist that a particular funding level for the Head Start program be included in the conference report on the bill.

On July 15, the House disagreed with the Senate amendment to H.R. 3982, agreed to a conference, and adopted a motion instructing the House conferees on a provision relating to the authorization for Home Energy Assistance Block Grants.

The conferees, meeting in 58 sub-conferences, worked from July 15 through July 28 and submitted a conference report on July 29, 1981.

In the House, the conference report on H.R. 3982 was considered July 31 under a "rule" (H. Res. 203) which also made in order the consideration of H.R. 4331, a measure to amend H.R. 3982 to restore the minimum social security benefit. The House adopted H. Res. 203, then passed H.R. 4331 and agreed to the conference report. On the same day, following the House action, the Senate agreed to the conference report, thus clearing the measure for the President's signature. The Senate also sus-

tained the Chair (Senate Parliamentarian Dove) in ruling that a motion to proceed to consider H.R. 4331 was not in order. Then, on August 13, 1981, President Reagan signed the budget bill into law.

VIII. CONCLUSION

Today, reconciliation remains one of the most controversial and least understood legislative developments in recent history. Many knowledgeable experts on the budget process have criticized the reconciliation process. Stuart Eizenstat, former chief domestic policy advisor to President Carter, has written that "reconciliation is exactly what Congress sought to avoid: undermining the role of its authorizing and appropriating committees and creating laws with inadequate consideration of the consequences."[7] Congressman Richard Bolling and his assistant, John E. Barriere, both of whom worked on the 1974 Budget Act, wrote in 1981: "If the administration's insistence that it have its own way and at once through the reconciliation process continues, it will be a gross distortion of the intent of those who wrote the Constitution and the Bill of Rights, as well as the intent of the 1974 Budget Act."[8]

Former Senator Abraham Ribicoff (D-Conn.), however, viewed the process differently. In 1981, he observed, "The way the budget process is working this year is how it was intended to work when the legislation was passed."[9]

Budget Director David Stockman is hopeful about the continued usefulness of the reconciliation process. "It's a trial and error process which has been going on for three years," he says. "The third year was most successful; we had a better system. We learned this year that reconciliation works on the revenue side as well as with outlays, but we should concentrate less on savings and more on compliance. Reconciling authorizations just doesn't work—there are too many numbers, people, and programs."

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[7] Eizenstat, *The Hill's Budget Stampede*, Wash. Post, June 21, 1981, at C1, col. 1.

[8] Bolling & Barriere, *Budget-Making Gone Awry*, Wash. Post, June 28, 1981, at D7, col. 1.

[9] Kaiser, *Budget Reconciliation Has Potential to Shift Power in Government*, Wash. Post, June 14, 1981, at A9, col. 4.

Stockman's opinion accords well with the viewpoint of the Appropriations Committee's staff. "Part of the glibness of the reconciliation process," says Appropriations Staff Director Kennedy, "was that you could vote for it because it did not mean anything. You're dealing with these big issues and big numbers, but that doesn't tell you anything about the grant back home in your district or interstate transfer money. I think the appropriations process has been badly damaged by reconciliation, but in a way that's not going to become apparent right away. Reconciling out-year discretionary programs is phony, the numbers are phony. They are subject to whatever adjustments staff can convince people to make, based on whatever economic assumptions people are willing to dream up." "We were naive," admits Kennedy, "but we felt we didn't need this strait jacket. We felt that we were part of the team, and we knew we could produce results."

"As this process evolves," says Stockman, "we will not have to lean as hard on the Appropriations Committee." He noted the difficulty of putting a budget together in the Senate and characterized it as "a most frightening experience." "Here at OMB," he continued, "I can put together a budget, and if I do not like a number I can order 600 people to put another one in. In the Senate, there are 100 individuals with sometimes 100 different numbers."

Whether reconciliation was, and still is, a boon or a bane to the budget process is unclear, but three elements of the reconciliation story are evident. First, the Ninety-seventh Congress unleashed a powerful legislative tool that operated under Republican control in 1981, but that could be used by either party in the future. Second, the dramatic events surrounding the budget process during the last two years will no doubt usher in a wide range of reforms from members on both sides of the aisle. Third, regardless of specific changes, Congress will remain under pressure to "live within its checkbook" in an era of fiscal restraint and of public dissatisfaction with burgeoning deficits.

Perhaps the most disarming issue facing the Ninety-eighth Congress is whether the Congress will be able to balance institutional concerns and economic imperatives. There is no doubt in anyone's mind that had the reconciliation process not been used in 1981, the federal deficit would be a great deal larger

today. Generally, reconciliation proved an effective, productive, and almost magical tool. It afforded Congress the ability to consider the entire budget and to depart from the piecemeal approaches of the past. But on another level, reconciliation engendered controversy, undermined traditional relationships, and fueled tensions, sometimes at a significant cost. With future projected deficits looming at unprecedented levels, the stage is clearly set: institutional priorities and practices will be pitted against the desire, on the part of members of both parties, to gain control of an ever-growing and self-generating federal budget. Many will argue that reconciliation does not afford the time so essential to policy formulation and decisionmaking, but others will claim that there is simply too much to do, with too little time in which to do it.

Senate Budget Committee Chairman Domenici, in testimony before the Government Affairs Committee, stated that:

> Congress has emerged from its experience with reconciliation with committees infinitely wiser and more sensitive to the fiscal policy impact of their legislative decisions. Acting together we have demonstrated that we can transcend the parochialism that all too often characterizes the committee system, and working together, we have achieved a measure of fiscal discipline that we could not achieve alone.[10]

Such was the case for budgetary management in the Ninety-seventh Congress; such will be the grounds for debate in the Ninety-eighth.

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[10] *Review of the Reconciliation Process: Hearings Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 5 (1981) (statement of Sen. Domenici).

ARTICLE

FEDERAL REGULATION OF CONSUMER DISPUTES IN COMPUTER BANKING TRANSACTIONS

MARK E. BUDNITZ*

In response to the increased use of electronic fund transfers, Congress enacted the Electronic Fund Transfer Act (EFTA) while the Board of Governors of the Federal Reserve promulgated a set of regulations entitled Regulation E (Reg. E). Reg. E contains model notices, which, if sent to the consumer in substantially similar form, protect the financial institution from liability under the EFTA.

Professor Budnitz illustrates the types of errors that can occur in electronic fund transfer systems and outlines the provisions of the EFTA and the model notices which address those errors. He explores the inconsistencies and ambiguities of the EFTA and of the model notices which, Professor Budnitz argues, create uncertainty and abuse that affect all the parties involved in EFT transactions. Professor Budnitz proposes specific revisions in the regulations designed to improve the EFT error resolution procedure and emphasizes the need for change in the current regulations before they are utilized to construct error resolution procedures for other types of financial transactions.

In the past few years, consumer use of the electronic fund transfer (EFT) system has increased dramatically. Millions of people deposit and withdraw cash from automated bank tellers,[1] pay their bills by computer, and authorize the electronic deposit of their wages or Social Security benefits[2] into their bank accounts.[3] In response to this increased use of EFTs, Congress

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[1] A 1981 study conducted by Payments Systems, Inc. estimated that there were 20,000 Automated Teller Machines (ATMs) in operation in 1980, and predicted that there would be 54,200 by 1985 and 71,000 by 1990. In 1980, 14% or 11 million of the nation's 80 million households were using ATMs. The study also estimated that 880 million transactions occurred on ATMs during 1980. Cox, *Prospects for Automated Tellers 1981 - 1990*, AM. BANKER, June 2, 1981, at 16.

[2] By the end of 1980, 31% of all monthly Social Security payments, totalling 10.3 million payments, were made through electronic direct deposits. The United States Treasury Department predicts that participation will increase to 55% by 1985, and to 80% by 1990. Hyman, 18 BANK SYS. & EQUIP., May 1981, at 20.

[3] For the purposes of this Article, the term "bank" will have the same meaning as, and will be used interchangeably with, the term "financial institution," despite the fact that the latter term may include credit unions, savings and loan associations, and other organizations.

passed the Electronic Fund Transfer Act (EFTA)[4] while the Board of Governors of the Federal Reserve System (FRB) promulgated a set of regulations designated Regulation E (Reg. E).[5] The focus of this Article is on one of the most crucial aspects of government involvement in this field: the mechanism for the resolution of EFT errors.

The EFTA[6] and Reg. E[7] have established a procedure that is triggered by a consumer's notification to his bank that an error has occurred or a request for documentation, information, or clarification regarding a funds transfer. When the bank receives notification of an alleged error from the consumer, it is required to investigate the allegation and promptly correct any error that it has committed.

Despite the apparent simplicity of this procedure, there are, as this Article will illustrate, many difficulties in applying and in construing Reg. E. There are three reasons why it is important to resolve the difficulties inherent in Reg. E. First, financial institutions, consumers, payors, and vendors need to know how to interpret Reg. E in order to ascertain the rights and duties of each party. Second, the FRB has recommended to Congress that the error resolution procedures for both EFT and credit card transactions should be made as similar as possible.[8] Therefore, it is imperative that the problems with the current EFT procedure be corrected before they are duplicated in the procedures for credit card transactions. Third, the Permanent Editorial Board for the Uniform Commercial Code has authorized one of its committees, the 348 Committee, to explore the advisability of promulgating a "New Payments Code" that would establish comprehensive rules for all payment systems including EFT.[9] The reporter for the 348 Committee has suggested that the committee consider extending the formal error resolution

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[4] 15 U.S.C. §§ 1693–1693r (1976 & Supp. IV 1980).
[5] 12 C.F.R. § 205 (1982).
[6] 15 U.S.C. § 1693f (1976 & Supp. IV 1980).
[7] 12 C.F.R. § 205.11 (1982).
[8] *To Amend the Electronic Funds Transfer Act, 1979: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. 6 (1979) (statement of Nancy Teeters, Governor, Board of Governors of the Federal Reserve System) [hereinafter cited as *Hearings, Electronic Funds Transfer Act*].
[9] Haydock, *The 348 Committee--An Interim Report*, 2 COMPUTER L.J. 27 (1980).

procedure to transactions that employ the use of checks.[10] It would be unwise for Congress or the 348 Committee to use Reg. E's error resolution procedure as a model if the regulation does not satisfactorily deal with EFT.

Given the extent to which the EFT error resolution procedures have, or will have, effects upon consumers, institutions, and the entire body of law encompassing error resolution procedures in EFT and other payment systems, this matter deserves thorough examination and comment.

Section I of this Article describes the four most prevalent types of EFT transactions. With that description as background, Section II discusses the ways in which EFT errors can occur and the consequent need for an error resolution procedure in the EFT system.

Section III evaluates the reasonableness of the rights and obligations established by Reg. E's error resolution process by examining the legal relationships among the consumers who use the EFT services, the banks that provide these services, and the government that regulates such services. This examination shows that the regulatory scheme is consistent with the consumer's legal interest in the funds employed in the EFT transfer, the legal relationships among the parties to EFT transactions, and the active participation of the government.

Section IV contains an analysis of the notice that the financial institution is required to send to the consumer who uses the EFT system. This analysis first discusses the efficacy of consumer notices in general and addresses the question of whether notices do, in fact, achieve their purpose. Despite some evidence to the contrary, the discussion demonstrates that notices are an important vehicle for consumer protection and that requiring them for EFT systems is therefore beneficial. As an extension to this discussion, the matter of "information overload" is considered, for the ultimate value of various notices will turn on whether the consumer ignores the notices, because they contain too much information for the consumer to assimilate. This Section concludes that the prospect of information overload is not serious enough to warrant automatic opposition

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[10] H. SCOTT, NEW PAYMENT SYSTEMS: A REPORT TO THE 348 COMMITTEE OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 182 (1978).

to proposals to add information to the present notices. Section IV then turns to the detailed notice provisions of Reg. E. It examines the long form initial and annual notice, the periodic short form notice, and the notice required after the consumer reports an error. The omissions and difficulties inherent in each of these notices are detailed and suggestions are made for their improvement.

Section V of the Article discusses who is authorized to report EFT errors to the financial institution, what constitutes an "error," and what information must be reported by the consumer to the bank. It is found that the present regulation does not adequately protect the consumer. The authorization to report errors is much too uncertain to guard against numerous problems that might develop. The definition of an error also is deficient due to the narrow construction given to it by the FRB. The amount of information that must be reported is likewise unclear because different legal authorities mandate varying degrees of disclosure.

Section VI describes the inadequacy of the investigation process that is triggered once the consumer reports an error to the bank. The responsibility of the bank to inquire into the error only within its "four walls" may be inadequate because the bank may be more capable than the consumer of discovering the origin of the error outside the bank's four walls, and because the initial and periodic notices sent to the consumer do not inform him of the limited bank investigation. The Section examines the regulation's recrediting provision, which requires that the bank recredit the consumer's account in the disputed amount, but finds that it does not sufficiently protect the consumer due to the various exceptions to the recrediting that relieve the bank from responsibility. The present recrediting provision also could lead to consumer abuse. The notice to the consumer concerning the bank's determination of its investigation is also found to be deficient. The notice may be so incomplete as to be worthless. The charges by the bank to the consumer for the investigation are also examined. Regulation of the charges is lacking in that neither the statute nor the regulation addresses the possibility that the bank charges might be excessive.

Section VII of the Article presents the conclusion that the present error resolution procedure for electronic fund transfers

should be revised in order to provide the EFT consumer and the financial institution with an effective error resolution procedure. If revised, the error resolution procedure could be a useful foundation upon which to structure a uniform approach for the resolution of errors in all consumer payment systems.

I. A Brief Description of EFT Systems

The EFTA regulates four major types of EFT systems. Each system has unique characteristics and participants. A consumer may participate in as few as one or as many as all four systems at the same time.

The first type of EFT system is one that employs Automated Teller Machines (ATMs). This is the most popular and most visible of the four systems. The ATMs perform many of the tasks of human bank tellers. The system is activated when the consumer inserts a magnetically encoded plastic card into the ATM and types in a secret code called the Personal Identification Number (PIN).[11] Once activated, the ATM can receive deposits, transfer funds between checking and savings accounts, disburse cash, and inform the consumer of his current account balances.

The second type of EFT system is called point-of-sale (POS). These are less prevalent than the ATM systems. The consumer uses POS when he purchases goods from a store. If the consumer and the store have accounts at the same bank, POS would involve three parties: the consumer, the store, and the bank. If the parties have accounts at different banks, a transfer of payments would involve a network switch.[12] Instead of paying with currency, check, or credit card, the POS consumer uses a bank-issued plastic card, often called a debit card. This card resembles an ordinary credit card, and the consumer in some instances can use the same card as both a credit card and an EFT debit card.[13] The data from the magnetically encoded card is trans-

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[11] Mittelsteadt, *The Stop Payment Right in an Electronic Payment Environment: An Analysis of the Transition Problems Involved When Integrating a Traditional Right into New Value Transfer Systems*, 17 New Eng. L. Rev. 355, 411 (1982).

[12] A. Bequai, The Cashless Society: EFTS at the Crossroads 32 (1981).

[13] *Hearings, Electronic Funds Transfer Act*, *supra* note 8, at 401.

mitted over telephone lines to the bank's computer together with the information supplied by the store, such as the date and amount of purchase.[14] If the bank's computer ascertains that there are adequate funds in the consumer's account, it authorizes the sale, immediately debits the consumer's account, and credits the store's account at a later time.[15]

The third system is the direct deposit system. This system allows millions of people to have their wages, private pensions, interest and dividends, as well as Social Security and other government benefits, transferred directly into their personal bank accounts. This system utilizes an automated clearinghouse (ACH) to transfer funds from one party's financial institution to another party's institution. Participation in the ACH is governed by the rules of a private association.[16] All but one ACH are owned and operated by the FRB, but probably few consumers are aware of the ACH and FRB's integral role in running the direct deposit system.[17] The payment of wages illustrates the operation of this system. The employer prepares a magnetic tape that identifies employees, their banks, and the amount of funds to be deposited in those banks.[18] The employer then sends the tape to its bank for necessary processing. The bank then sends the tape to the ACH, which prepares for the bank a magnetic tape or printed sheet for each employee. On the day the employees are paid, the employer's account is debited and the employees' accounts are credited.

The fourth system is an electronic bill payment system. It is engaged when the consumer signs an agreement authorizing his bank to pay certain creditors upon their submission of a bill to the bank. The system is used to pay recurring obligations such as rent, insurance premiums, and utility bills. When the bank receives a request for payment from a creditor, the bank debits

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[14] A. BEQUAI, *supra* note 12, at 32.

[15] H. SCOTT, *supra* note 10, at 10.

[16] Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 782 (1978).

[17] If the consumer has an account at a credit union, a savings and loan association, or a small commercial bank, an additional party to the transaction may be involved without the consumer's knowledge. Typically, the small institution will contract with a large commercial bank to receive the transfer from the ACH. The large bank then routes the payment to the consumer's bank. Leymaster, *Electronic Banking and the Poor: On the Short End of an Expensive Stick*, 14 CLEARINGHOUSE REV. 721, 722 n.7 (1980).

[18] Grandstaff & Smaistrla, *The Payments Mechanism—A Primer on Electronic Funds Transfer*, FED. RESERVE BANK OF PHILADELPHIA BUS. REV., Sept. 1976, at 7, 9.

the consumer's account in the amount of the bill and sends the data showing which account was debited, and in what amount, via the ACH, which transfers the funds to the creditor's bank.[19] The payment of bills by telephone operates in a similar fashion. The consumer first authorizes his bank to pay certain companies with which he does business. The companies send their bills to the consumer, who calls the bank and authorizes payment. Touch-tone telephones eliminate the need to speak to anyone except the bank's computers.[20]

II. How EFT Errors Occur and the Need For an Error Resolution Procedure

A. *EFT Errors*

In order to comprehend the situations in which a consumer may need to use the error resolution procedure, it is necessary to understand both the types and causes of errors that can occur in EFT systems. This understanding also helps to evaluate the wisdom of the specific disclosures and procedures that EFTA and Reg. E require. The following section describes some of the errors that can occur as a result of EFT.

One type of error can be caused by ATM malfunction. The cash dispenser can provide the consumer with less cash than requested, while recording a larger amount than is actually paid out.[21] The receipt mechanism can malfunction, so the consumer would have no record of the transaction. The receipt can be vital if a dispute arises between the bank and the consumer. The ATM also can fail to record the proper information on the deposit envelope.[22]

Another type of problem can occur if an unauthorized person uses an EFT card. A lost or stolen EFT card creates the potential for unlawful use, especially if the consumer writes his PIN on his card or carries his PIN elsewhere on his person. Clever criminals have duped consumers into allowing them to use the

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[19] A. Bequai, *supra* note 12, at 37; Mittelsteadt, *supra* note 11, at 418.
[20] A. Bequai, *supra* note 12, at 38.
[21] McEvans v. Citibank, 96 Misc. 2d 142, 408 N.Y.S.2d 870 (N.Y.C. Civ. Ct. 1978).
[22] *Id.*

consumer's EFT cards on the pretext of using their card to repair a malfunctioning ATM.[23] In Atlanta, a thief posed as a policeman and tried to obtain a consumer's secret code.[24] ATMs are also subject to abuse by bank employees.[25] Some criminals have developed a technique to "skim" the data from the card's magnetic strip and transfer it onto a second card.[26] Others use a device called a "spoofer" that can be inserted into ATM communications lines to cause the ATM to discharge money into the cash dispenser.[27]

Problems also can result from breaches in the security of POS systems. The lost or stolen card is one example. POS also presents opportunities for store employees to misuse the system.[28] Thieves have mastered the art of stealing credit cards[29] or of producing their own counterfeit cards.[30] They may work with stores that make out phony sales slips and send them to card-issuing banks, which would honor the slips. In 1980, 200 banks lost an estimated fifteen million dollars as a result of such activities.[31] Other persons may be able to perpetrate similar crimes using POS debit cards by coordinating their activities with a bank employee who has access to PINs.

Errors can also occur in both preauthorized bill payment and in direct deposit systems. Social Security recipients have encountered errors when they switched from payment by check to payment by EFT.[32] Businesses have complained of frequent errors made by ACHs both in payroll and in bill-paying transactions.[33]

Certain types of problems can occur regardless of which type of EFT transaction the consumer engages in because all EFT

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[23] Ognibene v. Citibank (N.Y. Small Cl. Ct. 1982), *discussed in* N.Y.L.J., Jan. 11, 1982, at 13; Trigaux, *Who's Liable in Teller-Machine Scam?*, AM. BANKER, Nov. 9, 1981, at 1, col. 1.

[24] Ashkinaze, *Victim of Credit Card Theft Helps Cops Nab Suspect*, Atlanta Const., Dec. 2, 1981, at 1-A.

[25] A. BEQUAI, *supra* note 12, at 35.

[26] *Id.* at 36.

[27] *Id.*

[28] *Id.* at 33.

[29] The Nilson Report No. 270, Oct. 15, 1981, at 8.

[30] *Designer Jeans Expose White Plastic Fraud*, COMPUTER WORLD, Mar. 16, 1981, at 1.

[31] *Id.*

[32] *Id.*

[33] Bonore, *The War Against the Check*, HARV. BUS. REV., Nov.–Dec. 1981, at 15.

systems employ similar equipment. Errors that can result from the bank's computers, computer tapes, and other electronic equipment are common to all EFT systems. The bank's computer can suffer a "memory loss" due to mechanical problems[34] or can fail to complete transfers due to a power failure.[35] Information on computer tapes is especially susceptible to problems. The information can be lost if the new information is written over the tape. This would occur if someone removes tape file protection rings or if the tape is incorrectly labelled and subsequently reused.[36] Tape drive failures, disk drive head crashes, and incorrect or incomplete processing runs also can destroy the information on tapes and disks. A minor alteration in a computer program can result in major information loss.[37] Furthermore, a single computer error can lead to more serious loss than a single human error because the computer can repeat the error many times.[38]

B. *The Need For a Resolution Procedure*

Despite the potential for widespread breakdowns in the EFT systems due to mechanical or technical failure, the available evidence suggests that such breakdowns, in fact, have not occurred. Yet, numerous commentators suggest that a sound and comprehensive EFT breakdown procedure is needed at an early stage of EFT development, because of the potential for a massive breakdown of the EFT systems or for a high volume of isolated errors. These proponents of a breakdown procedure support their fears that the potential problems may materialize by pointing to the many difficulties that consumers encountered in using credit cards before Congress mandated an error resolution procedure.[39] The proponents are neither confident in the

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[34] Port City State Bank v. American Nat'l Bank, 486 F.2d 196 (10th Cir. 1973).

[35] North Carolina Nat'l Bank v. South Carolina Nat'l Bank, 449 F. Supp. 616 (D.S.C. 1976), *aff'd*, 573 F.2d 1305 (4th Cir. 1978), *cert. denied*, 439 U.S. 985 (1978).

[36] *See* Murray, *Protecting Corporate Data with Off-Site Vault Storage*, COMPUTER WORLD, Mar. 16, 1981, at 15.

[37] D. PARKER, CRIME BY COMPUTER 7 (1976).

[38] Salerno, *Catching Up with the Computer Revolution*, HARV. BUS. REV., Nov.–Dec. 1981, at 8, 16.

[39] *See generally Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. (1973).

ability of technology to make EFT systems secure and error-free nor convinced that the banking institutions are willing to purchase improved error-avoiding equipment as such technology develops.

The enactment of an error resolution procedure only after substantial problems have occurred would not help past victims deal with uncooperative banks. There also would be a considerable time lapse from the development of significant problems and the dissemination of information regarding their seriousness to the public to the drafting and enactment of new error resolution procedures. Banks also would need time to implement new procedures before they could become binding. It may be less expensive in the long run to require an error resolution procedure at an early stage of EFT development rather than to impose new standards after system operations are fully in place.

Those who criticize the implementation of an error resolution procedure contend that there is no need for a legislatively mandated error resolution procedure because there have been no significant EFT failures. They point to the fact that an error resolution procedure has not been necessary for check transactions. The critics also believe that regulatory procedures may restrict a bank's ability to develop better methods to handle disputes and to adopt new technological advances. Regulations also may impose costs on financial institutions that probably would be passed on to the consumer. Absent any serious problem with EFT, these costs would lack any corresponding benefit to the consumer.[40] The critics also argue that to the extent occasional errors do occur, competitive pressures would provide adequate incentives for institutions to resolve errors without regulation. These incentives also would cause banks to invest in improved electronic equipment that is more secure and less likely to cause errors. Finally, the civil liability provisions of the EFTA[41] ensure that institutions would make reasonable efforts to avoid mistakes.

Despite the lack of consensus among commentators concerning the need for an error resolution procedure, the most influ-

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[40] *See generally* P. HEYNE, THE ECONOMIC WAY OF THINKING, 69, 283 (1980).
[41] 15 U.S.C. § 1693h (1976 & Supp. IV 1980).

ential institutions concerned with this issue have sided with the proponents of such a procedure. The National Commission of Electronic Fund Transfers has considered this question.

> [The] Commission concluded that an error resolution procedure is desirable for several reasons. A formal procedure assures the customer that his error allegations will be addressed by the depository institution and that a record will be established in the event that his allegation of error results in a dispute. The procedure also encourages the customer to examine his descriptive statement promptly. It assures that the customer will be properly debited and credited as quickly as possible if the account has been over-debited or under-credited. It enables the customer to obtain an explanation when he does not understand a portion of his descriptive statement.[42]

The United States Senate was particularly concerned with the "downstream" effects of EFT errors when it considered the lack of an error resolution procedure.[43] The Senate feared that the consumer may discover that an error has occurred only after he has taken steps in reliance upon the correct operation of the system. For example, the consumer may wrongly assume that a timely transfer of wages in the right amount was made to his checking account and consequently may have written checks to pay for essentials such as rent, utilities, and groceries. If that transfer was never made because of some EFT error, the checks would bounce. The Senate believed regulation of error resolution could ensure a prompt and inexpensive resolution of disputes. Such regulation would be justified, in part, because EFT errors frequently are not isolated events but rather are occurrences with downstream consequences.

Congress has reacted to the perceived threat of system failure and concomitant downstream problems by enacting an error resolution procedure that affects many millions of consumers and that may be used as a model for other payment systems. For these reasons, the focus of the remainder of this Article is on the details of that procedure.

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[42] NAT'L COMM. ON ELECTRONIC FUND TRANSFERS, EFT IN THE U.S.: POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST, FINAL REPORT 60 (1977) [hereinafter cited as EFT IN THE U.S.].

[43] S. REP. No. 915, 95th Cong., 2d Sess. 7 (1978).

III. THE LEGAL RELATIONSHIP BETWEEN CONSUMERS, THEIR BANKS, AND THE GOVERNMENT

One way to evaluate the reasonableness of the rights and obligations established by Reg. E's error resolution process is to examine the legal relationships among the consumers who use the EFT services, the banks that provide these services, and the government that regulates such services. This examination will determine whether the regulatory scheme is consistent with the consumer's legal interest in the funds employed in the EFT transfer, the legal relationships among the parties to EFT transactions,[44] and the active participation of the government.

A. *The Consumer's Property Interest in EFT Funds*

The consumer has a property interest in his EFT-transferred funds. Numerous legal rights attach to these funds throughout the EFT system. The consumer has a right to wages or government benefits that are directly deposited into his bank account. Once the funds are in his bank account, he has a legal right to the money represented by the account.[45] The funds in the account can be removed only by the consumer's order or through a legal right conferred by the state, such as garnishment or setoff.[46] In fact, a great deal of the advertising of EFT undertaken by banks stresses the consumer's right to the money in his account and promotes EFT as a means of protecting that right.[47] Consequently, if a transfer of the consumer's money via EFT does not occur properly, the consumer has a legal cause of

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[44] The legal relationships discussed below in regard to bank accounts apply to both EFT and check payment systems where the electronic transfers are made both into and out of a checking account. There are, however, many operational and legal differences between EFT and checks. *See, e.g.*, H. SCOTT, *supra* note 10, at 123, 144–46, 173–74, 221, 245–47; Mittelsteadt, *supra* note 11, at 413, 417; Nimmer, *Consumer Payment Systems: Leverage Effects Within an Electronic Funds Transfer System*, 17 HOUS. L. REV. 487, 526–27 (1980).

[45] *See* Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940); Taliaferro v. Reirdon, 186 Okla. 607, 99 P.2d 500 (1940); Matthews v. Hanson, 145 Va. 614, 134 S.E. 568 (1926).

[46] 5A A. MICHIE, BANKS AND BANKING 273 (1973).

[47] Advertisement on file in office of HARV. J. ON LEGIS.

action to protect his property right and to recover his money.[48] Therefore, every dispute over an EFT error has the potential for developing into a lawsuit between the consumer and his bank. The EFTA's error resolution procedure for dealing with EFT disputes provides an alternative mechanism outside the judicial system.

B. *The Legal Relationship Between the Consumer and the Bank*

The courts characterize in various ways the ownership of the funds in a consumer's account that are sent as electronic impulses by the United States Treasury or the consumer's employer to the consumer's bank and the funds that have been accepted as a deposit and recorded as funds in the consumer's account.[49] All courts agree that title to the funds passes to the bank.[50] Some courts, consistent with this passing-of-title theory, say that the money ceases to belong to the account holder[51] and becomes the property of the bank.[52] Other courts characterize the money as the property of the account holder.[53] Still other courts hold that the account holder is the "owner of the fund"[54] or the owner of the account.[55] However characterized, courts agree that the deposited funds are regarded as a loan made to the bank by the account holder.[56] As a result of that loan, a debtor-creditor relationship is established with the bank-borrower acting as debtor and the consumer-lender acting as creditor.[57]

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[48] 5A A. MICHIE, *supra* note 46, at 275–76.

[49] Under Reg. E, the bank must credit the amount of the transfer as of the day the funds for the transfer are received. 12 C.F.R. § 205.10(a)(2) (1982).

[50] *See, e.g.*, Kares Constr. Co. v. Associations Discount Corp., 82 Ohio Abs. 501, 503, 163 N.E.2d 913, 914 (Ct. App. 1960); Westerly Community Credit Union v. Industrial Nat'l Bank, 103 R.I. 662, 668, 240 A.2d 586, 590 (1968).

[51] Kares Constr. Co. v. Associations Discount Corp., 82 Ohio Abs. 501, 503, 163 N.E.2d 913, 914 (Ct. App. 1960).

[52] Westerly Community Credit Union v. Industrial Nat'l Bank, 103 R.I. 662, 668, 240 A.2d 586, 589 (1968).

[53] Matthews v. Hanson, 145 Va. 614, 618, 134 S.E. 568, 569 (1926).

[54] Redmond v. Farthing, 217 N.C. 678, 679, 9 S.E.2d 405, 407 (1940) (quoting Nannie v. Pollard, 205 N.C. 362, 362, 171 S.E. 341, 341 (1933)).

[55] Taliaferro v. Reirdon, 186 Okla. 607, 610, 99 P.2d 500, 503 (1940).

[56] Keller v. Frederickstown Sav. Inst., 193 Md. 292, 296, 66 A.2d 924, 925 (1940).

[57] 5A A. MICHIE, *supra* note 46, at 1.

The legislatures and the courts attach a special meaning to this debtor-creditor relationship that distinguishes it from the conventional debtor-creditor relationships that occur in the private market place. The Uniform Commercial Code prohibits a bank from disclaiming or limiting its liability for either lack of good faith or failure to exercise ordinary care in connection with check deposits and collections.[58] Some courts have characterized the bank's duty as not merely due care and diligence, but "active diligence" in its care of the account holder's money.[59] Most courts have imposed high standards of due care on banks even prior to the actual making of a deposit, although the relationship is merely that of a bailor to his bailee. One court has based this heightened standard on the public's need for professional and competent banking services.[60] That court argued that this need justifies customer reliance on the integrity of financial institutions even in the bailor-bailee situation.[61]

In addition, under special circumstances the relationship between a bank and its customer may impose more obligations than that of debtor and creditor.[62] In a recent case, the Washington Court of Appeals found that a savings and loan association and a customer were in a "quasi-fiduciary relationship of trust and confidence."[63] The court supported its claim by noting that a lender and consumer deal with each other at arms length and both understand that the objective of the lender is to make a profit.[64] Although ordinarily no fiduciary relationship is established, there are certain types of transactions that thrust the bank into the role of an adviser to the consumer, such as where the bank has "superior business acumen and experience."[65] The court further noted that the savings and loan association had sent out notices of an additional banking service available to

[58] U.C.C. § 4-103(1) (1978).
[59] 5A A. MICHIE, *supra* note 46, at 275.
[60] Phillips Home Furnishings, Inc. v. Continental Bank, 231 Pa. Super. 174, 183, 331 A.2d 840, 844–45 (1974).
[61] *Id.*
[62] *See generally* Annot., 70 A.L.R.3d 1344 (1976).
[63] *See* Stone v. Davis, 66 Ohio St. 2d 74, 419 N.E.2d 1094 (Ct. App. 1981), *cert denied*, 454 U.S. 1081 (1981); Hutson v. Wenatchee Fed. Sav. & Loan Ass'n, 22 Wash. App. 91, 103, 588 P.2d 1192, 1199 (1978);.
[64] Hutson v. Wenatchee Fed. Sav. & Loan Ass'n, 22 Wash. App. 91, 103, 588 P.2d 1192, 1199 (1978).
[65] *Id.*

customers. It held that, "[t]his extra service, while not changing the relationship to one of fiduciary trust, does mean that the customer will rely upon the lender for one more facet of the entire transaction."[66]

Fiduciary or quasi-fiduciary relationships also may arise in the context of particular EFT transactions. The bank may be playing an active role as an advisor-participant when it encourages a consumer to sign up for direct deposit of his Social Security payments. Banks frequently send brochures to their customers that seek to convince the customers to participate in new EFT services. In connection with these solicitations, the banks advise and inform their customers, as well as explain legal rights and duties. Other relationships and incumbent responsibilities also may arise. When the consumer uses preauthorized bill paying a principal-agent relationship may be created, with the consumer's bank acting as an agent for purposes of making the payment.[67]

Given all of the legal relationships between the bank and its customers, a high degree of responsibility should be imposed upon the bank. The imposition of duties upon banks to investigate alleged errors that arise from EFT transactions is therefore consistent with that responsibility.

C. *The Government's Role in the Payment System*

The United States Government has long recognized that the effective operation of a national payment system, through which consumers deposit and transfer money in payment for goods and services, is necessary for the successful operation of the modern economic market and social system. Consequently, the viability of this system is a matter of national interest that should not be left to the private market. This governmental interest in the system began with Congress' authorization of the FRB to operate its own check-clearing system when the nation's private check-clearing system began to break down in the late 1800's

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[66] *Id.*

[67] *See generally* Tyree, *Electronic Funds Transfer in New Zealand*, 8 N.Z. U.L. Rev. 139, 157 (1978).

and the early 1900's.[68] The FRB has taken its role as an operator of the national check-clearing system very seriously and continually has strived to improve its operation.[69] Additionally, the FRB regulates many of the banks using the check-processing facilities. Congress also has undertaken efforts to improve the system, for example, by mandating a new system for pricing the checks processed through member banks of the Federal Reserve System.[70]

The government plays an active role in EFT transactions as well. The FRB operates all but one of the ACHs. The FRB, pursuant to recent federal law, now sets the prices that banks must pay when using the ACH.[71] The FRB also is the major regulator of many of the banks using the EFT system.[72] Finally, the federal government makes extensive use of EFT. It aggressively promotes the increased use of direct deposit of payments such as Social Security checks, and it prices EFT so that it is far cheaper to transfer by EFT than by processing checks.[73]

The tremendously active role of the government, especially the FRB, as operator, promoter, regulator, and user of national payment systems should be recognized when considering the institutional context in which EFT errors occur. The government's multifaceted involvement distinguishes the EFT marketplace from most others. Given the government's extensive involvement, the government itself may be responsible for many errors that occur in the EFT system. Its impact upon the EFT's error resolution procedures is therefore significant.

IV. The Notice Requirement

Reg. E requires the financial institution to notify consumers of the availability of a procedure for resolving EFT errors, their

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[68] *See generally* Scott, *supra* note 16, at 737, 747. The states also have recognized the need for both an orderly check-clearing procedure and clear lines of responsibility. As a result, the states have adopted Articles 3 and 4 of the Uniform Commercial Code.

[69] *See, e.g.*, 12 C.F.R. § 210.14 (1982); Hamilton, *An Update on the Automated Clearinghouse*, 65 Fed. Reserve Bull. 525 (1979); *Collection and Clearing in the U.S.*, Fed. Reserve Bank of Richmond, Annual Report (1972).

[70] 12 U.S.C. § 248(a) (1980).

[71] *Id.*

[72] *See generally* Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 Stan. L. Rev. 687 (1980).

[73] 45 Fed. Reg. 58,691 (1980).

rights under that procedure, and the steps they must follow in order to assert those rights.[74] This section examines the notice requirements in order to explain those provisions that are not clear, to point out their deficiencies, and to suggest changes.[75] The efficacy of consumer notices is examined and the detailed provisions of Reg. E are analyzed.

A. *Will Consumers Notice the Notices?*

Many critics of the current notice system have relied upon a 1977 FRB survey[76] of consumer regulations as proof that notices are not very effective. That survey showed that most consumers do not pay attention to notices regardless of how well drafted they are or when they are issued. The survey, however, does not clearly demonstrate the inefficacy of notices for error resolution procedures.

The survey questioned consumers about the notices that they received to inform them of their right to complain about billing errors. Such notices are required by the Fair Credit Billing Act,[77] which has substantially the same purpose as the EFTA's error resolution procedure. Consumers were asked as part of the survey, "As far as you know, is there any federal legislation or regulation specifically dealing with credit card billing errors?"[78] Regardless of whether the responses are broken down into categories incorporating just cardholders, or only those cardholders who have experienced an error, the vast majority of respondents said either that there was no federal law or that they did not know of one.[79] This finding has been heralded as proof that

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[74] 12 C.F.R. §§ 205.7(a)(10), 205.8(b) (1982).

[75] Both the FRB and the Federal Trade Commission (FTC) have proposed changes to the notice requirements. *See Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 1523 (1981) (statement of Linda Dorian, Deputy Director, Bureau of Consumer Protection, FTC) [hereinafter cited as *Hearings, Competition and Conditions*]; *Hearings, Electronic Funds Transfer Act, supra* note 8, at 402 (statement of Nancy Teeters, Governor, Board of Governors of the Federal Reserve System).

[76] DURKIN & ELLIEHAUSEN, 1977 CONSUMER CREDIT SURVEY 2 (Board of Governors of the Federal Reserve) (Dec. 1978) [hereinafter cited as FRB SURVEY].

[77] 15 U.S.C. § 1666 (1976 & Supp. IV 1980).

[78] FRB SURVEY, *supra* note 76, at 41.

[79] *Id.* at 43. Only 16.4% of all respondents said they knew there was a federal law dealing with billing errors. This percentage rose to 23.9% of all cardholders who had experienced a billing error.

consumers do not read or remember notices of error resolution procedures, and has been used to justify eliminating the notice requirement.[80]

Upon closer examination, however, it is questionable whether the inquiries and responses have any significance. First, it should be noted that the Fair Credit Billing Act did not take effect until October, 1975.[81] Since the survey was conducted in August and September of 1977, consumers had been receiving the notices for less than two years. In contrast, other portions of the study involved sections of the Truth in Lending Act, which took effect in 1969. It also compared consumers' knowledge of credit disclosures from 1970–1974 with their knowledge in 1977. The study found a significant increase in awareness of certain credit disclosures during that far more extensive period of time.[82] It is reasonable to expect a similar increase in awareness of billing notices over a comparable period of time.

More importantly, whether or not a consumer knows of the existence of a federal law is, for all practical purposes, irrelevant. Some of the surveyed consumers may have known there was some type of a law, but thought it was not a federal law. In fact, at that time at least two states had their own credit card billing law.[83] The Fair Credit Billing Act notices were not designed to highlight the existence or the significance of federal law. Although the notice required to be given to the consumer upon an extension of credit states that the federal Truth in Lending Act requires prompt correction of billing errors,[84] the EFTA does not require that the notice concerning billing error that accompanies the periodic statement contain any reference to federal law.[85] Certainly, there is little likelihood that a consumer would remember the reference to federal law on the initial notice received perhaps years before any dispute.

The survey also did not ask cardholder respondents questions that would have elicited meaningful information about the ef-

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[80] *Hearings, Competition and Conditions*, *supra* note 75, at 1523 (statement of Linda Dorian, Deputy Director, Bureau of Consumer Protection, FTC).

[81] 15 U.S.C. §§ 1666–1666j (1976 & Supp. IV 1980).

[82] FRB SURVEY, *supra* note 76, at 7.

[83] CONN. GEN. STAT. ch. 657a, §§ 36-417a to -417 (1981), *repealed by* CONN. PUB. Acts 8-158, § 16 (Supp. 1982); MASS. GEN. LAWS ch. 93C (1975), *repealed by* Act of 1978, ch. 480 § 7, *replaced by* MASS. GEN. LAWS ch. 140C, § 9B (1981).

[84] 12 C.F.R. § 226.7(a) (1982).

[85] *Id.* § 226.7(d)(5).

fectiveness of notices. For example, they were not asked if they remembered either the initial notice provided when they opened their accounts or the subsequent periodic notices. They were not asked if they read the notices, or if not, the reasons why not. Important questions remained unanswered. Did the consumers fail to read the notice because they never read any notices from creditors? Were the consumers illiterate or did they have difficulty with English? Did they try to read the notice but found it difficult to understand? Moreover, the survey did not ascertain whether the card issuers even sent the notices to the consumer or if the notices conformed to the requirements of the Act.

An even more significant test of the effectiveness of a notice is whether the intended audience acts in the manner in which the notice intended rather than whether the audience remembers receiving a notice stating that a federal law provided an error resolution procedure. In the survey, 81.5% of the consumers responded in exactly the manner suggested by the notice: they complained to the creditor.[86] In only 10% of the cases was no action taken by the institution. In a separate survey, the FRB asked selected creditors about their experience with the Fair Credit Billing Act. Large banks, such as the Bank of America, reported receiving thousands of formal inquiries.[87] Unfortunately, the 1977 survey did not include any questions that would have produced a greater understanding of the role that the notice plays in generating this high complaint rate. For these reasons, the FRB's 1977 Consumer Credit Survey does not support the contention that consumers do not read notices of the availability of an error resolution procedure or do not remember the content of those notices.

Skepticism towards *any* kind of consumer disclosure has resulted from criticisms of the Truth in Lending disclosures.[88] This

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[86] FRB SURVEY, *supra* note 76, at 42.

[87] *Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts*, 64 FED. RESERVE BULL. 363, 364 (1978) [hereinafter cited as *Exercise of Consumer Rights*].

[88] *See generally* Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit Contracts*, 62 VA. L. REV. 841 (1977); Landers & Rohner, *A Functional Analysis of Truth in Lending*, 26 U.C.L.A. L. REV. 711 (1979); Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400.

skepticism, however, may not be justified in the case of EFT error resolution notices because of the significant differences between them and the Truth in Lending disclosures. The objective of the Truth in Lending disclosures is to influence the consumer's behavior when he is deciding whether or not to contract for credit with a particular creditor, that is, *before* the contract is entered into. In contrast, the notice of the error resolution procedure serves the function of alerting the consumer to the availability of a procedure *after* the consumer has contracted for a service and has encountered a problem. It is at this time, after the consumer experiences an EFT problem, that he probably would be anxious to complain about the erroneous transfer of his money. In addition, the FRB finding that consumers in fact do complain about credit card billing errors[89] that are in some respects similar to EFT errors indicates that EFT consumers will make use of the procedure.

B. *Information Overload and EFT Notices*

Assuming that the consumer will pay attention to a notice of EFT error resolution procedures, the content of that notice must be considered. This section analyzes and evaluates currently used EFT notices, and highlights the important information that is omitted from the notices. The notices would be far more useful if such information were included. Unfortunately, however, the incompleteness of the notices cannot be remedied simply by adding information to the notice. These additions may result in a notice that contains too much information. Such an overload of information may be so overwhelming to the consumer that he would not even read the notice, or he might read the notice but understand and remember far less of it than if the notice had contained less information. Therefore, in designing notices, the FRB has had to balance the need to disclose all of the necessary information with the dangers of requiring the disclosure of too much information.

However, not all additions of information to a notice result in information overload. The concept's scientific basis originates in studies whose methodology and conclusions have been se-

[89] *FRB Survey*, *supra* note 76; *Exercise of Consumer Rights*, *supra* note 87, at 364.

verely criticized by other social scientists.[90] One experiment showed that increasing the amount of information helped consumers to choose higher quality brands.[91] Other studies confirm the hypothesis that increasing the amount of information does not necessarily result in information overload. In fact, up to a point, increasing the amount of information increases consumer understanding.[92] The critical question is not whether adding further information to an EFT notice will result in information overload. Rather, the important questions are when is more information necessary to ensure proper understanding, and what is the optimal amount of information beyond which information overload occurs.

It is impossible to know with certainty how information overload would affect consumer behavior without conducting experiments directly testing various forms of EFT error resolution notices. For example, an investigation should be made to determine whether the addition of two sentences to a notice containing the optimal amount of information would result in the consumer's not even bothering to read the notice. Does rejection of the notice instead occur after adding another five or ten sentences? Alternatively, if two sentences above the optimal number are inserted, perhaps the consumer may read the whole notice, but with reduced comprehension. The addition of the two sentences may not affect the consumer's comprehension, but would make it more difficult for him to remember the details of the notice in the future when a problem arises. If the effect of the additional information is to decrease the consumer's ability to remember details, this is not a serious problem because the notice will have served its function as long as the consumer reads it when it is sent and remembers enough of it to recall that an error resolution procedure is available when a problem occurs. If the consumer remembers that much, he will realize that he has to find the notice or obtain another one from his bank in order to know how to use the procedure. At that time, if he is seriously interested in resolving the dispute, he would certainly have the patience to read the notice and to follow the

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[90] Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 675 n.100 (1979).

[91] *Id.* at 676 n.100.

[92] Davis, *supra* note 88, at 848.

procedure. Information overload should not be a problem at that point unless the notice is so unreasonably long or so incomprehensible as to make the consumer's effort totally futile.

Moreover, the willingness of the consumer to read the notice, and his ability to understand and to remember it, is not simply a function of the amount of information in the notice. Several other factors are involved of which the first is readability. A notice's readability is increased to the extent that it contains short sentences and uses familiar words[93] in a simple format. A second factor is the notice's conceptual difficulty. New ideas, unless they contain simple concepts, are intimidating and difficult to comprehend.[94] A third factor is the reader's motivation.[95] Given the consumer's general apprehension concerning the problems of computers, it is reasonable to assume that he would feel motivated to read a notice entitled "In Case of Errors or Questions About Your Electronic Transfers."[96] A fourth factor is the consumer's reading environment.[97] The bank periodically mails the EFT notice to the consumer's home. This reading environment compares favorably to that inside a bank, or other lending institution, where most consumers read the precontract Truth in Lending disclosures.[98]

The EFT notice is far shorter, uses more familiar words, has a simple format, and basically contains a much simpler message than the Truth in Lending disclosure. These attributes make the notice far more readable than the disclosure.

The above discussion is not meant to suggest that information overload can never be a problem for EFT error resolution notices. However, the factors explored do argue against automatic opposition to proposals that add information to the present notices.

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[93] *Id.* at 847.

[94] *Id.* at 847, 855.

[95] *Id.*

[96] *See generally Fair Credit Billing: Hearings on S. 652 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 92d Cong., 1st Sess. (1971).

[97] Davis, *supra* note 88, at 847.

[98] Landers & Rohner, *supra* note 88, at 725; Whitford, *supra* note 88, at 426. *See generally* Leff, *Contract as Thing*, 19 AM. U.L. REV. 131, 145–47 (1970).

C. *The Long Form Initial Notice*

Section 905(a)(7)[99] of the EFTA requires the institution to disclose to the consumer the terms and conditions of EFTs. Disclosure must be made at the time the consumer contracts for EFT service and must include both a summary of the error resolution provisions of section 908 of the EFTA and a description of the consumer's rights under that section. The institution must make the disclosures in "readily understandable language"[100] in accordance with FRB regulations.

The FRB has simplified these compliance requirements by providing the financial institutions with a model notice in Reg. E.[101] If the institution uses the model notice or one that is "substantially similar,"[102] the institution is protected from liability under the EFTA.[103]

The institution is required to provide every consumer with notice of the error resolution procedure "before the first electronic transfer is made . . . ."[104] It can be argued that this requirement provides little benefit to the consumer. If the initial notice is sent long before an error occurs, many consumers will not remember having received it. The consumer is most likely to use a notice that is received close to the time he encounters a problem. Since it is impossible to know when an error will occur, sending a notice of the error resolution procedure along with each periodic statement could prove to be most beneficial.[105] Periodic notice would aid all consumers except those

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[99] 15 U.S.C. § 1693c(a)(7) (1976 & Supp. IV 1980).

[100] *Id.* § 1693c(a).

[101] 12 C.F.R. § 205.7(a)(10) (1982).

[102] *Id.*

[103] 15 U.S.C. § 1693m(d)(2) (1976 & Supp. IV 1980). This section protects institutions from liability when they use the FRB's "model clause[s]." While the Model Disclosure Clauses are actually contained in Appendix A of Reg. E, the prescribed initial notice of error resolution is not contained in that appendix. Rather, it appears within the body of 12 C.F.R. § 205.7(a)(10) (1982) and nowhere is referred to as a "model clause" or notice. Presumably, it would be treated as such under any reasonable interpretation of Reg. E. An institution could alternatively rely upon § 1693m(d)(1), which would protect it from liability for any act done in good faith in conformity with any regulation of the FRB.

[104] 12 C.F.R. § 205.7(a) (1982). This is consistent with the notice of billing error rights for credit cards. 12 C.F.R. § 226.7(a), (a)(9) (1982).

[105] Under Reg. E, the institution must send a notice either once each year or with each periodic statement, in addition to the initial notice requirement 12 C.F.R. § 205.8(b) (1982).

who experience a problem before receiving the first periodic statement.[106] These consumers may not receive any notice of the error resolution procedure until as long as a month after the transfer.[107]

Since errors may occur before the consumer receives the first periodic statement, elimination of the initial notice would deprive consumers who encounter problems before receiving subsequent periodic notices of necessary information. Errors often occur during this initial period in the transition from the receipt of wages or of Social Security by check to receipt by electronic transmission. The name of the employee or beneficiary, the amount of the payments, and the name of the financial institution that will receive the funds must all be recorded accurately on computer tapes and transferred from one type of system to another. The recipient financial institution must transfer the proper amount into the correct consumer's account. There is evidence that mistakes occur at this transition stage, but the extent of these mistakes is unknown.[108] Certainly, a consumer who depends upon his Social Security check and whose benefits are not correctly transferred needs information concerning the error resolution procedure *immediately*, not at the end of the month.

Congress decided to require the initial notice after weighing the costs of the notice against the benefits that the consumer would derive from it. The FRB's task was to draft a notice that accurately conveyed the most important information to the consumer.[109]

The FRB's model notice[110] omits certain information of which the consumer should be aware. The notice explains that if the

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[106] Another possibility would be to require that the initial notice be sent at the same time that the first transfer occurred. However, if the first transfer is a direct deposit, requiring the payor to send the notice would impose a tremendous burden upon the payor, because it has almost no other notice responsibilities.

[107] 12 C.F.R. § 205.9(b) (1982).

[108] Leymaster, *supra* note 17, at 721, 722 n.5 (1980).

[109] 15 U.S.C. § 1693b(b) (1976 & Supp. IV 1980).

[110] Section 205.7(a)(10) of 12 C.F.R. requires a notice that is substantially similar to the following:

In Case of Errors or Questions About Your Electronic Transfers Telephone us at
(insert telephone number)
or
Write us at (insert address)

creditor fails to resolve the dispute within ten days, the financial institution must recredit the consumer's account for the amount in dispute while it completes its investigation. Reg. E, however, also provides that if the financial institution reasonably believes that an unauthorized transfer for which the consumer would be liable "may have occurred," it may withhold up to fifty dollars from the amount recredited.[111] The notice does not inform the consumer that this amount may be withheld from the recredit. It is not clear when or how the institution should inform the consumer of this action. Presumably, the bank must disclose the withholding on the next periodic statement sent to the consumer. The initial notice, however, leads the consumer to believe that the entire amount in dispute will be recredited.

In addition, the initial long form notice does not explain that the consumer may pursue judicial remedies even if the institution finds that no error has occurred. The consumer may interpret the notice's silence on alternative forms of relief to mean that the error resolution procedure is the only relief provided by federal statute.[112] The consumer also could believe that the only alternative remedy is a traditional state contract or tort action, which entails proof of actual damages, and payment of

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as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer listed on the statement or receipt. We must hear from you no later than 60 days after we sent the FIRST statement on which the problem or error appeared.

(1) Tell us your name and account number (if any).

(2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.

(3) Tell us the dollar amount of the suspected error.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will tell you the results of our investigation within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will recredit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not recredit your account.

If we decide that there was no error, we will send you a written explanation within 3 business days after we finish our investigation. You may ask for copies of the documents that we used in our investigation.

[111] 12 C.F.R. § 205.11(c)(2)(i) (1982).

[112] The EFTA does not affect the availability of state remedies. *See* 15 U.S.C. § 1693q (1976 & Supp. IV 1980).

his own attorney's fee even if successful. Most consumers may not realize that the EFTA places liability upon the financial institution for failure to make transfers in accordance with the terms of the account.[113] The EFTA also provides treble damages for certain violations of the error resolution procedure.[114] Either the initial notice or a subsequent notice, such as the statement issued by the institution when it determines that no error has occurred,[115] should inform the consumer of the substantial remedies provided if the institution has not complied with the error resolution procedure[116] or otherwise has violated the EFTA. The consumer also is not told that the EFTA contains a statute of limitations.[117]

The omission of all this important information makes the long form notice far less useful to the consumer than it could be. Because the initial notice may be the consumer's most complete disclosure,[118] these defects are significant.

D. *The Long Form Annual Notice*

Because the consumer may not remember or retain the initial notice of error resolution procedures, Congress has required the institution to send the consumer a summary of the procedure at least once each calendar year.[119] The institution also is required to provide the consumer with its address and its telephone number on each periodic statement.[120] The FRB modified these requirements in Reg. E to provide the bank with the choice of sending the consumer the long form initial notice at least once each year (in which case the initial notice also would serve as

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[113] *Id.* § 1693h(a)(1).

[114] *Id.* § 1693f(e)(1) (failure to recredit); *id.* § 1693f(e)(2) (willful failure to acknowledge error).

[115] 12 C.F.R. § 205.11(f)(1) (1982).

[116] *See* 15 U.S.C. §§ 1693m(a), 1693f(e) (1976 & Supp. IV 1980).

[117] *Id.* § 1693m(g).

[118] The institution thereafter can elect to send only the short form notice with the periodic statement. 12 C.F.R. § 205.8(b) (1982). The drawback to the proposal in the text is that it could result in the notice being too long for the average consumer. The FRB should conduct careful studies to determine the precise nature of information overload as discussed in Part V(B). But it would not be fair to deprive consumers of the information the initial notice should provide while these studies proceed, solely on the chance that the studies might show the proposed notice is too long.

[119] 15 U.S.C. § 1693c(a)(7) (1976 & Supp. IV 1980).

[120] *Id.* § 1693d(c)(4).

the annual notice in the first year), or sending a short form notice with each periodic statement.[121] If the institution elects to send the long form notice each year, the defects of that notice are repeated annually.

E. *The Short Form Notice with Each Periodic Statement*

The consumer may receive the long form notice only once because the institution is allowed to send the short form notice with each periodic statement in place of the yearly long form notice.[122] Because the short form notice may be printed on the periodic statement, the institution does not have to ensure that each consumer has received the notice each year. The consumer may benefit from this because he is continually reminded of the availability of the error resolution procedure and receives frequent brief summaries of some of its important features.

The principal disadvantage of the short form is the paucity of information that it discloses to the consumer. Reg. E provides that the institution must complete its investigation within ten business days of receipt of an oral notice of error,[123] or forty-five days if the investigation requires more time,[124] but then must provisionally recredit the consumer's account in the amount in error.[125] The regulation also states that the institution may require the consumer to provide the bank with a written confirmation within ten business days of the oral notice.[126] If the institution opts for the forty-five-day investigation period and requests written confirmation that the consumer fails to provide within ten business days, the institution is not required to provisionally recredit the account.[127]

The short form does not alert the consumer to many of these critical aspects of Reg. E. It does not inform the consumer of the possibility that the institution may require him to confirm

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[121] 12 C.F.R. § 205.8(b) (1982).

[122] *Id.* The first proposed version of Reg. E allowed the use of the short form as an alternative to annual notice. *See* Electronic Fund Transfers: Hearing, 44 Fed. Reg. 25,850, 25,853, 25,862 (1979) (to be codified at 12 C.F.R. § 205).

[123] 12 C.F.R. § 205.11(c) (1982).

[124] *Id.* § 205.11(c)(2).

[125] *Id.* § 205.11(c)(2)(i).

[126] *Id.* § 205.11(b)(2).

[127] *Id.* § 205.11(c)(3).

his oral report in writing.[128] This omission may create problems if the institution claims that it notified the consumer that it required a written confirmation, but the consumer alleges that the institution did not give him such notice.[129]

To remedy this problem, the FRB could require the institution to provide a written notice of the written confirmation requirement when the consumer makes an oral notification of error. If the consumer registers his complaint in person, the institution could simply hand the consumer a written form notice. However, if the consumer notifies the institution of the error by telephone, the institution would be required to mail to the consumer the notice of the written confirmation requirement. Financial institutions might argue that such a mailing requirement is excessively burdensome in view of the other protections afforded to consumers.

Moreover, mailing this additional notice would not help the consumer unless the prescribed timetable were lengthened. Postal as well as other processing delays may result in the consumer's failure to receive the institution's notice of the written confirmation requirement until it is too late for him to ensure that his written confirmation is received by the institution within the required ten-day period.[130] A possible solution would be to extend the ten-day period to allow the consumer time to receive and to respond to the institution's notice. The bank could instead include the written confirmation requirement on the short form and inform the consumer about it when he makes an oral complaint.

The short form notice does not inform the consumer that if the institution does not receive written confirmation of the consumer's complaint within ten business days, the EFTA does not require the institution to recredit the consumer's account when it elects to take forty-five days to investigate the complaint. This is particularly misleading because the current version of the short form explicitly states that the institution will recredit the consumer's account if the investigation lasts longer than ten days.

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[128] *Id.* § 205.11(b)(2).

[129] One authority, however, notes that, "Of course, as a general business practice oral notice is ill advised." J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 419 (1972).

[130] 12 C.F.R. § 205.11(B)(2) (1982).

The provision that requires the institution to recredit the consumer's account after the ten-day investigation period has elapsed should include a notification that if the institution does not receive the written confirmation within ten business days, it is not required to recredit the consumer's account. Otherwise, the notice does not inform the consumer that he would lose substantial rights if he does not meet the confirmation requirements.

A third omission is that the short form notice does not set forth a provision requiring an institution to complete its investigation within forty-five days when it exercises its option to take longer than ten days.[131] The average consumer might reasonably conclude that the law imposes no maximum length of time on the investigation. This omission is especially serious if the investigation takes longer than forty-five days and the institution has failed to recredit the consumer's account because it did not receive a written confirmation within ten days.

Even the consumer whose account has been recredited is harmed if the institution takes more than forty-five days to complete its investigation. If the consumer has encountered an EFT problem, he probably will wait for the error resolution procedure to be completed before seeking counsel and bringing a lawsuit. However, since a lawsuit under the EFTA must be filed within one year from the time of the violation,[132] the statute of limitations may bar the consumer's action. In addition, many consumers desire a speedy resolution because they find the experience to be emotionally difficult.[133] Finally, the consumer needs notification of the forty-five-day limit so that he may

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[131] 15 U.S.C. § 1693f(c) (1976 & Supp. IV 1980); 12 C.F.R. § 205.11(c)(2) (1982). Congress enacted the ten- to forty-five-day schedule as a compromise between the consumers and the industry. Consumers argued that disputes should be resolved quickly to minimize the hardship that results when their money is tied up in an account due to an institution's error. *Hearings on S. 2065 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 49 (1977) (statement of Mark Leymaster, National Consumer Law Center) [hereinafter cited as *Hearings on S. 2065*]. The financial industry argued that they needed a substantial time period to investigate errors since many consumers might invoke the error resolution procedure at the same time. *Id.* at 240 (statement of Eugene M. Tangney, First National Bank of Boston), 304 (statement of Milton W. Schober, American Retail Association).

[132] 15 U.S.C. § 1693m(g) (1976 & Supp. IV 1980).

[133] *See generally* NO ACCESS TO LAW; ALTERNATIVES TO THE AMERICAN JUDICIAL System (L. Nader ed. 1980); Nader, *disputing Wihtout Force of Law*, 88 YALE L.J. 998 (1979).

pursue sound financial planning. If the institution determines that no error has been committed and the consumer accepts that decision, the consumer is liable for the recredited amount. If the investigation extends over a long period of time, it is likely that the consumer will have spent the funds that were provisionally recredited.

F. *The Notice after the Consumer Reports an Error*

Many of the problems of the short form notice could be ameliorated if the institution were required to send the consumer an adequate long form notice upon receipt of a consumer's complaint. The long form notice contains information that is crucial to the consumer who wishes to use the error resolution procedure. The long form notice, as proposed here, would adopt the requirement that the bank must complete its investigation within forty-five days. It also would inform the consumer of his right to an explanation and to documentation of the institution's findings. Moreover, a revised version of the long form notice might contain the additional features suggested in Part IV(C), including notice of the possibility of the bank withholding fifty dollars from the recredit, the right to pursue judicial remedies, and the need to file a lawsuit within one year.[134]

Issuing a notice after the receipt of an error complaint is not without precedent. A similar procedure is used in the resolution of credit card errors when the creditor has chosen the short form option.[135]

Reg. E, as it was originally drafted, actually required institutions using the short form alternative to mail or deliver the long form notice within ten business days of receiving an error notification.[136] As a result of comments that it had received in response to the proposal, the FRB dropped this requirement in its next revision of that section.

> Commenters pointed out that in most cases the investigation and correction of the alleged error will have already been

[134] Alternatively, these final two disclosures could be included in the notice sent when an institution determines that no error has occurred. *See supra* Part IV(C).
[135] 12 C.F.R. § 226.7(d)(5) (1982).
[136] 44 Fed. Reg. 25,862 (1979).

> completed by the time the long notice arrives, or will be completed shortly thereafter, and that the notice would then come too late to be of any practical use to the consumer. Such a notice might also be confusing, since a consumer receiving it might feel obliged to notify the institution again.[137]

It is curious that these commenters, presumably the financial institutions, claimed that most investigations would be completed within the initial ten days. In recommending the forty-five-day period for investigation to Congress, the institutions argued that they needed more than ten days to investigate errors.[138]

The FRB had to balance the cost to the institutions of supplying another notice against the benefits that consumers would derive from the notice. The FRB, however, could have easily satisfied both the institutions' concerns and the consumers' need for a more detailed notice by requiring the long form notice only when the institution exercised the forty-five-day option. To avoid confusion, a sentence should be added to the long form notice explaining that its purpose is to provide a more comprehensive explanation of the error resolution procedure. The notice should make clear that the consumer does not have to renotify the institution of his problem.

V. THE REPORTING OF EFT ERRORS

A. *Who Is Authorized to Report an Error*

There is some uncertainty as to who is authorized to report an EFT error to a financial institution. The statute, Reg. E, and the short and long form notices all speak solely in terms of having the consumer report the mistake. The FRB, however, has stated in unofficial commentary in the Federal Register that an agent of the consumer also may make the complaint.[139] The inclusion of agents protects the consumer who is unable to make

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[137] *Id.* at 59,467 (1979).
[138] Taffer, *The Making of the Electronic Fund Transfer Act*, 13 U.S.F.L. REV. 231, 242–43 (1979).
[139] 44 Fed. Reg. 59,480 (1979).

the report himself. The short and long form notices fail to inform the consumer that his agent may initiate the resolution procedure. This omission can be justified by the fact that most consumers probably assume that they may use an agent and by the need to keep the notice a reasonable length.

Nevertheless, the FRB should make clear in Reg. E the agent's authorization power because the binding effect on the bank of the unofficial commentary is unclear. The EFTA protects the institution from liability for any act done in "good faith in conformity with any rule, regulation, or interpretation" of the FRB, or official statement of an authorized employee of the FRB.[140] An institution could therefore argue that since the assertion by the FRB in the Federal Register that the consumer's agent can make a report of an error is not a rule, regulation, or interpretation, it can refuse in good faith to accept a report made by an agent, on the grounds that the EFTA and Reg. E require the consumer himself to make the report. By analogy, this conclusion is supported by cases interpreting the Truth in Lending Act, which uses the same phrase. Under the Truth in Lending Act, courts have held that a creditor cannot base a good faith defense upon its reliance on and its conformity with a provision in an unofficial pamphlet issued by the FRB, because the pamphlet is not a rule, regulation, or interpretation.[141]

The phrase "good faith in conformity with . . ." may not, however, support the institution's interpretation. Whereas this phrase may mean that the institution is deemed to act in good faith if it acts in conformity with a rule, regulation, or interpretation, it may also mean that the institution must act in good faith *and* in conformity with regulations and interpretations.

Moreover, the Truth in Lending provision may be distinguished from the EFTA error resolution procedures because the Truth in Lending statute largely pre-empts state credit disclosure law. The EFTA and Reg. E do not alter the application of state agency law. Therefore, if the person reporting the error on behalf of the consumer had authority under the applicable state law of agency, the institution could be acting in bad faith if it refused to accept the report of the agent.

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[140] 15 U.S.C. § 1693m(d)(1) (1976 & Supp. IV 1980).

[141] *See, e.g.*, Jacklitch v. Redstone Fed. Credit Union, 463 F. Supp. 1134 (D. Ala. 1979).

The statute and regulations, in addition to failing to discuss whether the consumer's agent can report an EFT error, also do not prescribe a procedure for the institution to follow if it discovers an error itself or receives a report of an error from a non-agent third party. The FRB has addressed this matter in the Supplementary Information included in the Federal Register:

> [A] financial institution has error resolution responsibilities only when *the consumer* notifies the financial institution of an error. The financial institution need not comply with the error resolution procedure if it or its auditor, for example, discovers an error, or if any other party, other than an agent of the consumer, notifies the financial institution concerning an error.[142]

The FRB reiterated this position in its Official Staff Commentary.[143] If a third party informs the institution of an error or if the institution discovers the error itself, it is presumably under a good faith duty to investigate the problem and to make appropriate corrections. But since no provision in the EFTA applies, there is no specific deadline to ensure prompt action. In addition, if the institution were to take an extended period of time to investigate, it would not be required to credit the consumer's account in the interim.

The problem that arises from this lack of protection for the consumer when a third party notifies an institution of an error is demonstrated in the following example. Suppose that Old Mother Hubbard has contracted for preauthorized electronic transfers from her NOW checking account to pay several recurring bills, including her rent of $260 per month.[144] The NOW

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[142] 44 Fed. Reg. 59,480 (1979).

[143] *Official Staff Commentary on Reg. E,* FED. RESERVE REG. SERV. (FRB) Q11-7 (1981).

[144] The institution must send the consumer written notice whenever a preauthorized transfer varies in amount from the previous transfer or from the preauthorized amount. 12 C.F.R. § 205.10(d) (1982). The consumer, however, may authorize the bank to forego notice if the transfer falls within a specified range of amounts or if it differs from a previous transfer by no more than an agreed upon amount. *Id.* The example in the text assumes that the bank either is unaware of the programming error, and consequently fails to send this notice, or is aware of it at some point, but does not notify the consumer because the $20 error falls within the range in which the consumer has agreed to waive her right to notice. Of course, the $20 discrepancy should be recorded on the periodic statement in the form of a $280 transfer to the landlord. Many consumers will be "notified" of the error by seeing it on the periodic statement. However, the possibility of failure to notice the error increases as the infirmity of the consumer increases, as the number and type of transactions on the periodic statement increases, and as the amount of the discrepancy decreases.

account has overdraft protection that automatically establishes an interest-bearing loan when she overdraws her account. She also makes withdrawals and deposits using the bank's ATMs. Consequently, her monthly statement contains a multitude of unfamiliar terms, many of them in abbreviated or coded form. It is filled with Truth in Lending and EFTA disclosures, and other information that the bank provides to promote its many services. As a result, Hubbard fails to notice that each month the computer incorrectly transfers $280 instead of $260 to her landlord. The landlord owns hundreds of properties and does not notice the excess payment for nine months. When he does find the error, he notifies the bank rather than Hubbard. The bank takes three months to investigate, finally admits its error, and begins transferring only $260 each month.

The EFTA requires neither the landlord nor the bank to notify Hubbard when the landlord reports the error to the bank.[145] If the bank had notified Hubbard, she could have made the allegation of error on her own behalf and triggered the statutory procedure. The EFTA's failure to require that the bank notify her causes her to lose the benefits of the procedure. Moreover, because the EFTA imposes no timetable on the bank, the bank may extend its investigation unreasonably, except in the unlikely event that Mother Hubbard prevails in a suit based on a common law theory such as unconscionability, bad faith, lack of commercial reasonableness, or unfair practices. Given this lack of a procedure or timetable, her account will not be recredited while the lengthy investigation progresses.

When Hubbard discovers the error, she could opt to sue the bank. Under the EFTA, an institution is liable for all damages proximately caused by its failure to make a transfer in the correct amount.[146] If the institution's error was not intentional and occurred despite procedures reasonably adapted to avoid any such error, the institution is liable only for actual damages proven. In this case, the bank must correct its records to show transfers of only $260 each month and must also credit the account for interest that the extra twenty dollars would have

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[145] *But see* 12 C.F.R. § 205.6(c) (1982) (In the case of an unauthorized transfer, Reg. E deems notice to be given if the institution "becomes aware of circumstances that lead to the reasonable belief that an unauthorized transfer was or may be made.").

[146] 15 U.S.C. § 1693h(a) (1976 & Supp. IV 1980).

earned had it not been incorrectly transferred. In addition, if Hubbard can prove that she suffered other damages because the extra twenty dollars was unavailable to her each month, the bank should credit her account for these losses. This civil action, however, is subject to a one-year statute of limitations.[147]

Of course, Hubbard may never discover that an incorrect amount has been transferred. The EFTA does not require the bank to notify the consumer of such an error. While it is reasonable to confine the error resolution procedure to complaints made by the consumer, the institution should be required to inform the consumer when it receives notice of an error from another party. Such notice is justified on a theory that when the bank agrees to make preauthorized payments, it is acting as an agent of the consumer.[148] Moreover, basic principles of equity and fairness favor this requirement.

B. *The Definition of "Error"*

In order to trigger the error resolution procedure, the consumer must allege that the institution has committed an "error" within the definitions contained in the EFTA and Reg. E.[149] Congress granted the FRB specific authority to supplement the EFTA's definition of error.[150] The FRB has modified the definition of error to expand or limit the Act's coverage in several situations. This section will examine the manner in which the FRB has exercised its regulatory powers in the expansion or limitation of the definition of error.

The EFTA defines error as "the omission from a periodic statement of an electronic fund transfer affecting the consumer's account that should have been included . . . ."[151] Therefore, if the periodic statement fails to contain a record of a direct deposit to the consumer's account, a POS purchase made with a debit card, or a deposit made at an ATM, this omission is an error that enables the consumer to assert his rights under the EFTA's

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[147] *Id.* § 1693m(g).

[148] *See generally* Tyree, *supra* note 67, at 157; RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

[149] 15 U.S.C. § 1693f(f) (1976 & Supp. IV 1980); 12 C.F.R. § 205.11(a) (1982).

[150] 15 U.S.C. § 1693f(f)(7) (1976 & Supp. IV 1980).

[151] *Id.* § 1693f(f)(3).

error resolution procedure. This definition is inadequate because the bank may include a transaction on the periodic statement, but may describe it inaccurately. Since the transfer has not been omitted from the statement, it would not come within the definition of error. Exclusion of this situation from the definition of error would be particularly damaging if the statement is the only proof of the transaction provided to the consumer, such as a statement that wrongly identifies a payor of a direct deposit and is therefore inadequate for tax purposes. Reg. E solves this problem by including in its definition of error[152] certain transfers that are not identified in accordance with section 205.9(b) of Reg. E. That provision specifies what the periodic statement must contain. As a result, an inaccurate description on a periodic statement falls within the Reg. E definition of an error.

If a malfunction in an automated teller machine causes it not to provide the customer with a receipt, the consumer would need a mechanism to ensure prompt investigation and accurate documentation of the transfer. These receipts may be the consumer's only source of proof of the transaction in a lawsuit brought months or years later. While the EFTA does not include this situation in its definition of error,[153] Reg. E does define an error as any transfer not identified in accordance with the specified requirements spelled out in section 205.9(a). This section requires the ATMs to provide receipts and specifies the information that the receipts must contain. Requiring the institution to provide receipts would be of little value without a provision specifying that such a failure would trigger the error resolution procedure.

Additionally, Reg. E defines error to include a failure by the institution to notify the consumer or to credit his account in accordance with the regulation's requirements.[154] This provision is necessary to prevent many of the "downstream" effects discussed in Part III that could occur if the consumer authorizes

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[152] 12 C.F.R. § 205.11(a)(6) (1982). The original version of this definition was contained in the § 205.2(*l*)(8) proposal, 44 Fed. Reg. 25,861 (1979), and was explained at 44 Fed. Reg. 25,851 (1979).

[153] 44 Fed. Reg. 25,851 (1979).

[154] Failure to comply with 12 C.F.R. § 205.10(a) (1982), which contains notice and crediting requirements for preauthorized transfers, constitutes an error under 12 C.F.R. § 205.11(a)(6) (1982).

an electronic credit, but the institution fails to credit his account promptly or to notify him of the credit.

Both the EFTA and Reg. E define "error" to include an unauthorized transfer of funds.[155] These provisions protect the consumer through both the error resolution procedure and the liability limitations. Thus, a consumer who promptly reports an unauthorized use of his EFT card can limit his liability for that use and can invoke the error resolution procedure. However, the precise timing of that invocation has caused the FRB some difficulty. The FRB originally stated that the error resolution procedure would be triggered at the time the consumer reported to the institution that his card was lost or stolen, whether or not the consumer was aware of an actual unauthorized use.[156]

Commenters on the proposed rules objected to this interpretation.[157] They argued that the mere possibility of unauthorized use should not trigger the error resolution procedure. They believed that only the actual occurrence of an unauthorized use should impose this burden on the institution. In addition, it would be difficult for the institution to investigate a mere possible unauthorized use since it would not know where to start its investigation. The institution would have to begin its investigation at or before the time the consumer realized the card was lost or stolen and examine every transaction that subsequently occurred. The FRB agreed with these commenters and stated in the Supplementary Information in the Federal Register that the procedure is not triggered until the consumer alleges an actual unauthorized use.[158]

The FRB's approach is flawed because the consumer is disadvantaged by not being informed of the necessary procedure to trigger the error resolution process when his EFT card is lost or stolen. The consumer is not informed that an *unauthorized use* is considered to be an error. Thus, the institution must notify the consumer that he has to report a lost or stolen card to limit his liability[159] and must send him notices telling him that if he

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[155] 15 U.S.C. § 1693f(f)(1) (1976 & Supp. IV 1980); 12 C.F.R. § 205.11(a)(1) (1982).
[156] 44 Fed. Reg. 25,851 (1979).
[157] *Id.* at 59,479–80 (1979).
[158] *Id.*
[159] 12 C.F.R. § 205.7(a), app. A at 2 (1982).

reports an error the institution must correct it within ten business days.[160] However, the institution is not required to inform the consumer that if he wants it to investigate, he specifically must allege that there was an unauthorized use and request an investigation.

The consumer should be informed of his responsibility to allege an unauthorized use in order to prevent the imposition of a large liablity on him from his failure to trigger the error resolution procedure. Under Reg. E, if a consumer notifies the institution of his lost or stolen card within two business days of discovery of the loss, he may be liable for transfers of up to fifty dollars that occurred before the notification.[161] A consumer who waits more than two days to notify the institution is liable for up to $500 if the institution "establishe[s]" that the unauthorized transfers would not have occurred "but for" the failure of the consumer to notify the institution within two days. The institution records unauthorized transfers as debits to the consumer's account. After the consumer reports the loss or theft of his card, he assumes that the institution will not debit his account if an unauthorized transfer is made. However, court decisions show that financial institutions often do not give the requisite legal effect to notices from the consumer of a lost or stolen EFT card.[162] Notices from the consumer may be forgotten or misunderstood. A consumer may believe that by giving his notice to the institution he has limited his liability to fifty dollars, but the bank may interpret the "but for" requirement differently, thereby allowing the consumer's liability to continue. A consumer therefore may want to invoke the error resolution procedure to determine whether the bank gave effect to the notification and how the institution has interpreted the law.[163]

Finally, the FRB created two exceptions to the definition of error as it relates to requests for documentation, additional information, or clarification concerning an electronic fund transfer. The definition excludes "routine" inquiries about the balance in a consumer's account and requests for duplicate copies

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[160] *Id.* § 205.8(b).
[161] *Id.* § 205.6(b).
[162] *See, e.g.*, First Nat'l Bank v. Fazzari, 10 N.Y.2d 394, 179 N.E.2d 493 (1961).
[163] If the institution takes the full 45 days to investigate, the consumer may not discover how the institution dealt with the notice until the second periodic notice after the report.

of documentation or other information "that is made only for tax or other record-keeping purposes."[164] Reg. E as originally drafted excluded a request for copies for tax or "business purposes."[165] This provision was later changed to include tax or other "record-keeping purposes." The FRB agreed with the commenters who argued that use of the phrase "business-purposes" was confusing because the EFTA applies only to consumer transactions.[166] In addition, the institutions claimed that the phrase "business purpose" was too narrow. For example, a consumer might request documents in order to obtain "evidence in a domestic dispute." Such a request is not for a business purpose, but should be excluded from the definition if it is "clearly unrelated to verifying the transfer . . . ."[167] On the other hand, some commenters were afraid the exception was broad enough to create a huge loophole that would encourage institutions to claim that certain requests were exempted from the regulation in instances where this was unjustified. In response, the FRB declared: "[t]he Board intends this exception to apply only when there is a clear indication that the request is for purposes unrelated to determining whether an error has occurred."[168]

In its commentary, the FRB also clarified the meaning of the section of the EFTA that defines "error" to include "a computational error by the financial institution . . . ."[169] The original Reg. E proposal defined this type of error as "[a] computational error or similar error of an accounting nature made by the financial institution . . . ."[170] In response to objections from commenters, the FRB deleted "accounting nature." The final version describes this sort of error as "[a] computational or bookkeeping error made by the financial institution relating to an electronic fund transfer . . . ."[171] The FRB made the revision because it did not intend to include "errors of judgment that may occur in making accounting decisions."[172] In addition, the

[164] 12 C.F.R. § 205.11(a)(7) (1982).
[165] 44 Fed. Reg. 59,480 (1979).
[166] 45 Fed. Reg. 8255 (1980).
[167] *Id.*
[168] *Id.*
[169] 15 U.S.C. § 1693f(f)(4) (1976 & Supp. IV 1980).
[170] 44 Fed. Reg. 25,861 (1979).
[171] *Id.* § 205.11(a)(4).
[172] 44 Fed. Reg. 59,480 (1979).

FRB's commentary lists examples of the errors that it meant to include: "arithmetical errors, posting errors, errors in printing figures, and errors in figures that were jumbled due to mechanical or electronic malfunction."[173]

This definition of error is a necessary expansion and clarification of the EFTA. It was appropriate to indicate the limited scope of the law by adding the phrase "relating to an electronic fund transfer,"[174] since the EFTA governs only disputes involving such transfers. However, the scope of the provision "relating to an electronic fund transfer" remains unclear.

For example, suppose a consumer has his Social Security check deposited electronically into his checking account on the first day of each month. He writes out checks to pay the rent, utilities, and insurance on the second day of the month. But suppose that one month later the checks bounce and the consumer reports an error, alleging that the bank did not correctly credit the Social Security check. The bank investigates this allegation and determines that the Social Security transfer took place at the scheduled time and in the proper amount. It then reports this to the consumer. In its investigation of the error the bank finds that, in fact, the checks bounced only because the first check to return to the bank was an "on-us" check[175] that it overencoded, thereby wrongfully depleting his account.

Certain questions relating to Reg. E arise from this scenario. Once the institution has determined that no error occurred in the electronic deposit of the Social Security check, its responsibilities may cease under Reg. E. Can it merely report to the consumer that no EFT error has occurred, and then deal with the overencoding error in its ordinary manner? Since the overencoding occurred on a check, Articles 3 and 4 of the Uniform Commercial Code apply. The UCC imposes no error resolution procedure upon the bank. It only imposes liability for wrongful dishonor[176] and requires the bank to act in "good faith."[177]

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[173] *Id.*

[174] 12 C.F.R. § 205.11(a)(4) (1982).

[175] An "on-us check" is one drawn on an account in the same bank as that of the payee. B. CLARK, THE LAW OF BANK DEPOSITS 3-30 (1981). Since the transaction involves only one bank, the drawer's account would be debited quickly.

[176] U.C.C. § 4-402 (1978).

[177] U.C.C. § 1-203 (1978).

Once the bank has begun its investigation and has ascertained that there was an electronic fund transfer involved in the same account, the error could be considered one "relating" to an electronic fund transfer within the meaning of Reg. E. This argument is particularly strong if the electronic deposit of Social Security benefits is the only source of funds in the checking account. The argument is strengthened by the Reg. E requirement that the error resolution procedures must be followed even if "an error occurred in a different manner" than "that described by the consumer."[178] The drafters of the regulation may have considered only the situation in which the consumer describes one type of electronic error and the institution discovers another type of error. Nonetheless, the language used in Reg. E also might cover the non-EFT error described above. Even if Reg. E does not bind the bank in resolving the encoding error, considerations of fairness and a recognition of the legal relationship between the bank and its customer[179] still should require the bank to disclose that it found the source of the error in the course of its investigation. In addition, the bank should indicate what action it intends to take in regard to that error.

C. *Information Which Must be Reported by the Consumer*

The EFTA, Reg. E, and the model notices differ significantly in regard to the information that each requires the consumer to report to trigger the error resolution procedure.[180] The model

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[178] 12 C.F.R. § 205.11(f) (1982).

[179] *See also supra* Part IV.

[180] Section 1693f(a) of the EFTA requires the consumer to provide oral or written notice in which the consumer:

> (1) sets forth or otherwise enables the financial institution to identify the name and account number of the consumer;
> (2) indicates the consumer's belief that the documentation, or in the case of notification pursuant to section 1693(b) of this title, the consumer's account, contains an error and the amount of such error; and
> (3) sets forth the reasons for the consumer's belief (where applicable) that an error has occurred.

15 U.S.C. § 1693f(a) (1976 & Supp. IV 1980). Reg. E defines notice of error as one that:

> (ii) Enables the financial institution to identify the consumer's name and account number; and
> (iii) Except for errors described in paragraph (a)(7) of this section, (a consumer's request for documentation or additional information or clarification) indicates the consumer's belief, and the reasons for that belief, that an error exists in the consumer's account or is reflected on documentation required by §§ 205.9

notices lack many of Reg. E's protections for consumers and do not adequately carry out the FRB's express policy of aiding the consumer who lacks the sophistication to follow an intricate error procedure.

First, Reg. E requires the consumer to indicate "to the extent possible the type, the date, and the amount of the error,"[181] whereas the EFTA and the model notices do not contain the qualification that the consumer indicate the above information only "to the extent possible." The FRB inserted this qualification into the regulation in order to

> . . . minimize the possibility that a consumer could be denied the protections of [§ 205.11] simply by not understanding the error or knowing its amount. Consequently, the proposed regulation states that the reasons for the consumer's belief that an error has occurred and a description of the type and amount of the suspected error need only be provided to the extent possible. While the regulation contemplates that the consumer articulate at least a general assertion or description of the suspected error, a financial institution would not be relieved of error resolution responsibilities where a consumer is unable to describe the error or articulate the amount of or the reasons for the error.[182]

In contrast, the model notices require the consumer to "tell us the dollar amount of the suspected error"[183] and "describe the error."[184] If the institution can require the consumer to comply strictly with the mandates of the FRB's notices, it also could allege that the consumer failed to initiate the error resolution procedure by not describing the type and amount of error with the specificity required by the model notice. Therefore, the EFTA and the model notices do not protect the consumer who

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or 205.10(a) and indicates to the extent possible the type, the date, and the amount of the error.

12 C.F.R. §§ 205.11(b)(ii)-(b)(iii) (1982). Both the long and short form notices state:

(1) Tell us your name and account number (if any).

(2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe there is an error or why you need more information.

(3) Tell us the dollar amount of the suspected error.

Id. §§ 205.7(a)(10), 205.8(b).

[181] 12 C.F.R. § 205.11(b)(1)(iii) (1982).

[182] 44 Fed. Reg. 25,856 (1979). *But cf.* 45 Fed. Reg. 8255 (1980).

[183] 12 C.F.R. § 205.8(b) (1982).

[184] *Id.* §§ 205.7(a)(10), 205.8(b).

has such inadequate knowledge of a transaction that he is unable to describe the alleged error with particularity.

Competitive forces could provide incentives for financial institutions to simplify the error resolution procedure by allowing a summary description of the error to trigger the procedure. Nonetheless, the FRB should redraft the notices to parallel Reg. E's less stringent requirements in order to prevent financial institutions from using the notices to deprive a consumer of his right to the error resolution procedure.

In addition, neither the long nor the short form notice indicates that the consumer should inform the institution of the date of the error. An omission of the date by the consumer in his notice to the institution may therefore prevent triggering the error resolution procedure. Although the EFTA contains no such provision, it would be reasonable to require consumers to specify the date in order to facilitate the investigation. However, since the consumer never receives notice of this requirement, it would be unreasonable to require him to do so.

It might be argued that the institution could incorporate a date provision in its notice and refuse to investigate a complaint that does not specify the date. The regulation only requires that the institution send a notice "substantially similar" to the one in Reg. E.[185] The institution may claim that it is merely incorporating into its notice a requirement that is clearly and explicitly called for in the regulation. The consumer could argue that the "substantially similar" provision allows only minor modifications such as grammatical changes or an insertion of the name of the bank.[186] Since the inclusion of an important piece of information omitted in the form prescribed by Reg. E indeed goes well beyond the "substantially similar" requirement, the FRB should eliminate potential disputes by making Reg. E and the model notices consistent.

Moreover, the standard for determining whether a consumer information request constitutes an allegation of error for purposes of activating the error resolution procedure is broader under Reg. E than under the model notices. Under Reg. E,

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[185] *Id.*

[186] *See Official Staff Commentary on Reg. E*, FED. RESERVE REG. SERV. (FRB) Q7-18 (1981).

whenever a consumer requests information about an electronic fund transfer, whether it is connected to receipts, periodic statements, or preauthorized transfers, this request is an "error," and triggers the error resolution procedure if the other requirements including name and account number are satisfied. Section 205.11(a)(7) defines the limits of an "error" to include

> [a] consumer's request for any documentation required by §§ 205.9 or 205.10(a), *or* for additional information or clarification concerning an electronic fund transfer. This includes any request for documentation, information or clarification in order to assert an error within the meaning of paragraphs (a)(1) through (6) of this section.[187]

Section 205.9 applies to receipts at electronic terminals and periodic statements, and section 205.10(a) applies to notices of preauthorized transfers by the payor or the financial institution.

Under the model notice provisions, however, only a request for information on the periodic statement or the receipt is considered to be an error.[188] Therefore, requests for information on preauthorized transfers would not be considered errors since the institution does not have to send the consumer a receipt (a term used in Reg. E only to refer to receipts from electronic terminals),[189] and it may fail to send a periodic statement. Even if the institution does send a periodic statement, for certain types of accounts it can send one as infrequently as four times a year.[190]

The model notices also are defective because they apply only to requests for information, and not to documentation or clarification as provided for in section 205.11(a)(7). Consumers may need the more detailed explanation that results from clarification or documentation requests. Although an information request could be satisfied by a mere summary statement, clarification requires explanation in terms the consumer can understand. The documentation by the financial institution requires it to provide

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[187] 12 C.F.R. § 205.11(a)(7) (1982). The FRB adopted this provision over industry objections which were "(1) that every request about the consumer's account would activate the error resolution procedure and (2) that it is unclear what steps would be necessary to investigate and correct this type of error." 45 Fed. Reg. 8254–55 (1980). The FRB responded that it believed "the statute requires treatment of the consumer request as error." *Id.* at 8255.

[188] 12 C.F.R. §§ 205.7(a)(10), 205.8(b) (1982).

[189] *Id.* § 205.9(a).

[190] *Id.* § 205.9(d).

written proof that could be very valuable to the consumer. In addition, the institution must decode any document that is in computer printout form.

Reg. E and the model notices also differ in the type of written confirmation that the consumer must send to the financial institution after he orally reports an error. The EFTA and Reg. E both permit an institution, upon receiving an oral report of error, to require the consumer to send "written confirmation" that must be received by the institution within ten business days.[191] The long form notice requires the consumer to put the complaint into writing. It provides, "If you tell us orally, we may require that you send us your *complaint or question* in writing within 10 business days."[192] The short form notice contains no reference to the requirement for a written confirmation. It is unclear whether the institution can require a consumer to put his complaint into writing as required by the long form notice, or whether a written confirmation as provided by the EFTA and Reg. E is sufficient. Presumably, a written confirmation could consist of a letter that merely states, "I hereby confirm the error I reported to you over the phone today." A written complaint requirement also could require the consumer to put into writing his name, his account number, a description of the alleged error, an explanation of why he believes there is an error, and the amount of the error.

These more onerous provisions in the model notices, unsupported by either the EFTA or Reg. E, are inconsistent with the FRB's policy of providing easy access to the error resolution procedure, and should be revised. Just as the consumer should not be foreclosed from the error resolution procedure by his inability to describe an error in great detail, the consumer should likewise not be shut off from the procedure by his inability to draft a written complaint.

A simple written confirmation requirement would be beneficial to financial institutions as well by providing the financial institution with a written record of the complaint that could facilitate the complaint's processing. The financial institution could still contact the consumer if it needed more information.

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[191] 15 U.S.C. § 1693f(a)(3) (1976 & Supp. IV 1980); 12 C.F.R. § 205.11(b)(2) (1982).
[192] 12 C.F.R. § 205.7(a)(10) (1982).

VI. THE INVESTIGATION OF ERRORS

A. *The Scope of the Investigation: The "Four Walls" Requirement*

Although errors can be committed by any one of the parties to an electronic transfer, including merchants, banks, automated clearinghouses, employers, and the United States Treasury, the EFTA often requires only the consumer's financial institution to investigate an alleged error.[193] Moreover, the institution is usually authorized to limit its investigation to its own "four walls."[194]

The EFTA does not clearly define the scope of the financial institution's investigative responsibilities. In establishing the institution's civil liability for failure to comply with the error resolution procedure requirements, it provides that the inquiry into an error be conducted "from the evidence available at the time of its investigation . . . ."[195] The "evidence available" to the financial institution might refer either to the evidence within the institution's four walls or to evidence available from third parties. The EFTA's definition of the term "error" includes errors that occur both inside the consumer's financial institution[196] and outside of the institution.[197] Arguably, the EFTA's inclusion of errors that could occur beyond the institution's four walls is an indication that the institution's duty to investigate includes those errors. The FRB, however, adopted a narrow interpretation of this ambiguous statutory language. Reg. E requires that the financial institution's mandatory investigation include only a "review of its own records regarding an alleged error . . . if the alleged error concerns a transfer to or from a third party and there is no agreement between the financial institution and the third party regarding the type of electronic fund transfer alleged in the error."[198]

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[193] 15 U.S.C. § 1693f(a) (1976 & Supp. IV 1980).
[194] 45 Fed. Reg. 8256 (1980) (to be codified at 12 C.F.R. pt. 205).
[195] 15 U.S.C. § 1693f(e)(2) (1976 & Supp. IV 1980).
[196] Computational errors made by the institution are defined in *id.* § 1693(f)(4).
[197] *See id.* § 1693f(f)(2) (definition of an incorrect transfer to or from the consumer's account).
[198] 12 C.F.R. § 205.11(d)(2) (1982). A footnote to this section seeks to define those

Therefore, the scope of the institution's investigation depends on the type of transaction involved. If the transfer involves only the institution, such as a deposit at an ATM, only the institution's own records are involved. Even if the transfer involves a third party, the institution must only review its own records when the institution and the third party have not entered into an agreement concerning the specific type of transfer involved. The error resolution procedure does not protect the consumer if the institution's records indicate that it did not commit an error. The consumer must then find the source of the error himself, determine who is responsible for it, and seek to have it corrected.

This limit upon the scope of an institution's duty to investigate was developed in response to industry comments on the FRB's proposed regulations. The original proposal provided for the provisional recrediting of the consumer's account if the investigation were to take longer than ten days.[199] The proposal did not modify the institution's duty to contact third parties in the course of the investigation. The FRB, however, was concerned with the burden on the institution, particularly in the direct deposit program, of contacting third parties and recrediting the consumer's account when the investigation exceeded ten days. The FRB, therefore, proposed a plan that would have required the financial institution to complete its in-house investigation within ten days; but when it would be necessary to extend its investigation to a third party to resolve the error,[200] the institution would have an unspecified number of days beyond the ten

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circumstances under which there is an agreement between the consumer's institution and third parties:

> Institutions do not have an agreement for purposes of paragraph (d)(2) of this section solely because they participate in transactions under the federal recurring payments program, or that are cleared through an automated or other clearing house or similar arrangement for the clearing and settlement of fund transfers generally, or because they agree to be bound by the rules of such arrangements. An agreement that a third party will honor an access device is an agreement for purposes of this paragraph.

Id.

The FRB also explains how it determines whether an agreement is of the type that requires an investigation beyond the institution's four walls. 45 Fed. Reg. 66,364 (1980); *see also id.* at 8256 (to be codified at 12 C.F.R. pt. 205) (proposed Oct. 6, 1980).

[199] 44 Fed. Reg. 25,863 (1979) (to be codified at 12 C.F.R. pt. 205) (proposed May 3, 1979).

[200] *Id.* at 25,857 (to be codified at 12 C.F.R. pt. 205) (proposed May 3, 1979).

days, and would not be required to provisionally recredit the consumer's account.

The FRB dropped the proposal and instead adopted the strict "four walls" approach. It explained that the industry objected to the required extension of the investigation to third parties because the investigation might then exceed ten days, forcing the institution to provisionally recredit the consumer's account.[201] But a provisional recredit was precisely what the FRB's tentative proposal would *not* have required. The tentative proposal was a compromise because it spared the institution the provisional recredit yet gave the consumer the protection of an investigation beyond the institution's four walls.

The FRB justified its four-walls policy by asserting that many errors are made by the consumer's bank or the originator of the transfer. In the case of errors committed by the bank, the four-walls rule meets consumers' needs since the bank will discover its own error even within the limits of that rule. In the case of errors committed by the originator of the transfer, the FRB explained that it would be "more efficient" for the consumer, than for the bank, to resolve the dispute with the originator of the transfer.[202] The FRB did not explain its use of the term "efficient," but presumably meant that it would be less costly for the consumer to resolve the dispute than for the institution. In order to determine the validity of this assumption, one would have to compare the costs to the consumer with those to the institution. Consumer costs include such expenses as transportation and the value of time spent by the consumer in pursuit of his claim. If the consumer has to take time off from work, the value of that time may be substantial. While the consumer who has his money at stake might pursue the case more aggressively than the bank, he could be intimidated by the vast bureaucracy of an agency such as the Social Security Administration or by the power of an employer.[203] The institution's costs include the cost of employing persons to investigate the error.[204]

[201] *Id.* at 59,481 (to be codified at 12 C.F.R. pt. 205) (proposed Oct. 15, 1979).

[202] 44 Fed. Reg. 8256 (1980) (to be codified at 12 C.F.R. pt. 205). The FRB promised to monitor the situation and consider further action if necessary. *Id.*

[203] *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1979), and Palmer v. Columbia Gas Co., 479 F.2d 153 (6th Cir. 1973) (describing the difficulties that consumers have in persuading utilities to correct billing errors).

[204] These costs could be allocated in several ways. A bank might impose the extra

A bank is less likely to be intimidated by a government agency or employer, and may be able to resolve the dispute rapidly if it has handled similar problems in the past.

Moreover, if the FRB is incorrect in assuming that financial institutions or originating parties cause most errors, the consumer would face substantial unjustified obstacles. For example, if another party, such as the payor's bank or the ACH, has caused the error, the consumer would have to determine who has committed the error and persuade that party to correct the error. Because the EFTA does not apply to resolution of third party errors, the consumer may have difficulty getting anyone other than his own bank to cooperate fully and promptly since no other parties compete for the consumer's business. Therefore, absent other applicable law, the third party at fault could follow whatever procedures and deadlines it desired when investigating and correcting errors.

Therefore, if many errors are caused by parties other than the financial institution or the originating party, or if the consumer is likely to have difficulty resolving disputes with the originating party, it may not be efficient for the consumer to resolve third party errors. The four-walls rule cannot be justified on the basis of efficiency.

If the four-walls rule is retained, the initial and periodic notices sent to the consumer should warn him of the limits of the bank's investigation. The short form notice gives a false impression by informing the consumer that the bank "will investigate your complaint and will correct any error promptly."[205] The FRB should require the financial institution to disclose the limits of its investigation in the written explanation it is required to send the consumer when the bank has found no error.[206] Because the

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cost upon either all nonbusiness customers or all EFT customers. Alternatively, the bank could impose a charge only upon those customers who invoke the error resolution procedure, or only upon those customers whose errors require an investigation outside of the bank. Finally, rather than impose costs directly upon EFT consumers, banks might work out arrangements to share the costs with the other participants in multiparty EFT transfers. It is impossible to know whether this last possibility would impose significant costs upon users of the system. The scheme most likely to result in substantial consumer expense would be one where only the consumer who alleges an error requiring an investigation of third parties is charged for the costs incurred. Under the other alternatives, unless many errors are alleged, the costs probably would be spread among so many persons that the extra cost to each person probably would be minimal.

[205] 12 C.F.R. § 205.8(b) (1982).

[206] *Id.* § 205.11(f).

financial institution's investigation is so limited, Reg. E also should require the institution to tell the consumer, in cases where it finds that it has committed no errors, to contact the other parties to the transaction in order to get a complete explanation.

A requirement that the financial institution inform the consumer of the limits of its investigation is consistent with the financial institution's duty toward its customers, especially when the financial institution acts in a fiduciary capacity. The inclusion of this warning is also sound policy where one or more of the parties is an agency of the government, such as the FRB as operator of the ACH or the Social Security Administration and United States Treasury as payors. If a government agency is responsible for the error, the consumer should not be given legally required notices that suggest that the financial institution's investigation includes contact with that agency when in fact no contact has occurred.

B. *The Recredit Provision*

If an institution elects to take up to forty-five days to investigate a consumer's alleged error,[207] it must "provisionally recredi[t] the consumer's account in the amount of the alleged error (including interest where applicable) within 10 business days of receiving notice of error."[208] When the institution exercises the recrediting option, Reg. E imposes a duty on it to inform the consumer that his account is being recredited and that the consumer will have full use of the funds while the institution determines whether an error has occurred.[209] If the institution determines that no error has occurred, it must inform the consumer that the recredit is being withdrawn, but that certain items will continue to be honored.[210]

This recrediting provision also reflects Congress' and the

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[207] The institution must complete its investigation as promptly as possible. It can extend the investigation beyond the initial ten-day period only if necessary. *Official Staff Commentary on Reg. E,* FED. RESERVE REG. SERV. (FRB) Q11-11 (1981).

[208] 12 C.F.R. § 205.11(c)(2) (1982).

[209] *Id.*

[210] *Id.*; *see also* 44 Fed. Reg. 25,856 (1979) (to be codified at 12 C.F.R. pt. 205) (proposed May 3, 1979).

FRB's recognition of the special relationship between the financial institution and the consumer regarding the transfer of funds. If the institution could prevent the consumer from using his own money for an extended period while it investigated an error, the legal obligation the bank has to the consumer would be emasculated.

The recrediting provision also may encourage financial institutions to make a determination concerning the dispute within the ten-day period rather than to exercise the forty-five-day option. This would save the financial institution the expense of additional notices and would prevent certain types of consumer fraud. For example, if the institution always were to use the forty-five-day option, a consumer could perpetrate a fraud upon the institution by claiming a frivolous error and withdrawing all of his funds, including the provisional recredit. By the time the institution determines that no error in fact had occurred, the consumer could have left the jurisdiction or become insolvent.[211]

On the other hand, making a determination within ten days may be more costly to the institution and may result in less accurate determinations than if the full forty-five days are used. For example, if an institution is faced with an unusually large number of complaints and feels the need to resolve them within the ten-day period to avoid notice expenses and the risk of fraud, it might have to keep its employees beyond normal business hours, resulting in greater expense. The pressure to resolve a dispute within the shorter time period also could result in careless investigations by some institutions that might either wrongly agree with the consumer that an error had occurred and absorb the loss, or wrongly insist that an error has not occurred and force the consumer to absorb the loss or pursue more costly judicial remedies.

Two major exceptions to the institution's obligation to recredit the consumer's account could undermine the protections that the EFTA and Reg. E provide to the consumer. First, if the institution requires the consumer to provide a written confirmation after filing notice of error, and the institution does not receive the confirmation within ten business days of the oral notice, it need not provisionally recredit the consumer's ac-

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[211] *See* 45 Fed. Reg. 8262 (1980) (to be codified at 12 C.F.R. pt. 205).

count.[212] As previously discussed, there is much confusion as to what kind of written confirmation is required.[213] At least one consumer representative has labelled this exemption "draconian," and has suggested that it would be more reasonable to postpone the recredit obligation only for a time period commensurate with the consumer's delay in transmitting a confirmation.[214]

Second, if the institution "has a reasonable basis for believing that an unauthorized electronic fund transfer may have occurred," and that the consumer is liable for the transfer, the institution may withhold a maximum of fifty dollars from the amount recredited.[215] This withholding is based on section 908(c) of the EFTA, which provides that the institution may provisionally recredit the consumer's account "subject to section 909."[216] Section 909 imposes liability upon the consumer for certain unauthorized transfers.[217] It provides that "[i]n any action which involves a consumer's liability for an unauthorized electronic fund transfer . . . the burden of proof is upon the financial institution to establish that the conditions of liability . . . have been met and, . . . that the disclosures required to be made to the consumer . . . were in fact made . . . ."[218] The FRB has had considerable difficulty interpreting this reference in section 908(c) to section 909 because the provision does not specify at what time the institution can assume that an unauthorized transfer has been made for purposes of withholding the recredit of a consumer's account.

It does not appear that Congress considered the recrediting problems in drafting section 909. Rather, the provision uses terminology such as "in any action," and "burden of proof" that applies to judicial proceedings.[219] Both the EFTA and Reg. E are unclear as to whether the use of these terms means that the institution must carry its burden of proof in a court proceeding as a prerequisite to the imposition of liability upon the

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[212] 12 C.F.R. § 205.11(b)(2), (c)(3) (1982).

[213] *See supra* Parts V(E) and VI(C)(2).

[214] COMMENT OF THE NATIONAL CONSUMER LAW CENTER CONCERNING DOCKET NO. R0221, PROPOSED REGULATION E AMENDMENTS 19 (undated).

[215] 12 C.F.R. § 205.11(c)(2)(i) (1982).

[216] 15 U.S.C. § 1693f(c) (1976 & Supp. IV 1980).

[217] *Id.* § 1693g(a), (b).

[218] *Id.* § 1693g(b).

[219] *Id.*

consumer for unauthorized use.[220] In the alternative, the institution unilaterally could determine the consumer's liability and either bill the consumer or debit the consumer's account for the alleged amount of liability. In the latter case, the institution would carry the burden of proof only if the consumer contested the imposition of liability in the course of litigation.

The FRB decided that the reference to section 909 meant that the institution could impose liability for unauthorized use at the time it provisionally recredits the account. The FRB, however, placed restrictions on the institution's ability to impose this liability in order to adhere to Congress' intention, evidenced in section 909, that the consumer be liable only in limited circumstances. For example, to impose liability at the time of the provisional recredit, the institution must have "a reasonable basis for believing . . . that it has satisfied the requirements of section 205.6(a) . . . ."[221] Section 205.6(a) provides that the institution must comply with a number of requirements in order to impose liability on the consumer for an unauthorized transfer.[222] One such requirement is that the institution have a reasonable basis for believing that an unauthorized transfer has taken place.[223] According to the drafting history, the institution must have more than a mere suspicion that such a transfer has occurred to have "a reasonable basis" for such a belief.[224]

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[220] For example, the model notice disclosing consumer liability for unauthorized use is worded in terms of the possibility the consumer could "lose" up to $500. 12 C.F.R. § 205.7(a) app. A at 2 (1982). There is no explanation of what the bank has to do in order for the consumer to "lose" this money. In explaining the liability for failure to notify the bank within 60 days of transmission of the periodic statement, the notice informs the consumer that he may not get his money back "if we [the bank] can prove that we could have stopped someone from taking the money if you had told us in time." *Id.* This language suggests that the bank must go to court and meet its burden of proof before charging the consumer for the loss.

[221] *Id.* § 205.11(c)(2)(i).

[222] *Id.* § 205.6(a). For example, the card or other means of access used by the consumer to initiate transfers must be an "accepted access device" as defined by § 205.2(a)(2). In addition, the institution must provide certain information to the consumer. *Id.* § 205.6(a)(3).

[223] *Id.* § 205.11(c)(2)(i).

[224] The Oct. 15, 1979 proposal merely stated that the institution could withhold the unauthorized amount "where an unauthorized electronic transfer may have occurred." 44 Fed. Reg. 59,486 (1979) (to be codified at 12 C.F.R. pt. 205) (proposed Oct. 15, 1979). In the commentary to this provision, the FRB explained that the institution could withhold the amount only when the institution "suspected" an unauthorized transfer has taken place. *Id.* at 59,481. The final version of the regulation modified the proposal by allowing the institution to withhold payment only if it has a "reasonable basis" for its belief that such a transfer has, in fact, taken place. 12 C.F.R. § 205.11(c)(2)(i) (1982).

In its final recredit limitation, the FRB allows the financial institution to withhold from the provisional recredit only an amount up to fifty dollars.[225] The FRB supported the fifty dollar limitation despite industry arguments that an institution should be allowed to withhold up to $500. The FRB responded that in order to impose liability greater than fifty dollars, the institution would have to prove both that the consumer failed to report the loss within two business days of learning of it, and that the institution could have prevented the loss if the consumer had given timely notice.[226] However, the FRB failed to acknowledge that allowing any amount to be withheld was broad enough implicitly to relieve the institution of its statutory burden of proof. Section 909 requires the institution to establish that it met the conditions of liability and sent the proper disclosures to the consumer. It is thus questionable whether the FRB's resolution of this issue is consistent with the stringent terms of section 909 of the EFTA.

Since neither the EFTA nor Reg. E limits the amount in error that the consumer may allege, the institution might have to recredit the consumer's account by an unjustifiable amount. Reg. E requires that the institution provisionally recredit the consumer's account "in the amount of the alleged error."[227] The long form notice informs the consumer, "[W]e will recredit your account within 10 business days for the amount you think is in error . . . ."[228] The FRB, apparently disturbed by the prospect of having exorbitant consumer claims, at one point solicited suggestions for "less costly means to implement the statutory requirements . . . ."[229] However, in its final version of Reg. E, the FRB settled for language that was fully consistent with the statute's clear mandate requiring recrediting "for the amount alleged to be in error."[230]

If the FRB had wanted to continue the "suspected" standard, it could have retained the original language of the proposal, or it could have specifically incorporated the "suspected" standard into the final regulation. But, by adding a "reasonable basis" test, the FRB presumably intended to impose a more stringent standard than mere suspicion.

[225] 44 Fed. Reg. 59,481 (1979) (to be codified at 12 C.F.R. pt. 205) (proposed Oct. 15, 1979).

[226] *Id.*

[227] 12 C.F.R. § 205.11(c)(2)(i) (1982).

[228] *Id.* §§ 205.7(a)(10), 205.8(b).

[229] 44 Fed. Reg. 59,484 (1979).

[230] 15 U.S.C. § 1693f(c) (1976 & Supp. IV 1980).

Given the many forms in which electronic fund transfers can take place, the wide range of amounts of transfers, and the interface between EFT errors and errors involving other types of transfers, it would be prudent to establish only very broad standards for the allegation of error to prevent abuse. Presumably, courts would apply general standards of good faith and reasonableness if a dispute arose. Thus, if a consumer claims an error and recredit in an amount that his financial institution believes far exceeds the amount that the error could possibly involve, the good faith and reasonableness standard should be extended so that the institution would not be in violation of the recredit provisions if it refused to recredit the full amount of the alleged error.

If the institution finds that an error has occurred, it must promptly notify the consumer that the provisional credit has been made final.[231] If, on the other hand, the institution has concluded that the consumer's allegation is unfounded and in fact no error has occurred, the institution is entitled to debit from the consumer's account the amount recredited. But since the EFT device may access the consumer's checking account, it is important that the institution immediately inform the consumer when this happens because the consumer's checks could bounce if the account is debited in the amount of the alleged error without his knowledge.

The original proposed regulation addressing this problem contained a provision that required the institution to provide the consumer with at least three days notice before it debited the account.[232] The institutions opposed this provision because consumers who received the advance notice would be able to withdraw their funds before the institution debited the account.[233] The FRB accepted this argument and substituted a provision that the institution must notify the consumer of the debit only at the time of the debit.[234] As was noted in the Federal Register:

[231] 12 C.F.R. § 205.11(e)(2) (1982). In its Official Staff Commentary, the FRB failed to specify whether the requirement of prompt notification is satisfied by including the notice on a periodic statement mailed within the 10 business days or the 45 calendar days. Instead, the FRB asserted that the institution must take into account "the specific facts involved." *Official Staff Commentary on Reg. E*, FED. RESERVE REG. SERV. (FRB) Q11-20 (1981).

[232] 44 Fed. Reg. 25,863 (1979).

[233] *Id.* at 59,482.

[234] 12 C.F.R. § 205.11(f)(2) (1982).

"It is hoped that notice at the time of debiting, rather than prior to debiting, will reduce substantially the potential for fraud."[235]

To protect the consumer who has written checks drawn upon an account from which provisionally recredited funds have been debited, Reg. E also requires the institution to notify the consumer that it will honor both checks payable to third parties and preauthorized transfers that are drawn on the provisionally recredited funds for five business days after mailing notice of the debiting.[236] The institution can inform the consumer of this provision either orally or in writing. A problem may develop if the institution chooses to mail the notice because the consumer may not receive the notice for two or three days. The result of this delay may be that some of the checks written by the consumer just before the notice was received by him would fail to reach the institution within the five days. The institution would then be allowed to refuse to honor them or subject them to overdraft charges.[237]

The relationship between the recredit provision and the consumer's request for information, documentation, or clarification concerning a fund transfer is another area where problems have developed. The interrelationship is somewhat ambiguous. A consumer may request information, not because he believes an error has occurred, but merely because he does not understand some aspect of a transaction. Reg. E defines such a request as an allegation of error by the consumer.[238] But since both the time the institution could take to provide requested information and the way in which the recredit provision operates were phrased in terms of an investigation of error, rather than a request for information, it was unknown how these provisions would have operated with such a request.

The FRB clarified these matters in a statement in the Federal Register:

> [Where the consumer] merely requests additional information or documentation . . . the financial institution should be able to do this within 10 business days. If the institution

[235] 44 Fed. Reg. 59,482 (1979).

[236] 12 C.F.R. § 205.11(f)(2)(ii) (1982); *see also Official Staff Commentary on Reg. E*, FED. RESERVE REG. SERV. (FRB) Q11-22 (1981).

[237] *Official Staff Commentary on Reg. E*. FED. RESERVE REG. SERV. (FRB) Q11-24 (1981).

[238] 12 C.F.R. § 205.11(a)(7) (1982).

> takes more than 10 business days, however, the recrediting procedure will then apply. The amount recredited would be the amount of the transfer(s) about which the consumer requested information or documentation.[239]

The consumer may discover that an error has occurred once the institution sends the requested information to him. Reg. E provides that in order for the consumer to trigger the error investigation procedure, he must ensure that the institution receives his notice of error within sixty days of the date the institution transmitted the erroneous information.[240] Unfortunately, the notice does not advise the consumer of this deadline. The notice states, "We must hear from you no later than 60 days after we sent the FIRST statement on which the error or problem appeared."[241] The consumer could reasonably conclude that he has a total of sixty days from the date the institution sent the periodic statement both to request the relevant transactional information and to notify the institution of an error. The consumer may not be able to do both within sixty days if there are delays in the mail, if he waits a few days before requesting information, or if the institution does not send the information until the end of the forty-five-day period. The consumer may consequently forego the opportunity to send his notice of error because he would believe that he has missed the sixty-day deadline. To avoid this problem, the notices should be revised to inform the consumer that he has sixty days from the date of transmission of the requested information to notify the institution of an error. In the alternative, the institution should insert a form notice to that effect along with the requested information.

C. *Notice of Dispute of the Institution's Determination*

If the institution determines that "an error" occurred, it must correct the error within one business day after that determina-

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[239] 44 Fed. Reg. 59,481 (1979). The notices do not clearly tell the consumer he has a right to receive either the information he requested within 10 days or a recredit. The notices disclose the "10 day provision" in the context of investigation of an error, but do not explain that a request for information is treated as an error for these purposes.

[240] 12 C.F.R. § 205.11(b)(1)(i)(B) (1982).

[241] *Id.* §§ 205.7(a)(10), 205.8(b).

tion and must notify the consumer orally or in writing.[242] If the institution determines that "no error occurred *or* an error occurred in a different manner or amount from that described by the consumer," the institution must mail or deliver to the consumer a written explanation of its findings. This explanation must include a notice of the consumer's right to request documents upon which the institution relied in making such a determination.[243] The foregoing makes clear that if an institution finds an error, it must correct the error, whether or not it is the error about which the consumer complained.[244] Furthermore, if the institution determines that an error has occurred in a different amount or manner from that described by the consumer, the institution cannot simply tell the consumer orally that he was right and the records will be straightened out. Rather, the institution must mail or deliver a written explanation of these findings, including the right to request documentation.[245]

Although this procedure imposes significant burdens upon those institutions that provide EFT, it is not unreasonable given the difficulty the consumer may have in understanding the nature of certain types of errors, the consumer's property interest in the funds held by the institution, and the special legal relationship between the institution and the consumer. Furthermore, EFT is an important part of the national payment system. The integrity of that system depends upon the disclosure and explanation to the consumer of errors that have occurred in his account so that he can better understand the system, have the error corrected, and make intelligent choices concerning his use of EFT. Requiring these written explanations also may result in more efficient operation of an institution's EFT system by providing the institution with a record of recurring problems that indicate the need for changes in the operation of the system.

Despite the meritorious features of Reg. E's notice requirement where a dispute has been resolved, the notice and the accompanying explanation are deficient in several respects. First, although the institution is allowed to charge fees for the

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[242] *Id.* § 205.11(e).
[243] *Id.* § 205.11(f)(1) (emphasis added); *see also Official Staff Commentary on Reg. E*, FED. RESERVE REG. SERV. (FRB) Q11-17 (1981).
[244] "Error" is defined in 12 C.F.R. § 205.11(a) (1982).
[245] 12 C.F.R. § 205.11(f)(1) (1982).

documents requested by the consumer,[246] the institution is not required to disclose the amount of the fee at the time it informs the consumer of his right to such documents. This may cause unfair surprise and expense to a consumer who requests documents and is charged fees that far exceed any benefit the consumer could derive from the documents.

Second, it is not clear how explicit the institution's written explanation of its finding that "no error occurred" must be. For example, it is unclear whether a financial institution may respond in this manner: "After fully complying with the investigation procedures required by federal law, we have determined that no error has occurred as that term is defined by federal law and in accordance with the scope of our investigation duties." This explanation may be inadequate if the financial institution determined that there was an error, but not the type of error covered by Reg. E. The explanation also may be questioned where the financial institution has determined that it committed no error within its four walls, but strongly suspects that an error was caused by another party to the transaction. Congress' concern over the "crucial importance" of error resolution[247] and the FRB's recognition of the consumer's need to be informed of errors, even those not precisely identified by the consumer, indicate its intention that the explanation be more helpful than the cryptic one posed above.

Reg. E, in order to ensure that the consumer is provided a meaningful and useful explanation, should require the institution to describe briefly to the consumer what it has done to investigate the alleged error, and how the institution arrived at its conclusion that no error occurred. The institution should specify that no error occurred anywhere in the system or that no EFT error occurred within its four walls and that it has no responsibility to investigate further, or that an error occurred, but it is not an EFT error. In the last case, the institution should inform the consumer of what, if anything, it plans to do about the error. This proposal requires greater specificity than Reg. E. It does not, however, lock the institution into the confines of a mandatory explanation form.

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[246] *See Official Staff Commentary on Reg. E,* FED. RESERVE REG. SERV. (FRB) Q11-31; *see also supra* Part VI(D).

[247] S. REP. No. 915, 95th Cong., 2d Sess. 6–7 (1978).

Once the institution sends notice that it has found no error and that the provisional recredit has been debited, the typical consumer probably would believe that he has exhausted his remedies.[248] Some consumers may know that they can still pursue state common law remedies. Unless they are told, however, they do not know that they are entitled to special remedies under the EFTA.[249] As a result, the notice sent to the consumer at this time should include at least a brief reference to the availability of relief under the federal law. Disclosure of the one year statute of limitations[250] is equally important.

Opponents of these proposals emphasize the prospects for increasing information overload and the cost of such proposals. A consumer would be highly motivated to read, to understand, and to act upon the information contained in this notice if he believed that an error had occurred and his financial institution had told him that there is nothing it would do about it. The possibility that the consumer will ignore the information because he has too much is greatly reduced in that situation.

The costs and benefits of requiring a more detailed notice also must be examined.[251] The suggested disclosures, such as fees imposed for documents, the right to pursue private judicial remedies, and the statute of limitations, can be standardized and printed on form notices at negligible cost. The possible benefit

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[248] The consumer is provided a notice of the institution's liability for failure to make transfers before the first transfer occurs. 12 C.F.R. § A(10) app. A at 10 (1982). Problems that might bring about liability, however, may not arise until long after this disclosure is sent. Moreover, the required notice indicates neither that federal law establishes this liability nor that the institution's liability is independent of the error resolution procedure. The notice, however, does emphasize that there are failed transfers for which the institution is not liable, such as when an ATM is empty. Finally, the notice is silent on the possible liability of other parties to the transaction. Therefore, although the consumer is provided with a disclosure of the institution's liability, the deficiency of that notice will not ameliorate the difficulties described in the text.

[249] The EFTA imposes not only general civil liability upon institutions, but also treble damages for failure to comply properly with the error resolution procedure. 15 U.S.C. § 1693m (1976 & Supp. IV 1980). In addition, there are special provisions designed to overcome the excessive transaction costs that make consumer actions based on private common law remedies unattractive. *See, e.g., id.* § 1693m(a)(2) (minimum damage award); *id.* § 1693m(a)(3) (costs and attorney's fees).

[250] *Id.* § 1693m(g).

[251] *See generally* Baram, *Cost-Benefit Analysis: An Inadequate Basis for Health, Safety and Environmental Regulatory Decision-Making*, 8 ECOLOGY L.Q. 473, 481–93 (1980).

to the consumer may be substantial if the disclosures facilitate his ability to correct errors or recover his damages despite the institution's determination that no error has occurred.

The costs of requiring institutions to explain their investigation results with some specificity are uncertain. Many institutions already may be interpreting Reg. E to require explanations substantially similar to those suggested. For those institutions, the proposal would not impose any expense greater than that presently incurred.

If, on the other hand, institutions are currently providing summary explanations that would not comply with the proposed requirements, the proposal may impose additional costs on them. The key question is whether those costs are offset by the benefits to consumers. The answer depends on the circumstances surrounding the error. If the institution were to determine correctly that there was no error and that the consumer should have realized that there was no error before lodging the complaint, the proposal would subject the institution to needless expense. However, if the institution were correct in finding no error but the consumer had reasonable grounds to suspect that there was an error, the benefits to both the institution and the consumer may be greater than the costs. An adequate explanation should increase consumer satisfaction with the way the bank serves its customers[252] and educate consumers both about what constitutes an error under the EFTA[253] and how EFT operates. As a result, the explanation supplied by the institution may dissuade the consumer from filing unwarranted lawsuits.

In other instances, the institution's full explanation would enable the consumer to prove that there really was an error, for example, where the explanation indicated that the financial institution investigated the wrong customer's account. The cost of providing a full explanation could still be greater than the

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[252] A report based upon research conducted by the Conference Board found that banks are often unresponsive to consumer complaints. E. McQuire, Customer Relations in Financial Institutions 22, 24, 30 (1979).

[253] Many consumers have accounts through which their checking, credit card, and EFT services operate. A consumer may be correct in believing an error has occurred, but it may be a checking error not covered by the EFTA.

corresponding benefit to the consumer. If, however, the error recurs each month, or is system-wide, or results in a substantial monetary loss, the benefits to the consumer could outweigh the cost to the institution.

Finally, a full explanation often would avoid the need for litigation, which imposes substantial costs on financial institutions, consumers, and taxpayers. If the institution fails to provide an adequate explanation when it informs the consumer that it has found no error, the consumer who strongly believes that he is correct may file a lawsuit and engage in discovery to obtain an adequate explanation. Therefore, the requirement of a satisfactory explanation upon conclusion of the Reg. E investigation may provide the consumer with the information needed to demonstrate to the financial institution that an error has indeed occurred and that the institution would lose if the case went to court.

It is difficult to assess the costs and benefits of providing detailed explanations to the consumer. Even if accurate data could be collected on the cost to the institution, it is questionable whether comparable values could be given to the benefits derived by institutions, consumers, and society. It would be difficult, for example, to quantify precisely the benefit of avoiding litigation, and even more difficult to determine how often a satisfactory explanation actually did avoid litigation. Unless comparable values can be assigned to costs and benefits, it is virtually impossible to determine whether the costs outweigh the benefits.

The explanation of the financial institution's finding of no error is a necessary element of Reg. E's error resolution procedure. An error resolution procedure in which the consumer is not told why he is wrong in believing an error occurred is similar to a trial in which the losing party is not told whether he lost on the law, the facts, or a procedural rule. An explanation is necessary to preserve the integrity of the EFT error resolution procedure since the financial institution is both the fact finder and the party alleged to have caused the error. Reg. E would be improved further if the consumer were supplied with additional information, as specified above, at the time the institution informs him that it has determined that no error occurred.

D. *Charges for Investigations and Requests*

Whether the institution can impose a charge for conducting an investigation or for supplying information, clarification, or documentation, and how much to charge, are issues of crucial importance. If the consumer's financial institution can impose a substantial charge, the consumer will be discouraged from asserting his rights unless both the amount of money in question and the probability that the institution is responsible for an error are high. Banks that demand excessive charges could completely thwart the effective exercise of the error resolution procedure. Nevertheless, the EFTA and Reg. E do not discuss charges for investigating errors.[254]

The FRB has recommended to Congress that the EFTA be amended to prohibit all charges since "we believe that permitting these charges at all serves to discourage customers from exercising their right to assert errors."[255] The FRB has decided not to address this issue in Reg. E in the absence of statutory change.[256] The FRB did note its concern "with any chilling effect on the good faith assertion of errors (particularly errors involving small amounts that might result from the imposition of charges)." The FRB has warned that it will carefully monitor the situation and will reexamine the need for regulation if it becomes aware of "abuses or of a chilling effect on the exercise of rights."[257] Finally, the FRB has raised the possibility[258] that

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[254] Similar charges may arise in regard to two other federal consumer laws. Under the Fair Credit Reporting Act, the consumer is entitled to obtain this particular report without charge if he requests it after receiving notice that he has been denied credit, insurance, or employment based on such a report. 15 U.S.C. § 1681j (1976 & Supp. IV 1980). If the consumer wants a report under any other circumstances, the credit reporting agency can impose a "reasonable charge." *Id.* Under the Fair Credit Billing Act, the consumer has a right to demand an investigation and request transaction documents, but the Act is silent as to whether the creditor can impose a charge for this. *Id.* § 1666. Creditors have informed the FRB that they do charge consumers for exercising their rights under that law. "In some cases, these charges are quite substantial, and in others they are open-ended—for example, $5 per hour for an investigation." *Hearings, Electronic Funds Transfer Act*, *supra* note 8, at 402 (statement of Nancy Teeters, Governor, Board of Governors of the Federal Reserve System).

[255] *Hearings, Electronic Funds Transfer Act*, *supra* note 8, at 402 (statement of Nancy Teeters, Governor, Board of Governors of the Federal Reserve System).

[256] 45 Fed. Reg. 8257 (1980).

[257] *Id*; *see also Official Staff Commentary on Reg. E*, FED. RESERVE REG. SERV. (FRB) Q11-31 (1981).

[258] 44 Fed. Reg. 8257 (1979); 45 Fed. Reg. 66,365 (1980).

charging the consumer for the costs of the institution's compliance with the Act could constitute a waiver of the consumer's rights under the Act in violation of Section 914 of the EFTA.[259]

The FRB has considered the possible costs that could be shifted to the consumer if an institution could charge for its error investigation. In one of its early Economic Impact Analysis statements, the FRB solicited comments from financial institutions on the costs and levels of charges for error investigations before the regulation went into effect, the probable costs of other requirements under Reg. E, and the desirability of permitting only reasonable charges.[260] The average costs of error resolution were estimated to range from $3.50 to $12.00 per alleged error. Estimates of the average cost of providing documentation ranged from $3.00 to $12.00 for each request.[261]

Assuming that these estimates are based upon a reasonable allocation of costs,[262] it is not clear what type of regulation could best curb unreasonable charges. One approach to limiting unreasonable charges would be to set a maximum amount that could be charged. Based upon the above figures, and assuming there may be at least some padding in the industry estimates, a ten dollar maximum would be reasonable. A regulation either could establish the ten dollar amount as a maximum, or allow an institution to exceed that amount if it were able to substantiate that its costs were higher. There are, however, several objections that could be made to this approach. The consumer would have reason to fear that the institution would regard ten dollars not as a maximum, but as a figure that is presumptively reasonable, and consequently would charge ten dollars even if the actual costs were much lower. Institutions, conversely, would argue that the ten dollar figure will soon become obsolete as costs continue to escalate, and the difficulty of amending

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[259] 15 U.S.C. § 1693l (1976 & Supp. IV 1980).

[260] 44 Fed. Reg. 59,485 (1979).

[261] 45 Fed. Reg. 8262 (1980).

[262] It is not clear that reliable estimates can be made by the industry. *See generally Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts*, 65 FED. RESERVE BULL. 363 (1978). In April 1981, the Governors of the FRB announced plans to survey the costs of complying with Reg. E. Three of the Governors expressed their skepticism of such a survey. Reasons for their skepticism included the difficulty of isolating compliance costs and the fact that the financial institutions responding would have an "ax to grind." *Compliance Costs*, Wash. Credit Letter, Apr. 27, 1981, at 3.

regulations would preclude a timely readjustment of the maximum. In addition, institutions might argue that they would not request periodic increases of the maximum dollar amount even if their costs exceeded that amount because it is too time consuming and too expensive to try to substantiate costs.

Another approach to restricting unreasonable charges for investigation or information would be to mandate that such charges be reasonable and conscionable. Unfortunately, there is no easy way to make such a determination. Suppose Small Bank charges fifteen dollars per document, while Medium Size Bank charges ten dollars and Big Bank charges five dollars. The difference could be due to economies of scale. Alternatively, it may cost each bank fifteen dollars per document, but some may charge the lower fees to promote consumer good will and confidence in EFT. Because of this variety of factors involved in a decision to charge a certain rate, one cannot simply assert that Small Bank's charges are unreasonable or unconscionable. Furthermore, costs can be measured in many ways.[263] Unless the FRB were to issue guidelines on how costs were to be calculated, institutions could never be certain that their calculations were made in a manner that the FRB would consider reasonable.

A third approach would be to prohibit fees altogether. This approach avoids all of the above problems while ensuring that the consumer's right to documentation and access to the error resolution procedure is not chilled. The effect, however, probably would be to spread the costs to all EFT customers, or even to non-EFT customers, of the institution. This is unfair to those consumers who never need documentation or the error resolution procedure and who do not want to pay for others' use of these rights. Moreover, there is always the danger that every institution will have a few consumers who will abuse a free system by continually requesting documents and by frivolously invoking the error resolution procedure.

A response to the problem of consumers who are clearly abusing these procedures and rights would be to allow the institution to terminate its relationship with those consumers or to charge a fee to those consumers. If the bank can charge only the abusers of the system, the costs of the error resolution

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[263] *Compliance Costs*, Wash. Credit Letter, Apr. 27, 1981, at 3.

procedure would not have to be spread to those who do not expect to use it, although others probably would be willing to pay the small fee because some day they too may need to ask for documents or to invoke the error resolution procedure.[264] The prohibition of fees also would serve the public interest by ensuring that documents that the consumer may need in order to discover errors and to protect his rights are really available to him without the chilling effect of fees.

VII. Conclusion

Deficiencies in Reg. E's error resolution procedure raise serious questions about the ability of government agencies to draft satisfactory regulations. Error resolution is not an inherently complex subject. The FRB's staff of skilled attorneys and economists have had the opportunity to present several draft regulations and have had the benefit of many comments in response. The FRB also has had the prior experience of drafting an error resolution procedure for credit cards. Nevertheless, the adequacy of the regulations the FRB has promulgated is questionable. Consequently, Congress and the 348 Committee of the UCC should be cautious both in revising the EFTA and in applying identical error resolution procedures to other payment systems.

The model notices illustrate one type of complex drafting problem. Notices must be received at a meaningful time, but not so often that they place an undue burden on institutions or are disregarded by consumers. Notices must meet regulatory requirements, which in turn must be consistent with the statute. In addition, notices must contain all the information that the consumer needs, but must be short enough to prevent information overload. The error resolution notices must accurately disclose the precise scope and timing of the procedures and the rights and obligations of the consumer and the institution. The terms in the notices must be drafted in a way that is consistent with the technical definitions of those terms in Reg. E. At the

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[264] *See generally* Wallace, Gaining Perspective on Cost Benefit Analysis—Of Science, Snake Oil and Consumer Protection 4 (unpublished paper prepared for Consumer Advisory Council of the Board of Governors of the Fed. Reserve System).

same time, the notices must be readily understandable to most consumers. Certainly, compliance with the notice requirements imposes costs upon the institutions. These costs are not justified unless they result in a large benefit to consumers. Cost-benefit analysis, however, often cannot provide clear direction because the identification, valuation, and comparison of costs and benefits involves many unknown variables.

Omissions in the regulatory provisions illustrate another set of drafting problems. The FRB failed to put all of the information necessary to understand Reg. E into the regulation itself. Instead it issued an Official Staff Commentary to supplement the regulation. The FRB also inserted explanations of Reg. E in Federal Register statements that accompanied proposed drafts of the regulation. However, these methods of coping with omissions pose two problems. First, the authoritativeness of these explanations is unclear.[265] Commentaries have been a useful adjunct to many statutes and regulations such as the Uniform Commercial Code[266] and the Truth in Lending Act,[267] but are objectionable if their authority is unclear.[268] Second, because some of the statements do not appear in the regulation or even in the Official Commentary, many parties to EFT may be unaware of them.

In addition, the regulation must clearly specify which consumer requests trigger the error resolution procedure and who has authority to report an error. If the consumer is not informed of the type or quantity of information he must supply to the institution, the consumer's ignorance could relieve the financial institution of its responsibility to investigate the error or recredit the consumer's account. Moreover, in certain situations, such as where the institution is more capable of discovering the source of an error than the consumer or where the consumer does not know of the limits of the institution's investigation of error, the institution should be required to conduct a complete investigation, not one merely within its own four walls. The

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[265] For example, an institution is relieved of liability if it acts in conformity with an FRB rule, regulation, or interpretation. 15 U.S.C. § 1693m(d)(1) (1976 & Supp. IV 1980). The position of an institution acting in conformity with a Federal Register statement is uncertain.

[266] *See, e.g.*, Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, [1966] WIS. L. REV. 597.

[267] *See, e.g.*, Truth in Lending, Official Staff Commentary, 46 Fed. Reg. 50,288 (1981).

[268] *See* Skilton, *supra* note 266, at 598–601.

amount the bank is allowed to charge for its investigation of errors also should be regulated to avoid excessive assessments.

Despite its defects and omissions, Reg. E's error resolution procedure represents a sophisticated model for the consideration of a uniform approach for all consumer payment systems. The drafters of new error resolution procedures should determine not only how to adapt Reg. E to other payment systems, but also how to solve the regulation's substantive problems. They should give serious thought to the format of these procedures. It is important to avoid the situation in which proper understanding of a provision requires piecing together and comparing the final regulation with several proposed versions and statements accompanying those versions.[269] With these points in mind, Reg. E's error resolution procedure provides a sturdy foundation upon which to build a uniform approach for the resolution of errors in all consumer payment systems.

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[269] The 1951 version of the UCC prohibited references to prior drafts of the text and comments to ascertain legislative intent. Braucher, *Legislative History of the Uniform Commercial Code*, 58 COLO. L. REV. 798, 809 (1958).

ARTICLE

THE GROUP INTEREST CONCEPT, EMPLOYMENT DISCRIMINATION, AND LEGISLATIVE INTENT: THE FALLACY OF *CONNECTICUT V. TEAL*

ALFRED W. BLUMROSEN*

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Recently, in Connecticut v. Teal *a closely divided Supreme Court allowed individuals who were excluded from further consideration for employment by a component of a selection process to sue even if the selection process as a whole did not discriminate. In this Article, Professor Blumrosen argues that* Teal *is inconsistent with both the legislative history of Title VII and prior cases, including* Griggs v. Duke Power Co., *in which the Court developed the disparate impact principle, and* United Steelworkers v. Weber, *in which the Court upheld affirmative action.*

Professor Blumrosen maintains that the legislative history and judicial interpretations of Title VII are clarified by use of the jurisprudential concept of group interests. In particular, he asserts that the group interest concept illustrates how the legislators' underlying desire to improve the substantive economic and social status of minority groups was hampered by their reliance on terminology linked to individual and social interests. The resulting ambiguity in the statutory language and legislative history caused uncertainty in prior cases as well as the inconsistency of Teal. *Professor Blumrosen also suggests that the group interest concept remains a viable analytic approach that employers and courts may utilize to ameliorate potential problems arising from* Teal.

In the Civil Rights Act of 1964,[1] Congress initiated a major social and economic reform: "to lift the Negro from the status of inequality to one of equality of treatment."[2] The Civil Rights Act encompassed a wide variety of human relationships, spanning such diverse areas as public accommodations, voting

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[1] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h (1976)).

[2] 110 CONG. REC. 14,328 (1964) (statement of Sen. Muskie). The Act of course also protects other minorities and women. *See infra* note 61; Blumrosen, *Affirmative Action in Employment After* Weber, 34 RUTGERS L. REV. 1, 14–15 (1981).

rights, educational opportunity, employment opportunity, and access to federally supported programs. Its adoption paralleled an executive order that prohibited discrimination and that required affirmative action by government contractors.[3]

In the eighteen years since passage of the Act, the legal system has been engaged in translating the political judgment contained in the language of the statute into the real world in which people live and work. A substantial portion of judicial, administrative, and even legislative interpretation has concerned employment discrimination under Title VII.[4] The Supreme Court set the precedent that has immensely influenced personnel practice in the last decade in *Griggs v. Duke Power Co.*[5] The Court held that selection practices that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" were "discriminatory" and hence illegal.[6] "Built-in headwinds" included any requirements that "operate[d] to disqualify Negroes at a substantially higher rate than white applicants."[7] A requirement with such disparate impact must meet a test of "business necessity" in that it be "demonstrably a reasonable measure of job performance."[8] Title VII prohibited

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[3] Exec. Order No. 11,246, *as amended*, 3 C.F.R. § 169 (1974), *reprinted in* 42 U.S.C. § 2000e at 1232 (1976).

[4] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2). Title VII § 703:

> a) It shall be an unlawful employment practice for an employer—
> 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> 2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII also set up the Equal Employment Opportunity Agency, which originally was given only the power to issue guidelines and to investigate and conciliate discrimination claims against employers. *Id.* § 705, 42 U.S.C. § 2000e-4. In 1972, Congress authorized the EEOC to bring suit in federal court against private parties. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107 (codified at 42 U.S.C. § 2000e-6(c) (1976)).

[5] 401 U.S. 424 (1971). The employer required applicants for promotion to have a high school education and to pass a standardized general intelligence test. A smaller proportion of blacks than whites had high school diplomas, and blacks did less well on written tests than whites. The employer defended its practices on the grounds that its selection process treated black and white employees equally, and that its test and educational standards had been adopted "in good faith" response to Title VII.

[6] *Id.* at 432.

[7] *Id.* at 426.

[8] *Id.* at 436.

not only cases of overt or evil motive discrimination, but all "practices that are fair in form but discriminatory in operation."[9]

The *Griggs* decision produced employer responses in two directions. First, many employers sought to "validate" their employment tests—that is, to demonstrate by empirical analysis that the test is job related. Their efforts enriched industrial psychologists but rarely were successful in convincing courts of the relevance of employment tests to the jobs for which they were prerequisites.[10] Second, employers established affirmative action programs to replace traditional practices that had a disparate impact on minorities. This response was spurred by enforcement efforts under Executive Order 11,246.[11] For example, in *United Steelworkers v. Weber*[12] the employer and union agreed to reserve fifty percent of the places in a training program for minorities. As a result, some black employees who were admitted to the program had less seniority than whites who were excluded. White employees brought suit under Title VII, claiming the program constituted "reverse discrimination."

Drawing upon "the background of the legislative history of Title VII and the historical context from which the Act arose,"[13] the Supreme Court upheld the program. The Court argued that it would be "ironic" if an act intended to improve the lot of minority groups "constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[14]

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[9] *Id.* at 431; *see* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Dothard v. Rawlinson, 433 U.S. 321 (1977) (extended the disparate impact principle to cases of sex discrimination).

[10] In Albemarle Paper Co. v. Moody, 432 U.S. 405 (1975), the Court approved the EEOC Guidelines on Employee Selection Procedures. *Id.* at 431. The Guidelines required that tests must be shown by professionally acceptable methods to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 C.F.R. § 1607.5 (1982). Few tests are able to meet this strict standard under current validation procedures. *See* Reiter, *Compensating for Race or National Origin in Employment Testing*, 8 LOY. U. CHI. L.J. 687 (1977); Johnson, Albermarle Paper Company v. Moody: *The Aftermath of* Griggs *and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976).

[11] *See supra* note 3.

[12] 443 U.S. 193 (1979).

[13] *Id.* at 201.

[14] *Id.* at 204. The Supreme Court also recognized that effective affirmative action would provide evidentiary support for an employer in a case based on discriminatory intent. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978).

Pragmatically, *Griggs* was the stick that forced recalcitrant employers to improve opportunities for minority groups and *Weber* was the carrot that protected the employer who did so from "reverse discrimination" claims. By 1980, the lower courts and regulatory agencies charged with enforcing the equal employment opportunity laws had adopted an approach that emphasized the effect on the "bottom line" employment opportunities of minorities and women.[15] This approach encouraged employers to provide opportunities to these groups without either having to give up their selection procedures and thereby impairing their ability to select personnel, or to engage in expensive and uncertain efforts at validation, which, if successful, would justify denying opportunities to minorities and women. *Griggs* and *Weber*, along with related decisions and administrative regulations, created a body of law which has profoundly increased the employment opportunities of minorities and women. Nearly a quarter of the minority labor force of 1980 were in significantly better occupations than they would have been under the occupational distribution of 1965.[16]

Recently, however, the Supreme Court in *Connecticut v. Teal*[17] rejected the "bottom line" approach to employment opportunities. The closely divided Court held that the minority individuals who were excluded from further consideration by an unvalidated component of a selection procedure which had an adverse impact on their group had been discriminated against under Title VII. The fact that the employer had hired sufficient minorities so that there was no overall adverse impact on the group at the bottom line did not vitiate the claims of those minority individuals who were rejected. Each minority and woman had an "individual right" to be considered for an employment opportunity in accordance with "job related" requirements. The employer conduct which was insulated from "reverse discrimination" claims by *Weber* to encourage affirmative

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[15] *See* Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L.J. 1 (1981); Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 AD. L. REV. 323 (1981).

[16] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 400 (1968, 1981) (Table: Occupations of Employed Workers—Percent Distribution, By Race).

[17] 102 S. Ct. 2525 (1982) (5–4 decision).

action nevertheless left the employer exposed to "direct discrimination" claims by minorities and women.

Just as in *Weber*, the employer action in *Teal* improved opportunities for minorities and women. The *Teal* decision, however, interpreted Title VII so as to make illegal the very type of practices which were held legal in *Weber*. *Teal* forces the employer to select from among alternatives that are not satisfactory from the perspective of either equal employment opportunity or sound business management. Employers may drop formal selection devices in favor of more subjective procedures. They may divert resources that could otherwise go into training or recruiting into expensive and uncertain validation efforts. Finally, employers may decide that further affirmative action programs are no longer worth the effort since they will not protect employers from direct discrimination suits. All of these alternatives are destructive of the goals that Title VII and the Civil Rights Act sought to achieve.[18]

One reason for the Court's error in *Teal*, as well as for the prior uncertainty concerning the concept of employment discrimination, is the difficulty in giving concrete reality to the fundamental purpose of the Civil Rights Act: to enhance the status of minorities as *groups* in American society. The absence of a well-understood jurisprudential conception of group interests at the time the legislation was adopted has contributed to this difficulty. Because the legal system lacked the vocabulary to convey adequately the ideas the legislators strove to embody in law, the words employed in the statute were ambiguous and capable of multiple interpretations.

This Article will explore the jurisprudential conception of group interests that illuminates the adoption and interpretation of Title VII of the Civil Rights Act. Section I will outline the development of the group interest concept and will demonstrate its application to Title VII cases construing the terms "discrimination," "equal treatment," and "preferential treatment." This application will indicate how reference to group interests has, until *Teal*, helped to evolve a consistent interpretation of Title VII. Section II will demonstrate how the group interest concept

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[18] *See* Blumrosen, *The Bottom Line After* Connecticut v. Teal, DAILY LAB. REP. (BNA) § D (Aug. 27, 1982) *to be reprinted in* 8 EMPLOYEE REL. L.J., Spr. 1983.

captures part of the congressional "gamut of values"[19] inherent in the legislative history. In particular, it will illustrate how the legislators' underlying desire to improve the substantive economic and social status of minority groups was hampered by their reliance on terminology linked to individual and social interests. Finally, the conclusion will suggest that the group interest concept remains a viable analytic approach to Title VII that employers and the courts may still use to harmonize the interests of minority groups and employers in the workplace.

I. THE GROUP INTEREST CONCEPT AND TITLE VII

A. *The Group Interest Theory*

Under the influence of Roscoe Pound, American lawyers are trained to analyze legal problems in terms of individual and social interests. These interests are the claims or demands made by a person or by the society as a whole.[20] This dichotomy fairly reflected the legal world before 1932.

Beginning with the New Deal, however, claims were made on behalf of specific groups in the society. These claims were neither individual nor social.[21] However, no jurisprudence existed for discussion of this type of claim; no terminology was available to express in legal form the desire to improve the status of workers, blacks, women, or any other group.[22]

In 1958 Professor Thomas A. Cowan developed such a conceptual framework to translate the sociological concept of status into legal—and hence enforceable—rights and obligations.[23] Pro-

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[19] County of Washington v. Gunther, 452 U.S. 161, 199 (1981) (Rehnquist, J., dissenting) (citing National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967)).

[20] Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); *see also* J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE chs. 4–6 (1966).

[21] The National Labor Relations Act, for example, recognized the "group interests" of workers in a way which transcended individual claims, but did not reach the level of overriding social interests. *See* Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432 (1959).

[22] J. STONE, *supra* note 20, ch. 3.

[23] Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958). *A Symposium on Group Interests and the Law*, 13 RUTGERS L. REV. 427 (1959), represented an initial exploration of the application of the group interest concept in areas as diverse as labor law, federal income tax, torts, trade regulation, and conflict of laws. The impact of group interests on the procedural requirements of Fed. R. Civ. P. 23 was explored in Note, *Anti-*

fessor Cowan emphasized that Dean Pound's analysis in terms of individual and social interests required supplementation to understand, evaluate, and assist in resolving some of the dilemmas of an increasingly pluralistic society. In this sense, the concept of group interests was an adjunct of the change from a relatively homogenous society in the nineteenth century to a pluralistic society in the twentieth.[24]

Professor Cowan identified groups with what sociologists termed "secondary groups," in particular unions, associations, and professions.[25] Such groups are analogous to legal individuals in that they "make demands for themselves and resist the demands of individuals, other groups, and the whole of society."[26] However, the interests of groups are not those of a single individual or of a mere aggregate of individuals. As Professor Cowan described it, "Their claims are collective: the members of the [groups] make the demands in a collective capacity."[27] "Status demands" were identified as an archetypical group interest.[28]

The Civil Rights Act presents an example of legislation directed to the economic and social interests of specific groups. The deliberations leading to the Civil Rights Act repeatedly emphasized minority unemployment rates, occupational status, and income, making clear that Congress sought substantive improvement in these conditions.[29] Dean Pound's jurisprudential concept of individual and social interests was inadequate to encompass this objective. In *Griggs*, for example, the minority applicants each had an individual interest in not being the object of the employer's intentional discrimination. There was also a social interest in eliminating race as an employment criterion.

Discrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2), 88 YALE L.J. 868 (1979), in which the author constructs the notion of an "entity class" to take account of group interests. United States v. Bethlehem Steel Co., 446 F.2d 652, 660 (2d Cir. 1971), expresses the group interest concept clearly:

> [I]t is true that some of the black employees might have been assigned [to less desirable departments] even under the best of systems. But there is no apparent way of knowing that, or of determining now who they would be . . . . The discrimination found illegal here was to a group; group remedy is therefore appropriate.

[24] "Modern life is lived associatively. The new democracy is an aggregation of subgroups, not primarily of individuals." Cowan, *supra* note 23, at 331.

[25] *Id.*

[26] *Id.* at 332.

[27] *Id.*

[28] *Id.*

[29] *See infra* text accompanying note 74.

Each of these interests supported the employer's defense of good faith. The Court, however, not only upheld the plaintiff's claims, but also outlawed all employment practices that had disparate impact regardless of the intent with which they were adopted. This decision recognized the dominant role of group interests in a situation where the individual and social interest analysis might have led to a different result.[30]

In *Weber* the traditional analysis would identify two social interests: improving conditions of minorities and women and eliminating the use of race or sex as factors in employment. The former social interest supports use of an affirmative action plan; the latter undermines it. Thus the social interest analysis is inconclusive.

The individual interests are freedom from race or sex discrimination, in being "made whole" for losses caused by discrimination, and in not being held accountable for the actions of others which are beyond one's control. All three of these individual interests, however, cut both ways in that they support the claim of both the black workers and the white workers. Analysis in terms of individual interests is thus also inconclusive.

Teal similarly presents a situation where an analysis in terms of individual and social interests is inconclusive. The social interests in improving conditions for minorities and in eliminating the relevance of racial factors are inconclusive because they press in different directions. Either possible outcome arguably can further these social interests in the long run. Individual interests also press in both directions. The individual interests of those minorities who failed the test are, as the majority indicated, clearly involved. Yet the employer in *Teal* provided

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[30] "*Griggs* was rightly concerned that childhood deficiencies in education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973); *see also* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 St. Louis U.L.J. 225 (1976); Blumrosen, *supra* note 9; Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. Colo. L. Rev. 243 (1972); Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 Rutgers L. Rev. 1, 4–5 (1976). *But see* A. Goldman, Justice and Reverse Discrimination (1979), which argues that an attempt to improve the status of groups will be imperfect and consequently improper. This argument, however, is based on an individual interest analysis and therefore is unpersuasive with respect to a congressional judgment that group interests of minorities and women are to be recognized.

greater employment opportunities for those minority individuals who had passed the test. Since Title VII was intended to benefit all minorities and women, there is little reason to disregard the interests of individuals who do meet existing standards.

The inadequacy of the traditional analysis is understandable because the Civil Rights Act is the product of a pluralistic society. It is designed to right injustices inflicted on minority groups as well as those inflicted on particular individuals. The group interest analysis not only clarifies discussion of these cases; it tips the balance of interests and provides a standard of decision where individual and social interests are inconclusive.

B. *Group Interests and Title VII*

Griggs and *Weber* resolve two crucial Title VII issues: (1) the definition of "discrimination," marking the extent of illegal conduct, and (2) the extent to which employers may take positive action to favor minorities and women. These two issues obviously are intertwined; the more extensive the prohibited conduct, the greater will be the employer's right to minimize the risk of liability by favoring minorities and women. A narrow definition of discrimination would yield a correspondingly limited privilege to favor minorities and women.

The issue of the scope of prohibited conduct was decided in *Griggs*. The disparate impact concept of discrimination emphasized the process of selection. The degree of "disparity" of the "impact" of the selection process necessarily is determined by reference to groups—minorities vis-a-vis white males. Indeed, the disparate impact test requires comparision of the effects of an employment practice on groups as a whole. When the subordinate status of minorities and women in education, housing, or job opportunities caused disparate impact as compared to whites, the practice could no longer serve as an automatic barrier to employment opportunities. Thus the technical means by which the group interest concept achieved recognition under Title VII was through the disparate impact concept of discrimination.

The disparate impact principle of *Griggs* shaped the response to the second crucial issue under Title VII: under what circum-

stances may an employer favor minority groups? Since the Court adopted a broad definition of discrimination in *Griggs*, it found the employer's privilege to favor minorities and women to be correspondingly broad. In *Weber*, the Court held that the statute was intended to encourage opportunities for group members who had been discriminated against even when the individual beneficiaries of affirmative action had not themselves been the victims of discrimination.

Griggs and *Weber* recognized and protected the interests of minorities as a group. The injury to the group provided a foundation for legal analysis. In *Griggs*, injury to the group demonstrated disparate impact, which made the employer practice presumptively illegal. In *Weber*, benefit to the group justified practices which were otherwise illegal. As demonstrated above, individual and social interests conflict in these cases; the group interest concept demonstrates their underlying consistency.[31]

Neither *Griggs* nor *Weber* presented the question of whether discrimination exists when an employer uses an unvalidated selection procedure which has disparate impact, but then hires sufficient numbers of minorities or women to avoid any *overall* disparate impact. In *Teal*, the employer utilized a test as well as consideration of past performance in making its promotion decision.[32] The test clearly had disparate impact on minorities, but the overall result of the hiring process did not. The question presented was whether the employer would be liable to the twenty-two blacks who had failed the test.

The logic of *Griggs* and *Weber*, founded on recognition of group interests, suggested that employers which included minorities and women in adequate numbers satisfied the legislative concern about employment practices that restrict minority groups. The bottom line theory was consistent with *Griggs* and *Weber* because it provided the employer with "light at the end of the tunnel," thereby encouraging employers to include minorities and women in jobs from which they had traditionally

[31] *See supra* text accompanying note 30.
[32] 102 S. Ct. at 2529 presents the statistics:

	Applicants	*Passed Test*	*%*	*Hired*	*Bottom Line % (# Hired/# Applicants)*
White	259	206	79%	35	13.5%
Black	48	26	54%	11	22.9%

been excluded.[33] If the employer voluntarily complied with the thrust of the Act and Executive Order, it would be protected under the "impact" theory, would have a defense under the "intent" theory, and a promise of non-prosecution by government agencies. The bottom line concept, like the disparate impact test, is also a direct derivative of the group interest theory, because the "bottom line" is the measure of differential impact on groups as opposed to individual applicants. The bottom line theory combined three elements which made its adoption compelling: it encouraged voluntary action to improve opportunities for minorities and women; it enabled the employer to obtain a work force qualified by the employer's own selection standards without the expense and time of validation; and it fulfilled the group interests of minorities in realizing increased employment opportunities.

The majority in *Teal* erred in two ways. First, in emphasizing the disparate impact of one aspect of the selection process, they treated the concept of job relatedness as an end in itself rather than as a means to improve minority group employment opportunities.[34] Second, the majority assumed that "discrimination" had taken place and then considered whether the bottom line should constitute a defense. The correct question was whether any "discrimination" had taken place, which under a group interest analysis would be answered negatively.[35]

Teal is inconsistent with the evolutionary development of Title VII because its definition of "discrimination" represents a retreat from the group interest principle underlying *Griggs* and *Weber*. The tension between the individual and group interests is the fundamental difference between the majority and dissent in *Teal*. By emphasizing the individual interests under Title VII, the majority opinion appears inconsistent with both *Griggs* and *Weber*. It is more likely to pit minority individuals against each other than to eliminate employment selection processes that

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[33] *Cf.* Ford Motor Co. v. EEOC, 29 Fair Empl. Prac. Cas. (BNA) 121, 126 (1982) (holding that an offer of employment tolls back pay liability in order to encourage settlement offers by employers). The current Uniform Guidelines on Employee Selection Procedures state that neither the EEOC nor the Department of Labor would initiate action based upon the disparate impact of any component of a selection process if the total selection process resulted in no disparate impact. 29 C.F.R. § 1607.4C (1982).

[34] *See* Blumrosen, *supra* note 18.

[35] *Id.* at 2.

disparately affect their group, and more likely to discourage rather than facilitate voluntary employer efforts to establish remedial employment processes.

C. *"Equality," "Equal Treatment," and "Colorblindness"*

The group interest concept also clarifies the meaning of key phrases which occur repeatedly in Title VII legislative history and litigation: "equality," "equal treatment," and "colorblindness."

Paradoxically, both the majority and the dissent in *Weber* agreed that the goal of Title VII was to promote "equality" for minorities.[36] However, the seemingly straightforward "equality" concept contains ambiguities which became apparent as Title VII cases unfolded. The "quest for equality" necessarily implies that the underlying social and economic situation will be changed to improve the condition of those burdened by "inequality." If the underlying situation is disregarded, then the same actions to improve the "unequal conditions" will themselves appear to be the denial of "equality." The concept of "equality" thus encompasses a demand for change in the unequal situation, in order to arrive at a future in which the society is "colorblind." In short, the search for "equal treatment" is, in part, a search for better treatment.[37]

The concept of equality, because of its dual nature, created confusion in interpreting the statutory language of Title VII. Programs to improve the position of minorities and women found support in the "equal treatment" aspect of the equality principle, but these same programs simultaneously offended the "colorblind" aspect. *Griggs* recognized a conflict between these two aspects of equality. The reason good faith was not recognized as a defense in a direct discrimination case like *Griggs* was to further the statutory purpose of removing "barriers that

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[36] 443 U.S. at 202 (opinion of the Court); *id.* at 254 (Rehnquist, J., dissenting).

[37] The insistence by several writers, see, e.g., Meltzer, *The* Weber *Case: The Judicial Abrogation of the Anti-Discrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980), that Title VII be interpreted to adopt either a "colorblind/equal opportunity" principle, or a "color-conscious/equal results" principle may reflect a tendency in the law to interpose a doctrinal standard which drains some of the human content from the legal materials. *See* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976) and *infra* text accompanying notes 67–70.

have operated in the past to favor an identifiable group of white employees over other employees."[38] However, the same statutory purpose which called for the rejection of the good faith defense in *Griggs* required its recognition in *Weber*. The employer's good faith program to include minorities justified its race-specific actions.[39]

In contrast, *Teal* failed to distinguish these different aspects of equality. The majority reasoned that the disparate impact of the selection test was *itself* a denial of equal opportunity. Yet for the purpose of raising minorities to equal status, the key factor is opportunity in the overall selection procedure. The employer's "good faith" in *Teal* was more like *Weber* than *Griggs* in that it furthers the statutory purpose of increasing the employment opportunities of minorities.

The choice of emphasis within the concept of equality should be determined by reference to the underlying social and economic conditions that Congress addressed. In Title VII, Congress was not writing an abstract charter for a society "on a clean slate." Rather, it was legislating with respect to specific social realities in the United States as understood in 1964.[40] Giving meaning to the term "equality" without regard to this context is an unwarranted rejection of the realities which gave rise to the legislation.

These realities, however, are not fully captured by an analysis that considers only individual and social interests. The introduction of the concept of group interests into the structure of individual and social interests makes it possible to understand the legislative debates as expressing a congressional intent to

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[38] 401 U.S. at 430.

[39] George Orwell's classic *Nineteen Eighty-Four*, which was invoked by Justice Rehnquist in his dissent in *Weber*, 443 U.S. at 219–20, contains an appendix on the relationship between the language and ideas. G. ORWELL, NINETEEN EIGHTY-FOUR 181–82 (1949). Orwell believed that the possibility of multiple meanings was necessary for the articulation of complex ideas. Therefore a state which wished to suppress ideas limited most words to a single "plain meaning." Justice Rehnquist's attempt to restrict the meaning of the term "discrimination" to a single concept, reflected in *Weber* and first expressed in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), illustrates Orwell's point that a single meaning approach to language will interfere with the development of new ideas. Similarly, the absence of a jurisprudential conception of the group interest, and a terminology to go with it, made it difficult for the legislators to express a wish to improve the status of the group in any terms other than those which were used to deal with individual interests.

[40] *See infra* text accompanying notes 71–76.

improve the status of minorities as a group. The group interest concept identifies "colorblindness" and "equal treatment" as means to an end, not ends in themselves.

D. *"Preferential Treatment"*

The group interest concept also clarifies the key but cryptic phrase "preferential treatment." The group interests with which Congress was concerned in Title VII were those of minorities and women. These interests give rise to and are protected by the disparate impact definition of discrimination. However, the restriction on preferential treatment was intended to address the interests of white males. This phrase is contained in section 703(j), which was inserted in Title VII as part of a series of compromise amendments designed to placate those who feared that Title VII would require an employer to meet a "quota" of minority workers equal to their percentage in the community.[41] The supporters of Title VII, who from the beginning disclaimed any such intention, viewed this addition as cosmetic.

The phrase "preferential treatment" appeared without definition.[42] Therefore, both plaintiffs and defendants sought to pour meaning into it. Defendants sought to read the restriction on "preferential treatment" as a limitation on the use of statistics in establishing a violation.[43] They argued that whenever a case of discrimination is based upon the statistics showing a disparity between employment opportunities of minorities or women and those of other workers, any relief granted based on such findings is "on account of an imbalance" and therefore proscribed by Title VII.[44] This argument implies that the *Griggs* disparate impact principle is not a permissible interpretation of Title VII.

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[41] The Dirksen-Mansfield Amendment, which became section 703(j), read as follows:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total . . . of persons of any race employed by any employer . . . in comparison with the total . . . of persons of such race . . . in any community . . . or in the available workforce . . . .

78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(j) (1976).

[42] The term "preference" appears twice in other sections of Title VII: in section 712, 42 U.S.C. § 2000e-11, which preserves the "Veterans Preference" laws, and in section 703(i), 42 U.S.C. § 2000e-2(i), relating to "preferential treatment" for certain Indians.

[43] International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[44] *Id.* at 339–40 & n.20.

Justice Stewart specifically rejected this interpretation of section 703(j) in *Teamsters v. United States*:

> [O]ur cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination . . . . Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a tell-tale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of the work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.[45]

In allowing individual plaintiffs to establish a case based on actions against the group, the Court implicitly recognized that Title VII was designed to favor group interests. The study of statistics is necessarily an examination of effects on a collection of individuals rather than on single individuals. Title VII defines the collection by racial or gender criteria in order to recognize and to evaluate the extent of employer actions in relation to the group.

In *Weber*, the white employees sought to interpret preferential treatment as either a restriction of relief to "identifiable victims" of discrimination[46] or a prohibition on "all race-conscious affirmative action plans."[47] The technical weakness of these arguments is that section 703(j) is not stated to be a restriction on either proof of discrimination or on remedies available once discrimination has been found. Of course, this weakness could

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[45] *Id.* (citations omitted) (text of footnote included).

[46] *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 223 (1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

[47] United Steelworkers v. Weber, 443 U.S. 193, 201 (1979); *see also* International Ass'n of Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047, 1051 (8th Cir. 1969), in which defendants argued that section 703(j) prohibited the use of "quotas" or numerical remedies.

be overcome if section 703(j) was intended to restrict the scope of the entire Act. However, the Court's interpretation of section 703(j) has been influenced by the tradition that exceptions in "remedial legislation" should be narrowly construed in order to further the underlying purpose of the legislation.[48] To prohibit affirmative action by reference to the preferential treatment clause would undercut the purpose of the Act—to promote the group interests of minorities and women.

The Court, which had relied on statistics in adopting the *Griggs* disparate impact principle, refused to be deflected from their use by section 703(j). *Teamsters* foreshadowed an interpretation of preferential treatment which would not limit the effect of *Griggs*. *Weber* provides a principled basis for that interpretation by invoking the primary purpose of Congress to improve employment status of minorities, a purpose that required a narrow interpretation of section 703(j). Just as the definition of discrimination was expanded to accomplish the congressional purpose of improving the status of minorities, the definition of preferential treatment has been restricted to further the same purpose.

Nevertheless, the Court did give important meaning to the section. While the Court in *Weber* did not read section 703(j) to protect the group interests of white males, it did find a congressional purpose to avoid a "mechanical" allocation of jobs by proportional representation based on race or sex. Section 703(j) thus limits the group interests of minorities and women by reference to the social interest in maintaining flexibility in the industrial relations system. Even Justice Brennan, who upheld the plan in *Weber*, did not sanction the use of race- or sex-specific job standards to "maintain racial balance."[49]

E. *The Limits of Group Interest*

Griggs, *Teamsters*, *Weber*, and *Teal* addressed the ambiguities arising from the tension between individual and group in-

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[48] *See, e.g.*, Corning Glass Corp. v. Brennan, 417 U.S. 188 (1974) (Fair Labor Standards Act).

[49] 443 U.S. 193, 207 n.7 (1979); *see also* Blumrosen, *Affirmative Action in Employment After* Weber, 34 RUTGERS L. REV. 1 (1981).

terests implicit in Title VII. Once discrimination had been defined in *Griggs*, it was necessary to work out the meaning of the other terms of the statute in light of that definition. Broadening the definition of "discrimination" required adjustment of the correlative terms, such as "equal treatment" and "preferential treatment." In all cases this adjustment was accomplished by reference to the group interest that the disparate impact standard was designed to advance.[50]

The identification and recognition of group interests is, of course, only the beginning of analysis. Group interests are subject to limitation by and accommodation to other interests. In employment cases, for example, the courts have given controlling weight to such social interests as "peace and order" and continued production,[51] the stability of established institutions,[52]

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[50] Congress seemed to confirm this evolutionary course of development of the law in 1972:

> In any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Section-by-Section Analysis of H.R. 1746, Accompanying the Equal Opportunity Act of 1972--Conference Report, 118 CONG. REC. 7166.

The Supreme Court has had varying reaction to this language. In Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976), this section was quoted approvingly, but in International Bhd. of Teamsters v. United States, 431 U.S. 324, 338 n.39 (1977), the Court suggested that subsequent legislative history is "entitled to little, if any, weight." *See also infra* note 90.

This evolutionary development was not unique; it is paralleled by the history of the Federal Employers Liability Act, 45 U.S.C. §§ 51–60 (1976). There, Congress adopted the principle of comparative negligence to regulate railroad industrial accidents. It did not, however, redefine the network of terms and concepts used in the law of negligence. Courts used a common law technique to interpret and apply the new statute. For example, the courts were required to work out answers to the question of whether the railroad had a duty to anticipate the negligence of the worker, or whether the doctrine of assumption of risk was applicable. *See, e.g.*, Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957); Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54 (1943); *see also* 2 HARPER & JAMES, LAW OF TORTS 1177 n.9 (under the FELA, "the whole structure of reciprocal rights and duties has been shifted"). The answers to these questions were based on the need to carry out the statutory purpose. Similarly, in Title VII, once *Griggs* adopted a broad disparate impact principle, based on group interest, that principle has provided the touchstone for answering other questions.

[51] MacDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976) (employer need not retain those who steal from it, but may not choose whom to discharge from among the thieves on the basis of race); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (employer need not hire or retain one who has committed "unlawful and disruptive acts against it").

[52] Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (National Labor Relations Act does not prevent discharge of employees who sought separate grievance negotiation concerning civil rights, which would have been inconsistent with union's status as exclusive representative of employees).

and effective utilization of human resources.[53] This last interest explains why Title VII does not require an employer to establish training programs to equip unqualified nonemployees to work for employers who normally do not engage in training of entry level personnel.[54]

Group interests also have been properly limited by concern for individual interests. Neither a government agency[55] nor the parties to a collective bargaining agreement[56] can preempt judicial determination of an individual's discrimination claim. The Supreme Court has stated similarly that favoring certain members of a minority group does not justify discrimination against other members of the group.[57] This individual interest approach dominated the majority opinion in *Teal*, but was inappropriate because it limited the interests of the minority groups that Congress sought to protect.

Indeed, group interests are not fully separate from individual interests. An individual has an interest in being considered for employment on his or her own merits, distinct from the groups of which he or she is a member. The group to which that person belongs has an interest in ensuring that its members are not dealt with on the basis of stereotyped assumptions which may be inapplicable to particular members.[58]

The group interest concept aids in interpreting terms like "discrimination," "equality," and "preferential treatment" by reminding us of the purpose served by those terms. It does not determine all issues under Title VII. If group interests were

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[53] See the formulations in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which requires that a complainant be "qualified," and in *Griggs*, which permits employers to exclude persons based on "business necessity."

[54] *See* Morita v. Southern Cal. Permanent Med. Group, 541 F.2d 217 (9th Cir. 1976); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Blount v. Xerox Corp., 405 F. Supp. 849 (N.D. Cal. 1975).

[55] *McDonnell Douglas*, 411 U.S. 792 (employee's right to sue under Title VII not foreclosed by absence of an EEOC finding of reasonable cause to believe there was a violation of the Act).

[56] Alexander v. Gardner Denver Co., 415 U.S. 36 (1974) (employee's right to sue under Title VII not foreclosed by prior submission of claim to arbitration under collective bargaining agreement).

[57] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").

[58] Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (requirement that female employees make larger contributions to pension fund than male employees based on actuarial longevity figures for men and women constitutes discrimination under Title VII).

given controlling force, the result might be a permanent fragmentation of society along racial, ethnic, and sexual lines. Such a regimentation of society would be akin to the slavery and subordination from which we seek to escape. The value of the group interest concept lies in its utility both to recognize *and* to limit claims so that new interests can be asserted within the framework of existing social values. The group interest concept has the intellectual power to inform and to illuminate, but not to control. It brings to consciousness the nature of claims and compels their consideration.[59]

II. Legislative Intent and the Group Interest Concept

Any interpretation of the language of Title VII must recognize that Title VII is only one part of a larger program intended to address social, economic, and political wrongs committed against minorities and women.[60] The Civil Rights Act of 1964, together with subsequent statutes, attempted to root out these indignities in the most important areas of life. Education, housing, voting rights, access to places of public accomodation, the

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[59] If this analysis of the legislative purpose of Title VII is correct, it also should be applicable to Title VI of the Act, which prohibits "discrimination" in connection with federally funded programs. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 285–87 (1978), the Supreme Court, per Powell, J., held that Title VI permitted a medical school to "take race into account" in shaping its selection programs, but did not permit it to reserve a specific number of seats for minorities. In terms of the allocation of scarce opportunities on the basis of race, *Bakke* and *Weber* are indistinguishable.

However, an interest analysis suggests an important distinction between *Bakke* and *Weber*. In Title VII situations, the only congressional policy involved is that of ending discrimination. In contrast, Title VI situations always implicate the congressional policies which gave rise to the federally funded program, such as aid to universities, aid to farmers, and aid to depressed or disaster areas. Congress' fundamental purpose in programs subject to Title VI is usually not to raise the status of minorities, but rather to advance some other objective. The *Bakke* formula is arguably more consistent with a need to balance multiple congressional policies than is the *Weber* formula. To read Title VI to permit every federally funded program to be converted at the wishes of each grantee into a program to improve the status of minorities should require a clearer indication of legislative intent than that found in the Civil Rights Act. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (provision of Public Works Employment Act requiring ten percent of federal funds in local public works programs to be set aside for minority-owned businesses not inconsistent with the Due Process Clause or Title VI). Thus *Weber* and *Bakke* can be squared by comparing the competing federal policies involved in Title VI with the unitary policies involved in Title VII. This may be the point Justice Brennan had in mind in note 6 of *Weber*. *See* 443 U.S. at 206 n.6.

[60] The interrelationship of employment discrimination with other forms of restrictions on minorities has been recognized officially at least since the Truman administration. *See* U.S. President's Committee on Civil Rights, To Secure These Rights 141–46 (1947).

right to participate in federally funded programs, and freedom from harassment by the criminal justice system were all part of the civil rights program.[61] The Civil Rights Act was closely linked to the "War on Poverty," which dealt with many of the same problems through economic and political means. These pieces of legislation sought to shatter the fabric of life that had denied to minorities and women the place in the sun afforded to white males. Subordination of blacks in employment was seen as part of a pattern of subordination of a race.[62]

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[61] *See* Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h (1976)).

Title II § 201, 42 U.S.C. § 2000a (1976):

a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Title III § 301, 42 U.S.C. § 2000b (1976):

a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 401 of title IV herof, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States.

Title IV § 401, 42 U.S.C. § 2000c (1976):

b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Title VI § 601, 42 U.S.C. § 2000d (1976):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VII § 703; 42 U.S.C. § 2000e-2 (1976).

a) It shall be an unlawful employment practice for an employer—

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[62] *See, e.g.*, Senator Humphrey's opening statement in the Senate debate on the Civil Rights Act of 1964, *infra* text accompanying note 74.

Congress necessarily used specific statutory language, such as "discrimination" and "preferential treatment," to describe the conduct that it intended to regulate. This broad objective was well understood by both Democratic and Republican legislators who had a sense of history.[63] In a society where opportunities were in fact allocated on the basis of race, a decision to treat all persons "equally" by "colorblind" criteria necessarily confirms the advantageous position of whites. A "colorblind" educational requirement, such as that present in *Griggs*, would confirm white employment advantages because of the superior education whites had received. Much of the debate leading to the passage of Title VII that has been used to interpret these terms deals specifically with the need to improve the status of blacks. Discrimination included *inferior* treatment of blacks as a group due to the long-term social, economic, and historical process of suppression and subjugation that followed formal slavery.

Yet many legislators stated that the status of minorities could be improved if society lived by principles of "equal treatment" and "colorblindness."[64] The basic ambiguity in the legislative history of Title VII is between the overarching purpose to improve the status of blacks as a group and the specific statements that the statute requires "equal treatment" and "colorblind" decisionmaking. However, the reality of this tension became apparent only as cases arose that required the translation of a broadly conceived legislative purpose into concrete legal standards.[65] The group interest concept relieves this tension by highlighting the congressional purpose to improve the status of blacks as a group. From the perspective afforded by this concept, "colorblindness" and "equal treatment" may be means to that end, but are not ends in themselves. To accomplish the objectives of Title VII it is necessary to be literally "color-

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[63] *See infra* text accompanying notes 71–76.

[64] *See supra* text accompanying notes 36–40.

[65] As Chief Justice Burger's dissent in *Weber* makes apparent, the *Griggs* decision included both the concept of improving the conditions of minorities and the concept of "racial neutrality." 443 U.S. 216–17. The tension between these concepts was not apparent when the Court decided MacDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), because the white employees wished to be judged by the same standard as had been applied to black employees. *See supra* note 51.

conscious" in order to identify those whose advancement will improve the status of the group.[66]

The difficulty of interpreting Title VII results in part from the process of translating a broad legislative purpose into concrete legal standards. This process tends to dissipate the emotion behind the legislative purpose so that lawyers may operate with more abstract, albeit less humanly vital, concepts.[67] The conflicting effects of this abstraction are observable in the disparate impact test of *Griggs*. Although a desire to eliminate invidious discrimination based on an "evil motive" of suppressing minorities or women as a class gave a major impetus to the legislation, the disparate impact test did not require proof of improper motive either directly or indirectly.[68] This test obviates the necessity of finding a defendant immoral and enables objective or businesslike settlement of discrimination claims. However, it also obscures the emotional foundation of the law and suppresses any emotional attitude toward the challenged practice.

A similar abstraction occurs in the traditional technique of statutory interpretation that focuses on specific legislative statements and disregards those of a more general nature.[69] This approach attempts to make the inherently difficult process of statutory interpretation more "objective." However, it also obscures the sense of injustice which permeates the legislative history. It focuses attention away from lengthy committee reports and general debates about civil rights and towards a pithy phrase. This approach denigrates the congressional awareness

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[66] *See* Justice Blackmun's separate opinion in *Bakke*, 435 U.S. 265, 402–08 (1978) (Title VI).

One of the key events on the issue of "color consciousness" occurred in 1965 when the EEOC decided to require employers to submit annual reports on the race, sex, and national origin characteristics of their workers. Civil rights groups initially opposed the plan because they traditionally had objected to any reference to racial identity. They were persuaded that their "head in the sand" approach had not worked, and that statistical evidence was necessary to establish discrimination. *See* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW ch. 2 (1971). In 1972, Congress removed the ambiguity by legislation which clearly authorized the national reporting system. Pub. L. No. 88-352, 78 Stat. 241, § 709(d), 42 U.S.C. § 2000e-8, as amended by the Equal Employment Opportunity Act of 1972.

[67] *See generally* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

[68] 401 U.S. at 432.

[69] E. CAHN, THE SENSE OF INJUSTICE (1949). The law reviews sometimes contribute to this tradition by their reluctance to quote legislative history extensively. In addition, the codification of the Civil Rights Act into separate component subjects contributes to this dissipation of the emotional basis of the act. As a consequence of this separation, Title VII is sometimes viewed as a "labor" statute rather than as part of a broad civil rights program.

that the law was addressing the residual effect of slavery. It ignores the national sense of injustice, as evidenced by Bull Connor's dogs and firehoses in Birmingham, the freedom rides, the march on Washington of 1963, the growing restlessness among minorities, and the legislators' understanding of the causes of that restlessness. Given the rough and ready quality of legislative debate and compromise, a court is properly cautious in seizing on any particular words or acts as proof of congressional intent.[70] Especially in the case of a comprehensive statute such as the Civil Rights Act, a court should focus on the overall purpose of the act.

The concern of Congress with the need to improve the status of blacks as a group and the role of Title VII as one part of an overall program to obtain this improvement are apparent in the legislative history.[71] They were recognized in the Report of the House Judiciary Committee on the Civil Rights Act of 1964:

> Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
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> . . . [I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated . . . .
>
> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.[72]

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[70] *See* Murphy, *Old Maxims Never Die: The "Plain Meaning" Rule and Statutory Interpretation in "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

[71] *See generally* Vass, *Title VII Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); *see also* H. HUMPHREY, THE EDUCATION OF A PUBLIC MAN 267–87 (1976); Drew, *The Politics of Closure*, REPORTER, July 16, 1964, at 19 (analyzing the key role that Senator Dirksen played in securing the adoption of the Civil Rights Act.)

[72] H. REP. No. 914, 88th Cong., 1st Sess. 18 (1963). This report is cited in the majority opinion in *Weber* for the proposition that Congress did not intend to prohibit voluntary

This larger perspective also is apparent in two key Senate speeches: Senator Humphrey's opening statement in the debate and Senator Dirksen's closing remarks. Senator Humphrey's speech took three hours, and canvassed all of the titles of the bill.[73] On Title VII, he echoed the House Report in emphasizing that the statute was one part of an overall plan to improve the status of minorities. His use of statistics on relative unemployment rates and relative occupational status also highlights his concern for the effect of the statute on groups.

> I would like to turn now to the problem of racial discrimination in employment. At the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments. They are treated unequally in some labor unions and are discriminated against by many employment agencies.
>
> No civil rights legislation would be complete unless it dealt with this problem. Fair treatment in employment is as important as any other area of civil rights. What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education? We all know of cases where fine Negro men and women with distinguished records in our best universities have been unable to find any kind of job that will make use of their training and skills.
>
> The Negro is the principal victim of discrimination in employment. According to Labor Department statistics, the unemployment rate among nonwhites is over twice as high as among whites. More significantly, among male family breadwinners, those with dependents to support, the unemployment rate is three times as high among nonwhites as among whites. And although nonwhites constitute only 11 percent of the total work force they account for 25 percent of all workers unemployed for 6 months or more.
>
> Discrimination also affects the kind of jobs Negroes can get. Generally, it is the lower paid and less desirable jobs

affirmative action to eliminate discrimination, 443 U.S. 203–04, and in Justice Rehnquist's dissenting opinion for the opposite conclusion, *id.* at 229, n.11. Neither opinion refers to the first two paragraphs of the report which outline the need and justification for the legislation.

[73] 110 CONG. REC. 6529–53 (1964).

which are filled by Negroes. For example, 17 percent of nonwhite workers have white collar jobs; among white workers the figure is 47 percent. On the other hand, only 4 percent of the whites who are employed work at unskilled jobs in non-agricultural industries; among nonwhites the figure is 14 percent.

. . . .

The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them. This requires both an end to the discrimination which now prevails and an upgrading of Negro occupational skills through education and training. Neither task can be given priority over the other. They are as interdependent as the chicken and the egg and must be attacked simultaneously. Negroes cannot be expected to train themselves for positions which they know will be denied to them because of their color. Nor can patterns of discrimination be effectively broken down until Negroes in sizable numbers are available for the jobs to be filled. The problem of education is dealt with in part in title IV of this bill, and in title VI, as it affects programs of Federal assistance to education.

. . . .

. . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.

In title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination.

Racial prejudice in employment is one of the most wasteful practices for the economy . . . . We seek to eliminate it by means of this title—and not merely by force of law, but also by the informal procedures of conference, conciliation, and mediation.

. . . .

In short, the primary ingredients for a full and free life are inseparable from each other. Education cannot wait upon employment or political freedom. Employment opportunity

> cannot be postponed until the vote is won. The only way to break the vicious circle of minority oppression is to break it at every point where injustice, inequality, and denial of opportunity exist. It is for this reason that we propose enactment of comprehensive legislation that will touch on every major obstacle to civil rights.[74]

Senator Dirksen's position is especially crucial because he authored a compromise between the liberal supporters of the bill (both Democratic and Republican) and certain Republicans under his leadership. This compromise ended a filibuster and assured passage of the Civil Rights Act. In entering into the compromise, Senator Dirksen deserted the coalition of conservative Republicans and Southern Democrats which had prevented the adoption of civil rights legislation in earlier years.[75] By emphasizing the historical context of the legislation and the fundamentally sociological nature of the problem, Senator Dirksen made clear his view that Title VII was one part of a wide-ranging effort to advance the substantive status of minority groups in society.

> [The Pure Food, Drug, and Cosmetic Act, the Social Security Act, and the minimum wage laws] are programs that touch people. Today they are accepted as a part of the forward thrust in the whole efforts of mankind to move forward.
>
> I reemphasize the fact that it required no constitutional change to bring this about, because it appeared there was latitude enough in that document, the oldest written constitution on the face of the earth, to embrace within its four corners these advances for human brotherhood.
>
> It leads us—it leads me, certainly—to the conclusion that in the history of mankind there is an inexorable moral force that carries us forward.
>
> . . . .
>
> Mr. President, I must add a personal note, because on occasion a number of the "boys" up in the gallery have asked me, "How have you become a crusader in this cause?"
>
> That question was asked me once before. It was many years ago . . . . I listened to a Chinese doctor from the front at the time of the Japanese invasion of China come in and plead for money, for bandages, for medicine, in order to

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[74] *Id.* at 6547–51.

[75] *See* Mohasco Corp. v. Silver, 447 U.S. 807, 819–20 (1981); H. HUMPHREY, *supra* note 71; Drew, *supra* note 71.

> carry on. There was one line he used in his plea that seared itself indelibly into my memory.
>
> He said, "They scream, but they live."
>
> I carried those words with me for days and weeks, and when finally I was requested to go into the country for a number of speeches in the interest of Chinese relief, I did so.
>
> A friend said to me, "Why do you waste your time on so remote a project? After all they are people with yellow skins, 12,000 miles from home. You are wasting time which you might well devote to your own constituents."
>
> I said, "My friend, as an answer, there occurs to me a line from an English poet, whose name was John Donne. He left what I believe was a precious legacy on the parchments of history. He said, "Any man's death diminishes me, because I am involved in mankind."
>
> . . . .
>
> Mr. President, in line with the sentiment offered by the poet, . . . every denial of freedom, every denial of equal opportunity for a livelihood, for an education, for a right to participate in representative government diminishes me.

Yet, in the same discussion, Senator Dirksen also typified confusion over the meaning of "equality" by expressing the need to improve the status of minorities in terms of "equal opportunity."

> So today we come to grips finally with a bill that advances the enjoyment of living; but, more than that, it advances the equality of opportunity.
>
> I do not emphasize the word "equality" standing by itself. It means equality of opportunity in the field of education. It means equality of opportunity in the field of employment. It means equality of opportunity in the field of participation in the affairs of government, and the day in the life of a citizen when he can go to the polls, under a representative system, to select the person for whom to vote, who is going to stay in that position for a period of years, whether it is at the local, State, or National level.
>
> That is it.
>
> Equality of opportunity, if we are going to talk about conscience, is the mass conscience of mankind that speaks in every generation, and it will continue to speak long after we are dead and gone . . . .[76]

[76] 110 CONG. REC. 14,509–11 (1964).

Senator Dirksen's crucial role also enlightens the meaning of "preferential treatment." Section 703(j) was an important part of the compromise which made the Civil Rights Act possible. It is most unlikely that the compromise would have a meaning broader than that espoused by Senator Dirksen and his associates. As a matter of political principle, Senator Dirksen wished to minimize government interference with business.[77] Thus he resisted governmentally imposed requirements in the civil rights field. It is unlikely that he would have proposed legislation which would result in *greater* restraints on employers than those already under consideration. Yet a prohibition on "preferential treatment" would make informal settlements difficult and would therefore force judicial or administrative decisions on each set of facts alleged to constitute either direct or reverse discrimination. This would constitute maximum government involvement in business decisions which he was unlikely to favor.[78]

Senator Humphrey's statements regarding the "preferential treatment" language also support the idea that Congress was concerned with group interests. Following the introduction of section 703(j), Senator Humphrey commented:

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[77] *See* Drew, *supra* note 71, at 19.

[78] Senator Dirksen was concerned with limiting what employers might be forced to do, not with restricting what they wished to do. Thus he was understandably silent on the question of permissible affirmative action. Justice Rehnquist addresses this silence in his dissent in *Weber*. He attributes the views of the Southern Democrats to Senator Dirksen. See, e.g., 443 U.S. 193, 235, quoting an exchange between Senators Ervin and Hill, both Southern Senators opposing the bill. Their sentiments are attributed to Senator Dirksen's draft of section 703(j). *Id.* at 245. See also the exchange between Senators Sparkman and Stennis, quoted *id.* at 245 n.23, and between Senators Cotton and Curtis, *id.* at 250 n.29. The Southern Democrats, who sought to prevent the legislation, did express concern about "reverse discrimination." But attribution of their views to Senator Dirksen ignores the fact that Senator Dirksen deserted the Southern Democrats, who then were voted down. They were not participants in the compromise. If they spoke less to the issue after the Dirksen Amendments, it probably was to minimize their defeat. To conclude that Senator Dirksen embraced the views of the Southerners at the instant when he deserted them is unrealistic.

At least one Southern Senator did not believe that his views had been accommodated by the Dirksen Amendments. Senator Ellender stated,

> The substitute is directed at the South—at all States which do not have FEPC laws. It is generally known that the Southern States do not have such laws, for they have never needed them.
>
> I would just like to point to a few provisions of the Dirksen substitute which literally eliminates the Northern States from the operation of this proposed law . . . .

110 CONG. REC. 12,599 (1964), *reprinted in* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 [hereinafter cited as 1964 LEG. HIST.], at 3072 (1964).

> [A] new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. *This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.*[79]

This statement reinforces the notion that section 703(j) is to be construed consistently with the overarching purpose of Title VII, rather than as a broad exception to the statute.

The judicial and administrative interpretations of Title VII were examined in 1972, eight years after its enactment, during legislative deliberations over amendments which would have altered or modified the statute. This subsequent legislative history specifically recognized that Title VII was the subject of an evolutionary jurisprudence not anticipated in 1964. The 1972 legislative history affected that evolution in two ways. First, it sanctioned the legitimacy of early decisions, particularly the disparate impact test of *Griggs*. For example, the debates in both Houses were preceded by committee reports which specifically recognized that the concept of discrimination had expanded during the administration of Title VII. The House Report stated:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially "human" problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions.
>
> The forms and incidents of discrimination which the Com-

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[79] 110 CONG. REC. 12,723 (1964), *reprinted in* 1964 LEG. HIST., *supra* note 78, at 3005 (emphasis added).

mission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in *Griggs v. Duke Power Co.*, ___U.S. ___, 91 S. Ct. 849, 3 FEP Cases 175 (S. Ct. 1971), where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.[80]

The Senate report contained similar language.[81]

The 1972 legislative history also affected the evolution of Title VII jurisprudence by reaffirming that the restrictions on "preferential treatment" should not be construed so as to hamstring voluntary efforts of employers to eliminate discriminatory practices. Congress indicated this most explicitly by rejecting the views of those legislators who believed that section 703(j) prohibited the affirmative action programs spawned by *Griggs*. The most vigorous critic of what he viewed as a violation of the "plain meaning" of section 703(j) was Senator Ervin of North Carolina.

He proposed an amendment addressing the "quota issue,"[82] arguing that:

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[80] H.R. REP. No. 238, 92d Cong., 2d Sess. (1972), *reprinted in* SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 [hereinafter cited as 1972 LEG. HIST.], at 68–69 (1972).

[81] S. REP. No. 415, 92d Cong., 2d Sess. (1971):

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization.
>
> ....
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

Id. at 5, 1972 LEG. HIST., *supra* note 80, at 414.

[82] The amendment read as follows:

> No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race, or a particular religion, or a particular national orgin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges.

118 CONG. REC. 1661 (1972), *reprinted in* 1972 LEG. HIST., *supra* note 80, at 1038.

> When Congress adopted the Civil Rights Act of 1964 it undertook to forbid discrimination in reverse.
>
> It inserted in Title VII of that act a provision which stated in about as plain as words can be found in the English language that no employer should be required to hire employees on a quota system; that is, a system which required him to employ certain numbers or percentages of a particular race, or a particular religion, or a particular national origin, or particular sex.[83]

Senators Javits and Williams spoke against the Ervin Amendment, and squarely placed before the Senate the issue of whether quotas or preferential treatment were legitimate under the Executive Order and Title VII. Senator Javits stated:

> [I]t is clear that what is sought to be reached is, first the Philadelphia plan and similar plans in other cities, and beyond that, the whole concept of "affirmative action" as it has been developed under Executive Order 11246 and as a remedial concept under Title VII.[84]

Senator Williams stated:

> Mr. President, I do not believe that it is the intent of the Senator from North Carolina to deny to the judicial and executive branches of Government all power to remedy the evils of job discrimination; but I am afraid—I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.[85]

The Senate rejected this amendment.[86]

Similarly, when Senator Ervin offered another amendment to restrict the effect of Executive Order 11,246, Senators Williams and Javits again interposed objections.

Senator Javits said:

> We have held that, because the Federal Government—we voted on that here; we debated it and we decided it—has an interest in maintaining constitutional guarantees, it has discretion as to whom it will contract with and will not contract with, to affirmatively encourage nondiscrimination and full utilization of minority group employees and women. So we—

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[83] *Id.* at 1663, *reprinted in* 1972 LEG. HIST., *supra* note 80, at 1042.
[84] *Id.* at 1664, 1972 LEG. HIST., *supra* note 80, at 1046.
[85] *Id.* at 1676, 1972 LEG. HIST., *supra* note 80, at 1072.
[86] *Id.*, 1972 LEG. HIST., *supra* note 80, at 1074.

> and the courts have sustained us—permitted the Federal Government to put into effect an affirmative-action plan.
> This amendment, for practical purposes, would simply nullify that action. For those reasons, I oppose the amendment and hope it will be rejected.[87]

This amendment also was defeated.[88]

Thus, the Senate twice voted against restrictions on the use of quotas by overwhelming margins. The defeat of proposed amendments is not as clear an indication of congressional intent as is the adoption of statutory language. However, Congress should not be expected to spend time approving policies adopted by courts and agencies in implementing statutes.[89] The explicit rejection of amendments that express disagreement with judicial interpretations should be sufficient warrant for the court to continue on the course marked out by its precedents. Presumably, if Congress had not addressed the subject at all, the Court would have done just that. The fact that the Congress left the Court's approach unchanged after reviewing it should not produce a different result.[90]

Senators Williams and Javits, in the closing hours before the cloture vote on the 1972 amendments, again discussed the status of minorities.

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[87] *Id.* at 4918, 1972 LEG. HIST., *supra* note 80, at 1715.

[88] *Id.* at 4977, 1972 LEG. HIST., *supra* note 80, at 1717.

[89] The Civil Rights Act of 1964—Pregnancy Discrimination Act, Pub. L. No. 92-555, 92 Stat. 2076 (1978) and the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, both represent specific congressional overruling of Supreme Court decisions with which the Congress disagreed. When a matter is squarely presented to the Congress, and the challenged interpretation is not sufficiently contrary to its views to be revised, this fact is entitled to some weight in subsequent judicial assessments of the interpretation. Such interpretations should be allowed to stand.

[90] The doctrine of *in pari materia* sustains the appropriateness of considering the entire process of legislation, administrative and judicial interpretation, and subsequent legislative review, in determining how the statute should be interpreted. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). This approach has been followed by the Supreme Court in three Title VII cases: Albemarle Paper Co. v. Moody, 422 U.S. 405, 416–23 (1975) (with respect to remedies); Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 758–64 & 768 (1976) (same); Trans World Airlines v. Hardison, 432 U.S. 63, 76 n.11 (1977) (confirming EEOC interpretation of earlier act), and rejected in one, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The concerns expressed by Justice Stewart in *Teamsters* are largely related to the problem of retroactivity, which can be solved without engaging in a restrictive intepretation of the statute.

Senator Williams:

> I stand here in open confession that I feel the pressure upon me, as a Member of the U.S. Senate, of all people who have found in this land of promised equality and freedom that they, for reasons of land of origin, color of skin, or religion, have not had the opportunity to be fully assimilated on an equal basis.
>
> This is the pressure group to which we are addressing ourselves—those people who know that their constitutional rights are not fully protected until there is effective law saying that no matter what your religion, where you came from, or what your race or your sex, you are equal in that first fundamental for any man or woman, a livelihood for themselves and their families.[91]

Senator Javits touched upon the precise situation in *Weber*:

> We seek to do a great deal, sometimes with success, about housing, about education, about opportunities for the uses of places of public accommodation, et cetera; but we know in our hearts that the fundamental proposition by which all Americans are ultimately conditioned is jobs—*the availability of a job, the incentive of promotion with respect to a job, and the training for a job.* Unless these opportunities are open, we can say all we want to, and even make all the provisions we wish about other matters, but they are bound to be inadequate to the occasion of really giving an equal chance for life to the minorities in this country.
>
> So this is absolutely essential and absolutely basic. This is the enormous area in which discrimination continues. This law is vital. To secure the rights which we wish to secure under the Constitution, an essential condition precedent is that we shall secure this right, the right to a job. In terms of what we have learned in the war against poverty and in the civil rights field in the last 2½ decades, one thing stands out, Mr. President, and that is the issue of dignity. This consideration is superior even to money, or to any other opportunity. There is no greater dignity than that of the man who has a job and is earning his way. So, sociologically, this becomes a critical element of any effort in this country to bring abreast of the rest of society the poor and the minorities who are disadvantaged.[92]

The Civil Rights Act was adopted with awareness that post-Civil War programs had not adequately dealt with the social and

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[91] 118 CONG. REC. 4909 (1972), *reprinted in* 1972 LEG. HIST., *supra* note 80, at 1690.

[92] *Id.*, 1972 LEG. HIST., *supra* note 80, at 1691 (emphasis added).

economic consequences of slavery. The quest for equality in 1964 encompassed a desire to change the socioeconomic subordination of minorities, and not merely to repeat the post-Civil War history. The equality sought in 1964 involved substance as well as form.

Yet this need to improve the economic status of blacks was frequently expressed in terms of "equal treatment" and "colorblindness," which do emphasize form and seem inconsistent with race-specific programs aimed at substantive results. The linguistic irony, typified even in Senator Dirksen's statements, is that the legislators sought to achieve a substantive social purpose and yet spoke in terms which if applied literally would frustrate achievement of that purpose. The internal inconsistency runs throughout the debate. The discussion resulted from the lack of a way to discuss the sociologically defined problems of inferior status of minority groups in a legal framework. Contemporary jurisprudence lacked the technical legal concepts through which to discuss improving the status of underprivileged groups. The concept of group interests fulfills that need.

III. Conclusion

The interpretation of Title VII has afforded an extraordinary opportunity to observe the development and application of the group interest concept. Both the Civil Rights Act and the group interest concept had their roots in the pluralism of modern society. Given the recognition of the concept by writers in jurisprudence only a few years before passage of the Civil Rights Act, it is not surprising that the Congress had difficulty in articulating group interests along with the more traditional social and individual interests. The courts, faced with the resulting internal inconsistencies, have used a common law evolutionary approach to interpret Title VII.

Nevertheless, the decisions adopting and explaining the concept of discrimination have, until *Teal*, been consistent. The bottom line concept represented the logical continuation of this evolution. It embodied the happy coincidence of individual, group, and social interests—a rarity in our society. Individual minority and female workers received additional employment

opportunities, thus furthering their group interests, while social interests were advanced by minimizing the government regulation necessary to ensure voluntary affirmative action by employers. The concept came as close as possible to encouraging the industrial relations system to operate both fairly and autonomously.

Teal has thrown matters into confusion by converting a means to improve minority opportunity (a requirement that tests be job related) into an end that may be self-defeating. Society cannot produce tests for most employment situations that are job related as that term has been defined by the courts under Title VII.[93] Yet this is what *Teal* requires, not only for minorities and women but for all persons against which a test has disparate impact. *Teal* is likely to increase efforts to justify practices that deny minorities and women employment opportunities rather than voluntary efforts to remove those barriers.

There are two avenues by which the balance between individual and group interests thrown askew by the Court in *Teal* could be corrected. First, the Court may itself reconsider the issue in a subsequent case. There are many factors which justify distinguishing *Teal* on its facts.[94] The employer itself did not claim to have taken affirmative action.[95] Despite *Weber*, Connecticut was concerned that if it admitted that it had taken conscious affirmative action, it might be challenged by white employees who were not promoted.[96] As a result of this failure, neither Connecticut nor the amici emphasized the positive relation between the bottom line and affirmative action. Thus a bottom line justification based on affirmative action could still be recognized only in favor of employers who assert that such action had been taken. In addition, the appointments of minor-

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[93] *See supra* note 10.

[94] Political nuances also may have misled the Court. These political nuances arise from the fact that the Justice Department filed a brief in support of the bottom line principle while the EEOC abstained from participation. The Justice Department emphasized management prerogatives concerning the details of the process of avoiding disparate impact without fear of liability to unsuccessful applicants. It did not stress the argument that the bottom line concept furthers the purposes of Title VII by encouraging affirmative action to increase minority and female opportunity. The EEOC abstention may have appeared to the Justices to be the only way that the agency could signal the Court that it opposed the bottom line concept.

[95] *Teal*, 102 S. Ct. at 2529–30.

[96] Blumrosen, *supra* note 18, at 3.

ities were made well after suit had been filed, and only a month before trial. *Teal* could be limited to situations where the employer undertook affirmative action only after litigation had commenced, in effect seeking to meet the bottom line at the courthouse steps.[97]

Secondly, employers who meet the bottom line standard may argue for a more relaxed concept of job relatedness to validate the selection process.[98] A strict standard of job relatedness required by government guidelines was upheld in *Albemarle Paper Co. v. Moody*.[99] However, the Court noted there that "[t]he question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." In *Albemarle Paper*, the selection process was used to perpetuate overt racial segregation. This is a far cry from a holding that job relatedness must be measured by the most rigorous standards regardless of whether there is overall disparate impact. Indeed, even the majority in *Teal* acknowledged that the existence of a bottom line favorable to the group as a whole was evidence against an inference of overt discrimination.[100] The group interest concept suggests that courts remain open to the suggestion that a "rational relationship" standard should be applied in the absence of disparate impact at the bottom line.

The less stringent rational relationship test involves an overall judgment that employees who can pass a particular component of the selection process are likely to be better qualified than those who cannot. A rational relationship test would, unlike the EEOC Guidelines, require neither detailed statistical evidence nor intuitively obvious evidence. A mere rational relationship would not justify denying employment opportunities to minorities and women where the entire selection process has a disparate impact. In that situation rigorous analyses and findings to demonstrate job relatedness should still be necessary to justify the effect on minorities or women, as was the case in both *Griggs* and *Albemarle Paper*.

The process of adopting this standard could be facilitated by the regulatory agencies. The EEOC Uniform Guidelines on Em-

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[97] *Id.*
[98] *Id.* at 4.
[99] 422 U.S. 405 (1975); *see supra* note 10.
[100] *Teal*, 102 S. Ct. at 2535.

ployment Selection Procedures do not address the issue of "job relatedness" without overall disparate impact. There is thus no administrative interpretation of Title VII that requires that "job relatedness" be measured by the standards of the Guidelines in the absence of overall disparate impact and that prevents the adoption of a more relaxed standard of job relatedness for situations where employers have met the bottom line standards.[101]

Aside from a direct reconsideration of *Teal*, relaxing the standard of job relatedness may be the easiest way out of the conflict between social, individual, and group interests reflected in the decision. It would enable employers to minimize validation costs, because they could operate with a standard of rational validity, would satisfy the individual interest in "fair consideration" upon which the majority in *Teal* relied, and still would further the group interests in improved minority and female employment to which Title VII was directed.

[101] Blumrosen, *supra* note 18, at 4–5.

STATUTE

MEDICAL TREATMENT OF DEFECTIVE NEWBORNS: AN ANSWER TO THE "BABY DOE" DILEMMA

Robyn S. Shapiro*

The Indiana Supreme Court allowed the parents of a newborn with Down's Syndrome and a defective esophagus to withhold food and corrective surgery from the child in what is known as the "Baby Doe" case. This is only one of the most recent cases in which a defective newborn was allowed to die with the acquiescence of the courts. For years these decisions not to continue life-sustaining medical treatment for defective newborns were made informally by doctors. Recently, however, judicial scrutiny has become more prevalent. In this Article, Ms. Shapiro examines how decisions are made to withhold medical treatment from competent and incompetent adults, considers the current procedures for determining whether to withhold medical treatment from defective newborns, and proposes a Model Statute to guide such nontreatment decisions regarding defective newborns in the future.

In recent months, the subject of withholding medical treatment from defective newborn infants has received considerable public attention. Both the defective newborn and the competent adult patient have the same substantive right to refuse potentially life-prolonging treatment. However, it is difficult to ensure that the newborn's right is protected and implemented. The newborn himself cannot assert this right and his right may conflict with the rights of his parents. Section I of this Article shows how competent adults have an increasingly unrestricted right to request that their treatment be discontinued. Section II discusses the ways in which incompetent adults, unable to communicate adequately, are forced to rely on judicial determinations of their wishes. Section III contrasts the situation of deformed newborns, who are helpless in the hands of doctors who can make decisions informally and of parents who may be

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affected by conflicting emotions. Section IV demonstrates that legislation can help to provide guidelines in an area where decisions all too often are made by default or without due consideration of all necessary factors. Section V of the Article is the proposed Model Statute.

I. THE RIGHT OF COMPETENT ADULTS TO REFUSE MEDICAL TREATMENT

A competent adult has a right to refuse medical treatment, even if the ultimate result is death.[1] This right is grounded in the doctrine of informed consent and in the constitutional right to privacy.[2] Under the former, medical treatment can be given only after the patient has been informed about the treatment and has validly consented to it.[3] The requirement of valid consent implies that the patient has a right to refuse the treatment.[4] Similarly, the constitutional right to privacy recently has been broadened to include explicitly the right to decline medical treatment.[5] As one court explained:

> The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse

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[1] Roth & Wild, *When the Patient Refuses Treatment: Some Observations and Proposals for Handling the Difficult Case*, 23 ST. LOUIS U.L.J. 429, 432 (1979). In Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914), Judge Cardozo stated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." And in Erickson v. Dilgard, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (Sup. Ct. 1962), the court said: "[T]he Court concludes that it is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires."

[2] Brant, *Last Rights: An Analysis of Refusal and Withholding of Treatment Cases*, 46 MO. L. REV. 337, 341 (1981).

[3] *Id.*

[4] Clark, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 CREIGHTON L. REV. 795, 800 (1980).

[5] *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court declared that the unwritten constitutional right of privacy exists in the penumbra of specific guarantees of the Bill of Rights "formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.

> treatment, but by the failure to allow a competent human being the right of choice.[6]

The following four fundamental state interests may conflict with the patient's decision to refuse treatment: (1) preservation of life, (2) protection of the interests of innocent third parties (usually minor children),[7] (3) prevention of suicide, and (4) preservation of the ethical integrity of the medical profession.[8] However, in situations involving terminally ill competent adults where no innocent third parties' rights are present and the sole state interest is preservation of life,[9] courts have held that the individual's personal decision to refuse treatment prevails.[10] In addition, "living will" statutes,[11] which allow competent adults to specify in advance that they do not want extraordinary life-prolonging treatment, are consistent with the judicially-established principle that competent adults may refuse medical treatment. Thus, the right of a competent adult to refuse medical treatment is clearly established within appropriate limits.

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[6] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977).

[7] Courts should not leave young children destitute by allowing their parents to die. *In re* President & Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *see* Byrn, *Compulsory Life-Saving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 33 (1975).

[8] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977). These four interests were derived from *In re* President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

[9] A dying, competent adult's refusal of medical treatment does not constitute suicide and does not threaten the integrity of the medical profession. It is not suicide because in refusing treatment, the patient may not have the specific intent to die. Moreover, even if he did have such an intent, to the extent that the cause of death was from natural causes, the patient did not set in motion the death-producing agent with the intent of causing his own death. *See* Byrn, *supra* note 7, at 17–18. Furthermore, such refusal does not threaten the state's interest in protecting the integrity of the medical profession, because prevailing medical ethical practice recognizes that the dying often are more in need of comfort than of treatment. Eichner v. Dillon, 73 A.D.2d 431, 426 N.Y.S.2d 517, 541–42 (1980); *see* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977).

[10] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741–42, 370 N.E.2d 417, 425–26 (1977).

[11] *See* ARK. STAT. ANN. §§ 82-3801 to -3804 (Supp. 1979); CAL. HEALTH & SAFETY CODE §§ 7185–7195 (West Supp. 1982); IDAHO CODE §§ 39-4501 to -4508 (Supp. 1982); KAN. STAT. ANN. §§ 65-28, 101–109 (Supp. 1980); NEV. REV. STAT. §§ 449.540–.690 (1977); N.M. STAT. ANN. §§ 24-7-1 to -11 (1978); N.C. GEN. STAT. §§ 90-320 to -321 (Supp. 1979); OR. REV. STAT. §§ 97.050–.090 (1981); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1982); WASH. REV. CODE ANN. §§ 701.122.010–.905 (Supp. 1981).

II. The Incompetent Adult Patient

A. *Who Decides?*

The right of incompetent adults to refuse medical treatment is well established.[12] However, the inability of an incompetent adult to express his wishes complicates the issue. Other people must be entrusted with the responsibility for treatment decisions. The question of who these people ought to be has been answered differently by courts throughout the country. *In re Quinlan*[13] involved a twenty-year-old comatose woman who was placed on a respirator, but who remained in a vegetative state. The patient's parents wanted the respirator removed. The treating physician refused on the ground that the patient was not legally brain-dead. The family commenced a legal action, and the trial court upheld the treating physician's position. On appeal, the New Jersey Supreme Court reversed and gave Quinlan's father, as legal guardian, authority to remove the respirator. The most important aspect of the *Quinlan* decision was its procedural result. *Quinlan* established a three-tier procedure for termination of life-support systems:

> [U]pon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital "Ethics Committee" or like body of the institution in which Karen is then hospitalized. If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others.[14]

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[12] An exception is when the death of an adult would leave an orphan. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977).

[13] 70 N.J. 10, 55, 355 A.2d 647, 671–72, *cert. denied*, 429 U.S. 922 (1976).

[14] *Id.* at 55, 355 A.2d at 671.

In *Superintendent of Belchertown State School v. Saikewicz,*[15] the Supreme Judicial Court of Massachusetts rejected the "hospital committee" approach adopted in *Quinlan* and held that the court should decide whether potentially life-prolonging treatment should be withheld from an incompetent adult. In that case, the question was whether or not Saikewicz, an incompetent sixty-seven-year-old man, should receive chemotherapy treatments for incurable acute monocytic leukemia. Although the chemotherapy treatments might have prolonged Saikewicz's life for two to thirteen months, they were likely to cause severe side effects. Under the court's approach, it first determined "the incompetent person's actual interests and preferences." The court stated:

> We take a dim view of any attempt to shift the ultimate decision-making responsibilities away from the duly established courts of proper jurisdiction to any committee, panel or group, ad hoc or permanent. Thus, we reject the approach adopted by the New Jersey Supreme Court in the *Quinlan* case of entrusting the decision whether to continue artificial life support to the patient's guardian, family, attending doctors, and hospital "ethics committee."[16]

The *Saikewicz* court's rationale was that the role of the judiciary in our society is to resolve difficult moral problems. The court believed that no other person or group has the authority to decide questions of life and death. The opinion reads:

> We do not view the judicial resolution of this most difficult and awesome question—whether potentially life-prolonging treatment should be withheld from a person incapable of making his own decision—as constituting "gratuitous encroachment" on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society" no matter how highly motivated or impressively constituted.[17]

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[15] 373 Mass. 728, 752, 370 N.E.2d 417, 431 (1977).
[16] *Id.* at 758, 370 N.E.2d at 434.
[17] *Id.* at 759, 370 N.E.2d at 435.

The *Saikewicz* approach has been criticized by some in the medical profession who assert that decisions to withhold treatment should be made quietly and without judicial scrutiny.[18] Other commentators have gone further and have suggested that courts are not *able* to make such decisions. As stated recently by one *Saikewicz* critic: "The courts cannot be expected to exercise sound judgment when moral issues are so intertwined with complex medical considerations nor can they act promptly and flexibly enough to meet the rapidly changing needs of clinical situations."[19]

Proponents of court involvement argue that a court can better protect the rights of the incompetent because of its neutrality, which may outweigh the disadvantage of the formality of the court process.[20] The ability of family members to make decisions in the best interests of the incompetent often is hindered by emotional turmoil and by economic self-interest.[21] A proper decision, it is argued, can be made only by a court as neutral arbiter.[22] "Although the judicial process is somewhat awkward for parties who must confront a formal mechanism at a time of great emotional stress, the Court should make the judgment regarding withholding treatment cases because of its neutrality."[23]

In 1980, the procedural approach of *Saikewicz* was followed by the Massachusetts Supreme Judicial Court in *In re Spring*, and by the Supreme Court of New York in *Eichner v. Dillon*. In *Spring*, the family of a seventy-eight-year-old mentally incompetent man suffering from kidney failure petitioned the court for permission to terminate his life-prolonging dialysis treatment. The Massachusetts Supreme Judicial Court, modifying the decision of a lower court,[24] which had been affirmed by the Appeals Court,[25] concluded that it was error to delegate the

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[18] Relman, *The Saikewicz Decision: Judges as Physicians*, 298 NEW ENG. J. MED. 508 (1978).

[19] Relman, *The Saikewicz Decision: A Medical Viewpoint*, 4 AM. J.L. & MED. 233, 240 (1978).

[20] *See* Kindregan, *The Court as Forum for Life and Death Decisions: Reflections on Procedures for Substituted Consent*, 11 SUFFOLK U.L. REV. 919, 920 (1977).

[21] *Id.* at 933.

[22] Brant, *supra* note 2, at 353.

[23] *Id.* at 354.

[24] 8 Mass. App. Ct. 831, 850, 399 N.E.2d 493, 502–03 (1979).

[25] *Id.* at 837, 399 N.E.2d at 499.

decision to the family and to the doctor and reiterated its belief that *the court* must make such decisions.[26]

The question in *Eichner v. Dillon* was whether Brother Fox, an eighty-three year old priest in a chronically vegetative state, should remain on a respirator. In following *Saikewicz* and recognizing the need for judicial involvement to ensure uniform decisionmaking, the court stated:

> We agree with the *Saikewicz* court that the neutral presence of the law is necessary to weigh these factors, and, thus, judicial intervention is required before any life-support system can be withdrawn . . . . Certainly, this bespeaks no distrust of the good faith or competence of the physician for courts inevitably must trust the doctor's judgment as to medical prognosis. Rather, our decision recognizes that the societal interests to be safeguarded are so great that the courts have no choice but to intervene and to examine each case on an individual, patient-to-patient basis.[27]

B. *How is the Decision Made?*

Judicially-decreed guidelines as to *when* medical treatment may be withheld from an incompetent adult also vary from jurisdiction to jurisdiction. In *In re Quinlan*,[28] the New Jersey Supreme Court held that "the focal point of decision [as to when treatment should be withheld] should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen seems to be doomed."[29] Since there was no hope that Karen Quinlan would return to cognitive life, the court found that she did not have to suffer the attachment to a respirator. The court said, "[N]o . . . compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life."[30]

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[26] 380 Mass. 629, 633, 405 N.E.2d 115, 117 (1980).
[27] 73 A.D.2d 431, 474–75, 426 N.Y.S.2d 517, 550.
[28] 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).
[29] 70 N.J. at 51, 355 A.2d at 669.
[30] *Id.* at 39, 355 A.2d at 663.

The test in *Saikewicz* for determining when medical treatment should be withheld from an incompetent adult is more subjective. The court adopted a "substituted judgment" standard; since an incompetent adult has the same right as a competent adult to decline treatment, the court must determine whether or not the incompetent patient would exercise that right under the circumstances, if he were competent. If the court determines that the incompetent patient himself *would* choose to decline treatment, the treatment should be withheld.[31] This procedure is to be followed even though the decision may not conform to what is thought wise or prudent by most people. The court recognized the imprecision in trying to ascertain both the interests and the preferences of the incompetent patient. Of the various guiding principles the court evaluated, it explicitly rejected consideration of "quality of life" as part of the "substituted judgment" test. Accordingly, the court believed that the possibility of a longer life carries the same weight for a mentally incompetent or a retarded person as for anyone else, because the value of life under the law has no relation to intelligence or social position.[32]

Following the *Saikewicz* test, the court in *In re Spring*[33] held that the court's decision to refuse medical treatment for an incompetent person should be a "substituted judgment" of what the incompetent person would decide if he were competent. The court found that (1) the patient would die without the dialysis treatment; (2) with the treatment, he might survive for months; (3) the treatment would not even temporarily restore the patient to a normal, cognitive, integrated, and functioning existence; (4) the treatment caused unpleasant side effects, some of which were controlled through heavy sedation; and (5) termination of the treatment would not cause discomfort. The court ordered termination of the treatment based both on these facts and on the opinions of the patient's wife and son that if competent, the patient would request the withdrawal of treatment.[34]

Similarly, in *Eichner v. Dillon*,[35] the Supreme Court of New

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[31] 373 Mass. at 750–52, 370 N.E.2d at 430–31.

[32] *Id.* at 753, 370 N.E.2d at 431.

[33] 380 Mass. 629, 405 N.E.2d 115 (1980).

[34] The court said that with the treatment, survival for five years would not be probable, but still conceivable.

[35] 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).

York concluded that in deciding whether or not treatment should be withheld from an incompetent adult, the court must exercise "substituted judgment" on the patient's behalf. Thus the court must determine what the patient would decide if he were competent, taking into account his actual interests and preferences and his present and future incompetency. In that case, Brother Fox was a member of a religious community that had frequently discussed maintaining life-supporting systems during the pendency of the *Quinlan* case.[36] During the conversations, Brother Fox had expressed his desire not to have his life prolonged by extraordinary or artificial means in such a situation.[37] Just before the eighty-three year old pastor entered the hospital, he repeated these views.[38] In deciding that Brother Fox's life-support systems should be terminated, the *Eichner* court accorded great weight to his statements, declaring: "Common sense dictates that when an 83-year-old man undergoes surgery—even routine surgery—he contemplates the possibility of death. These findings of fact as to Brother Fox's intentions are entitled to great weight and we see no reason to disturb them."[39]

III. Children and the Defective Newborn

Withholding medical treatment from a child differs from withholding medical treatment from an incompetent adult because the rights of the child's parents are involved. In most cases, parents have a right to make fundamental decisions with regard to their children in areas such as education and lifestyle.[40] The United States Supreme Court has said: "[I]t is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include prep-

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[36] *Id.* at 442, 426 N.Y.S.2d at 529.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 547, 426 N.Y.S.2d at 597. The court made clear, however, that even in the absence of such statements, a "substituted judgment" decision would help to ensure the incompetents' well-being.
[40] Wisconsin v. Yoder, 406 U.S. 205 (1972) (right of Amish to educate their children); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (right to choose parochial schools over public schools); *see* United States v. Orito, 413 U.S. 139 (1973) (right of privacy extends to certain aspects of family relationship).

aration for obligations that the state can neither supply nor hinder."[41]

If the parent fails to care for the child, however, the state will protect the child from the actions or the inaction of the parent.[42]

> While . . . [the child] "belongs" to his parents, he belongs also to his state . . . . [T]he fact [that] the child belongs to the state imposes upon the state many duties. Chief among them is the duty to protect his right to live and to grow up with a sound mind in a sound body and to brook no interference with that right by any person or organization.[43]

Where a child needs medical care to survive and the parents refuse to provide it, the state has intervened successfully to ensure that the care is provided.[44] For example, in the Massachusetts Chad Green case,[45] Chad's parents stopped his chemotherapy treatments, which the hospital believed were necessary to fight the child's acute lymphocytic leukemia. The treating hospital sought resumption of the treatments. The evidence disclosed that without the treatments Chad would die in a few weeks, but with it he had a slightly better than fifty-percent chance of complete recovery. The court ordered resumption of the chemotherapy treatments. Similarly, in *Jehovah's Witnesses v. King County Hospital Unit No. 2*,[46] *People ex rel. Wallace v. Labrenz*,[47] and *John F. Kennedy Memorial Hospital v. Heston*,[48] the courts ordered blood transfusions where parents who were Jehovah's Witnesses refused to consent to such transfusions for their children. The basis of these decisions was that children have an independent right to life.

Courts also have overruled parents' medical treatment decisions in cases where the medical situation is not life-threatening, but the child's failure to receive certain medical care would be harmful to his health. In the second Chad Green case,[49] for

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[41] Prince v. Massachusetts, 321 U.S. 158, 160 (1944).

[42] Brant, *supra* note 2, at 362–63 (1981).

[43] *In re* Clark, 21 Ohio Op. 2d 86, 90, 185 N.E.2d 128, 132 (1962).

[44] *See, e.g.*, Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978) (ordering chemotherapy for leukemia-stricken child over parental objections); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (ordering transfusions for 22-year-old comatose patient over parental objections).

[45] Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978).

[46] 58 N.J. 576, 279 A.2d 670 (1971).

[47] 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

[48] 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).

[49] Custody of a Minor, 378 Mass. 732, 393 N.E.2d 836 (1979).

instance, evidence revealed that the laetrile, the large doses of vitamins A and C, the enzyme enemas, and the folic acid treatments, which Chad's parents had arranged for him to receive, had caused chronic cyanide poisoning, hypervitaminosis A which had damaged the central nervous system and the liver, and possible colon damage. The court proscribed these treatments.[50]

The issue of treating the defective newborn differs from that of children in need of medical treatment because of the low visibility of decisions to withhold treatment from the defective newborn. Each year, approximately 30,000 severely defective babies are born in the United States.[51] For these babies even the most heroic medical measures promise only very impaired lives. An earlier age of medicine offered no alternative to allowing these infants to die.[52] In the last four decades, despite modern medicine's ability to save the lives of many severely defective newborns, pediatric euthanasia has continued on a significant level because physicians have decided not to use extraordinary measures to preserve the lives of such infants.[53] A 1973 study of deaths in a special care nursery reported that 43 out of 299 deaths at the nursery resulted from decisions not to treat the infants.[54] Often only the attending health care personnel have been involved in the decision.[55] As *Time* reported in 1974: "[D]octors have long withheld lifesaving medical support from grossly malformed infants, allowing them to die at birth and often only telling the parents that their babies were stillborn."[56]

Recently, however, decisions not to treat severely afflicted newborns have increasingly come under the scrutiny of the public, the medical and legal professions, and governments.[57] In

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[50] *Id.* at 746, 393 N.E.2d at 845.

[51] *See Medical Ethics: The Right to Survival, 1974: Hearings on the Examination of the Moral and Ethical Problems Faced with the Agonizing Decision of Life and Death Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 26 (1974).

[52] Ellis, *Letting Defective Babies Die: Who Decides?*, 7 AM. J.L. & MED. 393, 398 (1982).

[53] *Id.*

[54] Duff & Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 NEW. ENG. J. MED. 890 (1973).

[55] *Id.* at 894.

[56] TIME, Mar. 25, 1974, at 84.

[57] Ellis, *supra* note 52, at 401.

the 1970's there were two widely-publicized incidents at Johns Hopkins Hospital involving parents' decisions to withhold corrective surgery from newborns who had Down's Syndrome with intestinal obstructions.[58] On April 15, 1982, "Baby Doe," a one week old boy with Down's Syndrome and a deformed esophagus, died one day after the Indiana Supreme Court allowed his parents to withhold food and corrective surgery.[59] The public outcry about this incident was so intense that the Department of Health and Human Services sent a letter to all hospitals receiving federal assistance, which threatened discontinuation of federal funds for those hospitals that discriminated against the handicapped (e.g., seriously retarded newborns) by withholding nourishment or treatment from them.

The increasing public concern with decisions not to treat defective newborns, the inconsistency in such decisions, the great diversity of opinion with respect to the ethics and morality of such practices, and the potential civil and criminal liability involved[60] underscores the need for legislative guidance. Statutory guidelines are appropriate so that our elective representatives may express society's collective moral and ethical sensibilities on this issue.[61]

IV. A Legislative Solution

The objective of the Model Statute proposed here is to minimize judicial intervention in decisions regarding the withholding of medical treatment from defective newborns. Section Two attempts to achieve this objective by establishing an initial pro-

[58] *Id.* at 399–400.

[59] *Baby Dies Before Court Could Be Asked to Save It*, Boston Globe, Apr. 16, 1982, at 7, col. 1. It is the practice of the Indiana Supreme Court not to make available the records of cases of this nature.

[60] Although there are no reported decisions imposing criminal liability for a deliberate failure to treat seriously defective newborns, general statutes concerning homicide, manslaughter, child neglect, and the like are applicable. *See* Ellis, *supra* note 52, at 402. Furthermore, there are many possibilities for civil liability in pediatric euthanasia cases. Parents might sue physicians and other health care providers for negligence, wrongful death, abandonment, or breach of an implied contract to do whatever is necessary to sustain life. Other civil actions might be brought in the name of the defective babies. Health professionals employed by the federal government might be vulnerable under the Federal Tort Claims Act, 28 U.S.C. § 1346 (1976 & Supp. IV 1980). *See* Ellis, *supra* note 52, at 412–13.

[61] *See* Ellis, *supra* note 52, at 414.

cess by which nontreatment decisions can be made and followed. Without such a provision, parents' and doctors' increasing awareness of the legal risks associated with nontreatment decisions could lead to greatly increased, expensive, time-consuming,[62] and complicated[63] litigation. A balance must be struck between efficient decision-making and effective judicial oversight. Subjecting all decisions to withhold medical treatment of defective infants to judicial scrutiny may lead to confusion and uncertainty in the pediatrics ward, because courts cannot act promptly or flexibly enough to meet the rapidly changing needs of such a large number of clinical situations. The requirement, in Section Two, of concurrence of the newborn's parents, his treating physicians, and the hospital's ethics committee on the decision to withhold treatment protects against inappropriate decision-making. The suitability of a nontreatment decision is ensured by the convergence of the parents' role in protecting their child's best interests, the physician's role in medically evaluating the infant's condition, prognosis, and proposed treatment, and the Ethics Committee's role in resolving difficult moral problems.

Section Three calls for a mandatory review of nontreatment questions by a Medical Treatment Panel where there is disagreement among the newborn's parents and the treating physicians, or the hospital's ethics committee. The Panel hearings provide an intermediate level of decision-making to avoid further lengthy and cumbersome court procedures. In addition, a Panel decision—which incorporates the collective guidance of those in health care, in hospital administration, in law, and in

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[62] In Eichner v. Dillon, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980), the lower court took almost two years to decide the case. A year before its decision, the patient died of congestive heart failure despite the assistance of the respirator. *Id.* at 434, 426 N.Y.S.2d at 523. Similarly, in *In re* Spring, 380 Mass. 629, 405 N.E.2d 115, the decision required almost two years, and again the patient died before its issuance. *Id.* at 631 n.1, 405 N.E.2d at 118 n.1.

[63] In Eichner v. Dillon, 73 A.D.2d 431, 476–77, 426 N.Y.S.2d 517, 550 (1980) the court required the following procedure to be followed in termination of care cases: (a) certification by attending physician that patient is terminally ill and in an irreversible vegetative state, (b) confirmation of this prognosis by an appropriately staffed hospital committee, (c) institution of a proceeding for appointment of a committee for the incompetent, and for permission to have life-sustaining measures withdrawn, (d) notification to the state Attorney General or appropriate district attorney who shall have an opportunity to secure independent medical examinations and opinions, and (e) appointment of a guardian ad litem who may elect to oppose the withdrawal of treatment petition.

other disciplines—is most appropriate for this type of morally and ethically complex decision.[64] The Panel expressly is empowered to make its decision to treat or to terminate treatment on the basis of medical evidence, not quality of life. This direction stems from the *Saikewicz* court's finding that our notion of basic decency prohibits devaluation of a patient's life merely because the patient is mentally incompetent or retarded. In addition, a "clear and convincing" standard of evidence is to be followed by the Panel. This stringent standard is mandated because of the significance of the decision to be reached.

Section Four entrusts the ultimate resolution of the nontreatment decision to the judiciary in cases where either the parents, the physician, or the ethics committee disagrees with the Panel order. In these situations, the court resolves the controversy, which is appropriate because of the role courts traditionally have played as the final arbiter of otherwise insoluble conflicts.

Advances in medical science have broadened the capability of physicians to preserve the life of seriously defective newborns. That ability has raised the issues of who should make the decision of whether the life should be maintained and of how that decision should be made. Parents, physicians, hospitals, and society need guidance in answering this difficult question. The Model Statute advanced here would establish a legal framework to guide the activities and the decisions of health care personnel and others.

V. A Model Statute: To Establish Procedures For the Review of Parental Decisions Regarding the Medical Treatment of Defective Newborns

Section One: Definition

> A "severely defective newborn" is one who is not likely to survive without medical intervention and whose prognosis for cognitive sapient life, even assuming this intervention, is poor.

Section Two: Initial Review of Parental Decisions

> In all cases where a severely defective newborn is in need of life-prolonging medical treatment and the parents or

[64] Furthermore, a Panel decision helps diffuse responsibility for the decision, much as multi-judge courts finally resolve difficult questions of law on appeal.

guardians of such child refuse to consent to that treatment, if all of the treating physicians and the hospital "Ethics Committee" or like institutional body concur with the parents' or guardians' decision, then such treatment shall not be administered. In all such cases, said action shall be without any civil or criminal liability therefor, on the part of any participants, whether parent, guardian, hospital, or others.

Section Three: Medical Treatment Panel Hearing

In all cases where a severely defective newborn is in need of life-prolonging medical treatment and the parents or guardians of such child refuse to consent to that treatment, if any of the treating physicians or the hospital "Ethics Committee" or like institutional body favor treatment, then the matter shall be set for an immediate Medical Treatment Panel hearing. At the Panel hearing, the Panel shall appoint a guardian ad litem to represent the interests of the newborn. The guardian ad litem shall then marshal all available arguments in favor of the treatment which the parents or guardians are seeking to terminate or to withhold. Within one week, the Panel shall meet and hear arguments regarding medical treatment for the newborn. Within two days after this hearing, the Panel shall render a decision. The Panel shall order that treatment to be withheld if it can be proved by clear and convincing evidence that such withholding of treatment is in the patient's best interests, considering the probability of recovery with the proposed treatment, the potential side effects of the treatment, and the nature of the treatment. A majority vote of the Panel shall be sufficient on which to base findings and an order.

Section Four: Judicial Review

Any party to the Panel hearing may within three days after the date of an order made by the panel, commence an action for a trial in the circuit court. The judgment or order of the circuit court shall supersede any order made by a Panel in a hearing under this chapter. The findings and order of any Panel shall be admissible in any action in circuit court. If no action for circuit court trial is commenced within three days of the Panel order, any party may file a certified copy of the Panel order with the circuit court and the court shall then render judgment in accordance with the order.

Section Five: Establishment and Composition of Medical Treatment Panels

An appropriate number of Medical Treatment Panels shall be established by the State Court Administrator to hear

controversies presented under this chapter. Each Panel shall consist of five members:

(a) One physician licensed to practice medicine in the state, appointed by the State Court Administrator for a six-month term or for the duration of any case pending at the expiration of such term from a list submitted by an appropriate statewide organization of physicians as designated by the Administrator.

(b) One person employed in the hospital administration department of a hospital in the state, appointed by the Administrator.

(c) One attorney licensed to practice law in the state, appointed by the Administrator.

(d) Two public members appointed by the governor for two-year staggered terms who are not attorneys and who, at the time of their appointment, are not engaged in or licensed to practice medicine. No person appointed to a Panel by the administrator under subsection (a), (b), or (c) may decline to serve on a Panel except that the administrator may for good cause excuse such person. No person may serve on a Panel if the person has a professional or a personal interest in a case under consideration.

STATUTE

TAX EXEMPTIONS FOR RACIALLY DISCRIMINATORY PRIVATE SCHOOLS: A LEGISLATIVE PROPOSAL

NEAL DEVINS*

In Revenue Ruling 71-447, the Internal Revenue Service expressly denied tax exemptions to racially discriminatory private schools. The Reagan administration recently challenged the existence of a defined policy prohibiting tax exemptions to these schools as well as the propriety of the IRS's involvement in regulating social policy. President Reagan has called upon Congress to settle the issue by enacting affirmative legislation. Congress, however, has maintained that long-established federal policy supports Revenue Ruling 71-447 and has refused to enact affirmative legislation.

In this Article, Mr. Devins examines the conflict between the executive, judicial, and legislative branches of government and argues that Congress must rationalize the present system by incorporating federal antidiscrimination policy and judicially defined constitutional guarantees into a coherent statute.

On January 8, 1982, the United States Treasury Department announced that "without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational, or scientific organizations on the grounds that they don't conform with fundamental public policies."[1] This policy shift by the Reagan administration reversed the established position of the Internal Revenue Service (IRS) that tax exemptions should be withheld from racially discriminatory private schools.[2] The administration argued that Congress should provide the IRS with explicit

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[1] I.R.S. News Release (Jan. 8, 1982); 2 CCH Tax Exempt Organizations ¶ 6578, at 9127.

[2] Congress had previously considered enacting legislation on this matter in the summer of 1979. *See, e.g.*, S. 103, S. 449, S. 990, S. 995, 96th Cong., 1st Sess., 125 CONG. REC. 16,432–44 (1979). *See generally Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979).

statutory guidance concerning the implementation of a nondiscrimination requirement and the denial of tax-exempt status to discriminatory schools.[3]

Thus far, Congress has refused the invitation to enact such new legislation, as it believes that a nondiscrimination requirement already is contained in existing statutes and court rulings.[4] Courts have been similarly hesitant about the administration's position. In *Wright v. Regan*,[5] the District Court of the District of Columbia questioned the legitimacy of the President's action by issuing an injunction prohibiting the IRS from granting tax exemptions to racially discriminatory schools.[6] The present law reflects the absence of a coherent policy among the three branches of government.

Because the survival of many private schools depends on their tax-exempt status, any congressional action would have widespread effects.[7] Such legislative action also would reveal how the federal government perceives its role in regulating discriminatory private schools.[8]

This Article proposes that Congress should enact specific legislation dealing with the problem of racial bias in private education. Such legislation would reduce the current confusion over the existence of a racial nondiscrimination requirement. It also would resolve conflicts in the implementation of this nondiscrimination policy among the legislative, executive, and judicial branches. Under the legislation proposed by this Article,

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[3] *See* Speech by President Ronald Reagan to Cabinet (Jan. 18, 1982); *see also* Letter from President Ronald Reagan to Vice President George Bush (Jan. 18, 1982), *reprinted in* 18 WEEKLY COMP. PRES. DOC. 37 (Jan. 25, 1982).

[4] 128 CONG. REC. S108 (daily ed. Jan. 28, 1982) (remarks of Sen. Hart); 128 CONG. Rec. S111 (daily ed. Jan. 28, 1982) (remarks of Sen. Bradley); *cf. infra* notes 59–67 and accompanying text.

[5] 656 F.2d 820 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-97).

[6] The injunction is effective until the final resolution of the case. Wright v. Regan, No. 80-1124 (D.C. Cir. Feb. 18, 1982) (order granting injunction).

[7] Congressional action or inaction will have a significant impact on private education generally. *See infra* notes 90–102 and accompanying text.

[8] The media have focused closely on the recent case of Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 149 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) as indicative of the federal government's attitude in this area. *See, e.g.*, *U.S. Shifts on School Exemption*, Wash. Post, Jan. 13, 1982, at 1, col. 4.; *Race Bias Won't Bar Tax-Exempt Status for Private, Religious Schools, U.S. Says*, Wall St. J., Jan. 11, 1982, at 1, col. 1; *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. Times, Jan. 9, 1982, at A1, col. 2.

the courts would apply and the IRS would implement the general nondiscrimination requirement enacted by Congress.

I. Overview of Federal Governmental Actions Before the Reagan Policy Shift

A. *The Judicial Basis of Nondiscrimination Policy*

The national policy opposing racially discriminatory school systems stems from the Supreme Court's landmark decision in *Brown v. Board of Education.*[9] Segregated private educational institutions, sometimes with the aid of state subsidies, long have been used to circumvent *Brown* in particular, and the goals of racial equality and of equal educational opportunity in general.[10] "The estimated enrollment in southern private schools organized or expanded in response to desegregation increased from roughly 25,000 in 1966 to approximately 535,000 by 1972."[11] As one court observed, "[U]nless this [private segregated school] system is destroyed, it will shatter to bits the public school system . . . and kill the hope that now exists for equal educational opportunities for all our citizens, white and black."[12]

Yet before 1970, the federal government generally prohibited only direct federal assistance to discriminatory private schools.[13] One exception to this policy was a 1967 IRS ruling that a tax "exemption will be denied and contributions will not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of

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[9] 347 U.S. 483 (1954) (racial segregation in public schools a denial of due process under the Fifth Amendment).

[10] *See, e.g.*, J. Ely, The Crisis of Conservative Virginia (1976) (private education subsidies used to promote massive resistance to desegregation). Similar action was taken in North Carolina, Mississippi, and Louisiana. *See* D. Nevin & R. Bills, The Schools that Fear Built (1976); King, *Rebuilding the Fallen House--State Tuition Grants for Elementary and Secondary Education*, 84 Harv. L. Rev. 1057 (1971).

[11] Comment, *Segregation Academies and State Action*, 82 Yale L.J. 1436, 1441 (1973).

[12] Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833, 857–58 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

[13] Direct assistance was prohibited under § 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1.

the laws of the United States."[14] This nondiscriminatory policy was of limited value, however, because a constitutional violation by the state was difficult to prove.[15]

In July 1970, the IRS altered this policy[16] after an injunction, made permanent in *Green v. Connally*, that denied tax exemptions to discriminatory schools in Mississippi.[17] The IRS based this decision on a finding that it would be improper to grant tax exemptions to schools that violate the important public policy objectives established in *Brown* and in the Civil Rights Act of 1964.[18] This is a specific application of the "frustration of public policy" doctrine, whereby the government is prohibited from benefiting individuals, institutions, or organizations whose practices or beliefs are contrary to national policy objectives.[19] The *Green* court mandated that schools seeking tax-exempt status adopt a policy of racial nondiscrimination, publish that policy, and provide certain information to enable the IRS to determine that the schools did not racially discriminate.[20] Although the decision was limited to Mississippi,[21] the court stated that the IRS "would be within its authority in including similar requirements for all schools of the nation."[22]

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[14] I.R.S. News Release (Aug. 2, 1967); N.Y. Times, Aug. 3, 1967, at A24, col. 3. An example of impermissible state support would be a discriminatory private school that had contracted with the Army to teach the children of Army personnel.

[15] *See* Brown, *State Action Analysis of Tax Expenditures*, 91 HARV. L. REV. 97 (1976) (nexus to state action difficult to establish). Recent Supreme Court decisions also suggest the difficulty of establishing state action. *See, e.g.*, Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[16] *See* I.R.S. News Release (July 10, 1970); N.Y. Times, July 11, 1970, at A1, col. 8.

[17] Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971). A permanent injunction was issued in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd summarily*, 404 U.S. 997 (1971). The precedential effect of this affirmance is unclear. In *Bob Jones Univ. v. Simon*, the Supreme Court gave it little precedential weight. *See* 416 U.S. 725, 740 n.11 (1974) ("[T]he court's affirmance in *Green* lacks that precedential weight of a case involving a truly adversary controversy."). *But see* Norwood v. Harrison, 413 U.S. 455, 463 n.6 (1973) (citing *Green* with approval). Congress recognized *Green*'s possible precedential value when it amended the tax-exemption provision of the Internal Revenue Code to prohibit the granting of tax exemptions to racially discriminatory private clubs. *See infra* notes 67–71 and accompanying text.

[18] 42 U.S.C. §§ 2000–2000h4 (1976 & Supp. IV 1980).

[19] *See* Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33–34 (1958).

[20] 330 F. Supp. at 1179–80.

[21] *Id.* at 1176. The order was limited because the injured party in that case was from Mississippi and was seeking relief only in that state.

[22] *Id.*

The IRS adopted this recommendation in 1971 by issuing Revenue Ruling 71-447, which prohibited the granting of tax exemptions to private schools that maintained racially discriminatory policies.[23] Private schools seeking tax-exempt status were required to publicize their nondiscriminatory policies.[24] The IRS issued Revenue Procedure 72-54 to provide guidelines for publishing these policies,[25] although no particular method of publication was required.[26]

In 1975, the IRS updated its requirements for private schools seeking tax-exempt status. Revenue Procedure 75-50[27] set forth guidelines and mandated record-keeping to determine if a private school's policies were racially nondiscriminatory. A school was required to "show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a *bona fide* manner in accordance therewith."[28] The regulation required tax-exempt institutions: (a) to adopt formally nondiscriminatory policies in their charters or bylaws, (b) to refer to such policies in their advertising brochures, and (c) to publish annual notice of such policies in a local newspaper of general circulation.[29]

Recognizing that religious schools appeal to a discrete segment of the community, the Procedure allowed these schools to satisfy their publication requirement through a notice of nondiscrimination in a newsletter or magazine of the religious organization.[30] In 1975, the IRS also published a revenue ruling denying tax-exempt status to any religious institution that maintained racially discriminatory policies, even if that discrimination were based on sincere religious beliefs.[31] Current IRS policies are based on these two 1975 rulings.

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[23] Rev. Rul. 71-447, 1971-2 C.B. 230.
[24] Rev. Proc. 72-54, 1972-2 C.B. 834.
[25] *Id.*
[26] *Id.* § 3.01, 1972-2 C.B. 834. For example, "publication by a school of notice of its racially nondiscriminatory policy in a newspaper of general circulation serving all racial segments of the locality from which the school's student body is drawn." *Id.*
[27] Rev. Proc. 75-50, 1975-2 C.B. 587.
[28] *Id.* § 2.02, 1975-2 C.B. 587.
[29] *Id.* § 2.02, 1975-2 C.B. 587.
[30] *Id.* § 4.03, 1975-2 C.B. 588.

B. *The Proposed 1978 Regulations*

In July 1976, two lawsuits were brought that questioned the adequacy of the 1975 enforcement procedures. First, in *Green v. Miller*[32] the plaintiff sought enforcement of the permanent injunction issued in *Green v. Connally*. Second, a nationwide class action, *Wright v. Regan*,[33] was brought to implement more stringent enforcement procedures throughout the country. These lawsuits, in addition to a concern that some private schools adjudicated discriminatory by a court or by an administrative body were deemed nondiscriminatory under the 1975 guidelines,[34] prompted the IRS to review and ultimately to revise its procedures.

On August 21, 1978, the IRS published a new proposed Revenue Procedure.[35] Under this Procedure, a private school was considered discriminatory either if it had been held by a court or an agency to be racially discriminatory *or* if it had an insignificant number of minority students and was formed or was substantially expanded at or about the time that the public schools in the community were desegregated.[36]

These standards were in many respects similar to the constitutional standards approved by the Supreme Court in *Norwood v. Harrison*.[37] Under the *Norwood* standards, a private school

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[31] Rev. Rul. 75-231, 1975-1 C.B. 158. The IRS based this position on the Supreme Court's recognition "that a religious basis for an activity will not serve to preclude governmental interference with the activity if it is otherwise clearly contrary to federal public policy." *Id.* at 159; *see* Prince v. Massachusetts, 321 U.S. 158 (1944). The IRS position was upheld by the Fourth Circuit in Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980) (*rev'g* 468 F. Supp. 890 (D.S.C. 1978)), *cert. granted*, 454 U.S. 892 (1981), and in Goldsboro Christian Schools v. United States, 644 F.2d 879 (4th Cir. 1981) (*aff'g* 436 F. Supp. 1314 (E.D.N.C. 1977)), *cert. granted*, 454 U.S. 892 (1981). The *Bob Jones University* and *Goldsboro Schools* cases recently were argued before the Supreme Court. 51 U.S.L.W. 3295 (U.S. Oct. 19, 1982).

[32] Motion to Enforce Decree and for further Declaratory and Injunctive Relief at 7, Green v. Miller, 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980).

[33] 480 F. Supp. 790 (D.D.C. 1979).

[34] *See Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 5 (1979) (testimony of Jerome Kurtz, Comm'r, IRS) [hereinafter cited as *Hearings*].

[35] 43 Fed. Reg. 37,296 (1978).

[36] *Id.* at 37,296–97.

[37] 413 U.S. 455 (1973). The Court declared unconstitutional a Mississippi textbook lending program that provided textbooks to all private schools, including those that excluded students on the basis of race. Plaintiffs had alleged that the law was unconstitutional on two grounds. First, the program was viewed as direct state aid to racially

may obtain certification of nondiscrimination by providing information as to its admissions policies and the number of its minority students. Unlike this informational requirement, however, the proposed IRS procedure used percentages to define what constituted an insignificant minority enrollment.[38] This would have established racial quotas for suspect schools. The Procedure also did not distinguish between religious and nonreligious schools, even if religious schools granted preference in admission to students of their faith.[39]

The IRS received an enormous number of written comments, mostly hostile, concerning this Procedure.[40] This firestorm of protest led to the scheduling of oversight hearings in both Houses of Congress.[41] On Feburary 9, 1979, a few days before these hearings were to begin, the IRS introduced a milder version of the proposed regulations.[42] Unlike the IRS's earlier proposal, the revised Procedure permitted the IRS to consider special circumstances in granting tax-exempt status, such as the formation or expansion of religious schools whose denominational beliefs did not mandate racial discrimination.[43] The new regulations, however, retained a modified version of the numerical "significant minority enrollment" test.[44] Public opposition to this quota-like standard and congressional fears regarding possible IRS control over private education resulted in severe criticism of the revised proposal.[45]

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segregated education. Second, the program was considered to impede the desegregation of public educational facilities. The Court based its decision on the first ground.

[38] 43 Fed. Reg. 37,296, 37,298 (1978). Suspect schools having a student body whose percentage of minority students was less than 20% of the percentage of the minority school age population in the community served by the school would have lost their tax-exempt status unless they could show good-faith efforts to attract available minority students. Good faith was defined as satisfaction of four of the following five criteria: (1) availability and granting of significant minority scholarships, (2) vigorous minority recruitment, (3) an increased percentage of minority enrollment, (4) employment of minority teachers or professional staff, and (5) other substantial evidence.

[39] *See id.* at 37,297–98.

[40] *See* Wilson, *An Overview of the I.R.S.'s Revised Proposed Revenue Procedure on Private Schools as Tax-Exempt Organizations*, 57 TAXES 515 (1979).

[41] *See id.*

[42] 44 Fed. Reg. 9451 (1979).

[43] *Id.* at 9453.

[44] *Id.* (exceptions from this standard granted when "circumstances . . . limit the school's ability to attract minority students").

[45] *See Hearings*, *supra* note 34, at 280–304 (testimony of William B. Ball, counsel for Nat'l Comm. for Religious Freedom); *id.* at 725–29 (testimony of Sen. Hatch); *id.* at 971–83 (testimony of Rep. Robert Dornan).

C. *Congressional Response to the 1978 Proposal*

Congress, satisfied with existing procedures and alarmed by the IRS's revised guidelines, stayed the implementation of these guidelines by passing riders to the Treasury Appropriations Act of 1980.[46] The Dornan Amendment provided that "none of the funds available under [the] Act may be used to carry out [the IRS proposals]."[47] The Ashbrook Amendment provided more generally that no funds may be used "to formulate or carry out any rule, policy, procedure, guideline, standard or measure which would cause the loss of tax exempt status to private, religious, or church-operated schools . . . unless in effect prior to August 22, 1978."[48] These restrictions, which were scheduled to lapse on October 1, 1980, have remained in force through continuing resolutions passed by Congress.[49]

Congress has been satisfied to maintain the status quo through these riders; affirmative legislation modifying the tax-exemption provision of the Internal Revenue Code has been thought unnecessary. The House recently revised the Ashbrook Amendment to extend its coverage, thereby precluding the IRS from implementing judicial statutory interpretations that require more stringent nondiscrimination enforcement measures than the standards in effect before August 22, 1978.[50] This modification resulted from congressional dissatisfaction with the court's holding in *Green v. Miller*.[51] The *Miller* court used a test similar to that in *Norwood*, in holding that a school was presumed to be

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[46] Dornan Amendment, Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979); Ashbrook Amendment, Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979); *see also* 125 CONG. REC. S11,979–85 (daily ed. Sept. 6, 1979) (Senate debate); 125 CONG. REC. S11,829–54 (daily ed. Sept. 5, 1979) (same); 125 CONG. REC. H5979–85 (daily ed. July 16, 1979) (House debate); 125 CONG. REC. 18,434 (1979) (same).

[47] Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979).

[48] Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979).

[49] *See* 127 CONG. REC. H5398 (daily ed. July 30, 1981); 126 CONG. REC. H7218 (daily ed. Aug. 19, 1980); 125 CONG. REC. H5983 (daily ed. July 16, 1979).

[50] Reported from the House Appropriations Committee on July 9, 1981, H.R. REP. No. 171, 97th Cong., 1st Sess.; passed by the House on July 30, 1981, 127 CONG. REC. H5392–98; reported by the Senate Appropriations Committee on Sept. 22, 1981, S. REP. No. 192, 97th Cong., 1st Sess.; and Senate consideration begun, but not completed, on Dec. 14, 1981, 127 CONG. REC. S15,177–95 (daily ed. Dec. 14, 1981).

[51] 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980); *see also* 127 CONG. REC. H5394–95 (daily ed. July 30, 1981) (remarks of Rep. Dornan); 127 CONG. REC. H5392–93 (daily ed. July 30, 1981) (remarks of Rep. Ashbrook).

racially discriminatory if it had been determined to be discriminatory in a judicial or administrative proceeding, or was established at a time when public schools in its area were desegregating and could not demonstrate that it did not discriminate.[52] This standard is similar to the 1978 IRS proposal whose implementation was stayed by the appropriations riders.

II. THE TAX-EXEMPTION PROVISION AS A POLICY MEASURE

A. *The Nondiscrimination Requirement: Congressional Recognition*

Congress has refused to incorporate an explicit nondiscrimination requirement into the Internal Revenue Code because it believes existing congressional enactments and legislative debates have clearly established that Congress recognizes nondiscrimination requirements. Civil rights advocates argue that positive legislation would legitimize President Reagan's position that there is presently no nondiscrimination requirement in the Code.[53] Congress' belief in the current existence of the nondiscrimination requirement also is apparent in legislative discussion of a concurrent resolution before Congress stating that "current Federal law clearly *authorizes and requires* the Internal Revenue Service to deny tax-exempt status and deductibility of contributions to private schools that discriminate on the basis of race."[54] A resolution, rather than specific legislation, was introduced because it was felt that "new legislation is both unnecessary and confusing. The law and policy against granting tax exemptions to such schools is clear."[55] Thus, as Senator Moynihan (D-N.Y.) commented, "The administrative decision to reverse the established federal rule denying tax-exempt status

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[52] Green v. Miller, 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980).

[53] *See Administration's Change in Federal Policy Regarding the Tax-Status of Racially Discriminatory Private Schools: Hearings Before the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 6–7 (statement of Lawrence H. Tribe, professor of law, Harvard Law School).

[54] S. Con. Res. 59, 128 CONG. REC. S108 (daily ed. Jan. 28, 1982) (remarks of Sen. Hart) (emphasis added); *see infra* notes 65–67 and accompanying text.

[55] 128 CONG. REC. S111 (daily ed. Jan. 28, 1982) (remarks of Sen. Bradley).

to private schools and colleges that practice racial discrimination is . . . illegal."[56]

The clear federal policy against discriminatory institutions is firmly established in Supreme Court decisions such as *Brown v. Board of Education*,[57] *Norwood v. Harrison*,[58] and *Runyon v. McCrary*,[59] as well as in many congressional enactments, including the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Civil Rights Act of 1964.[60] Congress' reaction to *McGlotten v. Connally*[61] illustrates its opposition to granting tax exemptions to racially discriminatory institutions. In *McGlotten*, the court held that nonprofit private clubs that excluded nonwhites from membership were entitled to tax-exempt status.[62] The court decided that because the tax exemptions were income-defining, they should not be conditioned on socially acceptable behavior.

> Congress had determined that in a situation where individuals have banded together to provide recreational facilities on a mutual basis, it would be conceptually erroneous to impose a tax on the organization as a separate entity . . . . [N]o income of the sort usually taxed has been generated; the money has simply been shifted from one pocket to another, from within the same pair of pants.[63]

Congress expressed its dissatisfaction with *McGlotten* by amending the tax-exemption provision of the Internal Revenue Code to prohibit the granting of tax exemptions to racially discriminatory private clubs.[64] Congress thus views the tax-exemption provision as a matter of broad social policy extending be-

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[56] Office of Sen. Moynihan (D-N.Y.), News Release (Jan. 9, 1982) (copy on file with the author).

[57] 347 U.S. 483 (1954).

[58] 413 U.S. 455 (1973) (state aid to discriminatory private schools prohibited).

[59] 427 U.S. 160 (1976) (private schools must admit minority students under 42 U.S.C. § 1981 (1976)).

[60] Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000–2000h4 (1976 & Supp. IV 1980); Fair Housing Act of 1968, 42 U.S.C. § 3601 (1976).

[61] 338 F. Supp. 448 (D.D.C. 1972).

[62] *Id.* at 457–59. The court also held that tax exemptions given to racially discriminatory fraternal organizations were impermissible under Fifth Amendment Equal Protection analysis. Further, provision of a tax deduction for charitable contributions was held to be a grant of federal financial assistance within the scope of the Civil Rights Act of 1964. *See infra* notes 75–78 and accompanying text.

[63] 338 F. Supp. at 458.

[64] 26 U.S.C. § 501(c) (1976).

yond the definition of income. Congress also has indicated that it supports nondiscrimination as a social policy.[65] Finally, amending the Code suggests Congress' willingness to act when it does not approve of the decisions of the other branches of government. In *Haig v. Agee*,[66] the Supreme Court indicated that Congress' failure to change an agency ruling is an implicit acceptance of the ruling. By not enacting legislation in response to Revenue Ruling 71-447, Congress implied acceptance of its principle of nondiscrimination. The Ashbrook and Dornan Amendments also implicitly support the legitimacy of an existing nondiscrimination requirement by limiting the scope of IRS enforcement efforts.[67]

B. *The Nondiscrimination Requirement: Enforcement Issues*

1. *Is a tax exemption government aid?* Whether a tax exemption can be classified as government aid raises issues under both the Civil Rights Act of 1964, which forbids granting federal aid to institutions that discriminate on the basis of "race, color or national origin,"[68] and the Establishment Clause of the First Amendment, which forbids government establishment of religion and severely limits federal aid to religiously affiliated private schools.[69]

The district court in *McGlotten v. Connally* concluded that a tax exemption to a racially discriminatory fraternal order is federal aid under the Civil Rights Act of 1964.[70] This holding was based in part on the recognition that other forms of indirect assistance have been recognized as federal aid.[71] More important, the court found that the purpose of the Act "is clearly to

[65] The Senate Committee Report on this legislation states that "it is believed that it is inappropriate for a social club . . . to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion." S. REP. No. 1318, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6051, 6058.

[66] 101 S. Ct. 2766 (1981).

[67] Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 96-74, §§ 103, 615; *see supra* notes 49–55; *see also* Wright v. Regan, 656 F.2d 820, 832–35 (D.C. Cir. 1981) (discussion of Act).

[68] 42 U.S.C. §§ 2000, 2000d-1 (1976).

[69] *U.S. Const.* amend. I ("Congress shall make no law respecting an establishment of religion. . . ."). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-8, 14-9 (1979).

[70] 338 F. Supp. 448, 461 (D.D.C. 1972).

[71] *Id.*

eliminate discrimination in programs or activities benefiting from federal assistance."[72] The decision is sound, although it raises a problematic issue concerning the possible "overconstitutionalization" of the Internal Revenue Code, whereby the Code's revenue collecting function is subsumed by social policies derived from the Constitution.[73] As an economic matter, a tax exemption would have to be entirely income-defining to avoid being characterized as a partial subsidy.[74] One report noted:

> [A] tax exemption, no matter what its form is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds.[75]

The total prohibition of governmental assistance to discriminatory institutions mandates that the Act's coverage should extend to the granting of tax exemptions to private schools.[76]

The Establishment Clause demands a different analysis of tax exemptions. In *Walz v. Tax Commission*,[77] the Supreme Court held that a tax exemption is not government aid under the Establishment Clause. The majority opinion explained that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[78] The majority's recognition that a religious institution benefits through a tax exemption makes this claim appear facially dubious.[79] Establishment Clause analysis, however, focuses on whether the "primary effect" of the exemption is to aid the institution, not whether some benefit might accrue to the institution.[80] Thus, a tax exemption might be impermissible

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[72] *Id.*

[73] *See* Bittker & Kaufman, *Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

[74] *See* Yale, *Income Tax Deductions and Credits for Nonpublic Education: Toward a Fair Definition of Net Income*, 16 HARV. J. ON LEGIS. 91 (1979).

[75] BROOKINGS INSTITUTION, REPORT ON A SURVEY OF ADMINISTRATION IN IOWA: THE REVENUE SYSTEM 33 (1933).

[76] Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958).

[77] 397 U.S. 664 (1970).

[78] *Id.* at 675.

[79] *Id.* at 674–75.

[80] Before 1977, Supreme Court precedents had suggested that almost no form of aid from the state either to nonpublic schools or to the families of nonpublic school students would be constitutional. This restriction has been relaxed in recent years. *Compare* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 780–81 (1973) (tuition grants and

under the Civil Rights Act of 1964 but not under the Establishment Clause. Thus, there may be a conflict between the judicial branch's prohibition of tax exemptions on constitutional grounds and the executive branch's interpretation of legislative enactments.

2. *What constitutes discrimination?* Determining what constitutes discrimination is analytically complex and emotionally charged. Should discriminatory acts be limited to explicit racial practices, such as refusing to admit any minority applicants or banning interracial dating, or should it include the gender-based classification found in an all-male military academy? How should explicit discriminatory beliefs be classified? For instance, is a Nazi-run school's teaching that blacks are an inferior race discriminatory? What if such practices are grounded in religious doctrine, such as Biblical passages that are interpreted to suggest that members of each race should associate only with members of the same race? Finally, what view should be taken of a school that is racially imbalanced due to factors unrelated to racial practices or beliefs? For instance, how should a private school whose classes are taught in German, Chinese, Hebrew, or Swahili be treated? Additional factors, such as location, idiosyncratic curricula and procedures, and admissions criteria based on religion, national origin, or measures of achievement may lead to racially imbalanced schools.

Unless the statutory criteria for nondiscrimination are clear, a private school will have to make difficult choices concerning its tax-exempt status.[81] For example, must a school for Orthodox Jews offer scholarships for nonwhite Orthodox Jews? For white non-Jews? Must it merely promote the fact that minority Orthodox Jews are welcome to seek admission, or must the school admit any minority student even though this may hinder the school's ability to provide a particular type of religious environment for the education of its students? If such a school need not abide by these requirements, however, what is to be

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deductions and maintenence reimbursements declared unconstitutional), *and* Meek v. Pittenger, 421 U.S. 349, 369–72 (1975) (broad range of direct and indirect aid declared unconstitutional), *with* Wolman v. Walter, 433 U.S. 229, 240–41 (1977) (funding upheld for theraputic and diagnostic tests but prohibited for field trips and instructional materials), *and* Committee for Pub. Educ. v. Regan, 444 U.S. 646, 658–61 (1980) (direct reimbursement to private schools for state mandated testing upheld).

[81] *See Hearings*, *supra* note 34, at 288–89 (testimony of William B. Ball).

done with a religious school whose practices are governed by the Ku Klux Klan? A solution to the tax-exemption dilemma that does not recognize the onerous practical effect it may have outside the scope of the original problem only will exacerbate matters.

A finding of discrimination by a court, as a constitutional matter, requires a showing of discriminatory intent. The Supreme Court stated in *Washington v. Davis*[82] that its "cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional, *solely* because it has a racially disproportionate impact."[83] Discriminatory intent does not mean that discrimination was merely a motive, but that it was the predominant motive.[84] In the case of private schools receiving state assistance, the test of constitutionality is the *Norwood* standard.[85] Under existing IRS procedures, a school that is found to be discriminatory and thus is prohibited from receiving state aid under the *Norwood* standard would be entitled to a tax exemption if it met the three guidelines outlined in Revenue Procedure 75-50.[86] The classification of a tax exemption as government aid for purposes of the Civil Rights Act of 1964, however, would result in the incorporation into the Internal Revenue Code of standards similar to the *Norwood* constitutional standards.

Congress can enact a statutory nondiscrimination standard that is more stringent than existing constitutional standards,[87] as demonstrated by recent congressional action in strengthening the Voting Rights Act of 1965.[88] There, Congress was concerned

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[82] 426 U.S. 229 (1976).

[83] *Id.* at 239.

[84] *See* Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[85] Norwood v. Harrison, 413 U.S. 455, 467 (1973), *on remand,* 382 F. Supp. 921, 925 (N.D. Miss. 1974) ("[T]he critical time of a private school's formation or unusual enlargement must be a significant factor . . . in determining whether it is racially discriminatory.").

[86] *See Hearings, supra* note 34, at 1-8 (testimony of Jerome Kurtz, Comm'r, IRS); *see supra* note 27 and accompanying text.

[87] *See* Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (Congress may prohibit use of certain literacy tests for voter eligibility, even if use of tests does not violate the Equal Protection Clause of the Fourteenth Amendment).

[88] *See* Blumstein, *Minority Civil Rights and Voting Rights,* Wall St. J., May 27, 1982, at 28, col. 3.

with the difficulty and the enormous expense of proving subjective discriminatory intent.[89] Similar problems exist in determining whether a private school has discriminated. Countervailing education and tax policies, however, must be considered in this determination.

C. *The Nondiscrimination Requirement: Policy Issues*

1. *Aid to Private Schools.* There are a variety of policy arguments that justify government assistance to private education. In expressing support for certain forms of state aid to religiously affiliated schools, Justice Powell asserted that:

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states, they relieve the tax-burden incident to the operation of public schools. The state has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.[90]

Private schools also may be a desirable educational alternative because they are free of many of the governmental constraints on public schools. Private schools can impart values, teach religion, enforce different disciplinary standards, select and dismiss teachers, and insist on sustained academic achievement in ways that public schools cannot. This is the essence of their privateness and of their appeal.

Tax exemptions are critical to the financial survival of private schools. Twenty-three percent of the revenues of private schools result from their tax-exempt status or the related charitable deduction.[91] Tax-exempt status is also an essential symbol of their continued independence from government control.[92] Pri-

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[89] 128 CONG. REC. S6560–61 (daily ed. June 9, 1982) (statement of Sen. Kennedy); *cf.* South Carolina v. Katzenbach, 383 U.S. 303, 327–28 (1965) (concern over obstructionist lawsuits at time of original passage of Voting Rights Act led Congress to prescribe remedies without prior adjudication of voting discrimination).

[90] Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part).

[91] *See Hearings, supra* note 34, at 400 (testimony of John Esty, Jr., President, Nat'l Ass'n of Indep. Schools).

[92] *See* Finn, *Public Support for Private Education, Pt. 1*, AM. EDUC., May 1982, at

vate schools strongly oppose any quota-based nondiscrimination standard that would condition a school's tax-exempt status on its minority enrollment, because such a standard infringes on their freedom to control their educational curricula.[93]

Civil rights groups view the issue differently. For them, "[w]hat is at stake is not some finely crafted provision of the tax code but the principles of *Brown v. Board of Education of Topeka, Kansas*."[94] The civil rights groups' position is that the government's primary duty is to ensure that tax exemptions are not given to schools with discriminatory practices. They argue that the IRS should evaluate a private school's nondiscrimination policy by looking at the actual number of minority students enrolled in it.[95] Some civil rights proponents also advocate nondiscrimination standards similar to the IRS's August 1978 proposal.[96]

The civil rights groups insist that IRS standards that strictly enforce the nondiscrimination requirements[97] are justified by (1) the rise of all-white "segregation academies" in Southern school

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4. It should be noted, however, that a schism exists within private education. On the one hand, older mainstream schools are willing to accept government regulation as a cost of obtaining needed government aid. These schools view themselves as quasi-public institutions, linked in many ways with government. *See* Finn & Devins, *Reagan, Discrimination and Private Schools*, Wall St. J., Feb. 2, 1982, at 30, col. 3. On the other hand, fundamentalist schools, which represent the fastest growing sector of private education, are unwilling to have themselves linked with government. Leaders of these groups argue that government should not interfere with their religious liberty by regulating their schools. *See Hearings, supra* note 34, at 554–56 (testimony of Paul Kienel, Executive Director, Ass'n of Christian Schools Int'l). The fundamentalists view their schools as islands of religious freedom. For them, a tax exemption is not government aid. Rather, it is merely the absence of government involvement in properly private matters. *See* Finn, *supra*, at 7.

[93] *See Hearings, supra* note 34, at 1158–67 (testimony of Robert L. Lamborn, Executive Director, Council for Am. Private Educ.).

[94] *See Hearings, supra* note 34, at 1229 (statement of Charles A. Lane, Co-Chairman, Lawyers' Comm. for Civil Rights Under Law).

[95] *See Hearings, supra* note 34, at 470 (statement of Bill Lann Lee, Assistant Counsel, NAACP Legal Defense Fund). He stated:

> The experience in Mississippi indicates that subjective and unverified professions of good faith and nondiscrimination are not enough in the situation where, as here, an all white private school has been established or significantly expanded in the wake of a local public school desegregation order as an escape for those seeking to escape the desegregation order.

Id.

[96] *See infra* note 35; *see also Hearings, supra* note 34, at 1229–32 (statement of Charles A. Lane); *id.* at 472–84 (testimony of E. Richard Larson, Nat'l Staff Counsel, Am. Civil Liberties Union).

[97] *See also Hearings, supra* note 34, at 730 (testimony of Arthur S. Flemming, Chairman, U.S. Comm'n on Civil Rights).

districts that have been subject to desegregation orders, (2) the increase in the number of direct government aid programs that could benefit these schools, and (3) the national policy of preventing discriminatory actions. According to these groups, tax exemptions are not entitlements, which can be taken away only if schools are blatantly discriminatory, but rather, are benefits that should be given only to those private schools that demonstrate compliance with the government's goal of nondiscrimination.

Adopting the approach of the civil rights groups would limit the diversity in thought and methodology that is essential to private education. This approach also would encourage increased use of the tax system as a tool of social regulation in the absence of specific congressional mandate. Weak enforcement standards, however, would lead to the equally undesirable outcome of tacitly approving racially discriminatory practices.

2. *Tax Policy Issues.* Whether a tax exemption is analogous to a social welfare program has been perennially debated by tax policy experts. Boris Bittker and George Radhert have argued that a tax exemption is different from other forms of government largesse. They contend that:

> Congress has rested income tax exemption on a number of distinct rationales [including] a lack of fit between the concept of "income" and the objectives of nonprofit organizations; their meager potential as a source of revenue; the nuisance of record keeping for groups that often operate informally and rely heavily on voluntary services; and the praiseworthy benevolent spirit animating such groups.[98]

The response to this argument is that Congress' amendment of the tax exemption provision after *McGlotten v. Connally* strongly suggests that Congress regards the social welfare function of groups receiving tax exemptions to be very important.[99] Thus, organizations seeking tax exemptions should be required to remain within broad social parameters established by the nation's public policies.

The value of tax-exempt organizations, however, stems not only from their actions, but also from the important national

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[98] Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 304 (1976).

[99] *See supra* notes 67–71.

value of pluralism.[100] Support for diversity of thought has been strong throughout American history. This suggests that the government should not promote one type of behavior or ideology over another through largesse.[101]

An additional argument against using tax exemptions as a tool of social policy is that the primary function of the tax system is the generation of revenues, not the regulation of social behavior. Although tax exemptions do encourage some activities and discourage others,[102] modifying the tax-exemption provision of the Internal Revenue Code to require affirmative action on the part of private schools would improperly transform that provision into a mandate for a particular form of socially desirable behavior. Thus, pluralism and revenue generation are considerations that limit the use of tax-exemption regulations to mere identification of discriminatory practices, not enforcement of affirmative action programs.

III. A Policy Proposal

The nondiscrimination requirement that now governs the granting of tax exemptions to discriminatory schools should be based on the Civil Rights Act of 1964. The IRS, unless required to do otherwise by Congress or the courts, should develop procedures with the sole purpose of ensuring that tax-exempt schools operate in a nondiscriminatory manner. *Norwood*'s constitutional standards should guide the IRS in developing these enforcement procedures.

Congress, however, also should avoid enacting an overly broad, "effects-only" definition of discrimination. Such an enactment would undercut pluralism interests in favor of affirmative nondiscrimination requirements. Schools that have not discriminated should be entitled to receive tax exemptions. A private school, however, should be required to submit detailed information about its operations in order to give the fact-

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[100] *See* Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring).

[101] *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).

[102] Critics of the current tax structure argue that government benefits should take the form of direct government aid. *See* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

finder sufficient information to determine whether the school discriminates.

It would be difficult, if not impossible, for Congress actively to oversee IRS implementation of such a policy. Lawmakers have different views of discriminatory school practices and of appropriate IRS enforcement procedures. Personal value conflicts might prevent Congress from distinguishing among discriminatory practices, beliefs, and effects.

Congress can adopt, however, a general nondiscrimination requirement that incorporates past court decisions and recognizes the applicability of constitutional standards. The courts then will be able to answer the difficult questions regarding the scope of the nondiscrimination requirement on a case-by-case basis through private party challenges to determinations of tax exemption status. The judicial decisions will give the IRS explicit direction for enforcement of the nondiscrimination requirement. If Congress is dissatisfied with the court's statutory interpretations, it can—as it did in the case of racially discriminatory private clubs—enact correcting legislation.

The current conflict among the three branches of government regarding the presence of a general nondiscrimination requirement should be eliminated. A more beneficial approach would be the development of an implicit working relationship among the branches through the adoption of a general nondiscrimination requirement enacted by Congress, defined by the courts, and implemented by the IRS.

IV. Potential Barriers to Successful Implementation of a General Nondiscrimination Requirement

A. *Judicial Barriers: Standing to Sue*

The ability of private parties to challenge the sufficiency of IRS enforcement procedures is the subject of *Wright v. Regan.*[103] The narrow issue before the Supreme Court in *Wright* is whether a general "denigration of the race" claim is a sufficient basis for standing to sue. If such a claim does not suffice, a

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[103] 656 F.2d 820 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

private party might have to show either that he has been treated in a discriminatory manner by the school or that the school's discriminatory practices have impeded area-wide desegregation efforts.[104] These standards are unsatisfactory to those who seek strict enforcement of the IRS nondiscrimination requirement.[105] First, if the claim is based on injury to a particular student, the remedy will be limited to the school's treatment of that student alone.[106] Second, proving harm from area-wide desegregation in a given community might be very difficult.[107]

In one of its most recent standing pronouncements, *Valley Forge Christian College v. Americans for Separation of Church & State*,[108] the Supreme Court held that an allegation of psychological harm is an insufficient basis on which to bring a claim.[109] Justice Rehnquist, writing for the majority, stated:

> [There is no place in our constitutional scheme for] the philosophy that the business of the federal courts is correcting constitutional errors and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to the transcendent endeavor.[110]

Similarly, the government alleges in *Wright* that the fact that a private party "may share certain attributes common to persons who may have suffered discrimination at the hands of private schools, is an insufficent ground upon which to conclude that they have been injured in fact."[111] The counterargument is that the government has an absolute duty to avoid aiding racially discriminatory institutions and thus plaintiffs' alleged injury is of a sufficiently personal nature to justify a hearing on the merits.[112]

Congress should anticipate that standing may be denied to

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[104] *See* Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979), *aff'd sub nom.* Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

[105] *See Wright*, 656 F.2d at 825 (summary of plaintiffs' complaint in Green v. Connally, 330 F. Supp. 1150, *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971)).

[106] *Id.* at 827.

[107] *See* Devins, *Tax Exempt School Issue Alive*, Nat'l L.J., Mar. 29, 1982, at 15.

[108] 102 S. Ct. 752 (1982).

[109] *Id.*

[110] *Id.* at 767.

[111] Petition for Certiorari at 15, *Wright*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

[112] Memorandum Opposing Certiorari filed by Lawyer's Committee for Civil Rights Under Law at 9, *Wright*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

individuals seeking relief from generalized discriminatory practices and respond to this possibility by incorporating a "right to sue" provision as a part of the amended tax-exemption statute. Admittedly, a provision that confers standing does not obviate the requirement that "plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."[113] Such a provision, however, might affect the courts' perception of what constitutes "a distinct and palpable injury." In his concurrence in *Trafficante v. Metropolitan Life Insurance Co.*,[114] Justice White wrote:

> [A]bsent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioner's complaint in this case presented a case or controversy within the jurisdiction of the District Court under Article III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right to sue in Court, I would sustain the Statute insofar as it extends standing to those in the position of the petitioners in this case.[115]

If Congress specifically puts a broad standing provision in the statute, courts will have difficulty circumventing their responsibilities through procedural manipulation and will be more likely to decide cases on their merits.

B. *Legislative Barriers: Appropriation Restrictions*

Congress may restrict nondiscrimination enforcement efforts through the passage of appropriations riders that limit the scope of the enforcement standards. The Ashbrook and Dornan Amendments, for example, were designed to prevent implementation of an "affirmative action" nondiscrimination enforcement standard.[116] Moreover, in the House's revised form, the Ashbrook Amendment seeks to prohibit the IRS from implementing any standards developed by the courts that grant broader relief than that provided under existing regulations.[117] This provision could result in conflicts among the three branches of government

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[113] Warth v. Seldin, 422 U.S. 490, 501 (1975).

[114] 409 U.S. 205 (1972).

[115] *Id.* at 212 (White, J., concurring) (citations omitted); *see also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

[116] *See supra* notes 46–49 and accompanying text.

[117] *See supra* note 50 and accompanying text.

since the constitutional standards of Equal Protection defined in *Norwood*[118] are more expansive than the existing IRS regulations. Thus, the constitutional decisions of the courts may conflict directly with the congressional appropriations riders.

The ultimate resolution of these congressional actions might lead to the very unsatisfactory result of withdrawal of tax exemptions from all private schools. If the IRS obeyed a court order that went beyond existing regulations, it would violate the House's revised Ashbrook Amendment prohibitions. If the IRS refused to obey the court order, it could be held in contempt of court and enjoined from granting any tax exemptions. Congress then might be forced to try to enact specific legislation in order to nullify the effect of the court's statutory interpretation. If its past actions provide any indication, Congress may be incapable of satisfactorily enacting such specific legislation.[119] Rather, Congress must establish broad parameters which permit the courts to define and the IRS to implement the nondiscrimination requirements.

Such general legislation should incorporate the *Norwood* constitutional standards into existing enforcement procedures. Congress also should appropriate sufficient funds to the IRS to implement this standard. Without these funds, the enactment of a nondiscrimination requirement would do little more than trigger conflicts among the three branches of government, because the IRS would be financially unable to follow judicial interpretations requiring more stringent enforcement procedures.

C. *Executive Barriers: Narrow Statutory Interpretation*

The Executive Branch also can limit the reach of nondiscrimination enforcement standards. Although constitutionally

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[118] 413 U.S. 455 (1973). These problems were hinted at in a pleading filed by the Justice Department in the *Wright* litigation:

> [The contentions may raise] serious constitutional questions, such as whether it is constitutionally proper for the Federal Government to confer tax exempt status on private schools that discriminate on the basis of race. Furthermore, insofar as the prohibitions may bar defendants from exercising enforcement discretion or from enforcing fully Code Section 501(c)(3)'s nondiscrimination requirement, they may intrude upon the president's duty under Article II of the United States Constitution to see that the laws are faithfully carried out.

Response of Defendants to Second Supplemental Memorandum of Intervenor Wayne Allen in Support of Motion to Dismiss and Supplemental Memorandum in Support of Defendant's Motion to Dismiss at 8–9, *Wright*, 480 F. Supp. 790 (D.D.C. 1979).

[119] *But see* McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

mandated to faithfully execute the law,[120] the Executive has considerable latitude in interpreting congressional enactments. For example, the Carter and the Reagan administrations adopted conflicting statutory interpretations of the tax-exemption provision. President Reagan based his decision to grant tax exemptions to racially discriminatory private schools on the fact that Congress had not explicitly required otherwise.[121] The Executive Branch also could narrow judicial decisions interpreting tax-exemption statutes by implementing court decrees only in those areas covered by the court order.[122] To avoid such problems, Congress should incorporate a requirement into its legislation that the IRS must implement the nondiscrimination standard in accordance with specified judicial decisions such as *Norwood*.

V. Conclusion: Elements of Proper Congressional Enactment

Congress should incorporate the following provisions into positive legislation:

(1) a general nondiscrimination requirement that incorporates existing IRS rulings and procedures along with the constitutional standards that have been determined by the courts;

(2) a right to sue that encourages court rulemaking through private-party actions; and

(3) provision of sufficient funds to the IRS to implement this policy.

Congress also must provide statutory guidance. Otherwise, the current confusion concerning both the existence and the expansiveness of the nondiscrimination requirement will remain. This is due to a fundamental disagreement within the Congress and among different Presidents over what constitutes discrimination and whether a tax exemption is government aid. Only the judiciary can provide consistent guidance on this matter. The judiciary, through case-by-case adjudication, can be cognizant of differences among private schools subject to review. The proposed statute would provide needed stability to this highly emotional, erratic area of the law through the formal

[120] U.S. Const. art. II, § 1.
[121] *See supra* notes 1–2 and accompanying text.
[122] *See supra* notes 20–21 and accompanying text.

incorporation of past revenue rulings and procedures. The following legislative proposal incorporates these procedures.

APPENDIX

A BILL

To amend the Internal Revenue Code of 1954 to prohibit the granting of tax-exempt status to organizations maintaining schools with racially discriminatory policies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. *Denial of Tax Exemptions to Organizations Maintaining Schools with Racially Discriminatory Policies.*

Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended by redesignating subsection (j) as subsection (k) and inserting a new subsection (j) reading as follows:

> (j) Organizations Maintaining Schools with Racially Discriminatory Policies
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> (1) (A) An organization that maintains a regular faculty and curriculum and has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such organization has a racially discriminatory policy.
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> (B) Any person may commence a civil suit on his own behalf or on behalf of a class of individuals similarly situated against the Internal Revenue Service to compel performance of this statute.
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> (2) For the purposes of this subsection an organization has a 'racially discriminatory policy' if it
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> (A) has been adjudicated as racially discriminatory by a federal or state court or administrative agency; or
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> (B) has been either formed or substantially expanded at or about the time of a local desegregation order and (i) lacks significant minority enrollment and (ii) the formation or expansion may be attributed in whole or in part to the public school desegregation order; or

(C) fails to comport with any of the following requirements: (i) it must include a statement in its charter bylaws or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and applicants, and (ii) it must include a statement of its racially nondiscriminatory policy as to students in all of its brochures and catalogs dealing with student admissions, programs, and scholarships, and (iii) it must make its racially nondiscriminatory policy known to all segments of the general community served by the school by announcing its policy of nondiscrimination through some medium that reaches the general community served by the school, and (iv) it must be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

(3) The Commissioner of the Internal Revenue Service shall have authority to promulgate regulations designed to enforce this provision.

COMMENTS

The purpose of this Act is to reaffirm the nation's commitment to nondiscrimination by prohibiting explicitly the granting of tax exemptions to private schools that discriminate on the basis of race. Standards are to be established by incorporating existing IRS rulings and procedures and constitutional nondiscrimination standards into the Internal Revenue Code.

In the case of religiously affiliated schools, these standards comport with any final judicial determination holding such standards to be unconstitutional under the Religion Clauses of the First Amendment.

Nondiscrimination enforcement techniques will be enhanced through enactment of a statutory right to sue, which permits enforcement of this provision by third parties.

Tax exemptions historically have served as a mechanism for government encouragement of both specific not-for-profit activities and national pluralism. However, the government's central and overriding commitment to nondiscrimination prohibits any government support of institutions that racially discriminate. The IRS should enforce this requirement through the least re-

strictive means available to implement this policy in order to maximize diversity of ideas.

The nondiscrimination requirement, although manifest in past congressional actions, is formally adopted in this Act. This will prevent the IRS from misinterpreting Congress' established commitment to racial nondiscrimination in the granting of tax exemptions.

The present procedure requires formal adoption of a racial nondiscrimination policy by the school, provision of specified related information to the IRS, and publication of the school's racial nondiscrimination policy in an area newspaper. Religious schools may satisfy their publication responsibilities through a religiously affiliated magazine. These standards originated with the IRS, not Congress. The new procedure will formally incorporate these requirements into the tax-exemption provision of the Internal Revenue Code to ensure that they are neither greatly expanded nor greatly contracted.

Present procedures are insufficient, as a private school adjudicated as racially discriminatory may retain its tax-exempt status if it qualifies under current IRS rulings. Under the newly enacted provisions, the constitutional standards that govern the grants of government aid to private schools will be applicable to the governmental granting of tax exemptions to private schools.

Adequate enforcement of the racial nondiscrimination requirement demands more than a set of established procedures. It requires proper execution of these standards. Private parties dissatisfied with the IRS's decision concerning the tax-exempt status of a particular institution should be permitted to obtain relief in the courts. Congressional enactment of a statutory right to sue will provide such recourse.

COMMENT
RELIEF FOR ASBESTOS VICTIMS: A LEGISLATIVE ANALYSIS

LOUIS TREIGER*

Over the next thirty to thirty-five years, an estimated 1.6 million[1] to 2.15 million[2] American workers will die from cancers caused by exposure to asbestos dust in the workplace. In addition, as many as three million more may suffer asbestosis,[3] a noncancerous asbestos-related disease.[4] While the lives of many of these millions of workers cannot be reconstructed, nor their diseases cured,[5] the affected workers, their dependents, and their survivors can be compensated.

Section I of this Comment describes the current asbestos problems: the extensive use of this toxic substance has created thousands of pending and potential lawsuits which total billions of dollars. This flood of litigation threatens to swamp the courts and to bankrupt defendants. Section II analyzes the similarities and differences among the three proposals for asbestos victims' relief that were before the Ninety-seventh Congress. None of these bills provided a comprehensive solution to the problems of providing relief to victims of asbestos exposure, but together the bills did contain all the elements necessary for such a solution. Section III selects the best approach from the three bills on the issues of who should be eligible to receive benefits, who should contribute to the benefit fund, who should administer the payments, what should happen to pending litigation, and what disease-causing substances should be covered. Finally, this Comment urges the Ninety-eighth Congress to adopt a comprehensive legislative proposal incorporating various provisions

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[1] 127 CONG. REC. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[2] NATIONAL CANCER INSTITUTE & NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS 1–2 (Draft Summary 1978) [hereinafter cited as NATIONAL CANCER INSTITUTE].

[3] *See* Comment, *An Examination of Recurring Issues in Asbestos Litigation*, 46 ALB. L. REV. 1307, 1307 n.4 (1982).

[4] *See infra* note 12 and accompanying text.

[5] *See infra* notes 12–14.

from each of the three asbestos bills. This proposal is far stronger than any of the bills that failed in the Ninety-seventh Congress.

I. Asbestos: The Onset of the Problem

"Asbestos," the generic name given to a group of hydrated silicate minerals that can be separated into soft, silky fibers with great tensile strength, is derived from a Greek word meaning "inextinguishable, unquenchable or inconsumable."[6] Its chief characteristics include heat resistance, chemical resistance, and favorable frictional properties.[7] Asbestos has been used as an insulator against heat since at least 1866,[8] and today it is used in more than three thousand products, from fireproofing material to brake shoes.[9]

We now know that asbestos is one of the most dangerous of all natural materials. Before this fact became well-established, more than twenty-seven million Americans may have been exposed to asbestos in one form or another,[10] including between eight and eleven million exposed in the workplace.[11] The diseases which result from exposure to asbestos dust include asbestosis, a non-malignant scarring of the lungs;[12] lung cancer (bronchogenic carcinoma);[13] mesothelioma, a malignant tumor

[6] Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860 (1980).

[7] Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L. REV. 55, 57 (1978).

[8] *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

[9] *See* Legal Times Wash., Aug. 18, 1980, at 1, col. 1. Asbestos is also frequently used in shoes, electrical insulation, wall and ceiling boards, potholders, and pipes. 127 CONG. REC. S10,033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart). Although the percentage of asbestos in certain products may be small, the unique properties of asbestos are often the critical factor in the product's proper functioning, as with brake shoes. *See* Mansfield, *supra* note 6, at 860.

[10] *See* N.Y. Times, Aug. 31, 1982, at A13, col. 6; Wall St. J., Aug. 30, 1982, at 15, col. 3.

[11] *See* NATIONAL CANCER INSTITUTE, *supra* note 2, at 1–2.

[12] Asbestosis is an irreversible disease of the lung characterized by clubbing of fingers, cyanosis, and basal rales in the chest. Comment, *supra* note 7, at 58 n.21. Although asbestosis is difficult to diagnose, awareness of its presence is important, as "most deaths of asbestosis are due to intercurrent respiratory infections, rather than pulmonary fibrosis. Pulmonary infections can be well treated, and experience has shown that many lives can be saved" by early diagnosis. Selikoff & Hammond, *Asbestos-associated Disease in United States Shipyards*, 28 CA-A CANCER J. FOR CLINICIANS 87, 95 (1978).

[13] This is the same type of lung cancer warned of by the Surgeon General on cigarette packages. *See* Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 343 (1980).

of the lungs or of the abdomen;[14] and cancer of the gastrointestinal tract.[15]

The first recognized case of asbestosis, afflicting an asbestos textile worker, was reported in 1906.[16] There were numerous medical and scientific studies of asbestos done in the first half of the twentieth century,[17] but the causal relationship between asbestos and these diseases did not receive wide public attention until 1965, when Dr. Irving J. Selikoff, head of the Mt. Sinai Hospital Environmental Sciences Laboratory in New York and the leading expert on asbestos-related diseases, published, together with his colleagues, a well-documented study that concluded that "asbestosis and its complications are significant hazards among insulation workers."[18]

Most exposure to asbestos has occurred since the beginning of World War II, during which an estimated 4.5 million workers were exposed in naval shipyards.[19] Because of the long latency period between exposure to asbestos and manifestation of an asbestos-related disease,[20] asbestos workers have begun to manifest these diseases only within the past ten years or so. The first products liability lawsuit against a manufacturer of asbestos products was filed in 1968.[21] Although that case and a second

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[14] *See* Selikoff & Hammond, *supra* note 12, at 95. Effective therapy for mesothelioma is not currently available and early diagnosis does not significantly increase the likelihood of survival. *Id.*

[15] *See id.* at 88 (table 1), 90 (table 3).

[16] Cooke, *Asbestos Dust and the Curious Bodies Found in Pulmonary Asbestosis*, [1929] 2 BRIT. MED. J. at 578.

[17] *E.g.*, E. MEREWETHER & C. PRICE, REPORT ON EFFECTS OF ASBESTOS DUST ON THE LUNGS AND DUST SUPPRESSION IN THE ASBESTOS INDUSTRY (1930); Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, [1924] 2 BRIT. MED. J. at 147; Lynch & Smith, *Pulmonary Asbestosis III: Carcinoma of the Lungs in Asbestos-Silicosis*, 24 AM. J. CANCER 56 (1935).

[18] Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Industrial Insulation Workers*, 132 ANNALS N.Y. ACAD. SCI. 139, 152 (1965).

[19] *See* Comment, *supra* note 7, at 55 n.2. Secretary of Health, Education and Welfare Joseph A. Califano estimated that from 500,000 to 1.4 million additional workers have been exposed to asbestos in American shipyards since the end of World War II. 124 CONG. REC. 12,023 (1978); *see also Occupational Diseases and Their Compensation, Part 1: Hearings on H.R. 2740 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 395–402 (1979) (statement of Capt. D.F. Hoeffler, M.D.) [hereinafter cited as *1979 House Hearings*].

[20] *National Workers' Compensation Standards Act, 1974: Hearings on S. 1029, S. 1772, and S. 2587, Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 2282 (1974) (statement of Dr. Irving J. Selikoff) [hereinafter cited as *1974 Senate Hearings*].

[21] *See* Mehaffy, *supra* note 13, at 345.

were settled for relatively small amounts,[22] the third suit, *Borel v. Fibreboard Paper Products Corp.*,[23] filed in 1969, was tried to verdict and affirmed for the plaintiff. In *Borel*, the court found that the manufacturer of asbestos products had violated his duty to warn the plaintiff, an insulation worker who died from asbestosis, about the dangers of working with asbestos, and hence the manufacturer was liable for damages.

This decision opened the floodgates to thousands of similar cases, all patterned after *Borel*. Today, more than thirty thousand products liability suits are pending against 260 asbestos concerns.[24] The present litigation has been called a "legal tidal wave"[25] and "the tip of the iceberg"[26] by commentators anticipating possible claims to be made through the 1980's and 1990's. Along with this huge volume of cases come staggering estimates of total liability, ranging anywhere from $40 billion to $150 billion.[27] In fact, asbestos litigation is already the largest single product tort litigation in history—the "mother lode" of products liability cases.[28]

One primary cause of this explosion of litigation has been the failure of state workers' compensation laws properly to compensate victims of asbestos-related diseases and of occupational diseases in general. Two major problems with workers' compensation systems arise in this context. First, workers or their surviving dependents simply do not know that workers' compensation benefits are available to them.[29] Second, those who

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[22] *Id.*

[23] 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

[24] Wall St. J., Aug. 27, 1982, at 1, col. 6.

[25] Winter, *Asbestos Legal "Tidal Wave" Is Closing In*, 68 A.B.A. J. 397 (1982).

[26] Podgers, *Toxic Time Bombs*, 67 A.B.A. J. 139 (1981).

[27] Dr. Irving J. Selikoff has estimated that total liability could reach $40 billion to $80 billion. N.Y. Times, Aug. 31, 1982, at A13, col. 6. William Bailey, Senior Vice President of the Commercial Union Insurance Co. and Chairman of the Task Force on Cumulative Trauma and Latent Injuries of the American Insurance Association, calculates that, under the "worst scenario," damages could be anywhere from $120 billion to $150 billion, exclusive of any "indirect costs" that might result from the bankruptcies of some businesses. N.Y. Times, July 3, 1981, at D4, col. 1; *see also* Podgers, *supra* note 26, at 139.

[28] Nat'l L.J., Aug. 18, 1980, at 1, col. 1. In terms of the number of claims filed, asbestos has become the largest products liability area, surpassing litigation over Agent Orange, DES, and the Dalkon Shield, *id.*, and even automobile injury litigation. Nat'l L.J., Oct. 19, 1981, at 1, col. 1.

[29] *See Occupational Disease Compensation and Social Security: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th

do file for benefits often find state statutes blocking them.[30] Many state compensation laws specifically prevent such victims from recovering damages.[31] Others may provide benefits for partial disability but will not permit a claimant to reapply for further benefits when his disability worsens, as is often the case with a progressive disease such as asbestosis.[32] In short, the state workers' compensation statutes are not meeting the problems involved with asbestos-related and other occupational diseases.

Reliance on the courts to resolve these cases has caused many problems. Time consuming asbestos litigation severely burdens the already heavy caseloads of both federal and state courts.[33] In addition, a large part of the resulting awards, from both settlements and judgments, goes to attorneys and to insurance

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Cong., 1st Sess. 68 (1981) (statement of Peter S. Barth, Univ. of Conn.) [hereinafter cited as *1981 House Hearings*]. Only 29% of the 995 diseased asbestos workers who were surveyed had filed workers' compensation claims for their asbestos-related diseases. *Id.*

[30] "The Department of Labor estimates that in general only 5% of those disabled by occupational disease [including asbestos victims] actually receive compensation from the states." *Asbestos Health Hazards Compensation Act of 1980: Hearings on S. 2847 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 239 (1980) (statement of Andrew T. Haas, General President of the Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers) [hereinafter cited as *1980 Senate Hearings*].

A startling example is the case of workers disabled by mesothelioma, which is caused only by asbestos exposure and is always fatal. Although state workers' compensation agencies know that mesothelioma is an occupational disease and that the claimants will soon die, only 38% of these claimants ever receive any state benefits. The percentages are certainly much lower for other asbestos-related diseases. *Id.* at 239–40.

[31] For example, eight states—Arkansas, Illinois, Kansas, Montana, Nevada, North Carolina, Ohio, and Vermont—place special restrictions on payments for asbestos-related and other dust-related diseases. Some states, including Arizona, Minnesota, and Pennsylvania, require that disability occur within a specified time of last exposure. One state, Louisiana, bases compensation payments on claimant's income when he was last employed by an asbestos concern, leading to the absurd result of a widow collecting only $15 per week (her deceased husband worked for Johns-Manville in 1924). *Id.* at 240–42.

[32] *Id.* at 242.

[33] For example, as of February, 1982, a backlog of 1400 asbestos cases in the Philadelphia Court of Common Pleas represented nearly 10% of that court's total caseload. *See* Winter, *supra* note 25, at 398. There are over 3000 asbestos plaintiffs in the Eastern District of Texas alone, severely straining the federal district court there. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1354, *appeal docketed*, No. 81-2204 (5th Cir. May 29, 1981).

Former Congressman Robert E. Sweeney, now an asbestos plaintiffs' lawyer, testified at a House hearing that "the level of litigation presently pending . . . is so high that the judicial system has literally no means to accommodate all the suits that are anticipated to be filed." *1979 House Hearings*, *supra* note 19, at 555; *see also* Winter, *supra* note 25, at 398.

companies, not to victims.[34] Finally, victims who litigate have been treated substantially differently by the courts: some have come away with huge damage awards while others have been left with nothing.[35] Even those victims who eventually win in court do so only after extensive preparation for trial and litigation; it takes years from the time of filing a claim until damages are collected.[36]

These problems were compounded in August 1982, by the bankruptcy filing of Manville Corporation,[37] the largest asbestos manufacturer in the United States and a defendant in 16,500 cases at that time.[38] The filing automatically froze all court proceedings involving Manville,[39] and the corporation stopped all settlement payments.[40] While the propriety of Manville's apparent use of the bankruptcy laws as a shield against litigation

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[34] The Manville Corp. (formerly Johns-Manville Corp.) bankruptcy filing, *see infra* text accompanying notes 37–42, revealed that the company had spent more on lawyers than on health injury claims. Legal fees had totaled $24.5 million, as opposed to $24 million for injuries and $7.5 million for property damage. Wall St. J., Aug. 30, 1982, at 3, col. 1.

Glen W. Bailey, Chairman of the Keene Corp., an asbestos manufacturer, estimates that 75% of settlement funds go to lawyers (defense lawyers included), 15% to insurance companies, and 10% to victims. "A plaintiff lawyer might represent 2,000 such claimants [having asbestos-related diseases]. Using the $1,000 per claim average settlement as has often been our experience, each claimant would receive $500—but the lawyer stands to gain $1 million (2,000 claims times $500 per claim)." N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3.

[35] *See 1980 Senate Hearings*, *supra* note 30, at 244 (statement of Andrew T. Haas).

[36] *See id.*

[37] *Fortune* ranked Manville Corp. (formerly Johns-Manville Corp.) number 181 on its "*Fortune* 500" list of the largest industrial corporations in the United States in May, 1982. *Fortune's Directory of the 500 Largest Industrial Corporations*, FORTUNE, May 3, 1982, at 266. The corporation has a net worth of $1.1 billion. Wall St. J., Aug. 27, 1982, at 1, col. 1. Except for asbestos claims, it was considered financially healthy before the filing. *See id.*

[38] Wall St. J., Aug. 27, 1982, at 1, col. 1.

UNR Industries of Chicago, a steel fabricator swamped with asbestos suits, filed for bankruptcy on July 29, 1982, almost one month before Manville did so. *Id.* Although it had not engaged in the manufacture of asbestos products since 1962, at the time of filing UNR had over 17,000 asbestos-related claims against it. D. Leavitt, Chief Executive Officer, UNR Industries, Testimony Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor (Sept. 9, 1982) (available from the subcommittee).

[39] *See* 11 U.S.C. § 362(a)(1) (1979).

[40] N.Y. Times, Oct. 7, 1982, at D1, col. 3. Suits against many other asbestos defendants, however, are continuing, *id.*, in the face of considerable doubt as to whether a defendant's bankruptcy also stays proceedings against codefendants. Winter, *Bankruptcies Create Asbestos Case Turmoil*, 68 A.B.A. J. 1361 (1982); *see also In re* White Motor Credit Corp., 11 Bankr. 294, 295 (Bankr. N.D. Ohio 1981) (products liability plaintiffs cannot dismiss a bankrupt debtor and proceed only against the codefendants).

has been questioned,[41] Manville hopes the reorganization proceedings will settle all existing claims and all claims by persons who discover during the reorganization that they have asbestos-related diseases. However, even if these claims are settled, future claims of those who discover that they are diseased following the reorganization may not be affected.[42]

Judges, plaintiffs, and defendants all agree that a better mechanism must be found to handle the problems caused by asbestos-related diseases and the resulting litigation.[43] Some proposals seek limited solutions through judicial and quasi-judicial methods, such as class actions,[44] arbitration,[45] and liberalized use of collateral estoppel.[46] Proposals for more comprehensive solutions rely on some form of federal legislation that would set up a fund to compensate victims of asbestos-related diseases. The

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[41] For example, one plaintiffs' attorney called the filing "a fraud on the bankruptcy laws." Wall St. J., Aug. 27, 1982, at 1, col. 1; *see also Dole Says Manville Filing to Affect Review of U.S. Bankruptcy Code by Senate Panel,* Wall St. J., Aug. 30, 1982, at 3, col. 2.

Manville claims that it was forced to file for bankruptcy after a study done by Epidermiology Resources, Inc., concluded that there eventually could be 52,000 suits filed against Manville and that its liability could reach two billion dollars. R. Jerry Falkner, an analyst with Underwood, Neuhause & Co. of Houston, explained that "[u]nder accounting rules, once you have an estimate of a liability, you have to set up a reserve, so [Manville's] net worth of $1.1 billion would have been wiped out [by the $2 billion reserve]." Wall St. J., Aug. 27, 1982, at 1, col. 1.

Plaintiffs' lawyers have asked the bankruptcy court to set aside Manville's bankruptcy filing on the grounds that it was filed in bad faith and that it is an abuse of the bankruptcy procedure. N.Y. Times, Nov. 9, 1982, at D1, col. 4.

[42] A bankruptcy court judgment denying future recovery to plaintiffs who have not yet discovered their claims might be a taking of these choses in action without due process. *See generally* U.S. CONST. amend. V; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8 (1978).

[43] "Whether through judge-made common law or legislative enactment, there is an urgent need for new approaches to the national tragedy of asbestos-related diseases." Migues v. Fibreboard Paper Prods. Corp., 662 F.2d 1182, 1189 (5th Cir. 1981).

William C. McLaughlin, President of the Asbestos Compensation Coalition, a manufacturers' lobbying group, has stated: "In short, the present system is an outrageous mess and Federal legislation should be enacted which would provide a better way to get prompt and adequate compensation into the hands of the victims." N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3; *see also* statement of Robert E. Sweeney, a plaintiffs' attorney, *supra* note 33.

[44] *See* Winter, *supra* note 25, at 397–98.

[45] *See id.* at 398; *see also 1979 House Hearings, supra* note 19, at 555 (statement of Robert E. Sweeney).

[46] *See, e.g.,* Bertrand v. Johns-Manville Corp., 529 F. Supp. 539 (D. Minn. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *appeal docketed,* No. 81-2204 (5th Cir. May 29, 1981). *But see, e.g.,* Migues v. Fibreboard Paper Prods. Corp., 662 F.2d 1182 (5th Cir. 1981); McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335 (S.D. Miss. 1980). *See generally* Baldwin, *Asbestos Litigation and Collateral Estoppel,* 17 FORUM 772, 783 (1982); Comment, *supra* note 3.

next section of this Comment will explore the different legislation put forth in the Ninety-seventh Congress to meet this problem.

II. Legislative Proposals for Relief

Senator Gary Hart (D-Colo.), Representative Millicent Fenwick (R-N.J.), and Representative George Miller (D-Cal.) all introduced bills in the Ninety-seventh Congress that attempted to deal with the problems of asbestos-related diseases. Each bill would have set up a fund to pay benefits to victims of asbestos-related disease and would have established a procedure for collecting and for distributing these payments. However, the bills also contained significant differences on five basic questions: (1) who should be eligible to receive benefits, (2) who should contribute to the benefit fund, (3) who should administer the payments, (4) what should happen to litigation pending at the time of enactment of the bill, and (5) what disease-causing substances should the bill cover?

A. *The Hart Bill*

Senator Hart's bill[47] would define those eligible for compensation payments as "persons disabled" by diseases resulting from occupational exposure to asbestos,[48] "a member of such person's household" who was disabled,[49] and dependents of those who died of asbestos-related diseases caused by the occupational exposure of the decedent or a member of his or her household.[50] Unlike the other two proposals, however, Senator Hart's bill would use federal and state workers' compensation boards, supplemented by the Benefits Review Board and an appeals procedure, to determine whose disability or death would be ruled asbestos-related and occupational and who therefore would be eligible for compensation.[51]

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[47] Asbestos Health Hazards Compensation Act, S. 1643, 97th Cong., 1st Sess., 127 Cong. Rec. S10,034–38 (daily ed. Sept. 18, 1981).

[48] *Id.* § 1(b)(1)(A).

[49] *Id.* § 1(b)(1)(B).

[50] *Id.* § 1(b)(1)(C).

[51] *Id.* §§ 5, 6, 8, 9.

The initial contributor to the victim's compensation fund would be the worker's last employer who exposed him to asbestos. If the employer were unknown or could not be located, one of the other "responsible parties"[52] would pay. The initial contributor could bring other responsible parties, including federal and state governments and agencies, into the payment plan.[53] Unlike other parties, which would have had to have sold asbestos or used it in employment to be held responsible,[54] government contributors could be held responsible whenever they are "determined to have contributed" to the worker's disability or death.[55]

The Hart bill also would establish federal "minimum standards" to judge whether state and federal workers' compensation laws provided "prompt, adequate, exclusive and equitable compensation" to asbestos victims.[56] If the Secretary of Labor were to find that such legislation failed to meet one of these standards, the "responsible parties" would pay "supplemental compensation" over and above that required by the law. This would bring payments to the level of compensation required by the bill.[57] All victims would receive compensation according to the same standard despite the different standards of each state's workers' compensation laws.[58]

Litigation pending at the time of the passage of the bill would be stopped,[59] and the victim would be entitled to proceed under the provisions of the bill.[60] The bill would compensate only asbestos-related diseases.

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[52] *Id.* § 7(2)(a). The term "responsible parties" includes employers, miners of asbestos, manufacturers or importers of asbestos products, and possibly federal or state governments. *See id.* § 2(10).

[53] *Id.* § 7.

[54] *Id.* § 2(10)(A).

[55] *Id.* § 2(10).

[56] *Id.* § 1(b)(1). The "minimum standards" are outlined in § 4.

[57] *Id.* § 5(b).

[58] "These standards are designed to eliminate the artificial barriers in most States' statutes which prevent compensation for asbestos diseases, and to insure such compensation is meaningful." 127 CONG. REC. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart); *see supra* notes 29–32 and accompanying text.

[59] "No person . . . entitled to file a claim for benefits pursuant to . . . this Act . . . shall be allowed to recover [damages] against" any responsible party, their insurers, or a union. S. 1643, § 10(b).

[60] *Id.* § 3.

B. *The Fenwick Bill*

Under Representative Fenwick's proposal,[61] any "affected person"[62] who was disabled due to an asbestos-related disease,[63] or any dependent of a person who had died from an asbestos-related disease,[64] would be eligible for benefits. The bill would establish an Asbestos Health Hazard Compensation Fund, to be administered by the Department of Labor.[65] The Department would prescribe regulations to determine whether an affected person either died or became disabled due to an asbestos-related disease.[66] Such protected persons would be identified on the basis of medical evidence.[67] No presumption that the disease was asbestos-related would be allowed.[68]

Contributors to the Asbestos Health Hazards Compensation Fund[69] would comprise three classes of "responsible parties."[70] One class would include manufacturers and importers of asbestos products that are likely to produce asbestos dust.[71] Members of this class would contribute two percent of their net domestic sales of asbestos products for the fifteen years preceding the year of payment.[72] A second class would include manufacturers and importers of products in which asbestos is "locked into the . . . product in such a fashion so that . . . there is little likelihood" that asbestos dust will be produced.[73] They would contribute one percent of their net domestic sales of asbestos products for the fifteen years preceding the year of payment.[74] The third class would consist of manufacturers of cigarettes or cig-

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[61] Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong., 1st Sess. (1981).
[62] "The term 'affected person' means a person whose occupation involves exposure to asbestos or any member of such person's household." *Id.* § 102(2).
[63] *Id.* § 201(a)(1)(A). For the level of benefits, *see id.* § 206(b).
[64] *Id.* § 201(a)(1)(B).
[65] *Id.* § 203.
[66] *Id.* § 205(a)(1).
[67] *Id.* § 205(a)(3).
[68] *Id.* § 205(b)(3).
[69] *Id.* § 203(a).
[70] *Id.* § 204.
[71] *Id.* § 102(11)(A)(i).
[72] *Id.* § 204(b)(1).
[73] *Id.* § 102(11)(A)(ii).
[74] *Id.* § 204(b)(2).

arette tobacco,[75] who would contribute 0.3% of their net domestic sales of these products during the fifteen years preceding the year of payment.[76]

Upon passage of the Fenwick bill, any protected person with a pending action for damages could elect either to withdraw the complaint and proceed under the terms of the bill, or to continue litigation.[77] Otherwise, the bill would provide a protected person's exclusive remedy.[78] The bill would not affect claims by victims of non-asbestos-related diseases.

C. *The Miller Bill*

Representative Miller's bill[79] would define those persons eligible for payments to include the surviving spouse or children of any employee who had been exposed to asbestos and had died from an asbestos-related disease,[80] and any employee who was disabled as a result of an asbestos-related disease.[81] Any disability due to an asbestos-related disease would be presumed to be occupational if the employee had been occupationally exposed.[82]

The last employer[83] who had employed the victim for a minimum of two years and who had exposed him to asbestos would be primarily responsible for payment of compensation.[84] If no employer were to qualify, then responsibility for payment would be assigned to an Asbestos Compensation Excess Liability Fund.[85] Fifty percent of the Fund would come from manufacturers and from importers of products containing asbestos as a

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[75] *Id.* § 102(11)(A)(iii).
[76] *Id.* § 204(b)(3).
[77] *Id.* § 302.
[78] *Id.* § 301.
[79] Occupational Health Hazards Compensation Act, H.R. 5735, 97th Cong., 2d Sess. (1982).
[80] *Id.* § 4(a)–(c).
[81] *Id.* § 4(a), (d).
[82] *Id.* § 5(b).
[83] "The term 'employer' . . . shall not include the United States or any State or political subdivision thereof." *Id.* § 2(5).
[84] *Id.* § 11(b).
[85] *Id.*

"significant constituent element,"[86] thirty percent from manufacturers and importers of products containing asbestos, but not as a "significant constituent element,"[87] and twenty percent from employers[88] who exposed employees to asbestos in the course of employment.[89] These contributions would be based on the sales of asbestos products during the previous fifteen years.[90]

The Department of Labor would administer the Fund;[91] a surcharge of ten percent on each contribution would pay for its costs.[92] In addition, the bill would set up an Occupational Disease Surveillance and Medical Treatment Research Advisory Committee[93] to survey workers exposed to occupational health hazards and to conduct research into improved means of medical treatment for exposed workers.[94] A one percent surcharge on contributions to the Excess Liability Fund would finance this committee.[95]

After passage of the bill, its compensation would be claimants' exclusive remedy against all third parties, including manufacturers and importers.[96] Litigation pending against manufacturers and importers of asbestos products at the time of the bill's passage, however, would continue.[97]

Unlike the other two bills, the Miller proposal was not aimed exclusively at victims of asbestos-related diseases. As proposed, it would establish one fund for compensating victims of diseases associated with asbestos and another fund for compensating victims of diseases associated with the mining of uranium ore.[98] Uranium miners, like asbestos victims, contracted cancer as a result of exposure to a hazardous substance in the workplace.[99] In addition, a trigger mechanism would permit the bill to be

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[86] *Id.* § 12(b)(2)(A)(i)(I).
[87] *Id.* § 12(b)(2)(A)(i)(II).
[88] *Id.* § 2(5).
[89] *Id.* § 12(b)(2)(A)(ii).
[90] *Id.* § 12(b)(3)(A).
[91] *Id.* §§ 2(10), 12(b)(1)(B).
[92] *Id.* § 12(d)(1).
[93] *Id.* § 16(c).
[94] *Id.* § 16(a).
[95] *Id.* § 12(d)(2).
[96] *Id.* § 9(c).
[97] *Id.* § 9(b)(1).
[98] *See* 127 CONG. REC. S1694 (daily ed. Mar. 4, 1982) (statement of Rep. Miller).
[99] *See generally 1980 Senate Hearings*, *supra* note 30, at 178–87 (statement of Sen. Domenici).

amended upon the recommendation of the Secretary of Health and Human Services to cover other occupational diseases.[100]

III. An Analysis of the Proposals

The three bills had similarities and differences in their answers to the five basic questions they addressed. None of these bills provided the best answer to all of the problems that need to be resolved. The bills did, however, contain all of the elements necessary to formulate a comprehensive proposal. This Section identifies each major issue, points out all arguments, and concludes which bill's position is the strongest on each issue.

A. *Eligibility for Benefits*

The Fenwick bill would provide the best definition of exactly which persons would be eligible to obtain benefits. All three proposals would offer coverage to asbestos victims who were exposed in the workplace. The Fenwick bill, however, would not permit the use of presumptions to determine eligibility for benefits;[101] it would rely instead upon direct medical evidence.[102] The advantage of this approach is that it avoids a major problem that plagued the Black Lung Benefits Act of 1972,[103] which provided compensation for miners with black lung disease. Under that program, "presumptions" of disease frequently led to payments of benefits to some who were not entitled to them.[104] Because of the certainty in diagnosing asbestos-related dis-

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[100] H.R. 5735, § 17.

[101] *See supra* note 68 and accompanying text.

[102] *See supra* note 67 and accompanying text.

[103] 30 U.S.C. §§ 901–45 (1976 & Supp. IV 1980).

[104] In describing this problem, Representative John N. Erlenhorn explained:

> The man who has a broken back through a roof fall and is a quadraplegic is getting less compensation [from workers' compensation] than someone who may have emphysema from smoking who, because of assumptions, or presumptions in the act, is getting black lung benefits; and social security disability [payments]; and state workers' compensation.

1979 House Hearings, *supra* note 19, at 548 (statement of Rep. Erlenhorn). *See generally* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues*, 83 W. Va. L. Rev. 869 (1981).

eases,[105] the direct medical evidence approach of the Fenwick bill still would ensure that the true victims of these diseases would receive benefits.[106]

The Fenwick bill, like the Hart bill, also would allow persons who contract an asbestos-related disease through the occupational exposure of a family member to receive benefits.[107] A recent study in southern California examined 305 wives of exposed shipyard workers, who themselves were never in the shipyards, and discovered that ten percent of them had contracted asbestos-related diseases.[108] Even the leading spokesmen for the asbestos industry readily admit that family members do contract such diseases and therefore should be compensated.[109]

B. *Proper Contributors*

Of all the issues involved in the asbestos debate, the question of which parties should contribute to a compensation fund is the most hotly debated and the most serious in its consequences.[110] The central question is whether the federal government should supplement industry contributions to the fund. The Hart bill would provide for federal participation in the compensation payments;[111] the Fenwick and Miller bills do not.[112] The most persuasive arguments on this issue favor government contributions.

Opponents of federal contributions argue that American taxpayers should not be called upon to "bail out" industry from a

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[105] *See, e.g., 1979 House Hearings, supra* note 19, at 43 (statement of Rep. Fenwick); *id.* at 549 (statement of John A. McKinney, Chairman of the Board and Chief Executive Officer, Johns-Manville Corp.).

[106] *See* 127 CONG. REC. E5860 (daily ed. Dec. 15, 1981) (statement of Rep. Fenwick).

[107] *See supra* notes 49 & 62 and accompanying text.

[108] The study, conducted by the American Lung Association of Southern California, was reported in Nat'l L.J., Oct. 19, 1981, at 1, col. 1.

[109] *See, e.g., 1979 House Hearings, supra* note 19, at 549 (statement of John A. McKinney).

[110] *See* N.Y. Times, Mar. 14, 1982, § 3, at 21, col. 1 (letter of Rep. Millicent Fenwick); N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3 (letters of Glen W. Bailey & William C. McLaughlin); N.Y. Times, Feb. 21, 1982, § 3, at 2, col. 5 (letter of Robert E. Sweeney); N.Y. Times, Dec. 27, 1981, § 11, at 12, col. 5.

[111] *See supra* note 53 and accompanying text.

[112] *See supra* notes 69–76 & 83 and accompanying text.

financially disasterous situation of its own making.[113] They point to evidence that the asbestos industry concealed its knowledge, obtained as early as the 1930's, of the harm caused by exposure to asbestos in the workplace.[114] Because industry leaders failed to warn workers of the hazards, industry alone should be financially liable.[115] Moreover, opponents argue that even if the fed-

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[113] *See, e.g., 1979 House Hearings, supra* note 19, at 147 (statement of Rep. Miller); *id.* at 554 (statement of Robert E. Sweeney).

[114] It is believed that asbestos industry leaders were or should have been aware as early as the 1930's that many studies had concluded that inhalation of asbestos dust is dangerous for humans. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1092 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). The number of pre-World War II studies is significant (*see supra* note 17 for a partial list), and the data collected were so conclusive that in 1933 the British government severely limited the allowable level of asbestos dust in the workplace, which has resulted in a much lower rate of asbestos-related disease in Britain than in the United States. *See* Comment, *supra* note 7, at 64.

Nevertheless, the industry intentionally ignored the available data and even took steps to keep the information from becoming widely known. For example, in 1935 the editor of the trade journal *Asbestos* wrote to the president of Raybestos-Manhattan, requesting permission to publish the conclusions of a British study of 1932 that had connected asbestos-related diseases to asbestos in the workplace. The editor even suggested that a "discussion . . . along the right lines would serve to combat the rather undesirable publicity given to it in current newspapers." Letter from *Asbestos* to Sumner Simpson (Sept. 25, 1935), *quoted in* Motley, *The Lid Comes Off,* TRIAL, Apr. 1980, at 21, 21.

Mr. Simpson was unpersuaded. In a letter to the secretary of Johns-Manville, he praised the magazine for "not reprinting the English articles," and observed that "the less said about asbestos the better off we are." Letter from Sumner Simpson to Vandiver Brown (Oct. 1, 1935), *reprinted in 1979 House Hearings, supra* note 19, at 152. Brown agreed and responded that any article on asbestos should reflect "American data rather than English." Letter from Vandiver Brown to Sumner Simpson (Oct. 3, 1935), *reprinted in 1979 House Hearings, supra* note 19, at 152.

The "American data" referred to were the conclusions of a study sponsored by industry from which industry leaders and lawyers edited out the finding that 53% of the workers examined were diagnosed as having asbestosis. As a Johns-Manville lawyer explained:

> It would be very helpful to have an official report to show that there is a substantial difference between asbestosis and silicosis; and by the same token, would be troublesome if an official report should appear from which the conclusion might be drawn that there is very little, if any, difference between the two diseases.

Letter from Hobart to V. Brown (Dec. 15, 1934), *quoted in* Motley, *supra,* at 22); *see also 1979 House Hearings, supra* note 19, at 152–60.

[115] Representative Miller stated:

> Under the terms of this legislation [an earlier bill on asbestos compensation, H.R. 2740, 96th Cong., 2d Sess. (1980), which provided for contributions by the federal govenment] the obligation for paying for decades of neglect, negligence, coverup and lies would be largely foisted upon the American taxpayer. The bill can, and will, run into the hundreds and millions of dollars, if not billions.
>
> It is not sufficient to merely add up the toll and have the Federal Government assume the burden. Ours is the responsibility to care for the sick and the

eral government somehow were responsible for asbestos-related diseases, in this era of falling tax revenues and tight budget constraints the federal government cannot afford to contribute to compensation payments for victims.[116]

These arguments are not persuasive. Government responsibility for asbestos-related disease stems from its complete control over the sale and use of asbestos for shipbuilding in World War II. An estimated 4.5 million workers were exposed to asbestos dust during the war[117] in both United States Navy and private shipyards. Even in the private shipyards, the government maintained significant control over how asbestos was used.[118] The government also stockpiled asbestos as a strategic material and, shortly after Pearl Harbor, restricted its use to fulfilling Navy and other maritime requirements.[119] Every ship built for the Navy had to conform to specifications, including the requirement that asbestos be used as an insulator.[120]

It is also clear that the government knew at least as much as industry about the health hazards caused by asbestos.[121] As

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> disabled, but ours is also the responsibility to establish firmly that the taxpayer will not pick up the bill for decades of corporate neglect.

1979 House Hearings, *supra* note 19, at 147–48 (statement of Rep. Miller).

[116] *See* N.Y. Times, Feb. 21, 1982, § 3, at 2, col. 5 (letter of Robert E. Sweeney).

[117] *See supra* note 19 and accompanying text. An estimated four million of these workers received "heavy exposure" to asbestos. *See* NATIONAL CANCER INSTITUTE, *supra* note 2, at 1–2.

[118] The government specified how the ships were to be built and often provided asbestos from its own stockpiles. *See infra* text accompanying note 119. For example, the federal government provided $491.3 million of the total $498 million spent on shipyard expansion in 1943. Letter from Edward W. Warren, P.C., Kirkland & Ellis, to Earl Parker, Manville Corp., Sept. 8, 1982, at 3 n.4 (copy available from Subcommittee on Labor Standards of the House Committee on Education and Labor) [hereinafter cited as Warren Letter]. Moreover, the government intervened directly into shipyard labor negotiations, and monitored all aspects of a shipyard's performance to ensure quick production. F. LANE, SHIPS FOR VICTORY: SHIPBUILDING UNDER THE U.S. MARITIME COMMISSION IN WORLD WAR II 268–75, 457–71, 482–87 (1951).

[119] *See* Warren Letter, *supra* note 118, at 2 n.3.

[120] *See, e.g.*, *1979 House Hearings*, *supra* note 19, at 230 (statement of Allen B. Coats, Gen. Rep., Metal Trades Dept., AFL-CIO); N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3 (letter of Glen W. Bailey).

[121] In 1938, the United States Public Health Service recommended that a threshold limit of five million particles per cubic foot be placed on occupational exposure to asbestos dust. Comment, *supra* note 7, at 65. Even this "tragically incorrect" standard never was enforced. *1979 House Hearings*, *supra* note 19, at 512 (statement of John A. McKinney). A federal protective regulation was not enacted until 1968, when the standard of 12 fibers per cubic centimeter was made legally enforceable against those

early as 1943, the Navy disregarded its own "Minimum Requirements for Safety and Industrial Health in Contract Shipyards,"[122] and Navy experts stated that "we expect [asbestosis] to occur in shipyards, because we have seen asbestos being handled in insulation work with little or no precautions."[123] The government's only explanation for its failure to adhere to even its own "Minimum Requirements" appears to be that the Navy did not "want to put through any restrictions that will slow up the shipbuilding program."[124] Government, and particularly Navy, opposition to standards for asbestos exposure continued long after the war.[125]

These facts demonstrate that the federal government is responsible for such diseases of workers exposed to asbestos in shipyards.[126] Requiring federal contributions to compensatory

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industries that sold more than ten thousand dollars' worth of material to the government and thus to whom the Walsh-Healy Act, 41 U.S.C. §§ 35–45 (1976) applied. Comment, *supra* note 7, at 65.

In 1971, a five fibers per cubic centimeter standard was promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (1976); *see* 29 C.F.R. § 1910.1001(b)(2) (1980). Even lower standards have been proposed, including 0.5 fibers per cubic centimeter by the Occupational Safety and Health Administration, 40 Fed. Reg. 47,652 (1975), and 0.1 fibers per cubic centimeter by the National Institute of Occupational Safety and Health, Comment, *supra* note 7, at 67. A nearly complete ban of asbestos products also has been suggested. *1979 House Hearings, supra* note 19, at 559 (statement of Robert E. Sweeney).

[122] These requirements, established by the Navy and Maritime Commission, called for "special ventilation," "special respirators," and "periodic medical examinations" for workers engaged in "any job in which asbestos dust is breathed." *See* Warren Letter, *supra* note 118, at 5; *see also 1979 House Hearings, supra* note 19, at 377 (statement of Joseph Guggieri).

[123] Warren Letter, *supra* note 118, at 4.

[124] *Id.* at 5.

[125] The Navy did not adopt any standard for exposure to asbestos in shipyards until 1973, *id.* at 6, a full eight years after Dr. Selikoff's widely publicized study was published. *See supra* note 18 and accompanying text. As recently as 1978, the Navy considered having government personnel strip asbestos from old ships because, "although it is somewhat crass to consider in reaching the ultimate conclusion, under the Fair Labor Standards Act, federal employees claims against the Government are limited, while under the Federal Tort Claims Act there is no such limitation on liability against non-federal employees." Warren Letter, *supra* note 118, at 7. This suggestion was rejected, partially on the grounds that the government could not continue to make "asbestos fodder" of its own employees. *Id.*

[126] To date shipyard workers have brought relatively few tort cases directly against the government, Warren Letter, *supra* note 118, at 7, probably because financially viable asbestos companies have been available as defendants. However, companies are beginning to bring third-party actions against the federal government. *Id.* at 8 & n.20.

In addition, the government has agreed to pay a reported $5.7 million as part of a $20

payments made to these workers is only fair. These payments would not be a "bailout" of industry; rather, they would represent the government's share of responsibility to compensate victims of asbestos-related diseases.[127] The argument that "Reaganomics" will not permit the government to meet its responsibilities leads to the conclusion that "the government needs a bailout, from a moral point of view."[128] "In many ways, asbestos disease is a hidden cost of World War II for which many Americans are still paying,"[129] but for which the government should be paying its fair share.

Another potential contributor to the compensation fund is the tobacco industry, which is partially responsible for the occurrence of lung cancer in asbestos workers. The Fenwick bill would require payments by the tobacco industry,[130] based upon findings in medical studies that asbestos workers who smoke have a strikingly greater risk of lung cancer than nonsmoking asbestos workers.[131] The Miller and Hart bills would not require such payments. In view of this increased danger to smoking workers, it would be equitable and proper to require contributions by the cigarette industry to the fund from which benefits are paid to asbestos workers with lung cancer.

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million settlement benefiting 445 workers at an asbestos plant in Texas. N.Y. Times, Dec. 20, 1977, at 30, col. 1. In other cases, juries have reduced damage awards or have rendered verdicts for defendants because government actions were deemed at least partially responsible for the plaintiffs' diseases. Warren Letter, *supra* note 118, at 9.

In the future, defendants may be relieved of liability based upon the "government contract" defense. *See, e.g., In re* Agent Orange Prods. Liab. Litig., 506 F. Supp. 762, 792–96 (E.D.N.Y. 1980) (ordering the government specifications defense tried first as potentially dispositive); Rivkin, *The Government Contract Defense: A Proposal for the Expeditious Resolution of Asbestos Litigation*, 17 FORUM 1225 (1982); Winter, *U.S. Contracts Asserted in Asbestos Defense*, 68 A.B.A. J. 790 (1982).

[127] The former Chairman of the Subcommittee on Labor Standards of the House Committee on Education and Labor, Edward P. Beard (D-R.I.), has declared:

> Who is to blame? I honestly believe it is a combination of industry and Government. . . . If I had to make a judgment, I would say simply, "Mr. McKinney [President of Manville Corp.], your company is guilty. The Navy, you are guilty. The shipyards, you are guilty. All the Government agencies, OSHA and everyone that still allows that product to be used all over the country, are very much guilty."

1979 House Hearings, *supra* note 19, at 531 (statement of Rep. Beard).

[128] *McKinney Asserts U.S. Must Share Cost of Asbestos Damage Claims*, N.Y. Times, Aug. 28, 1982, at 1, col. 5.

[129] *See* 127 CONG. REC. S10,033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[130] *See supra* notes 75–76 and accompanying text.

[131] *See* I. SELIKOFF & D. LEE, ASBESTOS AND DISEASE 327 (1978).

C. *Program Administration*

The best way to ensure uniformity[132] and to collect administrative costs from the responsible parties[133] would be to combine provisions from the Hart and Miller bills. The Hart bill would establish minimum standards for workers' compensation laws throughout the country. Federal standards for minimum compensation to workers with asbestos-related diseases would eliminate the "artificial barriers in most States' statutes which prevent compensation for asbestos disease."[134] Federal standards also would ensure that victims of asbestos-related diseases uniformly receive prompt, adequate compensation: prompt, because it would create no new bureaucracy,[135] and adequate, because it would ensure that all asbestos victims actually receive substantial benefits.[136] A formula that calculates benefits by disability, former salary, and family size would achieve uniformity.[137]

It seems equitable that those parties responsible for the payment of compensation also should be responsible for the administrative costs of the compensation program, as the Miller bill would require.[138] However, that bill excludes the federal government from the category of "employers,"[139] which means that the government would not pay any compensation or administrative costs. Each responsible party, including the federal government, should pay administrative costs based upon its percentage of responsibility. If, for example, industry pays sixty-five percent of all compensation payments, it should pay sixty-five percent of all administrative costs. It makes no sense to impose the entire administrative cost on only one of the parties, whether

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[132] *See supra* note 56 and accompanying text.
[133] *See supra* notes 91–92 and accompanying text.
[134] 127 CONG. REC. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).
[135] *1979 House Hearings*, *supra* note 19, at 393 (statement of Rep. Mendel J. Davis).
[136] Unfortunately, this is not true today. *See supra* notes 29–36 and accompanying text.
[137] S. 1643, 97th Cong., 1st Sess. § 4, 127 CONG. REC. S10,035–36 (daily ed. Sept. 18, 1981); *see also* 127 CONG. REC. S10,034 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).
[138] *See supra* notes 91–92 and accompanying text.
[139] *See supra* note 83.

on industry, as with the Miller bill,[140] or on government, as with the Hart and Fenwick bills.[141]

D. *Pending Claims*

The status of litigation pending at the time of enactment also has been hotly debated, and the three bills differ on whether such pending litigation should be halted. The Fenwick and Miller bills say no;[142] the Hart bill says yes.[143]

Some people feel very strongly that victims must have a right to litigate pending third-party claims.[144] Their argument is that "[t]he product liability suit . . . is the only vehicle by which manufacturers of products which contain toxic substances such as asbestos are going to continue to monitor and find out whether or not their product caused cancer and other occupational diseases."[145] As one union official put it: "Do not take away our American right to seek damages which the law allows us!"[146]

The industry's response is that "[t]here is a lot of money being wasted today in litigation which could be used for benefits."[147] In view of the enormous cost of asbestos litigation in recent years, it seems logical to eliminate litigation in order to preserve resources for injury claims. For example, Manville Corporation actually had spent more on legal fees than on health injury claims at the time of its bankruptcy filing.[148] Halting pending litigation also is consistent with the statutory purpose of relieving the court systems of the huge overload of asbestos cases.[149] Finally, the Miller and Fenwick bills are unfair because they deny judicial relief to victims who have not been "fortuitous" enough to have their asbestos-related diseases manifest them-

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[140] *See supra* notes 86–92 and accompanying text.
[141] *See supra* notes 56–57 & 65 and accompanying text.
[142] *See supra* notes 77 & 97 and accompanying text.
[143] *See supra* note 59 and accompanying text.
[144] This group includes, of course, defendants' lawyers in the asbestos litigation. *See, e.g.*, *1979 House Hearings*, *supra* note 19, at 552–57 (statements of Robert E. Sweeney and Ronald L. Motley).
[145] *Id.* at 556–57 (statement of Ronald L. Motley).
[146] *Id.* at 202 (statement of Charles Ballato, Pipefitters Local 620, Groton, Conn.).
[147] *Id.* at 550 (statement of John A. McKinney).
[148] The figures are $24.5 million as opposed to $24 million. *See supra* note 34.
[149] *See supra* note 33.

selves before passage of the bill. For these reasons, the soundest and fairest approach is to halt pending litigation, as proposed by the Hart bill.

E. *Other Toxic Substances*

The Hart and Fenwick bills are limited to asbestos-related diseases, while the Miller bill also includes cancer from the mining of uranium ore as a compensable occupational disease[150] and establishes a separate compensation fund for its victims. The bill has a trigger mechanism to bring other occupational diseases within its scope upon a finding by the medical community that a particular workplace substance actually causes the disease.[151]

Two arguments traditionally are offered for limiting compensation to asbestos-related diseases. First, although the effects of asbestos are known, those of other occupational diseases are not, so it would not be practical to include those diseases within present legislation. Second, the problems associated with asbestos are unique, from the point of view of both industry and government, and the number of asbestos victims is greater than the number of victims of other occupational diseases.[152]

These arguments are not convincing. The first argument does not apply to uranium miners, for the effects of exposure to uranium ore also are well known.[153] The bill would not be applied to other occupational diseases until their effects are fully known.[154] Second, the problems posed by asbestos are not unique. Asbestos, like other substances, harms workers who are exposed in the workplace. Although it is a good idea to apportion responsibility for payments differently for each disease, so that industry might bear the entire burden where government has no responsibility for a particular occupational disease, this objection does not demand that each occupational disease be given its own legislation. One bill should be flexible

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[150] *See supra* notes 98–99 and accompanying text; *see also* 127 CONG. REC. S1694 (daily ed. Mar. 4, 1982) (statement of Rep. Miller).

[151] H.R. 5735, 97th Cong., 2d Sess. § 17 (1982).

[152] *See 1979 House Hearings*, *supra* note 19, at 547 (statement of John A. McKinney).

[153] *See supra* notes 98–99 and accompanying text.

[154] H.R. 5735, § 17.

enough to include other occupational diseases in the future. Thus, the approach of the Miller bill is sound, and its provision for compensating persons with occupational diseases caused by toxic substances other than asbestos should be included in final legislation.

IV. CONCLUSION

The problems caused by asbestos will not disappear. Over the next two decades alone, an estimated 200,000 Americans will die from asbestos-related diseases.[155] The judicial system cannot adequately respond to the explosion of claims in this area. Congressional action must be taken to solve the problem. Of the three bills introduced in the Ninety-seventh Congress, the Hart bill was the best, because of its approach on the key issues of federal responsibility and third-party litigation. This Comment, however, argues for legislation incorporating various provisions from each of the three asbestos bills, forming a bill stronger even than the Hart bill.

The Ninety-seventh Congress made little progress on the three bills before it. With the soaring number of claims by diseased workers and the added problem of bankruptcy filings by asbestos manufacturers, the Ninety-eighth Congress should give asbestos legislation the attention it deserves and should grant much needed relief to American workers who suffer from asbestos-related diseases.

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[155] N.Y. Times, July 3, 1981, at A1, col. 1.

COMMENT

JUSTICE STEVENS' PROPOSAL TO ESTABLISH A SUB-SUPREME COURT

JEFFREY J. JONES*

Concerned that an overburdened Supreme Court has become less able to perform its job adequately, Justice John Paul Stevens recently proposed the creation of a new court designed to reduce the Supreme Court's caseload and to improve the quality of its output.[1] Justice Stevens' proposal differs significantly from one developed ten years ago by the Freund Commission[2] because it would give a newly created "Sub-Supreme Court"[3] just one function: to review all certiorari petitions and make final decisions on whether to grant or deny the request for review. The Supreme Court thus would have its docket fully selected by an independent court.[4] The Freund Commission would have restricted its proposed National Court of Appeals to recommending an assortment of cases from which the Supreme Court would select its final docket.[5]

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[1] Address by Justice John Paul Stevens, Annual Banquet of the American Judicature Society (Aug. 6, 1982) (available from the Public Information Office, U.S. Supreme Court) [hereinafter cited as Stevens Address].

[2] For a brief discussion of the Freund Commission, see *infra* note 5.

[3] This term was created for use in this Comment; Justice Stevens did not attach a name to his proposal.

[4] This feature has generated a great deal of discussion, not only by the other Justices, *see infra* note 18, but also in the media. *See, e.g., Supreme Court Blues*, N.Y. Times, Oct. 4, 1982, at A18, col. 1; Kester, *An Un-Supreme Court*, N.Y. Times, Sept. 30, 1982, at A31, col. 3 (Mr. Kester is a former Supreme Court law clerk); *Our Tired Justice(s)*, Sacramento Union, Sept. 17, 1982, at A10, col. 6; Greenhouse, *No Sign of Relief for an Overloaded Court*, N.Y. Times, Aug. 15, 1982, at E9, col. 1.

[5] Known formally as the Study Group on the Caseload of the Supreme Court, the Freund Commission was named for its chairman, Harvard Professor Emeritus Paul A. Freund. The group began its work in 1971 as part of the Federal Judicial Center, which Congress established in 1968 to study the problems of the federal courts. In its report, issued in December of 1972, the Freund Commission recommended legislative establishment of a new Article III court to be called the National Court of Appeals. That tribunal's principal responsibilities would have been to decide cases which involved inter-circuit conflicts and to pre-screen the Supreme Court's certiorari docket. As a result of this process, it was believed the Court would be forwarded just 400 to 500 deserving certiorari petitions, rather than the 4,000 or more now seen by the Court, and that the Court would be relieved of having to hear and decide cases which otherwise might have been reviewed to resolve inter-circuit conflict. *See* REPORT OF THE STUDY

Section I of this Comment briefly reviews the problems created by a growing federal caseload. Section II then explains Justice Stevens' proposal and the benefits he claims it would produce. Section III argues that the proposal would prove unwise, not only because its purported advantages are not likely to materialize, but also because it fails to address the larger problems caused by the appellate system's inability to handle the growing number of cases for which review is sought.

I. THE PROBLEMS OF A CONGESTED DOCKET

Overcrowded dockets have been a recurring difficulty at every level of the federal judicial system since its inception.[6] The system has been adjusted in response at various times: jurisdictions have been revised,[7] the number of judgeships has been increased,[8] and administrative and procedural reforms have been enacted.[9] Such periodic changes have enabled the federal judicial system to cope with a continual growth in the number of legal cases and controversies. Evidence now suggests that the need for basic reform is upon us.

At the Supreme Court level there are two basic concerns. First, the Justices are trying to do too much and consequently the quality of their work product is suffering. The workload is affecting their decisions, their written opinions, and their ability to supervise and to reform judicial procedures.[10] Second, despite their best efforts, the Justices are not hearing enough cases; there are simply too many "worthy" petitions for review.[11]

GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), in 57 F.R.D. 573 (1973) [hereinafter cited as FREUND REPORT].

[6] For a concise history of docket overcrowding in the federal judicial system, see Address by Justice Byron White, Anti-trust Luncheon 10–14 (Aug. 10, 1982) (available from the Public Information Office, U.S. Supreme Court) [hereinafter cited as White Address].

[7] *See id.* at 10–13; FREUND REPORT, *supra* note 5, at 583–84.

[8] The Omnibus Judgeship Act of 1978 recently augmented the number of federal district and appellate court judgeships. Greenhouse, *supra* note 4, at E9, col. 2.

[9] Examples have included prolonging the annual term, reducing the time alloted to oral argument, and augmenting the law clerk staffs. FREUND REPORT, *supra* note 5, at 607–11.

[10] *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), in 67 F.R.D. 195, 217 (1976) [hereinafter cited as HRUSKA REPORT]; *infra* notes 20–23 and accompanying text.

[11] *See infra* notes 24, 26, 72–81 and accompanying text.

Persistent growth in the Court's caseload appears responsible for a large part of the Court's troubles. In the 1981 Term the Court agreed to hear 210 cases, twenty-six more than the preceding Term and fifty-six more than two Terms ago.[12] Given Court-imposed scheduling limits and a pre-existing backlog, the petitions granted certiorari in the 1981 Term filled not only the remainder of the 1982 Term, but over one-half of the 1983 Term as well.[13] In addition, the Court not only needs to hear a growing number of complex cases, but also must sift through thousands of petitions. Last Term alone, 4,417 petitions were filed, nearly 350 more than just two years ago.[14] Unfortunately, the evidence points to a continuation of these upward trends.[15]

Aggregate statistics can sometimes be misleading,[16] but in this instance it appears clear that the escalating number of cases and certiorari petitions threatens the Court's ability to carry out its crucial functions. Almost a decade ago, the Freund Commission concluded that "for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions."[17] Seven Justices recently have issued public warnings[18] which highlighted what two

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[12] White Address, *supra* note 6, at 9.

[13] *Id.*

[14] Greenhouse, *supra* note 4, at E9, col. 1; Justice Lewis F. Powell, Address to the ABA Division of Judicial Administration, San Francisco (Aug. 9, 1982) (available from the Public Information Office, U.S. Supreme Court) (estimating the increase at 500 cases) [hereinafter cited as Powell Address].

[15] The Freund Commission concluded in 1972:

> There is no basis to foresee anything but an intensification of this trend in the period ahead, and with a larger and active bar, increasing legal assistance, and the possibility of an increase in the number of federal judicial circuits, the prospects of a still further increase in the number of review-worthy cases reaching the Court cannot be gainsaid.

FREUND REPORT, *supra* note 5, at 582.

History thus far has confirmed the Commission's projections. Moreover, Justice White recently noted that the problem of overcrowding "will very likely progressively worsen." White Address, *supra* note 6, at 15.

[16] Some scholars have argued that the caseload burden has been exaggerated. *See* Comment, *An Intermediate National Appellate Court: Solution or Diversion?*, 22 VILL. L. REV. 1022, 1026–28 (1977); *see also* Kester, *supra* note 4, at A31, col. 3.

[17] FREUND REPORT, *supra* note 5, at 578 (envisioning the Court's role as a "distinct one and essential one in our constitutional order: to define and [to] vindicate the rights guaranteed by the Constitution, and to maintain the constitutional distribution of powers in our federal union.").

[18] Lexington Herald, Oct. 11, 1982, at C2, col. 1 (report on speech of O'Connor, J.); Remarks of Justice Rehnquist, Mac Swinford Lecture, Univ. of Ky. (Sept. 23, 1982) (available from the Public Information Office, U.S. Supreme Court) [hereinafter cited as Rehnquist Remarks]; Remarks of Justice Thurgood Marshall, Second Circuit Judicial

commissions[19] already have established: the consequences of inadequate Supreme Court capacity can be serious and far-reaching.

The specific effects of these docket pressures are numerous: excessive delays,[20] harmful summary dispositions,[21] hasty resolution of increasingly complicated cases, accompanied by confusing, multiple opinions,[22] and bureaucratized systems of justice.[23] Legal scholars also have pointed to a failure to resolve inter-circuit conflicts,[24] the creation of widespread judicial uncertainty,[25] an inability to supervise state court operations adequately,[26] and a neglect of critical statutory and constitutional issues.[27]

The root causes are difficult to discern. Some have blamed the Justices themselves for making decisions which aggravate the overcrowding.[28] Others have pointed to external factors which are beyond the Court's immediate control: an increasingly litigious society, the expanding economy, the nation's growing population, and the plethora of legislatively created actions are among the most often cited.[29]

Conference (Sept. 9, 1982) (available from the Public Information Office, U.S. Supreme Court) [hereinafter cited as Marshall Remarks]; Remarks of William J. Brennan, Jr., Third Circuit Judicial Conference (Sept. 9, 1982) (available from the Public Information Office, U.S. Supreme Court) [hereinafter cited as Brennan Remarks]; White Address, *supra* note 6; Powell Address, *supra* note 14; Stevens Address, *supra* note 1.

[19] HRUSKA REPORT, *supra* note 10; FREUND REPORT, *supra* note 5.

[20] HRUSKA REPORT, *supra* note 10, at 218.

[21] *See id.* at 210; *see also* Marshall Remarks, *supra* note 18.

[22] Referring to the effects of the increased workload, Justice Blackmun wrote in 1975: "The heavier the burden, the less is the possibility of adequate performance and the greater is the probability of less-than-well-considered adjudication." Letter from Justice Blackmun to Sen. Roman J. Hruska (May 30, 1975), *reprinted in* HRUSKA REPORT, *supra* note 10, at 404 app. D; *see also* Stevens Address, *supra* note 1, at 2.

[23] *See, e.g.*, Rubin, *Bureaucratization of the Federal Court: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980); Vining, *Justice, Bureaucracy, and Legal Methods*, 80 MICH. L. REV. 248, 251–56 (1981); Rehnquist Remarks, *supra* note 18, at 26–27.

[24] HRUSKA REPORT, *supra* note 10, at 221–24.

[25] *Id.* at 219.

[26] *Id.* at 212 n.8.

[27] *See infra* notes 72–81 and accompanying text.

[28] Justice Stevens claims the Court's self-created overcrowding results, in part, from decisions to take cases at an interlocutory stage and to correct peculiar errors which do not relate to broad legal principles and are unlikely to be instructive to other courts. Stevens Address, *supra* note 1, at 6–10. *See also* Kester, *supra* note 4, at A31, col. 3.

[29] *See, e.g.*, HRUSKA REPORT, *supra* note 10, at 212; FREUND REPORT, *supra* note 5, at 582; Powell Address, *supra* note 14, at 5–13.

II. A SUB-SUPREME COURT AS A REMEDY

In developing his proposal for a Sub-Supreme Court, Justice Stevens focuses primarily on what may be called the qualitative crisis: what the Court is doing it is doing poorly. He argues that the Court has too little time to produce full and well-written opinions, to fulfill its supervisory role effectively, and to handle cases in a timely fashion. As evidence in support of these allegations, he points to the increasing number of per curiam opinions written by law clerks,[30] the elimination of some important judicial conferences,[31] and the development of long delays between the granting of certiorari and the final disposition of cases.[32]

To remedy the situation Justice Stevens favors the "creation of a new court to which the Supreme Court would surrender" its "power to decide what cases the Supreme Court should decide on the merits."[33] Although many remedial suggestions have been made since the Freund Report in 1972,[34] this proposal is unique in two ways. First, as Justice Stevens pointed out, the new court would "decide"—not merely "recommend"—that a "certiorari petition should be granted or denied."[35] Second, this would be the new court's *only* duty: it would not hear or decide any cases on their merits.

Justice Stevens' principal argument is that the Court agrees to hear too many cases because the Justices are "too busy to give the certiorari docket the attention it deserves."[36] Consequently, he suggests, a new court with additional time to review each filing would be better able to weed out cases unworthy of attention and in fact would "likely develop a jurisprudence of its own that properly [would focus] on the factors—other than possible error—that should determine whether or not a certiorari petition should be granted."[37] The new court thereby would reduce the Supreme Court's caseload and hence would palliate

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[30] Stevens Address, *supra* note 1, at 2.
[31] *Id.* at 4.
[32] *Id.* at 3.
[33] *Id.* at 11.
[34] *See infra* notes 83 & 85.
[35] Stevens Address, *supra* note 1, at 11.
[36] *Id.* at 5.
[37] *Id.* at 12.

the evils Justice Stevens considers destructive of the Court's operations. He further argues that even if the new court were to fail to decrease the number of petitions granted, it at least would free time for the Supreme Court Justices to do their "most important work."[38]

III. EVALUATION OF JUSTICE STEVENS' PROPOSAL

Justice Stevens' proposal does shed instructive light on important policy issues. For example, he has increased public awareness of the fact that *how well* the Court performs what it agrees to do is at least as important as *what* it agrees to do. Ultimately, though, Justice Stevens' suggested remedy would fail to accomplish its intended aims. The new court's ability to reduce the number of cases granted plenary review and to improve the criteria for selecting those cases appears wholly speculative. Moreover, the potential for the introduction of new and serious complications caused by the proposed separation of the screening and the decision-making processes is troubling. While Justice Stevens should be praised for his efforts to suggest solutions, his proposals must be subjected to careful examinations.

A. *Constitutional Questions*

Before evaluating the substantive aspects of the Sub-Supreme Court plan, its constitutional infirmities must be examined. Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, ..."[39] To vest the power of certiorari denial in the hands of another court arguably would violate that provision.[40] Chief Justice Earl Warren, responding to the Freund Commission report, wrote that:

> [D]elegation of such a vital part of the Court's function—that of screening out the cases worthy of full review—would

[38] *Id.*

[39] U.S. CONST. art. III, § 1.

[40] *See* Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A. J. 677 (1974); Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721 (1973).

> directly impinge on the Court's constitutional role. If the Court is to maintain its role as the supreme arbiter of the Constitution and of the federal laws, it must retain the sole right to select those cases that permit the Court to play that role.[41]

This constitutional objection, when applied to Justice Stevens' proposal, gains even more force, since certiorari grants would be not merely recommended, but ordered, thus completely removing the Court's power to set its docket. Nonetheless, this objection probably would not prove dispositive. Although Congress is unable to alter the Court's original jurisdiction, it retains considerable power to modify the Court's reach. Article III, section 2, endows the Court with appellate jurisdiction, "both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make."[42] Professor Kurland recently suggested that Congress' power might indeed give it the ability to remove the Court's certiorari function:

> [O]ne is inclined to ask why ["the power to decide cases presupposes the power to determine what cases will be decided"], especially in light of the fact that the Constitution assigns to Congress the function of defining the Supreme Court's appellate jurisdiction and that it was not until 1916 that wide certiorari jurisdiction was conferred on the Supreme Court.[43]

Admittedly this response, too, is subject to question. Congressional power over the Court's jurisdiction arguably is limited inasmuch as no jurisdictional restriction can violate any other provision of the Constitution,[44] including the "one supreme Court" provision. One commentator has argued, in addition, that Congress cannot impinge on the "essential" role of the Court.[45] Such positions invite a number of inquiries which go beyond the scope of this Comment.[46] Nonetheless, for purposes

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[41] Warren, 60 A.B.A. J., *supra* note 40, at 678.

[42] U.S. CONST. art. III, § 2.

[43] Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change*, 59 CORNELL L. REV. 616, 626–27 (1974).

[44] 128 CONG. REC. S1321 (daily ed. Mar. 2, 1982) (statement of Sen. Bumpers).

[45] Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

[46] Relevant questions might be: What "judicial power" must be vested in the "one supreme Court"? Once Congress grants the Court a power (i.e., the power of certiorari), can it then give that power to another court without endangering the "supremacy" of the Court?

of further analysis, it is important to note that the Constitution poses obstacles to Justice Stevens' proposal, though none seems clearly insurmountable.[47]

B. *Reducing the Number of Cases Granted Review*

Justice Stevens suggests two ways in which the new court might reduce the number of petitions granted. First, he argues that petitions now often are granted unnecessarily because the Court has too little time to review them systematically. A new court which would devote all of its attention to the petitions could scrutinize issues more carefully and could thereby identify a greater number of undeserving petitions. Second, Justice Stevens contends that the new court would develop a jurisprudence that would filter out a large number of unworthy cases.[48]

Both rationales rely upon questionable assumptions. The charge that "inadequate time" significantly contributes to enlarging the number of petitions granted plenary review is wholly unconvincing.[49] Fundamental differences in judicial philosophy—with respect to the proper role of the Supreme Court,[50] the appropriateness of judicial intervention,[51] the feasibility of reviewing many cases,[52] and the peculiar facts of particular

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[47] For a particularly strong presentation of the argument in favor of a broad reading of congressional powers in this area, see Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190 (1981). *But see* Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 198 (1981).

[48] These two arguments can be found in Justice Stevens' address. *See* Stevens Address, *supra* note 1, at 5, 12.

[49] Although Justice Stevens offers several examples of what he believes to be poor case selections by the Court, there is no demonstration that the causal factor leading up to the poor choices was insufficient time to review the petitions for certiorari. *See id.* at 7–10.

[50] *See, e.g.*, Provine, *Deciding What to Decide: How the Supreme Court Sets its Agenda*, 64 JUDICATURE 320 (1981). In her study of the Court's decisions during the Burton period, 1947–1957, Professor Provine suggests that "role conceptions . . . operate to free the justices from ideological isolation, permitting them to vote routinely with ideologically dissimilar justices." *Id.* at 333. However, she also recognizes that such role conceptions can sometimes have a disruptive, rather than unifying, effect: "The evidence here also suggests that role conceptions can also be a source of disagreement in case selection. The considerable differences among the Burton period justices in their willingness to vote for review appear to be at least partly attributable to variation in conceptions of the Court's role." *Id.*

[51] *Id.* at 330–31.

[52] Professor Provine notes:

> Certain justices during the Burton period consistently voted more often for review than their colleagues. The justices often divided into two groups on this

cases[53]—seem to exert the greatest influence on decisions to grant or deny review. Admittedly, one can only speculate about what the new court's attitude toward the screening process might be.[54] It is certainly plausible that such a court, established with a mandate to limit the number of cases granted plenary review, would develop a system to achieve its goal.[55] It is equally plausible, however, that the new court would believe that the Supreme Court should take a more active role in shaping the law; the result would be more cases, not fewer, on the Court's docket.[56] Finally, it is not at all clear that a court with extra time to analyze each petition would deny review more frequently than does the present Supreme Court. In fact, the new court might use its extra review time to discover many important issues that it could not "conscientiously"[57] disregard, but which a hurried Court might have overlooked. While such an effect might improve the quality of the cases selected, it would not tend to decrease the number of cases granted review.

> issue, with 20 percentage points or more separating them in some natural [divisions]. Black and Douglas were the long standing members of the review-prone group . . . .
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> . . . The willingness of Black and Douglas to involve the Court in this number of plenary decisions suggests that they place little value on time-consuming methods of decisionmaking. These men exhibited in their case selection behavior a willingness to reach decision quickly and to justify [those decisions] without ado, characteristics that are also evident in their behavior on the merits.

Id. at 329, 331.

[53] *See, e.g.*, Ulmer, *Supreme Court Justices as Strict and Not-So-Strict Constructionists: Some Implications*, 8 LAW & SOC'Y REV. 13 (1973).

[54] The Freund Commission noted in its recommendations that the screening process is inherently exposed to "the play of the subjectivity of the judges." FREUND REPORT, *supra* note 5, at 594. To combat this effect, the Commission would have required the vote of just three of the seven judges of the proposed National Court of Appeals to certify a case for Supreme Court review. This arrangement, it was felt, would minimize the chance of having a case wrongly denied review. The consensus was that in close situations, the new court should tend to certify cases to the Supreme Court. *Id.* at 593. While such a process would guard against arbitrary denials of review, it also would undermine the goal of reducing the number of cases forwarded to the Supreme Court.

[55] The Freund Commission's proposed court was expected to deny most of the petitions filed. *Id.* at 590.

[56] A former Supreme Court law clerk has observed:

> Filling someone else's docket is like spending someone else's money. The Justices now at least know that they are the ones who will have to decide any cases they agree to hear. A new court would feel no such constraint. Inevitably it would grant more petitions, not fewer.

Kester, *supra* note 4, at A31, col. 3.

[57] Justice White used this term when explaining the recent increase in the number of cases granted certiorari: "Apparently there were just too many petitions for certiorari that we could not conscientiously deny." White Address, *supra* note 6, at 9.

It is unlikely, therefore, that one could predict with any degree of certainty that a Sub-Supreme Court would grant fewer petitions for review. Moreover, change in the new court's composition would probably cause unpredictable fluctuations in the number of cases granted review.

Justice Stevens, however, offers an additional argument in favor of his proposal. He contends that even if the caseload were to remain constant or were to increase slightly, relieving the Court of the job of reviewing thousands of petitions would leave the Justices with more time to devote to the cases already accepted for review.[58] Other Justices, however, dispute this contention: one called it "plastic surgery";[59] others feel that the amount of time saved would be insubstantial.[60] Justice Stevens' plan offers, at best, uncertain or minimally effective relief for the Court's time pressure. More importantly, the plan creates new difficulties which could offset the possible benefits of any time savings.

C. *Problems of Removing the Court's Case-Screening Powers*

Justice Stevens' proposal assumes that the screening process can be separated from the duties of the Court without causing many detrimental effects. Justice Brennan recently called such an assumption "dangerously" wrong.[61] Bifurcating the screening and the plenary decision-making processes could aggravate the Court's troubles in several ways.

Bifurcation could result in more denials of review for deserving cases. The proclivity to grant certiorari often depends on a desire to reverse a lower court decision,[62] which, in turn, is partially a function of an individual Justice's political, legal, and

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[58] *See* Stevens, *supra* note 1, at 12.

[59] White, *supra* note 6, at 15A (Insert).

[60] *See* Goldberg, *There Shall Be "One Supreme Court"*, 3 HASTINGS CONST. L.Q. 339, 342 (1976); Brennan Remarks, *supra* note 18, at 11; White Address, *supra* note 6, at 15A (Insert).

[61] Brennan Remarks, *supra* note 18, at 14.

[62] *See* Kester, *supra* note 4, at A31, col. 3 ("The fact is that the Supreme Court chooses to review mostly decisions it does not like. Of the cases it hears 80 percent get reversed. Justices often select for review cases with facts that lend themselves to a particular legal result they favor."); *see also* Provine, *supra* note 50, at 329.

social philosophy.[63] Thus, the Supreme Court itself is in the best position to know whether or not it is interested in reversing or in correcting a lower court decision. Given the subjectivity involved, a different group of judges would inevitably overlook cases that the Supreme Court otherwise would have been interested in hearing and ultimately in reversing.[64] This would result in a reduction in the number of cases reversed, forestalling some important developments or clarifications in federal law. Former Chief Justice Warren discussed this potential effect:

> Many of the Court's great cases involving the Bill of Rights first came to the Supreme Court in the form of traditional lower court opinions that gave no hint of the Court's possible concern. In many instances, no one could have anticipated that the Justices would perceive in those cases the chance to advance the meaning and application of some aspect of the Bill of Rights.[65]

Bifurcation also could jeopardize the quality of the Court's decisions. The review and discussion of petitions by the Court serves an important educative function. Justice Brennan recently developed this notion:

> The Court's calendar mirrors the everchanging concerns of this society with ever more powerful and smothering government. The calendar is therefore the indispensible source for keeping the Court abreast of these concerns. Our Constitution is a living document and the Court often becomes aware of the necessity for reconsideration of its interpretation only because filed cases reveal the need for new and previously unanticipated applications of constitutional principles. To adopt Justice Stevens' proposal to limit the Court's consideration to a mere handful of the cases selected

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[63] *See supra* notes 50-53 and accompanying text. Justice Rehnquist explains:

> [L]egal realists . . . [have] pointed out that a judge's background might have as much to do with the way he went about deciding a case as would his legal education . . . . Judges, whether at the trial or appellate level, are not fungible: each brings to the bench a mind imprinted with his or her previous experience.

Rehnquist Remarks, *supra* note 18, at 3-4.

[64] Former Chief Justice Warren noted the personal nature of the screening process:

> The standards by which the Justices decide to grant or deny review are highly personalized and necessarily discretionary. Those standards cannot be captured in any rule or guideline that would be meaningful to an outside group of judges . . . . [T]he certiorari "feel" cannot be transmitted to others by any formal or informal judicial osmosis.

Warren, 59 A.B.A. J., *supra* note 40, at 728.

[65] *Id.* at 729.

> by others would obviously result in isolating the Court from any nuances and trends of legal change throughout the land . . . . The screening function is an indispensible and inseparable part of the entire process and it cannot be withdrawn from the Court without grave risk of impairing the very core of the Court's unique and extraordinary functions.[66]

The ultimate impact of this concern, however, remains unclear. By reading other sources, conversing with scholars, and informally inspecting the certiorari docket, the Court could duplicate the education now gained through its screening process. Bifurcation, nevertheless, would entail some risks of diminished quality.[67] The Court's current obligation to screen cases, at a minimum, compels a periodic, albeit truncated, review of lower court decisions which, most likely, would not otherwise exist.[68]

Finally, separation of the screening process from the review process would also remove a source of comment from the Court by eliminating dissents to certiorari denials. Justice Brennan recently emphasized the value of such comment:

> Such dissents often herald the appearance on the horizon of possible re-examination of what may seem to the judges of another court doing the screening work to be an established and unimpeachable principle. Indeed, a series of dissents from denials of review played a crucial role in the Court's reevaluation of the reapportionment question, and the ques-

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[66] Brennan Remarks, *supra* note 18, at 14–15.

[67] Justice Cardozo underscored the importance of maintaining a deep, yet broad, perspective on the issues confronting the nation when fashioning new law:

> All their [i.e., judges'] lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired conceptions; and the resultant is an outlook on life, a conception of societal needs, a sense in James's phrase of the "total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice must fall.
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> . . . .
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> . . . The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.

Cardozo, *The Nature of the Judicial Process, pt. I* (1921), *reprinted in* 2 E. LONDON, THE WORLD OF LAW: THE LAW AS LITERATURE 668, 672 (1960).

[68] It is doubtful that the Justices would continue to review the petitions systematically. Moreover, as Former Chief Justice Warren warned:

> The very flow of those cases through the chambers of the Court serves to inform the justices of what is happening in the system of justice . . . . No other court, no other group of judges, can possibly supply the Supreme Court with this intuitive education in the workings of our legal system.

Warren, 59 A.B.A. J., *supra* note 40, at 729.

> tion of the applicability of the Fourth Amendment to electronic searches. The history of the role of such dissents on the right to counsel in criminal cases and the application of the Bill of Rights to the States surely is too fresh in mind to ignore.[69]

Another very questionable assumption by Justice Stevens is that the Supreme Court already hears too many unnecessary cases. He maintains that the Court engages in needless lawmaking and that fewer cases should be heard and fewer opinions should be written.[70] Discussion of which cases the Court should and should not review raises far-reaching questions of federalism, judicial restraint, and Supreme Court jurisprudence.[71] Without exploring these extensive jurisprudential debates, intuitive factors and available evidence[72] make it clear that Justice Stevens' proposal misses the point.

The Court's problems do not stem so much from its improv-

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[69] Brennan Remarks, *supra* note 18, at 12–13.

[70] Stevens Address, *supra* note 1, at 6–10.

[71] For a discussion of the benefits of federalism and judicial restraint, see, e.g., Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, 2145 (1982) (O'Connor, J., dissenting); R. FISHER, THE CONCEPT OF JUDICIAL ACTIVISM 26 (1977); Graglia, *In Defense of Judicial Restraint*, in C. HALPERN & C. LAMB, SUPREME COURT ACTIVISM AND RESTRAINT 135 (1982); P. MCGUIGAN & R. RADER, A BLUEPRINT FOR JUDICIAL REFORM (1981).

[72] The Hruska Commission concluded:

> As societal needs become more varied and more urgent, the courts are inevitably called upon to do more. The federal judiciary is asked to adjudicate conflicting rights and competing demands in areas relatively unknown to the law a few short years ago: preservation of the environment, occupational safety, consumer protection and energy conservation. Meanwhile, society rightfully expects that the federal courts will attend as always to a wide spectrum of traditional concerns. The need to protect individual rights and basic liberties is no less urgent today than yesterday . . . . The courts must continue to meet these obligations even as they undertake new obligations imposed upon them in response to the needs of the contemporary scene.

HRUSKA REPORT, *supra* note 10, at 204.

In a letter to the Hruska Commission, Chief Justice Warren Burger explained:

> The changes brought on in the 20th century and the new social, political, and economic developments have surely not diminished the importance of the questions presented to the Supreme Court and have *vastly* increased the volume of *important* questions which can have an impact of great significance on the country.

Letter from Chief Justice Burger to Sen. Roman J. Hruska (May 29, 1975), *reprinted in id.* at 399 app. D (emphasis added).

In a related context Archibald Cox recently wrote: "With the growing size and complexities of government the federal courts are often the one and only place where effective relief can be obtained against an officialdom that turns its back upon community obligations." Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1, 18 (1978).

ident decisions to hear undeserving or unnecessary cases as from its inability to hear enough cases of any kind. In 1935 the Supreme Court handed down 142 decisions.[73] In 1982—after decades of far-reaching legislative enactments,[74] expanded legal doctrines,[75] and complex technological and economic changes[76]—that number increased to only slightly more than 150.[77] While several prominent authorities have detailed the large number of petitions which should have been, but were not, granted plenary review,[78] urging the Court to hear more cases per Term does not present a real solution. Although the Court granted 210 petitions during the 1981 Term, Justice Stevens and others have maintained for various reasons that the Court should hear fewer cases.[79] Both Justice Brennan and Justice White have suggested an upper limit of roughly 150 cases per Term.[80] The point here is not that the Court should hear more than 150 cases, but that the search for alternatives should seek to allow the system to resolve a greater number of cases without placing additional strain on the Supreme Court.

Argument over a case's stature as deserving or undeserving of Supreme Court review ultimately fails to promote a fruitful line of analysis. The criteria for determining if review is appropriate[81] are so subjective that development of a uniform

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[73] FREUND REPORT, *supra* note 5, at 619.

[74] *See generally* HRUSKA REPORT, *supra* note 10, at 212 ("Congressional enactments have imposed federal standards in such areas as occupational health and safety, protection of the environment, product safety, and economic stabilization, to name but a few."); FREUND REPORT, *supra* note 5, at 579 ("More and more subjects are committed to the courts as the fields covered by legislation expand. Civil rights, environmental safety, consumer, and other social and economic legislation are recent illustrations.").

[75] *See* FREUND REPORT, *supra* note 5, at 579–80 ("Changes in constitutional doctrines have also contributed [to the increasing caseload], as the reapportionment and school desegregation cases, as well as the criminal cases, attest.").

[76] Advanced electronic and computer technology has raised new legal issues in copyright law, the First Amendment, and a host of other areas. In addition, "[t]here has been a proliferation of federal regulatory and welfare legislation in recent years, legislation that requires interpretation, that produces conflicting judicial decisions, and that frequently raises constitutional problems." *Id.* at 582.

[77] Indeed, Justice Blackmun corroborated this idea when he wrote in a letter to the Hruska Commission: "Some of us here worry about the cases that we 'barely' do not take, namely those that almost assuredly would have been taken twenty years ago." HRUSKA REPORT, *supra* note 10, at 405 app. D.

[78] Stevens Address, *supra* note 1, at 6–7.

[79] White Address, *supra* note 6, at 7; Brennan Remarks, *supra* note 18, at 3.

[80] Some scholars have argued that the aggregate numbers can be misleading. For a brief review, see Comment, 22 VILL. L. REV., *supra* note 16, at 1026–28.

[81] *See* Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1016–25 (1978) (White, J.,

test for "review-worthiness" seems virtually impossible.[82] One could only speculate whether a Sub-Supreme Court might select a "better" assortment of cases for review.

If the Supreme Court were given more time for plenary review of each case, it might reduce the number of per curiam opinions it issued and also might improve the clarity of its holdings in certain instances. But bifurcation of the screening and decision-making processes also might leave the Court with many cases it is unwilling or unable to decide. Such a result would further frustrate the Court's attempts to establish clear national law. If it were unable to hear cases which it felt were deserving of reversal and were forced to decide cases in which it had little or nothing to say, the Court's ability to "make law" would be hindered.

D. *Systemic Inadequacy*

The shortcomings of Justice Stevens' proposal result from its inability to attack the cause of the Court's congestion problems. There are simply too many cases for the Court to handle. The Freund Commission recognized this problem ten years ago, when it suggested the creation of a court which not only would screen certiorari petitions but also would resolve many cases involving inter-circuit conflict.[83] Such a proposal goes far be-

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dissenting); HRUSKA REPORT, *supra* note 10, at 227–34; Marshall Remarks, *supra* note 18, at 6–8. Justice Marshall recently highlighted several cases where the Court "used summary dispositions to give short shrift to important issues." *Id.* at 7. One example particularly shocks the conscience. Without a full briefing on the merits or any oral argument, "[s]ix Justices held that the Eighth Amendment permits a sentence of 40 years and a fine of $20,000 for possession and distribution of less than 9 ounces of marijuana." *Id.*

[82] Justice Brennan recently alluded to this argument:

> Moreover, the assumption that the judges of a national court of appeals could accurately select the "most reviewworthy" cases wholly ignores the inherently subjective nature of the screening process. The thousands upon thousands of cases docketed each Term simply cannot be placed in a computer that will instantaneously identify those that I or any one of my colleagues would agree are "most reviewworthy." For a question that is "substantial" for me may be wholly insubstantial to some, perhaps all, of my colleagues.

Brennan Remarks, *supra* note 18, at 13.

[83] The Commission's Report concluded:

> We are concerned that the Court is now at the saturation point, if not actually overwhelmed . . . . [T]he function of the Court must necessarily change. In one way or another, placing ever more reliance on an augmented staff, the

yond removing the certiorari process from the Court. It also seeks to provide benefits by reducing the number of cases the Court would have to decide.

Justice Stevens also has recognized the potential value of such a jurisdictional change. At the same time that he proposed the Sub-Supreme Court, he also offered a new plan for removing certain classes of cases from the Court's docket. He suggested creation of a congressional standing committee which would clarify and correct legislation, thereby at least reducing uncertainty in statutory law.[84] Such an alternative would help to alleviate the Court's docket pressures by reducing the number of cases which the Court might feel the need to review. It deserves careful attention. Like suggestions which focus on administrative methods of dispute resolution and on expanded national appellate capacity, the standing committee idea would promote change by reducing the *need* for Supreme Court review.[85] Unfortunately, it too has unavoidable limitations.

One difficulty is that only a small number of conflicts could be clarified by congressional action; only those that arise out of a statutory ambiguity could be alleviated by the addition or alteration of legislative guidelines. More important, the risks of delay and neglect are enormous. As a consequence of special interest groups, crowded calendars, and political infighting,

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> Court could perhaps manage to administer its docket. But it will be unable adequately to meet its essential responsibilities.

FREUND REPORT, *supra* note 5, at 584.

The entire second section of the Freund Report considered and rejected various suggestions for alleviating the Court's docket pressures. Among these suggestions were limiting the Court to constitutional cases, excluding certain classes of cases from the Court's discretionary jurisdiction, and establishing special appeals courts to conduct final review of particular administrative law questions. *See id.* at 584–95.

[84] Stevens Address, *supra* note 1, at 14–15.

[85] A number of other suggestions for appellate reform have focused on reducing the Court's jurisdiction. Lloyd N. Cutler, Counsel to President Carter, recently proposed creation of a judicial panel, not a formal court, which would resolve conflicts between circuits, removing the need for the Court to hear such inter-circuit disputes. Cutler, *Help for the High Court*, N.Y. Times, Nov. 1, 1982, at A19, col. 2. Justice White has offered a number of suggestions, including creation of two Supreme Courts, one for civil and one for criminal cases, and a requirement that a court of appeals sit en banc before issuing a decision which conflicts with one previously made by another circuit. White Address, *supra* note 6, at 16, 17. Finally, the Hruska Commission would have established a national appellate court with power to dispose of cases referred to it from the Supreme Court or transferred to it by a federal appellate court. HRUSKA REPORT, *supra* note 10, at 199–200.

many voids in the law would surely go unfilled.[86] Detrimental effects would naturally follow:

> [W]hen Congress is unable to address a problem that arises within a statutory scheme and the Court continues to "remand" the problem to Congress by operating in the clear-statement model, a substantive decision results without either institution's explicitly confronting the choices implicated in that decision. Such abstention cannot produce reasoned results. More importantly, in a system of law whose moral growth over time is grounded on the concept of reasoned elaboration, the failure of articulation presages moral stagnation of the law.[87]

Finally, statutory revisions are inherently limited. The "limitations of language mean that, even when Congress formulates a specific intent, the words of a statute may not fully capture congressional meaning."[88] Whenever one reconstructs legislation, new and unforeseen problems may stem from the reconstruction itself.[89]

In short, congressional sensitivity to the problems of poorly drafted statutes should be encouraged, but as an addition to, not as a substitute for, adequate appellate review.

IV. Conclusion

While the proposed Sub-Supreme Court does not appear well-suited to solving the problems that face the Supreme Court, the

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[86] As Justice Brennan noted:

> Justice Stevens' congressional oversight suggestion overlooks the role of compromise that often accounts for the studied ambiguity of legislative language, deliberately adopted to let the courts put a gloss on the words that the legislators could not agree upon. If the legislators could not avoid ambiguity in originally enacting the law it might be no different if they attempted to resolve the conflict.

Brennan Remarks, *supra* note 18, at 8.

Moreover, minor statutory revisions would be especially susceptible to interest group pressures since such changes would more likely escape widespread attention. *See* Cox, *supra* note 72, at 24; Gellman, *Deficits Anonymous*, New Republic, Aug. 16 & 23, 1982, at 10; Miller, *In Defense of Judicial Activism*, in C. Halpern & C. Lamb, *supra* note 71, at 171.

[87] Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 905 (1982).

[88] *Id.* at 899.

[89] It is easily imaginable that Congress would substitute overly broad language to rectify what was an underinclusive statutory reading. The requisite precision and foresight called for to avoid such a possibility simply may not be feasible.

suggestion proves useful in focusing discussion on the urgent need to relieve the Court's presently overcrowded docket. Justice Stevens' particular remedy ultimately would be counterproductive primarily because it could provide only temporary relief. It does not help correct the gravest cause for alarm: the system's inability to cope with the growing number of noteworthy petitions that deserve full appellate review.

As this Comment suggests, the search for alternatives should move in the direction of expanding national appellate capacity or of seriously considering administrative or extra-judicial remedies. Above all, however, movement should commence. Justice Rehnquist has noted that the objective being sought "is not 'relief' for the Supreme Court but 'relief' for the litigants who are left at sea by conflicting decisions on questions of federal law."[90] One should remember that the victims of inaction suffer no less than the victims of change.

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[90] Letter from Justice Rehnquist to Prof. Leo A. Levin (June 10, 1975), *reprinted in* HRUSKA REPORT, *supra* note 10, at 408 app. D.

COMMENT

TOWARD COMPETENT AMBASSADORS: A QUOTA OF FOREIGN SERVICE OFFICERS?

JAMES W. MOELLER*

On November 23, 1981, Senator Charles McC. Mathias, Jr. (R-Md.), introduced the Chiefs of Diplomatic Missions Bill,[1] which would amend the Foreign Service Act of 1980[2] (1980 Act) to require a greater number of United States ambassadors[3] to be career members of the Foreign Service. The Bill would amend section 304(a) of the 1980 Act[4] by adding as paragraph five the following provision: "At any time, not less than 85 per centum of the total number of positions of chiefs of mission which are occupied shall be held by career members of the Service."[5] This Comment assesses the need for this Bill and its implications if passed.

The Appointments Clause of the United States Constitution[6]

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1 S. 1886, 97th Cong., 1st Sess. (1981), *reprinted in To Amend the Foreign Service Act of 1980: Hearing on S. 1886 Before the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 3 (1982) [hereinafter cited as *Hearing*].

2 22 U.S.C. §§ 3901–4226 (Supp. IV 1980).

3 As the principal United States representatives to individual foreign states, chiefs of diplomatic missions are accorded the title of Ambassador Extraordinary and Plenipotentiary (AEP). There are three lesser known official designations in addition to AEP that ambassadors are accorded as a function of the general capacity in which they serve. Representatives to international conferences and negotiations, as well as to the United Nations and to other international organizations, are given the rank of ambassador. Personal representatives of the President, typically engaged as diplomatic troubleshooters, have the title of Ambassador at Large. Finally, representatives whose service in practice suggests a hybrid between the ranks of ambassador and Ambassador at Large are accorded the personal rank of ambassador. An appointment to this personal rank is, however, distinguishable in two respects. First, it alone is not subject to Senate confirmation under the Appointments Clause of the Constitution. Second, the appointment is limited by law to six months. Foreign Service Act of 1980 § 302(a)(2)(B)(i), 22 U.S.C. § 3942(a)(2)(B)(i) (Supp. IV 1980). For further description of the similarities and differences among the four types of ambassadors, *see generally* SENATE COMM. ON FOREIGN RELATIONS, 97TH CONG., 1ST SESS., THE AMBASSADOR IN U.S. FOREIGN POLICY: CHANGING PATTERNS IN ROLES, SELECTION, AND DESIGNATIONS (Comm. Print 1981) (prepared by the Foreign Affairs and National Defense Division, Congressional Research Service).

4 22 U.S.C. § 3944(a) (Supp. IV 1980).

5 S. 1886, 97th Cong., 1st Sess. (1981), *reprinted in Hearing*, *supra* note 1, at 3.

6 U.S. CONST. art. II, § 2, cl. 2.

empowers the President to nominate and, with the advice and consent of the Senate, to appoint chiefs of mission. The 1980 Act does not limit or condition this executive authority. Rather, it creates certain procedural requirements for executive nomination and appointment of ambassadors. In addition, the 1980 Act provides recommended substantive qualifications as standards to guide the President in the nomination process.

Section 304(a)(1)[7] of the 1980 Act provides that appointees should be demonstrably competent for their posts. This competence includes a knowledge of the language, history, and culture of the foreign nation in which the individual is to serve. In view of these standards, section 304(a)(2) stipulates that the position of chief of mission ordinarily should be filled by career officers of the Foreign Service. Moreover, section 304(a)(3) states that an individual's political campaign contributions should not be a consideration in the President's choice of ambassadorial nominees.

Although the qualifications standards of the 1980 Act are not binding, there are certain procedural requirements. Section 304(b)(2) requires nominees to submit to the Senate Foreign Relations Committee and to the House Speaker a report of all political campaign contributions made either by the nominee or by his immediate family within the four years preceding his nomination. In addition, the President is directed under section 304(a)(4) to submit with each nomination for chief of mission a report on the individual's demonstrated competence. Section 304(b)(1) requires the Secretary of State to submit to the President from time to time a list of career Foreign Service officers who are qualified to serve as chiefs of mission. Finally, section 304(c) directs confirmed nominees to submit a report on their foreign language competence within the first six months of service.

The Chiefs of Diplomatic Missions Bill would depart from the 1980 Act's pattern of substantive guidelines and procedural requirements by establishing a mandatory quota requiring eighty-five percent of ambassadorial appointees to be career members of the Foreign Service. The idea of using a quota to improve

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[7] Section 304 of the 1980 Act is codified at 22 U.S.C. § 3944 (Supp. IV 1980).

the caliber of ambassadorial appointees is not new.[8] In 1973, the Senate Foreign Relations Committee considered a set of draft rules for the Committee's use in examining ambassadorial nominations.[9] Rule One declared a Committee intent to oppose the confirmation of noncareer nominees when the existing total of noncareer appointees exceeds fifteen percent of all chiefs of mission.[10] However, the draft rules were not adopted after both the Secretary of State[11] and the Chairman of the American Foreign Service Association[12] expressed doubt as to the appropriateness and the effectiveness of a formal quota.

Senator Mathias unsuccessfully introduced a similar quota during congressional sessions in 1974, 1975, and 1976.[13] Mathias

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[8] *See Foreign Relations Committee's Draft Rules for Consideration of Ambassadorial Nominations*, 119 CONG. REC. 38,608 (1973) (letter from Sen. J. William Fulbright, Chairman, Senate Comm. on Foreign Relations, to Secretary of State William P. Rogers (June 29, 1973)).

[9] *Id.* After Senator Fulbright introduced his correspondence into the record, neither the Senate nor the Foreign Relations Committee discussed the draft rules.

[10] *Id.* The rules also reflected the Committee's concerns with political campaign contributions (Rule One), competence (Rule Two), and willingness to provide information and congressional testimony (Rule Two). Rule Three expressed the Committee's intent to oppose according the rank of ambassador to any United States representative to the United Nations or to international negotiations unless by law such a position is designated as carrying such a rank. *Id.*

[11] *Id.* (letter from Secretary of State Rogers to Sen. Fulbright (Sept. 21, 1973)) ("I feel that formal percentage limitations on noncareer ambassadors are not needed . . . .").

[12] *Id.* at 38,609 (letter from Thomas D. Boyatt, Chairman, Bd. of Directors, Am. Foreign Serv. Ass'n, to Sen. Fulbright (Aug. 28, 1973)) ("[W]e note the difficulties inherent in hard and fast percentages.").

[13] In 1974, Senator Mathias introduced a measure that would have amended the Foreign Service Act of 1946, which has since been replaced by the Foreign Service Act of 1980, to provide that at any time after January 1, 1977, not less than 85% of all ambassadors must be career foreign service appointees. S. 3994, 93d Cong., 2d Sess., 120 CONG. REC. 32,401 (1975). Recommitted to the Foreign Relations Committee, the bill was ultimately enacted without the Mathias proposal as the Foreign Assistance Act, Pub. L. No. 93-559, 80 Stat. 1795 (1974).

The Senator reintroduced the same measure as a bill in the next Congress. S. 202, 94th Cong., 1st Sess., 121 CONG. REC. 641 (1975). Referred to the Foreign Relations Committee, it received further consideration but was not adopted.

Again in 1976, the Maryland Senator introduced his proposal for an 85% quota of career appointees among chiefs of mission. As an amendment to a foreign relations authorization bill, the proposal would have amended the 1946 Act to establish this quota. S. 3168, 94th Cong., 2d Sess., 122 CONG. REC. 32,401 (1976). In conference committee, the Mathias Amendment to the Senate bill, while not entirely deleted, was stripped of its formal quota. H.R. CONF. REP. No. 1302, 94th Cong., 2d Sess. 36–37, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1572, 1576.

The proposal ultimately emerged as section 120 of the Foreign Relations Authorization Act, Fiscal Year 1977, which states that "[i]t is the sense of the Congress that a greater number of positions of ambassador should be occupied by career personnel in the Foreign Service." Pub. L. No. 94-350, § 120, 90 Stat. 823, 829 (1976).

reintroduced the measure in 1981 in response to the Reagan administration's record of noncareer appointments,[14] which if maintained will be the highest of any administration in the post-war period.[15]

The purpose of the Bill is to ensure a higher level of competence in the conduct of United States diplomacy, both by reducing the number of potentially unqualified noncareer appointees and by attracting more qualified individuals to careers in the Foreign Service by improving their prospects for advancement to chief of mission.[16] In addition, these qualified individuals would provide a larger pool from which to nominate ambassadors. Thus, the quota also may improve the quality of the career diplomats appointed to chief of mission.

Despite these potential benefits, the need for the Bill is questionable at best.[17] First, the advice and consent provision of the Appointments Clause already provides the means to ensure qualified appointments.[18] Irrespective of either the Bill or the

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[14] As of April 1982, 43% of President Reagan's new ambassadorial appointments to bilateral posts (i.e., chiefs of diplomatic mission) were political. *Hearing*, *supra* note 1, at 1 (statement of Sen. Mathias). Senator Claiborne Pell (D-R.I.) also argued that if "you look at the new appointments, the percentage is really far too high for political appointees. It is the highest percentage of actual new political appointees for the first year of any administration since Herbert Hoover." However, Senator Pell acknowledged that "career ambassadors who are remaining in place should be counted as being credited to the [Reagan] administration." *Id.* at 12 (statement of Sen. Pell). Thus, only 29% of the President's appointments should be viewed as political. *Id.* at 6 (statement of Richard T. Kennedy, Under Secretary of State for Management).

[15] 127 CONG. REC. S14,019–20 (daily ed. Nov. 23, 1981) (statement of Sen. Mathias and chart by the Am. Foreign Serv. Ass'n); *cf.* Mathias, *Politics or Merit?*, FOREIGN SERVICE J., Apr. 1982, at 28, 31, *reprinted in Hearing*, *supra* note 1, at 15, 17 ("I suspect that this administration's record, after four years, probably will end up looking pretty much like those of its predecessors. But I can't take much satisfaction in that."). White House personnel director E. Pendleton James has provoked controversy over the administration's record of political appointees with comments such as that made on April 7, 1982: "The question is not whether we have too many political appointees, we do not have enough." *Hearing*, *supra* note 1, at 1.

[16] *See, e.g.*, Mathias, *supra* note 15, at 31, *reprinted in Hearing*, *supra* note 1, at 18 ("My intention in introducing S. 1886 is to control the abuse of ambassadorial appointments for patronage purposes and to strengthen the career service."); *see also* 127 CONG. REC. S14,019–20 (daily ed. Nov. 23, 1981).

[17] *See, e.g.*, *Hearing*, *supra* note 1, at 38 (statement of Sen. Pell) ("[P]eople join a church not to become a bishop."). *But see id.* (statement of Hon. Charles S. Whitehouse, President, Am. Foreign Serv. Ass'n) ("I think one can easily anticipate a very large number of resignations and retirements.").

[18] *Contra* Mathias, *supra* note 15, at 32, *reprinted in Hearing*, *supra* note 1, at 18 ("As any long-time observer of the confirmation process knows, the Senate rarely challenges a President's ambassadorial nominations. . . . It is unrealistic, then, to expect that the confirmation process will screen out any but the most obviously unqualified nominees.").

1980 Act, the Senate always has had the power to refuse to confirm a presidential nominee. Second, the Bill ignores the trend in United States politics for the executive branch to use its power of nomination to consolidate its control over the foreign policy apparatus rather than to pay political debts.[19] Thus, the debate over political appointees is more concerned with the issue of partisanship in nominations than with patronage.[20] Third, section 304 of the 1980 Act already provides several guidelines that encourage the President to nominate qualified individuals.[21] The requirement of executive certification of competence means that the President must take a close look at his nominees' qualifications.

The Bill raises constitutional issues as well.[22] The Reagan administration views the Bill as a direct infringement on the President's prerogative under the Appointments Clause.[23] The Bill, which would function as a statutory condition to Senate confirmation, in practical effect would violate the exclusivity of the President's power to nominate ambassadors.[24] A substantive quota goes far beyond the guidelines recommended to the President under the 1980 Act. Insofar as a quota is based on status rather than on qualifications, it arguably amounts to a legislative designation of nominees, which would be an unconstitutional usurpation of the President's power.[25]

The Bill would have several undesirable effects in addition to placing an unconstitutional limitation on the President's exercise

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[19] *See, e.g., Hearing, supra* note 1, at 58 (prepared statement of Rep. Broomfield).

[20] *See* SENATE COMM. ON FOREIGN RELATIONS, 97TH CONG., 1ST SESS., *supra* note 3, at 5.

[21] *Contra Hearing, supra* note 1, at 30 (remarks by Sen. Pell) ("[The certificates of competence have] become what you might call little novellas of fiction sometimes."). The veracity of the certificate of competence is not subject to public comment. The report required under § 304(a)(4) of the 1980 Act is protected from disclosure. *See* Privacy Act of 1974, § 3, codified as amended at 5 U.S.C. § 552a (Supp. V 1981).

[22] *Hearing, supra* note 1, at 7; *see also id.* at 58 (statement of Rep. Broomfield).

[23] *Id.* at 7 (testimony of Richard T. Kennedy, Under Secretary of State for Management).

[24] *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (discussion of separation of powers under the Appointments Clause); CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1973).

[25] "The powers relative to offices are part Legislative and part Executive. The Legislature creates the office, defines the power, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office." Myers v. United States, 272 U.S. 52, 128 (1926); *see also* Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977).

of his power to nominate ambassadors. It would tend to shift the focus of Senate attention from the qualifications of a nominee to the distinction between career and noncareer status.[26] Moreover, it might lull the Senate into a premature and possibly misguided sense of satisfaction with a nominee merely on the basis of his career status. In short, a quota system would make the confirmation process less rather than more effective.

The Bill is too simplistic a substitute for the Senate's constitutional responsibility for confirming presidential nominees. As the Bill's sponsor has acknowledged, the Senate has in the past failed to fulfill its responsibilities through thoughtful consideration of presidential nominees.[27] For example, despite vociferous criticism of Presidant Reagan's nomination of John Gavin as Ambassador to Mexico,[28] the Senate confirmed his nomination without debate by a vote of ninety-six to zero.[29] Initial descriptions of Gavin's nomination as "diplomatic sadism" and "a mockery" in the Mexican press[30] should have provoked at least some discussion on the Senate floor.

In defense of the Senate, thoughtful consideration of every nominee would be impracticable[31] because of the volume of nominations. Individual review would be particularly burdensome for the Foreign Relations Committee.[32] The Senate has recognized this problem[33] and in recent years has considered

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[26] *See Hearing*, *supra* note 1, at 6–7 (statement of Richard T. Kennedy, Under Secretary of State for Management).

[27] During debate on the 1974 Mathias Amendment to a foreign assistance bill, Senator Aiken noted the then current Senate criticism of the United States Ambassador to Luxembourg. "What I want to point out is that, in spite of all those who are criticizing that appointment now, not a single one of them voted against it in this Senate, not one." 120 CONG. REC. 33,484 (1974).

[28] *See, e.g.*, N.Y. Times, Mar. 14, 1981, at 2, col. 3.

[29] *See* 127 CONG. REC. S4377 (daily ed. May 5, 1981).

[30] *See* N.Y. Times, *supra* note 28.

[31] Nominations requiring Senate confirmation under the Appointments Clause are first referred to the Senate committee within whose jurisdiction the respective positions lie. If favorably reported out of committee, they are essentially assured confirmation. *See* SENATE COMM. ON FOREIGN RELATIONS, 97TH CONG., 2D SESS., THE SENATE ROLE IN FOREIGN AFFAIRS APPOINTMENTS 2 (Comm. Print 1982).

[32] In 1981, 2,356 nominations were referred to the Foreign Relations Committee. Routine lists (e.g., Foreign Service officer appointments and promotions) accounted for 2,184 of this total. Of the remaining 172, 72 were for chiefs of mission. The Committee's consideration of nominations is governed by Rule Two of the Rules of the Committee on Foreign Relations. *Id.* at 21. Hearings on ambassadorial nominations typically last less than one hour and are not followed by a published report.

[33] *See, e.g.*, Percy, *Advice and Consent: A Reevaluation*, 1978 S. ILL. U.L.J. 31. Senator Percy is now Chairman of the Foreign Relations Committee.

several measures that would increase its effectiveness in fulfilling its responsibility under the Appointments Clause.[34] However, a statutory quota, in view of its constitutional implications, should not be considered as a remedy to this problem.

Given the Senate's concern with the quality of nominees for chiefs of mission, the solution lies in the confirmation process itself. The Constitution does not allow Congress to legislate the nomination process. However, the Senate could adopt a rule, similar perhaps to that proposed in 1973, that would establish a de facto quota through the assertive exercise of advice and consent. Such a rule functionally would bind the President, yet would not violate the constitutionally mandated separation of powers. It would, however, have the same practical limitations as a statutory quota. For this reason, a quota in any form is at best a questionable measure to ensure a higher level of competence in the conduct of United States diplomacy.

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[34] *See generally* SENATE COMM. ON FOREIGN RELATIONS, 97th CONG., 2d SESS., *supra* note 31, at 61. These measures have included a reduction in the number of positions for which Senate confirmation is required by statute, a reduction in the number of hearings on nominations, and changes in the conduct of hearings at the subcommittee level. For example, in 1977, Senator Percy introduced a Senate resolution to establish a nonpartisan Senate Office of Nominations to assist in the preparatory investigation of nominees prior to full Senate consideration. S. Res. 258, 95th Cong., 2d Sess., 123 CONG. REC. 28,286–88 (1977).

COMMENT

A PROPOSAL TO INCREASE ACCESS TO ELECTRIC TRANSMISSION SERVICES

STEPHANIE POLLACK*

The control and regulation of the network of over 359,000 miles of electric transmission lines in the United States[1] has long been a source of legislative and judicial controversy. As early as 1965, a member of the Federal Power Commission (FPC) testified that "most people in the power business realize . . . it is the parties who control the transmission [lines], the arteries of the industry, that control the destiny of the millions of ratepayers of this nation."[2] The most recent congressional attempt to restrict the utility companies' absolute control over transmission services was incorporated into the Public Utility Regulatory Policies Act of 1978 (PURPA).[3] Under the Act, the Federal Energy Regulatory Commission (FERC) has limited authority to order wheeling—the provision of transmission services by a utility situated between two others to enable those others to buy and to sell power.[4] The complexity of PURPA's procedures[5] and a variety of other unresolved wheeling issues[6] have combined to prolong the debate over the appropriate scope of federal authority over transmission services.

This Comment first examines the two primary goals of increasing access to transmission services: maintaining coordinated operation of utilities and promoting competition among bulk power suppliers. Section II describes the PURPA provi-

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[2] *Extra-High Voltage Electric Transmission Lines: Hearings on S. 1472, S. 2139, and S. 2140 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 15 (1966) (statement of FPC Commissioner Charles Ross) [hereinafter cited as *Hearings*].

[3] Pub. L. No. 95-617, §§ 203–204, 92 Stat. 3117, 3136–40 (1978) (codified at 16 U.S.C. §§ 824j–824k (Supp. IV 1980)).

[4] Pace & Landon, *Introducing Competition into the Electric Utility Industry: An Economic Appraisal*, 3 ENERGY L.J. 1, 14 (1982).

[5] Tiano & Zimmer, *Wheeling for Cogeneration and Small Power Production Facilities*, 3 ENERGY L.J. 95, 101–02 (1982).

[6] Pace & Landon, *supra* note 4, at 15–16.

sions that govern FERC's wheeling authority and concludes that they preclude the realization of the aforementioned goals. Finally, Section III proposes an approach for "reregulating" transmission services, an approach that shifts the federal focus from ordering specific wheeling transactions to ensuring broader access to transmission facilities and services.

I. Coordination and Competition among Electric Utilities

The nation's 3500 electric systems are divided among public, cooperative, federal, and investor-owned utilities. The 250 investor-owned utilities generate almost eighty percent of the electricity sold to ultimate customers and own or operate most of the nation's transmission network. These utilities supply wholesale power to other utilities, often to smaller public and cooperative systems.[7] Seventy percent of all utilities purchase their full electricity requirements in this wholesale market.[8] Almost all such transmissions, sales, and exchanges of electricity between utilities are subject to FERC jurisdiction.[9]

Many interutility exchanges are conducted to enhance reliability and economy. For example, it is much cheaper for a utility to buy the power it needs at times of infrequent peak loads than for it to maintain another generating plant. Utilities currently exchange transmission services, emergency support, short-term power sales, and other services.[10] These exchanges can occur at almost any level of complexity, ranging from a simple bilateral transfer[11] to a complete power-pooling arrangement that sets forth each member's responsibilities to and requirements from the system.[12]

Obviously, the full value of coordination can be realized only where sufficient transmission capacity exists between interested utilities.[13] Transmission costs also affect the number of trans-

[7] OFFICE OF ELEC. POWER REGULATION, U.S. FED. ENERGY REGULATORY COMM'N, POWER POOLING IN THE UNITED STATES 5 (1981) [hereinafter cited as FERC].
[8] DOE, *supra* note 1, at 380.
[9] FERC, *supra* note 7, at 55.
[10] DOE, *supra* note 1, at 381–82.
[11] FERC, *supra* note 7, at 15.
[12] *See id.* at 2.
[13] *Id.* at 35.

actions. The computerized Florida Energy Broker System, for example, takes transmission costs into account when it attempts to pair buyers and sellers in the most efficient way.[14]

A well engineered coordination scheme promotes competition by providing each member of a pool with access to a number of suppliers.[15] The concern with competition between utilities is a recent phenomenon, for utilities historically have been considered natural monopolies, which require regulation to prevent overpricing.[16] After confronting inefficiencies within the industry, decreases in demand, and inflation, however, some regulators have now decided that "regulation is a poor substitute for competition."[17] Among the factors that promote competition is improved transmission technology, which makes "it economical for distribution systems and companies with surplus generating capacity to reach out farther and farther, the one for supplies, the other for customers."[18]

Unfortunately, the present structure of the industry inhibits the spread of competition. A utility that owns all the transmission lines in a region will be disinclined to allow a competitor to use its lines to take away its customers.[19] The Supreme Court has acknowledged the relationship between competition and availability of transmission services by allowing wheeling as a remedy in an antitrust action against a utility. In the landmark case of *Otter Tail Power Co. v. United States*,[20] the Court found that the utility's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position."[21] The Court concluded that the district court had the authority to order "wheeling to correct anticompetitive and monopolistic practices of Otter Tail."[22]

Judicially ordered wheeling is a supplement to, but not a substitute for, the FERC's wheeling authority. The conference

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[14] *Id.* at 37.
[15] *Id.* at 51.
[16] 1 A. KAHN, THE ECONOMICS OF REGULATION 11 (1970).
[17] Zielinski, *Are Natural Monopolies Becoming Unnatural?--A State Regulator's Perspective on Competition*, 35 REC. A.B. CITY N.Y. 290, 291 (1980).
[18] 2 A. KAHN, *supra* note 16, at 318 (1971).
[19] *See* Connecticut Power & Light Co., 31 Pub. Util. Rep. (PUR) 4th 315, 321 (FERC 1979).
[20] 410 U.S. 366 (1973).
[21] *Id.* at 378.
[22] *Id.* at 376.

report on PURPA stressed that Congress did not intend "that the courts defer actions arising under the antitrust laws pending a resolution of such matters by [the FERC] .... The court should be able to act whether or not action by the Commission under the provisions in title II can be requested or would be justified."[23] Given the length and expense of antitrust proceedings, however, separate regulatory authority is necessary to promote competition.

Increased availability of wheeling services would promote several types of competition. Access to transmission services would encourage the spread of cogeneration and small power production facilities, especially in regions with lower marginal costs.[24] The Department of Energy (DOE) cites utility unwillingness to wheel power as one of the factors limiting the development of wholesale or bulk power competition.[25] One common feature of the recent spate of proposals for encouraging competition by deregulating electric generation is common carrier regulation of transmission to ensure access to the transmission network.[26]

Availability of wheeling services not only promotes competition and coordination, but also can aid in achieving both of these regulatory goals simultaneously. Utilities often contend that the two outcomes are mutually exclusive and that no "compromise measure of market stability [can] permit both orderly electric system planning and effective competition."[27] DOE, however, recently concluded that "[t]he erroneous argument that competition and coordination are incompatible rests on the assumption that exclusive and inflexible power pooling is required to gain the benefits of coordination. This view fails to recognize that exchanging money can be an adequate substitute for exchanging coordination services."[28] Despite the potential

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[23] H.R. REP. No. 1750, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7659, 7802.

[24] Tiano & Zimmer, *supra* note 5, at 95.

[25] DOE, *supra* note 1, at 380.

[26] *See, e.g.*, White, *A Closer Look at Electric Utility Deregulation*, PUB. UTIL. FORT., Jan. 21, 1982, at 21; *see also* Hughes & Rosenzweig, *Sweden: A Model for a Segmented Utility System*, PUB. UTIL. FORT., June 24, 1982, at 13 n.2.

[27] Marshall, *Deregulation of Electric Generation Would Be a Bust*, PUB. UTIL. FORT., May 13, 1982, at 26.

[28] DOE, *supra* note 1, at 382.

benefits, FERC's authority to ensure that utilities purchase wheeling services from a reluctant intermediate utility is very limited.

II. Federal Regulation of Electric Transmission

Since 1927 the federal government has had clear and exclusive jurisdiction over the interstate sale and transmission of electricity.[29] The Supreme Court's decision in *FPC v. Southern California Edison* extended federal authority to all wholesale transactions, including utility sales to local distribution utilities.[30] Wheeling transactions take place between two utilities, so they are generally subject to FERC regulation.

Congress entered the field by enacting the Federal Power Act of 1935, which granted the FPC authority to "direct a public utility . . . to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy."[31] Judicial interpretation of this provision was slow in coming and early cases addressed only interconnection, not wheeling.[32] In 1968 the United States Court of Appeals for the District of Columbia ordered the FPC to decide whether this provision gave the Commission authority to order one utility to wheel power for another.[33] On remand, the FPC concluded it had no such authority.[34] The Supreme Court confirmed this interpretation in *Otter Tail Power Co. v. United States*, holding that "[s]o far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it."[35]

FERC was given limited authority to order wheeling by the 1978 passage of PURPA, which was one of five laws constituting President Carter's National Energy Plan.[36] The complicated

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[29] Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927).

[30] 376 U.S. 205, 214–16 (1964).

[31] Federal Power Act, ch. 687, § 202(b), 49 Stat. 838, 848 (1935) (codified at 16 U.S.C. § 824a(b) (1976)).

[32] *See, e.g.*, New England Power Co. v. FPC, 349 F.2d 258 (1st Cir. 1965).

[33] City of Paris v. FPC, 399 F.2d 983, 985 (D.C. Cir. 1968).

[34] City of Paris v. Kentucky Utils. Co., 41 F.P.C. 45, 49 (1969).

[35] 410 U.S. 366, 375 (1973).

[36] The other four laws are the Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174 (1978) (codified in scattered sections of 26 U.S.C. (Supp. IV 1980)); the National Energy

wheeling provisions negotiated by the conference committee of Congress were designed to limit the conditions under which FERC could order a utility to wheel power for another utility.[37] Such orders must conform to the provisions of sections 211 and 212 of PURPA.

Section 211 creates two application procedures. Electric utilities, geothermal power producers, and federal power marketing agencies can apply for orders that would conserve energy, promote efficiency, or improve reliability.[38] Such orders must, however, "reasonably preserve existing competitive relationships."[39] Alternatively, a wheeling order can be requested "when the first utility has a contract to cover the power needs of the other utility and decides not to renew the contract thus jeopardizing the second utility's ability to serve its customers."[40] Before applying for such an order, the affected utility must request transmission services from the former supplier and must be notified that the services will not be provided.[41]

Neither type of wheeling order can provide for transmission to an ultimate customer; the FERC's authority is limited to mandating bulk power transactions. The FERC cannot order a utility to wheel power that would replace energy provided to the applicant under a contract or rate schedule on file with the FERC.[42]

Section 212 imposes additional restrictions on the FERC's issuance of wheeling orders. The FERC is required to make a series of negative findings: orders cannot "result in a reasonably ascertainable loss" to the wheeling utility, "place an undue burden" on it, "unreasonably impair the reliability" of any affected utility, or impair any affected utility's ability to provide adequate

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Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978) (codified in scattered sections of 42 U.S.C. and 12 U.S.C. (Supp. IV 1980)); the Powerplant and Industrial Fuel Use Act, Pub. L. No. 95-629, 92 Stat. 3289 (1978) (codified in 40 U.S.C. §§ 872-877, 885 and scattered sections of 16 U.S.C. (Supp. IV 1980)); and the Natural Gas Policy Act, Pub. L. No. 95-621, 92 Stat. 3350 (1978) (codified at 15 U.S.C. §§ 3301-3432 & 42 U.S.C. § 7255 (Supp. IV 1980)).

[37] *See* H.R. REP. No. 1750, *supra* note 23, at 92, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7659, 7826.

[38] 16 U.S.C. § 824j(a) (Supp. IV 1980).

[39] *Id.* at § 824j(c)(1).

[40] H.R. REP. No. 1750, *supra* note 23, at 91, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7659, 7825.

[41] 16 U.S.C. § 824j(b)(1) (Supp. IV 1980).

[42] *Id.* § 824j(c)(1), (3).

service.[43] The FERC cannot issue a wheeling order if the utility claiming the loss shows that reasonably ascertainable costs are likely to result at the time the order is issued or at any time thereafter.[44] In addition, applicants must demonstrate their ability to pay for the mandated transmission services, including the costs of enlarging facilities and of providing a reasonable return. Finally, FERC can issue a wheeling order only after the parties have been given the opportunity to agree voluntarily to a proposed order.[45]

Given the complexity of these procedures, it is not surprising that the FERC has received only two applications for wheeling orders, one of which resulted in a settlement.[46] In the other case, the administrative law judge found that the requested transaction was not wheeling within the meaning of PURPA.[47] Nevertheless, he proceeded to discuss the findings required by sections 211 and 212. This tentative application of the new law is the best FERC interpretation to date, and it reveals some problems of the statutory schemes.

The decision noted one significant omission in PURPA: "The terms 'transmission services' and 'wheeling' . . . are not defined in the statute."[48] Another important term left undefined is "applicant"; the administrative law judge held that the applicant is the party to whom the power is wheeled, even though in this case the seller formally requested the wheeling order.[49] The administrative law judge did not specify whether sellers who did not meet the requirements for applicants under section 211 would be able to file wheeling order applications on behalf of buyers who were the legal applicants. Such an interpretation would aid cogenerators and small power producers[50] wishing to sell power to distant utilities; these entities cannot apply for orders under section 211.

The limitations of the PURPA wheeling scheme extend beyond those noted in the administrative law judge's decision. The

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[45] 16 U.S.C. § 824k(b)-(c) (Supp. IV 1980).

[46] Central Power & Light Co., 17 F.E.R.C. ¶ 61,078 (1981) (order approving settlement); Southeastern Power Admin. v. Kentucky Util. Co., 16 F.E.R.C. ¶ 63,051 (1981).

[47] Southeastern Power Admin. v. Kentucky Util. Co., 16 F.E.R.C. ¶ 63,051 at 65,248.

[48] *Id.*

[49] *Id.* at 65,253.

[50] Small power production and cogeneration facilities are defined at 16 U.S.C. § 796(17)(A), (18)(A) (Supp. IV 1980).

only applicants will be those utilities that can afford the time and expenses that will accompany the complicated proceedings the statute requires. Many potential applicants, however, are small municipal systems in need of supply alternatives but constrained by limited resources. The vagueness of the section 212 standards means that the required determinations are difficult to make and are easy to contest in court. Utilities reluctant to wheel are likely to take advantage of judicial appeals from the order proceedings and the statute's frequent opportunities for delay, such as the requirement that the parties attempt to reach a voluntary agreement.[51]

The most imposing barrier to using section 211 to increase access to transmission services is the requirement that wheeling orders "reasonably preserve existing competitive relationships."[52] The conference report specified that such relationships can involve utilities other than those mentioned in the order.[53] Because a wheeling order is invariably requested to gain access to previously unavailable sources of supply, an effect on the existing competitive relationship is almost inevitable. The 1978 provisions thus fail to provide a regulatory environment conducive to expanding access to transmission lines to promote competition and coordination.

III. Reregulation: Changing the Administrative Focus

The regulatory scheme embodied in sections 211 and 212 of PURPA requires FERC to intervene to effect individual wheeling transactions. This case-by-case approach immerses FERC in the details of individual cases and precludes it from assuming a broader policy-making role. Moreover, even an initially workable scheme would become a victim of its own success once the number of applications rose beyond FERC's capacity. Therefore, FERC should concentrate on general promotion of wheeling and should handle specific cases only when the coordinative or competitive benefits of the transaction outweigh its

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[51] *Id.* § 824k(c).
[52] *Id.* § 824j(c)(1).
[53] H.R. Rep. No. 1750, *supra* note 23, at 92, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7659, 7826.

private costs. FERC probably will have to search for such cases, because the utilities involved will lack any incentive to apply for wheeling orders.

This shift to a broader administrative focus is best accomplished by scrapping PURPA's wheeling provisions in favor of a system of increased regulation of extant and planned transmission facilities. FERC's new regulatory mandate would be equitable promotion of both coordination and competition, achieved through a hybrid system of transmission facilities regulation. FERC would be given the authority both to expand access to present lines and to ensure that expansion planning considers all future regional transmission needs.

Regulation of existing lines would vary with the amount of excess transmission capacity. Any supplier or any purchaser of wholesale power who wished to use such capacity would receive federal assistance. This person would be required first to approach the utility directly. If the parties could not reach an agreement, the person could seek a declaratory order from the FERC finding that the transmission line has excess capacity.

Upon a finding by the FERC that excess capacity exists, the utility controlling the line would be required to make that excess capacity available. The applicant would be given preferential access and others could request transmission services on a first come, first served basis. The FERC would give the supplying utility a specified period of time to develop and to post just and reasonable wheeling rates.[54] The FERC would examine the posted rates only if the applicant contested them within fifteen days.

If the FERC finds that excess capacity is not available, the applicant could apply to the FERC for a permit to enlarge the existing transmission facilities. Regulatory schemes of this type have been suggested,[55] but have received little attention, perhaps because this approach can succeed only as part of a broader regulatory effort. The FERC would assess whether the requested extension could be undertaken without endangering the reliability of the transmission network and whether the ap-

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[54] For current use of the just and reasonable standard, see 16 U.S.C. § 824d(a) (1976).

[55] *See, e.g.*, H.R. 12,322, 90th Cong., 1st Sess. § 409(f), 113 CONG. REC. 22,516 (1967).

plicant were financially qualified to complete the project. If appropriate showings were made, the FERC could authorize the applicant to make the proposed enlargement at its expense and to use the new facility under any conditions necessary to maintain system-wide reliability.

At least initially, this system would tend to require FERC oversight of many individual applications, although each FERC declaratory order or extension approval could result in multiple wheeling transactions. Far greater economies would result from the other half of this regulatory scheme—mandatory regional planning before construction of new transmission facilities. The inclusion of third parties' concerns in utility expansion calculations would reduce the need for FERC regulation.

Federal regulation of new transmission line construction was proposed as far back as 1935. The first administration bill to amend the Federal Power Act required utilities to obtain certificates of public convenience and necessity before constructing or modifying transmission lines.[56] Certification authority initially was proposed out of concern that utilities would "goldplate," or build unnecessary transmission lines to increase profits. The Senate Commerce Committee deleted the certificate provision, concluding that there was "no imminent danger of excessive extensions that would prove disadvantageous to consumers."[57]

The current need for certification authority stems from FERC's present inability to impose any conditions on utility construction or on modification of transmission lines. In 1962, the FPC approved stock issuances to fund a major transmission project, the Pacific Intertie, holding that "Congress has *not* given the Commission certificate jurisdiction in this area."[58] In response to that ruling, Representative John Moss (D-Cal.) introduced a bill to require the FPC to issue certificates of public convenience and necessity for construction of additional high voltage transmission lines.[59] The bill was reintroduced in the Eighty-eighth Congress, with an amendment that such certifi-

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[56] S. 1725, 74th Cong., 1st Sess. § 204(a), *reprinted in Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 40 (1935).

[57] S. REP. No. 621, 74th Cong., 1st Sess. 20 (1935).

[58] Pacific Power & Light Co., 27 F.P.C. 623, 626 (1962).

[59] H.R. 12,181, 87th Cong., 2d Sess., 108 CONG. REC. 10,927 (1962); 108 CONG. REC. 11,071 (1962) (statement of Rep. Moss).

cates would be issued subject to the condition that any authorized capacity not required by the applicant "shall be made available on a common carrier basis for other electric energy."[60]

This bill provides a partial model for granting FERC certification authority. Utilities would be required to apply for certificates before construction, operation, extension, or maintenance of major bulk power transmission lines. Applicants would have to show that the facilities would be required in the present or future under a standard of public convenience and necessity. The FERC would be authorized to attach all reasonable and necessary terms and conditions to certificates and to modify such conditions for good cause. One required condition would be that the utility post just and reasonable tariffs for wheeling services and provide such services to the fullest extent possible.

An obvious problem with this approach would be the reluctance of utilities to build excess transmission capacity. One solution would be to require the FERC to concentrate its investigatory resources on the issues of regional desirability and future necessity. The FERC's certification procedures would be designed to ensure that all transmission needs in a given region, including projected wheeling needs, could be met by the line. Such regional planning would encourage the construction of transmission projects that are economically viable only if a planning area larger than a single utility is considered.[61] The FPC suggested an appropriate standard in a bill drafted in 1965. The Commission's bill would have allowed issuance of certificates only upon a showing that the transmission facility would be part of a comprehensive regional development plan that includes "to the extent financially feasible sufficient capacity to meet all needs within the affected area for transmission capacity, whether from public or private generation."[62]

Certification authority focusing on future regional transmission needs eventually should ease access to transmission services for a broad range of public and private suppliers and purchasers of electricity. In the interim, new FERC authority

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[60] H.R. 2101, 88th Cong., 1st Sess., 109 CONG. REC. 568 (1963); 109 CONG. REC. 576 (1963) (statement of Rep. Moss).

[61] *See* FERC, *supra* note 7, at 41.

[62] S. 2140, 89th Cong., 1st Sess. § 212(e) (1965), *reprinted in Hearings*, *supra* note 2, at 5.

to certify the existence of excess transmission capacity would tap the potential of thousands of miles of existing lines for wheeling. Where excess capacity is lacking, the FERC could authorize an interested and qualified generator or customer to extend existing lines. These combined regulatory powers would allow the FERC to promote coordination and competition simultaneously and equitably. This administrative scheme seeks to maintain, at a minimum, current levels of reliability and coordination and to encourage increased competition through expanded opportunities for bulk power suppliers and customers. The FERC would be required to consider and to protect the financial and reliability interests of utilities without letting them use their control over transmission facilities to eliminate competition. More important, these results could be achieved while decreasing federal intervention.

IV. Conclusion

PURPA's attempt to create limited federal authority to order wheeling is doomed to failure by its limitations and complexities. Yet greater access to transmission services is vital if the regulatory goals of continued coordination and increased competition are to be achieved simultaneously. The solution to this dilemma is a legislative shift of the FERC's focus from the regulation of specific wheeling transactions to the promotion of broader access to transmission facilities and services. Such a shift would balance the needs of investor-owned utilities with those of their potential competitors and would result in a decreasing federal role as the bulk power market for transmission services became increasingly self-regulating.

BOOK REVIEW

THE REAGAN EXPERIMENT. Edited by *John L. Palmer and Isabel V. Sawhill*. Washington, D.C.: The Urban Institute Press, 1982. Pp. xvii, 530, appendix, notes. $29.95 cloth, $12.95 paper.

*Review by Christopher F. Edley, Jr.**

INTRODUCTION

The perspective of this Urban Institute[1] book is grand: "[T]he United States is embarking upon an experiment with economic and social policy, perhaps as significant as the New Deal. The Reagan administration has raised fundamental questions about the appropriate role of government in national life."[2] In a comprehensive attempt to describe and to assess this experiment, John L. Palmer and Isabel V. Sawhill have assembled a team of twenty-seven distinguished analysts for a critical survey of key areas of domestic, economic, and social policy.

There have been many important economic and political developments in the few months since the book went to press. But the messages one might distill from the volume are no less correct despite recent wishful thinking; the Reagan budget and tax policies have introduced a worrisome long-term deficit of major proportions, and the Reagan experiment is risky in both human and political terms.

The book is detailed and insightful and, remarkably, maintains the interest of the expert, yet it is easily accessible to the inexpert consumer of the *New York Times*. After an introductory chapter,[3] the book's three major sections describe the elements of the Reagan program: economic recovery, federalism, and the

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[1] The Urban Institute is among the first rank of Washington think-tanks. With substantial foundation backing, the Institute has launched a major two-year effort to monitor and to evaluate the Reagan administration's program. The announced purposes and publication plans of the Changing Domestic Priorities project are ambitious, but judging from the quality of this book, the first major product of the enterprise, it will soon be impossible to debate national policy without considering the products of The Urban Institute.

[2] Gorham, *Foreword* (p. xv).

[3] Palmer & Sawhill, *Perspectives on the Reagan Experiment* (ch. 1).

shift in social policy. Within each section are chapters that address in moderate depth particular aspects of the program, such as budget and health policy. A fourth section surveys the aggregate impacts of the program in regional and demographic terms.

Editors Palmer and Sawhill warn that they have not attempted to cover defense, foreign affairs, the environment, or natural resources.[4] However, they do not mention their neglect of civil rights. For a volume that purports to review major developments in social policy, the omission of civil rights is especially unfortunate given the major developments on that front.[5] Nevertheless, the overall sweep and sophistication of this compendium are impressive.

Unfortunately, this preliminary assessment of the Reagan program often relies on information that already was dated at publication. The book went to press shortly after Congress passed the fiscal year 1983 budget resolution in June 1982, but before the fate of President Reagan's problematic 1983 budget proposals could have been known.[6] Its analysis also preceded the proposal and passage of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[7] the tax bill fashioned by Republican Senators Robert Dole, Howard Baker, and Peter Domenici to raise revenues by trimming approximately one-third from the tax cut enacted at the President's behest just one year earlier.

Similarly, the book's press date fell before the momentous economic developments of late summer and fall. These included the relaxation of monetary constraints by the Federal Reserve Board, the surging unemployment rates, the sharp drop in interest rates resulting from those two factors, and the upsurge in the stock market. By omitting the TEFRA and other recent developments, the editors have rendered many of their figures obsolete, including those on the federal budget deficit.[8] For

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[4] *Id.* (p. 2).

[5] *See generally Justice: Lawyers, State Agencies Hit Reagan on Civil Rights*, 38 NAT'L J. 1611; *Is Reagan Backing Off on Civil Rights?*, U.S. NEWS & WORLD REP., Nov. 30, 1981, at 16; N.Y. Times, June 1, 1981, at 1.

[6] Indeed, substantial uncertainty remains at this writing: we await the lame duck Congress to enact appropriations bills or continuing resolutions.

[7] Pub. L. No. 97-248, 96 Stat. 324.

[8] Strictly speaking, the authors only rarely offer original numbers. They wisely use a variety of official sources. As to the economy, for example, they present and discuss the basic indicators and the variety of forecasts produced by the administration, the

example, the authors cite the pre-TEFRA deficit projections for 1985 under the President's proposed budget, now largely abandoned by Congress, as ranging from $82 billion (administration) to $140 billion (Congressional Budget Office).[9] By September, a few months after the book went to press, the Congressional Budget Office estimate had grown to $244 billion. The reader must keep in mind that recent developments have altered some of the numbers, and therefore some of the inferences.

Of course, the book does not reflect the midterm elections of November 1982. Those results can be reasonably interpreted as a qualified rejection of the "stay the course" Republican campaign theme, and suggest that President Reagan will find the next Congress a less agreeable co-experimenter.[10] Because the authors' political analyses and predictions are generally less substantial and less sophisticated than their economic and programmatic insights, the staleness of their political analyses is more problematic. Nevertheless, the volume is dense with useful information and thoughtful assessments.

SUMMARY AND CRITIQUE

A. *Overview*

The authors divide the Reagan program into three components: economic recovery, federalism, and social policy. Their presentation clarifies not only the ideological framework for

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Congressional Budget Office, and a number of congressional committees. Thus, because of the timing problem, the already fuzzy picture painted by this jumble of statistics is made even less informative. Many a dizzied reader will not find this too troubling, since the point of the exercise is to get a flavor for the policies, the options, and their import. Moment-to-moment monitoring of our macroeconomic lurches is, after all, almost a full-time endeavor for professionals (and the neurotically compulsive).

[9] Palmer & Mills, *Budget Policy* (ch. 3, p. 88 table 3-11). John L. Palmer served as Assistant Secretary for Planning and Evaluation in HEW under President Carter.

[10] Although the Republicans increased their number in the Senate by one and retained control, the Democrats gained twenty-six seats in the House of Representatives. Together with a gain of eight governorships and several very near wins against Republicans, this Democratic gain is widely viewed as a signal of significant disaffection with current policies. Whether or not that is an accurate generalization of the motivations for millions of voting-booth choices, it is an interpretation likely to influence legislative behavior whether or not the administration moves on its own to alter policies. N.Y. Times, Nov. 4, 1982, at 1.

each component and for the whole, but also provides a comparative context for the ideas guiding the Reagan experiment. For example, the book examines how the economic program and the New Federalism square with a variety of conventional approaches.

The historical backdrop they offer is, like most of their analysis, decidely heavy on economic and program policy, and light on questions of political culture and dynamics. They remind us of the economy's poor performance through the 1970's, the developing bipartisan support for real increases in defense spending, the growth in social welfare spending and increasing public doubts about its efficacy, the increased dependence of state and local governments on federal grants-in-aid, and the developing business resistance to the burgeoning regulatory regime.[11]

Of these and several other background matters mentioned by the authors, only the problem of macroeconomic stagflation seems to me truly fundamental, in that its consequences play out in the policy arena through the familiar human forces of self-interest and greed: it is unrealistic to expect generosity when the pie is shrinking, or at least failing to grow at the expected rate.[12] Many of the other points mentioned by the authors, however, are secondary and simply raise further questions. For example, why does the public doubt the efficacy of social welfare programs? Is it in part a rationalization for the selfishness that stems from a shrinking pie? To what extent are those public doubts legitimately rooted in fair evaluations of those programs? Are those doubts born of the excessive promotional campaigns of Reagan program proponents? Why is there no comparably broad and potent public cynicism about Pentagon fraud, abuse, and waste?

Similar questions can be raised about many of the eddies in the 1980 to 1982 political current, such as antiregulatory animus and the romantic praise of state and local governments. Answering such questions would require a thorough and compelling analysis of our political culture, which certainly will not be supplied in this review. In a phrase, however, I believe we

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[11] Palmer & Sawhill, *Perspectives on the Reagan Experiment* (ch. 1, pp. 2–4).

[12] *See generally* L. THUROW, THE ZERO SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE (1980).

should see the shift in political momentum as due not only to the shrinking pie, but also in large part to a propaganda failure on the part of liberal program proponents. If one recognizes that public perceptions are the engine of politics, and hence of budget and program decisions made by politicians, then it becomes crucial to ascertain the mechanisms for shaping those perceptions and to ask why those mechanisms were used more or less effectively by competing ideological factions. In 1980, conservative Republicans won the public persuasion contest, while liberal Democrats were the big losers. The result is largely attributable to the relative skillfulness of those factions, not to the comparative righteousness of their causes.

The background of public policy trajectories supplied by the authors in each chapter is interesting and useful, but leaves one wondering why it is all so. The reader also is left questioning whether these trajectories really give us a way to predict the results of the Reagan experiment.

B. *The Program for Economic Recovery*

The original Reagan strategy for curing the nation's economic ills had four components: monetarism, massive tax cuts justified by supply-side economics, spending cuts, and regulatory "relief."

1. *Monetarism.*—The first component of the Reagan program consisted of imposing a tight rein on the money supply by a cooperative Federal Reserve Board (the Fed) to knock the wind out of inflation. The authors observe that there is little dispute among conventional economists regarding the efficacy of this mechanism. It is not in and of itself radical. But the Fed was extreme (the authors blame President Reagan even though the Fed is formally independent) and the resulting high interest rates smothered demand and triggered a severe recession.[13] Recent events support that view.

2. *Supply-Side Tax Cuts.*—The record tax cut of 1981[14] was supposed to lead to a supply-side miracle, as the authors put it.

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[13] Sawhill, *Economic Policy* (ch. 2, p. 47).
[14] Economic Recovery Tax Act (ERTA) of 1981, Pub. L. No. 97-34, 95 Stat. 177 (1982).

The tax cut, estimated at one trillion dollars over five years, was intended to spur business investment and to offset the impact of inflation-induced upward "bracket creep."[15] It instead has produced a future of huge deficits, only somewhat moderated by the adjustments in the 1982 tax act in the TEFRA.[16]

3. *Spending*.—The volume examines in great detail the domestic budget cuts.[17] The authors believe these cuts have contributed little to the economic program. The politically realistic opportunities for domestic budget cuts, even in the President's honeymoon year, were far too limited to reduce the budget deficit by amounts significant in macroeconomic terms. This was due to the opposing pressures of defense and tax policies, and to the recession. For this reason, the budget cuts probably have had little impact on economic expectations. The budget cuts simply reveal a shift in social philosophy, not in economic realities.

4. *Regulation*.—The program for regulatory relief has ample precedent in the efforts of Reagan's three predecessors.[18] Among its key components are enhanced central authority by the White House and by the Office of Management and Budget's new Office of Information and Regulatory Affairs, and a general application of cost-benefit analysis. Interestingly, the authors devote particular attention to three counterbalancing aspects of the strategy: appointment to regulatory posts of people who are antiregulation ideologues, or are virtually ignorant about the agency subject matter, or both; severe budget and personnel reductions which threaten to cripple agency enforcement and other activities; and reliance on administrative rather than legislative methods of reform.[19] The first two have been quite effective in advancing the administration's program, while the last

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[15] "Bracket creep" refers to the effect of inflation in pushing individual taxpayers into ever higher marginal tax brackets, which results in higher tax payments in real terms without a corresponding increase in real income. The gross result is that inflation produces more real revenue from the individual income tax.

[16] Hulten & O'Neill, *Tax Policy* (ch. 4).

[17] Palmer & Mills, *Budget Policy* (ch. 3).

[18] Eads & Fix, *Regulatory Policy* (ch. 5, pp. 133–36).

[19] *Id.* (ch. 5).

raises questions about the sustainability and ultimate scope of the Reagan changes.[20]

The authors observe that the political risks in the legislative arena could prove great if deregulators move too far away from the designs of powerful members of Congress who are interested in particular agencies. The threshold for such risks probably is lower as a result of the 1982 midterm elections and the newly perceived vulnerability of administration policies. In addition, Reagan administration attempts to withdraw, to modify, and to rescind regulations have been troubled, in my view, in part because of procedural constraints imposed by administrative law and doctrine. Apart from delay, the ends of public scrutiny and political oversight have been served in textbook fashion by legal demands for regularity. Neutrally conservative legal doctrines impede all sweeping change.

5. *Conclusions*.—The authors clearly blame the recession on Reagan-inspired monetary policy, rather than on budget deficits. They also point out the irony that, for all the balance-the-budget campaign rhetoric, President Reagan's policies have greatly increased deficit forecasts. While the final Carter administration predictions promised a balanced budget by 1984, current estimates foresee triple-digit deficits stretching late into the decade. Of course, the political process will ensure policy changes to avoid that result.

Although the book does not compare the present political manipulation of economic analysis with similar distortions by previous administrations, the authors chronicle a series of policy decisions premised on what strikes the reader as highly speculative economic theories and outrageously optimistic forecasts. Once again, one might ask what in our political culture permits such practices, indeed seemingly compels them, when the welfare of millions and the economic security of the nation are at stake.

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[20] The authors mention in passing the potential vulnerability to legal challenge of administrative changes accomplished against the weight of well settled program purposes. The attempted rescission by the National Highway Transportation Safety Administration of the passive restraints regulation is a good example. *Id.* (p. 143).

C. *The New Federalism*

The New Federalism describes the devolution of federal responsibilities to state and local governments, and the consolidation and deregulation of federal grants-in-aid. The editors discuss the New Federalism with their analysis of the administration's emphasis on substituting private sector activity for government.[21] This association emphasizes the philosophical link between the two; underlying both objectives is the imperative to reduce the federal presence. Also significant, but given too little critical attention in this volume, is the philosophical distrust of national government and national political processes in favor of more local forms of governance. In other words, the Reagan program incorporates both a generalized antipathy towards government and a particular preference for lower levels of government.

These motivations are often confused in policy debates. Consider block grants.[22] The elimination of federal categorical constraints can reflect both ideological opposition to the imposition of federal policy preferences on local government, and substantive opposition to the purposes of the federal standards, such as requirements that funds be spent on low-income families. Budget cuts in block grant programs reflect both a substantive judgment about spending priorities, and a preference for less federal government.

The authors acknowledge, correctly in my view, that the extreme federalism shift favored by President Reagan is politically foreclosed because of opposition in Congress and among state and local officials.[23] It is anachronistic and ahistorical in conception, in that it ignores the powerful social and economic forces that have generated today's remarkably complicated but flexible intergovernmental system.[24] In one decade, the President's proposals would decrease federal funds as a percentage of state budgets to 1933 levels.[25] Even in its incremental form,

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[21] Peterson, *The State and Local Sector* (ch. 6).
[22] *Id.* (pp. 170–83).
[23] *Id.* (pp. 196–97).
[24] *See* M. DANIELSON, ONE NATION: SO MANY GOVERNMENTS (1977); M. REAGAN, THE NEW FEDERALISM (1972); A. WILDAVSKY, AMERICAN FEDERALISM IN Perspective (1967).
[25] Palmer & Sawhill, *Perspectives on the Reagan Experiment* (ch. 1, p. 10).

however, the New Federalism is likely to have substantial social and economic impact, as the authors indicate in their important preliminary findings on the state and local consequences of federal budget and policy shifts.[26] For example, they argue convincingly that lower levels of government have not been replacing lost federal funds with their own monies, and that they are unlikely to do so in the future. Furthermore, the desperate budget problems of state and local governments have worsened because of the recession. And private charitable activity will not fill the gap. To do so, report the authors, would require increases in charitable giving of forty percent annually over the 1983 to 1985 period.[27] Furthermore, nonprofit organizations, which comprise a significant portion of the social services delivery system, had relied on the federal government for approximately one-fifth of their funding. According to the authors, recent cuts in government aid to nonprofit organizations amount to five to ten percent of their budgets. These cuts have been made at a time when those organizations are facing increased demand because of reductions in government social services, and the recession.[28]

D. *Social Policy*

In seven chapters, the authors assess what the editors term "the shift in social policy" under the Reagan administration. Notwithstanding a few regrettable omissions, the picture that emerges is an impressively comprehensive and informative one.

That picture has a troubling aspect to it, however. As with the survey of economic policy and prospects, the reader is left disheartened by the relatively small role that reasoned assessment of program benefits and costs plays in major policy choices—now and in the past. By far the most important influence on a program's budgetary fate seems to be the political strength of its proponents relative to that of its foes. Vigorous support comes sometimes, but not always, when a program

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[26] Peterson, *The State and Local Sector* (ch. 6). Almost all chapters include some discussion of the state and local impacts of Reagan initiatives.
[27] Salamon & Abramson, *The Nonprofit Sector* (ch. 7, p. 236).
[28] *Id.* (ch. 7).

proves to be substantively successful, as with Head Start. But different motivations are at work when seriously flawed programs, such as some in the Veterans' Administration, escape the budgetary scalpel. The authors cast little light into this black hole separating actual policy choices on the one hand from the analyses of program accomplishments on the other. This was not, of course, their chosen mission in this volume. Nevertheless, since several of them have worked on both sides of that great divide—as policy officials and as academic investigators—their testimony and proposals for structural reform of the policy process might have been instructive.

THE LAST WORD

I must invoke a form of the reviewer's cliche: a brief piece cannot do justice to so rich a book. Nor can I forego the predictable comment of a noneconomist reader: more attention to the political and legal dimensions of the Reagan experiment and its context would have been welcome. This is particularly true because the book convincingly documents the impotence of liberally inspired policy analysis in the face of political ideology. The authors are, after all, on the outside looking in on the halls of power, and their tales suggest that analysts may forever be the manipulable servants of politicians.

In an important sense, therefore, the structural solutions they might concoct to right the long-term deficit imbalance, or to moderate the irrepressible regulatory imperative of the modern state, are likely to go the sad way of previous thoughtful analyses. Approaches *outside* analysis are required.

Proponents of the balanced budget amendment are wrong, but not totally. That amendment, they urge, would trump the business-as-usual legislative policy process and elevate one objective above others, with profound consequences for the role of analysis in constraining political discourse and decisions. The appropriate inquiry for policy science today is whether there are less drastic means and arenas for comparable structural approaches to preclude ill-conceived social experiments.

The administration's new Office of Information and Regulatory Affairs is such an effort, though not an entirely novel one.

In effect, it forces regulators to come to terms with the President's ideological agenda, including a cost-benefit test of proposed rules. The Congressional Budget Office is an earlier attempt at structural reform, as is the entire congressional budget process created by the Impoundment and Budget Control Act of 1974.[29] Frustrations and conflicts over the last two budget cycles, combined with the process' apparent inability to stem the tide of red ink, have led an increasing number of legislators to advocate substantial changes in the congressional budget process. A bipartisan group of former congressmen even has been formed to lobby against changes that would weaken the House and Senate Budget Committees.[30]

Multiplying such analytical institutions and granting them various formal or virtually formal roles in policymaking is not, as President Reagan has demonstrated, inevitably "conservative" in the sense of impeding radical change. By the same token, these institutions have not prevented ill-fated experimentation, such as Reaganomics. My conclusion is that analytical institutions cannot themselves produce better government.

The hope really must be for a better politics, not better institutions; the corollary is that law, as a source of constraints on process (and in the extreme, outcomes), ought to focus on reforming politics and political discourse, such as campaigns, rather than on refining the role of cost-benefit or other methodologies in executive decisionmaking. The true role for better and more analysis is as an aid to better politics, for example, by improving the quality of information available to political actors and voters.[31] Really good books help, too.

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[29] Pub. L. No. 93-344, 88 Stat. 297 (codified in scattered sections of 31 U.S.C.).

[30] The group, Committee for a Responsible Federal Budget, includes former House Budget Committee Chairman Robert Giaimo and former Senator Abraham Ribicoff, both Democrats, and former Senator Henry Belmon, a Republican.

[31] In that respect, the emergence of analytical and public policy staffs in business and special interest lobbies is an important and helpful development.

RECENT PUBLICATIONS

BARGAINING FOR JOB SAFETY AND HEALTH. By *Lawrence S. Bacow*. Cambridge, Mass.: The MIT Press, paperback ed. 1982. Pp. x, 149, notes, bibliography, index. $6.95 paper.

In *Bargaining for Job Safety and Health*, Lawrence Bacow sets forth a partial solution to the problems that the Occupational Safety and Health Administraton (OSHA) has had in regulating workplace safety. The time for Bacow's suggestions may have come in 1980, but has long passed in 1982. Essentially, Bacow proposes that collective bargaining over health and safety should be used to supplement the Occupational Safety and Health Act (OSH Act), and that OSHA should encourage bargaining by offering certain incentives such as exempting workplaces from OSHA inspection, funding industry marketing and mortality studies, and underwriting the cost of health and safety arbitrators. At first blush, the idea of using collective bargaining is attractive. It is consistent with one of today's strongest political trends: return to the private sector that which was once in the purview of regulatory agencies. A closer look, however, reveals that the author's proposals are unrealistic solutions to OSHA's problems.

In the first section of the book, Bacow describes the problems that OSHA faces in regulating occupational safety and health: management and workers are ignorant of safety hazards; there is a lack of consensus on how benefits derived from hazard abatement should be valued; and OSHA regulations must address both a diversity of hazards and a variety of regulated parties (employers). Bacow characterizes OSHA's current method of regulation as "command and control." Under this system, the agency relies on standards, inspections, and fines to encourage industry to comply. Bacow concludes that this enforcement process is ineffective. "Congress has given OSHA an impossible job . . ." (p. 14).

In the second section of the book, Bacow discusses several studies which have concluded that OSHA has had little impact on reducing job-related injuries. Bacow attempts to explain this ineffectiveness by using his model of "hazard abatement." To remove hazards from the workplace, OSHA must identify them,

define solutions, and implement those solutions. Bacow concludes that OSHA has failed in its mission because it has to tailor regulations at each of these steps to a multitude of workplaces. OSHA has been "relatively ineffective . . . because the existing regulatory structure is simply not capable of addressing the millions of separate problems . . . " (pp. 49–50).

Bacow asserts that the best way to increase OSHA's effectiveness is to encourage collective bargaining on health and safety issues. Collective bargaining would allow workers and management to address the peculiar safety hazards of their individual workplaces. Bacow cites examples of collective bargaining agreements which have been effective in enforcing OSHA standards. These include the agreements between the United Auto Workers and General Motors, the United Steelworkers and U.S. Steel, and the United Association of Plumbers and Pipefitters and the construction industry. Unfortunately, other unions have had difficulty persuading management to include contract clauses on health and safety issues. Bacow concludes that these difficulties show that incentives are necessary to promote collective bargaining.

Bacow recommends several ways of encouraging collective bargaining about safety standards. These include exempting workplaces from non-compliant-oriented inspections when unions are given an active role in OSHA enforcement; having OSHA respond quickly to union complaints; expanding an employee's right to refuse hazardous work; and paying for health and safety arbitration when disputes arise.

A 1982 paperback edition of this book is unwarranted in light of a recent study that contradicts those studies upon which Bacow relies. In 1981, two economists concluded that OSHA citations and plant-specific programs *have been effective* in reducing injury rates in large firms. Cooke & Gautschi, *OSHA, Plant Safety Programs, and Injury Reductions*, 20 INDUS. REL. 245 (1981). This study undercuts Bacow's major premise that OSHA has been ineffective in cutting injury rates. If OSHA is effective, there is not as much need to supplement its work.

This book is a good summary of OSHA's problems, but is a mediocre attempt at suggesting solutions. Unfortunately, in his eagerness to clothe OSHA as an ineffective agency, Bacow fails to make his case. He never convinces the reader that the solu-

tions he offers will improve the regulatory process. A number of his suggestions for reform are not developed. For example, he fails to designate the "specified conditions" that employers would have to meet to qualify for inspection exemptions or to specify who would be responsible for monitoring compliance with those conditions. In short, he leads the reader down the proverbial primrose path to several incomplete avenues.

Collective bargaining is a useful way of controlling occupational health and safety. The creation of OSHA has given unions more leverage in bargaining for job safety and health. An employer who refuses to bargain over plant safety and who fails to comply with OSHA is subject to worker-initiated complaints. The employer also will comply with OSHA standards to help protect itself from liability for injuries. The most questionable of Bacow's suggestions is his proposed inspection exemption for employers that appear to be cooperating with the unions. All health and safety regulations would be left to the give-and-take of collective bargaining. A union could trade workers' safety interests for higher wages.

Bacow offers some useful solutions, such as educating union stewards (and in turn employees) about workplace safety and expanding an employee's right to refuse hazardous work. Unfortunately, Bacow's reliance on collective bargaining rather than regulation is unrealistic in light of the aims and concerns of unions in hard economic times. Unions and workers today have more pressing bargaining problems than workplace safety, namely, whether they have a workplace at all.

Kathleen S. Edwards

GLOBAL STAKES: THE FUTURE OF HIGH TECHNOLOGY IN AMERICA. By *James Botkin, Dan Dimanescu, John McClellan, and Ray Stata.* Cambridge, Mass.: Ballinger Publishing Company, 1982. Pp. 199, appendices, index. $17.50 cloth.

The market for high technology products, which includes computer software and hardware as well as telecommunications systems and defense technology, traditionally has been dominated by the United States. In the past ten years, however,

Japan, France, and West Germany have gained large market shares, placing American dominance in jeopardy. The authors of *Global Stakes: The Future of High Technology in America*, all of whom work closely with the high technology industry, believe the current "squeeze" on American high technology market share will, if allowed to continue, have devastating effects on the United States economy. They claim that the global economy to which our domestic economy is inextricably linked is changing from an industrial and natural resource based economy to one based on information and human resources. The long-term health of the United States economy depends upon strong performance in this emerging knowledge-intensive era.

The authors identify two reasons for America's decline in the world market for high technology products. The first is the absence of a cohesive national policy that aids development of high technology. "National economic policy is increasingly at odds with the needs of America's high technology future" (p. 2). Reaganomics encourages traditional, capital-intensive manufacturing industries rather than new, knowledge and human-intensive industries, such as computer technology. High technology industry development is dependent on high risk investments in research and development. The authors support adoption of substantial tax credits to encourage these investments. A national policy of increased defense spending, while potentially a boost to the high technology industry, is presently more of a drain because defense priorities are not compatible with technologies that are viable commercially.

The second problem, according to the authors, is an educational system which produces an insufficient number of engineers. The growth of the high technology industry in the United States has outpaced the supply of those who are technically trained. A shortage of engineers is now the major constraint on the growth of the industry. Since human skills are the central resource of the industry, the authors point to the development of these skills as their major policy objective. They believe the problem has its roots in inadequate math training at the elementary and secondary levels and extends through undergraduate training, where outdated equipment and faculty shortages turn away potential engineering students. In addition, a declining number of engineers are reaching the graduate level and they

are pulled into industry by large salaries. This creates a shortage of engineering professors, which in turn creates a shortage of engineering classes, and a shortage of engineers. The result is that the United States produces half as many engineers per capita as Japan (p. 178). If this trend continues, the authors believe this country cannot maintain its global market share.

The two problems have a joint solution: more government commitment to and support of technical education. The authors state that a national high technology plan must "communicate to the American people the fundamental role education plays in strengthening our economy and culture" (p. 157). Japan and France serve as role models for the development of such a plan, and the book devotes a chapter to their plans. The authors believe, however, that the United States must design its own program. In general, the federal government should contribute sustained financial support to education, provide incentives for "on-the-job" training, and share research and development responsibilities with universities. Universities should give their engineering departments the flexibility to design programs that maximize industry and government support. The states play an important role in the authors' scheme since they can provide the main administrative system for the distribution of support. North Carolina is offered as an example of a successful fusion of government, industry, and education. The governor has appointed a Board of Science and Technology to advise him on the direction of the high technology industry; the legislature has appropriated substantial funding for university and high school math programs; and industry has provided jobs and invested its future in North Carolina.

The book is factual, yet not technical. It is intended to be a documentary for the uninitiated. Increasing public awareness of the issues involved in maintaining the market dominance of the United States in global high technology sales is indeed a worthwhile goal. However, the authors call into question both their analysis and their policy recommendations by failing to address data presented in the book that is inconsistent with their conclusions. For a work that relies heavily on factual evidence, the inconsistencies in their data are striking. For example, the author's premise is that the supply of engineers is failing to meet increasing demand. A table in the text reveals a steady decline

in the number of electrical engineering graduates from 1971 through 1977, and presents no data for later years (p. 35). However, another table buried in the notes at the end of the book reveals that not only did the number of electrical engineering graduates dramatically increase after 1977, but also that the new and closely-related field of computer science has produced a nearly ten-fold increase in the number of its graduates since 1970 (p. 208).

Failure to address and to explain contradictory data is not the study's only shortcoming. The thesis of the book relies on assumptions which, because they are not developed, are not questioned by the "uninitiated" reader. Implicit in the authors' work is the assumption that high technology development will be beneficial to American society. "The potential rewards of developing the high technology industry can be measured in jobs, in a more positive balance of trade, in an abundance of products and services that enhance the quality of life, and in a stronger posture in national security—in short, in the well-being of every American" (p. 177). The country might gain all this, but at what cost? The authors outline the benefits of high technology development, but fail to address the potential negative aspects of such development. For example, the effects of high technology development on such things as employment patterns, increasing impersonalization in society, and quality of life deserve attention. The authors fail to lay out the choices we are really making when we put the country to work for the high technology industry.

It is difficult to predict the social, environmental, and economic effects of such technological development. Most Americans probably did not dream that the invention of the automobile would help create the miles of asphalt that now are a part of American life. *Global Stakes: The Future of High Technology in America*, as a study of the future of the high technology industry, should address the vision of the future that the industry gives to society. Although this book gives a clear, readable, and interesting review of the problems this country faces in maintaining its global market share, *Global Stakes* fails to address why we should want to attain that goal.

Donald R. Weisberg
Anne C. Cicero

THE ECONOMICS AND POLITICS OF HEALTH. By *Rita Ricardo-Campbell*. Chapel Hill, N.C.: The University of North Carolina Press, 1982. Pp. 379, notes, index. $19.95 cloth.

In the past two decades, the literature of health care has expanded almost as dramatically as health care spending. Just as economists and policy-makers today question—or ought to question—every new dollar allocated to a national health care budget that is rapidly approaching three hundred billion dollars per year and nearly ten percent of the gross national product, so scholars and critics may reasonably ask whether a new book purporting to add something to the health policy debate carries with it benefits that outweigh its costs (or, in the language of a more innocent era, whether it is "worth the paper it is printed on"). Rita Ricardo-Campbell's *The Economics and Politics of Health* survives even the most rigorous cost-benefit analysis. Although not without flaws, it is a thoughtful and provocative summary of contemporary health policy issues.

To a field as complex, as confused, and as confusing as national health law and policy, Ricardo-Campbell brings three important attributes: a writing style that is generally lucid and well-organized, a freedom from any rigid ideological perspective, and, perhaps most importantly, an understanding that "more medical care does not always improve health" (p. 3).

It is not surprising that the author, an economist at the Hoover Institution, begins with chapters on the supply and demand for medical care, proceeds to a discussion of the economics of markets and what she terms "submarkets" of medical care, and concludes that enhanced competition in the health care marketplace is preferable to increased government regulation. It does come as a surprise, however, that this economist is so persistently sensitive to a variety of issues that one does not normally think of as economic but that are of great relevance to health care policy.

Ricardo-Campbell nicely summarizes the difficulties inherent in subjecting the economics of health care to a conventional free-market analysis. She notes that economic demand and "medical need" often may differ significantly. This is true not only because numerous conflicting government regulations dis-

tort market forces, but because the "complexity of modern medicine may have outstripped the educational level of the consumer, and even of some providers, thereby making the possibility of a fully informed consumer remote" (p. 11). In addition, the "growth of health insurance, both public and private, means that the price of care acts only partially in allocating medical resources . . ." (p. 11). Such observations have been made by others, but Ricardo-Campbell supplements them with an uncommon appreciation of the fact that "additional units of medical care do not always . . . [improve] and . . . may even worsen health" (p. 9).

Ricardo-Campbell's emphasis throughout is upon what experts in this country and abroad have learned about health policy issues and upon the data that have been collected. But she stresses, equally, what is not known and what may prove ultimately unknowable and unquantifiable. Because "patients' and physicians' perceptions of medical need do not always agree, nor do physicians always agree among themselves" (p. 252), the author concludes that it is impossible to allocate medical care according to need (p. 253). As for price, she argues that the classical free market model is "repugnant" as an allocation mechanism because poor people would suffer and die for want of even simple and inexpensive care if they had no means to pay. She also concludes that the current third party reimbursement system is "unworkable" since patients who do not pay directly for care tend to consume more than society can afford (p. 253). How, then, should medical care be allocated? What policy recommendations are appropriate?

Ricardo-Campbell suggests four strategies. First, she advocates the systematic education of consumers about "what medical care can and cannot do, and about what they can do to improve their own health . . . . Unless consumers are knowledgeable about what they buy, the market cannot approach a competitive market" (p. 331).

Second, she supports maintaining a wide variety of health care options, such as fee-for-service practice and prepaid group practice. She assumes that promoting competition among alternative mechanisms for providing health care leads to more innovative and efficient service.

Third, she advocates a "voucher" system that would be fi-

nanced primarily by employers. Vouchers would be dispensed to all workers, who would use them to pay for health insurance, prepaid health plans, or fee-for-service medical care (p. 331). She would maintain Medicaid and Medicare with some modifications until the new voucher system had proven itself, at which time a unitary system would be created.

Finally, the author urges that allocation decisions be made on the basis of careful cost-benefit analyses whenever the market is unable to make such decisions efficiently, although she fails to specify who should make such analyses. Ricardo-Campbell's discussion of costs and benefits is especially discriminating, making needed distinctions between emergency and nonemergency care, among different technologies (such as heart transplants, cataract surgery, total hip replacement, end-stage renal dialysis), between university teaching hospitals and community hospitals, between specialists and generalists, between physicians and paraprofessionals, between "deregulation" that is talismanic and total (which she rejects), and "deregulation" that is rational and selective (which she endorses). Throughout her discussion of costs and benefits, she remains conscious of the uncertainty that characterizes medicine and health care. Nevertheless, she concludes that "despite these limitations and the ethical issues involved in the valuation of life, the mere act of structuring a policy-maker's thinking along the lines of benefits and costs (with or without valuation) is helpful in making any specific decision: whether to approve a new drug, reimburse for a given medical procedure, or finance a specific research project" (pp. 294–95).

The Economics and Politics of Health is likely to prove helpful over the next decade in making specific decisions about the structure, the financing, and the allocation of health care resources. If its argument is on occasion repetitious, its sentence structure on occasion haphazard, and its simplicity on occasion more a vice than a virtue, this new volume remains, on the whole, an occasion for celebration.

Michael G. Michaelson, M.D.

THE FOREIGN CORRUPT PRACTICES ACT: THE ANATOMY OF A STATUTE. By *George C. Greanias and Duane Windsor*. Lexington, Mass.: Lexington Books, 1982. Pp. xi, 151, appendices, index. $23.95 cloth.

Five years after the enactment of the Foreign Corrupt Practices Act (FPCA), George C. Greanias and Duane Windsor examine the passage, enforcement, interpretative difficulties, and proposed revisions of what may be "the most extensive application of federal law to the regulation of corporations since the passage of the 1933 and 1934 securities acts" (p. 1). Their study, *The Foreign Corrupt Practices Act: Anatomy of a Statute*, reviews in considerable detail the legislative history of the Act and analyzes its provisions. This analysis lays the groundwork for their later attack on the effectiveness of, and philosophy underlying, the statute.

Following the revelation shortly after Watergate of improper payments made overseas by major American corporations, the Ninety-fourth Congress immediately attempted to pass legislation to prevent American companies doing business abroad from bribing foreign officials to win contracts or to gain some other competitive advantage. However, this first legislative effort was unsuccessful, largely because of a dispute between President Ford and Congress over whether the law should require mere disclosure of payments to foreign officials or should criminalize payments outright. The Carter administration brought with it a moralistic fervor which was clearly apparent in its foreign policy. "Given this new foreign policy, administration support for a law to curb illegal and questionable payments abroad became a political necessity" (p. 70). The authors of this study claim that the Carter administration placed upon American corporations a "proconsular role." They now would be partially responsible for carrying out a foreign policy that condemned payments to foreign officials to gain business advantage even if those payments were normal practice abroad. The authors claim that the expansion of traditional regulatory power to encompass new noneconomic concerns ("the law of government control") led to a statute with conflicting and ambiguous provisions. This ambiguity, they contend, affects the Act's interpretation and enforcement.

In its current form, the Act contains both antibribery provisions and internal accounting requirements. It applies to companies that issue securities under the Securities Act of 1933 and other domestic concerns that make use of the mails or interstate commerce. The antibribery provisions prohibit companies from attempting to influence foreign governments or officials for the purpose of "obtaining or retaining business for or with, or directing business to, any person" (FCPA § 78dd-2(a)). The internal accounting provisions direct issuers to maintain adequate records and internal accounting controls so that compliance can be monitored. Failure to abide by the antibribery or internal accounting provisions may subject companies to severe criminal penalties.

The authors allege that the Act is ambiguous. Technically, the Act applies with equal force to intentional acts and to unintentional mistakes such as clerical oversights and misinterpretation of facts. It is not surprising that an act that imposes harsh penalties on activities that are either benign or legal under foreign law, is enforced selectively. This selectivity in enforcement results in ambiguity because it is difficult for companies operating abroad to determine what competitive activities are prohibited under the Act. In addition, the responsibility for enforcement of the Act is divided between the Justice Department and the Securities and Exchange Commission. These two agencies bicker over the proper meaning of the Act thereby adding to its ambiguity. The ambiguity of the Act reflects the legislative process under stress; hastily drafted legislation was passed as a moral imperative, and thus has created "confusion among foreign policy, ethical, and marketplace considerations" (p. 4).

According to the authors, the corporate response to the uncertainty generated by the Act has been, quite understandably, to withdraw from particular activities altogether rather than risk severe criminal sanctions. Furthermore, lawyers and accountants who advise corporations are unwilling to accept the responsibility for interpreting their clients' duties under the Act.

The authors propose a revision of the Act based upon a "marketplace theory" for regulating questionable payments. This approach would require disclosure of the foreign payments but would not forbid them unless they clearly constituted bribery under foreign law. The authors contend that their recom-

mendations are a practical solution to the ambiguities in the Act since payments to foreign officials which are not prohibited abroad clearly would not violate American law (p. 3).

A separate issue is that of enforcement. Under the authors' proposal, "enforcement would deal with the disclosure of material incidents, not [the] definition of legality. Such information would be a guide to both investors and foreign governments" (p. 143). It would be the responsibility of foreign governments to regulate questionable payments according to their own laws and customs. The authors' approach is in accordance with the principles of national sovereignty, and thus avoids charges of moral imperialism by the United States.

A shortcoming of the authors' "marketplace theory" is its failure to solve the problem of court jurisdiction. The present Act raises thorny issues relating to the extraterritorial jurisdiction of American courts over foreign subsidiaries of American corporations. Although the authors would not prohibit payments, they would require disclosure of those payments. Enforcement of the disclosure provisions still would require extraterritorial jurisdiction.

The Foreign Corrupt Practices Act is a thoroughly readable study which provides valuable insights into how the legislative process sometimes responds in a less-than-rational manner and primarily as a matter of political and moral imperative. The weaknesses and ambiguities of the FPCA, which result from a "confusion of motives and means" (p. 142), are intelligently brought out. The criticisms of the "proconsular" role of American corporations and "the law of government control" are original and provide strong unifying themes in the explanation of how and why the FPCA came to be. What effect the authors' proposals would have on the incidence of overseas bribery is difficult to determine. However, by furnishing clearer standards for liability, the proposals would add a measure of certainty to the legal environment within which businesses act. This would permit them to respond to the requirements of the law through action, rather than reaction.

Z.H. Feroze

PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT. By *Steven Lewis Yaffee*. Cambridge, Mass.: The MIT Press, 1982. Pp. xii, 239, appendices, notes, bibliography, index. $17.50 cloth.

Steven Yaffee makes a bold argument in favor of an extreme form of government regulation—prohibitive policy—at a time when government intervention is viewed as inefficient and counter-productive. In *Prohibitive Policy: Implementing the Endangered Species Act*, Yaffee claims convincingly that such regulatory policy, which proscribes behavior "in an absolute, boundary-setting direction" (p. 1) often is effective and necessary. Its advantages lie in the fact that, ironically, "prohibitive policy is usually not implemented prohibitively" (p. 6) and that "the realized mode of enforcement is that of negotiation rather than litigation to demand compliance with the letter of the law" (p. 7). Prohibitive policy is much less absolute and inflexible than its name indicates because bargaining among interested parties takes place during its implementation. Thus, prohibitive policy is not necessarily inefficient or overly severe.

Yaffee contends that prohibitive policy is particularly appropriate when, as in the case of species extinction, it is impossible to chart a detailed course of action, but to fail to take any action could prove disasterous. Thus he examines the Endangered Species Act of 1973 (ESA). The ESA is proscriptive; it outlaws any activity which would result in species extinction and does not explicitly require a balancing of the costs and benefits of such activity.

The ESA calls for the classification of any species or subspecies whose existence is threatened or endangered. A species is recommended for listing by scientists, on the basis of technical data. Importing, exporting, and "taking" are prohibited, and *all* federal agencies are required to review their actions to ensure that they are not jeopardizing any listed species or its critical habitat. Further, citizens' suits can be initiated to try to force the Secretary of the Interior to act. The Fish and Wildlife Service of the Department of the Interior has primary responsibility for implementation of the Act.

Yaffee characterizes the ESA as "an extremely strong, comprehensive, and prohibitive statement" (p. 56). Yet the author

claims that conflicting interests are considered in implementing the Act (p. 58). There is room for bargaining, and thus balancing, because the Act allows a great deal of administrative discretion. And where discretion is involved, as Yaffee reveals, personal and agency biases as well as internal and external pressures can be expressed and can affect decisions.

Yaffee says that administrative discretion is exercised at a number of stages in the classification process. For example, discretion is exercised when scientists review technical data to determine if a species is endangered and when agency officials review and modify the scientists' analyses. Agency officials negotiate with outside interests when they are deciding whether to classify a species or habitat. They are sensitive to the demands of environmental organizations, development interests, the media, and Congress. Thus, although the prescription of the Act is "preserve species at all cost," these various interests do have room to bargain over which species will be granted protection, what level of protection will be given, and what habitat stipulations will be applied.

Despite this opportunity for bargaining, Yaffee points out that the prohibitive mandate still serves an important function. It represents an absolute mandate by which to judge the Fish and Wildlife Service's performance, and gives citizens' groups the threat of litigation with which to demand compliance (p. 153).

The ESA has proven effective and its popularity has been sustained despite the uproar over the snail darter and the Tennessee Valley Authority's Tellico dam project. The bill's reauthorization in June 1982 attests to its continued support. Yaffee notes that no other piece of species-preservation legislation has succeeded in forcing agencies to consider the effects of their activities on endangered species, even when other legislation required that environmental interests be given equal status with other goals, like economic development. The prohibitive element forces parties into negotiations and limits the scope of those negotiations.

Such policy, however, is not free of problems. Yaffee warns against prohibitive mandates which demand too much too quickly. An example is the auto emission standards established in the early 1970's, which were scoffed because they were unreasonably stringent. The most significant shortcoming of pro-

hibitive policy is that it does not explicitly define a bargaining process through which outside interests can contribute their views. Thus, when agency officials make decisions, they may be responding to what has been a very limited presentation of outside perspectives. Yaffee suggests that "mechanisms that allow for explicit participation of affected groups generally should be included" (p. 162) in prohibitive legislation, even though public participation may seem inimical to the notion of prohibitve policy. Prohibitive mandates are not necessarily circumvented in doing so. Increasing access to the negotiating process reduces the risk of inappropriate decisions.

Unfortunately, Yaffee does not provide a fuller explanation of how to design a prohibitive statute with mechanisms to ensure participation by competing interests. Nor does he cite any existing examples of statutes with such mechanisms, the implication being that there are none. Because the participation of competing interests in the bargaining process is at the heart of Yaffee's support of prohibitive policy, the problem of limited access to the process warrants more attention.

Despite his failure to fully address this problem, *Prohibitive Policy* is quite thorough. It is well-documented and Yaffee effectively integrates the ESA in presenting his arguments. Yaffee's style and organization are clear and straightforward, making the book accessible to the political activist, the legislator, and the social scientist.

The book's appeal is heightened by its timeliness. Amidst the present anti-regulatory fervor, Yaffee has shown that there is a place even for as strong a form of government regulation as prohibitive policy. Such a regulatory policy is not implemented prohibitively, but instead offers unique potential for bounded but effective negotiation among competing outside interests.

Corrie Johnson

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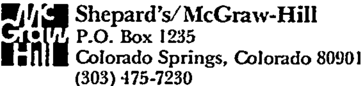

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