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ARTICLE

THE PAPERWORK REDUCTION ACT: PAPERWORK REDUCTION MEETS ADMINISTRATIVE LAW

WILLIAM F. FUNK*

In the Paperwork Reduction Act of 1980, Congress created administrative procedures aimed at decreasing federal paperwork. Building upon earlier legislation, the Act centralized in the Office of Management and Budget (OMB) the review and clearance of all federal collections of information from the general public. In addition, the Act contained a "Public Protection" provision intended to provide a means of private enforcement of the Act.

In this Article, Professor Funk reviews the legislative history and implementation of the Paperwork Reduction Act and argues that in practice the Act has severe shortcomings. He contends that, despite its title, the Act in fact provides OMB with significant power over the substantive programs of other agencies. Professor Funk also argues that notwithstanding the intent of the drafters the Public Protection provision is virtually useless. Finally, Professor Funk calls for an end to specialized legislation aimed at government paperwork. Instead, he argues, paperwork requirements should be evaluated by the same cost-benefit analysis used in reviewing all other government regulations.

Contents

* Professor of Law, Lewis and Clark Law School. B.A., Harvard University, 1967; J.D., Columbia University, 1973. This Article is based on a study prepared for the Administrative Conference of the United States. The author wishes to thank the numerous individuals who were interviewed in connection with that study, without whose memories and insight this Article could not have been written. In addition, the author wishes to thank Jeffrey Lubbers of the Administrative Conference for his support and suggestions as well as the number of people who provided valuable comments on an earlier draft of this Article submitted to the Rulemaking Committee of the Conference.

Often equated with government red tape,[1] and sometimes used as a symbol for government regulation generally, government paperwork is as ubiquitous as government itself. The eleventh law passed by the First Congress of the United States imposed a paperwork requirement, the documentation of marine vessels.[2] And the Constitution itself mandates one of the largest government paperwork requirements—the decennial census.[3]

Government paperwork has generally been defined as the government obtaining facts or opinions through the use of forms, questionnaires, reporting or recordkeeping requirements, or similar methods,[4] and has traditionally been distinguished from individually targeted information gathering, as is involved, for example, in criminal and civil investigations. Information gathering for statistical purposes is clearly encompassed within the

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[1] The original bill that became the Paperwork Reduction Act was entitled the Paperwork and Redtape Reduction Act. S. 1411, 96th Cong., 1st Sess. (1979).

[2] Act of Sept. 1, 1789, ch. 11, 1 Stat. 55 (1789). By 1980, 42 different forms were required to document a marine vessel. *See Oversight of the Paperwork Reduction Act of 1980: Hearing Before the Subcomm. on Information Management and Regulatory Affairs of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 5 (1983) (statement of Christopher DeMuth, Administrator for the Office of Information and Regulatory Affairs, Office of Management and Budget) [hereinafter 1983 *Senate Oversight Hearing*].

[3] U.S. CONST. art. I, § 2.

[4] 44 U.S.C. § 3502(3) (1982).

concept of government paperwork requirements. And while polls, studies, surveys, and censuses were once viewed as the most burdensome of paperwork requirements, today statistical information gathering is only a small percentage of government paperwork.[5] Nevertheless, many people continue to perceive them to be a substantial burden.[6]

The most burdensome form of government paperwork is tax reporting. While dissatisfaction stems in part from the subject matter, and tax forms are often extensive and difficult to fill out, tax reporting scores at the top of every study of the most onerous paperwork requirements. Another burdensome and controversial form of paperwork is that related to regulatory or compliance activities. Into this category falls the vast array of reporting and recordkeeping requirements associated with environmental, health and safety, and business regulatory activities. Some would extend the concept of government paperwork even to required product labeling and Securities and Exchange Commission registration and disclosure rules.[7]

Distinct from mandatory reporting and recordkeeping requirements such as those mentioned above, which can usually be enforced with civil or criminal penalties in the case of willful refusals,[8] are paperwork requirements that citizens must comply with in order to obtain some government benefit. Even these requirements, however, are usually mandatory if one wishes to obtain the benefit in question. Within this category are applications for various personal benefits—social security, Veterans Administration, unemployment, disability, welfare—as well as applications for government grants and paperwork associated

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[5] U.S. OFFICE OF MANAGEMENT AND BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1982 7 (1981) [hereinafter 1982 ICB].

[6] In polls reported by the Small Business Administration, censuses were viewed, after tax reporting, as constituting the greatest paperwork burden on small business. U.S. SMALL BUSINESS ADMINISTRATION, SMALL BUSINESS PAPERWORK: PROBLEMS AND PROGRESS 6 (1983). Even among larger businesses, census reporting is commonly a cause for industry to unite to oppose particular requirements. *See, e.g.*, BUSINESS ADVISORY COUNCIL ON FEDERAL REPORTS, BACF REPORT 1–2 (June 1985)(describing comments made on a proposed Energy Information Administration Manufacturing Energy Consumption Survey (MECS) Form EIA 846).

[7] Indeed, the Office of Management and Budget's [hereinafter OMB] regulations under the Paperwork Reduction Act would appear to reach so far. *See* 5 C.F.R. § 1320.7(c) (1985) (definition of "collection of information").

[8] *See, e.g.*, 13 U.S.C. §§ 221, 224 (1982) (fines for refusal to answer census questions); 26 U.S.C. § 7203 (1982) (criminal penalties for failure to file tax returns); 42 U.S.C. §6928(d) (Supp. II 1984) (criminal penalties for generators, transporters, and disposers of hazardous waste for failing to file required reports).

with government contracts. In 1981, it was estimated that almost twenty percent of the paperwork reporting burden imposed by the government was attributable to reporting or recordkeeping required to obtain or retain a benefit.[9]

Despite the inevitability of government paperwork, for almost half a century Congress has not only railed against it but also taken affirmative actions to limit or reduce it.[10] The most recent legislative action on the subject was the Paperwork Reduction Act of 1980.[11] Responding to the alleged $100 billion cost of federal paperwork[12] and the perceived inadequacies of existing law,[13] and riding a crest of public and political dissatisfaction with government bureaucracy generally,[14] Congress attempted to create a legislative scheme and administrative procedures by which unnecessary and burdensome paperwork requirements would be substantially diminished, if not eliminated.

Building upon the then-existing Federal Reports Act's concept of an independent, supervisory agency reviewing the paperwork requirements of other agencies, the Paperwork Reduction Act assigned to the Office of Management and Budget (OMB) the review and clearance of all federal collections of information from the general public.[15] Moreover, the Paperwork Reduction Act was to clarify and codify an expansive reading of the paperwork requirements covered by the Federal Reports Act, explicitly covering recordkeeping and paperwork requirements contained in regulations. To facilitate enforcement of the Paperwork Reduction Act against agencies, Congress also created a "public protection" provision to shield persons from pen-

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[9] 1982 ICB, *supra* note 5, at 6. The same document estimated that a third of the government's reporting and recordkeeping requirements, excluding the Treasury Department, were required to obtain or retain a benefit.

[10] The Federal Reports Act of 1942, Pub. L. No. 77-831, 56 Stat. 1078, was passed in 1942 and amended in 1973. Pub. L. No. 93-152, § 409, 87 Stat. 576 (1973).

[11] Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501-20 (1982)).

[12] COMMISSION OF FEDERAL PAPERWORK, FINAL SUMMARY REPORT 1 (Oct. 3, 1977) [hereinafter FINAL REPORT]. The Commission estimated that the $100 billion per year in paperwork costs were imposed as follows: on the federal government—$43 billion; on private industry—$25-32 billion; on state and local government—$5-9 billion; on individuals—$8.7 billion; on farmers—$350 million; and on labor organizations—$75 million. *Id.* at 5.

[13] *Id.* at 8-9. The FINAL REPORT specified 770 recommendations for reducing government paperwork.

[14] The presidential election of 1976, as well as that of 1980, contained a substantial anti-Washington flavor. Candidate Carter campaigned against the federal bureaucracy and when in office undertook a number of initiatives designed to improve the responsiveness and effectiveness of the bureaucracy and to reduce the burdens of government regulation and paperwork. *See, e.g., infra* text accompanying notes 122-25, 141.

[15] 44 U.S.C. § 3503 (1982).

alties imposed for failing to provide or maintain information, if the information requirement does not display a current OMB control number.[16]

The new powers granted to OMB to enable it to meet its paperwork reduction responsibilities, as well as the continuation in a new environment of certain powers created by the Federal Reports Act, have raised a number of questions. Primary among them is the institutional role of OMB as central overseer of all government information collection activities. While OMB's role as central overseer of agency regulations pursuant to presidential order[17] has been much discussed in the legal literature,[18] that role has been limited to one of reviewing and commenting

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[16] *Id.* In a further effort to reduce government paperwork burdens, Congress required OMB to set goals for the reduction of specified percentages of the existing paperwork burden, *id.* §§ 3505(1), 3505(2)(E), and required OMB to establish a Federal Information Locator System to help eliminate duplicative reporting and recordkeeping requirements. *Id.* § 3511.

In addition to the paperwork reduction aspects of the new Act, Congress included a number of provisions which might affect paperwork reduction, even though the motivation and support for these other provisions stemmed from independent concerns. Foremost among these were provisions relating to general information policy functions, statistical policy functions, records management functions, privacy functions, and federal automatic data processing and telecommunications functions. *Id.* § 3504.

This Article does not address these topics except to the limited extent that they directly intersect with paperwork reduction issues. Persons interested in these aspects of the Paperwork Reduction Act (of 1980) are advised to consult the annual reports filed by OMB under the Act; a 1983 GAO Report, IMPLEMENTING THE PAPERWORK REDUCTION ACT: SOME PROGRESS, BUT MANY PROBLEMS REMAIN, REPORT BY THE COMPTROLLER GENERAL TO THE CHAIRMAN, COMMITTEE OF GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, GAO/GGD-83-35 (1983); and *Paperwork Reduction Act Amendments of 1983: Hearings on H.R. 2718 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 98th Cong., 1st Sess. (1983). *See also* O'Reilly, *Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy*, 10 J. OF LEGIS. 95, 115–19 (1983).

Recent amendments to the Act in October 1986 mandate greater OMB attention to statistical policy, information resources policy, and the Federal Information Locator System. The amendments also realign the roles of GSA and OMB with respect to ADP purchases. *See* Pub. L. No. 99-500, Title VIII, 100 Stat. ——— (1986).

[17] Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601, at 40 (Supp. II 1984); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601, at 431 (1982) [hereinafter E.O. 12,291]; Exec. Order No. 12,044, 3 C.F.R. 152 (1978), *reprinted in* 5 U.S.C. § 553, at 70 (1976 & Supp. II 1978) [hereinafter E.O. 12,044].

[18] *See, e.g.*, Breyer, *Reforming Regulation*, 59 TULANE L. REV. 4 (1984); DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981); Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291*, 23 ARIZ. L. REV. 1235 (1981).

on regulations proposed by Executive Branch agencies.[19] Under the Paperwork Reduction Act, however, OMB's powers extend even to the so-called independent agencies[20] and, as to agencies in the Executive Branch, the Act authorizes OMB to issue binding decisions forbidding information collection activities that it deems unnecessary.[21] Given the allegations of abuse that have attended OMB review of regulations pursuant to executive orders, the implications of the Paperwork Reduction Act, where OMB's powers are even greater, deserve careful consideration.

The Act's treatment of regulations that contain information collection requirements, and the distinction drawn between such collections and those that are not contained in regulations, also deserves particular consideration. Although one of the purposes of the Paperwork Reduction Act was to eliminate an ambiguity as to whether earlier paperwork legislation encompassed regulatory information requirements, the manner in which regulations are to be treated is an issue which has haunted the implementation of the Act since its enactment.

Were information collection requirements discrete and separable from the substantive activities of agencies, the above issues might be of only academic, or at most, limited interest. In reality, however, the information requirements of a regulatory program often reflect judgments about the program itself. If OMB is to have the last word regarding information requirements,[22] this may imply the authority to exercise final judgment as to the substance of agency programs.

Despite OMB's potentially awesome powers over paperwork requirements, Congress was not confident, given past history, that OMB would vigorously enforce the requirements of the Act against agencies. Congress therefore added a public protection provision to enable the public to be a partner in that enforcement effort. That provision, however, has never been successfully invoked, raising the question whether that provision has fulfilled its promise.

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[19] E.O. 12,291, *supra* note 17, §§ 1(d), 3. As a practical matter, however, OMB can extend its review indefinitely and thereby delay indefinitely the promulgation of an agency rule.

[20] 44 U.S.C. §§ 3502(1), (10) (1982).

[21] *Id.* § 3508.

[22] With respect to independent agencies, OMB does not have the last word. By a majority vote of its members, an independent agency may override OMB's disapproval of an information collection. *Id.* § 3507(c) (1982).

The purpose of this Article is to address these questions and issues against the backdrop of the history of attempts to control government paperwork. In so doing, this Article presents a case study of the tensions involved in attempts by Congress to mandate particular executive action and the Executive's translation of that mandate into its own agenda. It also highlights certain aspects of the current wisdom regarding regulatory reform that legislators should consider carefully before enacting broad reforms in regulatory procedure.

I. BACKGROUND: THE FEDERAL REPORTS ACT

A. *The Problem Perceived: The Legislative History of the Federal Reports Act*

On May 16, 1938, President Roosevelt wrote a letter to the Central Statistical Board in which he commissioned it to study the problem of government paperwork:

> I am concerned over the large number of statistical reports which Federal agencies are requiring from business and industry . . . . I desire to know the extent of such reports and how far there is duplication among them. Accordingly, I am requesting the Central Statistical Board . . . to report to me on the statistical work of the Federal agencies, with recommendations looking toward consolidations and changes which are consistent with efficiency and economy, both to the Government and to private industry.[23]

The Central Statistical Board reported back to President Roosevelt that for the fiscal year ending June 30, 1938, agencies had collected over 135 million returns from individuals and businesses[24] and concluded that, although most of the requested information was necessary to the government, reporting should be coordinated but remain decentralized.[25]

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[23] S. REP. No. 479, 77th Cong., 1st Sess. 21–22 (1941). The Central Statistical Board later became part of the Bureau of the Budget. *Id.* at 2.

[24] *Id.* at 22–23. The Central Statistical Board broke down the information collected into 97.5 million administrative returns (including approximately 10 million income tax and informational returns), and 38 million non-administrative returns (information collected for the formulation of public policy).

[25] *See id.* at 25. Centralization was deemed unadvisable and impractical. The main argument against a centralized data-gathering agency was a perception that the disadvantages of separating statistical processes from agencies' administrative operations would outweigh any advantages. It was felt that the expertise of the administrative agency would require less information which would be used more effectively, since the information requested would be intrinsically related to the programs administered by the agency. There was also a fear that centralization of data-gathering would decrease both the accuracy and the timeliness of the information. *See, e.g.*, 91 CONG. REC. A5419 (1945) (statement of Rep. Clarence Cannon (D-Mo.)).

Partially as a result of the Central Statistical Board's study and recommendations, but probably more as a result of increased complaints from business, particularly small business,[26] Congress began to view seriously the federal paperwork burden. In 1941, after conferences between representatives of the Bureau of the Budget (BoB) and the Senate Special Committee to Study the Problems of American Small Business, the Committee reported a bill entitled The Federal Reports Act of 1941.[27] Essentially, it provided two means of coordinating reporting between the agencies. First, BoB would be empowered to direct one agency to collect information on behalf of two or more agencies. Second, BoB would be authorized to direct one agency to provide to another agency data the first agency had collected for itself.[28] This bill was referred to the Senate Committee on Education and Labor.

The outbreak of World War II, however, spawned a host of new reporting requirements which threatened to dwarf previous paperwork burdens.[29] Both the Office of Price Administration and the War Production Board were singled out as creating particularly onerous requests for information.[30] In 1942, the bill reported by the Senate Committee on Education and Labor required BoB clearance of any agency's plans or forms for the collection of information from ten or more persons, authorized BoB to make a determination whether the collection of any information by an agency was necessary for the proper performance of its functions, barred any collection of information which BoB determined unnecessary for any reason, and ex-

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[26] *See generally* S. REP. No. 479, *supra* note 23, at 2. The report includes over 120 excerpts from letters by small businessmen complaining about the paperwork burden. One businessman complained that a third of his office-labor overhead was the result of government requests for information. Another complained that his costs to fill out the various reports had increased by over 700 percent during the previous five years. A third letter complained about being "audited to death." Yet another felt that "the taxes are more or less unjustified [sic]—but to keep the records and fill out the forms [is] quite a burden." A fifth businessman wondered if anyone in Washington ever read the mountains of reports after he "burn[ed] night oil to prepare [them]." *Id.*

[27] *Id.* at 3–4.

[28] *Id.*

[29] *See, e.g.*, U.S. COMMISSION ON FEDERAL PAPERWORK, THE REPORTS CLEARANCE PROCESS 5 (1977) [hereinafter THE REPORTS CLEARANCE PROCESS].

[30] *See* 88 CONG. REC. 9158 (1942). According to one report, in 1942 the War Production Board wanted to know the exact location of all of one company's products sold since 1939. The Board requested serial numbers, sizes, and other detailed information due within five days, and supplied one page for the answers; the company returned 107 pages to Washington. Reynolds, *Bureaucratic Questionnaires Add to Troubles of War Plants*, Cedar Rapids Gazette, Dec. 6, 1942, *reprinted in* 88 CONG. REC. 9437–38 (1942).

empted the Treasury Department from the bill.[31] The Committee's report described the bill's purpose as "reducing the cost to the Government of obtaining . . . information and minimizing the burden upon business enterprises and other persons."[32]

In the House, a number of amendments were made.[33] In addition to deleting the Treasury exemption, the House exempted the General Accounting Office (GAO) from the Act[34] and provided that persons who failed to furnish information to agencies could only be subjected to the penalties provided by law.[35] The House-Senate conference committee reinstated the Treasury exemption in a somewhat narrowed form—only the Internal Revenue Service (IRS), the Comptroller of the Currency, the Bureau of the Public Debt, the Bureau of Accounts, the Division of Foreign Funds Control, and the federal bank supervisory agencies were exempted.[36] Most of the other House amendments were retained.[37] On December 24, 1942, the bill became law as the Federal Reports Act of 1942.[38]

The limited nature of the Act was generally recognized. During floor debates, Senator Arthur H. Vandenberg (R-Mich.), the majority leader, complained that the bill did not "remotely

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[31] S. REP. No. 1651, 77th Cong., 2d Sess. 2–5 (1942). Incredibly, one of the explanations for the Treasury exemption was that few of the complaints received were directed at the Treasury. To the contrary, the most cited complaint of the 120 excerpts in the Special Committee's report involved tax forms. A second justification for the Treasury exemption in the report was the need to maintain the confidentiality of tax returns. In this regard, the bill was also amended to increase the confidentiality protections of information shared by agencies. *See id.* at 4–5.

[32] *Id.* at 2.

[33] *See* 88 CONG. REC. 9164–65 (1942). The House bill, H.R. 7756, was reported in late 1942 by the House Committee on Expenditures in the Executive Departments in the same form in which the Senate bill, S. 1666, had passed the Senate, with one exception.

[34] H.R. REP. No. 2658, 77th Cong., 2d Sess. 1 (1942). The reason for the GAO exemption was GAO's need, as the investigative arm of Congress, to collect data unhampered by an executive branch clearance process. *See* 88 CONG. REC. 9163 (1942). In addition, Rep. William M. Whittington (D-Miss.), the floor manager of the bill, claimed that he was unable to find a single complaint regarding GAO information requests.

[35] This amendment was added in response to tales of agencies inventing non-monetary penalties for violations of their regulations. *See* 88 CONG. REC. 9164 (1942).

[36] H.R. REP. No. 2722, 77th Cong., 2d Sess. 6 (1942). While these exemptions were based on the need to protect the confidentiality of the information, *see* 88 CONG. REC. 9437 (1942) (statement of Rep. Whittington), it seems clear that of equal importance with respect to the IRS was the fear of interfering with the collection of taxes. *See id.* at 9158 (statement of Rep. Whittington).

[37] The other House amendment deleted by the conference was a proviso that the Act did not apply to information required by law to be reported or withheld. *See* H.R. REP. No. 2722, *supra* note 36, at 5.

[38] Pub. L. No. 77-831, 56 Stat. 1078 (1942) (codified as amended at 44 U.S.C. §§ 3501–20 (1982)).

touch[] the magnitude of the problem . . . [of] endless paperwork dictated from Washington,"[39] but he endorsed the bill as a fine start in the right direction.[40] By requiring the Director of the Bureau of the Budget to review agencies' requests to collect information, Congress hoped to abate somewhat the escalating pressures from various agencies for additional statistics, to avoid some duplicative reports, and to reduce the burden associated with large numbers of seemingly unnecessary reports.[41] Even then, however, questions were raised as to whether agencies would comply with the Act and whether some penalty against administrators for non-compliance should be included.[42]

B. *Practice Under the Federal Reports Act*

Under the Act, the BoB required each agency (other than GAO and the exempted Treasury units) seeking information from ten or more persons to submit the proposed questionnaire to the BoB's Office of Statistical Standards, accompanied by a request for clearance on its Standard Form 83.[43] The request had to include a full explanation as to how the information was to be collected, whether it was to be a one-time or repetitive requirement, the number of respondents, and who they were and how they were selected. Moreover, the request was required to contain a statement of justification, describing the situation or problem which made the collection necessary and how the data would be used. The agency was required to list the consultations it had had with interested groups and the results of the consultations. The request also had to contain an estimate of the time that would be required for a typical respondent to furnish the information.[44]

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[39] 88 CONG. REC. 9076 (1942).

[40] *See id.* at 9078. *See also id.* at 9437 (statement of Rep. Whittington).

[41] *See, e.g., id.* at 9078 (statement of Sen. Vandenberg); *see also id.* at 9159, 9161, 9165 (statement of Rep. Whittington).

[42] *See, e.g., id.* at 9436 (statements of Reps. Harry Sauthoff (Progressive-Wis.), Clare E. Hoffman (R-Mich.), Clarence J. Brown (R-Ohio)); *id.* at 9439 (statement of Rep. Leland M. Ford (R-Cal.)).

[43] Bowman, *Administration of the Federal Reports Act*, 18 ADMIN. L. REV. 109, 109–10 (1965). Later the clearance unit's name became the Statistical Policy Division. *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 19. Still later, it became the Office of Regulatory and Information Policy. *See* S. REP. NO. 930, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6248. The Standard Form 83, however, has retained its designation to this day.

[44] Bowman, *supra* note 43, at 110–11.

When the BoB received a request, the request was logged in and sent to the staff member assigned to that area of specialization.[45] In 1947, the number of professionals reviewing agency requests was forty-seven; by 1965 they numbered only twenty-five, a level which remained constant at least through the 1973 fiscal year.[46] Each of these professionals was charged with being fully informed as to all information collected by all agencies in his or her field—without the benefit of computerization or even a manual indexing system or catalog.[47]

In addition to depending on its own staff, the BoB relied heavily on outside consultation in its approval process. One source of consultation was persons in government agencies who used the type of data in question, who obtained similar data, or who for other reasons might be experts on the issues. In this way, the information request was coordinated among interested government agencies. The BoB also consulted private persons or organizations who were interested as consumers of the data or as respondents.

The primary entity for outside consultation was the Advisory Council on Federal Reports.[48] This council was formed in 1942 at the request of the then Director of the Bureau of the Budget, who asked five leading national business organizations to name representatives to a group he could call upon for advice on federal reports. While the Council itself met quarterly and considered broad questions, it formed standing committees concerned with particular industries (consisting of representatives of those industries) with which BoB could consult. In cases where a report did not fall within a standing committee's jurisdiction, ad hoc panels were formed. These consultations were, like the consultations with government personnel, informal "shirt-sleeve" sessions, usually including representatives of the

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[45] *Id.* at 111.

[46] S. REP. No. 125, 93d Cong., 1st Sess. 25 (1973). In addition to clearing requests for information, the reviewers' duties also included writing budgets for the statistical agencies, maintaining statistical standards, and developing statistical consistency at an international level. *Id.* at 21. For an overview of BoB functions, see generally Rappaport, *The Bureau of the Budget: A View from the Inside*, 101 J. ACCT. 31 (1956).

[47] S. REP. No. 125, *supra* note 46, at 26. In 1971, the responsibility for substantive review of forms to be used for regulatory or program administration purposes was shifted from the Statistical Policy Division to the budget examiners responsible for the agency involved. Given the budget examiners' other duties, they were understandably reluctant to devote much time to paperwork review. *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 23.

[48] Bowman, *supra* note 43, at 112.

agency seeking the information.[49] This friendly, if not cozy, relationship eventually led to criticism, congressional investigations, and, in 1972, enactment of the Federal Advisory Committee Act (FACA).[50] The Council was then reorganized as the Business Advisory Council on Federal Reports, an industry trade group, rather than as an advisory committee under FACA. This ended the special relationship that had existed, but did not end OMB's consultations with the group.[51]

The review given a particular request for information varied greatly.[52] Significant requests could require extensive review and a considerable length of time, which often resulted in complaints of delays.[53] While the greatest attention was given to the form and methodology of the request, with which the employees of the statistical office were expert, the office also scrutinized the need for the information and the burden caused by its collection, as required by the Federal Reports Act. It was estimated that about ten percent of the new requests for information were denied.[54] Approved reports were assigned an approval number and an expiration date, which were required to be printed on the form.[55]

For most of the post-war period, the number of approved reports remained fairly constant.[56] Even the distribution of the

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[49] *Id.* at 113.

[50] Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified; at 5 U.S.C. app. §§ 1–15). *See also* S. REP. No. 1098, 92d Cong., 2d Sess. 2, 6 (1972); *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations on S. 3067*, 91st Cong., 2d Sess. 1–2 (1970) [hereinafter *Hearings*] (statement of Sen. Lee W. Metcalf (D-Mont.)); *id.* at 209–21, 226–33 (statement of Ralph Nader). For the history behind the Federal Advisory Committee Act, see generally Levine, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217 (1973).

[51] *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 23. BoB became OMB in 1970. *See* Reorg. Plan No. 2 of 1970, *reprinted in* 5 U.S.C. app. at 1129 (1982), *and in* 84 Stat. 2085 (1970).

[52] *See* Bowman, *supra* note 43, at 115–16.

[53] *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 24. *See also Hearings*, *supra* note 50, at 209–21 (statement of Ralph Nader).

[54] Bowman, *supra* note 43, at 117. *See also* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 24.

[55] Bowman, *supra* note 43, at 115. Writing in 1965, Raymond T. Bowman described the control number and its uses:

> [The] number is a visible evidence of Budget Bureau approval and readily identifies the form with our record of review. It is a useful control device whereby we and the agencies keep track of what is approved. Moreover it is an announcement to the public that the form has been approved by the Bureau of the Budget. Many businessmen familiar with the requirements for Budget Bureau review question the status of any form which they receive without such a number.

Id.

[56] From 1959 to 1963, the number of OMB-approved repetitive surveys was "slightly

types of reports did not change greatly. Statistical reports accounted for a little more than a quarter of the forms, application forms for a little less than a quarter, program evaluation and other management reports about forty percent, and regulatory reports less than ten percent.[57]

While the clearance process had only been one part of the Federal Reports Act, it was the part that always received the greatest attention both from within and without BoB (and later OMB). In the earliest years, however, BoB achieved some remarkable results under its coordinating function by developing uniform standards.[58] For example, the Standard Industrial Classification (SIC) codes, which are today the basic taxonomy of commercial activity, were adopted under BoB tutelage.[59]

C. *Inadequacies and the Regulatory Agencies*

Over the years, certain congressional committees periodically held hearings and issued reports complaining that either the Federal Reports Act was inadequate or that BoB (and later OMB) was not adequately enforcing the Act. In 1965, a House Post Office and Civil Service subcommittee remarked that "the Federal Reports Act, as presently administered, fully serves the interests of neither the Government nor the public."[60] The subcommittee recommended that "loopholes which have been exploited by the Federal agencies during the past 23 years" be plugged,[61] and exemptions for fiscal and banking agencies be repealed, in order to bring all commissions, presidential committees, and regulatory agencies under the Act.[62]

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more than 5000." Bowman, *supra* note 43, at 124. In 1977 the number was 4753. *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 19. At this time, GAO reviewed the reports of independent regulatory agencies. GAO reported that it had 470 such reports on file in 1976. *Id.* at 32. The burden was not consistent. In 1965 the total burden of repetitive reports was estimated to be 95 million hours. *See* Bowman, *supra* note 43, at 126. By 1977, the report forms in OMB's inventory (which did not include the forms used by independent regulatory agencies) were estimated to involve 134 million burden hours. THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 19. None of these numbers include the Internal Revenue Service's tax forms. They also do not include procurement forms.

[57] *Compare* Bowman, *supra* note 43, at 125 *with* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 19, 32.

[58] *See* BUREAU OF THE BUDGET, CENTRALIZATION AND COORDINATION OF FEDERAL STATISTICS, *reprinted in* 91 CONG. REC. A5420–23 (1945).

[59] *See id.* at A5423.

[60] THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 41.

[61] *Id.*

[62] *Id.* at 41–42.

In 1972, the Senate Select Committee on Small Business concluded there was "an indifference of OMB officials towards their basic responsibilities . . . . Since only a relative handful (between one and five percent) of forms [were] disapproved, [the] committee [could] only conclude that hundreds of unnecessary or duplicative forms [were] being imposed on the public."[63] The Committee further concluded that OMB, being so far removed from small business, was unaware of the problems these businesses faced. The Committee also believed that OMB incompetently adapted data requests to respondents' records,[64] consistently lacked initiative in pursuing the directives of the Act,[65] and refused to adequately staff or equip the office responsible for carrying out the Act.[66] The Committee then recommended that Congress transfer authority for administering the Act from OMB to the GAO.[67] Complaints of inadequate enforcement were buttressed by the refusal of certain agencies, among them the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), to submit regulatory reporting to OMB for clearance.[68]

These charges of inadequacy, however, contrasted sharply with complaints that OMB was preventing the regulatory agencies from fulfilling their statutory functions.[69] The uneasy relationship between OMB and the Advisory Council on Federal Reports fueled this criticism.[70] On the one hand, the sometimes lengthy clearance process led to delay. Ralph Nader and Professor William Rogers catalogued OMB's role in delaying approval and then representing industry's position with respect to information collections in the areas of pollution control, gas pipeline regulation, and highway safety.[71] On the other hand, OMB's review of the need for the information, even though clearly authorized by the Act, seemed to infringe upon the regulatory agencies' statutory duty. The FTC, for example, claimed that its ability to study concentration in industries was

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[63] S. REP. No. 125, *supra* note 46, at 25–26.
[64] *Id.* at 30.
[65] *Id.* at 34.
[66] *Id.* at 60.
[67] *Id.* at 63.
[68] *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 43.
[69] *See id.*
[70] *See Hearings*, *supra* note 50.
[71] *Id.*

stymied by OMB's refusal to grant FTC requests for information.[72]

These latter complaints came to a head with the first Arab oil embargo in late 1973. The FTC and the Federal Power Commission (FPC) had not completed investigations into the oil and gas industries, and many blamed OMB and the Advisory Council on Federal Reports.[73] As a result, Congress adopted an amendment to the Act, exempting independent regulatory agencies from OMB oversight.[74] The amendment transferred from OMB to GAO the responsibility for reviewing these agencies' reporting requirements for duplication and unnecessary burden, but not the authority to review the agencies' need for the information. As a precondition for the collection of information, the new provision required independent regulatory agencies to submit their plans or forms to GAO and to receive GAO's "advice" that the information was not already available within the government and that the compliance burden was minimized.[75] GAO was required to render this advice within forty-five days of request.[76]

While this amendment was a victory for those who had viewed OMB as doing too much under the Federal Reports Act, those who felt too little was being done had their victory the following year. Late in 1974, Congress established a Commission on Federal Paperwork and directed it to study and report what changes should be made in laws, regulations, and procedures to assure

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[72] 119 CONG. REC. 23,883 (1973) (statement of Sen. Philip A. Hart (D-Mich.)).

[73] *See id.*

[74] Pub. L. No. 93-152, § 409, 87 Stat. 576 (1973) (codified at 44 U.S.C. § 3512 (1976)). This amendment was added to the Trans-Alaska Pipeline Authorization Act on the Senate floor, linked to another floor amendment to strengthen the FTC's subpoena power. *See* 119 CONG. REC. 23,883–87, 24,084–86 (1973). The conference committee accepted the provision, but the House members questioned its wisdom. *See, e.g., id.* at 36,604 (statement of Rep. Harold E. Collier (R-Ill.)), 36,604–05 (statement of Rep. Frank Horton (R-N.Y.)). Rep. Horton, a leader in criticizing the OMB for its failure to reduce reporting, said "I have never been told that the present system allows too few requests for information." *Id. See also id.* at 36,610–11 (statement of Rep. Bill Frenzel (R-Minn.)). *But see id.* at 36,609–10 (statement of Rep. Harold T. Johnson (D-Cal.)), 36,616 (statement of Rep. Elizabeth Holtzman (D-N.Y.)), 36,616–17 (statement of Rep. Michael Harrington (D-Mass.)). OMB objected, GAO had doubts, and even the FTC said the Federal Reports Act change was not significant. *See id.* at 36,605, 36,610. What carried the day, however, was the perceived need to authorize the Trans-Alaska pipeline as soon as possible and the recognition that recommitting of the entire bill merely on account of the Federal Reports Act amendment would delay the bill for another year. *See id.* at 36,605–06 (statement of Rep. Morris Udall (D-Ariz.)).

[75] 44 U.S.C. § 3512(c) (1976).

[76] *Id.* The Act contained no time limitation for OMB's review.

that necessary information was obtained by the government with minimal burden, duplication, and cost.[77]

D. *Judicial Review and the Federal Reports Act*

For its first thirty years, the Federal Reports Act escaped judicial review. This period of dormancy ended with the famous line of cases challenging the FTC's line of business reports (LB reports). Since 1970, the FTC had apparently been half-heartedly seeking approval from OMB to undertake a broad-scale inquiry to determine areas of the economy in which profits were excessively high or low and to assess the relationships between market structure and financial performance.[78] This information, it was hoped, would be valuable in identifying areas of the economy where antitrust actions should be brought. These LB reports were conceived to be annual reports filed by 500 large manufacturing corporations, representing seventy percent of the nation's manufacturing capacity.[79] The FTC would seek the financial data from each company according to a uniform accounting system developed by the FTC and based upon OMB's Standard Industrial Classification codes. This was to ensure that the data would be aggregated according to neutral, uniform classifications, rather than historical accident or managerial preferences that defined each company's own accounting classifications. Because firms did not maintain their financial data on the basis of the FTC classifications, each company would have to reclassify its financial data according to the FTC system in order to complete the report. While the FTC estimated the median cost of reclassification per firm to be $50,000, five corporations submitted estimates that indicated the cost to each would be over $1 million.[80]

OMB's delay in approving this report was one of the motivating factors behind the amendment to the Federal Reports Act that eliminated OMB review of independent agencies' reports.[81] After the amendment, the FTC submitted the LB report form to GAO for its review. Within two months, GAO completed its

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[77] *See* Pub. L. No. 93-556, 88 Stat. 1789 (1974) (codified at 44 U.S.C. § 3501 (1982)).

[78] *See* 119 CONG. REC. 23,883 (1973) (statement of Sen. Philip A. Hart).

[79] A.O. Smith Corp. v. FTC, 396 F. Supp. 1108, 1110 n.1 (D. Del. 1975), *prelim. injunction vacated*, 530 F.2d 515 (3d Cir. 1976).

[80] 396 F. Supp. at 1118.

[81] *See* 119 CONG. REC. 23,883 (1973) (statement of Sen. Hart).

review of the report.[82] This review, however, included a conclusion by the GAO staff that the data generated by the LB reports would "be unreliable at best, and may be seriously misleading."[83]

The LB report was challenged by respondents in several district courts on various grounds. In *A.O. Smith Corp. v. FTC*,[84] the plaintiffs sought a preliminary injunction against the reporting requirement on, inter alia, the ground that the Comptroller General of the GAO had erred in approving the report. The court found, however, that the plaintiffs had no substantial probability for success on this ground. Instead, the court found that the FTC's requirement for firms to submit an LB report was a "rule" under the Administrative Procedure Act (APA).[85] Because adoption of this requirement had not followed APA rulemaking procedures, the court preliminarily enjoined the enforcement of the reporting requirement.[86] This decision was reversed by the Third Circuit on the ground that plaintiffs had failed to show irreparable harm.[87]

By now, however, it was time for the next LB report. The FTC revised the reporting requirement and submitted it to GAO for clearance in July 1975. GAO reviewed and cleared the LB report form within forty-five days. Thereafter, orders were served on 450 firms to complete the reports. When various firms failed to report, the FTC sought enforcement of the orders in district court.[88] The respondents defended on the basis that the LB report orders were issued in violation of the rulemaking requirements of the APA and were further invalid because the Comptroller General's approval was in error.[89] The court found that the LB report order was not a rule under the APA, but rather an investigative act, for which the APA does not define

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[82] *See* A.O. Smith Corp. v. FTC, 396 F. Supp. at 1111.
[83] *Id.* at 1118.
[84] 396 F. Supp. 1108 (D. Del. 1985).
[85] *Id.* at 1119, 1121–24.
[86] *Id.* at 1112, 1125.
[87] A.O. Smith Corp. v. FTC, 530 F.2d at 525–29.
[88] *In re* FTC Corporate Patterns Report Litig., 432 F. Supp. 291, 301–04 (D.D.C. 1977), *aff'd sub nom.* Appeal of FTC Line of Business Report Litig., 595 F.2d 685, 692–93 (D.C. Cir. 1978) (per curiam), *cert. denied sub nom.* Milliken & Co. v. FTC, 439 U.S. 958 (1978). This case also involved challenges to the Corporate Patterns Report form, which was to be used by the FTC for a similar industry survey, but which was aimed at over 1100 large manufacturing firms. *In re* FTC Corporate Patterns Report Litig., 432 F. Supp. at 298.
[89] *Id.* at 298–99.

any particular procedure.[90] This determination was upheld by the court of appeals.[91]

With respect to the Comptroller General's approval, the first issue was whether it could be reviewed at all. The FTC maintained that because the Comptroller General's decision was only "advice" under the Federal Reports Act, the decision was committed to agency discretion by law and therefore unreviewable.[92] The court rejected this argument because the Federal Reports Act "clearly sets forth two criteria under which the Comptroller is to make his review: avoiding unnecessary duplication and minimizing compliance burden."[93] That the Act characterized the communication of these findings, which were a prerequisite to the agency collection of information, as "advice," did not alter the fact that there was law to apply.[94] Having determined that the Comptroller General's review was itself reviewable, the court addressed the defendants' claim that the Comptroller General had erred in approving the LB report form. This claim stemmed from the language in the Act that "the Comptroller General shall determine . . . the appropriateness of the forms for the collection of such information."[95] This language, the firms said, required the Comptroller General to make a cost-benefit determination as to the appropriateness of the forms for their intended purpose.[96] The court rejected this interpretation as inconsistent with the legislative history which exempted independent agencies from just that sort of review. Rather, the "appropriateness of the forms" was read as a short-hand reference to the burden of reporting inquiry.[97]

The defendants also claimed that the Comptroller General's approval was arbitrary and capricious, because the clearance letter had acknowledged that the burden problems of the 1973 LB report were "still incompletely resolved" in the 1974 form, and that "a rather long test period of data collection and analysis

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[90] *Id.* at 301–04.

[91] Appeal of FTC Line of Business Report Litig., 595 F.2d at 693–96.

[92] *In re* FTC Corporate Patterns Report Litig., 392 F. Supp. at 307. Two district courts in dictum had accepted this argument from the FTC in earlier LB report litigation. *See* General Electric Co. v. FTC, 411 F. Supp. 1004, 1006 (N.D.N.Y. 1976); Westinghouse Electric Corp. v. FTC, 1976-1 Trade Cas. (CCH) ¶ 60,871 (S.D. Ohio 1976).

[93] *In re* FTC Corporate Patterns Report Litig., 432 F. Supp. at 307–08 (relying on Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)).

[94] *Id.*

[95] 44 U.S.C. § 3512(d) (1976).

[96] *In re* FTC Corporate Patterns Report Litig., 432 F. Supp. at 308.

[97] *Id.*

will be required to fully reconcile FTC's data needs with minimum burden."[98] The court rejected this claim as well. While the court did not subject the Comptroller General's determination to searching scrutiny, it found that he had considered and rejected defendants' claims of undue burden before approving the form.[99] This rejection, in light of the FTC's efforts to improve the form and the limited time available for his review, was not unreasonable.[100] On appeal, the defendants raised only the "appropriateness" claim, which was rejected by the court of appeals on the same basis as the court below.[101]

Despite the defendants' lack of success on the merits, Federal Reports Act claims continued to be brought. In *FTC v. Rockefeller*,[102] several banks defended against FTC subpoenas in part on the basis that they had not been approved by the GAO. The court held that subpoenas were not the collection of "information" as defined in the Act.[103] The FTC was not the only agency so afflicted. The Federal Power Commission (FPC) also had its reporting requirements challenged under the Federal Reports Act.[104] Later the Department of Energy (DOE) found its reporting and recordkeeping requirements challenged.[105] In *Shell Oil Co. v. DOE*,[106] several energy producing companies chal-

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[98] *Id.* at 309, 311.

[99] *Id.*

[100] *Id.* at 309–11. The court also rejected a claim that GAO's approval was procedurally flawed because it had violated its own regulations in approving the forms.

[101] Appeal of FTC Line of Business Report Litig., 595 F.2d at 708–10.

[102] 441 F. Supp. 234 (S.D.N.Y. 1977).

[103] *Id.* at 243–44. *See also* FTC v. Carter, 464 F. Supp. 633, 642 (D.D.C. 1979).

[104] *See* Superior Oil Co. v. FERC, 563 F.2d 191 (5th Cir. 1977). In this case, the FPC had adopted a report form by rulemaking, and the report form had been approved by GAO. Respondents claimed, however, that the FPC had announced it would not resubmit the form annually as required by GAO. The court rejected the claim on the basis that the FPC's announcement was meant simply to streamline pre-clearance procedure. *Id.* at 202–03. *See also* Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976). In this case, the court set aside a report form adopted by rulemaking. The court found unsupported by substantial evidence the premise that the need for the information outweighed the burden its collection placed on industry. Interestingly, the FPC defended in part on the basis that this was a determination for GAO, which had approved the collection. The court rejected this claim, pointing out that the determination of need and the ultimate question whether to collect the information rested on the collecting agency, not on GAO. *See* 542 F.2d. at 1043.

[105] *See* Shell Oil Co. v. DOE, 477 F. Supp. 413 (D. Del. 1979), *aff'd* 631 F.2d 231 (3d Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 1024 (1981). *See also* Olympian Oil v. Schlesinger, [1974–80 Binder] Energy Mgmt. (CCH) (N.D. Cal. March 1, 1979) ¶ 26,140 (DOE recordkeeping requirement contained in regulation challenged on basis that it was not approved by OMB or GAO; summary judgment for DOE denied because, while regulation itself might not require approval under Federal Reports Act, implementing documents might).

[106] 477 F. Supp. 413.

lenged the Financial Reporting System of the Energy Information Administration (EIA), a component of DOE. This reporting program required the submission of substantial financial and operational data for the years 1977 and 1978. Although limited to energy producing companies, the report was similar to the FTC LB report form and raised similar problems for the companies involved. In addition, EIA explicitly stated its willingness to provide disaggregated (company-specific) data to other agencies, such as the FTC and the Antitrust Division of the Department of Justice. The respondents challenged the report form on a number of grounds, including the claimed invalidity of the report's clearance by OMB.[107] The court rejected DOE's arguments that OMB's review was committed to agency discretion by law, citing *A.O. Smith Corp.*[108] and *In re FTC Corp. Patterns Litigation.*[109] On the merits, the court assessed whether OMB's approval had been arbitrary and capricious. It had little difficulty concluding that the approval was reasonable, but the court did subject OMB's decision to some scrutiny, including OMB's conclusion that the need for the information warranted the burden and cost involved.[110] On appeal, the respondents apparently did not even raise the Federal Reports Act claims.[111]

Not only had it taken a long time to discover the Federal Reports Act as a possible means to challenge reporting or recordkeeping requirements, but also its zero success rate suggested that such challenges would not remain as a standard weapon in the arsenal of industry lawyers. Nevertheless, the willingness of courts to review GAO and OMB determinations on the merits at least held out the hope of judicial invalidation of a reporting or recordkeeping requirement in an egregious case. Before that case appeared, however, the Federal Reports Act was replaced by the Paperwork Reduction Act.

II. The Paperwork Commission

In 1974, responding to continuing constituent complaints about paperwork burdens and to already perceived difficulties

[107] *See id.* at 428. The respondents asserted that GAO rather than OMB should have reviewed the form. The court found, however, that while the term "independent regulatory agency" was not defined in the Act, the history of the amendment indicated that only regulatory agencies with quasi-judicial functions were intended to be exempted from OMB review. Because EIA had no such functions, OMB was the proper entity to review the report form.

[108] 396 F. Supp. 1108 (D. Del. 1985).

[109] 432 F. Supp. 291 (D.D.C. 1977).

[110] *See Shell Oil*, 477 F. Supp. at 429–30.

[111] *See Shell Oil*, 631 F.2d at 232–33.

with GAO's role as overseer of the regulatory agencies, Congress created the Commission on Federal Paperwork.[112] The Commission's charter required it to make a number of studies to determine the nature of the federal paperwork problem and to make recommendations for changes in statutes, rules, regulations, procedures, and practices.[113] The final report was to be submitted within two years of the Commission's first meeting.[114]

On October 3, 1977, the Commission submitted its final report, summarizing the findings from thirty-six previously issued specialized reports, which included no less than 770 recommendations.[115] Many of these recommendations related to specific reporting or recordkeeping requirements identified in the course of the Commission's investigations. Many more involved easy, non-controversial administrative or procedural changes, so that by the time of writing the summary report, the Commission could claim that almost half of the 770 recommendations contained in the specialized studies had already been adopted.[116]

Its findings at the general level produced no surprises. Seven key causes of bad paperwork, defined as duplicative, excessive, costly, contradictory, intimidating, or confusing[117] were identified: lack of communication between government and those subject to the paperwork requirements; bureaucratic insensitivity to the problems paperwork causes; incomprehensible forms and instructions; overlapping organizations requiring the same or similar information; poor program design; poor information practices leading to unnecessary paperwork requirements; and inconsistent and ineffective confidentiality policies creating con-

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[112] Pub. L. No. 93-556, 88 Stat. 1789 (1974), 44 U.S.C. § 3501 note (1976) (eliminated in 1982 U.S.C.).

[113] *Id.* § 3, 88 Stat. at 1789–90.

[114] *Id.*

[115] FINAL REPORT, *supra* note 12.

[116] *Id.* at 1. Under the legislation creating the Paperwork Commission, OMB was required to monitor and report on executive agencies' actions in response to Commission recommendations. This was done in three reports: U.S. OFFICE OF MANAGEMENT AND BUDGET, PAPERWORK AND RED TAPE: NEW PERSPECTIVES, NEW DIRECTIONS (Reports to The President and Congress, June 1978, October 1978, and September 1979). The Paperwork Reduction Act specifically required the Director of OMB to "complete action on recommendations of the Commission," 44 U.S.C. § 3505(3)(D) (1982), and this requirement spawned an additional and final report on the recommendations. U.S. OFFICE OF MANAGEMENT AND BUDGET, FEDERAL INFORMATION COLLECTION: AGENCY ACTIONS ON COMMISSION ON FEDERAL PAPERWORK RECOMMENDATIONS, Vol. I (Multi-agency Recommendations) December 1980, Vol. II (Recommendations to Departments) March 1982, Vol. III (Recommendations to Independent Agencies and the Office of Management and Budget) January 1983.

[117] FINAL REPORT, *supra* note 12, at 12.

fusion and mistrust.[118] The Commission also described several failures of the existing system of control: legislation and regulations were drafted with little consideration of the paperwork consequences; controls had only been established over the forms themselves, not over the reason the forms existed; the controls in existence had been designed to control statistical paperwork, rather than program management and operation which constituted the vast bulk of federal paperwork; existing controls were spread among a number of different agencies; and there was no central listing of what information was being collected by the government.[119]

Many of the Commission recommendations read like old texts for good government. Congress should consider paperwork consequences at each stage of the legislative process; agencies should give interested persons a full opportunity to participate in the rulemaking process; and everyone should engage in more planning.[120] However, one recommendation reflected the increasingly popular attempt to import economic concepts into political organization and management. Information should not be treated as a free good, but as a scarce resource. The government should manage information just as it manages financial, material, and human resources.[121] It followed that there should be a federal budget for this resource.

III. The Information Collection Budget

President Carter launched the budget concept in 1979. By executive order, he required each agency in the Executive Branch to prepare an annual paperwork budget.[122] Rather than dollars, the budget would use what had become the standard

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[118] *Id.* at 6–8.
[119] *Id.* at 8–9.
[120] *Id.* at 15–16.
[121] *Id.* at 16, 56, 63.
[122] Exec. Order No. 12,174, 3 C.F.R. 462 (1979), *reprinted in* 5 U.S.C. § 552 note (Supp. III 1979)(eliminated in 1982 U.S.C.) [hereinafter E.O. 12,174]. Actually, many of the features of a budget for paperwork had been introduced earlier in the Carter Administration. OMB had already mandated across-the-board percentage reductions in paperwork requests by establishing ceilings and allocating them to the executive agencies. *See generally* The Reports Clearance Process, *supra* note 29, at 13–14. Nevertheless, in 1981 the Director of OMB referred to the Federal Information Collection Budget for Fiscal Year 1981 as the "first paperwork budget." U.S. Office of Management and Budget, Information Collection Budget of the United States Government: Fiscal Year 1981 (memorandum of transmittal from James T. McIntyre, Jr. to the President, Jan. 13, 1981) [hereinafter 1981 ICB].

measuring tool under the Federal Reports Act—burden hours. Burden hours were simply the number of hours it took to comply with a particular request for information multiplied by the number of persons subject to that request. Each agency would submit its proposed budget to OMB, specifying the information requests the agency planned to use in the following fiscal year. The Director of OMB was to review and was authorized to modify the proposed budget. An agency could exceed its budget only upon further OMB approval.[123]

A budget approach was particularly useful to OMB for a number of reasons. First, the clearance process for individual information requests had required OMB to focus on the trees, failing to see the forest. An annual review of the entire mass of federal information requests, while presenting its own difficulties, provided a valuable perspective on federal paperwork requirements. Second, because the President was invoking his general constitutional authority to coordinate executive action,[124] he was able to include in the budget those executive agencies that avoided OMB review under the Federal Reports Act, notably the Treasury Department. Third, as OMB had already learned, a budget was a useful tool in forcing general reductions in agency paperwork requirements.[125]

Reducing paperwork was the name of the game. President Ford had set a goal in 1976 of reducing by ten percent the number of reports requested from the public.[126] This goal was exceeded, but the burden hours associated with the remaining

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[123] E.O. 12,174, *supra* note 122. In addition to requiring an annual paperwork budget, the Order required agencies to review all requests for information within two years of their initial issuance and at least every five years thereafter. The Director of OMB was further required to establish a federal information locator system, which would list all the types of information collected by the various agencies. The Paperwork Commission had recommended such a system as a means by which to avoid agencies duplicating each others' information requests. *See* FINAL REPORT, *supra* note 12, at 17. Finally, the Order required the Director of OMB to publish an annual paperwork calendar of significant requests for information.

OMB issued a proposed rule to implement the Order, as well as to strengthen its controls over agencies under the Federal Reports Act. Controlling Paperwork Burdens on the Public, 45 Fed. Reg. 2586 (1980) (proposed Jan. 11, 1980). The proposed rule was never adopted and was replaced with a new proposed rule after passage of the Paperwork Reduction Act. Controlling Paperwork Burdens on the Public, 47 Fed. Reg. 39,515 (1982) (proposed Sept. 8, 1982) (codified at 5 C.F.R. pt. 1320).

[124] E.O. 12,174, *supra* note 122.

[125] OMB's use of ceilings for one-time and repetitive reports to be allocated among the agencies, *see supra* note 122, had been critical to the administration's claimed 15% reduction in government paperwork in two years. *See* Federal Paperwork Reduction: Remarks on Signing Exec. Order No. 12,174, 1979 PUB. PAPERS 2176 (Nov. 30, 1979).

[126] THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 11.

reports actually increased by four percent.[127] While this increase was the result of two new federal programs (HUD's Uniform Settlement Statement and the Employee Retirement Income Security Act), the Paperwork Commission concluded that even with respect to the already existing programs there had been little reduction in real burden.[128] The Carter Administration built upon the framework of the Ford program, affirming the five percent goal it had set for 1977.[129] By 1979, President Carter could claim a fifteen percent reduction in burden hours under his administration.[130] For fiscal year 1981 the first paperwork budget, officially denominated the Information Collection Budget (ICB), set a goal of a further reduction of almost four percent.[131]

The Paperwork Reduction Act does not specify any budget for government paperwork or even mandate a budget process.[132]

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[127] *Id.*

[128] *Id.* at 12.

[129] *Id.* at 13.

[130] Federal Paperwork Reduction: Remarks on Signing Exec. Order No. 12,174, 1979 PUB. PAPERS 2176 (Nov. 30, 1979).

[131] *See* 1981 ICB, *supra* note 122, at 1. The mathematics of burden reduction are fascinating. President Carter's 15% reduction between 1977 and 1979 would have reduced paperwork burden to 720 million burden hours from a base of 847 million burden hours. Federal Paperwork Reduction: Message to Congress, 1979 PUB. PAPERS 2180, 2181 (Nov. 30, 1979). In 1981, however, OMB stated that in fiscal year 1980 "[a]gencies subject to the information collection budget imposed a paperwork burden of 1,276 million hours on the public." 1981 ICB, *supra* note 122, at 1. Thus, despite claims of reductions, the admitted burden hours had increased during the Carter Administration by 50%. Similarly, the Reagan Administration, while claiming to have surpassed the Paperwork Reduction Act's 25% reduction goal for its first two years, has watched its burden hours increase from 1,534 million hours at the end of FY 1981 to 1,924 million hours for FY 1985. U.S. OFFICE OF MANAGEMENT AND BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1985 [hereinafter 1985 ICB]. While there are logical explanations for these apparent anomalies, there is an element of comedy in a system that annually reports reductions in paperwork but over time reports consistently increasing burden hours.

One explanation for this seeming anomaly is the practice of recomputing existing paperwork burden at the end of each year and only measuring reductions in future years against that recomputed base figure. For example, in FY 1984, OMB first included the great mass of agency procurement paperwork in its calculation of the existing paperwork burden. This inclusion resulted in the addition of hundreds of millions of burden hours to the base figure, even though this did not reflect any actual increase in paperwork. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1984 17–18 [hereinafter 1984 ICB]. Past years' reported percentage reductions, however, were not recomputed in light of the substantially increased base figure. Thus, each year's "year-end adjustments" can result in increased base figures to be used for setting percentage reductions in the following year, but not in correcting the past years' reported reductions.

[132] The absence of express statutory authority for a paperwork budget under the Paperwork Reduction Act has led some to question the lawfulness of the budget process. *See Paperwork Reduction Act Amendments of 1984: Hearings on S. 2433 Before the Subcomm. on Information Management and Regulatory Affairs of the Senate Comm.*

Nevertheless, OMB has continued the ICB as a principal mechanism by which OMB fulfills its responsibilities under the Act to establish general policies and procedures for controlling information collections.[133] As described by OMB, the process for establishing the ICB is similar to the process for determining the fiscal budget.[134] Each year, agencies submit to OMB a proposed budget describing all collections of information the agency proposes to impose on the public during the new fiscal year, including the agencies' best estimate of the burden hours involved in the collections. OMB reviews each submission and holds meetings with agencies until a final budget is completed. Under OMB's regulations, an agency then cannot impose any collection not included in the budget unless the agency provides for an offsetting reduction or obtains a supplemental authorization from OMB.[135] OMB publishes the ICB annually, describing the past year's reductions and the present year's paperwork budget for the government.

Both OMB and the agencies agree that the ICB is a potent force for reducing the reported burden hours involved in information collections.[136] Many agencies complain, however, that the meat-ax approach used by OMB in the ICB can result in inappropriate reductions or counterproductive trade-offs.[137] That is, an agency may feel forced by OMB's ceiling to eliminate a reporting requirement it believes to be very important, only because it believes other requirements are even more important. Moreover, in these circumstances internal bureaucratic power, rather than the merits of competing collections, may play a greater role in a decision to retain one collection rather than another. An agency may even go so far as to substitute a more costly procedure, such as on-site inspections of a facility, for a cheaper reporting requirement, because the substitute procedure does not count toward its ICB.[138] Because OMB's ceilings are viewed as essentially arbitrary (or political), where agencies

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on Governmental Affairs, 98th Cong., 2d Sess. at 240 (1984) (Memorandum of Law by the Public Citizen Litigation Group).

[133] 1985 ICB, *supra* note 131, at 2. *See also* 5 C.F.R. § 1320.10 (1986) (OMB regulation on ICB).

[134] 1985 ICB, *supra* note 131, at 2.

[135] 5 C.F.R. § 1320.10 (1986).

[136] Anonymous interviews with a number of paperwork personnel in executive agencies.

[137] *Id.*

[138] *Id.*

believe these ceilings interfere with their programs, there is substantial question as to the net benefits of the ICB.

OMB understandably denies the negative effects of the ICB and asserts that the problems faced by the agencies are no different from those faced in the fiscal budget process.[139] While there is substantial truth in this observation, one major difference exists between the fiscal budget process and the ICB process. The final OMB fiscal budget is merely a proposal to Congress; it is not the last word. The ICB is the final word. The absence of inevitable and continuing congressional oversight of the ICB suggests that OMB should be somewhat more solicitous of agency concerns in the development of the ICB. As a practical matter, however, the absence of meaningful congressional oversight is likely to result in OMB being less solicitous of agency views.

IV. The Paperwork Reduction Act

A. *Legislative History*

In 1977, with the publication of the Final Report of the Paperwork Commission, Congress did not rush to legislate the recommendations made by the Commission. Rather, the interested members of Congress, especially Representative Frank Horton (R-N.Y.) and Senator Thomas McIntyre (D-N.H.), the Chairman and Co-Chairman of the Commission, together with Senator Lawton Chiles (D-Fla.), focused on congressional oversight of OMB's activities as a means of implementing the Commission's recommendations.[140] Furthermore, paperwork reform was only one of a number of administrative reforms afoot in the Administration and Congress.

President Carter had come to Washington in part by running against the bureaucracy. A centerpiece of his reform, Executive Order 12,044, promulgated in March 1978, required executive agencies to use cost-benefit analyses in justifying regulations; to minimize paperwork burdens on the public; and before adopt-

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[139] Interview with Nell Minow, special assistant to the Administrator of Office of Information and Regulatory Affairs, in Washington, D.C. (June 17, 1985).

[140] *See Efforts to Reduce Federal Paperwork Burdens: Hearing Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs* 95th Cong., 2d Sess. (1978).

ing any significant regulations, to estimate the reporting and recordkeeping requirements necessary for compliance.[141]

Administrative reform was also popular in Congress. The bill that became the Regulatory Flexibility Act was first passed in the Senate in 1978.[142] Sunset legislation was in vogue as well.[143] By 1979, both the Executive and Congress had launched major reform initiatives.[144] In March the administration unveiled its regulatory reform bill, essentially extending E.O. 12,044 to all agencies.[145] Also in March, Representatives Frank Horton and Jack Brooks (D-Tex.) introduced H.R. 3570, the Paperwork and Redtape Reduction Act of 1979. In June, Senators Chiles, John Danforth (R-Mo.), and Lloyd Bentsen (D-Tex.) introduced a companion bill, S. 1411, and a hearing was held on November 1.[146] Later that month, President Carter issued his executive order on paperwork reduction[147] and, in the statement that accompanied it, specifically endorsed Senator Chiles' legislation.[148]

In February 1980, Representatives Brooks and Horton introduced H.R. 6410 in the House as a new companion measure to S. 1411. Hearings were quickly held.[149] The House Committee on Government Operations, chaired by Represenatative Brooks, amended the bill to include a number of provisions relating to automatic data processing (ADP) and telecommunications technologies, matters of special interest to Representative Brooks.[150] The Committee unanimously reported the bill, as amended, in early March,[151] and on March 24, the House passed H.R. 6410 without any member speaking against it.[152] The marriage of

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[141] E.O. 12,044, *supra* note 17, at §§ 1(e), 2(d)(6).

[142] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601–12 (1982)) (requires federal agencies to consider the impact of proposed regulations on small businesses, organizations, and governmental entities).

[143] *See, e.g.*, S. REP. No. 981, 95th Cong., 2d Sess. (1978); S. REP. No. 326, 95th Cong., 1st Sess. (1977).

[144] *See generally Increasing Attention Focused on Regulatory Reform Plans*, 37 CONG. Q. WEEKLY REP. 560–63 (Mar. 31, 1979).

[145] *See* S. 755, 96th Cong., 1st Sess., 125 CONG. REC. 6152–59 (1979); and H.R. 3263, 96th Cong., 1st Sess., 125 CONG. REC. 6326–28 (1979) (summary).

[146] *Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. (1979).

[147] E.O. 12,174, *supra* note 122.

[148] Remarks on Signing Executive Order 12,174, 1979 PUB. PAPERS 2176.

[149] *See Paperwork Reduction Act of 1980: Hearings before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. (1980).

[150] *See* H.R. REP. No. 835, 96th Cong., 2d Sess. (1980).

[151] *Id.*

[152] 126 CONG. REC. 6212–14 (1980).

paperwork reduction, dear to Representative Horton, and ADP, a subject of special concern to Representative Brooks, gave the bill momentum at a time when other reform measures were losing support.

In the Senate, the Governmental Affairs Committee, to which H.R. 6410 was referred, reported S. 1411 in August in a form very similar to H.R. 6410.[153] One problem surfaced in committee. Several senators were concerned about the impact of the ADP amendments on defense and intelligence agencies.[154] The principals agreed, therefore, to support a floor amendment to delete the bill's coverage of ADP with respect to defense command-and-control and intelligence systems.[155]

A last snag developed when Senator Edward Kennedy's (D-Mass.) staff discovered the bill's implications for reporting and recordkeeping requirements contained in agency regulations.[156] As drafted, the bill appeared to require OMB's approval before any reporting or recordkeeping regulation could become effective, and this approval was limited to a maximum of three years. Senator Kennedy's staff feared that an OMB hostile to a regulatory program would be able to effectively repeal a regulation adopted after notice and comment without any public process.[157] This fear intensified with Ronald Reagan's election in the first week in November. As a result, last-minute negotiations produced a floor amendment to section 3504(h).[158] This amendment created an elaborate and special procedure to govern collection of information requirements contained in agencies' proposed rules, the effect of which was to require OMB to comment publicly on the proposed rule if it wished to affect the reporting or recordkeeping requirement. Only if the agency's public response was unreasonable would OMB be able to disapprove the requirement in the rule.[159]

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[153] *See* S. REP. No. 930, *supra* note 43. Virtually the only substantive difference was the addition of a procedure for OMB approval in emergencies, which is found at 44 U.S.C. § 3507(g) (1982).

[154] *See* S. REP. No. 930, 96th Cong., 2d Sess. 64–73 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6303–12 (additional views of Sens. Jackson (D-Wash.), Cohen (R-Me.), Glenn (D-Ohio), and Stevens (R-Alaska)).

[155] Interview with Robert Coakley, Professional Staff Member, Subcommittee on Federal Expenditures, Research and Rules, Senate Committee on Governmental Affairs, in Washington, D.C. (June 20, 1985).

[156] Telephone interview with Alan Morrison, Public Citizen Litigation Group (July 1985).

[157] *Id.*

[158] *See* 126 CONG. REC. 30,177 (1980).

[159] As part of the deal, Senator Kennedy also obtained certain other changes in the

On November 19, on the floor of the Senate, Senator Danforth in Senator Kennedy's absence explained the amendment's purpose as "prevent[ing] OMB from undoing a collection of information requirement specifically contained in an agency rule after that requirement has gone through the administrative rulemaking process if the OMB Director ignored the rulemaking process."[160] In the hurried process of negotiating this floor amendment some of its implications were overlooked. This failure was to cause problems in the future.[161] At the time, however, supporting paperwork reduction was the paramount issue and the bill passed by acclamation.[162]

In the House, Representative Brooks took issue with the defense-related complaints concerning ADP.[163] Representative Horton explained the Kennedy amendment.[164] Not having been a party to the negotiation, Representative Horton was not sympathetic to the provision.[165] Indeed, Representatives Brooks and Horton considered forcing the bill to conference,[166] but, given the limited time left in the session, this would have effectively killed the bill. Politics being the art of compromise, they settled for the bill as it was.[167] Representative Horton, however, took the opportunity to supply a little legislative history by explaining the Kennedy amendment. He declared that under the amendment, OMB could "disapprove any collection requirement which it finds 'unreasonable'—which is to say, not of sound judgment in the opinion of the OMB Director."[168] This was

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bill. Thus, in section 3518(e), the statement that nothing in the act affects the authority of the President or OMB with respect to the substantive policies and programs of agencies was amended to specify the enforcement of civil rights laws as one of those programs. Also, a list of exempted collections of information was amended to add compulsory process under the Federal Trade Commission Improvements Act of 1980. Finally, even with respect to reporting requirements not in regulations, Senator Kennedy bargained for language requiring OMB to seek public comment and to make its decisions public.

[160] 126 CONG. REC. 30,178–79 (1980). The *Congressional Record* also contains two columns of a statement by Senator Kennedy, 126 CONG. REC. 30,178 (1980), which was inserted after the fact. Senator Kennedy's statement explains the procedure in section 3504(h), as well as its purpose. Senator Danforth's explanation of the purpose is totally consistent with the Kennedy statement.

[161] *See infra* text accompanying notes 235–265.

[162] 126 CONG. REC. 30,193 (1980).

[163] *Id.* at 31,227.

[164] *Id.* at 31,228.

[165] Interview with Steve Daniels, legislative assistant to Rep. Horton, in Washington, D.C. (June 19, 1985).

[166] *Id.*

[167] *Id.*

[168] 126 CONG. REC. 31,228 (1980).

clearly at odds with the provision's language that authorized the director to disapprove a collection only if the agency's response to OMB's comments was unreasonable. In addition, Representative Horton stated that no decisions by OMB under the Kennedy amendment were reviewable in court.[169] The provision, however, stated that there would be no judicial review of the Director's decision *to approve or not to act upon* a collection of information requirement,[170] implying that there could be review of a decision to disapprove. In any case, no one objected to the bill, and it was passed by a voice vote.[171] On December 11, 1980, President Carter signed the bill into law.[172]

B. *The Act Generally*

The linchpin of the Act was the role of OMB as policymaker and overseer of government paperwork activities. This capitalized upon OMB's experience under the Federal Reports Act and the Carter Administration's use of OMB as the central overseer of the executive branch's regulatory process. The Paperwork Reduction Act specifically created the Office of Information and Regulatory Affairs (OIRA) in OMB, to which the Director of OMB was directed to delegate his functions under the Act.[173] These specific paperwork control functions were to

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[169] *Id.*

[170] 44 U.S.C. § 3504(h) (1982).

[171] 126 CONG. REC. 31,228 (1980).

[172] Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980), (codified as amended at 44 U.S.C. §§ 3501–3520 (1982)).

[173] 44 U.S.C. § 3503 (1982). Prior to the Act, OMB had created an Office of Regulatory and Information Policy which had responsibility for OMB's paperwork functions (the Federal Reports Act, E.O. 12,174, *supra* note 122, and the follow-up of the Paperwork Commission's recommendations). This office also had responsibility for OMB's oversight of agency activities under E.O. 12,044, *supra* note 17, the Carter Administration's order to improve government regulations generally. Thus, the Paperwork Reduction Act's creation of OIRA and its specified functions essentially codified existing arrangements. *See* S. REP. No. 930, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6248. While recognizing the value of locating in one office both the oversight of government regulations and the government information collection activities, however, Congress expressed concern with the possibility that regulatory reform initiatives, if also assigned to that office, would dilute the attention and resources devoted to paperwork issues. *Id.* at 8–9, 1980 U.S. CODE CONG. & ADMIN. NEWS at 6248–49. These concerns proved well-founded, as in the Reagan Administration OIRA was the point office for both regulatory reform (under the new E.O. 12,291, *supra* note 17) and paperwork reduction. Thereafter, OIRA was criticized for having not devoted sufficient attention or resources to its information management responsibilities under the Act. *See generally* U.S. GENERAL ACCOUNTING OFFICE, IMPLEMENTING THE PAPERWORK REDUCTION ACT: SOME PROGRESS, BUT MANY PROBLEMS REMAIN, REPORT BY THE COMPTROLLER GENERAL TO THE CHAIRMAN, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES (1983) [hereinafter IMPLEMENTING THE PAPERWORK REDUCTION ACT].

include: the review and approval of information collection requests proposed by agencies; the determination of whether a collection of information by an agency was necessary for the proper performance of the functions of the agency, "including whether the information will have practical utility for the agency;" ensuring that the various procedural requirements for information collection requests were met; designating central collection agencies; setting burden reduction goals; overseeing action on the Paperwork Commission recommendations; and setting up a Federal Information Locator System (FILS).[174] None of these functions, however, were new to OMB.[175]

What was new was the extent to which OMB's clearance function reached. For example, Treasury's exemption was eliminated, and the so-called independent agencies were again brought under OMB's scrutiny.[176] Moreover, under the Federal Reports Act, there had been disputes as to the meaning of the term "information,"[177] with several agencies denying that it reached recordkeeping and reporting requirements contained

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[174] 44 U.S.C. § 3504(c) (1982).

[175] The clearance by OMB of new information collection activities by most agencies had, of course, existed under the Federal Reports Act. 44 U.S.C. § 3509 (1976). Even the explicit authority for OMB to determine the necessity of the information collection to carry out the agency's functions had been expressly provided in the Federal Reports Act. 44 U.S.C. § 3506 (1976). The term "practical utility" and its use as a means for screening information collection requests was adopted from the guidelines that had been issued by OMB, first under President Ford's paperwork program and later President Carter's paperwork program. *See, e.g.*, 45 Fed. Reg. 2586, 2588 (1980) (Proposed OMB rule to implement E.O. 12,174 and the Federal Reports Act). OMB had also been responsible under the Federal Reports Act for designating a central collection agency when the information needs of two or more agencies would be adequately served by a single entity. 44 U.S.C. § 3504 (1976). OMB had already been responsible for overseeing action on the Paperwork Commission's recommendations. Pub. L. No. 93-556, § 3(d), 88 Stat. 1789 (1974), 44 U.S.C. § 3501 note (1976) (eliminated in 1982 U.S.C.).

Executive Order 12,174 had required OMB to establish a federal information locator system and, by requiring the annual paperwork budget, had put OMB in charge of across-the-board burden reduction goals.

[176] 44 U.S.C. § 3502(1) (1982). The only independent agency exempted from OMB oversight was the Federal Election Commission. *Id.* While brought under OMB's oversight, the independent agencies retained a veto power over OMB determinations with respect to particular information collections. 44 U.S.C. § 3507(c) (1982).

[177] The term "information" in the Federal Reports Act was defined as

> facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling either for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States or for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

44 U.S.C. § 3502 (1976).

directly in regulations.[178] The Paperwork Reduction Act clearly encompassed both these requirements.[179] OMB's power to review all information collection requests was reinforced by a new provision, entitled "Public Protection."[180] This provision insulated persons from "any penalty for failing to maintain or provide information to any agency if the information collection request . . . does not display a current control number assigned by [OMB]."[181] In this way, if agencies ignored OMB and its clearance process, the people subject to the resulting information collection would have an explicit basis for not complying with it.

Also new were the statutory deadlines set for OMB. In a little less than two years, OMB was to set goals to reduce the existing paperwork burden by fifteen percent, and by the following year, a further ten percent.[182] Within one year of enactment of the Act, OMB was to establish FILS, identify areas of duplication in information collection and develop a schedule and methods for eliminating them, and identify initiatives to reduce by ten percent the paperwork burden associated with grant administration. Within two years, OMB was to complete action on the Paperwork Commission's recommendations.[183]

Agencies also were assigned responsibilities.[184] This was responsive to a common criticism of the clearance process under the Federal Reports Act: the process was too little too late. The primary responsibility for ensuring the elimination of duplication and unnecessary information collections should rest with the agencies. OMB should be the overseer or check, not the front line of attack against paperwork abuse.[185] Each agency was required to designate a senior official to carry out that agency's

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[178] *See* THE REPORTS CLEARANCE PROCESS, *supra* note 29, at 34. *See also* S. REP. No. 930, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6253; H.R. REP. No. 835, 96th Cong., 2d Sess. 19 (1980).

[179] "Information collection request" was defined to mean "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, or other similar method calling for the collection of information." 44 U.S.C. § 3502(11) (1982). Moreover, the procedures applicable to information collections contained in proposed regulations were specifically addressed. *See* 44 U.S.C. § 3504(h) (1982).

[180] 44 U.S.C. § 3512 (1982).

[181] *Id.*

[182] 44 U.S.C. § 3505(1) (1982).

[183] 44 U.S.C. §§ 3505(2), (3) (1982). These are only the deadlines directly pertaining to OMB's paperwork functions. In addition, there were a number of deadlines relating to information resource management and automatic data processing. *Id.*

[184] 44 U.S.C. § 3506 (1982).

[185] *See* FINAL REPORT, *supra* note 12, at 18.

responsibilities under the Act.[186] In order to ensure that that individual was sufficiently senior to manage those responsibilities, the Act required that the person report directly to the agency head.[187] Moreover, the Act provided that OMB may even delegate its clearance functions as to an agency's paperwork requests to the designated senior official of that agency.[188] Nevertheless, despite the new statutory duties placed upon agencies with respect to paperwork[189] and the newly focused responsibility placed upon the designated senior officials, the power provided by the Act belongs to OMB and that power rests in the clearance function.

C. *The Clearance Function*

Unlike the Federal Reports Act, the Paperwork Reduction Act specifies many of the details of the clearance process. The Act requires that an agency submit to OMB the proposed "information collection request"[190] together with an explanation of how the agency has assured that the information sought is not already available within the federal government, that the burden on respondents is minimized to the extent practicable, and that the information will be tabulated in a manner to enhance its usefulness.[191] The agency must publish a notice in the *Federal Register* announcing the submission of the request to OMB.[192]

OMB then has sixty days within which to approve or disapprove the request, a period that OMB may extend for an addi-

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[186] 44 U.S.C. § 3506(b) (1982).

[187] *Id.*

[188] 44 U.S.C. § 3507(e) (1982). This delegation can be made only if the Director of OMB finds the agency's designated senior official to be "sufficiently independent of program responsibility to evaluate fairly whether proposed information collection requests should be approved and has sufficient resources to carry out this responsibility effectively." *Id.* The delegation is made by rule after public notice and opportunity for comment. *Id.*

OMB did not make its first delegation until June 15, 1984—to the Board of Governors of the Federal Reserve System. *See* 49 Fed. Reg. 20,792 (1984) (codified at 5 C.F.R. § 1320.9(d), pt. 1320 app. A). OMB has, however, issued a general call encouraging agencies with effective internal control systems to seek delegations. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES, FOURTH ANNUAL REPORT UNDER THE PAPERWORK REDUCTION ACT OF 1980, at 18 (1985) [hereinafter FOURTH ANNUAL REPORT].

[189] *Compare* 44 U.S.C. § 3506 (1982) *with* 44 U.S.C. § 3501 (1976). *See also* 44 U.S.C. § 3507(a)(1) (1982).

[190] 44 U.S.C. § 3507(a)(2)(A) (1982).

[191] Id. § 3507(a)(1).

[192] Id. § 3507(a)(2)(B).

tional thirty days.[193] If OMB is silent, approval is inferred.[194] Before approving an information collection request, OMB is to determine if the collection of information is "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility."[195] If OMB for any reason determines the collection to be unnecessary, the agency may not collect the information.[196] Approvals are for periods specified by OMB, which may not exceed three years, or one year if the approval is inferred from OMB's silence.[197] When OMB approves the collection, it assigns a control number to the information collection request.[198] OMB's determinations must be made publicly available.[199] If OMB disapproves a proposed information collection request from an independent regulatory agency,[200] that agency may override OMB's veto by a

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[193] Id. § 3507(b). In emergency situations, the head of an agency may require OMB to approve or disapprove a request in a shorter period of time, and, if the request is approved, the agency may collect the information without further compliance with the Act for a period of 90 days from the date when the request was submitted to OMB. *See* 44 U.S.C. § 3507(g) (1982). This authority has been utilized 23 times since April 1981. Seventeen of these were in the first year and six in the second. The authority has not been invoked since March 1983, when OMB's regulations implementing the Act were promulgated. Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13,666 (1983) (codified at 5 C.F.R. pt. 1320 (1986)). Those regulations suggested agencies request expedited plenary consideration instead of invoking the mandatory emergency, but limited, authorization. 5 C.F.R. §§ 1320.17(e), (f) (1985).

[194] 44 U.S.C. § 3507(b) (1982). Approval by silence is the exception. Between April 1, 1981 and September 30, 1982, of the almost 6000 appovals of paperwork requests, only 12 were by silence. *See* IMPLEMENTING THE PAPERWORK REDUCTION ACT, *supra* note 173, at 58.

[195] 44 U.S.C. § 3508 (1982). "Practical utility" is defined as "the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion." 44 U.S.C. § 3502(15) (1982).

[196] 44 U.S.C. § 3508 (1982). This substantive standard is unchanged from the Federal Reports Act. *See* 44 U.S.C. § 3506 (1976).

[197] 44 U.S.C. §§ 3507(b), (d) (1982).

[198] *Id.* § 3507(b).

[199] *Id.*

[200] "Independent regulatory agency" is defined at 44 U.S.C. § 3502(10) (Supp. II 1984):

> the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission.

Id.

majority vote of its members.[201] OMB must then assign a control number to that request.[202]

A somewhat different procedure is prescribed when a "collection of information requirement"[203] is contained in an agency's proposed rule published for public comment.[204] This is the procedure created by the Kennedy Amendment. The agency in this circumstance must send a copy of the proposed rule to OMB not later than its publication in the *Federal Register*.[205] Within sixty days of the publication of the notice of proposed rulemaking, OMB may file public comments on the collection of information requirement.[206] If OMB does not file any comments within the sixty days, then it generally may not disapprove the collection of information requirement contained in the rule.[207] If OMB does file comments, the agency must respond to them when it promulgates the final rule.[208] OMB is then able to disapprove the collection of information requirement in its discretion if, within sixty days of the publication of the final rule, OMB finds the agency's response to its comments was unreasonable.[209] OMB may in its discretion also disapprove the collection of information requirement in a final rule if OMB finds that between the proposed and final rule, the collection of information requirement was substantially modified, so that OMB failed to have adequate notice for at least sixty days as to the final requirement.[210] Any disapproval and the reasons for it must be made publicly available.[211] Any OMB disapproval of an in-

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[201] 44 U.S.C. § 3507(c) (1982). This override power has rarely been exercised. Through September 1985, independent agencies had overridden OMB denials on only three occasions. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES, SECOND ANNUAL REPORT UNDER THE PAPERWORK REDUCTION ACT OF 1980, at 5 (1983) and FOURTH ANNUAL REPORT, *supra* note 188, at 8. Since then, the Federal Communications Commission has overruled OMB twice. *See infra* note 571.

[202] 44 U.S.C. § 3507(c) (1982).

[203] The term "collection of information requirement," unlike "information collection request," is not defined in the Act. It is used exclusively in section 3504(h), relating to collections of information specifically required by agency rules adopted after notice and comment. 44 U.S.C. § 3504(h) (1982).

[204] *Id.* § 3504(h)(8).

[205] *Id.* § 3504(h)(1).

[206] *Id.* § 3504(h)(2).

[207] *Id.* § 3504(h)(4). *But see id.* § 3504(h)(5).

[208] *Id.* § 3504(h)(3).

[209] *Id.* §§ 3504(h)(5), 3504(h)(5)(C).

[210] *Id.* § 3504(h)(5)(D). OMB may also disapprove a collection of information requirement contained in a rule if the agency failed to provide OMB notice not later than the publication of the notice of proposed rulemaking. *Id.* § 3504(h)(5)(B).

[211] *Id.* § 3504(h)(6).

dependent regulatory agency's collection of information requirement is subject to the same override provisions as OMB disapprovals of those agencies' information collection requests.[212]

V. Initial Implementation

A. *The Treasury-OMB Dispute*

Congress recognized that the paperwork requirements of the Act would be entirely new to some agencies and that certain aspects of the clearance process would be new to all agencies. Consequently, Congress delayed the effective date of the Act until April 1, 1981.[213] The public protection provision, which allowed persons to ignore information collection requests not displaying control numbers, applied only to information collection requests made after December 31, 1981.[214] Thus, agencies had adequate time to ensure that information collection requests had OMB control numbers.[215]

For most agencies, implementation did not prove to be especially difficult. The independent agencies reported to OMB rather than to GAO, and most agencies, in light of the arguably broader coverage of the Act, were forced to reassess what they had been submitting under the clearance process. Nevertheless, for the most part, business continued as usual.

The implementation process proved to be far more difficult, however, at the Treasury Department, particularly at the Internal Revenue Service (IRS). The IRS was the largest requester of information in the government,[216] and its information collections had never before been subject to prior approval. Moreover, it faced peculiar difficulties in creating the necessary tax forms because almost annual changes to the tax laws necessitated

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[212] *Id.* § 3504(h)(7). *See also supra* text accompanying notes 200–02.

[213] *See* Paperwork Reduction Act, Pub. L. No. 96-511, § 5, 94 Stat. 2812, 2826 (1980)(codified at 44 U.S.C. §§ 3501–20 (1982)). The Act became law on December 11, 1980.

[214] *See* 44 U.S.C. § 3512 (1982).

[215] *See* S. Rep. No. 930, 96th Cong., 2d Sess. 52 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6292; H.R. Rep. No. 835, 96th Cong., 2d Sess. 30 (1980).

[216] At the time, the calculation of federal paperwork listed the Department of the Treasury as imposing the largest number of burden hours (661.2 million) of any agency, or 45% of the total federal paperwork burden. *See* 1982 ICB, *supra* note 5, at 13. Of this, 95% was attributable to the Internal Revenue Service. *Id.* Later, when agency procurement was included in the calculations, the Department of Defense moved into first place. *See* 1984 ICB, *supra* note 131, at 20.

corresponding changes to the tax regulations and forms. Substantial lead time was necessary to draft and issue regulations and to create and review the new forms. The lead time available was often minimal, and the added necessity of obtaining prior approval from OMB imposed a seemingly impossible burden.[217]

Perhaps because the IRS had not been subject to OMB or GAO review before, the initial fears of such review may have been extreme. Some IRS officials probably feared that personnel in OMB without expertise in tax laws could easily create problems of massive proportions through an attempt to simplify reporting or minimize burdens.[218] Others may have feared that the OMB review would entail a policy review which could be construed as a political review, thereby tarnishing IRS's independence and professionalism.[219] In addition, officials in the IRS, accustomed to acting autonomously in the past, may have manifested a natural reluctance to be subjected to the review of another agency. Nevertheless, the Act did in fact mandate such a regime of review.

Controversy surrounding interpretation of the Act began to arise when OMB provided guidance to agencies relating to the effective date of the public protection provision.[220] Because large numbers of existing agency regulations, including all of the IRS regulations, had never been submitted to OMB, they did not have OMB control numbers.[221] The public protection provision, however, authorized persons after December 31, 1981 to ignore "information collection requests" which did not have valid control numbers.[222] OMB initially directed agencies to forward all existing regulations lacking control numbers to OMB for its review pursuant to section 3507.[223] This guidance crystallized a basic ambiguity in the statute.

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[217] Interview with anonymous official of the Internal Revenue Service in Washington, D.C. (June 18, 1985).

[218] *Id.*

[219] *Id.* Initial implementation of the Paperwork Reduction Act coincided with OMB's implementation of E.O. 12,291 and the initial activities of the Presidential Task Force on Regulatory Relief, whose executive director was the director of OIRA. Many of the identified "initiatives" of the Task Force related to the reduction of paperwork. *See generally* PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS (Aug. 11, 1983).

[220] *See* 44 U.S.C. § 3512 (1982).

[221] Even when control numbers had been assigned to regulations, those regulations virtually never displayed the control number. The public protection provision allows persons to disregard information collection requests that do not "display" a current control number. *See* 44 U.S.C. § 3512 (1982).

[222] Id.

[223] *See* Memorandum from Christopher DeMuth to Agency Paperwork Officials, re:

The Act uses two different terms to refer to collections of information imposed by an agency: "collection of information requirement"[224] and "information collection request."[225] The former is undefined[226] and appears only in section 3504(h), which establishes the procedure for OMB review of regulations which are adopted by notice-and-comment rulemaking and require collections of information. "Information collection request" is a defined term and is used throughout the statute to refer generally to information collections imposed by agencies.[227] The ambiguity lies in how these terms interrelate—are they mutually exclusive, or is "information collection request" an umbrella term, of which "collection of information requirement" is merely a subset?

Important consequences flow from this determination. First, the power of OMB to disapprove "information collection requests" is plenary, whereas its power to disapprove "collection of information requirements" is strictly limited.[228] Second, OMB can approve an "information collection request" for no longer than three years,[229] but the Act fails to specify any time limitation on OMB approval of "collection of information require-

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Paperwork Reduction Act Coverage of Information Collection Requirements in Existing Regulations (Oct. 12, 1982) (on file at HARV. J. ON LEGIS.) (referring to a "bulletin circulated in late 1981"). While OMB later articulated a legal justification for subjecting all collections of information to section 3507's procedures, the initial implementation seems to have arisen more from the dynamics of the situation than a considered legal opinion. The same office (OIRA), using the same personnel (agency desk officers), was already reviewing under E.O. 12,291 all proposed and final regulations prior to their publication. *See infra* notes 462–581 and accompanying text. OMB's review of any paperwork requirements in the rule was coincident with and largely indistinguishable from its review under the Executive Order.

[224] 44 U.S.C. § 3504(h) (1982).

[225] *Id.* § 3502(11).

[226] The term "collection of information," however, is defined.

> [T]he term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. § 3502(4) (1982).

[227] The definition in full reads as follows: "the term 'information collection request' means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, or other similar method calling for the collection of information." 44 U.S.C. § 3502(11) (1982). The term is used in 44 U.S.C. §§ 3502(7), (9), 3504(a), (c), (h), 3505–08, 3510(a), 3511–12, 3514(a), and 3517 (1982).

[228] *Compare* 44 U.S.C. § 3508 (1982) *with* 44 U.S.C. §§ 3504(h)(4), (5) (1982).

[229] *See* 44 U.S.C. § 3507(d) (1982).

ments." Third, the requirement for a control number states that the control number is to be displayed on the "information collection request,"[230] and no mention is made of control numbers on "collection of information requirements." Fourth, the public protection provision applies by its terms only to "information collection requests."[231] Thus, if the two terms are mutually exclusive, persons would have to comply with "collection of information requirements" whether or not the collections have valid control numbers. On the other hand, if "collection of information requirements" is included within the definition of "information collection request," then the failure to display a valid control number could render invalid (or repeal *sub silentio)* otherwise valid and effective regulations, because persons would be excused from compliance.

Closely related to, if not dependent on, the determination of whether "information collection request" was an all-inclusive term was the question of how to categorize already existing regulations which had been adopted after notice and comment. Were such regulations to be treated as "collection of information requests?" If so, their failure to display a control number would effectively invalidate them. If not, these regulations would seem to avoid the Act altogether, because review under section 3504(h), applicable to "collection of information requirements," occurs only at the time the regulation is proposed for notice and comment.

The OMB interpreted the term "information collection request" to be inclusive.[232] The Treasury Department did not. Treasury did not want to submit for OMB review the vast body of existing IRS regulations requiring persons to maintain records or report information.[233] If OMB's interpretation of the term prevailed, any lapse by either Treasury or OMB in identifying and numbering all the applicable regulations could seriously disrupt the collection of taxes.

The Treasury Department did not object, however, to submitting existing IRS tax *forms* to OMB for approval.[234] There

[230] *See id.* § 3507(f).

[231] *See id.* § 3512.

[232] *See* Memorandum from C. Boyden Gray, Counsel to the Vice President, and Michael J. Horowitz, Counsel to the Director, Office of Management and Budget, to Assistant Attorney General Theodore B. Olson (January 15, 1982)[hereinafter Gray Memorandum](on file at HARV. J. ON LEGIS.).

[233] Interview with anonymous Department of Treasury official in Washington, D.C. (June 18, 1985).

[234] Memorandum from Theodore B. Olson, Assistant Attorney General, to C. Boyden

was less basis for objection here because there was no ambiguity in the statute. Furthermore, the potential for OMB interference was less because the substantive information required on the forms was invariably required to be submitted by regulations. The forms were merely the vehicle for collection. The area for disagreement with OMB—whether the information was necessary—would only arise in considering the underlying regulations. Finally, the mischief that might be caused by inadvertent failure to display a control number on a form was limited by the existence of the substantive reporting or recordkeeping requirement in a regulation. Thus, even if under section 3512 one could ignore the IRS *form*, the substantive reporting or recordkeeping requirement imposed by the regulation would remain. In other words, whether or not the form 1040 is valid, the IRS regulations require persons to report their taxable income annually. This made all the more critical Treasury's view that their regulations not be considered "information collection requests."

B. *The Justice Department Opinion*

Neither Treasury nor OMB would budge from its interpretation of the Act. OMB, therefore, requested the Office of Legal Counsel (OLC) in the Justice Department to settle the dispute by rendering an interpretation that would be binding on the agencies.[235] OMB's argument was premised on the definition of

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Gray and Michael J. Horowitz, re: *Paperwork Reduction Act of 1980* (June 22, 1985) [hereinafter Office of Legal Counsel Opinion or OLC Opinion](on file at HARV. J. ON LEGIS.) at 17.

[235] *See* Gray Memorandum, *supra* note 232. Under 28 U.S.C. §§ 511–12 (1982), the Attorney General is authorized to render opinions on questions of law when requested by the President and the heads of executive departments. These opinions are considered binding on executive agencies. 25 Op. Att'y. Gen. 301 (1904). For a number of years, the Office of Legal Counsel in the Department of Justice has had the responsibility for preparing these Attorney General opinions. *See* 28 C.F.R. § 0.25(a) (1986). As a matter of practice in recent years, opinions of the Office of Legal Counsel have virtually supplanted opinions of the Attorney General. They are also considered to be binding on the agencies, although the only means of enforcement may be an appeal to the President or the refusal of the Justice Department to appear in court in defense of a contrary opinion.

Ordinarily, agency requests for opinions of the Office of Legal Counsel are made by the General Counsel for the agency, although it is not uncommon for the officer whose operations are involved to seek the opinion. Here, however, the request was made by neither the Administrator of OIRA nor the general counsel of OMB. Rather, the request was made jointly by the equivalent of special assistants to the Director of OMB and the Vice President. Some believed that involvement of these persons represented a conscious attempt by OMB to use its political weight to influence the decision. Telephone interview with former Office of Legal Counsel employee (May 1985).

"information collection request," the use of the term in the Act, and the legislative history of the Act. As defined, the term expressly includes a "reporting or recordkeeping requirement," and a recordkeeping requirement is further defined as "a requirement imposed by an agency on persons to maintain specified records."[236] Although these definitions do not on their face explicitly indicate that they include regulations, they are phrased in a manner which could include regulations.[237] In addition, portions of the legislative history of the terms suggest an inclusive reading.[238] Moreover, to exclude regulations adopted after notice and comment from the term "information collection request" would do substantial violence to the comprehensive scheme of the Act. One of the prime purposes of the Paperwork Reduction Act was to consolidate clearance functions in OMB and to eliminate exemptions from those functions that had existed under the Federal Reports Act.[239] If regulations adopted

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[236] 44 U.S.C. § 3502(16) (1982).

[237] It is possible, even from the plain language of the definition of "information collection request," to argue that the definition does not include regulations. The first four specified types of "requests" clearly refer to reporting requirements evidenced by something that itself is to be filled in or completed, unlike a reporting requirement imposed by a regulation. The canon of *ejusdem generis* would suggest that the term "reporting or recordkeeping requirement" should be construed narrowly to be consistent with the specific examples that precede it in the list. Furthermore, if "reporting or recordkeeping requirement" is to be read as broadly as its language allows, what is to be done with *statutes* which directly impose such a requirement? It seems unlikely that Congress intended that one could ignore without penalty such statutes merely because they do not display a current OMB control number.

[238] The Senate Report stated that "[t]he imposition of a federal paperwork burden does not depend on how the questions are asked of the respondent, but rather on the fact the Federal government has asked or sponsored the asking of questions." S. REP. No. 930, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6279. This statement, however, was made in the context of a discussion about whether oral requests fell within the definition. Even Senator Kennedy, in a post-enactment statement, referred to an "information collection request" in a manner suggesting that it included "collection of information requirements." He stated that his amendment drew a distinction between "an information collection request derived from a rule and one specifically contained in an agency rule." 126 CONG. REC. 34,237 (1980). In context, however, it is doubtful that the reference to "one specifically contained in an agency rule" reflected a considered answer to whether a "collection of information requirement" was also an "information collection request." Kennedy did not make the statement while explaining the relationship between the two terms. Instead, he made the statement while clarifying the fact that the procedures of section 3504(h) apply when a collection of information is contained in a rule, as opposed to derived from the rule.

Other aspects of the legislative history are less helpful. For example, the Senate Report explained the definition of "information collection request" as "refer[ring] to the actual instrument used for a collection of information." S. REP. No. 930, *supra*, at 29. This would be a strange description of a regulation.

[239] *See generally* S. REP. No. 930, 96th Cong., 2d Sess. 13–14, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6253–54 (strengthening the Federal Reports Act). Indeed, disputes over the Federal Reports Act's coverage of "recordkeeping require-

after notice and comment containing reporting or recordkeeping requirements were not included within the term "information collection request," and the procedures of section 3504(h) applied only during the notice-and-comment rulemaking process, then existing regulations already adopted after notice and comment with reporting or recordkeeping requirements would seemingly escape coverage of the Act. Indeed, OMB argued, extension of the Act to the IRS would be virtually meaningless if so many of its existing regulations could escape review.[240]

Treasury answered these arguments by relying on the language, history, and purpose of section 3504(h). Section 3504(h) establishes a detailed procedural scheme applicable to "collection of information requirements" proposed for adoption in regulations through notice-and-comment rulemaking. The Act does not specifically address regulations in any other section. This, Treasury argued, gives rise to an inference that section 3504(h) is the only provision applicable to such regulations, and that the term used in section 3504(h)—"collection of information requirement"—is the exclusive term for collections of information imposed directly by regulation adopted after notice and comment.[241]

The purpose and history of section 3504(h), Treasury urged, support such a reading. The section was introduced in a floor amendment by Senator Kennedy as a response to fears that the Act as then drafted "would permit the Director of OMB to overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or the agency that promulgated the rule."[242] Senator Kennedy's

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ments" were the cause of their specific inclusion in the Paperwork Reduction Act. *See* S. REP. No. 930, *supra*, at 13; H.R. REP. No. 835, 96th Cong., 2d Sess. 19 (1980).

[240] OLC Opinion, *supra* note 234, at 15.

[241] *Id.* at 10.

[242] 126 CONG. REC. 30,178 (1980). Actually, a substantial argument can be made that OMB did not have such power. As the bills were reported by both the House and Senate committees, section 3504(h) provided only that OMB should ensure that "in developing rules and regulations," agencies use efficient means to collect, use, and disseminate information, provide reasonable opportunity for the public to comment on the proposed means of collecting information, and assess the consequences of alternative means of collecting, using, and disseminating information. No particular procedure was specified for how OMB was to ensure that this occurred. The fact that section 3504(c) dealt with OMB's "information collection request" clearance responsibilities and procedures, while section 3504(h) dealt with OMB's responsibilities with regard to agency regulations, perhaps suggests that agency regulations were not intended to fall under subsection (c) and the procedures applicable to "information collection requests." The committee reports, morever, indicated that OMB's functions under section 3504(h), as reported, would be "similar to the present OMB function to oversee agency activities

amendment, therefore, specified the procedure by which OMB could review and comment on agency rules proposed for notice and comment, and the narrow category of circumstances under which OMB could disapprove the agency's collection of information requirement. Treasury argued that subjecting already-existing regulations (as well as future regulations after they were in effect) which were adopted after notice and comment to the control number requirement, the time limitation, and section 3507 review would frustrate the purposes of the Kennedy Amendment.[243] By means of these provisions, OMB could effectively invalidate regulations without public process.[244]

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under Executive Order 12,044." S. REP. No. 930, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6248. *See also* H.R. REP. No. 835, 96th Cong., 2d Sess. 9 (1980). Executive Order 12,044 was President Carter's order on regulatory reform. *See supra* note 17, *rescinded by* E.O. 12,291, *supra* note 17, § 10. Executive Order 12,044 imposed a number of specific requirements on agencies, including a requirement for regulatory analyses of "major" regulations, but did not specify any particular functions for OMB other than that of "assur[ing] the effective implementation of this Order" and approving procedures agencies were to adopt in complying with the order. E.O. 12,044, *supra* note 17, §§ 3, 5. OMB did not review all regulations as a matter of practice. Nor did it assert the right to disapprove them. Some "major" regulations were reviewed by the Regulatory Analysis Review Group (RARG), which was comprised of representatives of the Council of Economic Advisors, OMB, and other agencies with major regulatory responsibilities. On occasion RARG attempted to influence agencies with respect to the regulation at issue. *See* R. LITAN AND W. NORDHAUS, REFORMING FEDERAL REGULATION 69–79 (1983). Consequently, section 3504(h), as reported, did not unambiguously require treating regulations as "information collection requests." Nevertheless, it cannot be denied that the history is also susceptible to the interpretation that section 3504(c) applied by its terms to regulations imposing collections of information, and that section 3504(h) only granted additional responsibility and power to OMB, beyond clearance procedures, over agency regulations.

[243] OLC Opinion, *supra* note 234, at 11.

[244] Treasury also argued that section 3507(c), which relates to the power of independent agencies to override OMB disapproval of information collections, supported the distinction between "collection of information requirements" and "information collection requests." OLC Opinion, *supra* note 234, at 12–13. Section 3507(c) states that "[a]ny disapproval by the Director . . . of a proposed information collection request of an independent regulatory agency, *or an exercise of authority* [by the Director] *under section 3504(h)* . . . concerning such agency, may be voided [by a majority vote of the agency's members]." 44 U.S.C. § 3507(c) (1982) (emphasis added). The only authority concerning an agency that section 3504(h) grants the Director is the authority to disapprove, under certain circumstances, the "collection of information requirements" of an agency. Thus, section 3507(c) distinguishes between an "information collection request" and a "collection of information requirement" by specifying separately an independent agency's power to override OMB's disapproval of each. Were the "collection of information requirement" merely a subset of the universal "information collection request," this separate specification would not be necessary. Treasury therefore concluded that Congress intended section 3504(h)'s "collection of information requirement" to be treated separately from section 3507(c)'s "information collection request."

This argument loses some of its weight when one realizes that this language in section 3507(c) preceded the Kennedy Amendment. Thus, the section's reference to an independent regulatory agency's override of OMB's "exercise of authority under section 3504(h)," in the reported bill, meant only that independent agencies could, by majority vote, avoid any particular act by OMB to "ensure that . . . agencies (1) utilize efficient

If Treasury's arguments prevailed, the terms "collection of information requirement" and "information collection request" would be mutually exclusive. Because the Act's provisions regarding public protection, OMB control numbers, and the three year approval limitation period expressly used the term "information collection request," these provisions would not apply to "collection of information requirements." Moreover, all existing regulations adopted after notice and comment would completely escape OMB review, because section 3507's procedures apply only to "information collection requests" and section 3504(h)'s procedures apply only to *proposed* regulations containing collection of information requirements.

On the other hand, if OMB's arguments prevailed, OMB control numbers would be required for all collections of information, whether by "information collection requests" or "collection of information requirements." Agencies would then have to submit for OMB review the vast body of existing regulations which did not have OMB control numbers. OMB would conduct its review under the substantive and procedural standards of section 3507, rather than section 3504(h), and any subsequent approval would be limited to no more than three years.

The key to this puzzle is clearly section 3504(h). Prior to the adoption of section 3504(h) by the Kennedy Amendment, one could hardly argue that section 3507's procedures for review of "information collection requests" could not be applied to reporting or recordkeeping requirements in regulations.[245] Section 3504(h), however, clearly mandates that proposed rules with reporting or recordkeeping requirements be treated in accordance with procedures of that section, rather than with those of

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means . . . ; (2) provide . . . opportunity for the public to comment . . . ; and (3) assess the consequences of alternative means . . . ." S. REP. No. 930, 96th Cong., 2d Sess. 88 (1980). It did not refer to a separate OMB disapproval of a collection of information requirement, which did not exist in the bill at that time. Thus, the notion that section 3507(c) represents a careful distinction between "information collection requests" and "collection of information requirements" does not withstand scrutiny.

[245] *See* OLC Opinion, *supra* note 234. The OLC Opinion cites various statements in the reports as support for the proposition that the term "information collection request" did not necessarily include regulations, even before Senator Kennedy's amendment. The opinion, however, does not go so far as to conclude that, in the absence of Senator Kennedy's amendment, the OLC would interpret the term not to include regulations. *See id.* at 34–35, 40–41. In any case, OMB's authority under section 3504(h) as reported, *see supra* note 242, and section 3516 (authorizing OMB to adopt regulations necessary to exercise its authorities under the chapter) would have enabled OMB to require agencies to submit regulations for its approval according to the procedures of section 3507.

section 3507.[246] What is not clear is how section 3504(h), which by its terms deals solely with the *adoption* of regulations, relates to regulations in existence. While this issue was most acute at the time of the Treasury-OMB dispute with respect to the large number of regulations already then in existence, the same issue would recur with respect to all future regulations once adopted pursuant to section 3504(h). If a "collection of information requirement" were a subset of "information collection request," then the control number requirement, the public protection provision, and the time limitation all would apply to the regulations. As a result, with the expiration of the time limit, an agency would have to submit an existing regulation to OMB for clearance under section 3507.[247] The legislative history of section 3504(h) does not reveal the drafters' intent with regard to existing regulations, probably because those negotiating Senator Kennedy's amendment did not fully perceive the problem.[248]

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[246] OMB appears not to have fully conceded this point. In addition to its argument that "collection of information requirements" are a subset of "information collection requests," which are reviewed by OMB pursuant to section 3504(h) rather than section 3507, OMB also argued somewhat inconsistently that agencies could choose to have their proposed regulations reviewed under section 3507 rather than section 3504(h). OLC Opinion, *supra* note 234, at 48–49. As the OLC Opinion correctly notes, an agency's ability to make such a choice would not only undermine the purpose of section 3504(h), but would also be inconsistent with section 3504(h)'s explicit language ("each agency *shall* forward to the Director a copy of any proposed rule which contains a collection of information requirement . . . ." (emphasis in original)). *Id.* at 49–50.

[247] Even if OMB assigned a control number to the regulation when it was adopted pursuant to section 3504(h), the three-year time limitation for the approval would require the regulation to be resubmitted to OMB prior to the lapse of the approval. This resubmission would occur under section 3507, because there would be no new rulemaking proceeding to trigger section 3504(h).

[248] One key Senate staffer has indicated that he believed there was no problem because existing regulations should already have had time-limited control numbers pursuant to their review under the Federal Reports Act. Therefore, existing regulations would have to be reapproved or they would be unenforceable under section 3512. Interview with Robert Coakley, Professional Staff Member, Subcommittee on Federal Expenditures, Research and Rules, Senate Committee on Governmental Affairs, in Washington, D.C. (June 20, 1985). Mr. Coakley's understanding of what the practice had been under the Federal Reports Act may well have colored his expectation of what was to occur under the Paperwork Reduction Act. Because that practice was not uniform, however, his expectation was not well founded. Some agencies apparently submitted for clearance reporting requirements contained in rules, Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976), but others did not, Olympian Oil Co. v. Schlesinger, [1974–1980 Binder] Energy Mgmt. (CCH) ¶ 26,140 (N.D. Cal. Mar. 1, 1979). However, whatever the practice may have been with respect to agencies subject to the Federal Reports Act, for more than half the paperwork burden there had been no practice at all because the Act exempted the Treasury Department from its requirements. Here there would necessarily be questions regarding how already-existing regulations would be brought within the new Act.

Another person involved in the negotiation of the Kennedy amendment indicated that the problem of existing regulations was simply overlooked. He noted that the Kennedy amendment was a last-minute fix to a bill that had not received sufficient attention from

Nevertheless, Senator Kennedy's explanation of the purpose of section 3504(h) does create a strong argument for limiting OMB's power to disapprove regulations adopted after notice and comment. According to Senator Kennedy, the fault with the bill as reported was that it allowed OMB to veto agency regulations after they had been adopted by an agency pursuant to public notice and comment, without providing any procedural rights to either the public or to the agency involved.[249] To allow OMB to overturn an agency rule without having to justify the decision publicly, Senator Kennedy stated, would violate "basic notions of fairness upon which the Administrative Procedure Act is based, as well as concepts of due process embodied in the U.S. Constitution."[250] Moreover, under section 3508, OMB could declare an information collection request unnecessary for any reason and thereby block the information collection.[251] According to Kennedy, his amendment was designed to deal with these concerns by "limit[ing] the authority of OMB to overturn reporting, recordkeeping, and other information collection requirements adopted by a Federal agency in a rulemaking proceeding . . . [and] establish[ing] a procedural scheme which governs OMB's relationship with the Federal agencies."[252] The amendment also effectively limited OMB's power to overturn an agency's recordkeeping or reporting requirements to only those circumstances in which OMB finds the agency's response to its comments unreasonable.[253]

If regulations once adopted after notice and comment were included in the definition of "information collection requests," OMB could then deal with them under sections 3507 and 3508 and the very evils described by Senator Kennedy would occur.

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lawyers involved with agency regulations and the administrative process. Had they thought of the problem, this person said, they certainly would have ensured that existing regulations not be reviewed under section 3507. Telephone interview with Alan Morrison, *supra* note 156.

[249] 126 CONG. REC. 30,178 (1980). Part of the Kennedy Amendment also changed section 3507 to require that OMB's decision be made available to the public. *See* 44 U.S.C. § 3507(b) (1982).

[250] 126 CONG. REC. 30,178 (1980).

[251] 44 U.S.C. § 3508 (1982). Section 3508 states that the OMB "*may* give the agency or other interested persons an opportunity to be heard or submit statements in writing" (emphasis added), thereby indicating that OMB has discretion not to accept public comment before making its decision. *But see* 44 U.S.C. § 3517 (1982) (stating that OMB "shall provide interested agencies and persons early and meaningful opportunity to comment").

[252] 126 CONG. REC. 30,178 (1980).

[253] *See id.*

That is, OMB could invalidate an otherwise lawful regulation in a nonpublic proceeding upon OMB's determination of the merits without any public justification and without undertaking a new rulemaking. Moreover, agencies wishing to deregulate could merely fail to seek reapproval of a regulation when its OMB approval expired. Such a *sub silentio* repeal of regulations adopted after notice and comment would be directly contrary to the articulated purposes of section 3504(h).

The Office of Legal Counsel viewed these consequences of treating an existing regulation as an "information collection request" to so conflict with the purposes of section 3504(h) that this outcome should be avoided if the statutory language and history could be reconciled with an alternative interpretation.[254] Therefore, the burden shifted to OMB to demonstrate that the language and history of the statute *must* be interpreted to allow existing regulations to be reviewed under section 3507. Ultimately, OMB was unable to meet this burden.

OMB did not advance its case with its suggested resolution of the conflict between the purpose of section 3504(h) and the review of existing regulations under section 3507. OMB argued that, if it disapproved a requirement contained in an existing regulation, the affected agency would still have to undertake a rulemaking to rescind that requirement.[255] That rulemaking then would be subject to the procedures of section 3504(h). This argument, however, did not adequately address the concerns of Senator Kennedy. If OMB's interpretation was correct, OMB's prior disapproval of the existing requirement would be legally effective; the subsequent rulemaking would be a formality, merely rescinding a regulatory requirement no longer in effect. Neither the public procedure, designed to expose OMB's reasoning, nor the substantive limitations on OMB's disapproval authority would be applicable. In short, all of Senator Kennedy's fears would be borne out, but they would be obscured by a formalistic rulemaking.

The only way to avoid the conflict and to protect existing regulations from scrutiny under sections 3507 and 3508 is to find that "information collection requests" do not include collections of information required by regulations adopted after notice and

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[254] *See* OLC Opinion, *supra* note 234, at 22–27.
[255] *Id.* at 16.

comment.[256] This conclusion is supported by the Act's distinction between "information collection requests" and "collection of information requirements," the term used in section 3504(h) with respect to proposed rules. This conclusion necessarily means that the public protection provision, requiring control numbers for "information collection requests," does not apply to regulations. Moreover, because the procedures of section 3504(h) apply only to rulemaking proceedings initiated after the Act's effective date, those procedures cannot be used to review existing regulations. In short, existing regulations requiring reporting or recordkeeping, which were adopted after notice and comment, thereby escape review under both sections 3504(h) and 3507.

The seeming anomaly of this conclusion, which cuts against the Act's explicit purpose of reducing existing as well as future paperwork burdens, had probably been OMB's best argument.[257] The OLC Opinion provided a possible solution. Although the fifty-six page opinion barely addressed the issue in its body, the final paragraph stated that OMB does have "substantial authority over existing regulations" under section 3504(b).[258] That provision identifies OMB's "general information policy functions," which include "initiating and reviewing pro-

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[256] OLC concluded that regulations adopted by agencies *without* notice and comment could be categorized as "information collection requests." *See id.* at 24–25. First, section 3504(h)(8) explicitly limits application of section 3504(h) to those instances "when an agency publishes a notice of proposed rulemaking and requests public comments." Second, the entire thrust of section 3504(h) was to protect the integrity of the public rulemaking process. *See id.* If a regulation were adopted without notice and comment, there would be no public process to protect. Whether a regulation can be characterized as an "information collection request" depends on whether it was in fact adopted in a public proceeding, not whether it was required to be adopted in a public proceeding. Thus, if an agency utilizes notice-and-comment rulemaking, even if it is not required to do so, the regulation resulting from the rulemaking is not an "information collection request." This was important to Treasury, because while the IRS normally used notice-and-comment rulemaking, the IRS had historically maintained that its regulations were interpretative and therefore exempt from the Administrative Procedure Act's requirements for public procedure. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7:17, 7:21 (2d ed. 1979).

Even so limited, however, the inclusion of any regulation within the term "information collection request" produces results which are unique in administrative law. OMB retains a veto over an agency's otherwise lawful regulation and an agency may effectively invalidate its own regulation by inaction. A recent article describes some of the confusion which may result. *See* Allen, *Price Certifications Pose Dilemmas for Contractors*, Legal Times, May 12, 1986, at 27.

[257] IRS regulations accounted for almost half of the federal government's paperwork burden. *See* 1982 ICB, *supra* note 5, at 13. Thus, if OMB were unable to review the IRS regulations, it would be impossible to achieve the statutory goal of a 25% reduction in the preexisting paperwork burden by October 1, 1983. *See* 44 U.S.C. § 3505(1) (1982).

[258] OLC Opinion, *supra* note 234, at 56.

posals for changes in legislation, regulations, and agency procedures to improve information practices."[259] The Office of Legal Counsel saw nothing to stop OMB from initiating proposals under this provision for changes in existing regulations.[260] Thus, while OMB might not be able directly to review existing regulations under the Act, it could require that agencies wishing to change existing regulations undertake rulemaking. Such rulemaking would be subject to section 3504(h).

This solution to the problem of how to preserve OMB's power over existing regulations while remaining consistent with the purposes of section 3504(h) was ingenious, but its interpretation of section 3504(b) is questionable. This provision probably was not intended to refer to regulations containing specific reporting and recordkeeping requirements. The context of the provision suggests that Congress meant it to deal with "information policy" as opposed to "paperwork control" functions.[261] Moreover, the term "regulations" likely refers to those regulations which govern agency information practices generally. Nevertheless, without any analysis, the OLC opinion suggested that the provision would provide a legal basis for OMB to require agencies to propose changes in particular regulations containing reporting or recordkeeping requirements.

Despite this favorable interpretation of section 3504(b), the opinion was widely viewed as a substantial defeat for OMB.[262] The defeat was particularly painful because, only shortly before the Office of Legal Counsel issued its opinion on June 22, 1982, OMB had issued a draft guidance document to all agencies pointedly reflecting OMB's interpretation of the Act with respect to existing regulations.[263] Indeed, there is some evidence that OMB's initial reaction to the OLC Opinion was to consider ignoring or appealing the opinion.[264] Before long, however, OMB

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[259] 44 U.S.C. § 3504(b)(2) (1982).

[260] OLC Opinion, *supra* note 234, at 56.

[261] Section 3504(b) is a list of the Director's "general information policy functions," whereas section 3504(c) is a list of the Director's "information collection request clearance and other paperwork control functions."

[262] *See, e.g.*, Moore, *DOJ Restricts OMB's Paper Review Power*, Legal Times, June 28, 1982, at 1.

[263] Draft OMB Circular No. A-40, issued for comment on June 4, 1982.

[264] At the time, the Deputy Administrator of OIRA, James Tozzi, intimated that OMB had waited long enough for the Office of Legal Counsel to reach a position, and Tozzi further suggested that if that Office's interpretation differed from OMB's, OMB might well ignore it. Apparently, informal soundings of the Attorney General by administration officials led OMB not to pursue such an extraordinary route. Interview with Robert Coakley, *supra* note 248.

perceived the power implicit in the ability to "initiat[e] . . . proposals for changes in . . . regulations . . . to improve information practices."[265]

C. *The OMB Regulations*

On September 8, 1982, OMB proposed a regulation to implement the Director's paperwork control functions under the Act.[266] In addition to the procedures for forms under section 3507 and for proposed rules under section 3504(h), OMB created a special procedure applicable to existing regulations. The procedure mandated that all reporting and recordkeeping requirements in existing regulations be submitted periodically to OMB for review. This review would duplicate that performed under section 3507, except that OMB would only "initiate proposals for change in the requirement,"[267] rather than disapprove the reporting or recordkeeping requirement in the agency regulation. The agency would have a reasonable period of time, not to exceed 120 days, to publish a notice of proposed rulemaking with respect to the requirement, and the procedures of section 3504(h) would then come into play.[268] The existing requirement would remain in effect during the pendency of the rulemaking.[269]

OMB's proposed rule also required OMB control numbers for all collections of information, whether they were "collection of information requirements" or "information collection requests."[270] OMB noted that, while the OLC Opinion had concluded that the Act required OMB control numbers only for "information collection requests," the opinion "did not address whether the Director could, in the exercise of his policymaking and regulatory authorities under the Act, require that agencies display a valid OMB control number on information collection requirements in agency regulations."[271] OMB gave several reasons for requiring control numbers for regulations, among which was the importance of the control number as a mechanism to

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[265] 44 U.S.C. § 3504(b)(2) (1982).

[266] Controlling Paperwork Burdens on the Public, 47 Fed. Reg. 39,515 (1982) (codified at 5 C.F.R. pt. 1320).

[267] *Id.* at 39,528 (codified at 5 C.F.R. § 1320.14(d)).

[268] *Id.* at 39,529 (codified at 5 C.F.R. § 1320.14(h)).

[269] *Id.* at 39,528 (codified at 5 C.F.R. § 1320.14(d)).

[270] *Id.* at 39,527–28.

[271] *Id.* at 39,517.

monitor the paperwork burden.[272] OMB did not indicate what effect failure to display a control number on a regulation would have, stating that this issue "must ultimately be determined by the courts."[273]

While the proposed rule purported to recognize the force of the OLC's reasoning, the tone of the preamble seems hostile toward the OLC Opinion.[274] The consistency of the proposed rule with the opinion was questionable enough that OMB asked the Office of Legal Counsel to issue a memorandum essentially blessing OMB's approach.[275] OLC's memorandum in response did not suggest any reconsideration of the earlier opinion's conclusions. Rather, it restated forcefully OMB's power under section 3504(b)(2) to initiate proposals for change in existing regulations.[276] The memorandum then stated that OLC had no legal objection to seven specific elements of OMB's proposed regulations: (1) the mandatory submission to OMB by July 1, 1983, of all existing regulations not previously approved by OMB, to be resubmitted thereafter at least every three years; (2) OMB's review of these submissions under the substantive standard of section 3504(c)(2), which requires that the information be "necessary for the proper performance of the functions of the agency," and under OMB's authority to direct the agency to initiate a proposal for change if OMB determines that the regulation is unduly burdensome or unnecessary; (3) the legal obligation of the agency then to prepare and publish a notice of proposed rulemaking as to whether to retain, rescind, or modify the collection of information requirement in the regulation; (4) OMB's authority to treat the notice of proposed rulemaking under section 3504(h), including the authority to disapprove any

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[272] *Id.* at 39,518. Other reasons included the following: requiring control numbers was consistent with legislative intent; the fact that many agencies were routinely submitting regulations to OMB for assignment of control numbers demonstrated the feasibility of the process; the presence of control numbers would alert the public to the application of the Act; and displaying control numbers on regulations would ensure that, if a court disagreed with the OLC's opinion that section 3512 (the public protection provision) did not apply to regulations, the regulatory requirement would not be upset. *Id.*

[273] *Id.* at 39,519.

[274] *Id.* at 39,517. This is particularly noticeable in OMB's repeated statement that the courts might disagree with the OLC Opinion and hold a regulation unenforceable because it failed to display a control number. *See supra* note 272.

[275] *See* Memorandum from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, to Michael E. McConnell, Assistant General Counsel, Office of Management and Budget, re: Paperwork Reduction Act (Sept. 24, 1982) [hereinafter September 24 OLC Memorandum].

[276] *Id.* at 1.

requirement in the proposed rule under the standards contained in section 3504(h)(5); (5) OMB's authority to disapprove a collection of information requirement in an existing regulation if the agency involved refuses to comply within a reasonable time with an OMB directive to initiate a change or to publish a final rule containing the new requirement; (6) OMB's authority to disapprove not only the new proposed requirement but also the preexisting requirement; and (7) OMB's authority to require agencies to display control numbers on regulations containing approved collection of information requirements, although the absence of a control number would not invalidate the collection of information requirement.[277]

With two exceptions, these seven elements of OMB's proposed rules are fully consistent with the earlier OLC opinion.[278] The two exceptions relate to OMB's authority under certain circumstances to disapprove, and thereby render legally invalid, collection of information requirements in existing regulations. First, the OLC memorandum stated that if an agency failed to comply with an OMB directive to issue a notice of proposed rulemaking amending a collection of information requirement in an existing regulation, or failed to publish a final rule after the proposed rule, OMB could simply disapprove the existing requirement in the regulation.[279] Second, the memorandum sanctioned OMB's authority to disapprove not only newly proposed requirements, but also the underlying, existing requirements which the new proposals were designed to replace.[280] An agency, therefore, would not be able to protect existing regulations by merely proposing a new requirement which would be equally objectionable to OMB. The OLC memorandum stressed, however, that OMB's power to disapprove existing regulations was subject to the limitations of section 3518(e)—that nothing in the

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[277] *Id.* at 2–3.

[278] OMB's authority to require agencies to display control numbers on regulations purely for inventory and management purposes would seem to raise little question under the Act, *see* 44 U.S.C. §§ 3504(b), 3516 (1982), and OLC was careful to make clear that the absence of a control number, in its view, would not have legal consequences as to the validity of the collection of information requirement. The ability of OMB to require another agency to propose a change to an existing regulation containing collection of information requirements raises more questions under the Act, but these questions are less serious than those raised by OMB's original position. Moreover, the original OLC opinion, *supra* note 234, clearly suggested that OMB had such a power under section 3504(b)(2) of the Act.

[279] September 24 OLC Memorandum, *supra* note 275, at 3.

[280] *Id.*

Act "be interpreted as increasing or decreasing the authority of [OMB] with respect to the substantive policies and programs of departments, agencies and offices . . . ."[281]

In its original opinion, OLC had found no authority for OMB to disapprove collection of information requirements in existing regulations,[282] and the later memorandum is clearly inconsistent with the opinion in this regard, even in the limited circumstances addressed. While an agency's disregard of a lawful OMB directive to initiate a rulemaking may be improper and even unlawful, it does not necessarily follow that the remedy for such improper or unlawful conduct is to give OMB the power to invalidate that agency's otherwise lawful regulations. OMB has other means of enforcing its will on recalcitrant agencies. Moreover, the guilt of the agency has little to do with the validity of the regulation, which may well serve valid public interests. The purpose of section 3504(h) is to assure that all parties with interests in the regulation will have an opportunity to address its merits and demerits. The effect of OLC's memorandum is to allow a bureaucratic dispute (or conspiracy) between OMB and an agency to result in the invalidation of regulations without public process. This is directly contrary to the underlying analysis of the original OLC opinion, which relied on the legislative history of the Kennedy Amendment to ensure that OMB could not invalidate regulations adopted after notice and comment except through the rulemaking process.[283]

The memorandum's authorization of OMB power to disapprove existing requirements after public process may seem less egregious, but it too is inconsistent with the OLC opinion. The OLC opinion concluded that section 3504(h) applied only to rules proposed after the effective date of the Paperwork Reduction Act.[284] Moreover, the opinion stated that under section 3504(h), OMB could disapprove only those rules on which it commented during the comment period or which were not submitted to it for comment.[285] When an agency proposes a new rule containing a collection of information requirement to replace an existing rule, OMB could, subject to the standards enumerated in section 3504(h), disapprove that new rule. But

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[281] *Id.* at 2.
[282] OLC Opinion, *supra* note 234, at 31.
[283] *Id.* at 22, 24.
[284] *Id.* at 31–32.
[285] *See* 44 U.S.C. §§ 3504(h)(4), (5)(B); OLC Opinion, *supra* note 234, at 23.

just as would be the case if the agency never adopted the new rule or a court invalidated the new rule, the old rule would remain in effect because the agency had never lawfully revoked it. As the Supreme Court made clear in *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Corp.*,[286] the revocation of an existing rule requires a rulemaking. Under section 3504(h), OMB's power of disapproval applies only to the regulation adopted in the rulemaking proceeding subject to that section. Just as OMB cannot, under section 3504(h), create a collection of information requirement more to its liking when its comments have failed to persuade an agency that change is desirable, neither can OMB directly eliminate an existing requirement when its comments have not moved an agency to revoke the requirement through the rulemaking process.

OLC's September 24 memorandum does not contain any explanation for or analysis of its conclusions, so one cannot know whether the inconsistencies with its earlier opinion were inadvertent or deliberate. Given the pressure that OMB brought upon OLC, however, the characterization of the memorandum as reflecting a compromise between OMB and OLC may well be accurate.[287] The public perception was clearly that OLC had retreated from its opinion,[288] and while part of that perception was a result of the media's misreading of the original opinion,[289] there appears to be some truth behind the perception.

OLC's memorandum enabled OMB to assure agency officials that its proposed rulemaking was not inconsistent with OLC's original opinion.[290] A memorandum from OMB to the agencies stated that OMB and OLC had consulted extensively, that OMB was in full agreement with the Justice Department, and that its position had been reviewed and approved by OLC.[291] The memorandum contained a summary narration of the procedures applicable to the review of existing regulations, although it failed to specify OMB's power to disapprove existing regulations in the two circumstances described above.[292]

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[286] 463 U.S. 29 (1983).

[287] *See* Tax Notes, Nov. 1, 1982, at 406; Tax Notes, Nov. 15, 1982, at 563–64.

[288] *See, e.g.*, Moore, *New Justice Opinion Okays OMB Proposal On Paper Work*, Legal Times, Nov. 8, 1982, at 1; Legal Times, Nov. 15, 1982, at 22.

[289] *See, e.g.*, Moore, *DOJ Restricts OMB's Paper Review Power*, Legal Times, June 28, 1982, at 1.

[290] *See* Memorandum from Christopher DeMuth, *supra* note 223.

[291] *Id.* at 1.

[292] Memorandum from Christopher DeMuth, *supra* note 223.

On March 31, 1983, OMB published the final rule implementing its paperwork control functions under the Act.[293] In the preamble, OMB acknowledged that one of the major issues of concern to the public and the agencies was OMB's professed authority over existing regulations.[294] What followed was an extensive legal brief arguing that OMB had "full authority" over existing regulations.[295] Section 3504(h), OMB said, "is solely a procedural limitation on OMB authority [over regulations] and does not diminish OMB's substantive review powers."[296] The only issue, therefore, was the procedure to be used with respect to existing regulations, inasmuch as section 3504(h)'s procedures applied only to proposed rules. Exactly what OMB meant by "substantive review powers" was not entirely clear. OMB may have meant that, in reviewing existing regulations to determine if it should direct an agency to initiate a rulemaking, OMB would apply the same standard it applies in reviewing information collection requests; that is, OMB would determine whether the collection was necessary to the proper performance of the agency's functions. This interpretation would be consistent with the September 24 OLC memorandum.[297] On the other hand, OMB may have meant that it retained the substantive power generally to disapprove existing regulations. That this may have been the intended meaning was suggested by OMB's statement of its authority to disapprove collection of information requirements as well as proposed replacements for existing regulations. OMB supported this assertion by an intentional or convenient misquotation from the September 24 OLC memorandum.[298]

In any case, OMB concluded that the result of its interpretation was consistent with that of OLC's opinion, which recognized OMB's "broad powers . . . to initiate and review pro-

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[293] Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13,666 (1983) (codified at 5 C.F.R. pt. 1320).

[294] *Id.* at 13,667.

[295] *Id.* at 13,668.

[296] *Id.*

[297] *See* September 24 OLC Memorandum, *supra* note 275, at 2.

[298] The OLC memorandum stated that "OMB does have authority . . . to disapprove collection of information requirements *in* proposed replacements for existing regulations." September 24 OLC Memorandum, *supra* note 275, at 1 (emphasis added). OMB's purported quotation of that sentence, as printed in two different places in the Federal Register, stated that "OMB does have authority . . . to disapprove collection of information requirements *and* proposed replacements for existing regulations." Controlling Paperwork Burdens on the Public, *supra* note 293, at 13,668.

posals for changes in existing regulations."[299] OMB's interpretation resulted in essentially the same procedure for dealing with existing regulations as it had originally proposed—a one-time comprehensive review of all collection of information requirements in existing regulations which had not yet been approved by OMB.[300] If OMB determined that a collection of information requirement was unnecessary or unduly burdensome, then it could direct the appropriate agency to initiate a rulemaking subject to section 3504(h) in order to change the requirement.[301] Regulations would continue to be periodically reviewed, at least every three years,[302] similar to information collection requests which cannot be approved for a period in excess of three years.[303] Again, if the periodic review found the regulation unnecessary or unduly burdensome, OMB would direct the agency to initiate a rulemaking to change it.[304] The existing regulation would remain in effect during the pendency of the proceeding.[305] OMB drew special attention to its power to disapprove collection of information requirements in existing regulations in the two particular circumstances allowed by the September 24 OLC memorandum[306] and, indeed, specified these circumstances in the regulations themselves.[307]

The final rule did not alter the proposed rule's treatment of control numbers for regulations. With the blessing of the OLC

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[299] Controlling Paperwork Burdens on the Public, *supra* note 293, at 13,666, 13,668.
[300] 5 C.F.R. § 1320.14 (1986).
[301] *Id.* §§ 1320.14(f), (g).
[302] *Id.* § 1320.14(d).
[303] 44 U.S.C. § 3507(d) (1982).
[304] 5 C.F.R. § 1320.14 (1986).
[305] *Id.* § 1320.14(f).
[306] *See* Controlling Paperwork Burdens on the Public, *supra* note 293, at 13,681. The preamble purports to distinguish the disapproval of collection of information requirements in existing regulations from the disapproval of the regulations themselves. "OMB . . . neither claims to have nor has any power under the Act to disapprove any *regulation*. Its authority is limited to *collections of information*." *Id.* (emphasis in the original). Nevertheless, OMB's definition of "collection of information" expressly includes "rules or regulations," 5 C.F.R. § 1320.7(c)(1) (1986), and OMB made clear in its preamble that if it disapproves requirements imposed by regulations, then the requirements are "invalidated" and "may not be enforced against the public." Controlling Paperwork Burdens on the Public, *supra*. Clearly, by asserting the power to disapprove a collection of information, OMB does assert the power to render a regulation invalid. To claim that this is not the power to disapprove a regulation is only to make a semantic distinction.
[307] 5 C.F.R. §§ 1320.14(h), (i) (1986). In fact, OMB has yet to utilize this claimed power to disapprove a collection of information requirement in an existing rule because an agency has failed to initiate or complete a rulemaking as directed by OMB, though it has on occasion been tempted. Interview with OIRA official in Washington, D.C. (June 17, 1985).

memorandum, OMB required all collection of information requirements to display OMB control numbers.[308] The preamble reiterated that the authority for such a requirement derived not from section 3507(f) of the Act, which required control numbers for information collection requests, but from OMB's rulemaking power[309] and general management responsibilities under the Act.[310] The preamble further explained that this requirement was legally binding on the agencies, even though it was not directly mandated by the Act.[311] In the Public Protection provision of the regulations, OMB continued to be faithful to the OLC opinion and expressly denied that the absence of a control number on a regulation would itself invalidate the collection of information requirement in the regulation.[312] Unlike an information collection request, which would be unenforceable without a control number,[313] a collection of information requirement lacking a control number "will alert the public that either the agency has failed to comply with applicable legal requirements or the collection of information requirement has been disapproved."[314] In the latter circumstance, OMB provided that the collection of information would be unenforceable by reason of the disapproval.[315] OMB was silent as to what the legal effect might be in the former circumstance of an agency's "fail[ure] to comply with applicable legal requirements." Rather, OMB stated that "a member of the public confronting a collection of information requirement with no control number will be able to make further inquiries and may find that the requirement is unenforceable."[316]

The publication of the final rules implementing the Paperwork Reduction Act ended the initial struggle over OMB's authority. The Office of Legal Counsel rejected OMB's initial view of its authority—the ability to disapprove existing regulations adopted

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[308] 5 C.F.R. §§ 1320.4(a), 1320.13(f), (h), 1320.14(c), (e), (f) (1986).

[309] *See* 44 U.S.C. § 3516 (1982).

[310] Controlling Paperwork Burdens on the Public, *supra* note 293, at 13,666–70.

[311] *Id.* at 13,669. The preamble relies particularly on 44 U.S.C. § 3518(a) (1982), which provides that agencies' authority to prescribe rules for federal information activities "is subject to the authority conferred on the Director by this chapter."

[312] 5 C.F.R. § 1320.5(b) (1986).

[313] *Id.* § 1320.5(a); 44 U.S.C. § 3512 (1982)(stating that no person shall be subject to any penalty for failure to provide information if the information collection request does not display a current control number).

[314] 5 C.F.R. § 1320.5(b) (1986).

[315] *Id.*

[316] Controlling Paperwork Burdens on the Public, *supra* note 293, at 13,671.

after notice and comment without any public procedure. Nevertheless, OMB retained the authority to require agencies to institute rulemakings to change collection of information requirements, and in those rulemakings OMB could then substantively affect the collection requirements, even to the point of disapproving them if the agency was not responsive to OMB's suggestions. OMB's job was a bit more difficult procedurally, but OMB in effect retained the power to review existing regulations. Treasury may have won in principle, but it lost in actual effect, for it could not keep its tax regulations from OMB scrutiny.

Similarly, the OLC opinion rejected OMB's original interpretation of the Act, which would have limited the period of time for which a collection of information requirement could be approved, required control numbers on collection of information requirements, and subjected collection of information requirements to the public protection provision. Nevertheless, OLC did allow OMB to require resubmission of approved regulations for review at least every three years and to require control numbers for regulations. Although the absence of a control number did not make the regulation unenforceable, it could at least alert the public to the fact that something was wrong. Again, Treasury had won in principle, but OMB retained the substantive power it desired.

D. *Congressional Reaction*

Although OMB and Treasury had reached an accommodation of sorts, others were not satisfied. For example, some business groups, while reassured by the OMB-Justice compromise as reflected in the regulations, remained unhappy.[317] More importantly, Senator Lawton Chiles, sponsor of the Act in the Senate, was personally offended by the OLC opinion and what he viewed as its flouting of congressional intent.[318] The need to reauthorize the Act[319] provided Congress with an opportunity to amend it. Senate and House bills each provided a different solution to the problem.[320] The House Bill amended section

[317] 1983 *Senate Oversight Hearings*, *supra* note 2, at 41 (statement of James D. McKevitt, National Federation of Independent Business).

[318] Interview with Robert Coakley, *supra* note 248.

[319] 44 U.S.C. § 3520 (1982) (effective April 1, 1981) authorized appropriations for fiscal years 1981 through 1983 only.

[320] S. 2433, 98th Cong., 2d Sess., 130 CONG. REC. S2790 (daily ed. March 15, 1984); H.R. 2718, 98th Cong., 1st Sess., 129 CONG. REC. H9271 (daily ed. Nov. 7, 1983).

3504(h) to eliminate the term "collection of information requirement," substituting the phrase "information collection request . . . contained in, or derived from, a rule or regulation."[321] The procedure was also changed. Rather than having OMB comment on the proposed rule, the new provision would have OMB use the same procedure for information collection requests contained in proposed rules as it used for other information collection requests.[322] To avoid the concerns that spawned the Kennedy Amendment, the provision required OMB approval of the request *before* the final rule could be published by the agency.[323] The provision also required that any written communications between OMB and the agency be made part of the rulemaking record, and that any changes in the proposed and final forms of the information collection be explained by the agency.[324] The amendment specifically required agencies to submit existing regulations containing information collection provisions to OMB for review pursuant to section 3507.[325] Here, however, OMB could disapprove the collection of information in a rule without any public proceeding.[326] The amendments explicitly stated that both OMB disapproval of and the absence of a control number on an information collection request contained in a regulation would render the request invalid and unenforceable.[327]

The Senate's solution was simpler. The term "information collection request" would be defined to include "collection of information requirements."[328] In this way, the procedures of section 3504(h) would continue to apply to collection of information requirements contained in proposed rules, but the provisions of the Act that refer only to "information collection requests"—such as the public protection provision, the requirement for display of a control number, and the three-year limitation on the period of approval—would also apply to the collection requirements.[329] Although the issue of OMB's authority over existing regulations had given rise to the OLC opinion, the Senate bill made no specific attempt to resolve that problem.

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[321] H.R. 2718, *supra* note 320.
[322] *Id.*
[323] *Id.*
[324] H.R. REP. No. 147, 98th Cong., 1st Sess. 8, 16, 24–26 (1983).
[325] *Id.* at 8, 28.
[326] *See id.* at 8.
[327] *Id.* at 8, 25–26.
[328] S. REP. No. 576, 98th Cong., 2d Sess. 16, 27 (1984).
[329] *Id.* at 16.

By the time of the Senate report, however, agencies were supposed to have already submitted all such regulations to OMB for review.[330]

The Senate report purportedly addressed the concerns of those who believed that agencies would use the Act as a means of avoiding a rulemaking to rescind their regulations. Some feared that agencies might try to rescind a rule imposing a reporting or recordkeeping requirement merely by failing to resubmit the requirement to OMB when the prior approval expired.[331] The report stated, however, that OMB did not believe this to be a problem because OMB's regulation required agencies to resubmit previously approved collections of information to OMB prior to their expiration date.[332] Moreover, the Report continued, the Administrative Procedure Act requires agencies to undertake rulemakings to rescind or amend a rule. Thus, the rule would remain in effect after its clearance expired, but the agency simply would not be able to enforce it because of the public protection provision.[333] For those concerned about an agency using the Paperwork Reduction Act as a means of avoiding a rulemaking to rescind its regulations, these assurances could not have provided much comfort. Reliance on OMB to ensure that an agency maintains reporting and recordkeeping requirements which it wishes to eliminate seems unrealistic. Moreover, if an agency cannot enforce its reporting and recordkeeping requirements, it makes little sense to say that the rule remains in effect.

Fears about agencies seeking to rescind regulations without public process were not totally unfounded. For example, in 1984, coincident with the Senate Committee on Governmental

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[330] The Senate Report was ordered to be printed August 6, 1984. *Id.* at 1. Under OMB's regulations, agencies were to submit all previously unapproved collection of information requirements contained in regulations to OMB not later than December 31, 1983. 5 C.F.R. § 1320.14(a) (1986).

[331] S. REP. No. 576, *supra* note 328, at 16.

[332] *Id.* at 17 (citing 5 C.F.R. § 1320.14(a)(1986)). It is doubtful whether the regulatory provision cited would indeed require submission of a previously approved collection of information to OMB if an agency had decided that it wished to discontinue the collection. The agency would not be proposing a collection of information, and both section 3504(h) and section 3507 are phrased in terms of OMB approving or disapproving a collection of information requirement or information collection request proposed by an agency. For example, OSHA recently proposed to replace a number of recordkeeping requirements with certifications. OSHA claimed that these revisions, because they would not require a collection of information, would not be subject to the Paperwork Reduction Act. *See* 51 Fed. Reg. 312, 313 (1986).

[333] S. REP. No. 576, *supra* note 328, at 17.

Affairs' consideration of these amendments, the Department of Energy (DOE) was involved in an attempt to rescind certain recordkeeping requirements relating to price controls on crude oil and petroleum products.[334] While the price controls themselves had been rescinded in January 1981, DOE continued to require all firms to retain indefinitely their records regarding compliance.[335] OMB had conditioned approval of these recordkeeping requirements on DOE's initiation of a rulemaking to narrow the requirements to those records necessary for investigation and enforcement actions against firms which had violated the controls.[336] DOE, however, was under congressional pressure not to take any action which might endanger enforcement activities, and its proposals to limit the recordkeeping requirements were perceived as having that effect.[337] As a result, DOE officials considered merely letting the period of OMB approval lapse, rather than going through a public rulemaking to rescind parts of the recordkeeping requirement.[338] In this way, DOE perhaps hoped to direct congressional wrath away from itself and toward OMB, which had, after all, moved to curtail the requirement. DOE premised this plan on its belief that the absence of OMB approval would render the recordkeeping requirement unenforceable under the public protection provision.[339] OMB, however, would not join in this plan and insisted that it would extend the approval period even if DOE did nothing.[340] Consequently, DOE did seek an extension of the approval, proposed a rule to reduce the recordkeeping requirements, and finally adopted that rule with some changes.[341]

DOE's premise that the lapse of the period of approval for the requirement in the regulation would render the requirement unenforceable was inconsistent with both the OLC opinion and

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[334] *See generally* Letter from Robert P. Bedell, Deputy Administrator, Office of Information and Regulatory Affairs, OMB, to Rep. John D. Dingell (D-Mich.), Chairman of the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce (June 21, 1985) (on file at HARV. J. ON LEGIS.) [hereinafter Bedell Letter].

[335] *Id.* at 5.

[336] *Id.* at 6–10.

[337] *See, e.g.*, Letter from Rep. John D. Dingell, Chairman of the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, to John S. Herrington, Secretary of Energy (April 30, 1985) (on file at HARV. J. ON LEGIS.) [hereinafter Dingell Letter].

[338] Interview with anonymous OMB official in Washington, D.C. (June 17, 1985).

[339] *Id.*

[340] Bedell Letter, *supra* note 334, at 19.

[341] *See id.* at 9–11.

OMB regulations.[342] This, however, would have been changed by the amendments proposed by the Senate committee. Had those amendments been in effect, DOE's no-action alternative could have resulted in the elimination of the recordkeeping requirement. Even a temporary loss of that requirement, moreover, could have resulted in a permanent loss to the government of the ability to examine the records subject to the requirement. The concern about the effect on enforcement was real, and despite the assurances contained therein, the Senate committee's report does not appear to have considered this problem. Instead, the report seems to have assumed that there would be only a *delay* in the enforceability of the requirement. The report seems not to have recognized that as a result of a temporary lapse of a requirement to retain records a regulated entity could legally destroy records necessary for enforcement.

The House bill was passed without a recorded vote in November 1983.[343] The Senate, however, gave neither the Senate nor House bill floor consideration, and the impetus for substantive amendments to the Act died.[344] OMB was satisfied with its authority under its regulations and did not need additional powers to achieve control over agency paperwork.[345] The Treasury

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[342] The OLC opinion had made it clear that the public protection provision and the time limitations applicable to information collection requests were not applicable to collection of information requirements in regulations. OLC Opinion, *supra* note 234, at 36–40. Moreover, OMB's final regulation made it clear that, while OMB could require control numbers for collection of information requirements and limit the period for those numbers' approval, the absence, or lapse, of a currently valid control number did not render a collection of information requirement unenforceable. *See* 5 C.F.R. § 1320.5(b) (1986).

[343] *See* 123 CONG. REC. H9271–73 (daily ed. Nov. 7, 1983).

[344] In the spring of 1986, other events created a new motivation for reauthorization and substantive amendments. Upset with certain OMB actions, some House members sought to cut off all appropriations to OIRA, utilizing the lack of an authorization as a parliamentary weapon to accomplish this end. *See Dingell Moving to Revoke Some OMB Regulatory Review Powers*, INSIDE THE ADMINISTRATION, May 15, 1986, at 1. *See also infra* notes 345, 512, and 544.

[345] 1983 *Senate Oversight Hearings*, *supra* note 2, at 7. The absence of any provision authorizing appropriations for carrying out the Paperwork Reduction Act was not at all burdensome to OMB. To the contrary, one of the House's purposes in attempting to reauthorize the Paperwork Reduction Act was to require OIRA to spend the authorized funds *only* for activities relating to the Paperwork Reduction Act, not for the purpose of regulatory oversight or reform generally. *See* H.R. 2718, § 11, 98th Cong., 1st Sess., 129 CONG. REC. H9271 (daily ed. Nov. 7, 1983). This was in response to a finding that OMB had utilized OIRA personnel and appropriations authorized under the Paperwork Reduction Act to support regulatory oversight and reform activities under E.O. 12,291, contrary to Congress' desires. *See* H.R. REP. NO. 147, *supra* note 324, at 12–15. This restriction was opposed by OMB. *See* S. REP. NO. 576, *supra* note 328, at 12–15. Absent any reauthorization provision, OMB was free to spend funds appropriated to it for any of its functions without having to account for Paperwork Reduction Act activities

Department was also content.[346] The current framework, which clearly distinguishes between collection of information requirements contained in regulations adopted pursuant to notice and comment and all other collections of information, generally harmonizes the procedures of the Administrative Procedure Act with the Paperwork Reduction Act. This was the result of OLC's interpretation of section 3504(h). OMB's prior interpretation, as well as the amendments proposed by the House and Senate in 1983 and 1984, would have each raised significant questions. All would have enabled agencies to invalidate regulations through unilateral action without public procedure. While Congress probably could provide such power to agencies if it so desired, it is unlikely that it intended to do so here. Instead, Congress probably failed to recognize the potential consequences of the amendments and their conflict with the Administrative Procedure Act.

E. *The Inherent Conflict—Reporting Requirements Under the Administrative Procedure Act*

To a large degree, any attempt to treat equally paperwork requirements not contained in regulations and paperwork requirements contained in regulations is bound to raise conflicts.

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separately from E.O. 12,291 or E.O. 12,498 activities. *See* E.O. 12,291, *supra* note 17 and Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 note (Supp. III 1985).

In October 1986, as part of the continuing appropriations resolution funding federal activities pending fiscal year 1987 appropriation acts, Congress enacted a three-year reauthorization of appropriations for OIRA. *See* Pub. L. No. 99-500, Title VIII, 100 Stat. 1783 (1986). The provision also creates a special line-item budget account for OIRA and limits the use of the funds authorized to functions under the Paperwork Reduction Act. *Id.* Some congressional personnel apparently believe that this latter limitation will restrict OIRA activities under E.O. 12,291 and E.O. 12,498. *See* OMB WATCH, PAPERWORK REDUCTION: THE QUICK FIX OF 1986 9 (Nov. 1986). This belief proved unfounded with respect to the original Act's authorization, *see infra* note 460 and accompanying text, and there is little reason to believe that OMB will not allocate funds from other sources to OIRA for the Executive Order activity, just as it has done in the past. The continuing resolution also made a number of amendments to the Paperwork Reduction Act itself. *See generally id.* Perhaps most significantly, the appointment of future OIRA administrators is made subject to Senate advice and consent.

[346] Interview with anonymous Treasury official in Washington, D.C. (June 18, 1985). This is especially true because OMB has been responsive to Treasury requests for expedited clearance and has winked at Treasury's failure to give public notice of its submissions to OMB of information collection requests contained in regulations *not* adopted after notice and comment. *Id.* This latter practice would appear to be a clear violation of 44 U.S.C. § 3507(a)(2)(B) (1982), which requires that the agency prepare a notice for publication in the *Federal Register* stating that the agency has submitted to OMB a specified collection of information requirement.

These problems arise from the uncertain status of paperwork requirements under the Administrative Procedure Act (APA) itself. The definition of "rule" in the APA includes a "statement of general . . . applicability and future effect designed to implement . . . or prescribe law . . . ."[347] Whenever an agency imposes a general requirement for persons to report certain information or to retain certain records, the agency is making such a statement. Consequently, one might imagine that the procedures applicable to rulemaking would apply to the initial imposition of a general reporting or recordkeeping requirement. Many agencies, however, routinely impose reporting requirements without undertaking the procedures applicable to rulemaking.[348] Some of these cases fall within one or more of the exceptions to the requirements for rulemaking included in the APA,[349] although these exceptions would not explain the failure to publish these requirements in the *Federal Register* pursuant to the Freedom of Information Act.[350] In many cases, however, no exceptions would appear applicable.

In the FTC's LB report case, the issue of procedural requirements for agency information requests was squarely presented.[351] There the FTC ordered 450 of the nation's largest businesses to file reports disclosing information concerning their financial performance in 1974.[352] The companies resisted the FTC orders in part on the ground that they were rules which had been promulgated without the procedure required by section 553 of the APA.[353]

While the FTC undeniably had the legal authority to impose report orders under section 6(b) of the Federal Trade Commis-

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[347] 5 U.S.C. § 551(4) (1982).

[348] Included among such agencies are the Census Bureau and the Energy Information Administration of DOE. *See* Shell Oil Co. v. DOE, 477 F. Supp. 413 (D. Del. 1979).

[349] *See* 5 U.S.C. §§ 553(a), (b)(A), (B) (1982). Probably the exception with the greatest impact is the one relating to "public property, loans, grants, benefits, or contracts." *Id.* § 553(a)(2).

[350] *See id.* §§ 552(a)(1)(C), (D).

[351] Appeal of FTC Line of Business Report Litig., 595 F.2d 685, 693–96 (D.C. Cir. 1978) (per curiam), *cert. denied sub nom.* Milliken & Co. v. FTC, 439 U.S. 958 (1978). *See supra* notes 78–103 and accompanying text.

[352] The report was notable in its requirement that the company present its financial performance statistics according to the Standard Industrial Classification (SIC) codes. *FTC Line of Business*, 595 F.2d at 691 n.5. *See also supra* text accompanying notes 78–80. At the same time the FTC instituted the Corporate Patterns Report Program, which required 1100 major domestic corporations to report the value of the shipments of their domestic manufacturing establishments in terms of Census Bureau product classifications. *FTC Line of Business*, 595 F.2d at 692. This reporting program caused similar problems for respondents.

[353] *FTC Line of Business*, 595 F.2d at 693.

sion Act,[354] that provision did not indicate what, if any, procedure was required before the report orders could be issued. The companies argued that both the Securities and Exchange Commission (SEC) and the Federal Power Commission (FPC) had engaged in rulemaking when they undertook similar large-scale reporting programs and that the FTC was required to do the same.[355] The court noted, however, that the statutory provision authorizing the SEC's reporting program expressly required that it do so only by regulations adopted in accordance with the APA.[356] Moreover, the fact that the FPC engaged in rulemaking to impose its reporting program did not indicate that it had to do so.[357] There was no question that the FTC could have proceeded by rulemaking; the issue was whether it was required to do so.

The court determined that the "language and history of the APA suggest a classification of agency activity into three basic categories: rulemaking, adjudication and investigation."[358] Orders to file informational reports, the court held, fell into the third category. This category is encompassed by section 555(c) of the APA, which merely states that "[p]rocess, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law."[359] In short, this provision requires no particular preliminary procedure for imposing a reporting requirement.

The court rejected in a footnote the claim that the reporting programs were rules within the APA definition.[360] The companies argued that, because the data would be used for regulatory purposes, the collection of the data would itself be a prescription of law.[361] The court stated that use of the information collected for regulatory purposes could not serve as the touchstone of

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[354] 15 U.S.C. § 46(b) (1982).

[355] *FTC Line of Business*, 595 F.2d at 694 n.46.

[356] *Id.* (citing 15 U.S.C. §§ 77s(a), 78m(a) (1976)).

[357] *Id.* at 694 n.46.

[358] *Id.* at 695. *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.01 at 159 (1958). The only legislative history the court cited in support of this tripartite division was a floor statement by Rep. Francis E. Walter (D-Pa.), "a principal sponsor of the APA." *FTC Line of Business*, 595 F.2d at 695–96 (citing 92 CONG. REC. 5648 (1948)). This statement clearly distinguishes investigative functions from the legislative or judicial powers of agencies. This statement, however, is of doubtful authority in construing the Act because it was made *after* the enactment of the APA (a fact the court failed to mention).

[359] 5 U.S.C. § 555(c) (1982).

[360] *FTC Line of Business*, 595 F.2d at 695 n.48.

[361] *Id.*

this analysis for "then all types of compulsory process—including subpoenas—would similarly require rulemaking."[362] The companies also asserted that the line-of-business reporting requirement would fall within the Act's definition of rule by constituting a "prescription for the future of . . . accounting, or practices bearing on . . . [accounting]."[363] In responding to this argument, the court correctly noted that the FTC's reporting requirement did not impose on the companies any particular accounting system for the future, although it might require companies to rework their past accounts in order to comply with the FTC's reporting categories.[364]

While the D.C. Circuit's analysis in the *FTC Line-of-Business* case has never been seriously questioned,[365] it should be. Undoubtedly, much information-gathering by agencies is ancillary or incidental to rulemaking or adjudication, even if it might technically fall within the definition of a "rule." The context and history of section 555 of the APA establish that that section relates to "ancillary matters."[366] Moreover, the primary activity of adjudication and rulemaking would be greatly impeded if agencies were required to conduct the ancillary information-gathering through rulemaking. It is equally clear, however, that agencies gather information which is not ancillary or incidental to other proceedings, real or imagined, and which cannot be deemed investigative except by the greatest stretching of the term. For example, census information[367] and information gathered for public dissemination fall into this category. The gath-

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[362] *Id.*

[363] 5 U.S.C. § 551(4) (1982).

[364] *FTC Line of Business*, 595 F.2d at 695 n.48.

[365] Indeed, when a number of companies resisted the Energy Information Administration's Financial Reporting System, which bore many similarities to the FTC's Line-of-Business Report, they did not even raise the issue that the System had not been promulgated by rulemaking. *See, e.g.*, Shell Oil Co. v. DOE, 477 F. Supp. 413 (D. Del. 1979), *aff'd*, 631 F.2d 231 (3d Cir. 1980), *cert. denied*, 450 U.S. 1024 (1981). *See also supra* text accompanying notes 106–11. More often firms have challenged reporting requirements by characterizing them as formal adjudications, thereby entitling them to other procedural safeguards. *See, e.g.*, Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971).

[366] *See, e.g.*, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61 (1947), *reprinted in* OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE PROCEDURE SOURCE BOOK, at 110 (1985).

[367] Generically, census information can include not just information collected by the Census Bureau, but also basic demographic and economic data collected by any agency. The Energy Information Administration's Financial Reporting System should have fallen into this category. This category also describes the purpose of the Corporate Patterns Report, *see FTC Line of Business*, 595 F.2d at 692, if not the Line-of-Business Report. *See id.* at 691.

ering of such information, when accomplished by means of a general legal requirement imposed by an agency, both fits within the definition of a rule and is not ancillary to other proceedings. There is neither a policy nor a legal basis for exempting such an exercise of compulsory agency power from the procedures required for rulemaking. Indeed, the policy reasons underlying section 553 of the APA apply to general requirements for reporting. The public procedure required by section 553 reflects a determination both that the agency will be better informed as to its rules if it obtains comments and data from the public and that the public will have a greater sense that it is being treated equitably if it has been able to participate in the formulation of the laws that affect it.[368]

The Paperwork Reduction Act itself reflects this understanding to a certain degree in section 3507, which requires agencies to give notice in the *Federal Register* of any information collection request sent to OMB for approval, and in section 3508, which provides for oral and written comments on OMB determinations regarding the necessity of information. Most directly, however, section 3517 expressly requires that "in reviewing information collection requests, the Director shall provide interested agencies and persons early and meaningful opportunity to comment."[369] A consistent criticism of the Act is its failure to provide even greater opportunities for public participation.[370] Just as the Paperwork Reduction Act recognizes the identity, for paperwork control purposes, of reporting requirements and recordkeeping requirements, the APA should similarly recognize their identity, for procedural purposes, in its definition of a rule. Agency-imposed recordkeeping requirements are almost invariably imposed by rule under the APA. Recordkeeping does not fall within the terms of section 555(c), and at least where rates, wages, and prices are involved, it may be explicitly included within the definition of a rule. Nevertheless, under existing case law an agency could, without rulemaking procedures,

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[368] *See, e.g.*, S. Doc. No. 248, 79th Cong., 2d Sess. 19–20 (1946). Of course, the Administrative Procedure Act does not require that all substantive rules be adopted with public participation. 5 U.S.C. §§ 553(a), (b)(B) (1982). While some of these exceptions have been criticized, *see, e.g.*, Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970), to the extent that they remain, they would provide a basis for avoiding rulemaking procedures for reporting requirements that fall within their terms.

[369] 44 U.S.C. § 3517 (1982). *See also id.* §§ 3507(a)(2), 3508 (1982).

[370] *See, e.g.*, S. REP. No. 576, *supra* note 328, at 11–12, 45.

require firms to submit an annual report as comprehensive as the records of the firm.[371]

OMB has included within its definition of information collection "any requirement for persons to . . . publicly disclose information,"[372] including agency activities as diverse as establishing labeling requirements and regulating proxy statements.[373] The APA and other statutes invariably require that agencies submit such activities to rulemaking proceedings.[374] As OMB argued in justifying its interpretation, there is little distinction between a requirement to report data to a federal agency which then discloses it to the public and a requirement to report the information directly to the public.[375] The similarity of these requirements dictate that both the Paperwork Reduction Act and the APA should require that they be submitted to the same procedural process.

Determinations about whether a given reporting requirement is investigative, or is ancillary to a rulemaking or adjudication, or is a general prescription which implements law in its own right are not always easy to make. The fact that the line may at times be difficult to discern, however, is not an adequate justification for denying that it exists at all. Moreover, the Paperwork Reduction Act's rather pragmatic, or politic, distinctions between collections of information subject to the Act and those not subject to the Act suggest a good preliminary basis for line drawing.[376] Another basis for distinction could be to look to whether the reporting requirement is a one-time affair or is a recurring obligation, such as a semi-annual report.

The treatment of reporting requirements as rules or non-rules carries important consequences beyond the merely procedural. If reporting requirements are not considered to be rules, but are instead mere investigations, the legal interests recognized by law are usually limited to the interests of the agency and the party subject to the reporting requirement.[377] Rarely do courts

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[371] *See FTC Line of Business*, 595 F.2d 685.

[372] 5 C.F.R. § 1320.7(c) (1986).

[373] *See id.* § 1320.7(c)(2).

[374] *See* APA, 5 U.S.C. § 553 (1982) and *see, e.g.*, Petroleum Marketing Practices Act, 15 U.S.C. § 2822 (1982) (disclosure of octane content on gas pumps), Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 352 (1982) (drug labeling).

[375] *See* Controlling Paperwork Burdens on the Public, 47 Fed. Reg. 39,519–20 (1982); 48 Fed. Reg. 13,675 (1983) (codified at 5 C.F.R. pt. 1320).

[376] 44 U.S.C. § 3518(c) (1982).

[377] For example, with respect to a subpoena, usually only the person subject to the demand can contest it. Even the person to whom the information relates does not

perceive a separate public interest in the activity which may be vindicated by third parties. If the reporting requirements are considered to be rules, however, courts are more likely to recognize a public interest which third parties may protect.

This is most apparent in the elimination of an on-going requirement to report. If the requirement is contained in a rule, few question the legal interest of persons whose actual interests may be affected by the discontinuance of a reporting requirement. For example, when the Department of Labor attempted to reduce the reporting requirements of employers with respect to employees' wages and hours, no one disputed the right of the unions (on behalf of the employees) to challenge the lawfulness of this change in reporting, even though the claim of the unions related to the need for the reporting.[378] Similarly, when the Department of Transportation reduced the requirements imposed on trucking companies for truck drivers' daily logs, requirements previously imposed by regulation, no one questioned the right of the unions to challenge the reduction and to seek reinstitution of the former requirements.[379] The unions were allowed to argue the value and importance of the logs in enforcing drivers' hours-of-service limitations. In both cases, the aggrieved persons were not simply the parties whose private law rights were infringed.

The APA protects not only private interests from government intrusion, but the public interest in certain regulations as well.[380] In an environment where even government agencies perceive deregulation as the current wisdom, it is important to ensure not only that government justifies under law its intrusions, but also that it justifies under law removals of intrusions which are

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generally have the right to contest the subpoena if the information is in the possession of others. *See, e.g.*, SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984) (dictum) (doubting the right of the individual subject of the investigation to challenge subpoena of a third party); United States v. Miller, 425 U.S. 435 (1976) (repudiating due process or Fourth Amendment right to challenge subpoena of bank for defendant's check records). Where an activity is classified as investigatory, third parties have little if any cognizable right to agency enforcement of that activity. *See* Heckler v. Chaney, 470 U.S. 821 (1985) (prosecutorial discretion renders an agency's decision not to investigate presumptively immune from judicial review).

[378] *See* Building & Constr. Trades' Dept. v. Donovan, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

[379] *See* International Bhd. of Teamsters v. United States, 735 F.2d 1525 (D.C. Cir. 1984).

[380] *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1711–56 (1975); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). *See also* Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 179–89, 209–13 (1984).

of benefit to others. Because the APA, as construed by the courts, recognizes that beneficiaries of regulatory schemes may have legally cognizable interests in these schemes, such beneficiaries can ensure that any deregulation will be justified under law. Reporting requirements, however, except to the extent that they are reflected in regulations, are not similarly protected.

The Paperwork Reduction Act is dedicated to the *reduction* of reporting requirements. The clearance procedures are oriented toward ensuring that unnecessary reports are eliminated. Agencies are encouraged to focus on the burdens imposed by information collection and to review critically the need for information.[381] OMB is placed in the role of monitor, with authority to disapprove only unnecessary or overburdensome collections, and without authority to disapprove failure to collect necessary information.[382] The weight of the clearance process is directed against collection. While this focus may be necessary in order to overcome institutional biases which prevent agencies from objectively determining their need for information,[383] the process loses sight of the fact that reporting requirements can serve important public interests. Given this bias in the Paperwork Reduction Act, the APA's failure to afford protection to the public values found in non-regulation reporting requirements is especially disturbing and could seriously jeopardize the public interest which these various reporting requirements serve.

VI. The Public Protection Provision

A. *Its Limitations*

The Federal Reports Act contained many of the substantive requirements found in the Paperwork Reduction Act.[384] The Public Protection provision,[385] however, did not exist in the Federal Reports Act. Its inclusion in the Paperwork Reduction Act was the result of the perceived failure of agencies to comply even with the relatively easy requirements of the Federal Reports Act. In some cases the failure derived from legitimate

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[381] *See* 44 U.S.C. § 3507(a)(1) (1982).
[382] *See id.* § 3508.
[383] *See* Final Report, *supra* note 12, at 16, 56, 63.
[384] *See* 44 U.S.C. §§ 3501–12 (1976).
[385] 44 U.S.C. § 3512 (1982).

differences in interpretation between agencies and OMB and GAO over the coverage of the Act, but simple non-compliance was also a factor.[386] There was no specific mechanism in the Federal Reports Act to penalize agencies which failed to comply.[387] Nor did the Act provide any means by which the public might determine if an agency had complied with the Act in adopting a reporting requirement.[388]

In light of the history of non-compliance under the Federal Reports Act, the drafters of the Paperwork Reduction Act doubted the ability or will of OMB over time to police the agencies' compliance with the new act's requirements.[389] Therefore, the idea of using the public as a means of enforcement appeared attractive. Such public enforcement would create an incentive for both the agencies and OMB to comply with the Act.

To enable this public enforcement, Congress first required that "[a]n agency shall not engage in a collection of information without obtaining from [OMB] a control number to be displayed upon the information collection request."[390] Next, it provided that

> [n]otwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not display a current control number assigned by [OMB], or fails to state that such request is not subject to this chapter.[391]

This requirement for the display of a "current" control number was to provide public enforcement of the time limitations ap-

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[386] Senator Percy (R-Ill.) reported that GAO had found that the Department of Agriculture's Food Safety and Quality Service alone had issued 1100 forms that were not approved under the Federal Reports Act. The explanation for this non-compliance was that it was difficult to inform program people of the requirements and that top management did not take paperwork control seriously. S. REP. NO. 930, 96th Cong., 2d Sess. 75, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6312, 6313.

[387] In the litigation over the Federal Trade Commission's Line-of-Business reports, the courts entertained claims that the reporting requirement was invalid because of a failure to comply with the Federal Reports Act, but the courts consistently found compliance. *See supra* text accompanying notes 78–111. There is no reported case of a reporting requirement being overturned for failure to comply with the Federal Reports Act.

[388] In implementing the Federal Reports Act, OMB's Circular A-40 had required numbers to be displayed on approved forms. The circular itself, however, was neither published nor publicized.

[389] Interview with Robert Coakley, *supra* note 248.

[390] 44 U.S.C. § 3507(f) (1982).

[391] *Id.* § 3512.

plicable to OMB's approval of information collection requests.[392] By these provisions, Congress thought that persons could determine whether a reporting or recordkeeping requirement needed to be approved, had been approved, and was still valid.[393] If approval was necessary but no current control number was displayed, persons could ignore the requirement with impunity. This threat of legalized non-compliance, it was hoped, would create a strong incentive for the agencies to follow the requirements of the Act.[394]

Several factors, however, have severely limited the effectiveness of the Public Protection provision as a means of enforcement. Most importantly, respondents face considerable difficulty in determining which reporting or recordkeeping requirements they may safely ignore. First, some reporting requirements are not subject to the Act at all, so that the Public Protection provision does not insulate one from liability for failing to respond to them.[395]

Second, OMB's interpretation of the term "information" not to include certain affidavits, oaths, affirmations, certifications, receipts, changes of address, consents, or acknowledgments[396] increases the public's uncertainty as to which information request forms fall within the scope of the Public Protection provision.[397] To many people a governmental demand for a certifi-

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[392] *See id.* §§ 3507(b)–(d).

[393] S. REP. NO. 930, 96th Cong., 2d Sess. 52, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6292.

[394] *See* S. REP. NO. 930, 96th Cong., 2d Sess. 48, 52, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6288, 6292.

[395] Section 3518(c)(1) expressly exempts the collection of information from the application of the Act in five circumstances: in a criminal case; in a civil case to which an agency is a party; in an administrative case where an agency is proceeding against specific persons; in compulsory process under the Antitrust Civil Process Act; and in the conduct of intelligence activities. While the introductory phrase of section 3512, "[n]otwithstanding any other provision of law," suggests universal applicability, the legislative history is explicit that the collections specified in section 3518(c)(1) are not subject to the Public Protection provision at all and thus need not state the inapplicability of the Act to them. *See* S. REP. NO. 930, 96th Cong., 2d Sess. 52–53, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6292–93. These specified collections are not always immediately evident. For example, one uncertainty is whether the exemption applicable "during the conduct of . . . an administrative action or investigation involving an agency against specific individuals or entities," 44 U.S.C. § 3518(c)(1)(B)(ii) (1982), applies not only where the agency acts as plaintiff or prosecutor but also where the agency acts in a judicial capacity in a dispute between two private parties.

[396] *See* 5 C.F.R. § 1320.7(k)(1) (1986).

[397] OMB recognized that this exception could be misused, so it provided that the above exception applied only if it entailed "no burden other than that necessary to

cation as to some fact must be difficult to distinguish from normal government reporting requirements. Thus, the authorized absence of a control number again undermines the universality of control numbers, so that individuals cannot rely on the Public Protection provision.

Third, the Public Protection provision only applies to information collection requests from an "agency." However, two agencies are expressly excluded from the defined term, while others may be excluded by their particular legislation, further diluting the universality of the control number regime.[398]

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identify the respondent, the date, the respondent's address, and the nature of the instrument." 5 C.F.R. § 1320.7(k)(1) (1986).

Notwithstanding this safeguard, it appears clear that "certifications" imposing substantial burdens have not been submitted to OMB and have not been assigned control numbers. For example, the IRS Form W-9 is entitled the Payer's Request for Taxpayer Identification Number and Certification. Failure to file the Taxpayer Identification Number subjects a person to a fifty dollar penalty; failure to certify that one is not subject to "backup withholding" results in financial institutions withholding twenty percent of the person's dividends, interest, and certain other payments. To fill out the form requires reading the instructions, which comprise the equivalent of one and a half pages of the Federal Register. In 1984 the IRS required that the W-9 form be filled out by every person and entity in the nation with a brokerage or financial account. This tremendous burden would have been recognized had it been submitted to OMB. Because it fell within the terms of OMB's certification exception, however, it was not submitted to OMB, was not considered in measuring paperwork burdens, and did not display a control number. To persons receiving it, however, it must have been perceived as another government information requirement. The ability of agencies to avoid OMB clearance by styling their information collection as a certification creates an incentive for agencies to "cheat," creating certifications which do not properly fit within OMB's limited definition. There is some evidence that this occurs. *See, e.g.*, 51 Fed. Reg. 312 (1986) (OSHA eliminates several recordkeeping requirements and replaces them with a "certification" requirement which goes beyond the limit of 5 C.F.R. § 1320.7(k)(1) (1986)).

[398] The Federal Election Commission and the General Accounting Office are expressly excluded, 44 U.S.C. § 3502(1) (1982), and recently the Second Circuit declared the United States Postal Service exempt. *See* Kuzma v. United States Postal Serv., 798 F.2d 29 (1986). The court's analysis in *Kuzma*, however, is not convincing. Ignoring the legislative history of the Paperwork Reduction Act which indicates that one purpose of the Act was to eliminate exemptions of the Federal Reports Act, the court held that the Act did not evince an intent to supersede a section of the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), which exempts the USPS from any "Federal Law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of [the APA]." 39 U.S.C. § 410(a) (1982). The Paperwork Reduction Act on its face is not a law dealing with the listed subject areas for exclusion, and in *Kuzma* the challenged form did not relate to any of those subjects. The court also relied on the fact that the Paperwork Reduction Act specifically includes the Postal Rate Commission, *see* 44 U.S.C. § 3502(10) (1982), but does not mention the USPS. This deduction is flawed because the Postal Rate Commission is one of the agencies included in the definition of an "independent regulatory agency." *Id.* The USPS, however, is an agency in the executive branch, and the applicable definition which the USPS meets is by generic type rather than by a list of covered agencies.

Finally, the main cause of the lack of universal coverage for the Public Protection provision is the interpretation by the Office of Legal Counsel that a "collection of information requirement" is not an "information collection request."[399] As a result of this interpretation, the Public Protection provision does not apply to reporting or recordkeeping requirements contained in regulations adopted after notice and comment,[400] probably the largest source of mandatory reporting and recordkeeping requirements. Moreover, this interpretation creates peculiar problems in identifying whether an information collection form may be safely ignored. For example, a businessman might find that a particular form sent to him by an agency requiring information concerning his firm's transactions does not display a control number or state that it is not subject to the Paperwork Reduction Act. If he ignores this form, he may find himself in legal difficulty because the form itself had been adopted after notice and comment as a regulation,[401] or because some or all of the substantive information demanded in the form was required by regulation, even though the particular form was not. If the latter was the case and he submitted the required information, but not on the particular form, he would be protected by the Public Protection provision, but if he ignored the form because it did not display a control number, he would be fully liable for failing to submit the information required by the regulation.[402]

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[399] *See supra* notes 235–65 and accompanying text.

[400] In its implementing regulations, OMB required the assignment and display of control numbers even on collection of information requirements—i.e., reporting or recordkeeping requirements contained in regulations adopted after notice and comment. *See* 5 C.F.R. §§ 1320.13(j), 1320.14(c), (e) (1986). This was done, however, pursuant to OMB's general rulemaking power to manage Federal information collection. Therefore, the public protection provision still does not apply. *See* 5 C.F.R. § 1320.5(b) (1986). As OMB stated, "a member of the public confronting a collection of information requirement with no control number will be able to make further inquires and may find that the requirement is unenforceable." 48 Fed. Reg. 13,671 (1983).

[401] This is not normal practice by agencies, but there are instances where it is done. *See, e.g.*, Superior Oil Co. v. FERC, 563 F.2d 191 (5th Cir. 1977) (FPC adopted report order through rulemaking).

[402] The OLC opinion on the Public Protection provision caused the members of Congress who viewed this provision as central to the effectiveness of the Act to attempt to amend the Act in 1984 to overturn the OLC opinion. *See supra* text accompanying notes 317–33, 343–44. While there were undoubtedly numerous reasons why that movement to amend the Act failed, at least two factors undercut the continued viability of the Public Protection provision's rationale of including the public in the enforcement of the Act. First, for four years OMB had demonstrated both the ability and will to enforce the Act against the agencies, and there was little, if any, willful non-compliance with the Act by agencies. The claim that public enforcement of the Act was necessary was unavailing in light of this experience.

Second, upon closer scrutiny, even the experience under the Federal Reports Act did

As a result of these various statutory, regulatory, and interpretive exclusions from the Public Protection provision, the public is virtually unable to determine which forms it can safely ignore. Given this uncertainty, an individual's safest course is to complete all information forms, whether or not they display a current control number. In most cases, the risk involved in not responding far outweighs the burden of the response avoided.

Despite the impacts on the effectiveness of the Public Protection provision caused by the OLC opinion, there are substantial reasons why the provision should not be extended to cover information collections imposed by regulation. The Public Protection provision would make a reporting or recordkeeping requirement in a regulation unenforceable for failure to display a current control number regardless of the reason for the absence of the number, since the provision does not distinguish between omissions of control numbers resulting from the absence of OMB approval and omissions because of errors unrelated to the Paperwork Reduction Act. The potential consequences could be severe. For example, a typographical error omitting a control number from a Treasury Department regulation could have a devastating effect on revenue collection if seized upon by the universe of persons subject to that regulation.

A requirement to display a "current" control number on regulations could create further problems. OMB has interpreted this requirement to mean that forms, questionnaires, and similar instruments must display their expiration dates, except in unusual circumstances approved by OMB.[403] If a similar requirement were applied to regulations, amendments to the regulations would be necessary whenever a regulation was reapproved. This

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not support the notion that OMB would lack the will or ability to enforce the Act. That is, much of the so-called non-compliance under the Federal Reports Act was the result of ambiguities which were eliminated by the Paperwork Reduction Act. Also, much of the non-compliance involved non-mandatory reporting requirements, which the Public Protection provision would not affect. *See infra* text accompanying notes 406–07. Furthermore, far from evidencing a lack of will or ability, OMB had historically played an active role in trying to reduce agencies' paperwork, so active in fact that in 1973 Congress took away OMB's authority over independent regulatory agencies. *See supra* text accompanying notes 69–76.

[403] *See* 5 C.F.R. § 1320.7(f)(1) (1986). *See also* 48 Fed. Reg. 13,666, 13,676 (1983) (preamble explaining § 1320.7(f)). This requirement might cause some waste. For example, agencies must estimate the number of forms required to be printed. In the past the forms could then be used until replaced. Now, however, the form cannot be used after the expiration date printed on the form, even though the same form is re-approved. The form must instead be reprinted with a new expiration date displayed.

would increase the opportunities for clerical error and, because the Code of Federal Regulations is updated only annually, the date reflected in the annual volume would not necessarily be up-to-date.

If the Public Protection provision were the only possible way of assuring compliance with the Act, the problems of extending it to regulations might be justified. As it is, however, judicial protection of persons subject to the reporting requirements should be available. If an agency adopts a regulation with a reporting or recordkeeping requirement "without observance of procedure required by law," a person subject to that regulation can challenge the validity of the requirement under the APA itself.[404] There is nothing in the Paperwork Reduction Act to suggest that its procedures for adoption of collection of information requirements would not be enforceable through the APA. One difference between review under the APA and the Public Protection provision, however, is that under the APA a court can take into account harmless error, so that procedural or clerical errors not prejudicial to the respondent would not render the paperwork requirement unenforceable.[405]

Another factor that limits the effectiveness of the Public Protection provision in trying to enforce the Paperork Reduction Act is that it can only be used defensively. It only protects against penalties.[406] While such a mechanism might be helpful for mandatory paperwork requirements which carry penalties for failure to comply, it obviously has no effect on voluntary reporting requests. More importantly, it has little effect on information required to be filed with the government in order to obtain a benefit.[407] A person seeking a benefit from the government, especially where the government can exercise discretion in determining who will receive it, is not likely to claim the right not to use the government's forms or not to submit the information requested. Inasmuch as one-third of the paperwork burden is currently in the area of procurement and application for

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[404] *See* 5 U.S.C. § 706(2)(D) (1982).

[405] *Id.* § 706.

[406] 44 U.S.C. § 3512 (1982).

[407] This is not to say that the Public Protection provision does not apply to such reporting requirements. Were an agency to deny a contract, grant, or welfare to an applicant *solely* because the applicant had failed to submit the information on the form required, this could be interpreted as a "penalty." *Cf.* 5 C.F.R. 1320.5(c) (1986).

grants, contracts, and benefits,[408] the Public Protection provision would be of little or no use in a large class of cases.

Further evidence of the lack of significance of the Public Protection provision is the fact that it has been invoked in only a handful of court cases.[409] In some of these cases the Act was invoked by tax protestors as but one of many claims,[410] and in none of the cases did the Public Protection provision supply the protection sought.[411] Because the provision has never been suc-

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[408] U.S. OFFICE OF MANAGEMENT AND BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1986 18 (1986).

[409] *See* Kuzma v. United States Postal Serv., 798 F.2d 29 (2d Cir. 1986); Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449 (9th Cir. 1983); United States v. Particle Data, Inc., 634 F. Supp. 272 (N.D. Ill. 1986); Snyder v. IRS, 596 F. Supp. 240 (N.D. Ind. 1984); Cameron v. IRS, 593 F. Supp. 1540 (N.D. Ind. 1984), *aff'd*, 773 F.2d 126 (7th Cir. 1985).

[410] Indeed, in two of these cases all of the protestors' claims were frivolous and the court imposed sanctions on the tax protester-plaintiffs in the form of attorney fees for the government. *See* Snyder v. IRS, 596 F. Supp. 240; Cameron v. IRS, 593 F. Supp. 1540.

[411] In *Cameron*, the plaintiff claimed that he did not have to file a tax return because the IRS forms did not display an OMB control number. *Cameron*, 593 F. Supp. at 1556. The court rejected this argument, claiming that the Paperwork Reduction Act does not apply to "[t]he process of assessment and collection of taxes," *id.*, citing section 3518(c)(1)(B)(ii), which exempts collections of information during the conduct of an administrative action or investigation involving an agency against specific individuals. Although the court's result is correct, its reasoning is flawed. The cited exemption would apply in the course of an IRS investigation and enforcement, but it clearly would not apply to income tax returns required to be filed generally. A more satisfactory line of reasoning is that the requirement to file an annual income tax return stems from statute and regulation, not from the form the IRS adopts. *See* 26 U.S.C. §§ 6011, 6012 (1982); 26 C.F.R. §§ 1.6011, 1.6012 (1986).

In *Snyder*, the plaintiff alleged that he could not be fined for filing false W-4 tax forms because the forms did not display an OMB control number. *Snyder*, 596 F. Supp. at 250. In dismissing this argument, the court merely cited the *Cameron* case for the proposition that "IRS documents do not need to carry OMB numbers to be valid." *Id.* Again, the court's result is correct, but its reasoning wrong. The Public Protection provision at most only protects a person from penalties for *failing* to file information. It does not protect one who files information which is false. *Cf.* 18 U.S.C. § 1001 (1982).

Two cases involved the IRS's use of IRS Form 2039, which does not display an OMB control number, as a summons. In *Particle Data*, the respondent defended his lack of response to the summons on the basis of the Public Protection provision. The court correctly noted, and chided respondent's attorney for not noting, that section 3518(c)(1)(B)(ii) exempts from the Act just such particularized investigations by an agency. *Particle Data*, 634 F. Supp. at 275–76. Prasch v. United States, 84-2 U.S. Tax Cas. (CCH) 9676 (E.D. Cal. 1984), also should have used this analysis. There the IRS had issued a summons to a savings and loan to submit plaintiff's financial records. Pursuant to 26 U.S.C. § 7609(b)(2) (1982) the plaintiff moved to quash an IRS summons on the ground, among others, that the summons did not have an OMB control number. The court stated that, even assuming that a control number was required for the summons, its absence was irrelevant because the IRS had followed all its own internal procedures. The simpler and more accurate reasoning would have been that the summons was exempt from the Act pursuant to section 3518(c)(1)(B)(ii). Moreover, the Public Protection provision probably does not, given its wording, provide a basis for a person to attack a collection of information request addressed to another. Therefore, even were the summons in the case not exempted by section 3518(c)(1)(B)(ii), the court

cessfully invoked to render an information collection request unenforceable, there is little reason to believe that the provision has had much of an impact on agency compliance.[412]

B. *Other Bases for Judicial Review*

The Public Protection provision's lack of effectiveness may be particularly troublesome because at least some of the judicial review available under the Federal Reports Act has been precluded by the Paperwork Reduction Act. Under the Federal Reports Act, with no Public Protection provision, persons were able to challenge the approval of a collection of information on

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would have been correct in not using the Public Protection provision to deny enforcement, although not for the reason it gave.

In *Navel Orange*, the court granted the government's request to enjoin the defendant to file reports required pursuant to the Agricultural Marketing Agreement Act. The court held that, even if the defendant's claim that the forms failed to display control numbers were true, the defendant could not raise such a claim as an affirmative defense to an enforcement action, but only in a subsequent administrative review. *Navel Orange*, 722 F.2d at 453–54. Moreover, the court stated, the government sought injunctive relief only for the period when the report forms had control numbers. *Id.* at 454. This latter rationale, of course, would be sufficient, but the former is suspect. Unlike traditional challenges to marketing orders which can be vindicated in subsequent administrative reviews by the return of monies paid, once the respondent has suffered the burden of responding to an invalid information collection request, a subsequent administrative proceeding can do little to make him whole. A better line of reasoning for the court would have been that the Public Protection provision only protected the defendant from any *penalty* for not reporting. In this action, the defendant was not being penalized. Instead, the government was engaging in a civil action to substitute a judicially ordered collection of information for the collection imposed by the allegedly defective form. Just as a reporting requirement imposed directly by regulation or statute would not be subject to the Public Protection provision, so also a judicially imposed reporting requirement would not be subject to it.

In *Kuzma*, a private mail receiving and forwarding agency challenged the Postal Service's Form 1538 because it displayed no control number. The court held that the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), exempted the USPS from the requirements of acts such as the Paperwork Reduction Act. *See Kuzma*, 798 F.2d at 31–32. *But see supra* note 398.

[412] There is evidence that public awareness of the control number regime has aided OMB in discovering some unapproved collections. Of the thirty violations that OMB has reported to Congress, more than half were identified and reported to OMB by persons in the private or public sector who noted the absence of a displayed control number. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES (OMB's annual reports under the Paperwork Reduction Act contain a list of violators, how they were discovered, and what action was taken, in the second appendix of each report). This impact is less than what the provision's authors had hoped for. Senator Danforth, for instance, stated that the Public Protection provision "should serve as [an] important deterrent . . . and it is an important protection." 126 CONG. REC. 30,192 (1980). Nevertheless, it appears to be the most that can be expected.

the merits.[413] Under the Paperwork Reduction Act, however, at least where the approval is of a collection of information requirement contained in a rule adopted after notice and comment, this procedure is no longer possible. Section 3504(h)(9) expressly provides that "[t]here shall be no judicial review of any kind of the Director's decision to approve or not to act upon" a requirement contained in a regulation adopted after notice and comment.[414]

The justification for this exemption is not entirely clear. On the one hand, section 3504(h) might recognize that the volume of paperwork requirements and requests sent to OMB for review is too large to allow OMB to scrutinize each sufficiently to assemble an adequate record. Given modern notions of judicial review of agency action, were the Director's decision subject to review, the decision would have to be supported by some record.[415] This record would have to include evidence supporting a determination of the necessity for the information, including its practical utility.[416] The Act, by recognizing inaction as the equivalent of approval,[417] indicates that lack of scrutiny by OMB should not bar a collection directly. Therefore, lack of scrutiny should not bar a collection indirectly by making it susceptible to judicial invalidation for failure to assemble an adequate record.

On the other hand, section 3504(h)(9) may simply reflect Congress' desire to make OMB's approval determination paramount. After all, Congress was aware of the litigation under the Federal Reports Act, and it may have wished to preclude the courts from substantively reviewing OMB's approvals.[418] One

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[413] *See* Superior Oil Co. v. FERC, 563 F.2d 191 (5th Cir. 1977); Shell Oil Co. v. DOE, 477 F. Supp. 413, 428–31 (D. Del. 1979); *In re* FTC Corporate Patterns Report Litig., 432 F. Supp. 291, 307–08 (D.D.C. 1977). *See also* Union Oil Co. v. FPC, 542 F.2d 1036, 1039–44 (9th Cir. 1976) (reporting requirement in rule reviewed under APA § 706(b)(2)).

[414] 44 U.S.C. § 3504(h)(9) (1982). This provision was added as part of the Kennedy Amendment on the Senate floor. In a post-enactment statement explaining his amendment, Senator Kennedy made clear his intent that this provision had no effect on an OMB *disapproval* of a collection of information requirement. *See* 126 CONG. REC. 34,237 (1980). This explanation was made to counteract a statement made on the floor of the House by Rep. Horton that none of OMB's decisions under section 3504(h), even decisions to disapprove collection of information requirements, would be reviewable in court. *See* 126 CONG. REC. 31,228 (1980).

[415] *See* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

[416] *See* 44 U.S.C. § 3504(c)(2) (1982).

[417] *See id.* §§ 3504(h)(3), (4).

[418] As Sen. Danforth said, "[w]e are not seeking to reduce paperwork by creating judicial remedies for people who want to challenge paperwork requests they receive from the Federal Government." 126 CONG. REC. 30,192 (1982).

weakness of this justification is its implication that OMB determinations resulting in a disapproval should likewise be immune from judicial review. Given the language of section 3504(h)(9), however, it seems impossible to conclude that disapprovals are so immune, despite Representative Horton's interpretation of the section as barring judicial review of OMB disapprovals.[419]

This provision does not mean, however, that the rule, or the collection of information requirement, is itself immune from review. To the contrary, the substantive requirement is fully subject to review, but the review would be of the action or decision of the agency which adopted the rule, not of OMB's approval of the rule. Thus, parties may challenge the rule as if the Paperwork Reduction Act did not exist; the Director's approval is irrelevant to the judicial review.[420]

There is no comparable provision to section 3504(h)(9) with respect to information collection requests. There is, however, explicit legislative history indicating an intent to preclude judicial review on the merits of an OMB approval.[421] Nevertheless, it is not clear how this intent is manifested in the absence of any preclusion provision similar to section 3504(h)(9).

In this context, general principles of administrative law would apply, and the issues litigated under the Federal Reports Act would reappear. One of those issues was whether the action of the Director of OMB is committed to agency discretion by law, so that under section 701(a)(2) of the APA the action would not be reviewable. Under the Federal Reports Act, that question was generally answered in the negative. Pursuant to the standard enunciated in *Citizens to Preserve Overton Park v. Volpe*,[422] courts found that there was law to apply in the requirement that

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[419] *See supra* note 414.

[420] *See, e.g.*, International Bhd. of Teamsters v. United States, 735 F.2d 1525 (D.C. Cir. 1984) (court rejected Federal Highway Administration's amendment of reporting and recordkeeping requirements without regard to OMB's approval). Indeed, in this case the court acknowledged that "the agency was in large part following OMB instructions to reduce the burdens," *id.* at 1529, yet the court rejected the agency's determination that some of the information deleted from the old regulation was "unnecessary for law enforcement purposes." *Id.* at 1532.

[421] *See* S. REP. No. 930, 96th Cong., 2d Sess. 52, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6292 ("[i]f an information collection request displays a current control number or states that the request is not subject to this Act, it is valid for the purposes of this Act"); 126 CONG. REC. 30,192 (1980) (remarks of Sen. Danforth) ("[l]awsuits which seek to challenge the necessity or burden of information collection requests cannot therefore be grounded on the provisions of this act").

[422] 401 U.S. 402 (1971).

the information be necessary to the functions of the agency.[423] Certainly, that is still the case, and section 3508 would seem to present a perfectly adequate law to apply.

Unlike the Federal Reports Act, however, the Paperwork Reduction Act suggests that OMB's inaction, its failure affirmatively to approve or disapprove an information collection request, constitutes a form of approval. There is no standard in the Act governing when OMB must affirmatively act to approve.[424] In this circumstance, it seems that there is no law to apply and thus no judicial review when OMB approves by inaction. One can argue from this that there should be no judicial review even when OMB affirmatively acts to approve an information collection request. To subject approvals to judicial review only when done affirmatively would encourage OMB inaction rather than action.[425]

An alternative argument for insulating OMB approvals of information collection requests from judicial review is that such an approval is not a final agency action and not ripe for judicial review, because the actual decision to impose an approved information collection request lies with the agency, not OMB.[426] This argument is supported by the policies underlying section 3504(h)(9)'s preclusion of judicial review of OMB's approval of collection of information requirements. There seems little reason to preclude judicial review of OMB's approvals of regulations imposing reporting or recordkeeping requirements, and yet allow review of approvals of information collection requests.

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[423] *See* cases cited *supra* note 413. Where GAO, rather than OMB, was responsible for the paperwork review function, it was not to review for the necessity of the information. Section 3508's predecessor, 44 U.S.C. § 3506 (Supp. V 1975), only applied to OMB review. GAO's review was limited to avoiding duplication and minimizing compliance burdens, although a reference to determining "the appropriateness of the forms" suggested a further scrutiny. *See* 44 U.S.C. §§ 3512(b), (d) (Supp. V 1975). *See also* Appeal of FTC Line of Business Report Litig., 595 F.2d at 708–10. Two courts in dictum stated that GAO's review was committed to its discretion by law because its review was characterized in the statute as "advice." *See* General Elec. Co. v. FTC, 411 F. Supp. 1004, 1006 (N.D.N.Y. 1976); Westinghouse Elec. Corp. v. FTC, 1976-1 Trade Cas. (CCH) ¶ 60,871 (S.D. Ohio April 15, 1976).

[424] *See* 44 U.S.C. § 3507(b) (1982). There is, however, one distinction between an affirmative approval and an approval by inaction—the maximum time limit of the approval. When OMB affirmatively approves an information collection request, the approval may extend for up to three years. *Id.* § 3507(d). If the approval derives from inaction, however, the approval cannot last for more than one year. *Id.* § 3507(b).

[425] Were a court in fact to review and reverse an OMB affirmative approval, OMB could respond by merely approving by inaction; this response would then be immune from review.

[426] *Cf.* Bethlehem Steel Corp. v. EPA, 536 F.2d 156 (7th Cir. 1976) (EPA regulations not "final" action, because impact on plaintiffs will not arise until state has taken further independent action).

As with regulations, the information collection request could still be challenged on the merits, but OMB's approval would not be an issue. Also as with regulations, OMB's decisions to disapprove a collection of information request could be separately challenged.[427] There is a clear statutory standard applicable to all disapprovals, and at least with respect to non-independent regulatory agencies, OMB's action is final.

VII. CENTRALIZED OVERSIGHT

A. *Background*

For those who studied the paperwork problem in the late 1970's, one recommendation stood out—centralized oversight of all agencies' paperwork,[428] meaning both the elimination of exemptions from oversight and the unification of oversight in one office.[429] The Paperwork Reduction Act accordingly eliminated the exemption Treasury had enjoyed[430] and unified in OMB the oversight functions which had previously been split between OMB and GAO.[431] Moreover, OMB's oversight under the Act is not merely procedural. It includes the power to determine whether information sought by an agency is necessary for the proper performance of that agency's functions and whether the information will have practical utility for the agency.[432] While this power is not completely new to OMB,[433] its restatement in the context of OMB's expanded jurisdiction contained the potential for significant change.

On its face, OMB's power to determine an agency's information needs is breathtaking. Rarely is one agency given the power to overrule another agency's determination of the proper scope of its functions. The legislative history confirms that this unique power was intended: the Senate Report emphasizes the test of information necessity and the responsibility of the Direc-

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[427] *But see supra* text accompanying notes 377–83.

[428] *See, e.g.*, FINAL REPORT, *supra* note 12, at 19–20.

[429] *Id.*

[430] *See supra* notes 213–65 and accompanying text.

[431] For a short period, the Secretary of Education had separate responsibility for overseeing information collection activities related to federal education programs. Control of Paperwork Amendments of 1978, Pub. L. No. 95-561, § 1212(b), 92 Stat. 2143, 2338–39 (1978) (codified as amended at 20 U.S.C. § 1221e (1982)).

[432] 44 U.S.C. § 3508 (1982).

[433] The Federal Reports Act contained similar language. *See* 44 U.S.C. § 3506 (1976).

tor of OMB in determining that necessity.[434] Only if the collection of information is specifically required by statute is the Director's determination not final,[435] except for those independent regulatory agencies which are authorized to overrule the Director.[436] On the floor of the Senate, Senator Danforth stressed both the necessity requirement, which means that the information is "truly needed to achieve the agency's objectives,"[437] and the role of OMB as the ultimate decision maker.[438] Nothing in the House Report suggests the contrary.[439]

The change from the language used in the Federal Reports Act reinforces the inference that OMB is to apply the provision strictly. Under the Federal Reports Act, OMB determined whether information was necessary for the proper performance of an agency's functions *or for any other proper purpose*.[440] The latter basis was not included in the Paperwork Reduction Act, indicating a stricter standard. The specification in the Paperwork Reduction Act that the information have practical utility likewise indicates a strict standard.[441]

In light of the breadth and depth of power given to OMB, surprisingly little concern over its possible misuse exists in the legislative history. What little concern was expressed involved independent regulatory agencies.[442] In response, the Act protects independent regulatory agencies by providing them with the power to overrule OMB's determinations.[443] With respect to executive agencies, however, the legislative history reveals virtually no concern.[444] Both the House and Senate reports, in response to concerns expressed regarding independent agencies, indicated that regulatory agencies in the executive branch had

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[434] S. REP. NO. 930, 96th Cong., 2d Sess. 49, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6289.

[435] *Id.*

[436] 44 U.S.C. § 3507(c) (1982) (stating the conditions for authorization to overrule the Director of OMB).

[437] 126 CONG. REC. 30,190 (1980).

[438] *Id.*

[439] H.R. REP. NO. 835, *supra* note 150.

[440] 44 U.S.C. § 3506 (1976).

[441] The Act defines practical utility as "the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion." 44 U.S.C. § 3502(15) (1982).

[442] S. REP. NO. 930, 96th Cong., 2d Sess. 14–16, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6254–56; H.R. REP. NO. 835, 96th Cong., 2d Sess. 21–23 (1980).

[443] S. REP. NO. 930, *supra* note 442, at 14–16.

[444] *See id.* at 15.

functioned without undue interference under the Federal Reports Act.[445]

Two further provisions in the Paperwork Reduction Act were viewed as protecting against interference from OMB. First, section 3504(a) requires that OMB's authority "be exercised consistent with applicable law."[446] Of course, this limitation provides little protection because the Act gives OMB authority to determine the applicable law regarding the necessity of information.[447] Second, section 3518(e) states that nothing in the Act "shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices . . . ."[448] This provision was adopted to guard against undue interference by drawing a distinction between paperwork requirements and substantive decisions.[449] Several agencies suggested the impossiblity of such a distinction,[450] and Senator Jacob Javits (R-N.Y.) expressed his doubts in the Senate,[451] but these warnings were brushed aside.

Congress was more concerned that regulatory reform activities by OMB might dilute the attention given paperwork reduction and information management.[452] At the time of debate, paperwork activities were the responsibility of OMB's Office of Regulatory and Information Policy.[453] That office also had responsibility for overseeing agency activity under President Carter's Executive Order 12,044 (E.O. 12,044), entitled "Improving Government Regulations."[454] The version of the paperwork bill passed by the House created an Office of Federal Information Policy, which the House Report made fairly clear would consist of the information management and paperwork elements of the existing OMB office, but would not be assigned regulatory reform activities.[455]

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[445] *See id.*
[446] 44 U.S.C. § 3504(a) (1982).
[447] *See, e.g., id.* at § 3504(d)(3).
[448] *Id.* at § 3518(e).
[449] S. REP. No. 930, 96th Cong., 2d Sess. 56, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6296.
[450] H.R. REP. No. 835, 96th Cong., 2d Sess. 22 (1980).
[451] 126 CONG. REC. 30,192 (1980).
[452] *Id.*
[453] 44 U.S.C. § 3503 (1976).
[454] E.O. 12,044, *supra* note 17.
[455] H.R. REP. No. 835, 96th Cong., 2d Sess. 9 (1980).

In the Senate, similar concerns were voiced,[456] but the Administration pressed strongly the view that the existing office's activities under E.O. 12,044 complemented its paperwork activities.[457] As a result, the Senate committee's bill provided for an Office of Information and Regulatory Affairs, which would essentially continue the existing office's functions.[458] Nevertheless, the committee warned that it did "not intend that 'regulatory reform' issues which go beyond the scope of information management and burden be assigned to the Office by the Director."[459]

In order to limit OMB in its assignment of regulatory reform issues to the Office, the bill specified that the sums appropriated were "to carry out the provisions of the bill," and for no other purpose.[460] Senator Charles Percy (R-Ill.) was not convinced. He noted that general regulatory reform legislation then being considered envisioned broad oversight powers in OMB, powers which would likely be assigned to the Office of Information and Regulatory Affairs and which would likely bury paperwork concerns.[461] His, however, was the sole dissenting voice, and the Senate committee's version became law.

B. *Executive Order 12,291*

Implementation of the Act lay in the hands of the new Reagan Administration, for which regulatory reform had an even higher priority than that assigned it by the prior administration. Executive Order 12,291 (E.O. 12,291),[462] issued on February 17, 1981, expressed that priority.[463] Building upon President Carter's

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[456] *See* 126 CONG. REC. 30,192 (1980).

[457] The Comptroller General's approval of the relationship aided its acceptance. *See* S. REP. NO. 930, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6248.

[458] *Id.*

[459] S. REP. NO. 930, 96th Cong., 2d Sess. 9, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6249.

[460] S. REP. NO. 930, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6251; *see also* 44 U.S.C. § 3520 (1982). The 1986 reauthorization contained a similar limitation. *See supra* note 345.

[461] S. REP. NO. 930, 96th Cong., 2d Sess. 74–75, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6312–13.

[462] E.O. 12,291, *supra* note 17.

[463] Actually, the first manifestations of general regulatory reform were in the President's creation of the Presidential Task Force on Regulatory Relief. *See* Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, PUB. PAPERS 30 (Jan. 22, 1981); Memorandum Postponing Pending Federal Regulations, PUB. PAPERS 63 (Jan. 29, 1981). The Task Force, chaired by the Vice President,

regulatory reform order, the new order went significantly further both procedurally and substantively. Unlike E.O. 12,044,[464] however, the new Order did not mention paperwork at all. Instead, OMB was instructed merely to coordinate[465] the provisions of the new Order with the requirements of the Regulatory Flexibility Act[466] and the Paperwork Reduction Act.

Substantively, the Order created a new general requirement that executive agencies not undertake regulatory action unless the benefits to the public outweigh the costs, and that executive agencies select regulatory alternatives which maximize benefits.[467]

Procedurally, the Order continued the previous Order's requirement that agencies prepare regulatory impact analyses of major rules,[468] and added the requirement that agencies send all proposed and final rules to OMB for review before publication.[469] OMB would review first the proposed rule and later the final rule for compliance with the Executive Order.[470] The Order does not purport to give OMB authority to override any determinations made by an agency,[471] but does require agencies to delay publication of proposed rules pending the completion of OMB's review and to delay publication of final rules until the agency has responded to OMB's views.[472] Moreover, OMB is

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generally oversaw executive branch regulatory relief activities. *See infra* text accompanying note 475. The memorandum provided that no current rulemakings could be completed for a sixty-day period and that rules not yet in effect because of a delayed effective date should have their effective dates further delayed. Memorandum Postponing Pending Federal Regulations, PUB. PAPERS 63 (Jan. 29, 1981); *see also* National Resources Defense Council v. EPA, 683 F.2d 752 (3d Cir. 1982).

[464] E.O. 12,044, *supra* note 17.

[465] E.O. 12,291, *supra* note 17, at § 6(b).

[466] 5 U.S.C. §§ 601–05 (1982). In general, the Regulatory Flexibility Act requires agencies to prepare economic analyses of the effects of agency regulations which are likely to have a "significant economic impact on a substantial number of small entities." 5 U.S.C. § 605 (1982). OMB has no role under the Regulatory Flexibility Act. *See generally* Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 2 DUKE L.J. 213 (1982).

[467] *See* E.O. 12,291, *supra* note 17, at § 2. The Order recognized that cost-benefit analyses might not always be permissible under the governing statute, including a caveat that the Order's requirements applied only "to the extent permitted by law." *Id.*

[468] *Id.* at § 3; *compare id.* at § 1(b) (definition of major rule) *with* E.O. 12,044, *supra* note 17, at § 3(a) (criteria for rules requiring regulatory analyses).

[469] E.O. 12,291, *supra* note 17, at § 3(c).

[470] *Id.* at § 3(c)(3).

[471] The Order explicitly provides that nothing in the subsection relating to OMB review shall be construed as displacing the agencies' responsibilities delegated by law. E.O. 12,291, *supra* note 17, at § 3(f)(3).

[472] *Id.* at § 3(f)(1)–(2).

authorized to require the agency to consider additional relevant data from any appropriate source.[473]

These standards and procedures applied to both pending and future rulemakings.[474] Existing regulations did not escape review either. The Presidential Task Force on Regulatory Relief ultimately focused its attention on 119 existing regulations.[475] The Office of Information and Regulatory Affairs (OIRA), created by the Paperwork Reduction Act,[476] was the office in OMB responsible for implementing E.O. 12,291.[477] Thus, Senator Percy's fear that paperwork issues would be buried under regulatory reform activities was apparently realized.

Nevertheless, the focus on regulatory relief was hardly at odds with paperwork reduction. Indeed, a number of the regulations identified for review by the Task Force were regulations that directly created a paperwork burden. For example, the driver's log requirement imposed by the Department of Transportation[478] was one of the regulations on the Task Force's hit list. This regulation required truck drivers to make detailed records concerning their status for each hour of the day as well as to record date, total mileage, vehicle identification, name of co-driver, and home terminal.[479] The Carter Administration had identified this regulation as imposing the seventh largest burden of any government paperwork requirement and the second largest among non-tax paperwork requirements.[480] With the Task Force's backing and the Administration's commitment to deregulation, OIRA was able to convince the Department of Transportation to reduce significantly the regulation's requirements and paperwork burden.[481]

The Task Force's focus on deregulation often had paperwork reduction results, even where the regulation itself did not impose

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[473] *Id.* at § 6(a)(3).

[474] *Id.* at § 7.

[475] *See* PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS (August 11, 1983) [hereinafter REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS].

[476] 44 U.S.C. § 3503(a) (1982).

[477] *See supra* notes 458–59 and accompanying text.

[478] 49 C.F.R. § 395 (1980).

[479] *Id.*

[480] 1981 ICB, *supra* note 122, at 10.

[481] Changes made by DOT reduced the burden hours from 31 million to 9.4 million. 1982 ICB, *supra* note 5, at 33; U.S. OFFICE OF MANAGEMENT AND BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1983 42 (1983) [hereinafter 1983 ICB]. Some of these changes, however, were invalidated on judicial review. *See, e.g.*, International Bhd. of Teamsters v. United States, 735 F.2d 1525 (D.C. Cir. 1984).

a paperwork requirement. For example, when the Department of Health and Human Services combined approximately thirty grant programs into seven block grants, states were able to save fifty-two million dollars in paperwork costs alone.[482] By combining twenty-eight programs into one block grant, the Department of Education reduced paperwork requirements by over eleven million burden hours.[483]

Deregulation itself invariably resulted in reduced paperwork requirements. For example, the Department of Labor made major changes to the Davis-Bacon Act regulations,[484] one of which was to reduce the recordkeeping requirements.[485] In addition, when President Reagan ended the price and allocation controls on crude oil and petroleum products,[486] a large body of reporting requirements was eliminated.[487] Thus, while the focus of OIRA was regulatory relief rather than paperwork issues, the result of that focus still led to significant reductions in paperwork burdens.[488]

While OIRA focuses its efforts on regulatory relief, its organization and practice tend to blur distinctions between activities under the Paperwork Reduction Act and E.O. 12,291. The office has two deputy administrators,[489] one of whom supervises the three branches of desk officers: the Regulatory Policy Branch, the Reports Management Branch, and the Information Policy Branch.[490] Agencies are assigned to desk officers in these branches, so that both regulations under E.O. 12,291 and requests for paperwork clearances under the Paperwork Reduction Act go to that agency's desk officer or officers.[491]

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[482] REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS, *supra* note 475, at 82.

[483] *Id.*

[484] *See* 29 C.F.R. §§ 1.1–6.57 (1986).

[485] *Id.* at §§ 3.3–3.4. The change in the paperwork requirements was invalidated, however, in Building & Constr. Trades' Dep't v. Donovan, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

[486] Exec. Order No. 12,287, 3 C.F.R. § 124 (1981), *reprinted in* 15 U.S.C. § 757 (1982).

[487] 1982 ICB, *supra* note 5, at 25.

[488] The GAO and certain congressional committees criticized the failure of OIRA to devote sufficient attention to paperwork issues in their own right, and especially to the information management and paperwork responsibilities not directly related to burden reduction, such as the creation of a Federal Information Locator System. *See generally* IMPLEMENTING THE PAPERWORK REDUCTION ACT, *supra* note 173. Dissatisfaction with OIRA's priorities was one of the catalysts for the unsuccessful attempts to amend the Paperwork Reduction Act in 1983 and 1984. *See* S. REP. No. 576, 98th Cong., 2d Sess. 6 (1984); H.R. REP. No. 147, 98th Cong., 1st Sess. 2 (1983).

[489] *See* 1983 *Senate Oversight Hearings*, *supra* note 2, at 72.

[490] *Id.*

[491] *Id.*

The Regulatory Policy Branch has responsibility for those agencies which generate the most rules regulating conduct.[492] The Reports Management Branch is responsible for those agencies with major paperwork burdens that are not generally regulatory agencies.[493] The Information Policy Branch is responsible for those agencies with the most automatic data processing equipment.[494] Despite the purported functional organization of the branches, the breakdown into three branches seems less the result of a need to differentiate among subject matters than a practice compelled by the number of desk officers and the need to provide adequate supervision. The orientation of the desk officer to the agency for which he or she is responsible results in a program focus, rather than a focus on paperwork issues per se.

Furthering the lack of distinction between paperwork review under the Act and regulatory review under E.O. 12,291, OIRA chose to use the same form for regulatory review under E.O. 12,291 that had been used under the Federal Reports Act.[495] This form was then also adopted for use under the Pa-

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[492] These include the Departments of Agriculture, Energy, Interior, and Transportation, the Environmental Protection Agency, and several independent commissions: the Nuclear Regulatory Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, and the Federal Energy Regulatory Commission. These independent commissions are only subject to OIRA for purposes of the Paperwork Reduction Act, not E.O. 12,291. E.O. 12,291, *supra* note 17, at § 1(a).

[493] These include the Departments of Treasury, Education, Health and Human Services, Labor, and Housing and Urban Development, as well as the Veterans Administration, the Railroad Retirement Board, and the Bank Supervisory agencies.

The Reports Management Branch is described by OMB as the Branch concerned with the agencies imposing the most paperwork burdens. Interview with Nell Minow, Special Assistant to the Administrator of OIRA, in Washington, D.C. (June 17, 1985); *see also* 1983 *Senate Oversight Hearings*, *supra* note 2, at 72. Such a description, however, does not accurately reflect the paperwork burdens as they were perceived either in 1981 or at present. For example, the fiscal year 1980 paperwork burdens of the Departments of Agriculture, Transportation and Commerce, the Securities and Exchange Commission, and the Federal Communications Commission all were greater than those of the Departments of Housing and Urban Development, Labor, and Education. 1983 ICB, *supra* note 481, at 14.

[494] These include the Departments of Defense and Commerce, the General Services Administration, the Federal Communications Commission, the Securities and Exchange Commission, the Small Business Administration, the Federal Emergency Management Agency, the National Credit Union Administration, the National Aeronautics and Space Administration, the State Department, the Agency for International Development, the International Trade Commission, the Office of Personnel Management, the Department of Justice, and the Commodity Futures Trading Commission.

[495] Memorandum from Louis Kincannon, Assistant Administrator of OMB to Clearance Officers of Departments and Agencies 1 (March 27, 1981) (on file at HARV. J. ON LEGIS.).

perwork Reduction Act.[496] OIRA quickly modified the form to indicate whether it was being used for an E.O. 12,291 review or for a paperwork clearance review.[497] Agencies thus submit two separate copies of the form if a regulation is being reviewed under both E.O. 12,291 and the Paperwork Reduction Act.[498] For the desk officer, review under both authorities is essentially the same: to determine whether the benefits of the agency action justify the action and, if so, to determine whether the burdens of the action have been minimized.

The respective procedures of E.O. 12,291 and paperwork clearance review are likewise indistinguishable. The desk officer reviews the materials submitted by the agency.[499] If the submission is a rule, the submission must include the rule and its preamble, as well as any regulatory impact analysis.[500] If the submission is a request for paperwork clearance, the submission must include a narrative justification,[501] which serves the same purpose as a regulation's preamble. The justification should include a full description of the burden to be imposed by the reporting or recordkeeping requirement and the reasons for imposing that burden, including efforts to achieve the same or similar ends through alternative means such as using or modifying already existing collections.[502]

If the desk officer has any questions regarding either a regulation or paperwork requirement, he or she may contact the

[496] *Id.*

[497] *Id.*

[498] Memorandum from Nat Scurry, Chief of the Reports Management Branch of OIRA to Department and Agency Regulatory Contacts and Clearance Officers 1 (May 20, 1982) (on file at HARV. J. ON LEGIS.).

[499] The officer within OIRA authorized to approve agency submissions depends on the submission. For example, at one time, no one beneath a branch chief could approve a regulation under either E.O. 12,291 or Paperwork Reduction Act review. Interview with Nell Minow, Special Assistant to the Administrator of OIRA, in Washington, D.C. (June 21, 1985). Desk officers, on the other hand, could approve paperwork requirements not contained in regulations and imposing less than 50,000 annual burden hours. Paperwork requirements imposing over 1 million burden hours went to the Deputy Administrator. *Id.*

It has become common to refer to agencies as "appealing" OMB's disapproval of a paperwork requirement. *See, e.g.*, OMB WATCH, INFORMATION COLLECTION REPORT: OMB CONTROL OF PROGRAMS 10 (Nov. 18, 1985). OMB's regulations allow for reconsideration of a disapproval only if the agency head or designated senior official, 44 U.S.C. § 3506(b) (1982), requests it and submits significant new or additional information. 5 C.F.R. § 1320.11(i) (1986). In effect, an "appeal" means only that the requesting agency has elevated the issue to a higher bureaucratic level.

[500] U.S. OFFICE OF MANAGEMENT AND BUDGET, INTERIM INSTRUCTIONS FOR REQUESTING OMB REVIEW UNDER THE PAPERWORK REDUCTION ACT AND EXECUTIVE ORDER 12,291 (March 27, 1981) (on file at HARV. J. ON LEGIS.).

[501] *Id.*

[502] *Id.*

agency for further information. Invariably this is done orally.[503] Sometimes the discussion becomes a forum for low-level negotiation for changes to the agency's proposal.[504] Often an agency will withdraw a submission rather than have it disapproved, especially where the agency plans to resubmit the proposal in altered form.[505] If a paperwork submission is disapproved, OIRA places a one-sentence formal explanation in the public file.[506] In the case of a regulation reviewed under E.O. 12,291, apparently not even a summary statement is made publicly available.

E.O. 12,291 provides no mechanism for public comments to OMB on proposed or final rules under consideration. Indeed, no formal mechanism exists by which the public even knows when a proposed or final rule is submitted to OMB. Interested persons, however, often are aware of the submission either from their sources within the agency, from the trade press, or from requests for their views from OMB.[507] A significant volume of comments to OMB on draft rules submitted by agencies may result.[508] OMB places such materials in OIRA's public reading room. Moreover, OMB advises persons communicating with OMB to communicate also with the agency involved.[509]

Specific provisions of the Paperwork Reduction Act affect public comment on agency submissions under the Act. For example, section 3507(a)(2) requires an agency submitting a proposed "information collection request" to OMB to publish a notice of that fact in the *Federal Register*.[510] The notice pro-

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[503] *See* Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 56 (1984) [hereinafter Olson]. This article is noteworthy in its discussion of the realities of OMB review under E.O. 12,291. Its author obtained access to a substantial number of internal OMB documents involved in E.O. 12,291 reviews, something few have accomplished.

[504] *Id.*

[505] OMB WATCH, MONTHLY REVIEW: EYE ON PAPERWORK 2 (Sept. 22, 1986).

[506] *See* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., OMB REVIEW OF CDC RESEARCH: IMPACT OF THE PAPERWORK REDUCTION ACT 24, 32, 34, 36, 37 (Comm. Print 1986) [hereinafter CDC REPORT].

[507] Olson, *supra* note 503, at 56.

[508] *Id.*

[509] Memorandum from Wendy L. Gramm, Administrator of OIRA to the Heads of Departments and Agencies Subject to Exec. Order Nos. 12,291 and 12,498 (June 13, 1986), *reprinted in* 5 INSIDE THE ADMIN. 4 (August 14, 1986) [hereinafter Gramm Disclosure Memorandum].

[510] 44 U.S.C. § 3507(a)(2) (1982); *see also* 5 C.F.R. § 1320.12(a) (1986). The latter regulation requires an agency to send its notice to the *Federal Register* on or before the day the submission is made to OMB. This is not always done. OMB WATCH,

vided, however, has often consisted of little more than the title of the collection and information as to where further information can be obtained.[511] Thus, only the most sophisticated observers have taken advantage of the public notice. In practice, trade press and direct OMB solicitation are more likely sources of notice. While nothing in the Act addresses such a requirement, OMB has acquiesced to public demand for access to paperwork docket files,[512] which supposedly contain all public comment on agency paperwork submissions. The completeness of the files, however, is doubtful.[513] They generally have not contained copies of correspondence between OMB and the agency concerning the agency's submission.

The bulk of communication by OMB with agencies and third parties under either E.O. 12,291 or the Paperwork Reduction Act is oral.[514] Neither the Order nor the Act require the reduction of these communications to writing, and OMB is loath to do so.[515] Such a requirement would create a significant added burden for its staff, which might in turn create a disincentive to oral discussion. OMB has also opposed attempts by agencies to make records of oral communications with OMB.[516] OMB's explanation seems to reflect more truly its overall reluctance to memorialize oral communications: "If everything is to be shared [with the public], then advice is not candid and to the point and straightforward."[517]

The near identity in treatment of regulations reviewed under E.O. 12,291 and paperwork collections under the Paperwork

INFORMATION COLLECTION REPORT: OMB CONTROL OF PROGRAMS 5 (Oct. 28, 1985). Indeed, the Department of Treasury has established a practice of not publishing *any* notice in the *Federal Register* when it sends to OMB for clearance an information collection request which is a regulation. *See supra* note 346. The justification may be that because these regulations do not require prior notice and comment under the Administrative Procedure Act, they should not require prior notice under the Paperwork Reduction Act. While there is a certain logic to this justification, it is not sufficient to overturn the plain language and intent of both the Act and the OMB regulation. The fact that OMB condones the practice does not make it lawful. *Id.*

[511] Olson, *supra* note 503, at 60.

[512] *See, e.g., id.* at 64 n.324 (author receives docket files in response to Freedom of Information Act request). The 1986 amendments to the Paperwork Reduction Act, *see supra* note 345, have created a requirement for public access to agency and public written comments to OMB.

[513] Olson, *supra* note 503, at 64. This author's experience with the paperwork docket files has been similar to that of Olson.

[514] *Id.* at 55–57.

[515] *Id.* at 58–59.

[516] *Id.* at 59.

[517] *The Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy & Commerce*, 97th Cong., 1st Sess. 57 (1981) (testimony of James Miller, III, former OIRA Administrator).

Reduction Act provokes inquiry in three areas: the process by which regulations containing paperwork requirements are reviewed; the difference in authority OIRA possesses under the Order and under the Act with respect to an agency's submission; and the possibility of OMB misuse of its authority under the Paperwork Reduction Act to achieve policy goals unrelated to paperwork.

C. *Review of Paperwork Regulations*

Under the Paperwork Reduction Act, as interpreted by the Office of Legal Counsel opinion,[518] OMB may comment publicly on a collection of information requirement within sixty days after an agency publishes a proposed rule containing the requirement.[519] If OMB fails to make any such comment, the Act bars OMB from disapproving the requirement.[520] If OMB comments and the agency's response in the final rule is unreasonable, OMB may disapprove the requirement.[521] In practice, however, the process has operated differently.

For executive agencies, E.O. 12,291 requires submission of all proposed rules to OMB at least ten days before their initial publication.[522] Major rules must be submitted at least sixty days before publication.[523] OMB may also extend these periods indefinitely at its discretion.[524] These periods enable OMB to review and comment on proposed rules and final rules before publication. OMB's comments pursuant to the Executive Order are not placed in the rulemaking file.[525] If OMB does not object

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[518] *See supra* notes 232–65 and accompanying text.

[519] 44 U.S.C. § 3504(h)(2) (1982).

[520] *Id.* § 3504(h)(4). If the agency fails to provide the required notice of rulemaking to OMB or if the agency substantially changes the proposal in the final rule without giving OMB a further opportunity to comment, OMB may disapprove the requirement at its discretion. *Id.* § 3504(h)(5).

[521] *Id.* § 3504(h)(5)(C).

[522] E.O. 12,291, *supra* note 17, at § 3(c).

[523] *Id.*

[524] *Id.* at § 3(f).

[525] During the summer of 1986, OMB came under substantial pressure from Congress regarding the secrecy of its regulatory review process under both E.O. 12,291 and E.O. 12,498. OIRA reached an agreement with Senators Levin (D-Mich.) and Durenberger (R-Minn.) whereby OIRA committed itself to an after-the-fact disclosure of review documents. Specifically, OIRA agreed to make public, upon written request, copies of the drafts of advance notices of proposed rulemaking, notices of proposed rulemaking, and final rules submitted by agencies to OMB for review under E.O. 12,291,

to the proposed rule, then the agency is so informed.[526] If OMB does object, informal negotiation between OMB and the agency occurs until OMB withdraws its objection.[527] Then the proposed rule, perhaps significantly altered as a result of OMB's objections, is published for comment. A similar process is followed for the final rule.[528]

Obviously, this procedure differs from the process envisioned in section 3504(h) for proposed rules containing collection of information requirements.[529] OMB need not, and does not, follow the procedure in that section in its review of executive branch regulations containing collection of information requirements. Rather than make public comments on the proposed rule during the normal comment period, OMB makes private comments to the agency pursuant to its E.O. 12,291 review prior to publication of the proposed rule and then again between the end of the public comment period and publication of the final rule.[530] Moreover, OMB's ability to delay indefinitely publication of either a proposed or final executive branch rule amounts to the substantive power to deny approval on any basis OMB chooses. OMB withholds both the fact of denial and the bases for it from the public.[531]

OMB thus avoids the Kennedy Amendment when reviewing collection of information requirements for proposed regulations. This avoidance of the Kennedy Amendment does not mean that OMB disregards the Amendment. The Kennedy Amendment was written to limit substantively the powers given to OMB by the Paperwork Reduction Act with respect to collection of information requirements and to require OMB's exercise of *these* powers to be carried out pursuant to the procedures of section 3504(h).[532] The Kennedy Amendment did not address OMB's

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after their publication in the *Federal Register*. Gramm Disclosure Memorandum, *supra* note 509.

Also, OIRA will make available correspondence between OIRA and the agency head concerning the draft documents. *Id.* While the agreement with the Senators limits the disclosure of correspondence to that involving the agency head, OIRA will also apparently disclose correspondence sent from OIRA to any agency personnel regarding a proposed or final rule under review. *See OMB Allows Disclosure of Correspondence from OIRA to Agency Personnel*, 5 INSIDE THE ADMIN. 1 (Sept. 4, 1986).

[526] Olson, *supra* note 503, at 56–59.

[527] *Id.*

[528] *Id.*

[529] *See supra* notes 245–61 and accompanying text.

[530] *See supra* notes 525–28 and accompanying text.

[531] *But see supra* note 525.

[532] *See supra* notes 159–60 and accompanying text.

exercise of power over regulations pursuant to authority other than the Paperwork Reduction Act. Under E.O. 12,291, OMB is able to influence executive branch regulations generally without public scrutiny of its influence. Regulations imposing paperwork requirements are only a small subset of the regulations covered by the Executive Order, and the review of that subset under the Order does not require the exercise of any powers granted to OMB by the Paperwork Reduction Act.[533] Consequently, OMB's use of E.O. 12,291's procedures for executive branch regulations imposing reporting or recordkeeping requirements raises no more questions than its use of those procedures generally for executive branch regulations.[534]

OMB's use of E.O. 12,291 rather than section 3504(h) to influence or control regulations containing reporting or recordkeeping requirements should be disturbing to those who saw section 3504(h) as a means of assuring the possibility of meaningful public participation in decisions regarding collection of information requirements.[535] Equally disturbing is the fact that OMB's penchant for non-public decision making appears to extend beyond collection of information requirements. The Kennedy Amendment's attempt to ensure public participation was not limited to collection of information requirements and section 3504(h). The amendment also built upon the requirement already established in section 3507(a)(2) that agencies publish in the *Federal Register* a notice of submission to OMB of any information collection request.[536] The Kennedy Amendment required that, in reviewing information collection requests, OMB provide "interested agencies and persons early and meaningful opportunity to comment."[537] Moreover, the Amendment required that OMB's decision to approve or disapprove an agency's information collection request be made publicly available.[538]

Together these provisions suggest, if not mandate, a significant opportunity for involvement by interested persons and

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[533] In order to affect an independent agency's regulation imposing a reporting or recordkeeping requirement, OMB must utilize the procedure of § 3504(h), because E.O. 12,291 would not be applicable. E.O. 12,291, *supra* note 17, at § 1(d).

[534] There is, of course, active scholarly, political, and judicial debate over the broader questions of OMB's procedures and powers under E.O. 12,291. *See supra* note 18; *see also* Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986) (judicial inquiry into OMB delay in promulgating regulations).

[535] *See supra* text accompanying notes 156–59.

[536] 44 U.S.C. § 3507(a)(2) (1982).

[537] *Id.* § 3517.

[538] *Id.* § 3507(b).

agencies in decisions concerning information collection requests. While the public procedures applicable to information collection requests are not as comprehensive as those available for collection of information requirements in notice-and-comment rulemakings, the procedure applicable to requests does not create a strictly two-party relationship between the agency and OMB.

OMB's regulations implementing the Act appear to reflect an acceptance of this public involvement, but in practice OMB has shown little interest in ensuring that agencies comply with the provisions regarding public participation in either its regulations or the Act. For example, OMB's regulations require that agencies send their notice of a submission of an information collection request to the *Federal Register* not later than the date of the submission to OMB.[539] In this way, the public will be informed of a submission in time to have a meaningful opportunity to comment. OMB, however, is lax in enforcing this requirement, and it is often violated.[540] It is not rare for a collection to be approved by OMB before the notice of its submission is even published.[541] While a means to police the requirement is readily available to OMB, OMB prefers to wait to receive complaints before acting.[542]

Even a timely notice in the *Federal Register* is of little use if the notice is uninformative as to the information collection request involved. There was no uniform format prescribed for notices, and each agency determined on its own what notice it believed to be sufficient. While OMB could in its regulations prescribe a minimum amount of information, it has refrained from doing so,[543] and almost any issue of the *Federal Register* contains agency notices that contain information insufficient to allow meaningful comment by the public.[544] Moreover, at least

[539] 5 C.F.R. § 1320.12(a) (1986).

[540] OMB Watch has begun a regular compilation of such violations. *See, e.g.*, OMB WATCH, *supra* note 499.

[541] *Id.*

[542] *Id.*

[543] *Cf.* 5 C.F.R. § 1320.18(b) (1986) (minimum information required to be included on the information collection request itself).

[544] *See, e.g.*, 51 Fed. Reg. 37,070 (1986) (Federal Communications Commission notice). In the 1986 amendments to the Paperwork Reduction Act, *see supra* note 345, Congress took matters into its own hands and specified the minimum information that agencies must publish in their Federal Register notices: the title of the request, a brief description of the need for the information and its proposed use, a description of the likely respondents and the number of times they will be asked to respond, and an estimate of the burden that will result from the information collection request. *See* Pub. L. No. 99-500, Title VIII, 100 Stat. ____ (1986).

one agency, the Treasury Department, has decided to omit the *Federal Register* notice altogether where the information collection request is a regulation adopted without notice and comment.[545] OMB is aware of Treasury's failure to provide notice[546] but has implicitly condoned it. In short, OMB is not enforcing the public participation provisions of the Act or OMB's own regulations. Rather, OMB's actions suggest that it views the process as taking place strictly between OMB and the agency.

This does not mean that OMB is not interested in the views of certain members of the public. OMB desk officers on occasion will even initiate public participation by calling a particular lobbying group to ask for comments.[547] More frequently, desk officers accept calls from groups they view favorably.[548] Such oral communication, moreover, is not memorialized for the public file. Indeed, some affected agencies assert that even they are sometimes not apprised of the origins of OMB comments which, because of their nature, the agencies believe are unlikely to have originated with OMB.[549] This selective and non-public public participation is not what was intended by the Act.

D. *OMB's Power To Determine the Need for Information*

Executive Order 12,291 by its terms gives OMB no substantive power to disapprove or overrule an agency's determination. Rather, OMB must rely on its power to convince an agency to change its position. Under the Paperwork Reduction Act, however, OMB has the express power to overrule an agency's determination of its need for information, if the collection is not directly required by a statute or regulation.

Section 3504(c)(2) provides that one of the Director's functions is to determine whether an agency's collection of information is "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency."[550] Section 3508 states that "[b]efore approving a proposed information collection request, the Director shall determine whether the collection of information by an

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[545] *See supra* note 346.
[546] *Id.*
[547] *See* Olson, *supra* note 503, at 56.
[548] *Id.*
[549] *Id.* at 57.
[550] 44 U.S.C. § 3504(c)(2) (1982).

agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility."[551] That section concludes with the statement that "[t]o the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information."[552] This power extends, at least initially, even to the independent agencies, though they may overrule the Director's determination by a majority vote.[553] Despite this difference in power granted by the Executive Order and the Act, there is little indication that OMB's practice under the two sources differs.

There have been a number of criticisms of the way OMB has influenced agency regulations pursuant to E.O. 12,291.[554] These criticisms are generally either that OMB is acting in excess of its authority or that its procedures subvert the public rulemaking procedure.[555] In assessing the authority granted to OMB by the Paperwork Reduction Act, it is natural to compare OMB's practice under the Executive Order with its practice under the Act. No one suggests that OMB should have more power over executive agency regulations.[556] Moreover, those supportive of OMB's oversight and deregulatory powers do not suggest that OMB's powers over executive agencies are insufficient for the task.[557]

In reality, OMB's power to persuade agencies is formidable. That power, however, derives not from legal arrangements as much as political ones. Despite OMB's substantial authority

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[551] *Id.* § 3508.

[552] *Id.*

[553] *Id.* § 3507(c).

[554] *See, e.g.*, Olson, *supra* note 503; *see also Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 880 (1983).

[555] Olson, *supra* note 503; *see also* Fix & Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 923 (1985).

[556] The American Bar Association's Section on Administrative Law has, however, recommended the extension of the order to independent regulatory agencies. *ABA Mid-year Meeting*, Legal Times 2, 4 (Feb. 17, 1986). The waning academic and judicial support for the constitutionality of the independence of independent regulatory agencies suggests that the future, or at least the nature, of that independence is clouded. *See, e.g.*, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 662–66 (1984); *see also* Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), *aff'd sub nom.* Bowsher v. Synar, 54 U.S.L.W. 5064 (1986).

[557] *See, e.g.*, DeMuth, *The Reagan Record: A Strategy for Regulatory Reform*, 7 REGULATION 25 (March/Apr. 1984).

over agencies (primarily the budget and personnel ceilings), absent presidential support and congressional acquiescence, OMB has little institutional clout. The power of OMB in the Reagan Administration in fact derives primarily from strong presidential support and a generally supportive Senate, as well as public sentiment generally favoring deregulation.

Of equal importance to OMB's power to persuade is the desire by agency heads to support the President's program, rather than the program defended by the career bureaucracy. The career bureaucracy defends not so much a statutory program as the gloss which that bureaucracy has placed upon the statute. A new administration, especially one succeeding that of a different party, views that gloss not as a neutral and technocratically correct result, but as the political result that flows from the premises of the prior administration. New agency heads inherit their program infrastructure, yet they cannot rely upon it to reflect the new administration's political goals. The OIRA staff, however, is believed to be politically reliable and more likely to reflect the President's program than the agencies' staffs.[558] Thus, an agency head desirous of furthering the President's program may be easily persuaded by OIRA that an agency's proposed action in fact is not as well supported on the merits as the agency staff suggests.

If OMB's current power to persuade is in reality virtually the power to compel, it may not be surprising that OMB's substantive actions under the Paperwork Reduction Act do not differ significantly from its actions under the Executive Order. What is interesting is that, despite OMB's clear authority to overrule agency determinations of the need for information, OMB has generally proceeded by negotiation and persuasion rather than by fiat.[559] Despite administration rhetoric suggesting that it is drastically cutting paperwork burdens,[560] in fact it has proceeded cautiously, picking its targets rather carefully and withdrawing

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[558] It is interesting that, in fact, most of the original staff of OIRA was inherited from the Carter Administration's Office of Information and Regulatory Policy as well as its Council on Wage and Price Stability. Even the *eminence grise* of the initial Reagan deregulatory activities, Deputy Administrator James Tozzi, was a Carter holdover. This suggests that under the Carter Administration OMB's program was not far removed from that under President Reagan, as evidenced by the substantive similarity between E.O. 12,044 and E.O. 12,291. One major difference, however, is the lack of support given by the Carter Administration to regulatory reform. R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 68–69 (1983).

[559] Interview with Nell Minow, *supra* note 499.

[560] 1982 ICB, *supra* note 5, at 33.

if seriously challenged. Some may dispute this assessment. Nevertheless, given its statutory power to make *the* determination of the necessity of the information, OMB has without a doubt pulled its punches in a large number of cases.

For example, during the first half of 1985, OMB raised questions concerning and later disapproved several paperwork requests of the Veterans Administration (VA) and the Department of Housing and Urban Development (HUD).[561] All the disputed questions in the paperwork requests related to racial information. The agencies said they needed the information to monitor minority participation in certain loan programs or to discover segregation in public housing. OMB said that the information the VA was collecting was already collected by another agency and had never been used for enforcement purposes.[562] With respect to one of the HUD forms, OMB said that collecting racial data building-by-building, as opposed to on a project-wide basis, lacked practical utility.[563] Finally, OMB disapproved one form with the notation that it "does not comport with the Administration's policy with respect to quotas."[564] Press coverage suggested that OMB was focusing on racial information as a back-door means of hampering civil rights enforcement.[565] In this atmosphere, OMB was persuaded to back off its rejection of some of the VA and HUD forms.[566]

A statistical comparison similarly suggests no substantial difference between the level of scrutiny or substantive standards applied to regulations reviewed under E.O. 12,291 and paperwork clearances under the Paperwork Reduction Act.[567] For example, during the period April 1981 through March 1983, OMB approved eighty-eight percent of the agency requests for

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[561] *Senate Probes Whether OMB Is Undermining Fair Housing Programs*, 4 INSIDE THE ADMIN. 1, 6 (Oct. 10, 1985); Mariano, *OMB Reverses Decision To Prohibit Collection Of Data On Race, Gender*, Wash. Post, July 26, 1985, at A21, col. 1.

[562] Mariano, *supra* note 561, at A21, col. 1.

[563] *Id.*

[564] *Senate Probes Whether OMB Is Undermining Fair Housing Programs*, *supra* note 561, at 6.

[565] *Id.* at 1, 6.

[566] Mariano, *supra* note 561, at A21, col. 1. Moreover, a recent study prepared at the request of the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee reported that of six Center for Disease Control paperwork requests denied by OMB during the period January 1984–March 1986, three denials were modified or rescinded under Congressional pressure. CDC REPORT, *supra* note 506, at 1–2.

[567] *See* FOURTH ANNUAL REPORT, *supra* note 188, at 8; REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS, *supra* note 475, at 62–64.

paperwork clearances.[568] During the calendar years 1981 and 1982, OMB approved without change eighty-six percent of the regulations submitted to it for review under E.O. 12,291.[569] While differences between the statistical bases may suggest caution in comparing these figures,[570] the statistics do not flag major differences.

OMB's treatment of independent regulatory agencies also supports the conclusion that OMB has not been prodigal in the use of its paperwork authority. Because of the clear ability of independent regulatory agencies to overrule OMB's determinations, OMB might feel less self-restraint in this context than in dealing with executive agencies. Any OMB error perceived by the independent agencies could be corrected by those agencies. Nevertheless, the record suggests that OMB is no less circumspect with the independent regulatory agencies. The data reported by OMB does not specify the number of occasions on which OMB disapproved the information collections of an independent regulatory agency, but the occasions could not have been too numerous: between mid-1981, when the Paperwork Reduction Act went into effect, and September 1985, an independent agency overruled OMB on only three occasions.[571]

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[568] FOURTH ANNUAL REPORT, *supra* note 188, at 8.

[569] REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS, *supra* note 475, at 62–64.

[570] Two major differences between the statistics on paperwork clearances and regulation reviews are the fact that the former includes existing paperwork requirements subjected to review, whereas the latter only includes new regulations; and that the latter includes the submission of a proposed and final regulation as two separate submissions, whereas the former counts each paperwork clearance request only once. OMB WATCH, *supra* note 505, inside back cover. How these differences affect the approval rates can only be a matter of speculation. For example, one would expect that a proposed regulation approved without change by OMB would likely also be approved without change in its final version. How many proposed regulations are thus counted twice cannot be determined from the available data. Similarly, the counting of reviews of existing paperwork requirements might inflate the approval rate, because many had already been subject to review under the Federal Reports Act.

The data does not provide a basis for determining how many of the paperwork clearances approved were of existing requirements, and how many of those had in fact been previously cleared by OMB or GAO. Beginning in October 1985, OMB Watch has begun to publish statistics indicating whether a paperwork clearance is of a collection previously cleared. From September 1985 through August 1986, the statistics show that OMB disapproved (or the agency withdrew) 5% of all requests for clearance, but it disapproved (or the agency withdrew) 11% of all clearance requests for new collections of information. *Id.*

[571] The Civil Aeronautics Board overruled OMB twice, once over a requirement for airlines to display on passenger tickets the contractual liability limit for lost or damaged baggage, and once with respect to a requirement that airlines report periodically on passengers denied boarding because of overbooking. U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES: SECOND ANNUAL RE-

Moreover, in the seven months monitored by *OMB Watch*, OMB approved some 189 collections of information submitted by independent regulatory agencies, while disapproving (or allowing agency withdrawl of) nine.[572] This five percent disapproval ratio for independent agencies compares to the five percent disapproval ratio for all agencies in the same seven-month period.[573]

One possible reason for OMB's reluctance to utilize its statutory power to disapprove collections of information, as opposed to using more resource-demanding negotiation, may lie in the fact that many collections of information are "collection of information requirements." In order to disapprove a collection of information requirement in a final rule which was submitted to it as a proposed rule, OMB would have to comment publicly and in writing on the proposed rule.[574] This might well be more resource intensive than even protracted oral negotiations. Moreover, at least with respect to executive agencies, the final disapproval by OMB would have to be based on the unreasonableness of the agency's response to its comments, so that OMB would lose the flexibility inherent in its E.O. 12,291 reviews.

Moreover, many paperwork reviews are of *existing* regulations which directly impose reporting or recordkeeping requirements.[575] Under the Office of Legal Counsel memorandum, OMB may require agencies to submit these existing regulations to OMB for review as part of OMB's general oversight responsibilities.[576] Under this review, however, these existing regulations are not themselves subject to disapproval under section 3507 of the Act,[577] and because they are not collection of information requirements in proposed rules, these submissions are

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PORT UNDER THE PAPERWORK REDUCTION ACT OF 1980 5 (April 1983). The National Credit Union Administration overruled OMB in 1985 over a requirement for federally-insured credit unions to report their 1985 share insurance premium. FOURTH ANNUAL REPORT, *supra* note 188, at 8. Since the last annual report by OMB, the Federal Communications Commission has overruled OMB disapprovals on two occasions. Letters from William J. Tricario, Secretary of the Federal Communications Commission, to James C. Miller, III, Director of OMB (Nov. 22, 1985 and Jan. 2, 1986) (on file at HARV. J. ON LEGIS.).

[572] OMB WATCH, *supra* note 505, inside back cover.

[573] *Id.*

[574] 44 U.S.C. § 3504(h)(6).

[575] *See supra* notes 231–33 and accompanying text.

[576] OLC Opinion, *supra* note 234; *see also supra* notes 255–65 and accompanying text.

[577] *Id.*

not subject to the procedures of section 3504(h) of the Act.[578] OMB's regulations claim to provide it with the authority for OMB to require agencies to initiate proposals for change in these existing regulations, where the existing collection of information requirement subject to review was not approved by OMB, but this authority is clearly more tenuous than that explicitly provided in the statute.[579] Even more tenuous is OMB's asserted authority to disapprove existing collection of information requirements,[580] effectively invalidating an existing regulation, if an agency refuses within a reasonable time to initiate or complete a rulemaking to change the requirement. Hence, as a practical matter OMB is limited to the use of persuasion in its review of paperwork requirements in existing regulations.

Indeed, the only area in which OMB apparently uses its power to disapprove collections of information is with respect to information collection requests of such little consequence that lower-level OIRA personnel can dictate to their opposite numbers in the executive agencies without fear of the matter being raised to higher levels.[581] If so, this process testifies to the impotence of the power granted to OMB in the Paperwork Reduction Act.

E. *OMB Misuse of Its Legal Authority*

Despite the foregoing suggestion that OMB has not in fact fully utilized its power under the Paperwork Reduction Act, relying instead on its bureaucratic power, commentators allege that OMB has used the back-door of paperwork reduction to achieve regulatory reform.[582] Indeed, notwithstanding the seeming anomaly, it would be possible for OMB to use the Paperwork Reduction Act to affect regulatory reform even while not exercising its power of disapproval under the Act. This is most

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[578] *Id.*

[579] *Id.*

[580] 5 C.F.R. § 1320.14(h) (1985); *see also supra* text accompanying notes 278–87.

[581] During the summer of 1985 when the author conducted interviews with agency and OMB personnel, this conclusion seemed well supported by the statements of these persons. Since that time there have been increasing indications of desk officers exerting substantial disapproval authority, even with respect to collection of information requirements. *See, e.g.*, OMB WATCH, MONTHLY REVIEW: EYE ON PAPERWORK 6–7 (Oct. 24, 1986).

[582] *See, e.g.*, CDC REPORT, *supra* note 506, at 3, 20; Olson, *supra* note 503, at 6–7; OMB WATCH, *supra* note 510, at 3; *Senate Probes Whether OMB Is Undermining Fair Housing Programs*, *supra* note 561, at 1.

apparent with respect to the independent regulatory agencies, which are not subject to E.O. 12,291 review of their regulations. Even though these agencies may ultimately reject OMB's determinations as to paperwork requirements, OMB has an opportunity to try to influence the agencies with respect to collections of information. Moreover, while OMB may not often use its power to disapprove when reviewing executive agency paperwork requests, the existence of that power is a substantial bargaining chip for OMB as it negotiates with the agency to convince it to follow OMB's wishes. Consequently, the complaints made by critics cannot be dismissed simply because OMB rarely exercises explicitly its power of disapproval under the Act.

At the time of passage of the Act, some had worried that OMB's power to determine the need for information was subject to abuse.[583] This concern, however, was voiced mainly with respect to the independent regulatory agencies, not executive agencies, and therefore was met with the power of the independent agencies to override OMB's determination.[584] The only protection provided for executive agencies was the provision stating that nothing in the Act was to be interpreted as increasing the authority of the President or OMB with respect to the substantive policies and programs of departments and agencies.[585]

This provision, however, is of limited value, even assuming it is followed in good faith, due to the fact that information collection almost invariably reflects and affects substantive policy; moreover, substantive policy is often indistinguishable from information collection. Because the Act expressly gives OMB the authority to make binding decisions for executive agencies as to the policy governing information collection,[586] the Act necessarily must be read to accept the effect on substantive policies that flow from OMB's information collection decisions.

A few examples may demonstrate the power OMB wields over the substance of agency programs. First is an example of the identity between a substantive program and an information collection: the truck driver's log.[587] While in one sense the substantive policy is driver safety (by limiting the number of hours

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[583] *See supra* notes 442–51 and accompanying text.
[584] *See supra* notes 442–43 and accompanying text.
[585] 44 U.S.C. § 3518(e) (1982).
[586] *Id.* § 3504.
[587] *See supra* text accompanying notes 478–81.

a trucker can drive), the program used for years to achieve this policy is the contemporaneous creation of a detailed log. The creation of such a log is without question an "information collection" under the Act. Thus, the necessity of the log for the performance of the agency's functions—effectuation of its driver safety and limitation-on-hours policy—is clearly to be determined ultimately by OMB.[588] If OMB believed that the agency could achieve its goals by less burdensome means, under the Paperwork Reduction Act OMB must disapprove the collection as unnecessary to the proper performance of the agency's functions.[589] This would directly displace the agency's determination of the most appropriate means for carrying out its substantive policy and program. Thus, where the substantive program is a paperwork collection, it will clearly be subject to OMB's control.[590]

A second example is where a substantive program's definition is reflected in its information collection. HUD's Performance Awards Program is designed to recognize outstanding public housing agencies for their actions in improving the quality of life of residents.[591] To implement this program, HUD developed an agency nomination form, which was disapproved by OMB on the grounds that "it is not stated (and is unclear) how this relates to HUD's function of complying with legal requirements."[592] In other words, OMB was not accepting at face value HUD's explanation that the Performance Awards Program was a "proper performance of the functions" of HUD, and then denying the necessity of the nomination form to the accomplishment of that function. Rather, OMB was denying the necessity for the information because the program itself was not a proper performance of HUD's functions.[593]

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[588] In this example, the agency's program was carried out by regulation, which to some degree complicates OMB's authority. For purposes here, however, to demonstrate the overlap between substantive policy and paperwork requirements, the program's implementation by regulation is coincidental.

[589] 44 U.S.C. § 3508 (1982).

[590] Labeling and disclosure requirements, which OMB includes within the definition of "collection of information," 5 C.F.R. § 1320.7(c)(1) (1985), would often also share an identity with the underlying program. Consequently, an OMB determination that a labeling requirement is unnecessary is the equivalent of a decision on the merits of the program.

[591] OMB WATCH, *supra* note 510, at 10.

[592] *Id.*

[593] A common example of a related situation is OMB's review of the information requirements imposed by an agency in a grant or loan application. OMB's concern with particular requirements stems from its doubts as to the necessity of the information for

A third example of the way in which OMB determinations can affect substantive programs is in the enforcement area. Enforcement, whether of regulations, grants, or contracts, often takes the form of recordkeeping or reporting requirements. From income tax returns to line-of-business financial reports, generalized reporting requirements provide an administratively efficient means by which to gather information for potential enforcement actions. Generalized recordkeeping requirements can provide an alternative means by which agencies can ensure the availability of information for potential enforcement action, as well as a means to check the accuracy of any reports filed with the agency. Because of the close connection between a substantive program and its enforcement mechanism, OMB's power over reporting and recordkeeping requirements again poses questions. In passing on the necessity of the information to be reported, OMB looks not only at whether the information involved is necessary to the particular enforcement effort involved, but also at whether the enforcement effort itself is necessary.

For instance, one of the programs identified for review by the Presidential Task Force on Regulatory Relief was the Department of Labor's implementation of the Davis-Bacon Act,[594] which requires that workers on federal construction projects be paid a minimum wage based on locally prevailing wage rates. One provision of the Act requires that employers subject to its provisions submit weekly statements to the contracting agency detailing the wages paid each employee.[595]

Historically, the regulations required employers to submit each week a copy of their payrolls, indicating the name and address of each covered employee, his or her classification, rate of pay, daily and weekly hours worked, deductions made, and actual wages paid.[596] The Department of Labor (Labor) determined that the cost of this requirement was approximately $100 million.[597] If OMB determined that some of this information

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determining whether the grant or loan should be awarded. In other words, OMB second-guesses the agency as to the basis upon which the loan or grant should be made. *See, e.g.*, OMB WATCH, EYE ON PAPERWORK: OMB CONTROL OF GOVERNMENT INFORMATION 9–10 (Dec. 23, 1985).

[594] 40 U.S.C. §§ 276a–276c (1982).

[595] *Id.* § 276c.

[596] 29 C.F.R. § 5.5(a)(3) (1982).

[597] *See* Building & Constr. Trades' Dep't v. Donovan, 712 F.2d 611, 631 (D.C. Cir. 1983).

was not necessary to the proper performance of Labor's functions under the Davis-Bacon Act, OMB could disapprove its collection.[598] This disapproval would override Labor's determination that it needed all of the information to perform its enforcement functions adequately.[599] Moreover, if OMB determined that *no* individually identifiable payroll data should be reported because the Davis-Bacon Act did not require such detail, and because enforcement of the Act by this means was unnecessary, then under section 3508 of the Paperwork Reduction Act that determination too would override Labor's views.[600]

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[598] This example involves an existing "collection of information requirement," which raises particular problems under the Paperwork Reduction Act; but in terms of the interplay between a substantive program and its enforcement, the discussion remains apt.

[599] In reality, Labor was not in disagreement with OMB. Labor found that the information submitted to the contracting agency was infrequently used. 47 Fed. Reg. 23,662 (1982). *But see* Building & Constr. Trades' Dep't v. Donovan, 712 F.2d at 631 (citing evidence that Labor had once testified to the contrary).

[600] Again, in reality, Labor concurred with OMB's views and eliminated any requirement for employers to report payroll data, substituting instead a statement to the effect that the employer had complied with the Davis-Bacon Act. On review, this change to the reporting requirement was invalidated by the D.C. Circuit on the ground that the statute required the weekly reporting of payroll data. Building & Constr. Trades' Dep't v. Donovan, 712 F.2d at 630–33. In reaching this conclusion, the court relied to some extent on its conclusion that the statutory provision was intended to play a role in uncovering violations of the law. *Id.* at 631.

A similar example with respect to recordkeeping would be the Department of Energy's (DOE) recordkeeping requirements regarding transactions that occurred under the Mandatory Petroleum Price and Allocation regulations in effect from 1973 to 1981. *See supra* notes 334–41 and accompanying text. With oil decontrol in January 1981, the need for businesses to continue to maintain records with respect to past transactions was called into question by OMB, at least where no investigative or enforcement activity was underway. Bedell Letter, *supra* note 334, at 6. DOE did not actively assert that all the required records were necessary for enforcement activities, but suggested that it was unable to determine what records might be relevant to both on-going and yet-to-be-initiated enforcement litigation. *Id.* at 9.

While OMB in fact negotiated with DOE to reach an accommodation, had this recordkeeping requirement come before OMB pursuant to § 3507 of the Act, OMB could have simply disapproved the recordkeeping requirement as not being necessary to the proper performance of DOE's functions—despite the contrary views of DOE's enforcement personnel. Not only does the Act place OMB in the position of determining whether the records required are necessary for the enforcement activities envisioned by the agency, but it also allows OMB to determine whether those envisioned enforcement activities are indeed the proper performance of the agency's function. While the Act does not on its face give OMB power over DOE's enforcement activities (so that OMB cannot under the Paperwork Reduction Act dictate enforcement policy to DOE), by giving OMB complete power over DOE's recordkeeping requirements, the Act gives OMB substantial, *de facto* power over DOE's enforcement policy.

This example also involved an existing collection of information requirement, which may have accounted for OMB's negotiation stance. However, the political sensitivity of the issue probably better explains OMB's decision to apply deliberate, if protracted, pressure on DOE to amend its regulations, rather than to attempt by fiat to demand immediate paperwork reductions. *See* Letter from Rep. John D. Dingell, Chairman of the Oversight and Investigations Subcomm. of the House Comm. on Energy and Com-

A fourth example of the way paperwork control can affect substantive policy is where an agency's collection of information is necessary to determine whether and to what extent a problem exists requiring regulatory action. For instance, in 1984 the National Institute for Occupational Safety and Health submitted to OMB a proposed epidemiological study of ladder-fall injuries.[601] The study was justified to OMB both as an experimental application to traumatic injuries of epidemiological methods which had been successful with respect to disease, and as a source of data for an Occupational Safety and Health Administration (OSHA) rulemaking regarding ladder-fall accidents. OMB denied approval, stating that "we are not convinced that the study proposed is necessary for OSHA rulemaking, and therefore conclude that it has no practical utility."[602] The effect of OMB's denial in this case, overriding OSHA's determination that the information would be "very important,"[603] may well have been to obstruct OSHA's substantive rulemaking. Whether or not OMB's decision is correct, it appears that the Act gives OMB the authority to determine whether the proposed collection of information is necessary.

This second-guessing by OMB seems clearly intended by the Act. It is a decision about the necessity of information for the proper performance of an agency's functions. Indeed, the only argument from the text of the statute against second-guessing would be that, while OMB determines the necessity of the information, the agency determines the proper performance of its own functions. If HUD determines that a Performance Awards Program is necessary, then OMB would be limited to determining whether the nomination form is appropriately tailored to the standards for the award. Similarly, if OSHA decides it needs certain data for a rulemaking, OMB could only review the paperwork requirement to see if it would provide that data. Such an interpretation would eviscerate OMB's review role, however, for the agency can always tailor the statement of its functions to match the information desired. In short, if the determination of the proper performance of an agency's functions is in the hands of the agency, OMB would never have the last word.

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merce, to Douglas H. Ginsburg, Administrator of OIRA (May 3, 1985) (on file at HARV. J. ON LEGIS.); Dingell Letter, *supra* note 337.

[601] CDC REPORT, *supra* note 506, at 35.

[602] *Id.*

[603] *Id.*

The statutory language, while not explicit, generally does not support such a restricted interpretation of OMB's role. Grammatically, section 3508's language encompasses within OMB's determination the entire question of whether the information is necessary for the proper performance of an agency's function.[604] The explicit requirement of an OMB determination of the practical utility of the information[605] suggests a probing OMB scrutiny of the agency's need for and use of the information, rather than the more limited role suggested by the restrictive interpretation. Moreover, section 3508's final sentence, authorizing disapproval if "the Director determines that the collection of information by an agency is unnecessary, *for any reason*,"[606] further suggests that broad scrutiny by OMB is justified.

The legislative history on this point is not clear-cut. On the one hand, the Senate report suggests that the Act does not affect the power of OMB over the substance of agency policy.[607] On the other hand, the floor debate and other portions of the legislative history reiterate the importance of having OMB subject agency judgments as to the utility of information to strict, independent scrutiny.[608] However, for Senator Chiles and Representative Horton, the leaders in the Senate and House, there was little question that OMB's power to determine necessity extended as far as necessary to subject the paperwork requirement to independent scrutiny.[609] While OMB's authority under the Act does not extend beyond paperwork, it extends to everything that imposes a paperwork burden. Indeed, only one exception to this rule was stated in the Senate Report: if a collection of information is specifically required by statute, then OMB's determination of necessity is not final because that determination has been made by Congress.[610] The negative pregnant of this one exception, however, is clear. Nothing less than a specific statutory requirement for the information will block OMB's review. Thus, if a substantive policy adopted by an agency implies or rests upon a particular paperwork require-

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[604] 44 U.S.C. § 3508 (1982).

[605] *Id.*

[606] *Id.* (emphasis added).

[607] S. REP. No. 930, 96th Cong., 2d Sess. 56, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6296.

[608] *See supra* text accompanying notes 434–41.

[609] Interview with Robert Coakley, *supra* note 248; interview with Steve Daniels, *supra* note 165.

[610] S. REP. No. 930, 96th Cong., 2d Sess. 49, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6241, 6289.

ment, OMB can subject that policy to scrutiny to determine if the paperwork requirement is necessary under the Act. While OMB is given no power over the agency's determination of substantive policy as such, the Act does give OMB all requisite power to decide whether any collection of information request is necessary. OMB is limited to acting upon a collection of information, but is not limited to accepting an agency's statement of its substantive policy. Although Congress has over time oscillated between the desire for strong measures to cut paperwork burdens and reaction to those strong measures, at the time of the passage of the Paperwork Reduction Act it clearly favored strong measures. The congressional leaders apparently discounted the danger of abuse by OMB, trusting in congressional oversight to stay an overzealous OMB.[611]

If this analysis of OMB's statutorily granted power over collections of information is correct, complaints that OMB is using the Paperwork Reduction Act to affect substantive policy are complaints at least as much about the Act as about OMB. The congressional sponsors who vested such power in OMB may have intended to ensure that OMB would not be restricted in striking down paperwork burdens, but the result is to enable OMB to significantly influence substantive policies through its power over paperwork. OMB is not unaware of the pendulum of reaction,[612] and undoubtedly OMB's desire not to jeopardize its powers plays an important role in its decisions to exercise those powers cautiously.

VIII. Conclusion

In enacting the Paperwork Reduction Act, Congress hoped to achieve a major breakthrough in reducing the burden of government paperwork. Under the Federal Reports Act, BoB and OMB consistently announced elimination of unnecessary paperwork, yet inexorably the paperwork burden increased.[613] This has not changed under the Paperwork Reduction Act.[614] Ultimately, reality may be better reflected by impressions than statistics. Here success has also been elusive. At the same time

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[611] Interview with Robert Coakley, *supra* note 248. In fact, Congressional oversight of claimed abuse has not been ineffective. *See supra* note 566.

[612] *See supra* note 525.

[613] *See* Bowman, *supra* note 43, at 117.

[614] *See supra* note 131.

that OMB was reporting a thirty-two percent decrease in paperwork burdens, a poll of small business owners indicated that eighty percent perceived paperwork burdens to have increased or stayed the same over the preceeding two years.[615]

This failure, however, may stem more from unrealistic conceptions of paperwork burdens than from any institutional or procedural failing of the Act. Underlying Congressional action in this area has been an entrenched belief that a vast number of unnecessary and duplicative reporting and recordkeeping requirements exist.[616] Certainly, some duplicative requirements have been discovered, but they are few in number.[617] Significant reductions in paperwork burdens cannot be attained by eliminating unnecessary requirements, just as significant budget reductions cannot be achieved by merely rooting out waste, fraud, and abuse.

One of the few innovations in the Paperwork Reduction Act is the Public Protection provision, designed to allow persons to ignore collections of information which do not display an OMB control number. Contrary to the drafters' desires, the provision in practice may be only a cruel fraud that can lead innocent persons to violate the law. Because of the inability to define the universe of collections subject to the provision and because of the dichotomy between forms and regulations imposing reporting requirements, both of which are aggravated by the OLC

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[615] *See Paperwork Reduction Act of 1980: Hearing before the Subcomm. on Gov't Regulation and Paperwork of the Senate Comm. on Small Business*, 98th Cong., 1st Sess. 8 (1984).

[616] *See* FINAL REPORT, *supra* note 12, at 599–601.

[617] For example, in the first four years under the Paperwork Reduction Act, OMB discovered only twenty-eight cases of duplicative collection. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES, FIRST ANNUAL REPORT UNDER THE PAPERWORK REDUCTION ACT OF 1980, App. 1 (1982); U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES, SECOND ANNUAL REPORT UNDER THE PAPERWORK REDUCTION ACT OF 1980, App. A (1983); U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES, THIRD ANNUAL REPORT UNDER THE PAPERWORK REDUCTION ACT OF 1980, App. A, (1984); U.S. OFFICE OF MANAGEMENT AND BUDGET, MANAGING FEDERAL INFORMATION RESOURCES, FOURTH ANNUAL REPORT UNDER THE PAPERWORK REDUCTION ACT OF 1980, App. A (1985). The burden hours saved by eliminating these duplicative collections were substantially less than one percent of the total burden hours eliminated during the same period.

The Commission on Federal Paperwork had believed that a Federal Information Locator System (FILS) would reduce duplication. *See* FINAL REPORT, *supra* note 12, at 17. While the Act subsequently required OMB to develop a FILS, *see* 44 U.S.C. § 3511 (1982), OMB did not place a high priority on establishing the FILS. *See* IMPLEMENTING THE PAPERWORK REDUCTION ACT, *supra* note 173, at 14–15. The FILS is now operational but agency personnel with whom this author has spoken unanimously described the system as practically worthless.

Opinion, people cannot rely in confidence on the Public Protection provision to ignore a reporting requirement that lacks an OMB control number. Rather than serving as a meaningful incentive for agency compliance with the clearance requirements of the Act, the Public Protection provision appears to be nothing more than a defense of last resort by protestors against taxes or regulatory programs. This failure of the provision to play a meaningful role under the statute, however, may actually be a boon. Otherwise, technical or good-faith errors by agencies might have disastrous consequences for tax or regulatory enforcement.

For the most part, the Paperwork Reduction Act built upon the Federal Reports Act. Consequently, the present Act generally reflects the 1940's conception of administrative action that existed in the earlier Act: agencies act upon regulated entities and procedures are necessary to protect those entities from the depredations of the agencies. Unlike the Administrative Procedure Act, however, the Paperwork Reduction Act, like the Federal Reports Act before it, establishes the Office of Management and Budget, rather than the courts, as the overseer and ultimate interpreter of agency authority. Further reflecting the 1940's concept, the Act generally perceives the affected interests to be those of the agency and those subject to the agency. OMB's role is to represent the interests of those subject to the agency. OMB acts only as a brake on the agency, which is viewed as otherwise acting without limit.

Absent from this calculus are the interests of the public or of specific beneficiaries of the agency action. In the Paperwork Reduction Act, those interests are reflected imperfectly in the Kennedy Amendment.[618] In practice, however, the Kennedy Amendment is a nullity except with respect to independent agencies. OMB does not comment publicly in executive agencies' rulemaking. At the same time, OMB does not disapprove the regulation under the Paperwork Reduction Act after it has

[618] Indeed, section 3504(h), unlike the other public participation provisions, only has significant effects with respect to third-party interests. Absent this section, OMB's invalidation of a collection of information requirement in a rule promulgated after notice and comment would not offend the proposed respondent, whose burden would be relieved, or treat the agency differently than OMB does in disapproving a collection of information request. Only those members of the public who participated in the rulemaking in support of the requirement would be adversely affected. Thus, by constraining OMB's substantive powers under the Act over collection of information requirements and requiring their exercise through public comments, section 3504(h) was intended to protect the interests of third parties.

gone through the rulemaking proceeding. Thus, although the process envisioned by the Kennedy Amendment is not utilized, the evil against which it was intended to guard is not present. Instead, OMB reviews all proposed regulations from executive agencies under E.O. 12,291 before they are initially published, and as a practical matter, they are not published until OMB approves them. Similarly, OMB reviews the final rule before it is published to assure that it is still acceptable. To the public, OMB's review is invisible and unacknowledged in the agency rulemaking. This method of proceeding poses its own problems, but those problems are not peculiar to paperwork requirements and do not depend on any authority granted by the Paperwork Reduction Act.

OMB's avoidance of public participation is not limited to reviews of collection of information requirements. In decisions regarding information collection requests, OMB has also done little to ensure that the opportunities for public participation established by the Act and OMB's own regulations are in fact provided. Instead, OMB appears to prefer decision-making without public interference. That OMB's practice tends toward secrecy and abjures the public participation and involvement characteristic of notice-and-comment rulemaking is hardly surprising. OMB has had little experience with notice-and-comment rulemaking. Most of its "rules" are exempt from the requirements of section 553 of the APA.[619] Rather, they are classified as circulars, bulletins, instructions, memoranda, or directives, and are not even published in the *Federal Register*. OMB has conducted its traditional activities of reviewing executive agency testimony before Congress, reviewing executive branch legislative proposals, reviewing proposed executive orders and proclamations, as well as developing the federal budget, all without public procedure or involvement. OMB's location in and identification with the Executive Office of the President have also contributed to OMB's sense of being different from agencies and hence not subject to the norms or practices applicable to them.[620] In addition, the concept of a unitary, hierar-

[619] *See* 5 U.S.C. § 553(a)(2) (1982) (exception for matters relating to agency management).

[620] The special nature of OMB and its relation to the President are indicated by the Director's exemption, until 1974, from appointment contingent upon the advice and consent of the Senate. *See* Pub. L. No. 93-250, 88 Stat. 11 (1974). *Cf.* Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (Office of Science and Technology in Executive Office of the President held to be an "agency" subject to the Freedom of Information Act despite claim by government that it was staff to the President rather than an agency).

chical executive might support a confidential intra-executive decision-making process. Just as we do not expect public participation in the internal process by which subordinates in an agency influence the agency decision-maker, one could argue that we should not expect public participation in the intra-executive influencing of the agency decision-maker.[621]

To understand OMB's lack of commitment to public participation is not to excuse it. Whatever else may be said, the Paperwork Reduction Act envisions a proceeding in which the public may meaningfully participate and affect the ultimate decision. OMB is not ensuring that proceeding, and is therefore not fulfilling its responsibilities under the Act.

Under the Federal Reports Act, one of the motivations for transferring jurisdiction over independent agencies from OMB to GAO was the perception that OMB had used its paperwork clearance power to interfere with the independent agencies' substantive policies. Today that perception exists at least to some extent concerning OMB reviews of executive agencies' paperwork requests under the Paperwork Reduction Act. To a large extent, however, the Act intended and accepted OMB interference with substantive policies that imposed or implied paperwork requirements.

Implicit in the acceptance of a strong role for OMB in the paperwork clearance process should be a recognition of the frequent direct relationship between paperwork requirements and substantive policy. To divorce the two is often analytically difficult and creates an artificial distinction between substance and paperwork. A strong paperwork clearance office necessarily requires the power to affect substantive policy, in order to attack the related paperwork burden. At the time the Paperwork Reduction Act was passed, the desire was for strong medicine to attack the ill. Thus, the power given to OMB was what was thought necessary to effect the cure.

In practice, however, OMB has not exercised its powers to their full extent. OMB has often chosen bureaucratic arm-twist-

[621] There is logic in such an argument, but the analogy ultimately fails. First, acceptance of a confidential internal agency process ultimately depends on the presence of a public proceeding which cabins the discretion available within the agency. To the extent that OMB fails to provide or ensure a meaningful public proceeding to inform and limit the decision it is affecting, OMB should not be able to analogize its situation to intra-agency advice. Second, whatever expectations or logic may suggest, the Paperwork Reduction Act establishes OMB as a separate and distinct entity from the agency proposing a collection of information, not as part of a unitary, internal executive decision-making apparatus.

ing over fiat, despite its legal authority to disapprove collections of information, and has been circumspect in its targets for reductions. Rather than attack major subject areas, such as labeling and public disclosure provisions, OMB has nibbled at the edges, disapproving an EEO statistic here and an FCC requirement there. In this way, OMB tries to conserve its political capital. If OMB creates too many political enemies, it will have its wings clipped, regardless of its legal authority.[622]

Agency rulemaking and agency paperwork issues have intersected throughout this Article, and the relation of rules to reporting requirements has created confusion and legal complexity. The Paperwork Reduction Act carries forward this distinction between paperwork requirements contained in rules and those not in rules. Functionally, however, generally applicable reporting and recordkeeping requirements are indistinguishable from rules which impose a reporting or recordkeeping requirement. What causes some requirements and not others to be made by rule is a matter of happenstance and history, not logic or analytical distinction. Therefore, all reporting and recordkeeping requirements should be treated alike and subjected to the rigors of rulemaking. If this change were made, there would be no need for special procedures such as those provided by the Paperwork Reduction Act. Section 553 of the Administrative Procedure Act would apply in terms of procedure, and the body of case law reviewing informal rulemaking would govern judicial review.

Such a reform would also eliminate a recurring source of contention by delineating the proper boundary between paperwork clearance and interference with substantive policy. By treating paperwork requirements as rules under the APA, the whole concept of paperwork as a distinguishable commodity disappears. A paperwork requirement is a rule that imposes a burden, just as does a non-paperwork regulation. Centralized oversight, coordination, or review, such as is practiced by OMB under E.O. 12,291, could proceed (or not) under such appropriate procedures, without regard as to whether or not what is reviewed is a "paperwork" requirement.[623]

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[622] The 1986 amendments to the Paperwork Reduction Act, *see supra* note 345, indicate OMB's vulnerability. While none of the procedural amendments meaningfully affect OMB's powers or procedures, OMB was unable to block the requirement that future administrators of OIRA would be subject to Senate confirmation, reflecting continuing congressional concerns about OMB's powers in this area.

[623] There is nothing intrinsic to paperwork requirements to justify unique centralized

Treating paperwork like other regulatory burdens would also promote efficiency. Since there would be no special weight attributed to "paperwork" burdens, these burdens could be measured in dollar costs. This process would avoid the inefficiency of the present burden hour measure, which treats an hour of executive time as equal to an hour of clerk time, an hour of computer time as equal to an hour of manual filing, and record-keeping as imposing no burden. Managers could thereby set priorities in light of actual costs, and paperwork requirements could be compared with all other regulatory requirements on the basis of their costs and benefits, not on their artificial distinction as a paperwork burden.

Finally, altering the focus of paperwork review would provide an additional benefit. Under the Paperwork Reduction Act, OMB's review is only a brake on agencies' collections of information. There is no provision or authority for OMB to determine that additional information is necessary for the proper performance of an agency's functions. OMB's review focuses only on reducing costs, as opposed to increasing the net benefits. The stated goal of E.O. 12,291 is to maximize the net benefits of regulation, and OMB's function is to determine if the agency has complied with the order. Today OMB clearly seeks to minimize regulatory burden, without placing much emphasis on increasing regulatory benefits, but this should not obscure the theoretical and practical value of a review which maximizes net benefits—a review that is not possible under the framework of the current Paperwork Reduction Act.

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oversight. Nor is there a particular expertise in OMB to justify its role as the central overseer of paperwork. Under the Federal Reports Act, the BoB unit which reviewed paperwork clearances in fact was made up of experts in statistics and survey techniques. Generally, there is little of that expertise remaining in OIRA, while at the same time there has been a substantial growth of such expertise in the agencies Nevertheless, the 1986 amendments to the Paperwork Reduction Act, *see supra* note 345, continue to attempt to mandate OIRA leadership in the statistical area.

ARTICLE

A CONSTITUTIONAL ANALYSIS OF THE EQUAL ACCESS ACT'S STANDARDS GOVERNING PUBLIC SCHOOL STUDENT RELIGIOUS MEETINGS

NADINE STROSSEN*

Numerous disputes have arisen over the use of public secondary schools for meetings by student religious groups. In every analysis of whether schools should grant such access there are competing Free Speech Clause and Establishment Clause concerns. Students could perceive a school's granting access as state endorsement of religion. Conversely, prohibition could result in the violation of students' free speech rights.

Congress attempted to deal with these concerns in 1984 by enacting the Equal Access Act. Professor Strossen shows that the Act favors access in situations where the Supreme Court has indicated that access is not required by the Free Speech Clause and circuit courts have found that such access would violate the Establishment Clause. In the absence of any directly controlling Supreme Court precedent, Professor Strossen attempts to reconcile the competing constitutional concerns involved in equal access controversies. In doing so she offers guidance as to whether and how schools should comply with the Act, given the inconsistencies between the constitutional and statutory standards for resolving equal access claims.

In the Equal Access Act (the Act),[1] Congress addressed a controversial issue that has led to numerous disputes before school boards and courts around the country: when a public high school[2] allows voluntary, student-initiated, nonreligious student groups to meet on school premises, should it grant equal

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[1] Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. § 4071 (1984)). The Equal Access Act became effective in August 1984. For the text of the Act, *see infra* note 164.

[2] This Article's analysis applies to schools containing lower grade levels, as well as high schools (grades nine through twelve). The Article refers to high schools, however, because they will probably receive the most access requests from voluntary, student-initiated, religious groups.

access to voluntary, student-initiated, religious student groups?[3] Two federal judges have maintained that denying equal access violates the Free Speech Clause.[4] However, all four courts of appeals which have ruled on the issue have held that granting equal access violates the Establishment Clause.[5]

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[3] The equal access controversy concerns the free speech rights of organized student groups rather than individual students or informal student groups. Religious expression in public schools by individual students or informal student groups raises fewer Establishment Clause concerns. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring) ("Nothing in the United States Constitution as interpreted by this Court . . . prohibits students in public schools from voluntarily praying at any time before, during or after the school day."); Mueller v. Allen, 463 U.S. 388, 399 (1983) (government aid received by parochial schools, under a statute allowing tax deductions for tuition and related expenses, was "available only as a result of decisions of individual parents;" therefore, no "'imprimatur of state approval' . . . can be deemed to have been conferred" on religion).

[4] Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983) (Nealon, C.J.), *rev'd*, 741 F.2d 538, 561 (3d Cir. 1984) (Adams, J., dissenting), *vacated and remanded on other grounds*, 106 S. Ct. 1326 (1986) (school district's refusal to permit wholly student-initiated nondenominational prayer club to meet during activity period violated club members' free speech rights). The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. It is binding on the states, Near v. Minnesota, 283 U.S. 697, 707 (1931), and protects the rights of individual students not only to engage in religious expression, but also to associate for such purposes. NAACP v. Alabama, 357 U.S. 449, 460–61 (1958).

[5] Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); *Bender*, 741 F.2d 538 (3d Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Brandon v. Bd. of Educ., 635 F.2d 971 (2d Cir. 1980). The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. It is binding on the states. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

Although the Establishment Clause is usually invoked to challenge governmental favoritism toward religion, it also prohibits governmental hostility toward religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984). Most equal access opinions have not discussed the Establishment Clause problems resulting from the denial, as opposed to the grant, of access. However, in Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub. nom.* Widmar v. Vincent, 454 U.S. 263 (1981), the Eighth Circuit held that the Establishment Clause required a public university to grant equal access to a student religious group. *See id.* at 1317–18 (denial of equal access has the primary effect of inhibiting religion, and "hopelessly entangles" a university in defining religion, determining whether proposed events involve religious worship, and monitoring events to ensure no prohibited activity occurs).

Student religious groups seeking access to school premises have also based their claims on the Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. The Free Exercise Clause is binding on the states. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948). However, the courts have consistently rejected the asserted free exercise rationale for equal access. *See Bell*, 766 F.2d at 1400 n.6; *Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 976–78; *Bender*, 563 F. Supp. at 703. As one court of appeals has explained,

> [w]e do not challenge the students' claim that group prayer is essential to their religious beliefs . . . . [However,] the school's rule [prohibiting group prayer on school property] does not place an absolute ban on communal prayer . . . . While school attendance is compelled for several hours per day, five days per

Reflecting asserted congressional concern for the high school students' free speech rights,[6] the Act requires secondary schools to grant equal access to any "noncurriculum related" student groups, including religious, political, or philosophical groups, in circumstances where such access would probably not be required under current Free Speech Clause doctrine.[7] In several recent decisions, the Supreme Court has curtailed Free Speech Clause protection of both access claims to government property[8] and public school students' speech.[9]

Conversely, reflecting what some critics have described as Congress's relative lack of concern for Establishment Clause values,[10] the Equal Access Act purports to require schools to grant equal access to student religious groups in certain circumstances under which circuit court rulings have held that such access would violate the Establishment Clause,[11] and Supreme

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> week, the students . . . are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place . . . .

Brandon, 635 F.2d at 977.

Although the majority in Widmar v. Vincent, 454 U.S. 263 (1981), did not reach the college student religious group's free exercise rationale for its equal access claim, the sole Justice who did analyze that claim rejected it. *Id.* at 284 (White, J. dissenting).

[6] *See, e.g.*, 130 CONG. REC. H7723–24, H7727 (daily ed. July 25, 1984) (statement of Rep. Roukema (R-N.J.)); *id.* at H7724 (statement of Rep. Frank (D-Mass.)); *id.* at H7732 (statement of Rep. Goodling (R-Pa.)); *id.* at H7734–35 (statement of Rep. McEwen (R-Ohio)); *id.* at H7735 (statement of Rep. Eckart (D-Ohio)); *id.* at H7738 (statement of Rep. Slattery (D-Kan.)); 130 CONG. REC. at S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield (R-Or.), the Act's Senate sponsor); *id.* at S8361 (statement of Sen. Jepsen (R-Iowa)). *See also* President's Statement Upon Signing H.R. 1310 (Education for Economic Security Act), 20 WEEKLY COMP. PRES. DOC. 1120, 1121 (Aug. 11, 1984): "These provisions honor, in a public school setting, this country's heritage of freedom of thought and speech, and I am delighted that they now become the law of the land." *Id.*

[7] *See infra* text accompanying notes 258–65.

[8] *See infra* text accompanying notes 37–44.

[9] *See infra* text accompanying notes 49–62.

[10] *See, e.g.*, Boisvert, *Of Equal Access and Trojan Horses*, 3 LAW & INEQUALITY 373, 406 (1985) (The Equal Access Act's legislative history indicates that it is a "blatant push to get religion into the public schools in violation of the Establishment Clause"); Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High School: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529, 556–59 (1985).

Some members of Congress viewed the Act as a backdoor attempt to inject organized prayer into the public schools. 130 CONG. REC. S8352 (daily ed. June 27, 1984) (statement of Sen. Metzenbaum (D-Ohio)); *see also id.* at H7725 (statement of Rep. Schumer (D-N.Y.) quoting the Reverend Jerry Falwell's comment that "[w]e knew we couldn't win on school prayer, but equal access gets us what we wanted all along"); *id.* at H7733 (statement of Rep. Ackerman (D-N.Y.) referring to equal access bill as "the son of school prayer").

[11] *See infra* text accompanying notes 69–87.

Court rulings have indicated that access would at least raise Establishment Clause problems.[12]

In light of the inconsistency between the Act's standards for resolving equal access claims and judicial decisions enunciating constitutional standards for resolving such claims, it is not surprising that decisions under the Act reflect differing views of its constitutionality.[13] Faced with the competing constitutional considerations implicated in every equal access dispute, as well as with conflicting directives from the courts and the Congress, school officials, students, parents, and other concerned parties had hoped that the Supreme Court would provide some guidance for resolving these conflicts during its 1985 Term. The Court had granted certiorari to review *Bender v. Williamsport Area School District*, in which the Third Circuit had rejected an equal access claim on Establishment Clause grounds, notwithstanding its holding that the denial of access violated the students' free speech rights.[14] Although the events at issue in *Bender* occurred before the Act's effective date, some parties concerned with the equal access issue had hoped that the Court's ruling would provide at least some indirect guidance concerning the Act.[15] However, in March 1986, a narrow majority of the Court de-

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[12] *See infra* text accompanying notes 28–33 & 68.

[13] *See infra* text accompanying notes 193–232.

[14] 741 F.2d 535, 559 (3d. Cir. 1984), *cert. granted*, 106 S. Ct. 56 (1986). Having concluded that denying equal access to the students seeking to hold religious meetings would violate their free speech rights, but that granting them equal access would violate the Establishment Clause, the Third Circuit was faced with the issue of how to reconcile these competing constitutional claims. It did so pursuant to a novel, open-ended balancing test:

> [T]he appropriate analysis requires weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the Framers, by deciding which course of action will lead to the lesser deprivation of those rights.

Id. (emphasis in original).

Although the Third Circuit observed that the facts of the *Bender* case presented a close question under its balancing analysis, it concluded that Establishment Clause concerns outweighed free speech concerns. *Id.* at 559–60. However, the court emphasized that "[u]nder other circumstances, of course, this same analysis could work to override the Establishment Clause, if a sufficiently compelling interest were shown." *Id.* at 560. For the facts of *Bender*, *see* text accompanying note 78.

[15] *See, e.g.*, Brief for the United States as Amicus Curiae, Supporting Petition for a Writ of Certiorari, at 2–9, Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986) (No. 84-773)(contending that, if allowed to stand, Third Circuit decision would cast doubt on Act's constitutionality, and would frustrate congressional objective of resolving constitutional issues involved with minimal additional litigation).

clined even to comment, let alone to rule, upon the merits of the *Bender* case.[16]

Far from resolving the equal access controversy during its 1985–1986 Term, the Supreme Court increased the confusion surrounding this controversy by issuing another decision, *Bethel School District v. Fraser*,[17] which significantly circumscribed students' free speech rights. The rationale underlying *Bethel* was that, due to their presumed immaturity, high school students are likely to be emotionally harmed by, and therefore should be insulated from, certain controversial speech.[18] This is directly contrary to the rationale underlying the Equal Access Act, which presumes that high school students are sufficiently mature to be exposed to controversial speech.[19]

Because of the Supreme Court's failure to provide specific guidance concerning high school equal access disputes, the numerous parties and courts that face such disputes have been relegated to the various commentators upon the subject. A school's ultimate concern in facing equal access issues must be to comply with the general dictates of the Free Speech Clause and the Establishment Clause, as interpreted by the Supreme Court.[20] The facts and circumstances that may be relevant to these ultimate constitutional requirements cannot be codified for all cases. Consequently, the Act's specification of criteria for evaluating all equal access claims necessarily departs from

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[16] Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986). The majority and dissenting opinions are discussed *infra* at text accompanying notes 85–103.

[17] 106 S. Ct. 3159 (1986).

[18] *See infra* text accompanying notes 56–62. *But see infra* note 60 (*Bethel* may reflect the Court's special concern with shielding minors from sexually explicit speech).

[19] The Equal Access Act's legislative history is replete with statements by members of Congress repudiating the view that high school students are too immature or impressionable to be exposed to controversial speech. *See, e g.*, H.R. REP. No. 710, 98th Cong., 2d Sess. 4 (1984); 130 CONG. REC. S8359 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *id.* at S8363 (statement of Sen. Mitchell (D-Me.)); *id.* at S8366 (statement of Sen. Grassley (R-Iowa)); *id.* at H7723 (statement of Rep. Frank); *id.* at H7727 (statement of Rep. Roukema).

[20] Any denial of equal access could be challenged under the Supreme Court precedents limiting governmental discretion to impose content-based restrictions upon speech in limited public forums, even absent any statute purporting to grant equal access rights. *See infra* text accompanying notes 34–48. Under the Supreme Court decisions consistently invalidating state-sanctioned religious expression in public schools on Establishment Clause grounds, *see infra* text accompanying notes 28–33, no such expression could escape judicial scrutiny merely by virtue of general legislative authorization. *See* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1407 (10th Cir. 1985) (although state statute purportedly authorized religious expression by voluntary student groups in public schools, equal access issue was reviewed solely on constitutional grounds, with no discussion of statute).

constitutional standards.[21] A school should comply with the Act's specific standards only insofar as they are not inconsistent with general constitutional principles.

This Article[22] is intended, first, to fill the gap left by the Supreme Court's failure to address the merits of *Bender*, by articulating principles for reconciling the competing constitutional concerns implicated in equal access controversies. The Article's second purpose is to compare the proposed constitutionally-derived standards with those specified in the Act in order to offer guidance about the respects in which schools should or should not comply with the Act.[23]

After sketching the constitutional underpinnings of the equal access controversy, Part I briefly summarizes the specific constitutionally-based equal access case law. Part II shows why constitutional principles require the resolution of any equal access case to be based upon the particular facts involved, rather than according to categorical rules. Part III specifies evidentiary standards for evaluating the facts surrounding any equal access controversy consistently with constitutional precepts, and explains why the dispositive facts cannot be exhaustively catalogued.

After analyzing the Act's provisions, as illuminated by its legislative history[24] and the judicial decisions that have inter-

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[21] *See infra* text accompanying notes 233–35.

[22] Some of the ideas discussed in this Article have developed out of issues previously explored in Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985).

[23] Few works which analyze the Equal Access Act have been published, and none compare the Act's standards for reviewing equal access claims with constitutionally-based standards. Nonetheless, several works have examined the Act from other perspectives. *See* Boisvert, *supra* note 10 at 375–79 (analysis of Act's legislative history concluding that Act had pro-religious purpose, thus rendering it unconstitutional in its entirety); Teitel, *supra* note 10 at 556–59; Note, *The Equal Access Act: Is It A Solution or Part of the Problem?*, 8 GEORGE MASON U.L. REV. 353 (1986) (concludes that Act is unconstitutional in its entirety, because it is inconsistent with current equal access case law and fosters excessive entanglement between government and religion); Note, *The Equal Access Act: A Haven for High School "Hate Groups"?*, 13 HOFSTRA L. REV. 589 (1985) [hereinafter HOFSTRA Note] (focuses on Act's legislative history, and concludes that "hate groups" cannot be excluded from student forum under Act); Note, *Using Federal Funds to Dictate Local Policies: Student Religious Meetings Under the Equal Access Act*, 3 YALE L. & POL'Y REV. 187 (1984) [hereinafter YALE Note] (examines federalism and enforcement problems associated with Act, and concludes that Act is potentially unenforceable).

[24] A detailed analysis of the Equal Access Act's lengthy legislative history is beyond the scope of this Article. At least two assessments of that history conclude that the Act's purpose was to advance religion, and therefore any grants of access under it to student religious groups would violate the Establishment Clause. *See* Boisvert, *supra* note 10; Teitel, *supra* note 10.

preted it, Part IV contrasts the Act's framework for evaluating equal access questions with the constitutionally-based framework proposed in Part III. Because the Act is more protective of free speech values than of nonestablishment values, some grants of equal access to student religious groups may comply with the Act but violate the Establishment Clause; conversely, some denials of equal access to student religious, political, philosophical, or other groups may comply with the Free Speech Clause but violate the Act. Finally, taking into account both the constitutionally-based standards and those aspects of the Act that are consistent with these standards, Part V outlines the options available to a public high school in determining its equal access policies.

I. Constitutionally-Based Cases Pertinent to Equal Access

A. *Underlying Constitutional Precedents*

As the Third Circuit stated in *Bender*, the equal access issue implicates "a constitutional conflict of the highest order."[25] Both the nonestablishment and free speech concerns, which weigh in favor of differing results, seem compelling. While the courts have vigilantly protected Establishment Clause values in the public school setting,[26] the denial of equal access suffers under a double presumption of unconstitutionality as a content-based prior restraint on free speech.[27]

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[25] Bender v. Williamsport Area School Dist., 741 F.2d 538, 557 (3d Cir. 1984), *vacated and remanded on other grounds*, 106 S. Ct. 1326 (1986).

[26] *See infra* text accompanying notes 28–33. For a statement of the concerns underlying the strict judicial enforcement of the Establishment Clause in public schools, *see* L. Tribe, American Constitutional Law § 14-9, at 841 n.9 (1978):

> [B]ecause of their central and delicate role in American life, public schools must be insulated from religious ceremony under the aegis of the Establishment Clause even where no coercion can be shown, whereas in other public forums, free exercise values permit some accommodation of [religion]. . . .

Id.

[27] *See* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (university's refusal to permit religious student group to meet on campus constitutes prior restraint upon students' expressive rights); *accord* Healy v. James, 408 U.S. 169, 184 (1972). Under the First Amendment, a presumption of unconstitutionality attaches both to prior restraints, *see, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam), and to content-based regulations on speech, *see, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972).

1. Establishment Clause Cases Concerning Religious Expression in Public Schools

The Supreme Court has found an Establishment Clause violation[28] in nearly every case in which it has ruled upon state-sanctioned religious expression on public school premises, even where individual student participation was at least arguably voluntary.[29] Even though the Court has recently sanctioned chinks in the metaphorical wall separating church and state in other

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[28] From at least 1971 until 1984, the Supreme Court consistently evaluated Establishment Clause issues under the tripartite test first specifically enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* test provides that a government policy or practice can pass muster under the Establishment Clause only if: (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive entanglement between government and religion. *Id.* at 612–13.

In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court stated that it would no longer be confined to the *Lemon* test in all Establishment Clause cases, *id.* at 679, although it did not propose an alternative test and has subsequently continued to rely on *Lemon*. *See, e.g.*, Witters v. Washington Dep't of Services for the Blind, 106 S. Ct. 748, 751 (1986); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985); Wallace v. Jaffree, 105 S. Ct. 2479, 2489–90 (1985).

Indeed, in one post-*Lynch* decision, the Court appeared to strengthen *Lemon*'s purpose test, by emphasizing that any challenged policy or practice must have a "clearly secular purpose." *Wallace*, 105 S. Ct. at 2490. Although the Court had employed the "clear secular purpose" test in previous cases, *see, e.g.*, Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam) (invalidating statute mandating the posting of Ten Commandments in public school classrooms), *Lynch* had reverted to the weaker "secular purpose" formulation. *See Lynch* 465 U.S. at 679 & n.6 (indicating that even a single secular purpose, among many religious purposes, would suffice under this standard). Perhaps the explanation for these shifting standards lies in the special strictness with which the Court enforces the Establishment Clause in the public school context. In another post-*Lynch* decision, the Court stressed that it has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Grand Rapids*, 105 S. Ct. at 3222.

Justice O'Connor's concurring opinion in *Lynch* formulated a "clarified version" of the *Lemon* test, 465 U.S. 688 n.*, under which the central issue is whether the challenged governmental action is either intended to convey a message that the government endorses (or disapproves) religion, or is likely to be perceived as conveying such a message. *Id.* at 691. The Court has regularly invoked this "clarified" *Lemon* test in several post-*Lynch* Establishment Clause cases. *See, e.g.*, *Grand Rapids*, 105 S. Ct. at 3223; *Wallace*, 105 S. Ct. at 2492–93.

[29] *See, e.g.*, *Wallace*, 105 S. Ct. 2479 (1985) (striking down statute mandating moment of silence for meditation or prayer); *Stone*, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating statute that prohibited teaching Darwinian evolution theory); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (prohibiting organized, teacher-led classroom Bible readings); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting organized, teacher-led classroom prayer); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (striking down "released time" program under which religious teachers provided religious instruction in public school classrooms during the school day to students electing to attend). *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding program under which public school students, upon written request by their parents, may leave school during school day and go to religious centers for religious instruction).

contexts,[30] its most recent pronouncements concerning public school religious expression continue to reinforce that wall.[31] The Court's chief concern in these cases is the risk that reasonable students could perceive the school as endorsing or supporting religion.[32] The Court has repeatedly expressed the fear that, because of young people's particular impressionability, they might be more likely than adults to perceive any religious expression on school premises as manifesting the school's approval of religion.[33]

2. Free Speech Clause Cases Concerning Speakers' Access to Public Property

The second significant body of Supreme Court precedent underlying the equal access issue is that concerning free speech guarantees on government property. Although individuals have

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[30] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (rejecting Establishment Clause challenge to city-sponsored nativity scene); Marsh v. Chambers, 463 U.S. 783 (1983) (rejecting Establishment Clause challenge to state-paid legislative chaplain); Mueller v. Allen, 463 U.S. 388 (1983) (rejecting Establishment Clause challenge to statute granting tax deductions to parents for tuition and other expenses incurred in sending children to parochial schools). *See generally* Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094 (1985); Teitel, *The Supreme Court's 1984–1985 Church-State Decisions: Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651 (1986).

[31] *See Wallace*, 105 S. Ct. 2479 (1985) (finding Establishment Clause violated by statutorily mandated daily moment of silence in public schools, for meditation or prayer, where legislative history indicated statutory purpose of promoting prayer). *See also* Grand Rapids, 105 S. Ct. at 3222 (1985) (holding Establishment Clause violated by school district's adoption of two programs under which public school employees taught secular subjects to nonpublic school students in classrooms leased from nonpublic schools at public expense, stressing "sensitive relationship between government and religion in the education of our children"); Aguilar v. Felton, 105 S. Ct. 3232 (1985).

[32] For a discussion of this policy concern, *see, e.g.*, L. TRIBE, *supra* note 26, § 14-5 at 825 n.15.

[33] *See, e.g.*, *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring): "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school . . . . The law of imitation operates and nonconformity is not an outstanding characteristic of children." *Id.*

The Court has also expressed the fear that, as a result of such perceived approval, students adhering to a minority religion or students not adhering to any religion at all might feel more alienated, or be more susceptible to indoctrination, than adults would be. In *McCollum*, the Court asserted that:

> [there] is an obvious pressure upon children to attend . . . . The children belonging to these nonparticipating sects will thus have inculcated in them a feeling of separatism when the school should be a training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents.

Id. at 227–28. *See also* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (distinguishing between adults "not readily susceptible to religious indoctrination" and children subject to "peer pressure").

no general right of access to public property for purposes of exercising their free speech rights, they do have such a right with respect to some government property, under the "public forum" doctrine.[34] Certain types of public property, such as sidewalks, streets, and parks, have been deemed quintessential public forums because they have traditionally been open for free speech purposes.[35] In addition, any other property that the government actually makes available for free speech purposes, even without a history or tradition of openness, is also regarded as a public forum. The government may not exclude or restrict speech on the basis of its content in any public forum, unless such action is necessary to promote a compelling state interest.[36]

Until recently, the Supreme Court also recognized, as a subcategory of public forums, a "limited public forum": public property where access could be limited to certain categories of speakers or subjects if "need[ed] to confine expressive activity on the property to that which is compatible with the intended uses of the property. . . ."[37] Public schools which made their facilities available to student groups were considered to have created limited public forums, in that nonstudent speakers could be excluded, and such exclusion was viewed as necessary to preserve the school's educational function. However, a public

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[34] *See generally*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

[35] This notion is eloquently expressed in Justice Roberts's oft-quoted dictum in Hague v. CIO, 307 U.S. 496 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515.

[36] For a discussion of the public forum doctrine, *see* Widmar v. Vincent, 454 U.S. 263, 267–68 (1981). *But see* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984) (although Supreme Court decisions in early 1970s began to espouse view that First Amendment almost completely prohibited content-based speech regulation, this approach never determined outcome of any cases, and has in any event become riddled with exceptions); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 727–31; Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205–06, 236 (1982).

[37] Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3458 (1985) (Blackmun, J., dissenting). For examples of limited public forums involving speaker and subject matter limitations, see, e.g., Widmar v. Vincent, 454 U.S. 263 (1983) (forum limited to speech by university students); City of Madison Joint School Dist. No. 8 v. Wisconsin Pub. Employment Relations Comm'n, 429 U.S. 167 (1976) (forum limited to speech about school board business).

school could not have limited the permissible subject matters for such a forum unless it could have shown that any such limitations were also necessary to preserve the school's educational function. Based upon this understanding of the limited public forum doctrine, both the district[38] and circuit[39] courts in *Bender* ruled that the exclusion of a student religious group from a public school forum violated the students' free speech rights.

The Supreme Court's most recent decision concerning the public forum doctrine, *Cornelius v. NAACP Legal Defense & Educ. Fund*,[40] was decided after the Third Circuit's ruling in *Bender* and effectively eliminated the limited public forum as an analytically separate category.[41] The Court indicated that so long as property is not held open to the public at large, it would be treated as a "nonpublic forum," and any access restrictions to it would be subjected only to minimal scrutiny.[42] In *Cornelius*,

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[38] 563 F. Supp. at 705–06.

[39] 741 F.2d at 546–50.

[40] 105 S.Ct. 3439 (1985).

[41] *See id.* at 3450 -51. As the dissenting opinion noted,

> [t]he Court's analysis empties the limited public forum concept of meaning. . . . The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. . . . The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.

Cornelius, 105 S. Ct. at 3461 (Blackmun, J., dissenting) (emphasis in original).

[42] *Id.* at 3450–51. The effective elimination of the limited public forum concept had been foreshadowed in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). *Perry* held that the government's "selective" granting of access to certain mailboxes did not "transform" this property into any type of public forum. *Id.* at 47. Yet the whole point of the limited public forum doctrine had been precisely to prevent the government from granting free speech access on any "selective" or restrictive basis, unless the government could prove that the access restrictions were necessary to preserve the government property for its intended purposes. *See supra text* accompanying note 37.

The *Perry* Court also observed that even in a limited public forum, "the constitutional right of access would . . . extend only to entities of similar character," *id.* at 48, and that the government maintained substantial discretion to classify which entities should be deemed "of similar character." *Id.* at 48. Applying these principles to the facts in *Perry*, the Court approved a school's determination that a rival teachers' union was not "of similar character" to the union which had been designated the teachers' collective bargaining representative. *Id.* at 55. Thus, *Perry* substantially constricted both the range of property which would be classified as a limited public forum and the protection against speech access restrictions on any such property. For examples of cases which, under *Perry*'s criteria, classify government property which has traditionally been accessible to speakers as nonpublic forums, see Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767, 773 (2d Cir. 1984) (public areas of subway stations); ACORN v. City of Phoenix, 603 F. Supp. 869, 871 (D. Ariz. 1985) (intersection of two public streets). For a decision illustrating the difficulty of showing an access restriction to be unreasonable as required by *Perry*, see Low Income People Together, Inc. v. Manning, 615 F. Supp. 501, 518 (N.D. Ohio 1985) (requiring

the Court stated that "[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"[43] *Cornelius* was the latest in a series of recent Supreme Court decisions vesting the government with substantial discretion to define the speakers and subjects that will be granted or denied access to government property which is not open to the general public for speech purposes.[44]

Under the relatively constricted public forum doctrine reflected in these recent cases, a public school might well exclude religion from a student forum without being held to violate students' free speech rights. Consistent with the relatively expansive view of the government's discretion to restrict access to its property which these cases espouse, a school could apparently manipulate its definition of appropriate subjects for a

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"convincing evidence" of unreasonableness). *See also* Note, *Public Forum Analysis After Perry Education Association v. Perry Local Educators' Association—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 550 (1986) [hereinafter FORDHAM Note]. ("[S]ince *Perry*, no restriction of access to a nonpublic forum has ever been held unreasonable.").

[43] 105 S. Ct. at 3448 (quoting *Perry*, 460 U.S. at 46). The *Cornelius* decision was issued by a 4–3 vote, with Justices Marshall and Powell not participating. Accordingly, the participation of these two Justices in future public forum cases could conceivably restore some limitations upon governmental discretion to restrict speakers' access to government property. Both Justices dissented from the Court's decision in *Perry*, 460 U.S. 37 (1983), which had also sanctioned broad governmental discretion to restrict access to government property. *See supra* note 42.

[44] In *Cornelius*, the Court held that an annual charitable fundraising drive conducted in the federal workplace during working hours was not a limited public forum, although for almost twenty years it had been open to any tax-exempt, nonprofit charitable organization that was supported by public contributions and provided direct health and welfare services to individuals. The Court therefore applied only minimal scrutiny to a 1982 Executive Order, No. 12,353, 3 C.F.R. 139 (1983), which for the first time excluded from the fundraising drive "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." 105 S. Ct. at 3446. The Court held that the exclusion of advocacy groups survived the low-level scrutiny it deemed applicable, reasoning that the avoidance of controversy is a valid ground for restricting speech in a nonpublic forum. *Id.* at 3453. Acknowledging that the purported concern to avoid controversy may conceal a bias against particular viewpoints, the Court said that on remand the excluded groups could attempt to show that their exclusion "was impermissibly motivated by a desire to suppress a particular point of view." *Id.* at 3455.

See also Perry, 460 U.S. 37 (although school mail facilities were open to union which had been certified as teachers' exclusive bargaining representative, had previously been open to rival union, and had periodically been open to civic and church organizations, *id.* at 47–48, the Court held that these facilities did not constitute limited public forum, and that school could bar rival union from them). According to the four *Perry* dissenters, the selective exclusion sustained there constituted viewpoint discrimination which should be prohibited even in a nonpublic forum. *See id.* at 65 (Brennan, J., dissenting). *See also* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

student forum to exclude, for example, all subjects deemed "controversial," including religious, political, or philosophical subjects. The school's assertion that such a subject matter definition was designed to avoid divisiveness and to provide a harmonious atmosphere conducive to education would probably be viewed as "reasonable" and not intended "merely" to suppress particular viewpoints.[45]

The Justices who have dissented from recent Supreme Court decisions eroding the public forum concept,[46] as well as First Amendment scholars,[47] have decried these decisions as undermining fundamental free speech values. To the extent that these criticisms are justified, the Equal Access Act could be viewed as restoring the constitutionally correct understanding of the limited public forum concept in the public school context. The Act prohibits the government from fine-tuning its definition of appropriate subjects for any public secondary school forum to

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[45] *See Cornelius*, 105 S. Ct. at 3454.

> Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Id. See also infra text accompanying notes 179–81 (under recent public forum decisions, school might permissibly include political clubs in student forum, but exclude philosophical or religious clubs).

[46] *See, e.g.*, *Perry*, 460 U.S. at 57 (Brennan, J., dissenting) ("[T]he Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic."). *See also Cornelius*, 105 S. Ct. at 3455 (Blackmun, J., dissenting); *id.* at 3466 (Stevens, J., dissenting); *Knight*, 465 U.S. at 300 (Stevens, J., dissenting) (restriction of speech on policy matters is inconsistent with First Amendment values which "guarantee an open marketplace for ideas—where divergent points of view can freely compete for the attention of those in power").

[47] *See, e.g.*, Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1301 (1979) (reasoning in Lehman v. City of Shaker Heights "stands the mandatory access notice on its head. Instead of providing an additional brake on governmental restriction of speech, [*Lehman*'s] approach makes mandatory access a threshold test for protection."); Farber & Nowak, *supra* note 36, at 1259, 1264 (public forum doctrine "endangers judicial protection of first amendment values"; *Perry* was wrongly decided because "Court failed to demand a noncensorial justification"); Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 336, 342, 422–23 (1986) (under Court's recent public forum cases, "First Amendment interests are lost in the formalistic maze of an outcome-determinative tiered analysis that focuses primarily on the law of property"; under this analysis, Court has "allow[ed] plainly viewpoint-based restrictions to stand"; this approach "appears calculated to enshrine streets, parks, and sidewalks . . . as the only public fora"); FORDHAM Note, *supra* note 42, at 546–52 (1986) (*Perry* revives previously repudiated treatment of speakers' access to public property more as matter of property law than of free speech rights); Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 131, 133 (1982) (First Amendment values are undermined by Court's recent public forum analyses, because of unsatisfactory criteria used to determine whether place is public forum, and because of the low level of scrutiny applied to restrictions on speech in nontraditional forums).

at least the same degree as the pre-*Cornelius* case law, and invalidates subject matter restrictions which would probably be acceptable under *Cornelius*.[48]

3. Free Speech Clause Cases Concerning Public School Students' Speech Rights

The Equal Access Act can fairly be viewed as counteracting the Supreme Court's recent reductions in the protection accorded not only speech on public property generally, but also in-school speech by public school students specifically. The level of protection which the Act accords to student speech is more consistent with the standard enunciated in the Supreme Court's seminal student speech case, *Tinker v. Des Moines Indep. Community School Dist.*,[49] than is the Court's latest ruling on the issue, *Bethel School Dist. v. Fraser*.[50]

Declaring that "[i]t can hardly be argued that students shed their constitutional rights of freedom of speech or expression at the schoolhouse gate,"[51] the Court in *Tinker* ruled that schools could not restrict students' expressive conduct merely on the basis of general apprehensions. Instead, the Court repeatedly emphasized that such restrictions would be permitted only if based upon specific evidence demonstrating that the expressive conduct would "materially and substantially interfere" with the work of the school or impinge upon the rights of other students.[52] Applying this standard to the facts in *Tinker*, the Court held that the school had violated students' freedom of expression in suspending them for wearing armbands protesting the Vietnam War, where the armbands had caused no actual disturbances. In addition, there was no specific evidence which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities.[53]

In subsequent cases, the federal courts have consistently enforced *Tinker*'s mandate that high school students' speech may be restricted only on the basis of specific evidence establishing that a particular harm necessitates such limitation. Accordingly,

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[48] *See infra* text accompanying notes 179–81, 258–66.
[49] 393 U.S. 503 (1969).
[50] 106 S. Ct. 3159 (1986).
[51] *Tinker*, 393 U.S. at 505–06.
[52] *Id.* at 509.
[53] *Id.* at 514.

these cases have consistently rejected the presumption that high school students are inherently too immature to be entitled to full free speech rights.[54]

Indeed, applying the principles enunciated in *Tinker* and its progeny, the Ninth Circuit Court of Appeals affirmed the lower court's ruling in *Bethel* that a high school had violated a student's speech rights by suspending him for delivering a speech containing sexual innuendoes at a student government assembly.[55] In reversing *Bethel*, the Supreme Court paid lip service to the standard it had articulated in *Tinker*.[56] However, as noted by the Ninth Circuit[57] and the dissenters from the Supreme Court's majority opinion,[58] the evidence in *Bethel* did not satisfy the *Tinker* standard: the record contained no evidence that any particular student was offended or otherwise harmed by the speech, let alone that the speech had caused or would be likely to cause a substantial disruption of the school's educational functions. Instead, the Supreme Court majority authorized the school to curb student speech rights on the basis of mere speculation that the sexual innuendo might be offensive or insulting to certain students in the audience, including younger students and female students.[59]

In effect, the Supreme Court in *Bethel* presumed that high school students are too immature to be exposed to potentially controversial, offensive or disruptive speech, and shifted the burden of proof to the student speaker to establish that the

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[54] *See, e.g.*, Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); Garvin v. Roseneau, 455 F.2d 233 (6th Cir. 1972); Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971); Scoville v. Bd. of Educ., 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976); Dixon v. Beresh, 361 F. Supp. 253 (E.D. Mich. 1973).

[55] *See* Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1359 (9th Cir. 1985) ("Just as in *Tinker*, the Bethel School District has failed to carry its burden of demonstrating that Fraser's use of sexual innuendo . . . substantially disrupted or materially interfered in any way with the educational process.").

[56] *Bethel*, 106 S. Ct. at 3163 (Court intimated that *Tinker* may be narrowly construed to apply only to political speech, or at least that it may be viewed as not protecting speech with sexual content).

[57] *Fraser*, 755 F.2d at 1359–61.

[58] *Fraser*, 106 S. Ct. at 3168–69 (Marshall, J., dissenting); *id.* at 3169 n.2 (Stevens, J., dissenting).

[59] The majority opinion simply asserted, as if it were taking judicial notice of incontrovertible facts, that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to . . . any mature person. By glorifying male sexuality . . . the speech was acutely insulting to teenage girl students." 106 S. Ct. at 3165. The majority opinion further surmised that the speech "could well be seriously damaging" to the youngest students in the audience, noting that they were "on the threshold of awareness of human sexuality." *Id.*

challenged speech would not meet the substantial disruption or material interference standard. It also deferred extensively to the discretion of school authorities to curb students' speech for purposes of avoiding its speculative or presumed adverse effects.

Bethel's weakened standards for judicial review of public school limitations upon student speech could be invoked to uphold denials of equal access for groups seeking to discuss religion or other potentially controversial, and hence potentially disruptive, subjects.[60] The Supreme Court's Establishment Clause decisions concerning interrelationships between government and religion in the educational context have consistently presumed that such interrelationships would lead to disruptive effects such as divisiveness and alienation, without any specific evidence that these effects were likely to occur.[61] Indeed, much like the dissenters in *Bethel*, Justices dissenting from these Establishment Clause decisions have charged the majority with engaging in mere speculation about the adverse effects of the challenged interrelationships.[62] In the context of the equal access controversy, the combined effect of *Bethel* and the educational Establishment Clause cases may well be to authorize denials of access to student religious groups based upon little more than the conjecture that some students might view an equal access grant as the school's endorsement of religion.

The Supreme Court's recent decisions limiting free speech rights in the context of both public forums in general and public schools in particular have somewhat lessened the conflict between nonestablishment and free speech precedents posed by pre-*Cornelius* and pre-*Bethel* equal access cases. Because these recent free speech rulings increase school officials' discretion to impose content-based restrictions on speech, the officials may exercise such discretion to avoid the Establishment Clause problems that could result from in-school meetings of student religious groups. Nevertheless, if the Free Speech Clause were

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[60] Because *Fraser* involved sexually explicit speech, it may well reflect the Court's particular interest in sheltering minors from words or images relating to sexuality. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968). If so, *Fraser* may represent more of an exception to the *Tinker* standard than a general erosion of it.

[61] *See* cases cited *supra* at note 29. *See also infra* note 102 and accompanying text.

[62] *See, e g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3244 (1985) (O'Connor, J., dissenting) ("The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York."). *See also infra* note 102.

construed to grant student speech in public schools the full measure of protection to which many judges and scholars contend it is entitled, and which it received under Supreme Court rulings until recently, then equal access issues would still entail a sharp collision between nonestablishment and free speech precedents. Putting aside the specific tenets of current constitutional doctrine, the equal access issue continues to reflect a sharp collision between general values of nonestablishment and free speech.[63] The following section discusses the cases which have attempted to resolve this conflict.

B. *Current Constitutional Case Law Concerning Equal Access*

1. The Supreme Court's Decision Concerning Equal Access in the University Context

The Supreme Court's decision in *Widmar v. Vincent*[64] involved a public university which made its facilities generally accessible to voluntary, student-initiated, nonreligious student groups. The Court ruled that the university violated the Free Speech Clause by not making these facilities equally accessible to a voluntary, student-initiated, religious student group, which sought to engage in prayer and worship.

Stressing the number and diversity of the student groups which met at the university,[65] *Widmar* held that the university had designated its campus as a limited public forum for students. Based upon this finding, the Court concluded both that the Free Speech Clause barred a content-based exclusion of the student religious group,[66] and that the Establishment Clause permitted granting equal access to this group, because no reasonable stu-

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[63] As the district court observed in *Bender*:

> On the one hand, but for the fact that the present dispute involved a high school . . . *Widmar* clearly would have controlled. On the other hand, but for the fact that the instant situation involved a purely student-initiated request to use a forum created by the school, the "school prayer" cases may very well have been dispositive.

563 F. Supp. at 699.

[64] 454 U.S. 263 (1981).

[65] *Id.* at 265, 274.

[66] *Id.* at 277.

dent should perceive the university as endorsing the group's religious message.[67]

The Court suggested, however, that the Establishment Clause analysis might be different in the context of a public high school student forum, asserting that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University policy is one of neutrality toward religion."[68] Although this statement implies that high schools might justifiably exclude student religious groups, the Court did not make a definitive holding to this effect. The Court did not state that all "younger students" are so "impressionable" that they would be inherently incapable of appreciating a school's neutral role under an equal access policy. Therefore, the Supreme Court in *Widmar* did not resolve under what circumstances, if any, high school student religious groups should be granted equal access.

2. Courts of Appeals Decisions Concerning Equal Access in the Secondary School Context

The four courts of appeals which have directly faced the issue[69] have unanimously held that Establishment Clause values

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[67] The *Widmar* opinion reasoned that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" because an equal access policy "'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities." *Id.* at 274 (quoting Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980)).

[68] *Id.* at 274 n.14.

[69] Another court of appeals decision, Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984), also involved the propriety of a student religious group's meeting on school premises, but the limited record in that case does not reveal whether the school had an equal access policy. Because of the case's procedural posture, its holding was quite narrow.

The Eleventh Circuit affirmed a district court order which preliminarily enjoined a school district from permitting a junior high school student group called "Youth For Christ" to meet on school premises, after school hours, under faculty supervision. The Eleventh Circuit held that the district court had not abused its discretion in concluding that the school's practice of permitting these meetings was likely to be found, after a trial on the merits, to violate the Establishment Clause. *Id.* at 649. In particular, the court concluded that the religious meetings were likely to be found to have the impermissible effect of promoting religion, in light of the school district's history of announcing church-sponsored activities at school assemblies, on school bulletin boards, and over school public address systems, and of allowing religious signs to be posted on school property. *Id.* at 648–49. However, given the sparse record, the Eleventh Circuit expressly noted that it could not make several factual determinations which would be necessary to evaluate the propriety of permanent relief, including whether the school permitted other student groups to meet on school premises. *Id.* at 649.

See also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1118 (7th Cir.

require denial of equal access to high school student religious groups.[70] However, these rulings were premised on differing analyses.

The rationale of two decisions, the Second Circuit's holding in *Brandon v. Board of Education of Guilderland Central School District*[71] and the Fifth Circuit's ruling in *Lubbock Civil Liberties Union v. Lubbock Independent School District*,[72] are fully consistent with a categorical rule precluding concerted student religious expression in public schools. Although neither expressly espoused such an absolute prohibition, both declared that "a high school is not a 'public forum' where religious views can be freely aired."[73] Thus, both courts apparently concluded that a high school cannot create a forum for concerted student religious expression without engendering reasonable student perceptions that the school supports religion. These conclusions followed from the courts' unsupported generalizations or presumptions that high school students are innately immature and impressionable.[74] This reasoning seems inconsistent with protecting students' free speech rights concerning certain potentially controversial nonreligious subjects, exposure to which could also adversely affect immature or impressionable students.[75]

In contrast with *Brandon* and *Lubbock*, the other two equal access decisions by courts of appeals, the Third Circuit's ruling

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1986) (rejecting claim by teachers and other public elementary school employees that the Free Speech Clause gave them the right to hold prayer meetings on school property before the school day, because there was no evidence that school had created any free speech forum). In dicta, the Seventh Circuit panel which issued the *May* opinion indicated that it might have fewer Establishment Clause concerns regarding religious meetings on school premises than did the other courts of appeals which have directly ruled upon such issues. The court noted that

> [t]he strongest support for [the plaintiff teachers'] position is the fact that the [school authorities] were fearful of violating the Establishment Clause. Their concern, which may well have rested on an exaggerated view of the scope of the Establishment Clause, led them to deny the use of school premises to two religious groups, one of which, at least, was school-related. This refusal might create interesting questions in a suit by such a group, modeled on the suit in *Widmar*, but that is not this suit . . . .

Id. at 1117.

[70] *See supra* note 5. *But see May*, 787 F.2d at 1117 (dicta), discussed *supra* at note 69.

[71] 635 F.2d 971 (2d Cir. 1980), *cert denied*, 454 U.S. 1123 (1981).

[72] 669 F.2d 1038 (5th Cir.), *reh'g denied*, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

[73] *Lubbock*, 669 F.2d at 1048; *accord Brandon*, 635 F.2d at 980.

[74] *Lubbock*, 669 F.2d at 1046–47; *Brandon*, 635 F.2d at 978.

[75] *See infra* text accompanying notes 131–37.

in *Bender*[76] and the Tenth Circuit's holding in *Bell v. Little Axe Independent School Dist. No. 70*,[77] employed ad hoc analyses. Focusing upon the particular facts presented, both decisions held that the equal access policies under review violated the Establishment Clause. In *Bender*, the Third Circuit concluded that the religious speech of a student Christian fellowship violated the Establishment Clause because it occurred during the official school day, was part of a school-organized activity program, and took place in the presence of a school-approved monitor.[78] In invalidating the student religious group meetings in *Bell*, the Tenth Circuit stressed the following specific facts presented by that case: the school was composed of students in kindergarten through grade nine, so most students were in elementary grades;[79] the religious group had been initiated by a faculty member along with several students;[80] teachers had participated in the meetings and arranged for outside speakers, including a minister, to attend;[81] the meetings occurred after school buses arrived at school, which was after teachers were required to be on duty, and after students were legally subject to the school's supervision and control;[82] students in the religious group were the only ones allowed inside the school building before the first class;[83] and the student religious group's meetings were announced through school publications and posters on school walls.[84]

In addition to stressing the specific facts involved in the cases at bar, both the *Bender* and *Bell* opinions further indicated that, because of certain inherent distinctions between universities and schools, there was a greater risk that an equal access grant in a secondary or elementary school would violate the Establishment Clause. The courts asserted that, because of these differences, high school students would more likely perceive such a grant as governmental endorsement of religion. For example, the Third Circuit in *Bender* emphasized the following distinctions: high school students' relative immaturity; the more obvious presence

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[76] 741 F.2d 538 (3d Cir. 1984).
[77] 766 F.2d 1391 (10th Cir. 1985).
[78] 741 F.2d at 560.
[79] 766 F.2d at 1396 n.1, 1401 n.7.
[80] *Id.* at 1397.
[81] *Id.*
[82] *Id.* at n.4.
[83] *Id.* at 1405.
[84] *Id.* at 1397.

that a religious group would "unavoidably" have owing to a high school's more structured and controlled environment; the fact that attendance for most high school students is compulsory under state law; and the fact that high school students are subject to constant supervision by, and follow the example of, adult school authorities.[85]

Nonetheless, unlike the Second and Fifth Circuits in *Brandon* and *Lubbock*, both the Third and Tenth Circuits in *Bender* and *Bell* stressed the important free speech rights of students in a school forum, noting that while the particular facts in the respective cases tilted the constitutional balance of interests in favor of Establishment Clause concerns, the outcome of such balancing might differ in other situations.[86] Therefore, the balancing approach followed by the Third and Tenth Circuits appears better calculated to promote both free speech and nonestablishment concerns than does the more nonestablishment oriented, categorical approach of the Second and Fifth Circuits. The anticipation that the Supreme Court would endorse one or the other of these two basic approaches, which resulted from its decision to review the *Bender* case, was frustrated by the Court's ultimate disposition of *Bender* on procedural grounds.[87]

3. The Supreme Court's Consideration of Equal Access in the Secondary School Context

In an opinion joined by five Justices,[88] the Supreme Court in *Bender* vacated the Third Circuit's judgment and remanded the case with instructions to dismiss the appeal for want of jurisdiction.[89] Neither the majority opinion nor Justice Marshall's separate concurrence expressed or intimated any views on the merits of the controversy. The merits were discussed, however, by the two dissenting opinions, one authored by Chief Justice

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[85] 741 F.2d at 552.

[86] *Bender*, 741 F.2d at 561; *Bell*, 766 F.2d at 1407.

[87] *Bender* was not the first case presenting the high school equal access controversy which the Court declined to review on the merits. It had previously denied certiorari in both *Brandon*, 454 U.S. 1123 (1981), and *Lubbock*, 459 U.S. 1155 (1983).

[88] Justice Stevens delivered the opinion of the Court, *Bender*, 106 S. Ct. 1326 (1986), in which Justices Brennan, Marshall, Blackmun, and O'Connor joined. Justice Marshall also filed a concurring opinion. 106 S. Ct. at 1335.

[89] This ruling was premised on the Court's conclusion that the sole party who had appealed from the district court decision, an individual school board member and parent of a student attending the school, did not have standing to appeal. *Id.* at 1333, 1335.

Burger and joined by Justices White and Rehnquist,[90] and the other written by Justice Powell.[91] The four dissenters agreed with the majority that the Third Circuit's judgment should be vacated, but they based their conclusion on substantive grounds.

Both dissenting opinions agreed that *Bender* was controlled by *Widmar*.[92] Justice Powell, who had authored the *Widmar* majority opinion, premised his *Bender* dissent entirely on the *Widmar* precedent. He said that the only "arguable distinction" between *Widmar* and *Bender* was the ages of the students involved, but he concluded that this "arguable distinction" did not warrant different legal rulings in the two cases.[93] Although Justice Powell quoted *Widmar*'s observation that university students are "less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion," he nevertheless opined that, "particularly in this age of massive media information . . . the few years difference in age between high school and college students" does not "justif[y] departing from *Widmar*" in the high school setting.[94] In support of this conclusion, Justice Powell cited Supreme Court decisions recognizing that First Amendment rights of free speech and association extend to high school students.[95]

Chief Justice Burger's dissent appears to rest upon broader grounds than the analogy between the *Widmar* and *Bender* cases employed by Justice Powell. He characterized the Third Circuit's decision as holding that, "because an individual's discussion of religious beliefs may be confused by others as being that of the state, both must be viewed as the same."[96] But, the opinion reasoned, if individual discussion of religious belief is to retain the protection it is intended to receive under the Free Speech and Free Exercise Clauses, "utterly unproven, subjec-

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[90] *Id.* at 1336.

[91] *Id.* at 1338.

[92] *Id.* at 1337 (Burger, C.J., dissenting); *id.* at 1338 (Powell, J., dissenting).

[93] *Id.* at 1339 (Powell, J., dissenting).

[94] *Id.*

[95] *Id.* (citing Bd. of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 864 (1982); and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506–07 (1969)). Of course, just a few months after its *Bender* decision, the Supreme Court issued its ruling in the *Bethel* case, which appeared to cut back the free speech rights accorded to high school students in the earlier cases cited by Justice Powell. *See supra* text accompanying notes 55–62. Regarding the inconsistencies between the positions espoused by the *Bender* dissenters in the *Bender* and *Bethel* cases, *see infra* note 101.

[96] *Bender*, 106 S. Ct. at 1337 (Burger, C.J., dissenting).

tive impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."[97]

Chief Justice Burger and the two other Justices who joined his opinion would apparently not subject a school's grant of equal access to any scrutiny under the Establishment Clause, on the theory that granting access does not entail sufficient state action to invoke constitutional limitations.[98] At the very least, these Justices would impose as a threshold requirement, necessary to trigger Establishment Clause scrutiny, the submission of some objective evidence justifying students' perception that an equal access grant manifested the school's endorsement of religion.[99] Absent this type of evidence, they would apparently deem irrelevant any indications that the equal access grant's primary effect was to advance religion.[100]

Chief Justice Burger's stringent evidentiary standard for challenging an equal access grant to a student religious group is inconsistent not only with the Court's most recent pronouncements concerning student speech in *Bethel*,[101] but also with the

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[97] *Id.* (emphasis in original).

[98] *See id.* at 1337–38. It is difficult to understand how the Williamsport school's voluntary creation of a student forum, in which groups met during the school day with teacher monitors present, can fairly be characterized as "state inaction." *See id.* at 1338.

In any event, even assuming *arguendo* that the Williamsport school had taken no action to initiate a student forum but had just passively permitted the student religious group to meet, Establishment Clause scrutiny still should not be foreclosed. As recognized in Justice O'Connor's widely cited reformulation of the *Lemon* test in *Lynch*, *see supra* note 28, the Establishment Clause may be violated when the government *appears* to approve or disapprove religion, even if it has not actually done so. Under this standard, a negative answer to Chief Justice Burger's "threshold question of whether the challenged activity is conducted by the State or by individuals," *Bender*, 106 S. Ct. at 1338, should not insulate such activity from judicial review. A school's passive acquiescence in a student religious group's meeting could reasonably be perceived as constituting endorsement, and would therefore violate the Establishment Clause even though the school did not actually conduct the meeting.

[99] *See Bender*, 106 S. Ct. at 1337–38 (Burger, C.J., dissenting). Even assuming *arguendo* the propriety of this threshold evidentiary requirement, Chief Justice Burger does not explain why it could not be satisfied by evidence concerning those characteristics of public schools and their students which create risks that any group religious expression on school property would be perceived as school endorsed. *See infra* text accompanying notes 111–14.

[100] *See id.* at 1338 ("That the 'primary effect' of state inaction might turn out to advance the cause of organized religion has no bearing upon the threshold question of whether the challenged activity is conducted by the State or by individuals.").

[101] The four dissenters in *Bender*, who joined the majority in *Bethel*, expressed substantially different attitudes concerning high school students' maturity and imposed significantly different evidentiary standards, depending on whether or not the speech at issue was religious. In *Bethel*, which did not involve religious speech, these Justices referred to the high school student speaker as a "boy" and to the other students as

Court's previous rulings concerning Establishment Clause problems caused by public school religious expression. The central question involved in any Establishment Clause challenge to public school religious expression, whether reasonable students would perceive it as conveying the school's approval or disapproval of religion, is not readily susceptible to "objective" proof. Therefore, the reassignment of evidentiary burdens could have a significant impact on the outcomes of actual controversies.

The Supreme Court's opinions concerning public school religious expression have not required specific objective evidence that the challenged expressions would actually cause reasonable student perceptions that the school endorses religion. Instead, the Court has assumed or presumed that such perceptions would arise from certain inherent characteristics of public schools and their students: that students are required to be on school premises as a result of state compulsory education laws and that, while on school premises, students are subject to at least a modicum of school supervision, as a matter of state or local law.[102]

The effect of adopting the evidentiary burdens endorsed by Chief Justice Burger and Justices White and Rehnquist in

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"girls" or "children." 106 S. Ct. at 3165–66. In *Bender*, which did involve religious speech, they argued that high school students should be accorded the same free speech rights as college students, brushing aside arguments about different maturity levels. 106 S. Ct. at 1338 (Burger, C.J., dissenting); *id.* at 1339 (Powell, J., dissenting).

Moreover, the *Bender* dissenters castigated the Third Circuit's conclusion that granting equal access to a student religious group would cause reasonable student perceptions that the school endorsed religion, charging that this finding rested on "utterly unproven, subjective impressions of some hypothetical students." 106 S. Ct. at 1338 (Burger, C.J., dissenting). Yet in *Bethel*, these same Justices relied upon the same type of "evidence" in concluding that the sexual innuendo contained in the student assembly speech would offend other students. 106 S. Ct. at 3165. *See supra* text accompanying notes 57–59.

[102] *See* cases cited *supra* at note 29. Two recent Supreme Court decisions illustrate the Court's relatively lenient evidentiary standards governing the finding of an Establishment Clause violation in cases "involving the sensitive relationship between government and religion in the education of our children." Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985); *see also* Aguilar v. Felton, 105 S. Ct. 3232 (1985). The Supreme Court in both cases invalidated certain governmental assistance programs, under which public school employees taught secular subjects in parochial schools. The Court in *Grand Rapids* feared that these teachers "knowingly or unwittingly tailor the content of the course to fit the school's announced goals," causing a prohibited "indoctrinating effect." 105 S. Ct. at 3225–26. This potential Establishment Clause violation persuaded the Court to strike down the programs, even though they had existed for almost twenty years, and even though there was no evidence of even one incident of the feared indoctrination throughout the entire period. *Id.* Expressly acknowledging this lack of evidence, the Court dismissed it as "of little significance," and concluded that "[t]he symbolic union of church and state inherent in [the challenged programs] *threatens* to convey a message of state support for religion . . . ." *Id.* at 3230 (emphasis added). *See also supra* note 62.

Bender would apparently be to replace the current presumption—that any concerted student religious expression in public schools causes Establishment Clause problems—with the presumption that any such expression is protected by the Free Speech Clause. The effect of the position articulated in Burger's *Bender* dissent is thus similar to that of the Equal Access Act, which also confers presumptive access rights upon concerted student religious expression.[103] In light of the compelling free speech interests implicated in any public forum, including a high school student forum, it is appropriate to grant more protection to concerted student religious speech in such a context than would be available under the traditional Establishment Clause analysis, which would presume such speech to breach the required separation between government and religion. To go to the other extreme, however, by presuming that free speech concerns should prevail, would attribute insufficient weight to the substantial countervailing Establishment Clause concerns implicated by any concerted religious expression in the especially sensitive public school environment.

For the reasons explained in the following two Parts, either absolute or presumptive rights of access for concerted student religious speech would be inconsistent with Establishment Clause principles. Instead, those principles, as well as Free Speech Clause principles, require that any equal access dispute be resolved on the basis of its particular facts and circumstances, with no absolute or presumptive rules in favor of either countervailing set of constitutional concerns.

II. The Constitutional Requirement of a Case-by-Case Resolution of Equal Access Issues

Three basic approaches are available for resolving any student religious group's claim for equal access to a high school student forum. The first is a general rule requiring schools to grant equal access to any voluntary, student-initiated, student religious group on free speech grounds.[104] The Equal Access Act essen-

[103] *See infra* text accompanying notes 164–90; *see also infra* text following note 233.

[104] Any student religious group meeting that occurs on school property must be voluntary and student-initiated. If any meeting, or any student's participation in a meeting, were instigated by school officials or other adults, then the free speech rationale for such a meeting would dissipate, because it would not reflect the students' expressive and associational choices. The Establishment Clause dangers entailed in such a meeting would concomitantly increase, because the adult role could create perceptions of government endorsement. *See infra* text accompanying note 184; *see also infra* text accompanying note 190.

tially extends such per se permission,[105] and the four Supreme Court Justices who dissented in *Bender* would apparently do the same.[106] The second possible approach is a general rule prohibiting schools from granting equal access to any student religious group on Establishment Clause grounds. In *Brandon* and *Lubbock*, the Second and Fifth Circuits each essentially imposed such a per se prohibition.[107]

A third possible approach is an individualized determination, based upon the facts and circumstances involved in any particular case, of whether a student religious group should be granted equal access. Such an individualized analysis was employed by the Third and Tenth Circuits in *Bender* and *Bell*, respectively.[108] This Part of the Article concludes that the case-by-case approach is the only one consistent with the applicable constitutional principles.

A. *A Categorical Rule Requiring Schools to Grant Equal Access Would Violate the Establishment Clause*

No court which has considered the equal access issue has advocated a per se rule authorizing concerted student religious expression under an equal access policy.[109] These cases all recognize the special establishment dangers posed by any religious expression in high schools. Due to certain inherent characteristics of high schools, as contrasted with colleges, there is a significant risk that any such expression, even in the context of a student forum, could be perceived as conveying the school's endorsement of religion. Judicial opinions have cited the follow-

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[105] *See infra* text accompanying notes 164–90; text following note 233.

[106] *See supra* text accompanying notes 92–100.

[107] *See supra* text accompanying notes 71–74.

[108] *See supra* text accompanying notes 76–86. The Supreme Court had also applied an individual analysis to the university equal access issue in *Widmar*. *See supra* text accompanying notes 64–68.

[109] Even the two judges who have approved particular equal access grants to public school student religious groups have stressed that their rulings were based upon the particular facts and circumstances involved. *See, Bender*, 563 F. Supp. at 698 (Nealon, C.J.); 741 F.2d at 569–70 (Adams, J., dissenting). Similarly, even with respect to the public university equal access policy in *Widmar*, the Supreme Court emphasized that its rulings were based upon the particular factual record, and should not be read as a per se authorization of all student religious expression under every equal access policy. 454 U.S. at 274–75. *But see supra* text accompanying notes 92–103 (four dissenters from Supreme Court's *Bender* decision would apparently endorse rule which at least presumptively authorized concerted student religious expression under equal access policy).

ing distinctions between colleges and high schools as particularly relevant: a high school serves more of an inculcative function than a college, which more closely resemble a marketplace of ideas;[110] most high school students are present in school by virtue of state compulsory education laws;[111] state laws generally require schools to exercise some supervision over students while on school property;[112] and high school students are generally less intellectually or emotionally mature, and more impressionable, than college students.[113] Accordingly, only a close examination of the facts in any particular case can illuminate whether, as actually implemented, even a facially neutral equal access policy has the nonneutral effect of implying that a school supports religion.[114]

B. *A Categorical Rule Prohibiting Schools from Granting Equal Access Would Violate the Free Speech Clause*

The foregoing differences between high schools and colleges warrant a stricter scrutiny of student religious speech in the former than in the latter. However, these distinctions do not absolutely preclude the creation of open student forums in high schools, nor do they inevitably cause high school students to perceive concerted religious expression in the school as endorsed by the school. Therefore, the above distinctions may not afford even a rational justification for the per se exclusion of concerted religious speech from a high school student forum. In any event, these distictions do not afford the compelling justification traditionally required for content-based exclusions of speech from a public forum or limited public forum.[115]

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[110] *E.g.*, *Bender*, 741 F.2d at 552. "[H]igh school instruction is given in a structured and controlled environment . . . [unlike] the open, free, and more fluid environment of a college campus." *Id.*

[111] *E.g.*, *id.*; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978.

[112] *E.g.*, *Bender*, 741 F.2d at 552–53; *Brandon*, 635 F.2d at 979.

[113] *E.g.*, *Bender*, 741 F.2d at 552; *Brandon*, 635 F.2d at 978.

[114] *Cf.* Wallace v. Jaffree, 105 S.Ct. 2479 (1979):

> By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period . . . . Nonetheless, it is also possible that a moment of silence statute . . . as actually implemented could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray.

Id. at 2499 (O'Connor, J., concurring).

[115] *See supra* text accompanying notes 36–37.

The inculcative function of public high schools does not justify an absolute prohibition of equal access. A public high school is intended to serve dual, somewhat inconsistent roles: not only as the transmitter of majoritarian views and values, but also as the facilitator of students' independent thought, inquiry, and discussion.[116] Both the Supreme Court[117] and lower courts[118] have expressly recognized the importance of the public high school's role as a marketplace of ideas.[119]

If a school were, or were perceived to be, serving as an inculcator of student religious speech, it would transgress the Establishment Clause. However, a school's designation of an open student forum under an equal access policy epitomizes its noninculcative or intellectual marketplace role. Reasonable students should appreciate that when a school functions as a marketplace of ideas, it does not necessarily endorse any ideas that students might exchange in such a marketplace.[120] Any risk that students would misperceive the school's neutral, noninculcative, nonsponsoring role under an equal access policy should be countered through such measures as explanatory statements or

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[116] *See, e g.*, Bd. of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 868–69 (1982).

[117] *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (1969) ("[P]ersonal intercommunication among the students . . . is an important part of the educational process."). *See also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). *Accord* Wiemann v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

Some Supreme Court decisions have referred to high schools and colleges interchangeably in discussing this essential intellectual marketplace function common to all public educational institutions. *See, e.g., Pico*, 457 U.S. at 877; *Tinker*, 393 U.S. at 512–14 & n. 6; Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[118] *See, e.g.*, Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971) ("A public school is undoubtedly a 'marketplace of ideas.' Early involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement."). *Accord* James v. Bd. of Educ., 461 F.2d 566, 573 (2d Cir. 1972); Cary v. Bd. of Educ. of Adams-Arapahoe School Dist., 427 F. Supp. 945, 952–53 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979) (while many Supreme Court statements concerning importance of opportunity for independent inquiry in academic setting were made in higher education context, "that does not destroy their importance in providing a philosophical guidance" in secondary education context).

[119] Indeed, the plurality opinion in *Pico* suggested that public school students have a constitutional right of access to a diversity of ideas. 457 U.S. at 866–68.

[120] *See Cary*, 427 F. Supp. at 953, *aff'd*, 598 F.2d 535 (10th Cir. 1979) (in assessing academic freedom issue, court should consider whether it arises in context where school acts in inculcative role, or in context where student is part of "open, participatory community").

disclaimers.[121] The wholesale exclusion of student religious speech is not necessary to avert such risk.

Compulsory education and school supervision requirements also do not warrant a per se prohibition of equal access. Even assuming that the majority of high school students actually attend school because of legal compulsion,[122] and even assuming that all schools have some legal responsibility for students whenever they are on school premises,[123] it still does not follow that students would inevitably regard their school as endorsing the religious content of any concerted religious speech which occurs on the school premises. The risk that these aspects of public high schools could lead reasonable students to infer school support for religion could and should be readily countered through

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[121] Various courts that have considered the tensions between free speech and nonestablishment values implicated by religious symbols on public property have relied upon disclaimers to minimize Establishment Clause problems. *See, e.g.*, McCreary v. Stone, 739 F.2d 716, 728 (2d Cir. 1984), *aff'd by an equally divided Court sub nom.* Bd. of Trustees v. McCreary, 105 S. Ct. 1859 (1985) (per curiam) (Establishment Clause does not bar temporary location of privately owned nativity scene in public park: "[w]e believe that a proper disclaimer message [together with other factors] will ensure that no reasonable person will draw an inference that the Village [of Scarsdale, New York] supports any church, faith, or religion associated with the display of a creche during the Christmas season").

In Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), the court determined that the temporary display of a creche in a public park would not violate the Establishment Clause if appropriate plaques indicated that the government did not sponsor the creche. *Id.* at 67. The court emphasized that the plaques "should be designed for maximum exposure and readability." *Id.* at 90 (Leventhal, J., concurring). *See also Widmar*, 454 U.S. at 274 n.14 (university handbook contained disclaimer concerning student organizations).

Of course, disclaimers will not always eliminate Establishment Clause violations. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam) (Establishment Clause violated when copy of the Ten Commandments was required to be posted in every public school classroom with disclaimer stating that the Ten Commandments constituted the basis of secular legal system).

[122] In most states, school attendance ceases to be compulsory once a student has attained the age of sixteen, which generally occurs in the tenth or eleventh grade. Therefore, in a high school with grade levels nine or ten through twelve, most of the students are no longer subject to compulsory education requirements. *See* Guggenheim & Sussman, *Age Under Which School is Compulsory*, in THE RIGHTS OF YOUNG PEOPLE, app. I, 306–07 (1985). Moreover, even students below the cut-off age level for compulsory attendance probably attend school for reasons other than their legal obligation to do so. *Cf.* Note, *Students' Constitutional Rights on Public Campuses*, 58 VA. L. REV. 552, 554 (1972) (even university-level education has come to be widely viewed as practical necessity).

[123] A random survey of the education statutes of several states indicates that many impose on schools a duty to supervise students' conduct on school property only during the school day. *See, e.g.*, Lauricella v. Bd. of Educ., 52 A.D.2d 710, 381 N.Y.S.2d 566 (N.Y. App. Div. 1976). Schools generally have no duty to supervise students who participate in voluntary extracurricular activities on school grounds after regular school hours, unless the activity is inherently dangerous. *See, e.g.*, Bush v. Smith, 154 Ind. App. 382, 289 N.E.2d 800 (1972). *See* Strossen, *supra* note 22, at nn.137–38.

reasonable, specific precautionary measures. Total exclusion of student religious speech is not necessary for this purpose.

The distinguishing feature between high schools and colleges that is most stressed by equal access decisions is high school students' relative immaturity and impressionability.[124] This distinction also fails to warrant categorical denial of high school equal access. The alleged difference between the general maturity levels of high school and college students would warrant a blanket prohibition upon high school equal access only if all high school students were inherently too immature and impressionable to be able to differentiate between a school's neutral provision of an open forum and its partisan endorsement of religious expression within that forum. Although the Supreme Court stated in *Widmar* that "university students are less impressionable than younger students," it did not reach the question of whether high school students are so impressionable that they would not "be able to appreciate that the [school's equal access] policy is one of neutrality toward religion."[125] In *Brandon* and *Lubbock*, however, the Second and Fifth Circuits did reach this question, and both answered it in the affirmative.[126] Neither of these opinions refers to any evidence concerning the level of high school students' impressionability. Therefore, the courts apparently took judicial notice of the "fact" that this level was sufficiently high to justify a total prohibition upon concerted student religious expression in public schools.[127]

Ironically, the idea that high school students inherently lack the requisite intellectual or emotional maturity to understand the government neutrality implicit in a student forum is logically inconsistent with the conclusion that equal access must be denied to avoid an Establishment Clause violation. If students are inherently bound to perceive a school's equal treatment of student religious groups as conveying its approval of religion, it would logically follow that students would also be likely to perceive the school's unequal treatment of student religious groups as conveying its disapproval of religion.[128] The Estab-

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[124] *See Bender*, 741 F.2d at 552–55; *Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 978.

[125] 454 U.S. at 275 n.14.

[126] *See supra* text accompanying note 74.

[127] *See supra* text accompanying notes 71–74.

[128] Judges who have viewed equal access grants to student religious groups as con-

lishment Clause is violated just as much by a governmental act or policy which appears to disapprove of religion as it is by one which appears to approve of religion.[129] Therefore, even assuming for the sake of argument that the asserted presumptions about high school students' relative immaturity were correct (which is a debatable proposition),[130] they could not justify de-

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stitutionally mandated have expressed this opinion. *See, e.g., Bender*, 741 F.2d at 565 (Adams, J., dissenting); *Lubbock*, 680 F. 2d at 426.

This is not the same argument as the one made by proponents of state-mandated, teacher-led prayer in public school classrooms: that the Court's invalidation of such activities manifests hostility toward religion. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 433–34 (1962). Students should be able to understand that the Establishment Clause, as well as the Free Exercise Clause, prohibits the government from sponsoring any religious activity in the public school classroom. This does not mean, however, that students should be able to understand that these constitutional guarantees prohibit students from voluntarily meeting to engage in religious expression at times and places when and where other students voluntarily meet to engage in other types of expression. If students are in fact able to understand that the exclusion of religious groups would not manifest the school's hostility toward religion, then they should also be able to understand that the inclusion of religious groups would not manifest the school's endorsement of religion.

[129] *See supra* note 5.

[130] *See* Wisconsin v. Yoder, 406 U.S. 205, 245 n.3 (Douglas, J., dissenting) ("There is substantial agreement among child psychologists and sociologists that the intellectual and moral maturity of the 14-year-old approaches that of the adult").

Contrary to the unsubstantiated assertions in some equal access decisions that high school students are *less* mature than college students, some experts in adolescent psychology believe that many high school students are less emotionally vulnerable or susceptible to indoctrination than many college students. *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507–09 (1983). Based upon research in adolescent psychology, this Note argues that

> [h]igh school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear, even more clear, perhaps, than in later stages of life. Thus, not only is the high school student able to make such a distinction, he is also likely to do so.

Id. at 509.

Experts in adolescent psychology have also opined that college students, at least in the early years of college, are in a "late adolescent" stage, when they are extremely impressionable and hence vulnerable to indirect coercion concerning religious beliefs. *See, e.g.*, White, *Problems and Characteristics of College Students*, in ADOLESCENCE, Vol. XV (No. 57), 23, 28 (1980). This analysis is supported by evidence that the typical convert to a nontraditional religion or "cult" is between the ages of eighteen and twenty-five, and a college student. C. STONER & J. PARKE, ALL GOD'S CHILDREN 68, 76 (1977); Schwarz & Kenslow, *Religious Cults, the Individual and the Family*, 5 J. OF MARITAL AND FAMILY THERAPY, 15, 16 (1979).

In contrast with the circuit court equal access decisions which have taken judicial notice of high school students' alleged immaturity, some other decisions have taken judicial notice of these students' maturity and sophistication. *See, e.g.*, Seyfried v. Walton, 668 F.2d 214, 219–20 (3d Cir. 1981) (Rosenn, J., concurring) (taking judicial notice of progressively higher levels of students' intellectual and emotional development in later secondary school grades); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (finding tenth graders sufficiently mature that teacher's refusal to lead flag salute would not have "destructive effect" upon them, court asserted that such students "are approaching an age when they form their own judgments"); Wilson v. Chancellor, 418 F. Supp. 1358, 1368 (D. Or. 1976)

nial of equal access; such presumptions or assumptions would dictate the conclusion that the denial of equal access would only substitute one type of Establishment Clause violation for another.[131]

An additional fundamental flaw in these unfounded presumptions or assumptions about high school students' immaturity or impressionability is that they are inconsistent with students' free speech rights. Mere assumptions or presumptions, as opposed to actual evidence, do not justify restricting student speech.[132] As noted by the Supreme Court Justices who dissented in *Bender*, students' free speech rights would not be meaningful if they could be displaced by the "utterly unproven, subjective impressions of some hypothetical students."[133] Following *Tinker*, the federal courts have closely confined school authorities' discretion to curtail students' exposure to various nonreligious ideas or opinions which such authorities do not support.[134] Moreover, the courts have done so even while expressly acknowledging that school authorities have a legitimate interest in avoiding the impression that they endorse such ideas or opin-

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("[T]oday's high school students are surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words.").

[131] A school should be able to avoid either type of violation through the adoption of measures less drastic than either an outright grant of access applicable on the same terms to all other student groups, or an outright denial of access. *See infra* notes 150 & 158.

[132] *See Tinker*, 393 U.S. at 737 ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); *id.* at 738 ("[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."). As discussed *supra* at text accompanying notes 55–62, the Court's recent *Bethel* decision appeared to depart from a strict application of this *Tinker* standard, although the Court acknowledged *Tinker*'s continuing authoritativenss. It is not clear to what extent *Bethel* marks a generalized diminution of the protection accorded to students' speech rights, and to what extent it reflects the Court's particular willingness to insulate minors from sexually explicit speech of the type involved in that case. *See supra* note 60.

[133] 106 S. Ct. at 1337 (Burger, C.J., dissenting).

[134] *Tinker* itself expressly declared that students "may not be confined to the expression of those sentiments that are officially approved." 393 U.S. at 511. *Accord* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970–72 (5th Cir. 1972) (free speech rights of high school seniors violated when school board suspended them for distributing "underground" newspaper advocating review of marijuana laws and offering birth control information); Gambino v. Fairfax City School Bd., 429 F. Supp. 731, 736–37 (E.D. Va.) (enjoining school board from prohibiting publication of article entitled "Sexually Active Students Fail to Use Contraception" in school newspaper), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F. Supp. 1164, 1165–66 (E.D.N.Y. 1974) (students' free speech rights would be violated if high school officials restrained distribution of school newspaper containing information about birth control), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

ions.[135] Instead, directly contrary to the operative presumptions in *Brandon* and *Lubbock*, these cases presume that high school students *are* capable of distinguishing a school's neutral provision of access to a spectrum of ideas and opinions from its partisan endorsement of any particular idea or opinion.[136]

This Article does not aim to prove that the average high school student is sufficiently mature to appreciate the neutrality of a public forum. Rather, it seeks to emphasize that the decisions which have endorsed absolute prohibitions upon equal access do not cite any evidence proving that the average high school student lacks the requisite maturity. The Article further seeks to underscore that, under constitutional authorities, mere presumptions or assumptions about high school students' immaturity cannot justify denying their free speech rights, or making those rights more limited than the corresponding rights of college students. This conclusion is reinforced by the fact that, in the view of some adolescent psychology experts, many high school students are less emotionally vulnerable or susceptible to indoctrination than many college students.[137]

III. Proposed Analytical Framework for Case-by-Case Resolution of Equal Access Issues

The preceding Part of this Article suggests two basic considerations that must both be taken into account in resolving any equal access issue consistently with both nonestablishment and free speech concerns. First, a public high school can, in theory, create a neutral student forum in which content-based restrictions on speech should be strictly limited. Second, due to certain characteristics which generally distinguish high schools from colleges and universities, there is a significant risk that any concerted religious speech in a high school could generate a

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[135] *See, e.g.*, Seyfried v. Walton, 668 F.2d 214, 216 (3d Cir. 1981) ("A school has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program"); Thomas v. Bd. of Educ., 607 F.2d 1043, 1049 (2d Cir. 1979).

[136] For example, in James v. Bd. of Educ., 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972), the Second Circuit expressly relied on the high school students' ability to distinguish between the official views of the school board and the personal opinions of a teacher as a basis for upholding the teacher's right to wear an armband protesting the Vietnam War. The court noted that "[i]t does not appear that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal political views." 461 F.2d at 574.

[137] *See supra* note 129.

reasonable perception that the school endorses religion, even when the school has created a neutral student forum.

From the foregoing pair of basic considerations, it follows that concerted student religious speech should be allowed on high school premises if and only if two general criteria are both met: (1) the school has created a neutral, open student forum; and (2) reasonable students do not infer that the school endorses religion.[138] This Part of the Article proposes an analytical framework for determining whether these two general, constitutionally mandated prerequisites for an equal access grant have been met in any particular case.[139]

In sum, a high school would be required to grant equal access to a student religious group if and only if certain showings could be made that were designed to assure compliance with the standards of both the Free Speech and Establishment Clauses. Once such showings were made, a presumption would arise that the equal access grant would be proper. However, this presumption could be rebutted by specific evidence that reasonable students would perceive the equal access grant as manifesting school support for religion. Following any such rebuttal, a school would be permitted to impose a special limitation upon the student religious group meetings, including the outright prohibition of such meetings, only if any such limitation were demonstrated to be the least drastic means available to counter reasonable inferences that the school endorsed religion.

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[138] Although the school should make efforts to ensure that every student understands the neutrality of its open student forum, it should not restrict or exclude student religious groups merely because some students unreasonably misperceive equal access as reflecting school endorsement of religion. *See* Citizens Concerned For Separation of Church and State v. City & County of Denver, 526 F. Supp. 1310, 1315 (D. Colo. 1981) (court permits nativity scene displayed on public property despite evidence that "most sensitive or fastidious citizens" perceive it as conveying government's endorsement of religion). *Cf.* Roth v. United States, 354 U.S. 476, 489 (1957) (test that "judg[es] obscenity by the effect of isolated passages upon the most susceptible persons . . . must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

[139] The proposed framework charts an intermediate course between the evidentiary standards reflected in Free Speech Clause and Establishment Clause precedents, respectively. Under traditional Free Speech Clause doctrine, a presumptive right of access for student religious speech would arise upon the showing of a student forum which is open to a sufficiently broad range of subjects. Following such a showing, the equal access opponent would bear the heavy burden of demonstrating that equal access would violate the Establishment Clause and that no less drastic alternative than denial of access could avert the violation. In contrast, under settled Establishment Clause doctrine, the equal access proponent would bear the heavy burden of disproving the presumptive Establishment Clause dangers deemed inherent in any public school religious expression. *See* Strossen, *supra* note 22, at 175–79.

The evaluation of whether any particular equal access grant to a student religious group is required by the Free Speech Clause or prohibited by the Establishment Clause cannot be completely confined to any codified set of criteria. Part III of this Article articulates factors and standards which should substantially guide the consideration of the ultimate constitutional questions, but the specified factors and standards cannot definitively resolve those questions.[140] The proposed standards represent an intermediate level of particularity, between the imprecise ultimate tests imposed by the Free Speech Clause and Establishment Clause (whether the school has created a forum for student speech and whether reasonable students would infer that it endorses religion) and a detailed code of particular criteria (whether a school has taken certain specific steps, which are deemed both necessary and sufficient for resolving the two underlying constitutional questions). In this respect, the proposed analytical framework departs both from the less structured approaches of the two circuit courts which have resolved equal access disputes on an individualized basis, and from the more rigid approach embodied in the Equal Access Act.[141] It is probably impossible to draw a precise route for assuring compliance with both free speech and Establishment Clause concerns in all equal access controversies. Nevertheless, it is submitted that the proposed intermediate-level approach charts a prudent midway course between the Scylla of vagueness (resulting from a

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[140] See Werhan, *supra* note 47, at 423–24 (advocates evaluation of claims of access to public property according to whether expression is compatible with normal activity of particular place at particular time; acknowledging that such an open-ended test is difficult for courts to administer and somewhat unpredictable, the author concludes that these costs are worth paying because reasons underlying decisions would be consistent with First Amendment values and fully articulated).

[141] The proposed evidentiary approach is more structured than that followed by the two circuit courts, because it focuses largely upon specifically articulated criteria. *See supra* note 14 (describing Third Circuit's uniquely open-ended balancing test). However, the proposed approach is simultaneously more flexible than the one reflected in the Equal Access Act, *see infra* note 164, since it recognizes that the process of answering the ultimate constitutional questions implicated in any equal access dispute can be guided by, but not completely confined to, a set of specified criteria.

For a discussion of the comparative advantages and disadvantages of resolving disputes about free speech access to government property pursuant to a case-by-case balancing process, or pursuant to fixed rules, see Cass, *supra* note 47, at 1317. Like this Article, the Cass piece proposes an intermediate approach; it articulates factors for evaluating each case which "do not eliminate altogether the need for balancing but do generalize some aspects of the balance." *Id.* at 1325. *See also* Farber & Nowak, *supra* note 36, at 1240–42 (for resolving claims concerning speech access to public property, advocates "focused balancing," which is hybrid between categorical approach and ad hoc balancing); *supra* text accompanying notes 64–68; *see also supra* text accompanying notes 76–86.

test which, in its insufficient specificity, provides inadequate guidance and predictability) and the Charybdis of overbreadth (resulting from a test which, in its excessive specificity, either proscribes too much expression that would be protected by the Free Speech Clause or permits too much that would violate the Establishment Clause).[142]

A. *Showing Required to Establish Prima Facie Equal Access Right for Student Religious Speech*

1. There Must Be an Open Student Forum

A public high school is not a traditional public forum. Therefore, a student religious group would have no protected access right to public school property unless it could demonstrate that the school had created a student forum by opening its facilities to student expression and association.[143] To demonstrate that the school had created a forum which is sufficiently open to trigger equal access rights for student religious groups, the equal access proponent should be required to make two essential showings: (1) that the forum was not created to promote religion; and (2) that any subject matter parameters are sufficiently broad to include, but not to single out, religion.

The first required showing mirrors the fundamental tenet that, to survive Establishment Clause scrutiny, a government policy

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[142] *Cf.* L. TRIBE, *supra* note 26, § 1211 at 630–31 ("[T]he dilemma of overbreadth versus vagueness in the context of the fair trial problem is insoluble [because of] . . . the inherently speculative character of any prediction . . . that a particular message will prevent the fair trial of a case."). The dilemma of overbreadth versus vagueness in the context of the equal access problem is also insoluble for an equivalent reason—namely, the inherently speculative character of any prediction that a particular religious student group meeting will be reasonably viewed as conveying the school's support of religion. *See also id.* at 714–16 (discussing general necessity of trading off overbreadth for vagueness whenever limitations upon First Amendment rights cannot be categorically defined, which occurs in any situation where First Amendment limitation aims to prevent harm from occurring rather than to redress consummated harm).

[143] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981). If a student religious group sought to meet at school independently of any open student forum, not only would it have no right of access under the Free Speech Clause, but also its meeting would almost certainly violate the Establishment Clause. As the Supreme Court stressed in *Widmar*, only the presence of numerous, diverse nonreligious groups could eliminate the perception that the school promoted religion which would otherwise have resulted from the student religious group's campus meetings. *Id.* at 265, 274, 277.

must have a clear secular purpose.[144] The second required showing derives from both Free Speech Clause and Establishment Clause doctrines. Under the Free Speech Clause, no speaker or group could claim a right of equal access to a limited public forum unless the proposed speech fit within permissible subject matter limitations upon that forum.[145] Under the Establishment Clause, religion may be included within a broad class which receive public benefits,[146] but it may not be singled out for such grants.[147] If some secular groups were excluded from the forum, the inclusion of religious groups might constitute a special benefit to religion in contravention of the Establishment Clause. Therefore, a school which barred the meetings of a student political or philosophical group, for example, could have diffi-

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[144] *See supra* note 28. The importance of this requirement in the particular context of public school religious expression is highlighted by the Supreme Court's most recent decision concerning such expression, Wallace v. Jaffree, 105 S. Ct. 2479 (1985). The Court struck down an Alabama statute that mandated a moment of silence in public schools, ostensibly for purposes of meditation, prayer, or any other quiet activity chosen by each individual student. In light of the statute's background, however, the Court concluded that its actual purpose was to promote prayer. *Id.* at 2491. Likewise, a public school forum that is purportedly created to promote student free speech and association but is, in reality, a subterfuge for school-promoted religion would violate the Establishment Clause and not give rise to any free speech rights on the part of student religious groups.

[145] *See, e.g.*, City of Madison Joint School Dist. v. Wisconsin Public Employment Relations Comm'n., 429 U.S. 167 (1976) (school board meeting is limited public forum for speech concerning school board business only).

[146] *See, e.g.*, Walz v. Tax Comm'n., 397 U.S. 664 (1970) (sustaining tax exemptions for religious institutions, because within broad class of nonprofit institutions receiving this tax benefit). *Accord* Mueller v. Allen, 463 U.S. 388 (1983) (in upholding plan allowing parents to claim state tax deduction for children's educational expenses, Court stressed breadth of tax benefits available to all parents, including those with children in public and private nonsectarian schools).

For a discussion of religion as included in a broad class for equal access purposes, see *Widmar*, 454 U.S. at 274 (referring to university's grant of access to over 100 student groups, Court stated that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect"). *See also* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207 (D. Kan. 1983). Where an elementary school building was made available to community groups during nonschool hours, the school district violated the Free Speech Clause by denying equal access to church for worship services. Such equal access would not violate Establishment Clause, for "[i]t is possible that religion and certain groups may benefit from access to School District facilities, but this is not the direct effect of the equal access policy; it is merely an incidental effect . . . . Religious groups share benefits with all other community groups. If religious groups benefit, it is in spite of, rather than because of, their religious character." *Id.* at 1218.

[147] Justice Brennan drew this distinction in his concurring opinion in School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963). Although he suggested that "hostility, not neutrality, would characterize . . . the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood," *id.* at 299, he also noted that "[a] different problem may be presented with respect to the regular use of public school property for religious activities." *Id.* at 298 n.74.

culty contending that it had created a sufficiently open forum to permit the meetings of a religious group.[148]

2. The School Must Impose Content-Neutral Restrictions to Minimize Establishment Risks

Because of the establishment dangers inherent in concerted religious expression in the public schools, as well as the difficulty of ascertaining whether such expression in fact violates the Establishment Clause, a school's duty under the Establishment Clause should be construed to go beyond merely avoiding clear violations. Instead, as courts have recognized, the school's duty should be viewed as the broader one of taking reasonably available, constitutionally permissible steps to minimize the risk of an Establishment Clause violation.[149] Accordingly, in addition to demonstrating the existence of an open student forum, the equal access proponent should also be required to show that the school has taken such steps.

In particular, the equal access proponent should show that the school has imposed certain content-neutral time, place, and manner regulations upon student group meetings.[150] The meet-

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[148] *See supra* text accompanying notes 37–45.

[149] *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3226–27 (1985). *See also* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1407 (10th Cir. 1985) ("[W]e believe that religious activity in the public schools . . . requires stricter separation than does a university campus or a public square."). Some courts have suggested that schools' interests in minimizing risks of Establishment Clause violations could even justify infringing free speech rights. For example, in *Bender*, the Third Circuit squarely held that the school's denial of equal access would violate the students' free speech rights, 741 F.2d at 550, but it nonetheless ordered the school to deny equal access to avoid an Establishment Clause violation. *Id.* at 560–61. In contrast, the recommended measures are fully consistent with free speech principles. *See infra* note 150. *Cf.* Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd*, 443 U.S. 193 (1978) (to enable employers and unions to avoid walking "tightrope" between potential liability for discrimination against minorities and discrimination against white majority, affirmative action plan adopted in collective bargaining agreement should be upheld if it is reasonable remedy for "arguable violation" of Title VII).

[150] The recommended regulations constitute less drastic alternatives to either an unqualified grant of access to a student religious group, with its attendant establishment dangers, or an outright denial of access, with its attendant free speech and establishment dangers. *See infra* note 158. These content-neutral regulations should significantly reduce the risk of an Establishment Clause violation without abridging students' free speech rights. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984):

> Expression . . . is subject to reasonable time, place and manner restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant govern-

ings should take place at times clearly separated from the compulsory attendance period;[151] the role of any adult supervisor should be as limited as permissible under applicable law[152] and should under no circumstances include participation in student group meetings; and the school should distribute information to students explaining the school's neutral role under an equal access policy in general, and disclaiming any approval or disapproval of religion in particular.[153]

B. *Showing Required to Overcome Prima Facie Equal Access Right for Student Religious Speech*

The proposed requirements for a prima facie showing that student religious speech should have equal access to public high schools can reduce, but cannot completely eliminate, the possibility that an equal access grant would violate the Establishment Clause.[154] Accordingly, under the proposed evidentiary approach, once an equal access proponent had established a

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mental interest, and that they leave open ample alternative channels for communication of the information.

Id. at 293 (citations omitted).

The proposed measures easily satisfy this standard. They are content-neutral because they apply to all student groups, regardless of the subject matter of their speech. They are narrowly tailored to serve the compelling governmental interest in complying with both the Establishment Clause and the Free Speech Clause. Finally, they leave open ample alternative channels for student group communication. All three measures should, in fact, enhance students' expressive rights by de-emphasizing the school's traditional inculcative role.

For a fuller discussion of the rationales for treating the proposed regulations as essential prerequisites for equal access grants to student religious groups, see Strossen, *supra* note 22, at nn.130–35 & accompanying text.

[151] *See* AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, EQUAL ACCESS: INTERPRETATION AND IMPLEMENTATION GUIDELINES 17 (1984) (reporting results of survey conducted in summer of 1984) [hereinafter AASA GUIDELINES] (seventy-eight percent of responding school districts already require noncurriculum related student groups to meet either before or after school).

[152] *See supra* note 122.

[153] Regarding the use of disclaimers and other explanatory statements, see *supra* note 120. For a more expansive discussion of all the proposed content-neutral regulations, see Strossen, *supra* note 22, at nn.136–40 & accompanying text.

[154] As Justice O'Connor recognized in her *Wallace* concurrence, 105 S. Ct. at 2496, even a neutral policy can have the impermissible effect of promoting religion, depending upon its implementation. *See supra* note 114.

prima facie claim, the burden would shift to the opponent to demonstrate that access should be restricted or denied.[155]

In accordance with general public forum doctrine, once a student religious group has established a prima facie right of access to a public high school forum, no special restrictions should be imposed upon the group unless such restrictions were demonstrated to be necessary to promote a compelling governmental interest.[156] The specific compelling interest which is implicated in the equal access context is the interest in avoiding an Establishment Clause violation.[157] Consequently, so limitations should be imposed upon any religious student group meetings unless these limitations were shown to be the least drastic measures necessary to avert an Establishment Clause violation.[158] Likewise, the student religious group should not be de-

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[155] For another proposed framework for evaluating constitutionally permissible access restrictions on speech in public schools, which also recognizes that compelling free speech concerns warrant access but that such concerns can be overcome by countervailing considerations, see Cass, *supra* note 47, at 1342–44. Although Cass does not expressly discuss student religious speech, the application to such speech of factors he identifies as pertinent to school access disputes in general should lead to granting equal access in some cases and denying it in others. On the pro-access side, Cass notes that because students have limited alternative forums for speech, courts should require school officials to make "substantial efforts to harmonize speech and other interests," and that "schools easily could allow . . . student speech . . . during non-class hours." *Id.* at 1344. On the nonaccess side, he cautions that courts "should be especially leery of commanding officials to allow speech that might be disruptive in . . . some schools, where a relatively volatile population is involved." *Id.*

[156] *See supra* text accompanying notes 34–36.

[157] In *Widmar* the Supreme Court concluded that the Establishment Clause did not bar the university from granting equal access to a student religious group. Consequently, it did not "reach the question that would arise if State accommodation of . . . free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." 454 U.S. at 273 & n.13. However, the Court did recognize that the university's "interest . . . in complying with its constitutional obligations [under the Establishment Clause and the State constitutional counterpart] may be characterized as compelling." *Id.* at 271.

In McCreary v. Stone, 575 F. Supp. 1133 (S.D.N.Y. 1983), the court held that the avoidance of an Establishment Clause violation was a sufficiently compelling state interest to justify content-based exclusion of speech from a public forum. *Accord* May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761, 766 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986) (school's interest in avoiding Establishment Clause violation that might result from permitting teachers to hold religious meetings at school, before school day, is sufficiently compelling to override countervailing constitutional interests asserted by teachers, including free association, equal protection, and free exercise of religion).

[158] Establishment Clause problems which might result from student religious groups being granted access on the same terms as other student groups could perhaps be avoided through the following types of alternative measures, which are less drastic than either an unqualified grant or an outright denial of access: student religious groups could be barred from using any or all school media to publicize their meetings; student religious group members could be "released" from school in order to meet at other nearby locations; a school could limit the length or frequency of student religious group meet-

nied access altogether unless the equal access opponent could prove that less drastic alternative measures would not suffice to prevent an Establishment Clause violation.

An equal access opponent could potentially meet the burden of proof necessary to overcome an access right by producing some evidence of the following types: testimony of individual students that they perceive the school to be sponsoring religion; opinion testimony by experts in adolescent psychology or education that, under the circumstances, a reasonable student would infer school support for religion; a survey of students demonstrating that some statistically significant portion perceived the school to be endorsing religion;[159] and evidence concerning objective factors which could support a conclusion that a hypothetical "reasonable student" would infer school endorsement of religion.[160] Evidence about objective factors which might support the foregoing conclusion could include, for example, evidence that the forum is not actually utilized by numerous, diverse student groups, or that the forum is used predominantly by one or more religious groups.[161]

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ings; such meetings could be confined to areas of the school that are not normally used for regular classroom instruction; and such meetings could be scheduled for evenings or weekends. *See* Strossen, *supra* note 22, at nn.149–52.

In addition to assisting a school in avoiding both an abridgement of students' free speech rights and a violation of the Establishment Clause by supporting religion (or reasonably appearing to do so), the foregoing measures should also assist a school in avoiding the Establishment Clause violation that could result from its disapproving of religion (or reasonably appearing to do so). *See supra* note 5, text accompanying notes 127–30.

[159] *See* Strossen, *supra* note 22, at nn.146–48.

[160] This could include evidence concerning any steps the school may take to promote its noninculcative role, the particular options the school has in fulfilling its supervisory obligations, and the general intellectual and emotional levels of the school's student body. *See generally* Trachtman v. Anker, 426 F. Supp. 198 (S.D.N.Y. 1976), *rev'd*, 563 F.2d 512 (2d Cir. 1977). The district court in *Trachtman* rejected school authorities' assertion that a student-authored questionnaire concerning eleventh and twelfth grade high school students' sexual attitudes would cause sufficient psychological harm to justify prohibiting its distribution. The district court relied upon the following factors pertaining to the school: that it was located in New York City, where students were confronted with much information about sexuality; that it taught sex education courses; and that it was for intellectually gifted students who were "likely to respond . . . with a higher degree of maturity than other students." *Id.* at 202 & n.3.

[161] Evidence concerning both the forum's actual utilization and the relative predominance of religious groups was central to the Supreme Court's analysis in *Widmar*. *See, e.g.*, 454 U.S. at 275 ("At least in the absence of empirical evidence that religious groups will dominate [the university's] open forum . . . the advancement of religion would not be the forum's 'primary effect.'").

The absence of the suggested actual utilization and nonpredominance factors would neither disprove the existence of a limited public forum nor prove the existence of an Establishment Clause violation. So long as the school property was in fact open and available as a matter of policy, a limited public forum should be found to exist, even if

IV. Constitutional Analysis of Equal Access Act's Standards

The Equal Access Act contains two general provisions that might be invoked to bring it into line with prevailing constitutional doctrines. Initially, the Act provides that it should not be construed as authorizing the United States or any state or political subdivision "to sanction meetings that are otherwise unlawful" or "to abridge the constitutional rights of any person."[162] It also contains a "savings clause" which provides that if any provision of the Act, or its application in any situation, is judicially invalidated, the Act's remaining provisions, and its applications in other situations, will not be affected.[163] In light of these general provisions, the Act could potentially be given limiting constructions that would save it from invalidation, notwithstanding constitutional flaws in certain specific provisions. This Article, however, focuses on the constitutional problems presented by the Act's specific provisions.

A. *The Act's Standards*

The Equal Access Act[164] applies to any public sec-

numerous, diverse student groups did not actually utilize it. *See McCreary*, 739 F.2d at 722 (in concluding that park constituted public forum, court stressed park's *availability* for free speech purposes; that park had not actually been utilized by numerous, diverse speakers was irrelevant). Likewise, so long as the school is neither supporting any student religious group nor perceived by the students as doing so, the student religious group meetings would not violate the Establishment Clause, even if such meetings did predominate. *See* Strossen, *supra* note 22, at n.142.

[162] 20 U.S.C. §§ 4072 (d)(5), (d)(7)(Supp. 1985).

[163] *Id.* § 4073. There is only sparse legislative history concerning these "safety valve" provisions. The "otherwise unlawful" provision was discussed briefly in the floor debates, with the implication that it would apply to some state laws forbidding homosexual conduct. *See* 130 Cong. Rec. S8343 (daily ed. June 27, 1984) (statement of Sen. Hatfield). The "constitutional rights" provision was hardly mentioned at all.

[164] The Equal Access Act, Pub. L. No. 98-377, 1984 U.S. Code Cong. & Admin. News, 98 Stat. 1302 (codified at 20 U.S.C. § 4071 (1984)), reads as follows:

SHORT TITLE

SEC. 801. This title may be cited as "The Equal Access Act."

DENIAL OF EQUAL ACCESS PROHIBITED

SEC. 802 (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

ondary school that "receives federal financial assis-

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

SEC. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

SEC. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

tance."[165] According to the Act, the determination of which schools are classified as "secondary" is to be made under state law.[166] The Act does not contain any provisions concerning the nature of the financial assistance that will bring a school within its scope. However, numerous federal statutes contain similar provisions, making them applicable to recipients of federal funding, and these provisions have frequently been subject to judicial rulings.[167] The general thrust of such rulings is that this type of statutory language should be broadly construed, to encompass institutions receiving even indirect federal financial assistance.[168] In consequence, because virtually all public secondary schools receive at least some indirect financial aid from the federal government, they will probably be deemed to be covered by the Act.[169]

The Act's central provision prohibits any school within its scope from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings," so long as the school has a "limited open forum" and the students seek to conduct their meeting within that forum.[170] The Act defines the critical term "limited open forum" as follows: "A public

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CONSTRUCTION

SEC. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

Id. No regulations have been issued under the Act.

[165] 20 U.S.C. § 4071(a) (Supp. 1985).

[166] *Id.* § 4072(1). A compendium of the definitions of secondary schools in all fifty states and the District of Columbia is contained in AMERICAN JEWISH CONGRESS, EQUAL ACCESS: A PRACTICAL GUIDE, app. A 18 (1984) [hereinafter AJC GUIDE].

[167] *See, e.g.*, Grove City College v. Bell, 465 U.S. 555, 557, 569 (1984) (statutory phrase "any educational program or activity receiving Federal financial assistance" construed as encompassing college whose educational programs receive no direct federal funding, but some of whose students receive federal financial aid; Court based this broad reading in part on "longstanding and coherent administrative construction of the phrase 'receiving Federal financial assistance'").

[168] *Id.*

[169] It is estimated that "[o]nly a handful of the approximately 16,000 public school districts in the United States do not receive federal financial assistance of some kind." Stern, *Public Education*, 10 URB. LAW. 497, 497 (1978). The Act's legislative history reveals Congress's assumption that most public secondary schools would be encompassed by the federal funding language. *See, e.g.*, 130 CONG. REC. H3857 (daily ed. May 15, 1984) (statement of Rep. Edwards (D-Cal.)) (noting that Act's predecessor bill, whose scope was defined in similar terms, would have injected "the imperial power of the Federal Government . . . into every one of the 15,517 school districts in the United States").

[170] 20 U.S.C. § 4071(a) (Supp. 1985).

secondary school has a limited open forum whenever such school grants an offering or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time."[171] The operative terms in this definition are "noncurriculum related" and "noninstructional time."

The Act defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[172] This definition does not clarify the status of meetings that occur during the compulsory attendance period when no instruction takes place. Two such examples are lunch breaks and "student activity periods" such as the one at issue in the *Bender* case.[173] However, the Act's legislative history indicates that the "limited open forum" concept applies only to student group meetings which occur before or after the entire compulsory attendance period, and not during any portions of that period, even if no classroom instruction is taking place.[174] Therefore, a school should not be deemed to have created a limited open forum, and consequently should not be subject to the Act's requirements, if it only allows student groups to meet during the school day.

The Act contains no definition of the second crucial term in its definition of "limited open forum": namely, "noncurriculum related student groups." However, one section of the Act describes the meetings of these groups as "not directly related to the school curriculum."[175] This language suggests that a school would become subject to the Act's requirements by granting access to a student group which was indirectly related to the school's curriculum. Consistent with this interpretation, the

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[171] *Id.* § 4071(b).

[172] *Id.* § 4072(4).

[173] The student religious group in *Bender* sought to meet during a thirty-minute "student activity period" which was regularly scheduled after the beginning of the school day, two days per week. 741 F.2d at 543; *see also* 563 F. Supp. at 709.

[174] *See* 130 CONG. REC. S8353 (daily ed. June 27, 1984) (statement of Sen. Hatfield) ("The regular instructional period is what the school would have when classes first are scheduled in the morning—maybe it is 8:30, maybe it is 9 o'clock—and it ends at 3:30."). Although the legislative history contains some support for the contrary interpretation, *see* 130 CONG. REC. S8356 (daily ed. June 27, 1984) (statement of Sen. Denton (R-Ala.)), this appears to be the minority view. In contrast, the legislative history of predecessor bills had clearly indicated that those bills sanctioned meetings during non-instructional time during the school day. *See, e.g., Equal Access Amendment: A First Amendment Question, Hearings on S. 815 and S. 1059 Before the Senate Committee on the Judiciary*, 98th Cong., 1st Sess. 13 (Apr. 28 and Aug. 3, 1983).

[175] 20 U.S.C. § 4072(3) (Supp. 1985).

Act's legislative history indicates that the term "noncurriculum related" was intended to be quite broad. For example, the legislative history suggests that the "noncurriculum related" label would apply to the following types of student groups, all of which are, at least arguably, indirectly related to the curriculum of many schools: Latin clubs, soccer clubs, Young Democrats, Young Republicans, religious clubs,[176] and humanitarian clubs that raise funds for charity.[177] In contrast, the legislative history indicates that curriculum related clubs are viewed rather narrowly, as those which are essentially extensions of the curriculum and aid students in learning substantive course material.[178]

The Act's relatively narrow definition of the types of student clubs that may be permitted to meet on campus without triggering an equal access obligation or, alternatively phrased, its relatively broad definition of the types of student clubs that will trigger an equal access obligation, sharply distinguishes it from the applicable constitutional principles. According to the Supreme Court's most recent rulings concerning the limited public forum and nonpublic forum concepts, the government has wide latitude to impose precise definitional limits upon the appropriate subject matter of such forums, and therefore to exclude speakers or groups whose subjects are not within any such tailored definition.[179] Under these decisions, schools may impose a wide range of subject matter limitations upon student

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[176] 130 CONG. REC. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

[177] 130 CONG. REC. H7726 (daily ed. July 25, 1984) (statement of Rep. Roukema).

[178] Senator Hatfield stated that curriculum related clubs are "really a kind of extension of the classroom," citing as an example a French club or a Spanish club that is formed by students in a French or Spanish class for purposes of developing conversational proficiency. 130 CONG. REC. S8342 (daily ed. June 27, 1984). The House debate supports a similarly restrictive definition of curriculum related clubs. Representative Goodling stated that a club would meet this description only if it satisfied both of the following criteria: (1) it involves subject matter of a type that a public school may permissibly sponsor, and (2) participation in it is "require[d]" or "directly encourage[d]" by the school or a teacher "in connection with curriculum course work." 130 CONG. REC. H7732 (daily ed. July 25, 1984).

In response to questioning, Senator Hatfield expressed the general view that the Act does not seek to limit a school's discretion to draw the line between clubs that are curriculum related and those that are not. *See* 130 CONG. REC. S8342 (daily ed. June 27, 1984). However, this general view is inconsistent with the specific criteria which both he and Representative Goodling articulated for defining the curriculum related concept.

Examples of curriculum related clubs that were cited during the congressional debates include language clubs, drama clubs, athletic groups, cheerleading groups, and bands. 130 CONG. REC. S8342–43 (daily ed. June 27, 1984) (statements of Sen. Hatfield and Sen. Gorton (R-Wash.)); 130 CONG. REC. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

[179] *See supra* text accompanying notes 40–45.

clubs, subject only to the strictures that any such limitations must be reasonable, and must not be imposed for the sole purpose of suppressing viewpoints with which school authorities disagree.[180]

Consistent with the Court's most recent holdings, for example, a school might well be permitted to define the student groups eligible for its forum as those relating to its curriculum either directly or indirectly. Such a definition would fairly encompass many of the types of clubs that would likely be deemed "noncurriculum related" under the Act's narrow construction of that term, because they do not directly help students to learn substantive course material. However, such a definition would still not encompass the full panoply of political, philosophical, and religious clubs to which a school would be required to grant access under the Act. Under this type of definition, a school could, for instance, permit political clubs on the rationale that they are indirectly related to the school's civics courses, but exclude philosophical or religious clubs on the rationale that the school's curriculum contains no courses to which they are even indirectly related.[181]

By drawing a dichotomy between the narrowly conceived category of "noncurriculum related" clubs and all other clubs, the Act gives schools virtually an all-or-nothing choice concern-

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[180] *See supra* text accompanying note 134.

[181] *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S.Ct. 3439, 3461–62 (1985) (Blackmun, J., dissenting) (under majority's reasoning, university in *Widmar* could permissibly have limited student forum to nonreligious student groups). Other examples of subject matter distinctions are *Cornelius* and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The government, as suggested by the facts of those cases themselves, is apparently authorized to deny access to any property not deemed a general public forum. Just as *Cornelius* upheld the exclusion of "advocacy" groups from a federal government workplace charity drive, so too a school could probably exclude from a student forum student chapters or analogues of the NAACP Legal Defense and Educational Fund, the Sierra Club Legal Defense Fund, and other groups excluded in *Cornelius*. *See Cornelius*, 105 S. Ct. at 3444. Moreover, because *Cornelius* held that the exclusion of any "controversial" group passed the reasonableness test applicable to subject matter limitations upon limited public forums or nonpublic forums, a school could well be allowed to limit a student forum to any group deemed "noncontroversial." *See supra* text accompanying note 45.

Similarly, just as *Perry* upheld the exclusion from school mail facilities of a union seeking to represent teachers, even though such facilities were open to various civic and church organizations, a public school might well be permitted to limit a student forum to civic and church organizations, but to exclude an organization seeking to represent students. Moreover, because *Perry* held that the union which had been designated as the teachers' bargaining representative could use the forum without creating access rights on the part of a rival union, a school could presumably allow the school-recognized student government to use the student forum without creating access rights on the part of other groups also seeking to represent student interests.

ing the subject matter limitations upon student clubs that will be permitted to meet in any limited open forum. To retain the right to enforce any subject matter limitations, a school may not let any club meet which is not directly related to the school curriculum (unless such club meets during instructional time or otherwise fails to comply with the Act's prerequisites for a limited open forum). By leaving schools with only these two, widely disparate choices concerning subject matter limitations upon student clubs,[182] the Act substantially narrows the broad discretion that schools have under current constitutional principles.[183]

Following its core provision, which prohibits any content-based denial of "equal access or a fair opportunity to" student groups in any limited open forum, the Equal Access Act provides that a school "shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum" if the school uniformly complies with five specified conditions:[184] (1) meetings are "voluntary and student-initiated"; (2) there is no school or government "sponsorship";[185] (3) any school or government employees or agents "are present at religious meetings only in a nonparticipatory capacity"; (4) meetings do not "materially and substantially interfere with the orderly conduct of educational activities within the

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[182] *See* Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 442 n.9 (3d Cir. 1985) ("We read the Act to give affected school districts a choice: either to create a limited open forum open to all student groups on an equal basis, or to refuse access to all noncurriculum groups."). *Accord* YALE Note, *supra* note 23, at 204 n.74 ("Congress intended to present at least one choice under the Act . . . whether to let all student groups, including religious ones, meet, or . . . not to give access to any student groups.").

[183] There is another significant distinction between the constitutional and statutory standards regarding a school's discretion to create a limited student forum. Under constitutional standards, a court will not find that a school created such a forum in the face of evidence of a contrary intent. However, a school's intent not to create a forum for speech concerning certain subjects will not deter a court from finding that it nevertheless did so, by virtue of the Equal Access Act. *See infra* note 266 and accompanying text. According to critics of the Court's recent decisions increasing governmental discretion to impose subject matter limitations upon "limited public forums," this increased discretion enables the government to impose content-based restrictions on speech. *See supra* notes 46 & 47. These critics would probably welcome the Act's constraints upon governmental discretion to limit the subject matter of student forums as a return to traditional free speech principles.

[184] 20 U.S.C. § 4071(c) (Supp. 1985).

[185] The term "sponsorship" is defined to include "promoting, leading, or participating" in a meeting. Furthermore, the Act's definition of "sponsorship" expressly excludes a school employee's assignment to a meeting for "custodial purposes." 20 U.S.C. § 4072(2) (Supp. 1985).

school";[186] and (5) "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."[187]

Neither the language nor the legislative history of this provision clarifies whether the five conditions are permissive or mandatory.[188] Although there has not yet been any judicial analysis of this section, other analyses support the contention that all of the specified conditions must be satisfied.[189] Regardless of whether Congress intended these conditions to be enforced in all limited open forums, they should all be enforced as a matter of constitutional law with respect to student religious groups.[190]

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[186] This language is apparently derived from Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (public school may restrict students' expressive conduct only if it would "materially and substantially interfere with the work of the school or impinge upon the rights of other students").

[187] 20 U.S.C. § 4071(c)(5) (Supp. 1985).

[188] For example, 20 U.S.C. § 4071(c)(5) (Supp. 1985) provides that outsiders "may not direct, control, or regularly attend" student group meetings. This language may be read as evincing a congressional intent to prohibit the outsider participation described, and there are indications in the legislative history that it was so intended. However, the language is also consistent with a reading that schools may, in their discretion, prohibit such outsider participation, and the legislative history also contains support for this alternative reading. *See* AJC GUIDE, *supra* note 166, at 7–8.

[189] *See, e.g.*, YALE Note, *supra* note 23, at 193 & n.35; Note, *Student Religious Groups and the Right of Access to Public School Activity Periods*, 74 GEO. L.J. 163, 214–15 (1985) [hereinafter GEORGETOWN Note]; AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, GUIDELINES FOR THE USE OF THE EQUAL ACCESS ACT 9–11 (1985); ANTI-DEFAMATION LEAGUE, RELIGION AND THE PUBLIC SCHOOLS, THE AFTERMATH OF EQUAL ACCESS: A CRITICAL ANALYSIS 8–9 (1984); AJC GUIDE, *supra* note 166, at 7–8. The United States Government has also espoused the position that these conditions must be complied with before a school will be deemed to have created a limited open forum. *See* Intervenor-United States Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Final Summary Judgment, Amidei v. Spring Branch Indep. School Dist., No. H-84-4673 (S.D.Tex. Apr. 17, 1985) at 20.

[190] Unless the meetings are voluntary and student-initiated, as required by the first condition, *see supra* text following note 184, no student free speech or associational rights are implicated, and hence no forum is created. *See* FORDHAM Note, *supra* note 42, at 560–61 (any place where audience is "captive," rather than voluntarily present, should not be considered public forum). Moreover, any student religious group meeting that is initiated by a school, or at which attendance is compelled by a school, would violate the Establishment Clause. *See supra* text accompanying note 32. *See also* YALE Note, *supra* note 23, at 193 n.35 (Establishment Clause would be violated by school-initiated meetings, and students' free exercise rights would be implicated by nonvoluntary meetings).

Likewise, if there is any school or government sponsorship, as prohibited by the second condition, *see supra* text accompanying note 185, the meetings of a student religious club would violate the Establishment Clause. Moreover, the prohibition upon school "sponsorship" of any student group meeting—which the Act defines as "promoting, leading, or participating," *see supra* note 185—further ensures that the meetings are voluntarily initiated and run by students, thus giving rise to free speech and associational rights.

The third condition, *see supra* text following note 185, which confines any school or governmental role in a student religious meeting to a nonparticipatory one, is identical to one of the essential criteria that this Article prescribes as a prerequisite for an open

B. *Case Law Interpreting Act*

Only two cases asserting claims under the Equal Access Act have to date resulted in reported judicial rulings. In addition, the author has obtained unreported slip opinions in two other cases which allege claims under the Act. Of these four cases, one involved a teachers' group in a primary school, thus clearly falling outside the Act's scope.[191] In contrast, the other three cases, two of which involved student religious groups, did raise colorable claims under the Act.[192]

1. *Student Coalition for Peace v. Lower Merion School District*

The *Merion*[193] case graphically illustrates the Act's expansion of students' free speech access rights beyond those which the

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student forum. This condition is designed to counter reasonable student perceptions that the school endorses a religious group which meets in the forum. *See supra* text accompanying notes 150–53.

The fourth requirement—that the meetings not materially and substantially interfere with the school's educational activities—simply paraphrases the definition in *Tinker* of the outer boundary of public school students' free speech rights, consistent with both the school's educational mission and the free speech rights of others within the school. *See Tinker*, 393 U.S. at 509; *see supra* text accompanying note 186.

Finally, the fifth condition—which prohibits nonschool personnel from directing or regularly attending student group meetings, *see supra* text accompanying note 187—follows from the fundamental requirement that any meetings must be voluntarily initiated and controlled by students as a precondition for the existence of a forum giving rise to student free speech or associational rights. *See supra* text accompanying note 187.

The Act contains several additional provisions beyond the ones that have been discussed in the text. However, these remaining provisions are less significant for purposes of the present analysis. Rather than prescribing conditions under which covered schools must grant equal access, most of these other provisions disclaim congressional intent to authorize schools to take various actions that would raise problems under either the Establishment Clause (for example, requiring any person to participate in prayer or other religious activity; *see* 20 U.S.C. § 4071(d)(2) (Supp. 1985)), or the Free Speech Clause (for example, limiting the rights of student groups that are not of a specified numerical size; *see* 20 U.S.C. § 4071(d)(6) (Supp. 1985)).

[191] May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986).

[192] Student Coalition for Peace v. Lower Merion School Dist., 633 F. Supp 1040 (E.D. Pa. 1986); Mergens v. Bd. of Educ. of Westside Community Schools, No. CV 85-0-426 (D. Neb. May 23, 1985); Amidei v. Spring Branch Indep. School Dist., No. H-84-4673 (S.D. Tex. July 1, 1985). These cases are discussed in order of the amount of information available about the rationales for the judicial rulings therein. The first case discussed has resulted in four reported decisions, including one by a circuit court of appeals; the second case discussed has resulted in one slip opinion explaining the denial of plaintiffs' motion for preliminary injunction; and the third case discussed resulted in an order of final judgment unaccompanied by any memorandum or opinion.

[193] This lawsuit has generated four reported decisions: 596 F. Supp. 169 (E.D. Pa. 1984) (denying plaintiff's motion for permanent injunction, which was based on Free Speech Clause claim); 618 F. Supp. 53 (E.D. Pa. 1985) (denying plaintiff's motion for

Supreme Court currently recognizes as a matter of constitutional principles. When premised on the Free Speech Clause, the students' access claim was denied.[194] However, when that very same claim was premised on the Equal Access Act, it was granted.[195]

Although the *Merion* litigation concerned a request for equal access by a nonreligious student group, it spawned judicial rulings about the Act's scope which would pertain as well to access claims by student religious groups. The Student Coalition for Peace (SCP), an organization of high school students advocating a nuclear freeze, sought access to various areas on the school premises to conduct a "peace exposition." Outside speakers were to participate, and the public at large was to be invited.[196] When the school denied this request, SCP commenced a lawsuit, asserting that the areas in question were limited public forums, and hence that the school's denial violated SCP's free speech rights.

The district court rejected SCP's claims because it found that the school had not designated any of the disputed areas as limited public forums for "political" speech, as the court characterized SCP's contemplated peace exposition. Although the district court recognized that the school had previously allowed two of these areas to be used for several events lacking school sponsorship, the court characterized such events as "primarily athletic and for the purpose of raising funds for a public charity," and thus distinguishable from SCP's planned peace exposition.[197] The court therefore deemed these areas to be nonpublic forums, and hence subject to any access restrictions which are reasonable and not designed to suppress particular viewpoints. The district court concluded that the school's denial of SCP's

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reconsideration of previous decision, based upon subsequently enacted Equal Access Act); 776 F.2d 431 (3d Cir. 1985) (affirming district court's rejection of plaintiff's constitutional claim, but vacating and remanding its judgment regarding plaintiff's statutory claim); and 633 F. Supp. 1040 (E.D. Pa. 1986) (opinion following circuit court's remand, granting plaintiff's request for permanent injunction, based on Equal Access Act).

[194] 596 F. Supp. 169 (E.D. Pa. 1984).

[195] 633 F. Supp. at 1043.

[196] 596 F. Supp. at 170–71.

[197] *Id.* at 174. The nonschool-sponsored events which the school had previously permitted on its premises included: a "Special Olympics" for handicapped children sponsored by the Jaycees; a "Bike Hike" for mentally handicapped citizens; the American Cancer Society's "Jog-A-Thon"; and a student-organized "Volleyball Marathon" (a charitable event in which participants solicited pledges from the community for each hour of volleyball played). *Id.* at 173.

access request complied with the foregoing standards because the school's "desire[] to keep the podium of politics off school grounds" was reasonable, and because SCP had not produced any evidence that the school sought to censor it because of its viewpoint.[198]

Following the enactment of the Equal Access Act, SCP made a motion for reconsideration of the district court's ruling. SCP contended that, because the school had permitted other student-initiated, noncurriculum related activities to occur on an athletic field and in a gymnasium, the school had made these areas into limited open forums under the Act.[199] In denying SCP's motion, the district court emphasized that SCP planned to invite members of the general public to its peace exposition, and cited legislative history indicating that the Act did not expand the access rights of nonstudents. Consequently, the district court concluded that the Act was

> not applicable to the narrow question raised by the plaintiff, namely, whether or not a school district may deny access to its facilities to a noncurriculum related student group which intends to invite nonstudents/the general public . . . where it has not been a policy or practice of the school to indiscriminately permit the use of the facilities in question . . . for similar purposes.[200]

Although the Third Circuit affirmed the district court's rulings on SCP's constitutional claims, it vacated and remanded the district court's judgment regarding SCP's Equal Access Act claims.[201] The appellate court rejected the school's contention that the Act does not apply to activities involving nonstudents, concluding that "student groups wishing to invite nonstudents onto school property are protected by the Act if the school's limited open forum encompasses nonstudent participation in student events. . . ."[202] However, the Third Circuit expressed no opinion concerning whether the Merion school district had created this type of limited open forum or whether it had created any limited open forum at all. Rather, it noted that the trial had occurred before the Act's effective date, thus necessarily failing to generate any evidence concerning what the Circuit Court

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[198] *Id.* at 174–75.
[199] 618 F. Supp. at 55.
[200] *Id.* at 60.
[201] 776 F.2d at 443.
[202] *Id.* at 442.

deemed the material issue on this point: namely, whether the school had evinced its intent to create a limited open forum *after* the Act's effective date.[203]

On remand, the school renewed the contention which the district court had previously accepted in rejecting SCP's constitutional claim: that its past grants of access for charitable or athletic events did not create a forum to which SCP had an access right for a political event. Although the district court reiterated its view that SCP had no constitutionally-based right of access, it accepted SCP's contention that "the Equal Access Act expands First Amendment rights to free speech."[204] While constitutional authorities permitted a school to designate a limited forum for nonpolitical speech only, the district court explained, the Act prohibits it from doing so.[205] SCP introduced evidence that, after the Equal Access Act's effective date, the school had permitted a student-initiated noncurriculum related event, to which the public was invited (specifically, a charitable volleyball marathon),[206] to take place in the gymnasium during noninstructional time. Accordingly, the district court ruled that SCP had satisfied its burden of proving that the school had made the gymnasium into a limited open forum to which SCP's peace exposition should be granted equal access.[207]

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[203] *Id.* at 442–43. The court explained:

> We read the Act to give affected school districts a choice: either to create a limited open forum open to all student groups on an equal basis, or to refuse access to all noncurricular student groups. For this choice to be a real one, we think schools must be given the opportunity to choose with full knowledge of the consequences of each alternative. We believe it would be inconsistent with this principle for us to find that the appellees here had created a limited open forum under the Act before the Act's adoption, and thus before the choice could be a meaningful one.

Id. at 442.

[204] 633 F. Supp. at 1043.

[205] *Id.* The court asserted that

> [a]t first blush it appears that Congress was attempting to expand the application of the Supreme Court's decision in *Widmar v. Vincent* . . . rather than expand the concept of a limited public forum when it drafted the Equal Access Act. However, after further analysis, I find Congress sought also to prohibit the denial of noncurricular related student groups' meetings on the basis of subject matter, namely as to religious, political, philosophical or other content of the speech. . . . Thus, I find that Congress did, by enacting the Equal Access Act, afford students the right to use school property beyond the constitutional guarantees in the first amendment.

Id. (footnote omitted).

[206] *See* 596 F. Supp. at 173.

[207] 633 F. Supp. at 1042–43. As evidenced by its position in the litigation, the Lower Merion School District had not intended to create a forum open to all student religious, political, philosophical and other speech. The district court's ruling on remand therefore underscores another significant distinction between the Free Speech Clause standards

2. *Mergens v. Board of Education of Westside Community Schools*

Although the *Mergens*[208] case has not yet resulted in a final judgment,[209] the district court's opinion denying plaintiff's motion for a preliminary injunction contains some discussion of the Equal Access Act.[210] Especially because there are as yet so few judicial discussions of any aspect of the Act, this opinion is noteworthy.

In early 1985, some students at Westside High School (a public secondary school that received federal funds) sought permission to form a Christian fellowship which would meet on school premises on the same terms as other student groups. When the school denied this permission, the students brought a lawsuit, contending that the school had violated the Equal Access Act as well as the First Amendment. The school authorities contended that the Equal Access Act did not apply to Westside High School, because the school had no limited open forum sufficient to trigger the Act's requirements. The school authorities further argued that, if the Act was deemed applicable to Westside High School and required it to grant access to the proposed Christian fellowship, the Act would violate the Establishment Clause.

The central issue concerning the Act's applicability to Westside High School was whether any of the thirty-one student organizations already permitted to meet at the school were "non-

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concerning subject matter restrictions on limited public forums and the Act's standards (aside from the government's reduced discretion, under the Act, to impose such restrictions). Under recent constitutional precedents, evidence that the government does not intend to grant access to certain speakers or subject matter would preclude a conclusion that any forum had been created which did include such speakers or subject matter; under the Act, in contrast, a "limited open forum" is deemed to have been created whenever the government has taken certain actions, regardless of its intent. *See infra* note 261 & accompanying text.

[208] No. CV 85-0-426 (D. Neb. May 23, 1985), which is pending in the U.S. District Court for the District of Nebraska. The author gratefully acknowledges the assistance of Douglas Veith, attorney for plaintiffs, in providing copies of pleadings and other papers which have been filed in the *Mergens* case (on file at HARV. J. ON LEGIS.).

[209] At the time of printing, the trial was scheduled to commence in late March or early April, 1986. Telephone conversation with law clerk to Douglas Veith, attorney for plaintiffs (Dec. 4, 1986).

[210] No. CV 85-0-426, slip op. (D. Neb. May 23, 1985). Pursuant to an order dated November 6, 1985, the court also denied plaintiffs' motion for summary judgment. No. CV 85-0-426, Order Denying Plaintiff's Motion for Summary Judgment (D. Neb. Nov. 6, 1985). However, this ruling was not accompanied by any memorandum or opinion addressing the issues in the case.

curriculum related,"[211] as required for a finding that the school had created a "limited open forum" under the Act.[212] The court noted that some of the student organizations, for example, a volunteer service organization associated with the Rotary Club of America, or a club for students interested in skin and scuba diving, had only a "tenuous" relationship to the school's "actual curriculum," although they could "definitely be linked to the school's educational mission."[213] The court indicated that a final determination of whether any such clubs ought to be classified as "noncurriculum related" should be postponed pending submission of evidence at trial. However, the court expressed its preliminary conclusion that these clubs were noncurriculum related and that therefore the school was subject to the Act's requirements.[214]

The court nonetheless declined to rule that plaintiffs were likely to prevail on the merits. It concluded that serious questions were raised by the schools' contention that construing the Act to mandate access for the proposed Christian fellowship would violate the Establishment Clause. The court based this conclusion on its perception of the danger that granting access to plaintiffs' club could create a reasonable appearance of school support for religion. It explained that this danger arose from several factors which distinguish the typical high school student forum from the university student forum at issue in *Widmar*.[215] Consistent with this posited typical high school situation, the

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[211] *Mergens*, slip op. at 6–7.

[212] *See supra* text accompanying notes 171 & 175–78.

[213] *Mergens*, slip op. at 6.

[214] *Id.* at 6–7. For purposes of ruling on the preliminary injunction motion, the court did not discuss any other reason why the Act might not govern student group meetings at Westside High School. However, in an affidavit submitted in opposition to plaintiffs' subsequently filed summary judgment motion, the Westside High principal made certain allegations which could raise other problems concerning the Act's applicability: that each student club at Westside High is required to be sponsored by a member of the faculty or administration; that each sponsor is obligated to direct, supervise, and control the activities of the sponsored club; and that sponsorship of student clubs is a factor in determining faculty compensation. Affidavit of James E. Findley, Principal of Westside High School, sworn October 28, 1985, at 2 ¶ 9, Mergens v. Bd. of Educ. of Westside Community Schools (D. Neb. May 23, 1985) (No. CV 85-0-426) (on file at HARV. J. ON LEGIS.).

If proven at trial, these facts could lead to the conclusion that Westside High School is not covered by the Act because it has not met the requirements for a "limited open forum"; the Act's provisions at least arguably prohibit school sponsorship of any meeting (20 U.S.C. § 4071(c)(2) (Supp. 1985)), or teacher participation in any religious club meeting (20 U.S.C. § 4071(c)(3) (Supp. 1985)), or the expenditure of public funds beyond the incidental cost of providing the space for student-initiated meetings (20 U.S.C. § 4071(d)(3) (Supp. 1985)). *See supra* text accompanying notes 184–90.

[215] *Mergens*, slip op. at 10.

court noted, Westside High School sought to keep its student clubs "within a reasonably close relationship to the school's mission," and none of the extant clubs were deemed "controversial or potentially divisive in nature."[216]

3. *Amidei v. Spring Branch Independent School District*

The *Amidei*[217] case is the only one of the three discussed in this section that concerns the rights of student religious groups under the Equal Access Act and has been litigated to a conclusion.[218] Without issuing any memorandum or opinion explaining its ruling, the district court entered an order of final judgment in favor of public high school students seeking to conduct religious meetings under the Act. The court permanently enjoined the school district from refusing to permit the student religious group to meet at a high school "during non-instructional time (as defined in the Equal Access Act) at a time any other student club regularly meets."[219] The school district did not appeal from this judgment.

Just as the *Merion* ruling demonstrates the extent to which the Act expands the protection of free speech interests above that accorded by constitutionally-based judicial decisions, so the *Amidei* ruling demonstrates the extent to which the Act contracts the protection of nonestablishment concerns, below

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[216] *Id.* The court also noted that an imprimatur of school approval could potentially be bestowed upon plaintiff Christian fellowship by virtue of the fact that such fellowship would presumably—like other student clubs—be officially recognized and seek to use school media. *Id.* at 11.

The *Mergens* preliminary injunction opinion highlights the discrepancy between the Act's criteria for permitting student religious clubs to meet in public schools and the corresponding Establishment Clause criteria. The Act requires public schools to grant equal access to any religious club as long as at least one other "noncurriculum related" club is given the opportunity to meet. But the term "noncurriculum related" is quite broad, encompassing even clubs that are indirectly related to the curriculum. *See supra* text accompanying notes 175–78. Therefore, even if the only other club or clubs meeting at a school were related to the curriculum—albeit indirectly—a religious club would still have to be granted equal access. Under such circumstances, noting that other student groups were indirectly related to the curriculum, reasonable students might well infer that the school endorsed all student groups meeting at school, including the religious group. This risk was expressly recognized by the *Mergens* court. *Mergens*, slip op. at 11. *See infra* text accompanying note 244.

[217] No. H-84-4673 (S.D. Tex. July 1, 1985). The author gratefully acknowledges the assistance of Harvey G. Brown, Jr. (attorney for plaintiffs), Jeffrey A. Davis (attorney for defendants), and Cathleen A. Farris (secretary to Mr. Davis) in providing copies of the pleadings and other papers which have been filed in the *Amidei* case.

[218] Just as the *Amidei* decision is unreported, so too there may be other unreported decisions which also adjudicate Equal Acess Act claims by student religious groups.

[219] *Amidei*, slip. op. at 1–2.

that accorded by such decisions. The *Amidei* federal district court upheld the equal access claim of a student religious group despite the fact that all four circuit courts of appeals which had considered similar claims had rejected them on Establishment Clause grounds.[220] Moreover, the district court which rendered the *Amidei* decision is within a circuit whose court of appeals had indicated support for a categorical exclusion of student religious groups from public high schools.[221]

Although the *Amidei* court did not issue any written rationale for its ruling, that rationale can be inferred from the parties' written submissions.[222] The material facts involved in *Amidei* were essentially identical to those involved in *Mergens*. A group of students sought to form a "Christian Club" which would meet at Westchester Senior High School one evening per week, during a period which the school had set aside for meetings of "administratively approved" clubs. To receive such approval from the school's principal, a club had to have a faculty sponsor, and had to be "serious, worthwhile" and permissible under state law.[223] The responsibility of each club's sponsoring faculty member, who was expected to attend all meetings, was to ensure the proper use of the school facilities, to supervise the students, and to enforce school rules.[224]

When the school denied plaintiffs' request for administrative approval, apparently on Establishment Clause grounds, plaintiffs instituted a lawsuit asserting that this denial violated both the Equal Access Act and the Constitution. The school district responded that the Act was not applicable, because Westchester High School had not created a limited open forum, and that if

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[220] *See supra* text accompanying notes 69–87.

[221] This indication was contained in the *Lubbock* case discussed *supra* text accompanying notes 72–74.

[222] The parties submitted a lengthy and detailed Stipulation of Facts, and then made cross motions for summary judgment based upon these facts as well as several affidavits. The parties also filed several legal memoranda. (On file at the HARV. J. ON LEGIS.).

[223] Affidavit of Frazier Dealy, Building Principal at Westchester Senior High School, sworn April 25, 1985 at 4, Amidei v. Spring Branch Indep. School Dist. (in support of Defendant's Supplement to Response to Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Final Summary Judgment).

[224] Stipulation of Facts, ¶ 44, filed March 28, 1985, Amidei v. Spring Branch Indep. School Dist. *But see* Affidavit of Frazier Dealy, *supra* note 223, at 4 (both the school district and Westchester High School required each teacher sponsor "to actively promote, supervise, lead and participate in student club activities."). In any event, the plaintiffs offered to forego any participation in their meetings by the faculty sponsor and also to have nonfaculty sponsors who were not ministers or other religious leaders. Stipulation of Facts, ¶¶ 72(a), (g), (o), (p), (q), (w), (x), (z).

the Act were deemed applicable, it violated the Establishment Clause.[225]

The central issue concerning the Act's applicability in *Amidei*, as in *Mergens*, was whether any of the clubs which had previously been granted access fit within the "noncurriculum related" concept. As in *Mergens*, the *Amidei* situation involved no clubs that discussed religion, politics, or philosophy, and none that could be deemed potentially controversial or divisive. Moreover, as in *Mergens*, the clubs involved in *Amidei* could all be viewed as at least indirectly connected to the curriculum.[226] Nevertheless, just as the *Mergens* court indicated it probably would do, the *Amidei* court definitively ruled that at least one noncurriculum related club had been given the opportunity to meet at the school during noninstructional time, therefore triggering the Act's applicability.[227]

The factual similarity between *Mergens* and *Amidei* pertains not only to the issue of whether a limited open forum existed, but also to the issue of whether a student religious group meeting would violate the Establishment Clause. The facts in *Amidei* closely paralleled those particular facts in *Mergens* which the *Mergens* court had cited as raising Establishment Clause problems: the school officials in *Amidei* also "maintain[ed] close supervision over student organizations"; the school in *Amidei* also attempted "to keep its student clubs within a reasonably close relationship to the school's administration"; and none of the extant clubs in the *Amidei* situation were "controversial or potentially divisive in nature."[228] Notwithstanding these facts, which had deterred the *Mergens* court from concluding that the student religious group would be likely to prevail on the Establishment Clause issue, the *Amidei* court concluded that student

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[225] Plaintiff's Motion for Partial Summary Judgment, undated; Response to Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Final Summary Judgment, at 4, 9, filed April 9, 1985, Amidei v. Spring Branch Indep. School Dist.

[226] The examples of Westchester High School's clubs which plaintiff characterized as "noncurriculum related," to support their assertion that the school had created a limited open forum under the Act, were the following: "Senior Girls," "Senior Boys," and "Run Through" (all of which focused on boosting school spirits in connection with football games), "Junior Achievement," and "Students Against Drunk Driving." Stipulation of Facts, ¶¶ 50, 51, 53, 54, 55.

[227] The school district did not press the argument that the Act could be deemed inapplicable for the separate reason that faculty sponsors participated in student club meetings. *See* Stipulation of Facts, ¶ 44. It is unclear from the parties' submissions whether this participation was limited to custodial supervision. *See supra* note 224.

[228] *See also supra* text accompanying notes 215–16; Affidavit of Frazier Dealy, *supra* note 223, at 2–3.

religious group meetings would not violate the Establishment Clause.

Absent any opinion directly stating the judge's reason for concluding that the Christian Club meetings would comply with the Establishment Clause, it must be presumed that those reasons include at least some that were advanced in plaintiffs' legal memoranda. In support of their position that Christian Club meetings in Westchester High School's limited open forum would not be perceived as school-endorsed, the plaintiffs submitted as evidence the fact that the plaintiffs offered to take various steps, which departed from Westchester High School's normal policies, to minimize the risk of reasonable perceptions that the school promoted their Christian Club.[229] The plaintiffs submitted the affidavit of a child psychiatrist, who had treated over 2500 high school students, and set out her opinions that the majority of high school students are sufficiently mature to understand that an equal access policy does not place the government's imprimatur upon religion, and that students would perceive the school district's refusal to permit plaintiffs to meet as hostility toward religion.[230] The plaintiffs also submitted affidavits of individual students at Westchester High School stating that they would not view the school's equal access grant to the Christian Club as school endorsement of religion, but that they would view denial of equal access as the school's hostility toward religion.[231]

Similar evidence had been introduced by the plaintiffs in the *Mergens* case,[232] but had not persuaded the court that the plaintiffs were likely to overcome the school district's Establishment Clause defense. The similarity between the material facts and evidence in *Mergens* and *Amidei*, juxtaposed with the differing

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[229] The plaintiffs made the following offers: to forego use of the school media and inclusion in the school yearbook; to post a disclaimer outside the room where they met; to forego attendance by any teacher or school employee, or to have two different school personnel attend the meetings on a rotating basis to minimize the likelihood that such attendance could be construed as sponsorship; and to have present at their meetings, solely for custodial purposes, an adult who is neither employed by the school district nor a minister or other religious leader. Stipulation of Facts, ¶¶ 72(a)–(z).

[230] Affidavit of Juanita T. Hart, M.D., sworn March 5, 1985, Amidei v. Spring Branch Indep. School Dist.

[231] *See, e.g.*, Affidavit of Steven Morris, sworn March 26, 1985, Amidei v. Spring Branch Indep. School Dist.; Affidavit of Steve Ringer, sworn March 8, 1985, Amidei v. Spring Branch Indep. School Dist.; Affidavit of Courtney Green, sworn March 8, 1985, Amidei v. Spring Branch Indep. School Dist.

[232] *See* Plaintiff's Statement of Material Facts at ¶ 10, Mergens v. Bd. of Educ. of Westside Community Schools (D. Neb. May 23, 1985) (No. CV 85-0-426).

judicial rulings in these two cases, underscores the ambiguous state of current law concerning the Act's constitutionality.

C. *Comparison Between Act and Proposed Constitutionally-Based Standards*

As indicated by both the language and the operation of the Equal Access Act, the Act is more protective of free speech than of nonestablishment values. Moreover, the Act is more protective of free speech values, but less protective of nonestablishment values, than the Court has been. Accordingly, the distinctions between the constitutionally-based analytical approach to equal access issues proposed in this Article, and the one set forth in the Equal Access Act, fall into two basic categories.

On the one hand, some of these distinctions result in the Act's imposing fewer limitations upon equal access grants than are required by constitutional precepts—specifically, those relating to nonestablishment concerns. With respect to this first category of distinctions, an equal access grant may fully comply with the Act, yet nevertheless violate the Establishment Clause. On the other hand, some distinctions between the constitutionally-derived requirements and the ones prescribed in the Act result in the Act's imposing upon schools additional obligations to grant equal access, beyond those they bear under constitutional norms—specifically, those relating to free speech concerns. With respect to this second category of distinctions, a school's denial of equal access may fully comply with Free Speech Clause standards, yet nevertheless violate the Act. These two categories of distinctions are discussed in turn below.

1. Some Grants of Equal Access May Comply with the Act but Violate the Establishment Clause

There is a major, overarching distinction between the constitutionally-grounded approach to equal access problems that is proposed in this Article and the approach embodied in the Act. In accordance with the constitutional law principles from which it is derived, the Article's recommended analytical framework gives the equal access opponent the opportunity to overcome any prima facie showing that a school has created a student

forum which gives rise to an equal access right. This prima facie showing can be overcome by demonstrating a countervailing compelling state interest—that an equal access grant would violate the Establishment Clause.[233] In contrast, the Act provides no opportunity to overcome an access claim by showing countervailing establishment (or other compelling) concerns. The Act thus creates an irrebuttable presumption that compliance with its specifications for a limited open forum necessarily eliminates any potential Establishment Clause problems which could result from student religious meetings on public school premises.

This Article has delineated a number of specific factors that are relevant in determining the constitutionality of an equal access grant to a student religious group. Consistent with applicable constitutional authorities, this Article recognizes that the dispositive issue must remain whether, under all the facts and circumstances involved in any particular case, such an access grant would reasonably be perceived as conveying the school's approval of religion.[234] A court's analysis of this ultimate constitutional issue should be facilitated by focusing on the specific factors articulated in this Article. However, an assessment of these factors, as well as any other factors, cannot displace the court's determination of the ultimate underlying issue. A school's compliance with the specified criteria for creating an open student forum subject to the recommended content-neutral restrictions should minimize the risk that reasonable students would perceive the school's equal access grant as conveying its approval of religion. Nevertheless, this risk cannot be entirely eliminated even by compliance with the proposed conditions.

For the foregoing reasons, it is submitted that no list of particular limitations upon an equal access grant to a student religious group could possibly be devised which would always prevent reasonable students from perceiving the grant as conveying the school's approval of religion.[235] But even putting aside the

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[233] *See supra* text accompanying notes 149–53.

[234] *See supra* note 28; *see also* text following note 139 & text accompanying notes 154–61.

[235] *See supra* notes 142–44; text accompanying note 136. *See also* YALE Note, *supra* note 23, at 206–07 n.82:

> Because of the delicate balance between free exercise and free speech rights on one hand, and the Establishment Clause on the other, decisions on religious issues often turn on the unique facts of the case . . . . Thus the Act may be

hypothetical impossibility of this task, the particular limitations upon equal access grants to student religious groups which are specified in the Equal Access Act clearly leave open a substantial possibility that reasonable students would perceive at least some such grants as conveying the school's approval of religion. Consequently, an equal access grant to a student religious group could fully comply with the Act, yet still violate the Establishment Clause. The following discussion outlines the most significant respects in which the Act's criteria for permissible equal access grants fail to foreclose the possibility that such grants would violate the Establishment Clause.

As outlined above,[236] the Act requires a school within its scope to grant equal access to all student groups regardless of their subject matter, including student religious groups, so long as the school has granted an "opportunity for" at least one "noncurriculum related student group to meet on school premises during noninstructional time."[237] The Act can be read as prescribing no additional preconditions for the creation of equal access rights.

The Act can also be read as prescribing the following additional preconditions for the creation of equal access rights: any meeting must be voluntary and student-initiated; no meeting may be sponsored by the school or the government; school or government employees or agents may be present at any religious meeting only in a nonparticipatory capacity; no meeting may materially and substantially interfere with the school's educational activities; and nonschool persons may not direct, conduct, control or regularly attend any activities of the student groups.[238] Even assuming the debatable proposition that the Act makes the foregoing additional conditions mandatory rather than discretionary,[239] a school's compliance with all of them would still not necessarily prevent reasonable students from viewing an equal access grant to a student religious group as conveying the school's approval of religion. This conclusion can be substantiated by considering the additional prerequisites, beyond those

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> seen as encroaching . . . upon the judiciary's proper role in interpreting the constitutional religion clauses.

Id.

[236] *See supra* text accompanying notes 170–71.

[237] 20 U.S.C. § 4071(b) (Supp. 1985).

[238] 20 U.S.C. §§ 4071(c)(1)–(c)(5) (Supp. 1985).

[239] *See supra* text accompanying notes 184–90.

set forth in the Act, which the present Article has recommended for any such grant to comply with the Establishment Clause.

First, this Article recommends that no student forum should be deemed to exist, sufficient to entitle a student religious group to access, unless it was created for a secular purpose. Absent compliance with this requirement, an equal access grant to a student religious group would violate the Establishment Clause.[240] In contrast, under the Act, a school could create a limited open forum specifically at the behest of one or more student religious groups. Nothing in the Act would prevent a school from designating such a forum for the express purpose of permitting one or more student religious groups to meet on school premises, a scenario that would surely give rise to serious Establishment Clause concerns.

Second, also reflecting constitutional dictates, the Article proposes that a student religious group will not have an equal access right to a student forum unless that forum is open to a sufficiently broad range of subjects to include religion without singling it out. Unless a school complies with this requirement, reasonable students could infer that the school's equal access grant to a student religious group manifests its approval of religion.[241] Under the Act, in contrast, a limited open forum will be deemed to exist, obligating the school to allow student religious groups to meet on its premises, as long as the school has done so little as to grant an opportunity to meet to a single noncurriculum related student group.[242] Indeed, as previously noted, that single group could itself be religious, thus creating a significant danger of reasonably inferred school support for religion.

Even if the forum is not initially opened expressly for the purpose of accommodating a religious group, the Act's failure to require subject matter breadth still engenders substantial risks of Establishment Clause violations. The Act's legislative history indicates that the term "noncurriculum related" is broadly construed, to include all groups except those which are essentially direct extensions of the school's curriculum.[243] Therefore, a school's obligation to allow religious groups to meet could be triggered merely by its permitting one nonreligious student

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[240] *See supra* text accompanying note 144.
[241] *See supra* text accompanying notes 146–48.
[242] 20 U.S.C. § 4071(b) (Supp. 1985).
[243] *See supra* text accompanying notes 175–78.

group to meet to discuss a subject related to the school's curriculum (albeit indirectly). Such a scenario would entail a significant danger that reasonable students would view the equal access grant to the religious group as conveying the school's endorsement of religion, for two major reasons. First, because the other group(s) utilizing the student forum may discuss subjects indirectly related to the curriculum, a reasonable inference could arise that all student groups are essentially indirect extensions of the curriculum, and hence school supported.[244] Second, because the other group(s) utilizing the student forum may be few in number and small in size,[245] the school's creation of the forum could reasonably be perceived as having the purpose or the effect of assisting the student religious groups.[246]

Yet another distinction between the constitutionally-grounded prerequisites for equal access proposed in this Article and the prerequisites specified in the Act leads to additional situations where equal access grants could comply with the Act but nevertheless violate the Establishment Clause. This distinction concerns the content-neutral time, place, and manner regulations that the Article recommends be imposed before student religious groups are entitled to equal access.[247] The Act at least arguably requires schools to impose two of these regulations: that student group meetings be scheduled outside the compulsory attendance period,[248] and that the role of any adult participant in student

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[244] This specific danger has already been recognized in the *Mergens* lawsuit, a case decided under the Equal Access Act, discussed *supra* text accompanying notes 208–16. *See Mergens*, slip op. at 10–11.

[245] The Act could be triggered by a request to meet made by a single group consisting of only two students. *See* 20 U.S.C. § 4071(d)(6) (Supp. 1985) ("Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof . . . to limit the rights of groups of students which are not of a specified numerical size.").

[246] Under the Act, once a school is deemed to have created a limited open forum, it would be required to grant equal access to all noncurriculum related student groups, regardless of subject, as a matter of policy. However, this policy obligation does not assure that, in any particular situation, a school's forum will actually include student groups discussing diverse political, philosophical, religious, or other subjects. The Act's exclusive focus on a school's *policy* of openness to diverse subjects, and its complete disregard for the *actual* diversity, leads to situations where a school may comply with the Act yet still violate the Establishment Clause. *See infra* note 252. *See also infra* text accompanying note 251.

[247] *See supra* text accompanying notes 149–53.

[248] The Act provides that a limited open forum is created when student groups meet during "noninstructional time," 20 U.S.C. § 4071(b) (Supp. 1985), which is defined in 20 U.S.C. § 4072(4) (Supp. 1985) as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." As discussed *supra* at text accompanying notes 172–74, it is not completely clear that this term refers only to

group meetings be confined to a custodial one.[249] However, the Act clearly does not require schools to impose the remaining regulation. Specifically, the Act does not precondition equal access upon a school's making of disclaimers or explanatory statements to assure that students understand its neutral posture.

A school's failure to comply with this final recommended condition (as well as its failure to comply with the other two recommended conditions) would not necessarily cause an equal access grant to violate the Establishment Clause; it would simply increase the likelihood of such a violation.[250] What is disturbing about the Act, then, is not its failure to make this condition an essential prerequisite for the finding of a limited open forum or the granting of equal access to a student religious group. Rather, the Act's critical shortcoming in this regard is its failure to take the school's disclaimer policies into account, to any extent whatsoever, as relevant to the legal propriety of equal access grants. So far as the Act is concerned, a school could fail to give students any explanation of the Equal Access

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times before and after the compulsory attendance period, but the weight of legislative history suggests that it does.

Even if the Act is interpreted to permit student meetings only before or after regular classes, it clearly does not require that the meetings occur only at times clearly separated from the compulsory attendance period, as this Article urges *supra* at text accompanying note 151. Meetings of a student religious group immediately before or after the normal school day are more likely to cause reasonable student perceptions of school approval of religion than are meetings at more clearly separated times. Therefore, a court should carefully scrutinize any student religious group meeting which occurs, for example, immediately before the school day, to determine whether reasonable students infer that the school supports religion. If so, these meetings should be struck down under the Establishment Clause, notwithstanding their compliance with the Equal Access Act. *See* Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1405 n.14 (10th Cir. 1985) (where student religious group met shortly before school day began and was observed by other students arriving for classes, reasonable perceptions could arise that school supported religious group).

[249] *See* 20 U.S.C. § 4071(c)(5) (Supp. 1985) (limiting sponsorship of any meeting by school or government, or their agents or employees) and 20 U.S.C. § 4072(2) (Supp. 1985) (defining sponsorship as including participation in meeting, but not attendance at meeting "for custodial purposes"). As discussed *supra* at text accompanying notes 184–90, however, it is unclear whether this limitation is mandatory or discretionary.

The Act contains another provision concerning the role of school employees in student group meetings, which could potentially lead to Establishment Clause problems. In 20 U.S.C. § 4071(d)(4) (Supp. 1985), the Act provides that it shall not be construed "to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee." If a school implements this provision by assigning to student religious groups adult supervisors whose beliefs accord with those of the students, a risk is created that reasonable students would perceive the school (through its designated supervisors) as endorsing the students' religious beliefs.

[250] *See* Strossen, *supra* note 22.

Act or the constitutional concepts it implicates. Such a failure would increase the risk that reasonable students would perceive a student religious group meeting as conveying the school's approval of religion. Yet it would have no legal impact under the Act.

The Equal Access Act's failure to take account of any other factors besides those it lists further compounds the likelihood that an equal access grant to a student religious group could comply with the Act but violate the Establishment Clause. Under this Article's constitutionally-based analysis, in contrast, any other factors which could indicate reasonable student perceptions that the school endorses religion may be cited to overcome a prima facie equal access right. For example, one such factor would include the relative dominance of student religious groups in the forum. As is the case regarding explanatory statements, these other factors are not absolutely determinative of the constitutional propriety of an equal access grant. For example, it would remain possible, although less likely, for students not to perceive an equal access grant as conveying a school's endorsement of religion, even if religious groups predominate within the forum.[251] Again, the Act's critical flaw is not its failure to treat such factors as controlling, but rather its failure to treat them as having any significance whatsoever.[252]

Another important category of situations where the Act purports to authorize or to require equal access grants which would violate the Constitution results from the Act's application to "secondary schools."[253] Some state laws define "secondary schools" to include junior high or middle schools, with the result

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[251] *See supra* note 161.

[252] In upholding the student religious group's equal access claim in *Widmar*, the Supreme Court emphasized the large number and diversity of student groups meeting in the university forum, and the relatively insignificant role that the single religious group would play in this context. 454 U.S. 263, 274–75. Moreover, the Court expressly indicated that if at some future time these factors should shift, causing student religious groups to predominate in the actual use of the forum, then Establishment Clause concerns might preclude the religious groups from continuing to meet. *See supra* note 161. If the relative number of student religious groups meeting in a university forum could cause university students to perceive the university as endorsing religion, a fortiori, the relative number of student religious groups meeting in a high school forum could cause reasonable high school students to perceive the high school as endorsing religion. *See supra* text accompanying note 68. Therefore, the Act's complete disregard of this predominance factor could lead to situations in which it would sanction an equal access grant that would violate constitutional norms. For example, as noted *supra* at text accompanying notes 241–43, the Act would authorize a school to maintain a forum in which all the student groups are religious.

[253] *See* 20 U.S.C. §§ 4071(a), 4072(1) (Supp. 1985).

that their students could be as young as eleven years old.[254] Therefore, the Act treats these younger students as per se capable of distinguishing between a school's neutral provision of a forum and its partisan endorsement of student speech within the forum.[255] In contrast, two circuit courts of appeals have ruled that even the older students in senior high schools are per se *incapable* of making this distinction,[256] and the Supreme Court's most recent discussion of student free speech rights reflects a presumption that high school students are inherently immature, impressionable, and hence easily harmed by speech which is potentially controversial or upsetting.[257]

In particular cases, evidence may well demonstrate that reasonable younger students cannot appreciate the public forum concept, and that they would consequently view their schools' equal access grants to student religious groups as manifesting the schools' support for religion. In such cases, any equal access grant would violate the Establishment Clause, notwithstanding its compliance with the Equal Access Act.

2. Some Denials of Equal Access May Comply with the Free Speech Clause but Violate the Act

In one significant respect, the distinctions between constitutionally-grounded equal access standards and the statutory standards contained in the Act result in the latter imposing increased obligations upon schools. Specifically, viewed from the schools' perspective, the Act reduces their discretion to define the subject matter encompassed by a student forum, which they would enjoy under recent Supreme Court precedents concerning the

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[254] *See* AJC GUIDE, *supra* note 166, app. A, at 25–27 (New York and South Carolina are examples of states whose laws define "secondary school" as including grades as low as the seventh).

[255] The Act's legislative history suggests that its sponsors actually intended to limit it to high schools. *See, e.g.*, 130 CONG. REC. S8347 (daily ed. June 27, 1984) (statement of Sen. Danforth (R-Mo.)) (stating that Act covers "kids who are freshmen through seniors in high school. It is [applicable to] people who are 14 through 18 years of age").

[256] *See* Brandon v. Board of Educ. of Guilderland Cent. School Dist., 635 F.2d 978; Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1046–47. These decisions are discussed *supra* text accompanying notes 71–75.

[257] *See* Bethel School Dist. v. Fraser, 106 S. Ct. at 3163, *supra* text accompanying notes 55–62.

limited public forum and nonpublic forum concepts.[258] Viewed from the students' perspective, these distinctions increase their free speech and associational rights at school.[259]

Under the Act, so long as a school makes its premises available to even one student group deemed to fit within the expansively conceived "noncurriculum related" category, then it forfeits the discretion to deny access to or exclude any other group that is also noncurriculum related.[260] To cite an example derived from the legislative history, if a school granted access to a student chess club,[261] it probably would not be able to exclude or discriminate against clubs of student Communists, Ku Klux Klansmen, Hare Krishnas, or Black Muslims on the basis of

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[258] *See supra* text accompanying notes 182–83. The Act's imposition of a greater obligation to afford equal access than the one schools bear under constitutional principles is not in itself an unlawful result. Congress has the power to impose such an obligation upon schools receiving federal financial aid, which are the only schools covered by the Act. 20 U.S.C. § 4071(a) (Supp. 1985). *See* Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

Nor is there any constitutional impediment to Congress' imposition of this increased obligation to grant equal access. It could be argued that school officials have a constitutional right to avoid the reasonable inference that they endorse ideas with which they do not actually agree. *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (striking down New Hampshire's requirement that state motto, "Live Free or Die," be displayed on car license plates, as violating First Amendment right to "refrain from speaking"). However, courts have held that when there is a legal obligation to facilitate the expression of ideas regardless of their content, as in a public forum, then no imputation of endorsement could arise which would be deemed sufficiently reasonable to violate this right. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Accordingly, if a school has created a limited open forum under the Act, a school official's free speech right to avoid apparent endorsement of certain ideas should not justify exclusion of student groups that Congress has defined as entitled to participate in such a forum.

[259] *See, e.g.*, HOFSTRA NOTE, *supra* note 23, at 592 ("[T]he Equal Access Act has expanded the freedoms of speech and assembly of public secondary school students in an unprecedented manner."). The Note articulates two major bases for this conclusion: (1) in contrast to *Widmar*, which seemed to require the presence of many student groups before finding a forum sufficient to trigger equal access rights, the Act is triggered by only a single noncurriculum related group, *id.* at 604; and (2) arguments that could have been made under Free Speech Clause principles to restrict access rights of controversial or divisive groups are less forceful under the Act, *id.* at 612–13.

[260] If a school could lawfully bar the meetings of any club for reasons apart from their subject matter, it would retain the authority to do so under the Act. *See* 20 U.S.C. § 4071(c)(4) (Supp. 1985) (school may bar meeting that materially and substantially interferes with orderly conduct of school's educational activities); *id.* § 4071(d)(5) (Act does not authorize school to sanction meetings that are otherwise unlawful); *id.* § 4071(d)(7) (Act does not authorize school to abridge constitutional rights of any person); *id.* § 4071(f) (Act does not limit school's authority to maintain order and discipline, and to protect well-being of students and faculty).

[261] *See* 130 CONG. REC. S8342 (daily ed. June 27, 1984) (statements of Sen. Gorton and Sen. Hatfield) (indicating that a school would have difficulty making a determination that a chess club was curriculum related, notwithstanding the discretion the Act ostensibly grants schools to determine which clubs should be so classified).

subject matter.[262] In short, the Act posits two extremes in terms of a forum's subject matter: either only the narrow range of subjects that are directly related to the curriculum, or the literally infinite range of subjects that are not.

Under current constitutional standards, in contrast, a school should be able to create a student forum that would include some, but not all, noncurriculum related groups.[263] Many schools have apparently chosen such an intermediate option, granting access to clubs that have some indirect relationship to the schools' educational mission, but not those espousing controversial and potentially divisive religious, political, or philosophical views.[264] As demonstrated by the judicial decisions

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[262] The Act's legislative history is unclear as to whether so-called "hate groups," or groups discriminating on the basis of race, sex, religion, or other invidious factors were intended to be excludable. *See* 130 CONG. REC. S8344, S8347 (daily ed. June 27, 1984) (statements of Sen. Gorton and Sen. Hatfield). *See* HOFSTRA Note, *supra* note 23, at 594–97, 612–14 (Act would probably require access to be granted to "hate groups" if any other student political groups are allowed to meet).

For a sample "parade of horribles" that educational institutions would have to tolerate under an open student forum, *see, e.g.*, Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976) (Markey, J., concurring) (upholding equal access right of gay university student organization) ("[A]ssociations devoted to peaceful advocacy of decriminalization or social acceptance of sadism, euthanasia, masochism, murder, genocide, segregation, master-race theories, gambling, voodoo, and the abolishment of all higher education, to list a few, must be granted registration . . . if [the university] continues to "register" [student] associations.").

Positively viewed, it could be argued that a student forum which is open to such controversial groups would not only enhance students' free speech and associational rights while they are in school, but would also foster their development into citizens who responsibly exercise their rights and are tolerant of the rights of others. These themes pervade the legislative history of the Equal Access Act. *See supra* note 6.

[263] *See supra* text accompanying notes 179–81.

[264] Of the reported equal access cases, only Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986) contains any description of the various student groups which meet at school. Additionally, papers filed in two of the unreported cases—Mergens v. Bd. of Educ. of Westside Community Schools, No. CV 85-0-426, slip op. (D. Neb. May 23, 1985) and Amidei v. Spring Branch Independent School District, No. H-84-4673, slip op. (S.D. Tex. July 1, 1985)—contain information about the student groups which met at the respective schools. All three of these student forums included some clubs that would probably be deemed "noncurriculum related" under the Act (indeed, the courts in *Mergens* and *Amidei* so ruled, *see supra* text accompanying note 214), but all of the clubs seemed to be connected to the curriculum at least indirectly, *see supra* text accompanying notes 226–27. Certainly, none of the clubs meeting at any of these schools centered their activities around politics, philosophy, or any other potentially controversial or divisive subject. *See Bender*, 741 F.2d at 543; *Mergens*, slip op. at 6; *Amidei*, slip op. at 2. *See also* Affidavit of James A. Findley, Principal of Westside High School, *supra* note 214, at ¶¶ 14–17 (the "goals, objectives, and activities" of all student clubs "are related to the curriculum" in that they are "substantially similar to or the same as the activities and requirements of one or more" classes, or are "logical and natural expansions or extensions of the subject matter" of such classes; it is school's intent not to permit student clubs that are "controversial or divisive").

A survey conducted by the American Association of School Administrators, although yielding relatively few responses, is consistent with the pattern revealed by the reported

which have been issued under the Act, this type of line-drawing, although probably authorized by recent Free Speech Clause doctrine, would not be permissible under the Act.[265]

V. EQUAL ACCESS POLICY OPTIONS CONSISTENT WITH BOTH THE CONSTITUTION AND THE EQUAL ACCESS ACT

It is important for schools to be aware of the significant extent to which the Act circumscribes their range of choices in defining a student forum's subject matter. Schools should be cognizant that if they grant access to any group which could be deemed "noncurriculum related," in accordance with the broad construction of that term in the Act's legislative history, then they face a substantial risk that they could be precluded from thereafter denying access to any group based on its subject matter, even if they have not intentionally created a forum for all noncurriculum related speech.[266]

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decisions. *See* AASA GUIDELINES, *supra* note 151, at 19–20. Of the 161 school districts which responded to the question "Are there organizations that are currently barred from free use of school facilities?," only 22 answered that no groups were denied access; 83 responded that "violent/hate or extremist groups" would be barred; 37 said that "subversive groups (advocating the violent overthrow of the government)" would be barred; 25 said that "religious groups" would be barred; 23 said that "religious cults" would be barred; and somewhat smaller numbers of school districts indicated that they would bar various other groups, including "profit-making groups," "groups that advocate illegal activities or offended community morals," "socially controversial groups," and "political clubs/parties."

[265] Although the *Mergens* and *Amidei* courts have manifested divergent views concerning the Establishment Clause issues raised by the Act, both courts agreed that the term "noncurriculum related" must be interpreted broadly, and consequently that the Act becomes applicable whenever a school grants an opportunity to meet to any club not directly related to the curriculum. *See supra* text accompanying notes 214, 226–27.

[266] For example, in the Student Coalition for Peace v. Lower Merion School Dist. case, discussed *supra* at text accompanying notes 193–207, the school was required to grant access to a student-initiated anti-nuclear gathering because it had previously granted access to a student-initiated charitable athletic event. This order was issued even though the school plainly had been unaware that the consequence of allowing the charitable athletic event would be its obligation to host the anti-nuclear event. To the contrary, the school had consistently distinguished between charitable athletic events—to which it did grant access—and political events—to which it did not. *See supra* text accompanying notes 204–07. In contrast, under current constitutional analysis, a school would not be deemed to have created a limited public forum on its property in the face of evidence that it did not intend to do so. *See, e.g.*, Cornelius v. NAACP Legal Defense Educ. Fund, 105 S. Ct. 3439, 3450.

In its opinion denying plaintiffs' motion for a preliminary injunction, the court in *Mergens*, slip op. at 11, noted that the Act "may tend to mandate the opening of a forum well beyond that which the school itself has sought to sanction." As the court explained, the high school had granted access to student groups that should probably be deemed "noncurriculum related" under the Act's relatively broad construction of that term. Nonetheless, the subject matter scope of these groups was still "narrow" and "much more limited" than that of the groups involved in *Widmar*. *Mergens*, slip op. at 11 n.1. In particular, the court stressed that the *Widmar* forum, in contrast with the high school forum, included groups "of various political and philosophical leanings." *Id.*

It is also important for schools to be aware of the equal access policy options that remain available to them, consistent with both the Act and applicable constitutional precepts. First, a school could forego all federal financial aid and thus be exempted from compliance with the Act.[267] Assuming that a school remains subject to the Act's requirements, it still has a range of equal access policy options which would allow it to avoid granting equal access to all noncurriculum related groups, regardless of subject matter.

Even if a school has created a limited open forum, it retains the discretion to discontinue that forum by declaring that it will henceforth not permit noncurricular clubs to meet during noninstructional time.[268] Under current public forum case law, such a change in policy would probably be sustained so long as the school could show that this change was reasonable and not made for the sole purpose of suppressing a particular viewpoint.[269] If the school's decision to prohibit meetings of noncurriculum related student clubs coincided with an access request by a controversial religious, political, or philosophical group, an inference might arise that the school's decision was intended, at least in part, to suppress a particular viewpoint. Even so, it would probably be difficult to demonstrate that the decision had no other purpose.

Although a school could permissibly restrict its forum to those student clubs which satisfy the Act's curriculum related concept, even if it had previously maintained a more open forum, it could well prefer not to do so. Instead, the school might prefer to make its forum available to a broader subject matter range in

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[267] This possibility was noted by the Third Circuit in the *Merion* case. *See* 776 F.2d at 442 n.9.

[268] For example, after passage of the Equal Access Act, the Boulder, Colorado School Board eliminated any limited open forum which had existed in its schools by henceforth granting access only to curriculum related groups whose "function is to enhance the participants' educational experience and supplement the course materials" used at school. 29 CHRISTIANITY TODAY 49 (Feb. 1, 1985).

[269] *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 46 (government may designate property as limited public forum subject to access restrictions that are reasonable and not intended to suppress expression merely because public officials oppose speaker's viewpoint; government retains right to revoke designation of such property as limited public forum). It would be unreasonable to construe the Act as requiring a school which had triggered its application to remain subject to the Act's requirements in perpetuity, especially when—as in the *Merion* case—a school may have become subject to the Act unwittingly. This conclusion is supported by the indications in the Act's legislative history that Congress did not intend to limit schools' discretion concerning the institution of a limited open forum. *See, e.g.*, 130 CONG. REC. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

order both to expand its students' educational opportunities and to promote free speech values.[270] The legislative history indicates that a major purpose of the Act was to promote students' free speech and associational rights.[271] It would therefore be ironic if the Act's practical effect were to reduce these rights by deterring schools from creating student forums.[272] Accordingly, it is essential for schools to understand the ways in which they may continue to grant access to student clubs with a broader subject matter scope than those directly related to the curriculum, while still not waiving the discretion to impose some subject matter limitations on the forum's scope.

A school could accomplish these important goals while probably still retaining the option of precluding any religious, political, or philosophical club from meeting on an equal basis by failing to take other necessary steps to trigger the Act's applicability, besides permitting a noncurriculum related student group to meet. For example, even a school's grant of access to noncurriculum related clubs would fail to trigger its obligation to grant equal access to other clubs if the noncurriculum related clubs met during "instructional" time.[273] Consistent with the reading of that term indicated by the Act's legislative history, a school could, for example, authorize some noncurriculum related student groups to meet during a student activity period occurring during the school day, without thereby incurring the obligation to grant equal access to all noncurriculum related groups.[274]

To the extent that the additional conditions listed outside the Act's central provision might be deemed mandatory rather than discretionary,[275] a school's failure to comply with one or more such conditions could preserve its discretion to impose reasonable, viewpoint neutral, subject matter limitations upon a stu-

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[270] Many schools currently opt for such an intermediate subject matter range, broader than "curriculum related" under the Act, yet narrower than "noncurriculum related." *See supra* note 264.

[271] *See supra* note 6.

[272] *See* GEORGETOWN Note, *supra* note 189, at 223 & n.112 (suggesting that, to avoid discouraging schools from opening their property to expressive activity, courts should construe Act narrowly and uphold any reasonable criteria for restricting access).

[273] 20 U.S.C. § 4071(b) (Supp. 1985).

[274] To comport with current constitutional standards, any definition of the permissible subject matter of the noncurriculum related student groups which could meet during noninstructional time would have to be reasonable and not imposed for the sole purpose of suppressing particular viewpoints. *See supra* text accompanying notes 179–80.

[275] *See supra* text accompanying notes 184–90.

dent forum without forcing it to grant access to all noncurriculum related groups. For example, a school could require teachers to play a participatory role in student group meetings,[276] or it could require that all clubs be school sponsored.[277] Of course, to the extent that these conditions are constitutionally required before a school may grant equal access to a student religious group, the consequence of noncompliance would be the school's forfeiture of discretion to permit religious group meetings.[278]

VI. CONCLUSION

In declining to address the merits of *Bender*, the Supreme Court failed to provide guidance to the numerous courts, schools, and other parties all over the country which confront equal access issues. These parties must therefore devise their own resolutions of the competing free speech and nonestablishment concerns underlying any equal access issue. Moreover, these parties must forge their own reconciliations of the inconsistent judicial and statutory directives specifically applicable to equal access problems. These include the four courts of appeals decisions which unanimously rejected the constitutionally-based equal access claims they considered; the Equal Access Act, which requires schools to grant equal access to student religious groups even under circumstances where the courts of appeals have held that equal access would violate the Establishment Clause, and the Supreme Court has indicated that equal access was not mandated by the Free Speech Clause; and the reported decisions under the Act, which reflect significantly differing views about its constitutionality.

This Article has attempted to provide the guidance to parties involved in equal access disputes which has not been provided by either the Supreme Court or Congress. The Article has suggested standards for resolving the conflicting constitutional con-

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[276] *See supra* note 214 (principal's affidavit submitted in *Mergens* case contended that school policy required teachers to sponsor all student clubs, thus exempting school from Act's coverage).

[277] *But see supra* text accompanying notes 223–24 (in *Amidei*, school was found to have limited open forum under Act, obligating it to grant equal access to student religious group, notwithstanding school rule that all clubs be school sponsored).

[278] *See supra* note 190 and accompanying text (conditions imposed by 20 U.S.C. § 4071(c) (Supp. 1985) may be constitutionally required before school may grant access to student religious club).

cerns implicated in every equal access case which are faithful to both of the fundamental First Amendment rights at issue.

The Article has also contrasted its proposed constitutionally-derived standards for evaluating equal access claims with those prescribed in the Equal Access Act. Based upon this comparative analysis, the Article has demonstrated that the Act is more protective of free speech values than of nonestablishment values, and that in comparison with current Supreme Court doctrine, the Act affords more protection to free speech interests in a limited student forum while affording less protection to nonestablishment interests. Consequently, the Article has shown that an equal access grant may comply with the Act yet violate the Establishment Clause, while an equal access denial could comply with the Free Speech Clause yet violate the Act. Finally, the Article has set out the range of equal access policy options that are available to a school, consistent with the requirements of both the Constitution and the Equal Access Act.

By complying with the constitutionally-based standards proposed in this Article, schools can maximize students' rights of free expression and association, as well as their right to remain free from governmental establishments of religion. Our nation's public schools can thereby promote their essential mission of teaching young people that constitutional liberties are vitally important in the everyday lives of all Americans, including students throughout the nation, and that these precious freedoms should not be "discount[ed] . . . as mere platitudes."[279]

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[279]*See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

NOTE

PATENT AND TRADE SECRET PROTECTION IN UNIVERSITY-INDUSTRY RESEARCH RELATIONSHIPS IN BIOTECHNOLOGY

DAVID E. KORN*

In recent years, there has been rapid and substantial growth in biotechnology research conducted jointly by industry and academia. Universities, industrial firms, and the general public all stand to benefit from increased research cooperation in this relatively young and extremely promising field. Unfortunately, the current framework of intellectual property laws often poses obstacles to successful negotiation of joint university-industry research ventures.

In this Note, Mr. Korn argues that biotechnology research joint ventures are a unique phenomenon deserving special attention and legal treatment. After discussing the recurrent concerns arising in such ventures and the present state of the applicable patent and trade secret laws, he surveys the approaches to joint research currently taken by some of the major universities and industrial sponsors. Finally, he considers some proposed changes in the existing intellectual property laws and suggests modifying the patent laws to encourage university-industry research cooperation in biotechnology.

I. AN OVERVIEW

Biotechnology is one of the many new technologies born in university and other academic research laboratories, with each of its constituent technologies — recombinant DNA, cell fusion, and bioprocessing—originating at a university.[1] Yet many university researchers have now left academia to become involved in commercial ventures in the nascent biotechnology industry. Others, though remaining at the universities, are increasingly participating in cooperative ventures with industrial sponsors.[2]

Established companies as well as start-up firms have sought to capitalize on new technologies and the wealth of talent present in academic biological research laboratories by establishing

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[1] *See* P. DALY, THE BIOTECHNOLOGY BUSINESS 51 (1985). "Biotechnology emerged, therefore, as a direct result of technology transfer from the universities which originally were the only places where the expertise existed." *Id.*

[2] This Note will focus on sponsored research projects and programs, research partnerships, and the formation of new research departments. These will all be referred to as "sponsored research programs," "cooperative research," "joint ventures," or "research relationships."

cooperative ventures with universities for the transfer of funding, manpower, and technology. Formal research ventures have been undertaken which range in scale from contracts with individual professors to perform specific research projects, to the seventy million dollar agreement between the Massachusetts General Hospital and Hoechst A.G. which creates a new department of molecular biology at the hospital to perform a wide spectrum of research.

Industrial sponsorship of university research is not a recent development, nor is it unique to the biotechnology industry. Corporate sources have been responsible for a significant portion of university research funding since long before World War II.[3] The many forms of cooperation between universities and industry now include consulting arrangements, licensing of new technology for development, sponsored research projects, sponsored research programs, research partnerships, industrial associates programs, and the formation of research departments and new research institutes.[4]

The amounts of both industrial and federal funding of university research expenditures have fluctuated considerably over the last four decades.[5] In the 1980s, the trend has been one of a relative decline in federal government support for basic science research and a corresponding increase in industrial funding.[6] At the same time, universities are becoming more aware of the potential commercial prospects of their research products.[7]

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[3] *See* D. BOK, HARVARD UNIVERSITY: THE PRESIDENT'S REPORT 1979–80 at 3 (1980).

[4] *See* S. OLSON, BIOTECHNOLOGY: AN INDUSTRY COMES OF AGE 12 (1986).

[5] For example, in 1953 industrial funding constituted 7.5% of all university research expenditures, while federal funding was responsible for 54.1%. Fowler, *University-Industry Research Relationships: The Research Agreement*, 9 J.C. & U.L. 515, 515–32 (1982–83). By 1966, the amount of government support had peaked at 73.5% of the research funding, while the proportion of industrial support declined to 2.4%. *Id.* at 515.

[6] In 1981, only 65.1% of the funds came from the federal government, while industrial support rose to an estimated 3.8%. Fowler, *supra* note 5, at 515. Current estimates of industrial support for basic science research place the funding level at a minimum of between $200 million and $300 million, or between 3% and 4% of university research and development expenditures. *See* S. OLSON, *supra* note 4, at 99. For a discussion of the prevalence of sponsored research in different technological areas, see NATIONAL SCIENCE BOARD, NATIONAL SCIENCE FOUNDATION, REPORT ON A NATIONAL SCIENCE FOUNDATION WORKSHOP ON INTELLECTUAL PROPERTY RIGHTS IN SELECTED STUDIES IN UNIVERSITY-INDUSTRY RESEARCH RELATIONSHIPS 258 (1983) [hereinafter NATIONAL SCIENCE BOARD].

[7] Former Duke University President Terry Sanford has said that "universities should do all that is reasonably possible to earn returns on inventions, and should not be timid in making prudent business arrangements to assure the target fair return." B. REAMS, UNIVERSITY-INDUSTRY RESEARCH PARTNERSHIPS 8 (1986).

While the chance of making much money from a patent is very slim,[8] universities have sometimes "struck it rich" with a patent. Biotechnology patents have proven, on occasion, to be particularly lucrative.[9]

Industrial sponsors, as well as universities, stand to benefit from these university-industry research relationships. While universities obtain a source of funding and a way of meeting the financial burden necessary to develop inventions commercially, industry gains access to new technology and excellent researchers. Both academics and industrial sponsors acknowledge, however, that this "commercialization" of the universities also causes problems such as conflicts of interest among researchers and changes in the university research environment, among others.

In order to create an incentive for industry to spend large amounts of money on university research, some sort of protection for industry's investment must be provided. At present, this protection usually takes the form of either ownership of, or a license from the university of, the intellectual property rights derived from the research relationship. However, the law's requirement of a certain element of secrecy in the research process as a prerequisite to obtaining the patent or trade secret protection desired by the industrial sponsor is in sharp conflict with the university's desire to maintain an open, academic, public-servant environment. As a result, considerations of how to allocate intellectual property rights resulting from a research relationship often become a stumbling block to reaching a joint venture agreement. The parties to such cooperative research contracts solve these problems in a variety of ways, often by

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[8] Derek Bok has said that "no sensible faculty member, anxious to maintain a high academic reputation, is likely to spend too much time chasing patents. It takes 1,000 disclosures to yield 100 patents. It takes 100 patents to yield ten licenses. It takes ten licenses to yield one that earns over, say, $50,000 a year." D. Bok, President of Harvard University, in D. BOK & D. KENNEDY, BUSINESS, SCIENCE AND THE UNIVERSITIES 4 (1981) (pamphlet available from the President's Office of Stanford University).

[9] For example, the University of Wisconsin earned more than $100 million in royalties over fifty years from a patent on a process for activating the Vitamin D content of milk. *See* N. WADE, THE SCIENCE BUSINESS: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE COMMERCIALIZATION OF SCIENTIFIC RESEARCH 57 (1984). Similarly, Stanford and the University of California at Berkeley have received approximately $2 million in royalties from the Cohen-Boyer patent for the basic recombinant DNA process. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COMMERCIAL BIOTECHNOLOGY: AN INTERNATIONAL ANALYSIS 411 (1984) [hereinafter OTA Report]. For other examples of universities benefitting financially from the commercial development of their research products, see N. WADE, *supra*, at 57.

compromising the interests of both the sponsor and the university.

Such conflicts can be particularly acute in the field of biotechnology. University-industry research relationships in this field were thrust into the public's view with the signing of the seventy million dollar agreement between the Massachusetts General Hospital (MGH) and Hoechst A.G. (the Hoechst agreement) in 1981. The Hoechst agreement, along with the formation of other large ventures such as the one between Monsanto and Washington University in St. Louis, have not only signalled an increase in industrial involvement in academic research, but have also heightened public interest in these relationships.[10]

This Note will analyze issues concerning the treatment of intellectual property rights in university-industry research relationships and will examine possible reforms designed to encourage the formation of research ventures without compromising the interests of the parties. It will first present a survey of the characteristics of university-industry research relationships in biotechnology and discuss what makes those relationships unique as well as particularly troublesome to some academics. Second, it will discuss the patent and trade secret protection available for the products of biotechnology research. Next, it will examine how the parties to university-industry research relationships actually allocate intellectual property rights and review the problems associated with these determinations. Finally, it will suggest some possible reforms of the intellectual property laws which might be more conducive to the formation of research relationships.

II. University-Industry Research Relationships in Biotechnology

A. *Current Developments*

1. Biotechnology as Distinct from Other Fields

The recent increase in the number of university-industry relationships in biotechnology has generated a great deal more controversy than did the formation of similar relationships in

[10] For further discussion of these agreements see *infra* note 213.

other technical areas.[11] The heads of several major research universities expressed many of these concerns at the Pajaro Dunes Conference, where they met with industry representatives to discuss the problems generated by cooperation.[12] Even Congress expressed concern with what it called the "commercialization" of academic biomedical research at two hearings in which representatives of both the industry and academia testified about the effects of commercial influences on university research.[13] The hearings focused specifically on biomedical research and addressed concerns arising from the influx of secrecy into the university environment, the problems associated with the large dollar amounts of some agreements, and the possibilities of conflicts of interest and commitment.[14]

Although university-industry research relationships are not unique to biotechnology, the public concern has largely been with biomedical research relationships rather than those in other fields.[15] This special attention is due to the academic nature of the field, the prevalence of new cooperative ventures in it, the sudden commercial interest in biotechnology, and the related public health concerns—all factors not present to the same extent in the rise of the semiconductor or computer industries.[16]

Unlike other fields characterized by prominent university-industry interaction, biotechnology is regarded as more of an academic science which should not be commercially influenced.[17] This attitude is evidenced by the fact that until the Cohen-Boyer patent in 1976 and the Supreme Court's approval

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[11] *See* N. WADE, *supra* note 9, at 23.

[12] *See* Pajaro Dunes Conference, *Draft Statement*, 9 J.C. & U.L. 533, 533 (1983).

[13] *University/Industry Cooperation in Biotechnology: Hearings Before the Subcomm. on Investigations and Oversight and the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology*, 97th Cong., 2nd Sess. 1 (1982) [hereinafter *Univ./Ind. Coop.*] (statement of Rep. Albert Gore, Jr. (D-Tenn.), Chairman of the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology); *Commercialization of Academic Biomedical Research: Hearings Before the Subcomm. on Investigations and Oversight and the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology*, 97th Cong., 1st Sess. 33 (1981) [hereinafter *Commercialization*] (statement of Dr. Paul Gray, President of Massachusetts Institute of Technology).

[14] For further discussion see *infra* section IIB, text accompanying notes 54–88.

[15] *See, e.g., Univ./Ind. Coop., supra* note 13; *Commercialization, supra* note 13; Pajaro Dunes Conference, *supra* note 12.

[16] For a comparison of the semiconductor and the biotechnology industries see OTA Report, *supra* note 9, at 531.

[17] While this may be true of all new technologies originating in university research laboratories, perhaps it is especially so in biotechnology because industry has continued to rely on the universities, and because universities have only recently sought to commercialize biotechnology research. *See infra* note 18.

of biotechnology patents in the 1980 case of *Diamond v. Chakrabarty*, academic scientists did not pay much attention to the commercial prospects of biological research.[18] In recent years, however, universities have become more actively involved in the commercial aspects of the field by forming huge ventures with the industry[19] and have been actively seeking patent protection for research products.[20] This sudden rise in the commercialization of an academic science has begun to alter the public image of the pure academic researcher.[21] The public perception of such a change in the role of a university professor, especially in the health fields,[22] has contributed to much of the recent public concern.

Another reason for according special treatment to the biotechnology field is that biotechnology firms are much more dependent on universities for their basic research needs than are companies in other industries. Although the federal government continues to fund most university research in biotechnology, industry may contribute as much as sixteen to twenty-four percent of biotechnology research and development funding in universities,[23] as compared with the average of between three and four percent for all technological areas combined.[24] Furthermore, twenty-three percent of university faculty members actively involved in biotechnology receive some industry sup-

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[18] Telephone interview with Max Wallace, Assistant University Counsel, Duke University (Oct. 9, 1986) [hereinafter Wallace]. *See also* N. WADE, *supra* note 9, at 30, for a description of how Stanford University, and not the individual researchers, actively pursued the Cohen-Boyer patent for the basic recombinant DNA process. For a discussion of *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), see *infra* text accompanying notes 121–131.

[19] For example, Massachusetts General Hospital (MGH) has a $70 million agreement with Hoechst. Contract between The General Hospital Corporation and Hoechst, A.G., May 13, 1981 (on file at HARV. J. ON LEGIS.) [hereinafter Hoechst agreement]. MGH is an independent, non-profit entity with its own board of trustees and a director. Although not financially obligated to Harvard, it is affiliated with Harvard as a teaching hospital. *See* B. REAMS, *supra* note 7, at 110. It should be noted that although there have been many such large arrangements formed, their prevalence has recently decreased in favor of smaller, more applied research projects.

[20] Wallace, *supra* note 18.

[21] Interview with David Blumenthal, Executive Director of the Center for Health Policy and Management, John F. Kennedy School of Government, in Cambridge, Massachusetts (Oct. 8, 1986).

[22] Telephone interview with Joyce Brinton, Director of the Harvard University Office of Patents, Copyrights, and Licensing (Oct. 9, 1986) [hereinafter Brinton]. According to Brinton, the public concern with commercialization of basic research appears most acute in the health sciences.

[23] Blumenthal, Gluck, Louis & Wise, *Industrial Support of University Research in Biotechnology*, 231 SCIENCE 242, 244 (1986) [hereinafter *Industrial Support*].

[24] Fowler, *supra* note 5, at 515.

port.[25] Finally, a few biotechnology firms depend heavily on universities for their research needs, and large firms are more likely to engage in university research than smaller firms.[26] Apparently, large firms are more diversified in their investment strategies and have greater financial ability to support basic research.[27] They are also more likely to have the capital required to take inventions from the basic stages through expensive commercial development.

The science of biotechnology is fairly new. It was born in the universities, and thus most of the short supply of talent in the field is still located in academia. Dr. Charles Muscoplat of Molecular Enetics views biotechnology research relations as differring from others in that

> a chemical company may have hundreds of organic chemists working for them, and if they need an outside consulting organization they will go and retain organic chemists at some university to help them solve a particular problem. However, if a large industrial company wants to do research in biotechnology today, they don't have the in-house skills. They either have to go to small biotechnology companies or to universities to acquire many of the skills relevant to do that type of work.[28]

Science journalist Nicholas Wade concludes that "rather than develop basic biological research laboratories on their own, . . . [the large chemical and pharmaceutical companies] sought to sponsor academic departments of molecular biology . . . ."[29] As the field matures and more researchers enter it, this shortage of scientists associated solely with industry may be alleviated, and the locus of research may then shift to industry. This trend should be contrasted with the semiconductor industry where more of the early scientific advances occurred in the firms, with the universities initially lagging behind in the development of new technologies.[30]

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[25] Blumenthal, Gluck, Louis, Stoto & Wise, *University-Industry Research Relationships in Biotechnology: Implications for the University*, 232 SCIENCE 1361, 1362 (1986) [hereinafter *Implications for the University*]. No statistics were given in this study for a comparison of the commercial involvement of university biotechnology researchers as opposed to those in other fields.

[26] *Industrial Support*, *supra* note 23, at 243. The authors distinguish between large and small firms by considering their capitalization and whether they appear on the Fortune 500 list.

[27] *See id.*

[28] Quoted in *Univ./Ind. Coop.*, *supra* note 13, at 90.

[29] N. WADE, *supra* note 9, at 24.

[30] *See* OTA Report, *supra* note 9, at 536.

Perhaps the greatest reason for giving biotechnology joint ventures special attention lies in the fact that there is an acknowledged state interest in regulating biotechnology research[31] as well as its products.[32] The public health issues involved[33] result in extensive government regulation of the field.[34] Since the cost of entering any given market is influenced by the cost of regulation,[35] universities cannot usually afford the very expensive development of biotechnology inventions. Biotechnology laboratories are also expensive to support because of the sophisticated equipment involved.[36] Thus, it is more difficult to start a biotechnology company or research department than it would be to start, for example, a computer software company.[37] As a result, large established industrial firms often rely more on universities for their basic research needs.

While some attorneys and scientists do not believe that biotechnology creates problems significantly different from those present with other technologies,[38] the Office of Technology Assessment (OTA) has taken an intermediate position on the issue. OTA has acknowledged that the situation with regard to biotechnology research is currently unique, but has also recognized that the field may eventually settle into the patterns exemplified by other technologies.[39] The OTA has concluded that biotechnology is now in an initial "hyperactivity" phase and that "[a]fter the industry goes through its initial phases, an equilibrium state

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[31] *See* NIH Guidelines for Research Involving Recombinant DNA Molecules, 49 Fed. Reg. 46,266 (1984) [hereinafter NIH Guidelines]. The U.S. Department of Agriculture (USDA) promulgated for public comment proposed USDA guidelines for all phases of agricultural biotechnology research. The proposed USDA guidelines are patterned after the NIH guidelines. 51 Fed. Reg. 23,367 (1986) (proposed June 26, 1986).

[32] *See* Coordinated Framework for Regulation of Biotechnology: Announcement of Policy and Notice for Public Comment, 51 Fed. Reg. 23,302, 23,302–03 (June 26, 1986).

[33] *See* Wallace, *supra* note 18; Brinton, *supra* note 22.

[34] For example, *see* NIH Guidelines, *supra* note 31.

[35] *See* P. DALY, *supra* note 1, at 42.

[36] Brinton, *supra* note 22.

[37] *Id.*

[38] For example, Peter Barton Hutt of Covington & Burling has stated that

> [u]niversities and corporations have engaged in productive cooperative enterprises for decades. It is thus surprising that, with the impressive new advances in biotechnology, the nature and content of these joint enterprises have recently come under public scrutiny. There is nothing inherent in biotechnology that alters traditional issues that have been raised by those joint ventures for decades . . . .

Hutt, *University/Corporate Research Agreements*, 5 TECHNOLOGY IN SOC'Y 107 (1983). For other similar views see statement of James Chaney, Vice President of Agrigenetics, in *Univ./Ind. Coop.*, *supra* note 13, at 93.

[39] *See* OTA Report, *supra* note 9, at 422. Evidence of this may be found in the decrease in the number of large cooperative ventures with industry.

. . . [will be] reached and a fairly healthy symbiotic relationship [will probably] emerge . . . ."[40] During the hyperactivity phase, however, both the benefits and dangers of cooperative research in the field will be accentuated and should be subjected to close public scrutiny. Thus, university-industry research relationships in biotechnology are at least currently different from those in other industries. It seems, moreover, that some of the presently unique features of biotechnology are inherent in the field, and that the biotechnology research joint ventures will remain a special case for some time to come. Because of these unique features, biotechnology, to continue to advance, will require increased cooperation between industry and the universities. Though there is some disagreement on the point, it appears that biotechnology joint ventures are particularly beneficial and should be encouraged.

2. The Advantages of Cooperation

The main types of university-industry cooperation in biotechnology are relations with specific professors, formation of research departments to study a broad range of subjects, and specific agreements for narrow areas of research.[41] Both industrial sponsors and universities derive considerable benefits from entering into these types of relationships.

Industry's reasons for entering into research relationships with universities range from financial motives to gaining access to new technologies, to promoting research in general. Industry's prime motive for any action, of course, is the profit motive, normally realized either as a short-term financial gain from immediately applicable research results or a long-term gain from patent rights. Edward David, Chairman of Exxon, claims that much of industrial sponsorship, at least by large companies with diversified research budgets, goes toward promotion of education and the public image of the corporation;[42] however, both of these may also produce long-term monetary gain for the industry.

Another important benefit to a sponsor comes from gaining access to university staff and resources. By sponsoring biotech-

[40] *Id.*

[41] *See* Fowler, *supra* note 5, at 516. For a discussion of specific examples of different relationships see *infra* section IV, text accompanying notes 185–217.

[42] David, *The University-Academic Connection in Research: Corporate Purposes and Social Responsibilities*, 24 IDEA 157, 160 (1983).

nological research in a university laboratory, a company can obtain access to the work of the best people in the field, from Nobel laureates to talented graduate students. Access at the basic research stage can often give the sponsor a "window on the technology" and a broader perspective from exposure to the new ideas of researchers with a less commercial orientation. The sponsor also gains a potential recruiting source and the opportunity to train its own staff with some of the best researchers in the field.

Industrial sponsors can also benefit from exposure to the broad range of resources available at a university. Universities can draw on a large interdisciplinary staff whose specialties are broader than those of even the largest in-house staff.[43] This variety is particularly important in biotechnology research because of the wide range of industries influenced by biotechnology. These include the pharmaceutical industry, the health industry, the agriculture, mining and chemical industries, and even waste management.[44] Therefore, scientists with expertise in any of these areas will be able to collaborate on many joint biotechnology projects. Moreover, since science has always prospered from open communication, cooperative ventures which enable in-house staff to consult with a variety of university researchers should promote further innovation.

Academia's main motives for entering into sponsored research programs are those of tapping a new source of funding, improving the quality of applied science, and facilitating technology transfer to industry.[45] The funding of research has become an important consideration in the wake of decreased federal funding, especially when there is the prospect of security through long-term arrangements such as the Hoechst agreement.[46] Furthermore, the transfer from the laboratory to the marketplace is an expensive proposition, "orders of magnitude more" expensive than the research process itself.[47] Since the

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[43] *See* Weisen, *Industry-University Relationships With Respect to Genetic Engineering Technology*, in INDUSTRIAL APPLICATIONS OF GENETIC ENGINEERING: THE LEGAL AND REGULATORY REGIME 15 (1985) (ALI-ABA course of study materials).

[44] *See* N. WADE, *supra* note 9, at 25.

[45] *See* Pajaro Dunes Conference, *supra* note 12.

[46] Hoechst agreement, *supra* note 19.

[47] *Commercialization*, *supra* note 13, at 40 (quoting Dr. Paul Gray). Development costs are significantly higher in the biotechnology fields because of government regulations concerning public safety. In the pharmaceutical or pesticide industries, it has been estimated that "[f]or every single dollar spent on research to make a discovery, you can estimate that it will take $10 or more to develop that discovery into a useful

university's place is in research, not in product development,[48] efficient commercial development requires cooperation between business enterprises and universities. The sharing of royalties generated by eventual sales of the finished product between the university and the corporation[49] encourages just such a result.

A further motive which may be in the back of the minds of university administrators is that cooperation might help avoid a raid on the universities.[50] University scientists may have less of a motive to move to industry when sponsored research gives them financial incentives through patent royalties. Sponsored relationships, moreover, may reduce industrial recruiting among faculty because the sponsor may be able to capitalize on researchers' talents without having to formally employ those researchers.

Finally, industrially sponsored research serves an important scientific goal. University researchers benefit from having a "taste of the real world," which changes the researchers' perspective. Researchers with industrial support are more productive, having higher publication rates and creating more patent applications.[51] More importantly, cooperation brings together scientists who otherwise would be prevented from working together.[52] It can therefore lead to exposure to many new problems and help establish the research directions and emphasis of the university scientist.[53]

B. *Issues in University-Industry Research Relationships*

1. Shift in the Focus of Research

University-industry cooperative research ventures have been criticized on the ground that the choice of research projects may

product which is actually being manufactured and sold in the marketplace." Statement of Dr. Howard Schneidermann, Senior Vice President for Research and Development of Monsanto Company, in *Univ./Ind. Coop.*, *supra* note 13, at 31. Much of this cost is incurred during the regulatory approval process, which is funded largely by the industry. *See* Peters, *Pharmaceuticals*, 5 TECHNOLOGY IN SOC'Y 191, 192 (1983).

[48] *See Univ./Ind. Coop.*, *supra* note 13, at 39 (statement of Dr. Howard Schneidermann).

[49] Although technology transfer is an example of a university-industry relationship outside of the research realm, it is similar to research relationships in that the university is supplying the research prowess and is depending on industry to develop the invention.

[50] *See* Weisen, *supra* note 43, at 16.

[51] *Implications for the University*, *supra* note 25, at 1363.

[52] *See* Weisen, *supra* note 43, at 16.

[53] *See* NATIONAL SCIENCE BOARD, *supra* note 6, at 258.

be controlled by industry, with a resultant shift from basic to applied research.[54] Such a shift would imply a trend toward choosing projects for their commercial and practical value rather than for the societal good. Thus, industry may be able to influence public policy by steering academic researchers away from the study of "knowledge for knowledge's sake" and into the arena of "knowledge for the sponsor's sake."

However, the concern that industry is directing research may not be as significant as many critics indicate. The National Institutes of Health and the National Science Foundation already exercise control over the direction of much scientific research by choosing to fund one kind of project rather than another of equal scientific merit.[55] In addition, many of the large agreements prevent just this type of commercialization of research decisions. While small consulting arrangements, and a few large ventures, often involve a narrowly specific question relevant primarily to a particular industry need, agreements such as that between MGH and Hoechst, and that between Monsanto and Washington University in St. Louis create research departments with broad spectrums of research goals.[56]

A related concern stemming from industrial sponsorship of biotechnology research involves possible deterioration of the standard peer review process which, in turn, may cause a decrease in the quality of research.[57] Academic researchers usually validate their work by withstanding challenges from colleagues and by having their work reproduced and cited by others. Industrial research, on the other hand, is secret to a significant degree,[58] receiving its validation through commercial success. While corporate research laboratories have made many impor-

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[54] *See* Leskovac, *Ties That Bind: Conflicts of Interest in University-Industry Links*, 17 U.C. DAVIS L. REV. 895, 902 (1984).

[55] *See* Culliton, *Biomedical Research Enters the Marketplace*, 304 NEW ENG. J. OF MED. 1175, 1197 (May 14, 1981). One researcher was even quoted as saying that the government exerted more control than industry. *Id.*

[56] The agreement between MGH and Hoechst is for "research in the field of molecular biology generally with specific initial emphasis in the areas of eukaryotic gene cell regulation, somatic cell genetics, microbial genetics, virology, immunology, and plant molecular biology." Hoechst agreement, *supra* note 19, at 2. Thirty percent of the research sponsored by the Monsanto agreement is designated for fundamental research. *See* N. WADE, *supra* note 9, at 51.

[57] *See* N. WADE, *supra* note 9, at 27.

[58] *See infra* discussion of secrecy at text accompanying notes 69–87, 170–177. It is interesting to note that the result of some arrangements could also be that industrial research may become subject to standard peer review practices.

tant breakthroughs,[59] the restraint on availability of information may be considered a problem in certain fundamental areas of research.

2. Corruption of the Academic Ethos

Another major concern is the corruption of the academic ethos caused by the decay of the peer review system, conflicts of commitment and interest among faculty members, weakened stance in the public trust, and the increase in secrecy among researchers. There has been a great deal of controversy concerning conflicts of commitment and conflicts of interest caused by the commercialization of academic science.[60] Some critics of university-industry research cooperation fear that university-related decisions of professors will be influenced by their equity interest in some of the companies they deal with. As a result, many universities now encourage financial disclosures by their faculty, with some, particularly those in the University of California system, actually requiring it.[61]

Researchers involved in a joint venture may also experience conflicts between their commitments to the sponsor, the university, and their students. Professors may become less available to students, and graduate students' research may be shifted toward the sponsor's work as well.[62] Most universities, however, have headed off this problem by placing limitations on the amount of time professors may spend on consulting work and requiring administrative approval of sponsored research programs.[63]

Yet another potential problem brought to light by the participants in the Pajaro Dunes Conference is that relations with industry may tarnish a university's reputation as a "repository of public trust."[64] University professors are frequently called

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[59] "[P]rior to World War II major advances in physics and chemistry had been financed by private companies such as Bell Telephone, DuPont and General Electric. These firms have been superb examples of enlightened and productive corporation investment in basic research." Statement of Dr. Jonathan King, Professor of Microbiology, Massachusetts Institute of Technology, in *Commercialization*, *supra* note 13, at 61.

[60] *See* Thompson, Dreben, Holtzman & Kreiser, *Academic Freedom and Tenure: Corporate Funding of Academic Research*, 69 ACADEME 18a, 18a (Nov.–Dec. 1983) [hereinafter *Academic Freedom*]; Leskovac, *supra* note 54, at 902–04.

[61] *See* Leskovac, *supra* note 54, at 910.

[62] *See Academic Freedom*, *supra* note 60, at 20a.

[63] *See id.*

[64] Pajaro Dunes Conference, *supra* note 12, at 533.

upon to testify in court or at legislative hearings on public policy issues. Much of the value of their testimony depends directly on their being independent from any commercial influence. Allegiance to commercial concerns may weaken the public perception of the credibility and independence of academic researchers, and their "usefulness [to the public] may be compromised."[65] The strength of this argument is lessened, however, by the fact that professors always have a stake in their area of research, whether it be as a result of pride in their research product, the need for grant money, or a direct financial interest in the testimonial issue.

3. Private Use of Publicly Funded Research

Another potential problem is the fear that private companies may capitalize on publicly funded work,[66] and even monopolize it through patent rights. Congressional hearings concerning this subject were conducted in the wake of the Hoechst agreement. While that venture does not cause funding conflicts,[67] non-exclusive funding arrangements in other agreements may involve the commingling of private and public funds. However, the 1980 amendments to the Patent Act[68] specifically allow the university to elect to retain title to the invention whenever government funding is involved. If an industrial sponsor and the government both fund the project, these provisions still apply, and the university may take title to the invention.[69] Thus, private monopolization of public research results can occur only if industry patents inventions which utilize non-patented technology developed with federal funds, or if industry is awarded an exclusive license for such inventions.

4. Secrecy in an Academic Environment

Finally, perhaps the most serious problem associated with cooperative research is the influx of secrecy[70] into the university

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[65] Leskovac, *supra* note 54, at 901.

[66] *See Commercialization, supra* note 13, at 2 (statement of Rep. Albert Gore, Jr., Chairman of the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology).

[67] *See* Hoechst agreement, *supra* note 19, at 11. Since the Hoechst agreement provides for formation of a new department exclusively funded by Hoechst, it involves no controversial exploitation of publicly funded work by a private company.

[68] 35 U.S.C. §§ 200–204 (1982).

[69] *See* OTA Report, *supra* note 9, at 419.

[70] Secrecy, in this context, refers to keeping one's work private and not disclosing it to fellow researchers.

environment. One of the fundamental ideals of university research is its openness. Scientists communicate freely among themselves, with students, and with other researchers in order to gain input from others. They spread their newly gained knowledge through personal communications, discussions at professional society meetings, and publications in scientific journals. Private industry, on the other hand, usually maintains a secretive environment in order to secure a competitive edge. While there may be some open discussion within the firm, there will normally be none outside of it. There is a significant chance that some of the secrecy, or at least some sense of privacy in the laboratory, may carry over to the universities by way of an industrially-sponsored research program.

Many scientists feel that a competitive atmosphere has arisen because of the industrial ties.[71] Such an atmosphere impedes peer review, open discussions at meetings, and the freedom to publish. For example, researchers sometimes refuse to answer questions at scientific meetings because of the fear of divulging proprietary information.[72] Furthermore, secrecy may strangle the peer review process because it impedes the evaluation of results in journals or at meetings. It seems that the ideals of academic research and industrial competition may thus be incompatible.

Some industrial representatives point out that university laboratories are competitive even when no industrial support is present. The status of a scientist is often measured by his or her peer recognition, something very much akin to being the first researcher to publish a finding. Therefore, researchers often keep their findings secret until published. Perhaps the best example of competition among researchers was Watson and Crick's race with Linus Pauling to discover the structure of DNA.[73] Commentators emphasize, however, that academic and

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[71] *See Commercialization*, *supra* note 13, at 8 (statement of Dr. Donald Kennedy, President of Stanford University).

[72] Donald Kennedy has stated that

> there are at least three or four incidents during this past year in which at scientific meetings—at which the traditional valuation of basic research has always been expected to prevail—there were communications in which a scientist actually refused on questioning to divulge some detail of technique, claiming that, in fact, it was a proprietary matter and that he was not free to communicate it.

Id.

[73] Their "run to glory" led to an extremely competetive environment until an official public announcement could be made. The story is documented in J. WATSON, THE DOUBLE HELIX (1968).

industrial secrecy are qualitatively different in terms of duration.[74] Academic secrecy lasts only until a result is found or, at the latest, until the date of publication or disclosure of the findings in a press release. While industrial secrecy may terminate at the time of publication if patent protection is sought, it may become permanent if trade secret protection is required.[75] In addition, scientists stress that the academic freedom at stake requires that secrecy be avoided as much as possible.[76] They have also claimed a right to perform research so as to maintain free choice of experiments. The notion of having no restrictions on publication is maintained in the policies of many universities which generally recognize the sponsor's right to review a publication for patentable results but not the right to prevent publication.[77]

While the First Amendment may provide an argumentative tool for scientists trying to avoid publication restraints placed on them by industrial sponsors,[78] the courts have not acknowledged a First Amendment right to conduct research, recognizing instead only a right to publish research results.[79] In fact, the courts have interpreted academic freedom in a way that may serve to help industry's arguments for maintaining secrecy. Thus, in a case involving attempted discovery of a university researcher's results before completion of the study, discovery of partial results of studies implicated in tort suits was not allowed because of the potential chilling effect on academic

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[74] *See* N. WADE, *supra* note 9, at 30.

[75] *See infra* discussion of trade secrets in section IIIB, text accompanying notes 162–84.

[76] Academic freedom is an elusive concept. In a public university, academic freedom stems from the Constitution because state action is involved. *See* B. REAMS, *supra* note 7, at 55. In a private university, where there might be no state action, the employment contract is the principal source of faculty rights and might not include any mention of academic freedom. *See id.*

[77] *See* Burke, *University Policies on Conflict of Interest and Delay of Publication*, 12 J.C. & U.L. 175, 189 (1985).

[78] It is only an argumentative tool because there may not be government action involved, and hence no grounds for a claim based on a violation of constitutional rights. Although it appears that government action could be implied from the signing of a research agreement by a state university or research institute or from the state's enforcement of the contract, it is unclear whether First Amendment rights would be upheld in this context. *Cf.* Rendell-Baker v. Kohn, 457 U.S. 830, 839–43 (1981) (even though respondent private school received public funds accounting for up to 90% of its operating budget, the school's decision to terminate the petitioners' employment was not compelled or even influenced by any state regulation; termination of employment therefore did not constitute state action, and petitioners were denied relief under 42 U.S.C. § 1983).

[79] *See* Note, *Considerations in the Regulation of Biological Research*, 126 U. PA. L. REV. 1420, 1434 (1978).

freedom.[80] There may therefore exist a right to temporarily keep research out of the public view. This right to keep research secret, a form of "scientist's privilege," should apply to employers or sponsors wishing to keep research secret, as well as the researcher.[81] On the whole, the conflict between the academic researchers' desire to publish freely, on the one hand, and the industrial sponsors' desire for confidentiality, on the other, remains quite sharp.

Different institutions treat situations involving confidential proprietary information in different ways.[82] Harvard University, for example, maintains a more traditional notion of academic freedom as its goal and has chosen to all but ban confidential research in its laboratories.[83] MGH has even gone a step further, recognizing no trade secrets and promising no form of confidentiality.[84] Other institutions, such as the Massachusetts Institute of Technology, have adopted policies which respect the sponsor's proprietrary information.[85] The Pajaro Dunes Conference endorsed a policy that acknowledged the need for secrecy only if absolutely necessary to perform the research.[86] It appears safe to conclude, however, that universities generally recognize that a certain quantum of confidentiality may be necessary if industrial sponsors are to invest, and they are willing to compromise their academic goals somewhat in order to promote the research. Nevertheless, industry representatives uniformly insist that the large expenditures often necessary to develop biotechnology

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[80] Dow Chemical Co. v. Allen, 672 F.2d 1262, 1274–77 (7th Cir. 1982). *But see* Wright v. Jeep Corp., 547 F. Supp. 871, 877 (E.D. Mich. 1982) (an allegedly confidential study by a researcher not party to the action was properly subject to a subpoena duces tecum; "[t]he court . . . [was] not persuaded that the possibility of being subpoenaed will sufficiently chill writers and researchers to warrant a special exemption from the duty to provide evidence." *Id.* at 877).

[81] The right is evident from the numerous employee confidentiality agreements upheld in the courts and from the entire concept of contractual confidentiality required for trade secret protection. *See infra* discussion of trade secrets in section IIIB, text accompanying notes 162–84.

[82] Confidential information includes both the results of work done at the university and proprietary information supplied by the sponsor in order to aid the research.

[83] FACULTY OF ARTS AND SCIENCES, HARVARD UNIVERSITY, GUIDELINES FOR RESEARCH PROJECTS UNDERTAKEN IN COOPERATION WITH INDUSTRY 7 (1983).

[84] Interview with Marvin Guthrie, Director of the MGH Office of Technology Administration, and Charles Murphy, Assistant Director of the MGH Office of Technology Administration, in Boston, Massachusetts (Feb. 1986). MGH has initiated a policy whereby it will license new unpatented technology as "Research Information" with no explicit promise of secrecy on the hospital's part. Exclusive licenses are granted for a period extending until the information becomes public. *Id.*

[85] *See Commercialization*, *supra* note 13, at 37 (statement of Dr. Paul Gray).

[86] Pajaro Dunes Conference, *supra* note 12, at 535.

products are justified only if development costs can be recouped later with the aid of patent or trade secret protection.[87] This strong desire to protect the sponsor's investment, and the university's conflicting desire to maintain an open environment, have made the negotiation of intellectual property protection "the main stumbling block" in developing more university-industry research relationships.[88]

5. Recurring Concerns

Several issues continually arise in the biotechnology joint venture context. As just discussed, while industry often desires trade secret protection in fast-moving high technology areas, universities generally abhor the concept of confidentiality. Another issue is the ownership of any intellectual property in inventions developed in the course of the research relationship. Even if the university retains title, the questions of license exclusivity and royalties remain problematic. Further concern stems from the possibility that the sponsor will insist on delaying publication until manuscripts can be reviewed for patentable subject matter, or on altering the publication in order to protect confidential information relating to the invention, even if only tangentially. Finally, there is the question of the degree to which industry should supervise the projects. The sponsor's monitoring of the research for patentable inventions may become intrusive, and industrial involvement at the early stages of research can destroy academic freedom. In order to analyze these issues, one must first turn to the legal concepts of patent and trade secret protection for the fruits of biotechnology research.[89]

III. Intellectual Property in the Products of Biotechnology Research

Legal protection against unauthorized use of biotechnology products or processes usually derives from either the patent or

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[87] *See* D. Nelkin, Science as Intellectual Property 15 (1984). Arthur Bueche, Vice President of General Electric, has said that "[i]f we could not maintain secrecy, research would be of little value. Research property leads to patents that protect ideas, but were it not for secrecy, it would be difficult to create a favorable patent position." *Id.* at 15.

[88] *See* National Science Board, *supra* note 6, at 260.

[89] For a discussion of other types of protection for biotechnology inventions, see I. Cooper, Biotechnology and the Law § 11.02 (1984).

the trade secret laws. A patent is a formal contract with the federal government to enforce the inventor's right to exclude others from use of the technological disclosures in the patent.[90] Once patented, the information is disclosed to the public by the Patent and Trademark Office. Patents thus provide a right to exclude from a narrow field of technology, albeit for a limited time, even those who discover the information independently.[91]

Trade secret law, on the other hand, simply prevents the improper obtainment of information that could fairly be called proprietary. It has been described as the right to prevent "disclosure or unauthorized use . . . by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse."[92] Trade secret protection derives from and is governed by state law,[93] and is thus not national in scope. It is based on common law principles of agency, contracts, property, and torts, and may vary among the states.[94] Since the very nature of trade secret protection is based on the premise that the information derives its value from being confidential, there is no registry of trade secrets similar to the Patent and Trademark Office. In the absence of unauthorized disclosure, only trade secret owners and their confidantes know of the information's existence. Unlike the patent laws, trade secret laws do not prohibit others from using the information if they discover it independently.[95]

A. *Patent Protection*

The patent system is the main legal tool Congress has created for promoting innovation in the technological sciences. The Constitution authorizes Congress "to promote the progress of science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their writings and discoveries."[96] The patent system provides for granting the pat-

[90] *See infra* discussion of patents in section IIIA, text accompanying notes 96–161.
[91] *See* 35 U.S.C. § 154 (1982).
[92] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974) (footnote omitted).
[93] *See* Ruckelshaus v. Monsanto, 467 U.S. 986, 1001, 1004 (1984).
[94] *See* I. COOPER, *supra* note 89, at § 11.01.
[95] *See Kewanee*, 416 U.S. at 476.
[96] U.S. CONST. art. I, § 8, cl. 8. The Constitution treats the patent system as promoting "the Useful Arts" rather than "Science". This is because the colonial meaning of "Useful Arts" was technological arts, whereas "Science" referred to more general knowledge. *See* In re Bergy, 596 F.2d 952, 958 (C.C.P.A. 1979), *vacated as moot*, Diamond v. Chakrabarty, 444 U.S. 1028 (1980). For the history of the *Bergy* decision see *infra* note 111.

entee the right to exclude others from a limited area of technology for seventeen years in exchange for the inventor's full disclosure of the invention to the public.[97] Thus, the patent system promotes innovation in two ways.[98] It offers would-be inventors certain exclusive rights to encourage their creative research efforts, thus acting as an inducement to their attempts to commercialize their inventions.[99] Secondly, it allows for publication of inventions without fear of commercial competition, which presumably adds to "the general store of knowledge"[100] and serves to "stimulate ideas and the eventual development of further significant advances in the [technological] art."[101]

Rather than stipulate specific statutory provisions for determining patentability of inventions in discrete technological areas, Congress has stated that "whoever invents or discovers any new and useful process, machine, manufacture or composition of matter"[102] may obtain a patent. With this broad definition, Congress has reserved a role for the courts to elaborate on what constitutes patentable subject matter.[103]

1. Patentable Subject Matter

Essentially, items are not patentable if they are not new or useful, or do not meet other specific requirements of the patent statute.[104] Discoveries and inventions are also nonpatentable if they cannot be adequately defined, if they are just mental ideas,[105] or if patenting would violate public policy.[106] In the field of biotechnology, patent protection is not restricted except insofar as inventors try to claim the discovery of physical phe-

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[97] 35 U.S.C. § 154 (1982) [hereinafter sections of Title 35 will be referred to as "Sections" in the text]; *Kewanee*, 416 U.S. at 480–81.

[98] *See* Adler, *Biotechnology as an Intellectual Property*, 224 SCIENCE 357, 358 (1984).

[99] *See Kewanee*, 416 U.S. at 480.

[100] *Id.* at 481.

[101] *Id.*

[102] 35 U.S.C. § 101 (1982). The only area where Congress has granted special protection is to inventors of a "distinct and new variety of plant," the so-called Plant Patent Act. 35.U.S.C. § 161 (1982). *See also infra* note 110.

[103] *Chakrabarty*, 447 U.S. at 315.

[104] 35 U.S.C. §§ 102, 103 (1982).

[105] Gottschalk v. Bensen, 409 U.S. 63, 67 (1972); *see also* Parker v. Flook, 437 U.S. 584, 589 (1978).

[106] *See, e.g.*, Dorr, *Expanding Patent Coverage: Policy Implications of Diamond v. Chakrabarty*, 42 OHIO. ST. L.J. 1061, 1067 (1981).

nomena or laws of nature,[107] naturally occurring articles,[108] or tuber propagated plants.[109]

Unless the research results can also be protected by obtaining a plant patent or a plant variety protection certificate,[110] the protection sought normally consists of one or more of the three basic types of patents: those for processes, products, and use. In the biotechnology field process patents are more prevalent and less controversial because the inventions often arise from new processes used to make otherwise conventional products, such as the method for preparing an antibiotic by using a microorganism questioned in *In re Bergy*.[111]

The willingness of the courts to protect biotechnological processes has led to patents in a wide variety of areas.[112] Process patents have been issued to protect recombinant DNA techniques and processes for achieving the synthesis or enhanced expression of a protein, the alteration of gene components, the preparation of vectors or plasmids, and the purification of DNA sequences.[113] Patent protection is also available for fermentation

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[107] *Chakrabarty*, 447 U.S. at 309. The Court stated that "[t]hus, a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity." *Id.*

[108] Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948) (denying protection for naturally occurring bacteria).

[109] 35 U.S.C. § 161 (1982).

[110] *See* Plant Patent Act of 1980, 35 U.S.C. §§ 161–64 (1982) and Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321–2583 (1982). The Plant Patent Act protects plant breeders who invent or discover and asexually reproduce "any distinct and new variety of plant . . . other than a tuber propagated plant or a plant found in an uncultivated state." 35 U.S.C. § 161 (1982). It grants "the right to exclude others from asexually reproducing the plant or selling or using the plant so reproduced." *Id.* § 163. The Plant Variety Protection Act provides similar protection for sexually reproduced plants. 7 U.S.C. §§ 2321, 2402 (1982). These statutes do not preempt the protection of new plants by standard patents. *Chakrabarty*, 447 U.S. at 311–13. Rather, they offer a somewhat different mode of protection. The advantage of plant patents is that the Act requires only that "the description [of the new plant] be as complete as is reasonably possible." 35 U.S.C. § 162 (1982). Such a standard is easier to meet than that of other patents. *See* 35 U.S.C. § 112 (1982). On the other hand, more than one claim can be presented in a standard patent application, so that parts of the plant can be protected as well as the whole plant. In addition, the protection provided by a standard patent is more comprehensive, so that tuber propagated plants can be protected from independent discovery . *See* OTA Report, *supra* note 9, at 392.

[111] 563 F.2d 1031 (C.C.P.A. 1977), *vacated and remanded sub nom.* Parker v. Bergy, 438 U.S. 902 (1978). For subsequent history of this case see *supra* note 96. For a discussion of why the *Bergy* appeal was withdrawn, see Eisen, *Biotechnology Inventions in the Afterglow of Chakrabarty*, in CURRENT DEVELOPMENTS IN PATENT LAW 1982, at 183, 183–84 (G. Coplein and R. Nimtz, eds. 1982).

[112] For a list of biotechnology patents in the United States and Europe see A. Haulin, *Patenting the Results of Genetic Engineering Research* in BANBURY REPORT 10: PATENTING OF LIFE FORMS 67, 95–125 (D. Plant, N. Riemers, and N. Zinder eds. 1982).

[113] *See* S. OLSON, *supra* note 4, at 95.

methods, methods of constructing or producing microorganisms, and methods of utilizing already known microorganisms to achieve new results.[114]

Patent protection for the products of biotechnology is more uncertain and has sparked great controversy over the concept of patenting life.[115] The Patent and Trademark Office has issued patents covering novel substances made by using microorganisms, nutrient media, compositions containing organisms, synthetic genes, synthetically produced hormones such as insulin, biologically pure cultures and altered sequences, probes, and vectors.[116] Yet, the question of whether inventors should be allowed to patent living organisms has not been definitively resolved in the courts. The Court of Customs and Patent Appeals appeared to have answered that question in the affirmative in the process patent context when it held in *Bergy*[117] that processes are "consistently considered to be statutory subject matter notwithstanding the employment therein of living organisms and their life processes."[118] The court thus refused to deprive the process of patent protection solely because elements of the process were alive, emphasizing instead the usefulness of the process itself.[119] That decision, however, has limited precedential value.[120]

The seminal case in the field is *Diamond v. Chakrabarty*,[121] in which the Supreme Court held that a new bacterium, capable of "eating" oil spills and thus markedly different from any bacteria found in nature, was a composition of matter within Section

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[114] *See* I. COOPER, *supra* note 89, at § 1.03; Whale, *Patents and Genetic Engineering*, 14 INTELL. PROP. L. REV. 93, 95 (1982).

[115] *See, e.g.*, King, *Arguments Against Patenting Modified Life Forms* in PATENTABILITY OF MICROORGANISMS: ISSUES AND QUESTIONS 36 (R. Acker and M. Schaechter, eds. 1981).

[116] *See* I. COOPER, *supra* note 89, at § 1.03. Patents are often granted and then later invalidated when challenged in court. Thus, it is unclear how many of the current biotechnology patents granted will be upheld if challenged; consequently, the breadth of the actual protection for biotechnology inventions is in doubt.

[117] 563 F.2d 1031, 1037 (C.C.P.A. 1977).

[118] *Id.*

[119] The court stated that

> [w]hat we have before us is an industrial product used in an industrial process—a useful or technological art if there ever was one . . . . [T]he nature and commercial uses of biologically pure cultures of microorganisms . . . are much more akin to inanimate chemical compositions such as reactants, reagents, and catalysts than they are to horses and honeybees or raspberries and roses.

Id.

[120] The decision was vacated as moot by the U.S. Supreme Court. *See supra* note 111.

[121] 447 U.S. 303 (1980).

101 of the Patent Laws,[122] and that patent protection should not be denied solely because the subject matter of the patent was alive.[123] Although some people claim that this case opens the door to the patenting of all new life forms,[124] Chief Justice Burger's majority opinion is limited in several respects. He stated that the Court should not attempt to distinguish between what is living and what is inanimate, but should rather focus on the distinction between products of nature and human-made inventions.[125] The Court noted that the bacterium in question was a product of human ingenuity, and that it was useful and different from any product of nature.[126] It was thus a nonnaturally occurring manufacture or composition of matter and therefore fell within the statutory grant of patent protection.[127]

The Court's opinion is particularly significant because it interpreted Section 101 expansively, holding that all inventions coming within that section's broad terminology should be patentable unless specifically excluded by Congress.[128] The fact that Congress has not chosen to enact a statute barring patents on biological organisms since the *Chakrabarty* decision, despite having passed significant amendments to the patent laws in 1984,[129] has been viewed by some commentators as a congressional stamp of approval for the patenting of organisms.[130] Yet, the *Chakrabarty* decision applies only to microorganisms which are nonnaturally occurring compositions of matter. Its relevance to the patenting of life forms more developed than microorganisms is unclear. Since the Court's opinion does seem to show a disregard for the animate quality of the patent's subject matter, *Chakrabarty* may indicate a willingness to allow patenting of any life form as long as the claimed invention meets the statutory requirements of novelty, utility, and nonobviousness.[131]

2. The Novelty Requirement

Of the three patentability criteria just mentioned, the novelty requirement probably causes the most problems in the biotech-

[122] *Id.* at 310.
[123] *See id.* at 312–13; Eisen, *supra* note 111, at 183.
[124] *See, e.g.*, King, *supra* note 115, at 36.
[125] *Chakrabarty*, 447 U.S. at 309.
[126] *Id.* at 310.
[127] *Id.* at 309–10.
[128] *Id.* at 308.
[129] *See* B. HAMBURG, 1985–86 PATENT LAW HANDBOOK 247 (1986).
[130] *See* Eisen, *supra* note 111, at 184.
[131] These requirements are described in 35 U.S.C. §§ 102, 103 (1982).

nology field. It can be met by demonstrating that the invention was not known or disclosed to others before either the date of the invention or one year prior to the filing of the patent application.[132] The requirement was designed to prevent the granting of exclusive rights to inventions already in the public domain and to encourage rapid disclosure of inventions.[133] Three criteria for novelty are important in the context of biotechnology patents in sponsored research programs: the invention must not have been known to others before the claimed date of invention;[134] a patent application must be filed within one year of publication of the invention;[135] and there must be no public use of the invention prior to one year before the filing of the application.[136]

Section 102(a) requires that the inventor be the first to "have known" of the invention.[137] Protection is lost, however, only if another person had "reduced to practice" the invention prior to the filing of the application.[138] This concept has peculiar consequences in biotechnology when applied to inventions consisting of the purification or synthetic production of biological substances, such as hormones or vitamins. In these cases, the issue is whether nature was the first to reduce the invention to practice. The courts have addressed this question and allowed the patenting of pure forms of natural substances when such pure forms are not normally present in nature.[139] It stands to reason that a substance which never before existed in pure form is novel because that substance might not have had any therapeutic value unless isolated and available in so pure a form.[140]

The second important requirement of Section 102 is that the invention not be in public use more than one year before the filing of a patent application.[141] The researcher's use in the laboratory, however, is protected under the experimental use exception described in *TP Laboratories v. Professional Posi-*

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[132] *Id.* § 102.
[133] *See* M. EPSTEIN, MODERN INTELLECTUAL PROPERTY 132 (1984).
[134] 35 U.S.C. § 102(a) (1982).
[135] *Id.* § 102(b).
[136] *Id.* This restriction is designed to prohibit effective extension of the 17-year term of patent protection through use of the invention before patent application is filed.
[137] 35 U.S.C. § 102(a) (1982).
[138] *See* M. EPSTEIN, *supra* note 133, at 133–34.
[139] *See, e.g.*, In re Kratz, 592 F.2d 1169 (C.C.P.A. 1979).
[140] *See* Merck & Co., Inc. v. Olin Mathieson Chemical Corp., 253 F.2d 156 (4th Cir. 1958); Sterling Drug, Inc. v. Watson, 135 F. Supp. 173 (D.D.C. 1955).
[141] 35 U.S.C. § 102(b) (1982).

tioners, Inc.[142] In that case, the Court held that use of an experimental orthodontic device in one's own office does not amount to public use.[143] Emphasizing that the inventor had consistently treated the device as experimental, the court concluded that the public interest in allowing a researcher time to perfect the invention is more important than the ideal of prompt disclosure.[144] In a university-industry research relationship this experimental use doctrine may relieve the sponsor of some of the burden of monitoring the use of the invention by the university researcher.

The third novelty requirement prohibits disclosure of the invention in a printed publication more than one year before the filing of the patent application.[145] Because this patentability criterion causes particular problems in the university-industry joint venture context, industrial sponsors often insist on monitoring the university researchers to ensure that inventions are not prematurely disclosed. Although disclosure is usually thought of as being in the form of publication in a journal, it may also take such seemingly benign forms as placing a thesis on the shelf of a library[146] or orally presenting a paper at a scientific meeting.[147] While the courts are sometimes lenient and require actual public distribution of and access to the information before finding that publication had occurred,[148] the scientist may still unknowingly commit an act fatal to the invention's patentability. This publication problem becomes even more significant when one considers patent prospects on a global scale. Companies usually obtain patent protection in all markets where they op-

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[142] 724 F.2d 965, 966 (Fed. Cir. 1984). The Court of Appeals for the Federal Circuit hears all patent appeals and is the successor to the Court of Customs and Patent Appeals. The court has stated that Court of Customs and Patent Appeals decisions will be binding precedent on all issues that the new court has not yet addressed. South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

[143] *TP Laboratories*, 724 F.2d at 972–73.

[144] *Id.*

[145] 35 U.S.C. § 102(b) (1982). *See* Application of Bayer, 568 F.2d 1357, 1362 (C.C.P.A. 1978); *see generally* Annotation, *Meaning of Term "Printed Publication" Under 35 U.S.C. § 102(a) and (b), Denying Patentability to Invention Described in Printed Publication Before Invention by Applicant or More Than One Year Prior to Date of Patent Application*, 70 A.L.R. FED. 796, §§ 2, 7 (1984).

[146] *Cf. Bayer*, 568 F.2d at 1362 (while a thesis available only to the graduate committee did not constitute publication, a document may qualify as "publication" under 35 U.S.C. § 102(b) notwithstanding that accessibility thereto is restricted to a part of the public).

[147] Deep Welding, Inc. v. Sciaky Bros., Inc., 417 F.2d 1227, 1235 (7th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1969). *See* Plant, *Patents and Publications/Patenting Life*, 24 IDEA 201, 223 (1983). For a discussion of the major cases concerning the publication ban see Annotation, *supra* note 145.

[148] *See Bayer*, 568 F.2d at 1361.

erate, or at least where competition could potentially arise. In Europe, however, patent applications must be filed before any publication whatsoever; there is no one-year grace period for filing after publication.[149] Industrial sponsors must, therefore, monitor university researchers all the more stringently if the sponsor intends to market the invention in Europe. Needless to say, such monitoring is strongly resented by academic scientists.

3. The Utility Requirement

The second requirement for a patent is that the invention be "useful."[150] This concept is particularly elusive in the research context because utility for further research is apparently not sufficient.[151] Although the utility standard is not well defined, it has been established that a process is not useful solely because it produces the intended product.[152] In the pharmaceutical context, however, knowledge of the pharmacological activity of a compound is a sufficient showing of utility, as is a demonstration of *in vitro* utility.[153] The utility requirement, vague as it may be, is often the cause of conflict between the researcher and the sponsor. The conflict results primarily from the researcher's desire to disclose an invention when he or she thinks it is complete, rather than when the patent laws will treat it as complete and useful.

4. The Nonobviousness Requirement

The third requirement of patentability is that the "differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would [not] have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."[154] This nonobviousness inquiry requires the Patent

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[149] *See* Plant, *supra* note 147, at 213–14. Thus, the United States protects the inventor more than does the European Economic Community. A consequence of this emphasis on being the first to invent is that the Patent Office often must institute proceedings called "interferences" in order to determine who was actually the first inventor. *See* 35 U.S.C. § 135(a) (1982).

[150] 35 U.S.C. § 101 (1982).

[151] *See* J. HALEY, JR., PROTECTING BIOTECHNOLOGY (1985) (on file at HARV. J. ON LEGIS.).

[152] Brenner v. Manson, 383 U.S. 519, 531 (1966).

[153] Cross v. Iizuka, 753 F.2d 1040, 1046, 1048 (Fed. Cir. 1985).

[154] 35 U.S.C. § 103 (1982).

Office to determine the scope and content of the prior art, the differences between the invention at issue and the prior art, and the ordinary skill of a person in the field.[155] Possible indicators of nonobviousness include the commercial success of the product and the existence of a long felt and unresolved need in the industry.[156]

In the biotechnology area, the academic nature of the field makes the prior art determination more direct because inventors are assumed to have constructive knowledge of everything published in the field. As the number of advances, publications, and skilled researchers in biotechnology increases, the amount of scientific knowledge considered prior art will increase as well, and more of the potential inventions will be deemed obvious.[157] Thus, the more the science advances, the more difficult it will be to meet the nonobviousness criterion if patent protection of research results is the norm. The more research is done secretly, however, the less information can be considered constructive knowledge and the easier it will be to meet the nonobviousness requirement. As a result, the requirement may serve as an incentive for industrial sponsors of joint research to push for more trade secret protection in certain basic areas of scientific inquiry.

5. The Disclosure Requirement

Finally, even if the novelty, utility, and nonobviousness criteria are satisfied, there still has to be be full disclosure of the invention if a patent is to be obtained. Such disclosure must "enable any person skilled in the art . . . to make and use the [invention]."[158] Although the invention does not have to be disclosed in its entirety, the best known mode of practicing it must be made public. The patent will be deemed invalid if the disclosure is so insufficient as to require undue experimentation in order to practice the invention.[159]

Biotechnology patents present a peculiar problem with regard to disclosure because it is extremely difficult to describe a microorganism or explain how a microorganism performs a given task in a way that will enable others to practice the invention.

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[155] Graham v. John Deere Co., 383 U.S. 1, 15 (1966).
[156] *See* M. EPSTEIN, *supra* note 133, at 137–38.
[157] *See id.* at 224.
[158] 35 U.S.C. § 112 (1982).
[159] W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1557 (Fed. Cir. 1983).

Consequently, inventors can satisfy the disclosure requirement by depositing the organism in an independent depository, such as the American Type Culture Collection.[160] The Patent Office can then obtain access to the organism from the effective date of the application, and the public can obtain access after the issuance of the patent.[161] Public access is delayed until the issuance of the patent because unrestricted access to the deposit at an earlier date would be equivalent to disclosing the invention to the public.

B. *Trade Secret Protection*

The other prominent type of intellectual property protection for the fruits of biotechnology research is trade secret protection. Trade secret laws protect the owner of intellectual property against the use of it by anyone who either obtains it improperly or uses it in breach of a confidential relationship.[162] The protection is based on a personal right to keep one's work secret and thus to exclude the world from use of it. As the Supreme Court noted in *Kewanee Oil Co. v. Bicron Corp.*, "[b]y definition a trade secret has not been placed in the public domain."[163] Trade secret protection is popular among industrial firms in the biotechnology field because the owner need not meet the standards of patentability. In addition, keeping information secret can potentially preserve a competitive advantage forever. Furthermore, since the biotechnology industry is growing rapidly and lead time is important, the short term of trade secret protection is often advantageous.

Trade secret protection furthers two important policies. First, it promotes innovation by providing an incentive to develop even those inventions which are not patentable.[164] Trade secret protection allows for licensing of nonpatentable inventions and protection of the sponsor's investment in them. Second, it enforces commercial ethics[165] and discourages industrial espio-

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[160] *See* In re Lundak, 773 F.2d 1216, 1221–1222 (Fed. Cir. 1985).

[161] *See, e.g.*, Ex parte Jackson, 217 U.S.P.Q. (BNA) 804, 808 (P.T.O. Board of Appeals 1982); In re Lundak, 773 F.2d 1216; In re Argoudelis, 434 F.2d 1390 (C.C.P.A. 1970).

[162] *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974).

[163] *Id.* at 484 (footnote omitted).

[164] *See id.* at 485.

[165] *See id.* at 481.

nage. Without trade secret protection, the incentive to invest would be dampened by the chance of theft of intellectual property by competitors or disclosure by employees, including university researchers, in breach of their confidential relationship with the employer. In any event, the aggrieved owner of misappropriated information must satisfy at least three requirements to win a lawsuit: 1) the information or scheme must have been termed a valid trade secret; 2) protective measures must have been taken to maintain its secrecy; and 3) the defendant must have acquired the information improperly.[166]

1. Validity Requirement of the Trade Secret

The question of the validity of a trade secret involves the examination of whether the information meets the applicable state statute's requirements for trade secret protection. Both the Restatement (Second) of Torts and the Uniform Trade Secrets Act definitions dictate that companies may protect, for example, the sequencing of data bases, chemical formulae, hybridization conditions, cell lines, microbes used in fermentation, new processes, the apparatus used in the processes, and even test results from the clinical testing of drugs.[167] The information need not be novel in the patent law sense. It must, however, possess a degree of novelty such that it would not be generally known in the industry and would provide a competitive advantage.[168] For example, matters of public knowledge or of general knowledge in the industry cannot be appropriated as a trade secret. Thus, employees may leave a job and use the general skill or knowledge acquired there as long as it does not involve secret processes.[169]

2. Maintenance of Secrecy

The second element in maintaining a trade secret action is the maintenance of a reasonable degree of secrecy with respect to the information at stake. The secrecy level need not be absolute,

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[166] *See* RESTATEMENT (SECOND) OF TORTS § 757 comment b (1977).

[167] *See, e.g.*, Adler, *Biotechnology as an Intellectual Property*, 224 SCIENCE 357, 361 (1984).

[168] *Kewanee*, 416 U.S. at 474, 476.

[169] *See, e.g.*, Dynamics Research Corp. v. Analytic Sciences Corp., 9 Mass. App. Ct. 254, 267, 400 N.E.2d 1274, 1282 (1980).

but reasonable precautions must be taken to protect the information.[170] The trade secret must be difficult to obtain without using improper means.[171] This requirement is thus an equitable concept of "clean hands"—the employer cannot claim information as a trade secret unless it is treated as such.[172] *E.I. duPont de Nemours & Co., Inc. v. Christopher*[173] probably provides the best statement of what constitutes a reasonable precaution. The *DuPont* court stated that "we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available."[174]

Precautions usually involve two types of measures—limiting employee and visitor access to information, and preventing leaks by employees, including consultants such as university professors. For example, plant security is used to restrict access to the material by both visitors and employees who are not required to work with it, and trade secrets are physically isolated in parts of factories or laboratories not accessible to casual visitors.[175] One can imagine that universities which treasure their open atmosphere would have trouble implementing many of these procedural precautions. Consequently, some institutions refuse to accept trade secrets from companies or to keep research results secret.[176]

Preventing leaks by employees is usually accomplished by placing them under contract not to disclose the information used and produced in their work. Most employees in industrial facilities, as well as some universities where industrially sponsored research occurs, sign employee confidentiality and nondisclosure agreements.[177] Furthermore, employees are usually notified

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[170] *See* Greenberg v. Croydon Plastics Co., Inc., 378 F. Supp. 806, 812 (E.D. Pa.), *vacated*, 184 U.S.P.Q. (BNA) 27 (1974).

[171] *See id.* at 812.

[172] *See* Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 890 (Minn. 1983).

[173] 431 F.2d 1012 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971), *reh'g denied*, 401 U.S. 967 (1971). In *DuPont*, the defendant competitor hired someone to take aerial photographs of machines that were being installed in a new DuPont plant before the roof was finished.

[174] *Id.* at 1016.

[175] *See* Pretty, *Preventive Measures to Protect Trade Secrets from Loss*, in PROTECTING TRADE SECRETS 143, 147–49 (G. Rose ed. 1981); Haley, *supra* note 151; M. EPSTEIN, *supra* note 133, at 15–25.

[176] See *infra* discussion in section IV, text accompanying notes 206–212.

[177] For example, Monsanto required all Washington University researchers, including students, to sign a confidentiality agreement. *See* B. REAMS, *supra* note 7, at 127.

as to exactly what information is a trade secret and therefore cannot be disclosed. Upon termination of employment, an exit interview is held to remind the employees of their obligations, and subsequent employers are often warned that the employee is under a confidentiality agreement. Enforcement of such agreements at universities in the context of a joint venture could seriously hinder a researcher's mobility and ability to work with fellow scholars at other institutions.

3. Improper Obtainment

The third element of a successful trade secret suit is the defendant's having obtained the material improperly, either by discovery of information through improper means or its disclosure by a party who was in a confidential relationship with the rightful owner of the information. The Uniform Trade Secrets Act defines improper means as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[178] Other statutes define it as means other than independent discovery, discovery through public disclosure, or reverse engineering.[179]

Public disclosure of the information eliminates trade secret protection. In biotechnology, the nature of both the product and the science makes loss of trade secret protection through public disclosure probable. Thus, distribution of the product to other laboratories, maintaining open access to university laboratories, or having the secret so obvious that reverse engineering would not take great effort would all lead to forfeiture of protection.[180] The problem is magnified by the academic nature of the science which creates an open atmosphere with free discourse between researchers. Exchange among researchers in a laboratory, discussion at a scientific meeting, or publication in a technical journal or an issued patent may all lead to loss of trade secret protection.

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[178] UNIFORM TRADE SECRETS ACT § 1(1), 14 U.L.A. 35 (1979).

[179] *See Kewanee*, 416 U.S. at 475–76.

[180] *See* Colony Corp. of Am. v. Crown Glass Corp., 102 Ill. App. 3d 647, 649, 430 N.E.2d 225, 227 (1980).

Some disclosures, however, do not result in the forfeiture of trade secret protection.[181] The most important of these is disclosure within a confidential relationship, which allows for talk among fellow employees, friends, or researchers without forfeiting protection as long as the policy of nondisclosure is made clear. Such a system of controlled disclosure also lays the groundwork for the licensing of trade secrets, sometimes called "know-how," whereby other firms can license the use of, for example, cell lines or manufacturing processes. Another type of disclosure that does not forfeit protection is disclosure of the trade secret as a component of a complex product where the secret is not obvious and reverse engineering would be difficult.[182] Finally, trade secret protection is not lost through filing a patent application. The Patent and Trademark Office is required to keep the application confidential and cannot even disclose its contents under a Freedom of Information Act re-

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[181] It should be noted that an important factor in considering trade secret protection is the risk of disclosure following submission to one of the many regulatory agencies demanding information about biotechnology products and research. *See* Kiley, *Trade Secrets and Biotechnology*, in PROTECTING TRADE SECRETS 443, 449 (G. Rose ed. 1981). Agencies such as the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the National Institutes of Health (NIH) frequently require submission of confidential safety and/or efficacy data before they approve biotechnology research or the marketing of biotechnology products. However, the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), requires agencies to disclose to the public information they obtain.

Admittedly, FOIA contains safeguards against the disclosure of submitted privileged or confidential information. *See id.* § 552b(c)(3)–(4). Nevertheless, companies are often wary of having agency employees scrutinize trade secret information, especially since competitors can often use FOIA as a legitimate source of otherwise unavailable information. The resultant tendency of many companies to submit as little information as possible for agency review sometimes frustrates the efforts of agencies such as the FDA and EPA to ensure public safety and health.

The court in Johnson v. HEW, 462 F. Supp. 336 (D.D.C. 1978), attempted to resolve this problem by holding that trade secret information submitted to the agencies in the form of test results could not be disclosed if such disclosure would cause substantial competitive injury. *Id.* at 337. In Ruckelshaus v. Monsanto, 467 U.S. 986 (1984), the Supreme Court also held that regulatory agencies should protect trade secret information submitted to them. *Id.* at 1003–04. *Ruckelshaus* stated that a company's interest in the submitted "health, safety, and environmental data cognizable as a trade-secret property right" under the applicable state law is protected by the Takings Clause of the Fifth Amendment. *Id.* at 1003–04. Yet, the Court then held that since the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1982), had been amended to allow the EPA to reveal confidential information submitted to it "when necessary to carry out" EPA's duties under FIFRA, Monsanto, the submittant, "was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it . . . ." *Id.* at 1006. Such a holding is not likely to encourage maximum possible disclosure of trade secret information to regulatory agencies, and the affected companies will probably remain reluctant to part with confidential data.

[182] *See* Analogic Corp. v. Data Translation, Inc., 371 Mass. 643, 648–49, 358 N.E.2d 804, 808 (1976).

quest.[183] Furthermore, a patent grant only eliminates protection on what it actually discloses, not on the entire process or product to which the patent is relevant.[184]

IV. Current Approaches to Joint Ventures in Biotechnology

Universities and industrial sponsors have already had the opportunity to address the unique demands of joint ventures in biotechnology research. Indeed, sponsored research has become a business at major research universities.[185] Most major universities have written formal patent policies and research handbooks to guide researchers who work on sponsored research.[186] These statements detail the procedures to be followed in choosing research projects, obtaining funding, disclosing inventions, and publishing the results.

All of the patent policies examined in a recent survey contain some sort of formal procedure for disclosing inventions to the university administration.[187] Some of the universities process these disclosures through in-house patent offices. Others employ patent management firms to decide when patent protection should be sought and when to file the applications. Finally, almost all of the policies contain provisions entitling the inventor to share in the royalties made from the patent.

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[183] 35 U.S.C. § 122 (1982); *see* Scharmer v. Carrollton Mfg. Co., 525 F.2d 95, 99 (6th Cir. 1975).

[184] *See* Data General Corp. v. Digital Computer Controls, Inc., 188 U.S.P.Q. (BNA) 276, 282 (Del. Ch. 1975).

[185] This is evidenced by the fact that most universities have an Office of Sponsored Research to implement research programs and to negotiate the actual contracts with the attorneys for the involved parties. These offices are typically integrated with the offices that control patents and licensing for the institution.

[186] The author conducted a nonrandom survey of university patent policies to reach this conclusion (on file at Harv. J. on Legis.) [hereinafter Author Survey]. The survey included the following universities: Brown University; Case Western Reserve University; Columbia University; Duke University; Georgia Institute of Technology; Harvard University; Massachusetts Institute of Technology; New York University; Pennsylvania State University; Princeton University; Rensselaer Polytechnic Institute; Rockefeller University; Stanford University; University of Colorado; University of Kansas; University of Michigan; University of Missouri; University of North Carolina; University of Pennsylvania; University of Rochester; University of Southern California; University of Virginia; Washington University; and Yale University.

[187] *See id.*

A. *University Policy Regarding Allocation of Ownership Rights*

A key issue concerning university-industry research relationships is whether the sponsor should own the patent rights or should instead merely obtain some sort of license to use any patents generated by the work it sponsors. Since 1977, there has been a trend toward universities retaining title to patented inventions resulting from industry-sponsored research.[188] Today, most universities retain title to any patents granted for inventions created in university facilities and by university researchers.[189] This trend can be explained in part by the fact that in 1980 Congress amended the patent law so that universities can elect to retain title to any research findings sponsored in whole or in part by federal funding.[190]

Still, different schools take different stances with respect to taking title to patentable findings. One approach adopted by some universities is to retain title to all inventions resulting from industry-sponsored research and then grant either an exclusive or nonexclusive license to the sponsor.[191] The rationale for retaining title is that it ensures that research results will be used for the benefit of the public.[192] In this way, the invention or process will definitely be developed rather than merely patented by a sponsor in an attempt to suppress an area of technology possibly valuable to its competitors.[193] Furthermore, university ownership of the patent rights is more consistent with the federal policy of having the university retain title to inventions in joint ventures.[194]

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[188] *Compare id. with* NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, SURVEY OF INSTITUTIONAL PATENT POLICIES AND PATENT ADMINISTRATION 2 (1978).

[189] *See* Author Survey, *supra* note 186.

[190] The government in turn receives a nonexclusive, royalty-free license to use the patented invention. *See* 35 U.S.C. §§ 202–203 (1982).

[191] *See, e.g.*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, INTRODUCTION TO RESEARCH AGREEMENTS WITH INDUSTRIAL SPONSORS 4 (1985); MASSACHUSETTS GENERAL HOSPITAL, RESEARCH & LICENSE AGREEMENT-SHORT FORM MASTER 6 (1985); DUKE UNIVERSITY, POLICY ON INVENTIONS, PATENTS, AND TECHNOLOGY TRANSFER q-2 (1982).

[192] Wallace, *supra* note 18. The federal government also shares this goal but prefers to ensure it by retaining the right to require the university to grant a license to the inventor if steps have not been taken to apply the invention. *See* 35 U.S.C. § 203 (1982).

[193] *See, e.g.*, Memorandum, Duke University Office of the General Counsel (July 9, 1984) (on file at HARV. J. ON LEGIS.).

[194] *Id.*

Another reason for this policy is that it permits the university to allocate the individual inventions generated by the sponsored research to those companies that can utilize them best, rather than granting all of the rights to a company that may only be able or willing to develop a small portion of the work.[195] Finally, the university's retention of title allows it to research related issues in the future without having to risk infringement, or having to purchase licenses to patents developed by its own researchers, in order to perform further research in the field.[196]

Most schools, though, are not willing to take this position.[197] A more typical position is that the university will usually retain ownership but will sometimes allow sponsors to acquire title.[198] The university may grant title to the sponsor when the research has a "narrowly focused application" and a single firm can develop it actively, or when the patents may be challenged, or when the benefits from royalties are so small as not to justify the expense of obtaining the patents.[199] Nonetheless, the university will retain title when the applications are for inventions broader than the interest of the sponsor or when the university is planning to develop related patents whose usefulness might be tainted by having the sponsor retain title.[200] Some schools are also willing to grant title to the sponsor when the sponsor has a dominant position in the field and the university's retention of title would be ineffectual.[201] Other school policies, finally, simply state that the actual sponsorship agreements will determine who maintains title to the invention.[202]

University policies with respect to the licensing of patents are also important because, from the industrial sponsor's perspective, the difference between holding a patent and holding exclusive license to that patent is minimal with respect to limiting access to the invention.[203]

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[195] *Id.*

[196] *Id.*

[197] *See* Author Survey, *supra* note 186.

[198] *See, e.g.*, THE PENNSYLVANIA STATE UNIVERSITY, UNIVERSITY PATENT PROCEDURE 4 (1985).

[199] *See, e.g.*, CASE WESTERN RESERVE UNIVERSITY, GUIDELINES FOR KEY ISSUES IN INDUSTRY-UNIVERSITY RESEARCH AGREEMENTS 1 (1983).

[200] *Id.*

[201] *See, e.g.*, UNIVERSITY OF WASHINGTON, PATENT AND INVENTION POLICY 1 (1983).

[202] *See, e.g.*, HARVARD UNIVERSITY, STATEMENT OF POLICY IN REGARD TO INVENTIONS, PATENTS AND COPYRIGHTS 6 (1985); THE UNIVERSITY OF MICHIGAN, INTELLECTUAL PROPERTY MANUAL 8 (1983); GEORGIA INSTITUTE OF TECHNOLOGY, PATENT POLICY e-50 (1980).

[203] Edward David, Chairman of Exxon, has said that "most companies are willing to

The typical clause adopted by universities in their policies states that nonexclusive licenses should be granted, but that exclusive licenses can be granted if necessary to ensure the development of the project.[204] The federal government is more restrictive than most universities in that it only permits the research institution to issue exclusive licenses for federally-funded research to specific types of firms and then only for limited times.[205]

B. *University Policy Regarding Maintenance of Secrecy*

Related to the ownership issue is the question of whether arrangements can be made for research results to be kept confidential, as is required to maintain trade secret protection. In general, the universities insist upon publishing research results.[206]

Most of the major research universities have implemented formal written policies which vary concerning when a delay in publication is justified and which determine the length of the delay on the basis of the reason for it.[207] Some of the policies state that patent review is the only reason to delay, while others permit a delay to review for confidential information that might be inadvertently disclosed in the publication.[208] In general, pub-

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let universities own the patents resulting from industry-supported research. The rub comes with the question of *exclusivity*." David, *supra* note 42, at 165 (emphasis in original). At the same time, a firm holding only an exclusive license does not have the option of licensing the invention or process to another firm or institution.

[204] *See, e.g.*, DUKE UNIVERSITY, POLICY ON INVENTIONS, PATENTS, AND TECHNOLOGY TRANSFER q-2 (1982). The Pajaro Dunes Conference endorsed the position that exclusive licenses can be granted provided that they are important to assure prompt, rigorous development of the patent. It also concluded that universities should reserve march-in rights and require due diligence on the part of licensees with respect to commercial development of innovations. Pajaro Dunes Conference, *supra* note 12, at 536.

[205] *See* Office of Management & Budget Circular A-124, 47 Fed. Reg. 7556 (1982). If the governmental or university policy forbids the university from granting an exclusive license, however, the university can still create an incentive for industry funding and cooperation by granting the sponsor a royalty-free, non-exclusive license. One example of such a license can be found in the MIT-Exxon agreement described in David, *supra* note 42, at 164.

[206] *See* Fowler, *supra* note 5, at 525. The study concluded that 82% of the upper-level administrators surveyed considered it legitimate to delay publication for patentability reviews. Some 87%, however, stated that it was not acceptable to delay publication for any other reason.

[207] *See* Burke, *supra* note 77, at 187. Thirty-two of the forty-nine institutions surveyed had formal policies concerning publication delays.

[208] *Id.* at 197.

lication delay is allowed only for patent protection and predisclosed proprietary data. The preservation of trade secret information is generally not considered to be a legitimate reason for delay.[209]

Universities have taken a variety of positions with respect to the secrecy afforded proprietary information given by the sponsor in order to facilitate research. Some institutions simply prohibit agreements that would impinge upon free and open research.[210] Others will keep such information confidential and will allow the sponsor to review publications to that end.[211] Some of the latter universities will promise only to exercise "reasonable precautions" with respect to the disclosure of confidential information.[212]

C. *Difficulty with the Current Intellectual Property Framework*

This look at university patent policies indicates that sponsors do have an opportunity to "shop around" for different degrees of protection or types of licenses.[213] In the current legal envi-

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[209] *Id.* at 189. *But see* Lachs, *University Patent Policy*, 10 J.C. & U.L. 263, 263 (1983–84).

[210] *See* YALE UNIVERSITY, REPORT OF THE COMMITTEE ON COOPERATIVE RESEARCH, PATENTS, AND LICENSING 4 (1984); HARVARD UNIVERSITY, *supra* note 202, at 6–8. Harvard tends to accept some restrictions on openness. MGH makes no promises about confidentiality, but does permit agreements with individual professors. Interview with Marvin Guthrie and Charles Murphy, *supra* note 84.

[211] *See, e.g.*, UNIVERSITY OF WASHINGTON, *supra* note 201, at 2–3.

[212] MIT, for example, will accept confidential information only "if it is necessary for the effective conduct of the research" and will "use reasonable precautions to protect such information." *Commercialization*, *supra* note 13, at 37 (statement of Dr. Paul Gray). Likewise, Case Western Reserve University will assure sponsors of its "best efforts" to avoid inadvertent disclosure of information. CASE WESTERN RESERVE UNIVERSITY, GUIDELINES FOR KEY ISSUES IN INDUSTRY-UNIVERSITY RESEARCH AGREEMENTS 1–2 (1983). While it will not disclose confidential information absent 60 days notice to the sponsor, Duke retains the right to determine whether information should be considered confidential. Wallace, *supra* note 18.

[213] An examination of actual joint venture agreements illustrates some of the approaches taken. The most publicized arrangement is the $70 million agreement between MGH and Hoechst A.G. *See* Hoechst agreement, *supra* note 19. The agreement is to set up a new Department of Molecular Biology at MGH which will be exclusively funded by Hoechst (thus eliminating any possible conflicts with federal funding). Title to all patents generated by the research belongs to MGH, there are no restrictions imposed on the content of the research, and MGH need not maintain any confidential information. *See* Culliton, *The Hoechst Department at Mass General*, 216 SCIENCE 1200, 1200–02 (1982). In turn, Hoechst receives an exclusive license to market patented inventions and has the right to review manuscripts prior to submission for publication in order to protect patent rights. This agreement seems unique in that not many companies appear willing to spend large amounts to fund basic research that may not yield

ronment, industrial sponsors can look to the market of schools with respect to provisions concerning title to inventions, exclusivity of licenses, the degree to which publication is protected or inhibited, the degree to which the sponsor controls the direction of research, and the licensing of trade secrets to the university. This sense of competition no doubt causes universities to respond more readily to industry's needs. Indeed, the best course for the future may be simply to maintain the status quo by ensuring free contracting between universities and industrial sponsors.[214]

Yet the current patent protection scheme does not appear to provide the optimal degree of coverage for biotechnology. As it

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valuable proprietary rights. Interview with Marvin Guthrie and Charles Murphy, *supra* note 84.

Two other major agreements involve Monsanto. Its agreement with Harvard University consists of a $25 million 12-year project to develop a tumor-blocking agent. D. NELKIN, *supra* note 87, at 21. The agreement involves exchanges of research information and the endowment of professorships. Monsanto is to receive exclusive licenses to all of the Harvard patents.

Monsanto's Washington University agreement is more complex because it involves funding different types of research. *See* B. REAMS, *supra* note 7, at 257–313. The negotiation of this agreement is discussed in S. OLSON, *supra* note 4, at 103. The sponsor has a great deal of influence over the direction of the research because all research proposals must first be approved by a committee, half of whose members are representatives of the sponsor. Moreover, 70% of the research will be channeled toward areas promising commercial utility. *Univ./Ind. Coop.*, *supra* note 13, at 16–18 (testimony of Dr. David Kipnis). Washington University will own all patents generated by the agreement, but Monsanto is granted an exclusive license and a thirty-day period to review manuscripts. University researchers are otherwise assured the freedom to publish all research results. *Id.*

[214] Of course, additional means of encouraging university-industry relationships have been developed. One effort involves research centers developed by state governments to encourage cooperative research. Examples of this type of arrangement include the North Carolina Biotechnology Center and the Penn State Biotechnology Institute. *See* Dibner, *Biotechnology in Pharmaceuticals: The Japanese Challenge*, 229 SCIENCE 1230, 1234 (1985). The Penn State center will be a research and educational center where member companies are granted access to the applied research facilities and developed products. The North Carolina Center receives $2.5 million from state, federal, and industrial sources in certain targeted laboratories at Duke and the University of North Carolina. *Id.* With respect to the North Carolina Biotechnology Center, *see also Commercialization*, *supra* note 13, at 155–59 (testimony of Quentin Lindsey).

The National Science Foundation has also been instrumental in creating incentives by granting seed money to university-industry consortia in many fields, including biotechnology. *See generally* Maugh, *Technology Centers Unite Industry and Academia*, 5 HIGH TECH. 48 (Oct. 1985). While this seed money helped to bring industry and universities together, it was limited in scale. Currently, the program's funding has expired. Interview with David Blumenthal, *supra* note 21.

Tax incentives have also been developed for industries interested in research with universities. The new tax act retains a tax credit for expenditures in excess of a base amount for basic research with universities and thus provides some incentive for industry to invest in such ventures. *See* I.R.C. § 41 (1986). For a discussion of tax incentives and the effects of research and development limited partnerships, *see* B. REAMS, *supra* note 7, at 161–69.

stands, the existing framework generates uncertainty regarding the scope of protection and thus encourages greater secrecy on the part of researchers than might otherwise be necessary. Ambiguity exists as to the extent to which new forms of life may be patented. The threat of unanticipated public disclosure under the existing novelty requirement can limit the openness of the research environment and the quality of peer review. Likewise, the uncertainty regarding the application of the utility and nonobviousness requirements by the Patent Office and the courts can lead to excess caution on the part of joint venturers uncertain of their ability to receive patent protection for biotechnological innovations.

Trade secret protection suffers from an even greater need to avoid public disclosure by restricting access to research and findings. But university researchers believe that any restriction on the content of publication is an unreasonable restraint on their academic freedom and societal obligation.[215] Furthermore, the secrecy requirement hinders the mobility of scientists between institutions. The disclosure of trade secret information to the public also eliminates the protection available to the holder of the trade secret. Finally, the current environment leaves unsatisfied industry's desire to maintain trade secrets, as very few schools are willing to keep research results unpublished.

Despite this ability to "shop around," the parties to the joint ventures may find the range of proprietary rights available somewhat constraining.[216] If the "policy and objective of the Congress [is] to use the patent system to . . . promote collaboration between commercial concerns and nonprofit organizations, including universities,"[217] then Congress should take new steps to promote this goal.

V. Proposals for Reform

Both universities and industry have a good deal to gain from joint ventures in biotechnology. The goal of any serious reform

[215] Society also has an interest in encouraging more cooperative research and innovation in general. Perhaps if a private company were willing to fund socially valuable university research in exchange for favorable proprietary protection, universities should be given incentives to accomodate such interests.

[216] James William Chaney, vice-president of Agrigenetics Corporation, stated that "if this issue of proprietary rights cannot be solved in a collaborative framework, industry will have little choice but to terminate sponsored research at universities and seek to do the same work one-hundred percent in-house, frequently seeking to hire the same scientists." *Univ./Ind. Coop.*, *supra* note 13, at 94.

[217] 35 U.S.C. § 200 (1982).

should be to encourage research in biotechnology and to reconcile the interests of both industry and academia at the expense of neither. In the words of Donald Kennedy, the President of Stanford University, "the conditions for that relationship need to be carefully structured, if a highly evolved and highly efficient mechanism for doing basic scientific work is not to be unwittingly damaged."[218]

A. *The Advantages of Reform Through Patent Law as Opposed to Trade Secret Law*

In the search for a vehicle of reform, a modification of the patent law offers a more attractive alternative than does any alteration of trade secret doctrine. This is certainly true from the perspective of the university. Significantly, patent protection places less restraint on the publication of biotechnological discoveries. With patent protection, any restraint on publication is temporary. Under trade secret protection, on the other hand, the restraint on publication continues until the new information is independently disclosed or until its value is lost. Thus, the discovery might never be made public. While the public would still benefit from the trade secret holder's application or licensing of the new biotechnology, the trade secret approach deprives the community of the new scientific knowledge. Under the patent scheme, however, such knowledge would be disclosed to the scientific community.

Patent law is also preferable from the point of view of the industrial sponsor. First, the cost of monitoring the research is relatively low under the patent regime because the sponsor need only ensure that there is no public use or printed publication of the information more than one year before the filing of the patent application. If trade secret protection is desired, in contrast, the entire research process must be monitored. Industry must make certain that trade secrets are neither published nor discussed with those not bound by confidential agreements.[219] To that end, all involved researchers must be kept on notice as to exactly which new results are considered secret. Moreover, the researchers must be given adequate incentive to maintain secrecy.

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[218] *Commercialization*, *supra* note 13, at 19–20 (statement of Dr. Donald Kennedy).

[219] Of course, if research matter is disclosed during the course of the research, patent protection may be available even if trade secret protection is lost.

Also, patent protection, once obtained, provides an industrial sponsor with far better protection during the seventeen-year term than that offered by state trade secret laws.[220]

B. *Proposed Modifications to Patent Law*

1. Relax Requirements for Standard Patent

Congress could ease the requirements placed on general patentability so that inventions and processes having a lesser degree of novelty, utility, or nonobviousness could be patentable. This would afford patent protection for biotechnology innovations that would ordinarily fail to fit within these restrictions and which could otherwise only be protected as trade secrets.[221] By relaxing the restrictions on what can be patented, far more information could be disseminated at no cost to the sponsor. Such a revision might, however, be inconsistent with the constitutional underpinnings of the patent system. In *Graham v. John Deere Co.*,[222] the Supreme Court stated that Congress may not constitutionally "enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby."[223] At the same time, the Court noted that "[w]ithin the scope established by the Constitution, Congress may set out conditions and tests for patentability."[224] Any general elimination or watering down of any of the three stated requirements, however, may offend the Court's sensitivity to "change in the general strictness with which the overall test is to be applied."[225] Thus, biotechnology inventions which do not meet the current requirements as interpreted by the courts might not receive standard patent protection.

2. Create Limited Patent with Relaxed Requirements

Another possible approach would be to create a distinct and more limited form of patent protection by easing the require-

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[220] *See generally Kewanee*, 416 U.S. at 489–90.

[221] *See id.* at 482–83 (trade secret law can protect items which would not be proper subjects for patent protection).

[222] 383 U.S. 1 (1966).

[223] *Id.* at 6.

[224] *Id.*

[225] *Id.* at 19.

ments for patentability and simultaneously decreasing the quality of protection for the inventions and processes meeting this reduced subject matter requirement. Under this proposal, the standard requirements of novelty, utility, and nonobviousness would be relaxed in exchange for a shorter term of patent protection.[226] For example, the limited patent protection could extend to discoveries published or in general use for more than one year prior to the owner's application for a patent.

This limited patent would give sponsors an incentive to invest in research that might otherwise prove too great a risk for the return. Most firms, of course, would prefer the full seventeen years of protection in exchange for their public disclosure.[227] But where the patent requirements cannot—or might not—be met, an intermediate term of protection may prove more beneficial to the sponsor as compared with trade secret protection and its attendant risks. It should be noted, moreover, that the option of seeking full patent protection in the future need not be foreclosed.

In the fast-paced biotechnology industry, where "lead time" plays a large role, the first years of patent protection are especially valuable.[228] During these years further development takes place, plants are "geared up" for production, and sales are made. Gaining a dominant market share in the early years is thus of greater importance to a firm than obtaining protection for the later part of the seventeen years, during which time competitors may "invent around" existing patents.

Thus, a limited patent option would preserve the competitive advantage currently secured by trade secrets while maintaining academic freedom and furthering scientific knowledge. Because both sides do in fact stand to gain from the exercise of this

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[226] Such an addition to federal law would most likely pass the *Graham* analysis insofar as the standard seventeen-year monopoly would not be extended to the applicant. Under this proposal, the shorter term is the quid pro quo for the relaxed requirements. The intellectual property laws suggest that Congress has generally incorporated the quid pro quo concept insofar as the term of protection afforded varies inversely with the quality of protection granted. Thus copyrights, which provide protection against copying and not against independently created similar works, have at least fifty years of protection. 17 U.S.C. §§ 302–303 (1982). Patents, which have much stronger protection insofar as they exclude the use of the patented invention by any nonlicensee (whether the invention is independently created or not), have only a seventeen-year term of protection. 35 U.S.C. § 154 (1982).

[227] Telephone interview with Walter Gilbert, Professor of Biology, Harvard University, and Acting Chief Executive Officer, Biogen N.V. (Feb. 1986).

[228] *Id.*

option, industrial support for university research would increase.

Furthermore, a limited patent scheme would not be unprecedented in light of the connection that Congress appears to make between the nature of the patent protection and its duration. In the Drug Price Competition and Patent Term Restoration Act of 1984,[229] for example, Congress enlarged the seventeen-year term of protection for the patents of pharmaceutical manufacturers by the amount of time taken by the Food and Drug Administration's approval process.[230] The Act demonstrates that Congress believes that in return for full disclosure of a patentable idea, the owner should receive a full term of protection so as to maintain proper incentives for innovation. It also illustrates that Congress will modify the length of the term where seventeen years no longer provides the desirable incentive.

One further modification may be desired. Once the limited patent had taken effect, other researchers involved in developing the invention or process following the disclosure would ordinarily be prohibited by the patent from continuing their work. This could be avoided by introducing an estoppel-type provision whereby any party then making use of the innovation would be issued a compulsory license similiar to those instituted by the copyright laws.[231] By keeping control in the hands of the patent holder, there would be no need to force a competitor to abandon a project.[232]

3. Special Patent Statute for Biotechnology Research

The patent laws could also be amended to provide specific protection for biotechnology inventions in general or for those resulting from university research in particular. Congress would simply afford standard patent protection to biotechnology that previously had not been considered to have met the require-

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[229] 35 U.S.C. § 156 (Supp. II 1984).

[230] The Act was passed in response to industry claims that the regulatory procedure shortened the "effective life" of pharmaceutical patents and that this lessened industry incentive to invest in the development of new drugs. *See* Hamburg, *Comments on Newly Passed Drug Price Competition and Patent Term Restoration Act*, 83 PAT. & TRADEMARK REV. 15 (1985).

[231] *See, e.g.*, 17 U.S.C. § 115 (1982) (authorizing compulsory licensing of nondramatic musical phonorecords subject to prior copyright).

[232] However, this plan would entail significant administrative costs in that an agency would be required to assess royalties and monitor the use or publication of inventions and processes.

ments of the patent statutes. The *Chakrabarty* decision, moreover, leaves open to Congress the option of expressly including or excluding the products of genetic engineering from patent protection.[233]

Congress has generally been reluctant to incorporate specific technologies into the patent requirements.[234] Nonetheless, the 1930 Plant Patent Act brought an entire range of flora within the subject matter requirements of the patent law,[235] which suggests that Congress could take a similar approach regarding biotechnology as a whole.

Congress could also create a statute that would grant some kind of limited protection for biotechnology discoveries that would not otherwise warrant patent protection. Indeed, Congress has passed special protective measures in the past. For example, the 1970 Plant Variety Protection Act provides the applicant with eighteen years of exclusive use of a new plant.[236] Congress has also created specific statutory protection for semiconductor chip products.[237] In addition, the copyright laws were amended to remedy deficiencies in the copyright protection of computer programs.[238]

The main advantage of a statute providing special protection for biotechnology discoveries would be the security and certainty afforded to companies planning research and development strategies and evaluating risk.[239] A biotechnology patent statute would avoid the haphazard development of doctrine often occasioned by the case-by-case development of the common law.[240] Moreover, litigation may be too expensive for many firms

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[233] *See Chakrabarty*, 447 U.S. 303, 317–18 (1980). The Court noted that

> [t]he choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.

Id. at 317.

[234] *See generally* 35 U.S.C. §§ 101–54 (1982).

[235] Plant Patent Act of 1930, 35 U.S.C. §§ 161–64 (1982) (protection for new and distinct varieties of asexually reproduced plants).

[236] Plant Variety Protection Act of 1970, 7 U.S.C. § 2321 (1982) (protection for new, distinct, uniform, and stable varieties of plants, excluding fungi, bacteria and first generation hybrids). While patent protection for new types of plants may be available under 35 U.S.C. § 101, the Plant Variety Act assures such protection.

[237] 17 U.S.C. §§ 901–14 (Supp. II 1984)(limited ten year protection for "mask works").

[238] 17 U.S.C. §§ 101, 117 (1982)(extends limited copyright protection to computer programs). *See also* LATMAN, GORMAN & GINSBURG, COPYRIGHT FOR THE EIGHTIES 126–137 (1985).

[239] *See* OTA Report, *supra* note 9, at 403.

[240] *Id.*

to engage in in the first place.[241] A specific statute could attempt to treat the problems unique to biotechnology, such as the special nature of living organisms, the lack of knowledge about all of the components of living beings, and the impossibility of anticipating all future developments.[242]

Yet the idea of a special protective statute for biotechnology products presents several pertinent questions. All new technologies raise questions about the scope and nature of patent protection and it is questionable whether biotechnology is so different from all other technologies as to warrant special legislation. One must also ask whether it is sensible to distinguish between types of biological inventions as, for example, between plants and animals. Assuming that only minor issues exist after the determination in *Chakrabarty* that living organisms are patentable, the current patent law may be flexible enough to accomodate new technologies.[243] Finally, such a statute would create new issues in need of interpretation and could possibly result in even less protection for new discoveries than is available under current patent laws.[244] Nevertheless, an amendment to the federal patent law would appear to offer a reasonable means of facilitating the growth of joint ventures in scientific research.

C. *Modifying the Trade Secret Laws*

Intellectual property protection could also be augmented through the modification of existing trade secret protection. One approach would be to extend state trade secret protection to information already disclosed to the public.

1. Relaxed Secrecy Requirement

The rules of secrecy could be relaxed to permit limited disclosure to occur while still affording the sponsor trade secret rights, thus allowing for the submission of results for publication or general disclosure at scientific meetings. While this sort of protection would encourage the transfer of confidential infor-

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[241] *Id.*
[242] *Id.* at 404.
[243] *Id.*
[244] *Id.*

mation from industrial sponsors to university researchers, it would be contrary to the *Kewanee* policy that ideas, once in the public domain, must stay there.[245] In other words, relaxing the secrecy requirement would allow information to be disclosed and then made unusable again, creating exactly the type of conflict that the Supreme Court sought to avoid.

In order to avoid such a problem, the states could implement a compulsory licensing program. In the case of inadvertent disclosure to a limited number of people, the sponsor would not lose all protection. Instead, those to whom the invention was disclosed would be allowed to continue use under a compulsory license and a confidentiality agreement prohibiting any further disclosure.

2. Elimination of the Bad Faith Requirement

The bad faith requirement could be eliminated as a requisite to trade secret liablity.[246] Under this proposal, trade secret actions could be brought against anyone who "happens upon" a trade secret, whether it be a graduate student in a laboratory or a competitor on a tour of a nonrestricted area of a facility. This form of protection can also be challenged on the ground that it conflicts with the "open access once in the public domain" principle.[247]

These proposals would be implemented at the expense of imposing liability on innocent users of the information. Creating such liability does not help to maintain commercial ethics or promote innovation. On the contrary, it may have a chilling effect on the utilization of information obtained legitimately.

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[245] The *Kewanee* decision analyzed a trade secret law which only protected matters not already in the public domain. *See Kewanee*, 416 U.S. 470, 484 (1974). According to the *Graham* Court, the constitutional provision on intellectual property mandates that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham*, 383 U.S. at 6. Thus, it seems that a state could not pass a trade secret law which would protect information already in the public domain in some form. It is assumed that such a law would be in direct competition with the patent laws and would thus be preempted under *Kewanee*.

[246] For example, the North Carolina Trade Secrets Act grants protection against good faith appropriators. Trade Secrets Protection Act, N.C. GEN. STAT. §§ 66-152–66-157 (1981).

[247] *See* Root, *Abandonment of Common Law Principles: The North Carolina Trade Secrets Protection Act*, 18 WAKE FOREST L. REV. 823 (1982).

3. Federal Trade Secret Law

Congress could also create a federal trade secret law to protect the products of biotechnology research. This would offer a uniform level of protection across the country.

It is unclear whether Congress could constitutionally provide such protection under the Patent Clause of the Constitution.[248] The constitutional mandate implements the American "instinctive aversion to monopolies,"[249] by granting monopolies for only a limited time and by requiring "innovation, advancement, and things which add to the sum of useful knowledge" before inventions or processes are granted protection.[250] A federally enforced monopoly designed to keep information secret might be found wanting under the Patent Clause because the protected information would not "make a distinctive contribution to scientific knowledge"[251] and would fall on the wrong side of the "line between the things which are worth the embarrassment of an exclusive patent, and those which are not."[252]

Congress might nevertheless pass a trade secrets law under the authority of the Commerce Clause.[253] Congress has utilized this clause to implement the federal trademark laws[254] in a way that complements the substantial body of state unfair competition law. Similarly, it would seem that no constitutional problem would result from legislating in the trade secrets area, despite its having been traditionally left to the states.[255]

Such legislation is not likely to conflict with the patent laws. An analogy can be drawn to the federal copyright statutes, drafted under the Commerce Clause, which do not repeal or otherwise affect any rights or remedies under the current patent law.[256] In turn, it would seem that overlap between a federal trade secrets law and the patent laws ought not to prevent

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[248] U.S. CONST. art. I, § 8, cl. 8.
[249] *Graham*, 383 U.S. at 7.
[250] *Id.* at 6.
[251] A & P Tea Co. v. Supermarket Corp., 340 U.S. 147, 154 (1950) (Douglas, J., concurring).
[252] *Graham*, 383 U.S. at 9 (quoting Thomas Jefferson).
[253] U.S. CONST. art. I, § 8, cl. 3.
[254] Lanham Trademark Act, 15 U.S.C. §§ 1051–1127 (1982).
[255] *See* E. KINTER, AN INTELLECTUAL PROPERTY LAW PRIMER 2, 273–74 (1982).
[256] *See* 1 NIMMER ON COPYRIGHT § 1.01[B](MB) (1986).

Congress from improving protection for biotechnological discoveries.[257]

VI. CONCLUSION

What should be done? It would appear that biotechnology is different from other technologies and that research in biotechnology may require a more sophisticated intellectual property framework with which to attract and control much-needed industrial sponsorship. Options for encouraging sponsored research thus include altering the patent laws and the trade secret laws.

In some respects, alteration of the patent laws would be the ideal reform. Industry would be granted more protection while the academic freedom of university scientists would be safeguarded. This would most likely be accomplished by means of a Congressional determination as to the nature of protection to be awarded innovations meriting some kind of protection. The costs of such modification are difficult to predict, however, and more study needs to be conducted to determine whether and how biotechnology demands special treatment as intellectual property before legislative reform will be in order.

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[257] An alternative to reform through the intellectual property laws lies in having federal agencies place conditions on federal research grants to university researchers. Conditions could take the form of mandated exclusive licenses to any industrial partners or of required contract terms sympathetic to the needs of the private sponsor. By thereby giving universities greater incentive to accomodate industry's proprietary concerns, more joint ventures in biotechnology may be encouraged. Stimulating research through agency incentives, moreover, may be more attractive than change through federal law because directives to agencies are more easily effected and because the scope and duration of agency regulations are usually less than that of statutes.

Government agencies currently place many conditions and responsibilities on the recipients of grants. *See* Office of Management and Budget Circular A-110, 41 Fed. Reg. 32016 (1976)(implemented at 45 C.F.R. § 74 (app. H 1985)). Congress has the power to attach strings to these grants so long as they are appropriate and related to the purpose of the grant. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947); *see also* 3 D. RILEY, FEDERAL CONTRACTS GRANTS & ASSISTANCE § 24.06 (1983). This power, however, is limited by the fact that "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government." United States v. Butler, 297 U.S. 1, 69 (1936)(quoting Linder v. United States, 268 U.S. 5, 17 (1925)).

Limits also exist as to what can be effectuated by agencies. Under current patent law, agencies do not appear to have the discretion to mandate allocations of exclusive license or original contractual rights. *See* 35 U.S.C. § 202 (1982). Moreover, such a program would not be favorably received by the university community. Professors would object to new strings attached to their work, while universities would be understandably reluctant to give up more control over the nature and application of the work done through their faculties and facilities. Interview with David Blumenthal, *supra* note 21. Thus, whether research grant conditions would increase joint venture activity at all is open to question.

NOTE

TENANT BLACKLISTING: TENANT SCREENING SERVICES AND THE RIGHT TO PRIVACY

ROBERT R. STAUFFER*

Tenant screening services use advanced computer technology to offer data on prospective tenants to landlords. Presently unregulated, these services may legally report tenants' prior successful lawsuits against landlords and legally justified withholding of rent as well as tenants' race, religion, and intimate personal behavior.

In this Note, Robert Stauffer explores tenant screening services as they now operate, and focuses on the dangers to privacy presented by their growth. He analyzes policy concerns which militate against the practices of these services, and considers opposing arguments, such as those grounded in freedom of speech. After reviewing current law, Mr. Stauffer concludes that the existing legal framework inadequately protects the legitimate interests of tenants, and proposes a scheme of regulation applicable to tenant screening services.

Suppose that in order to find housing in our society, you had to present yourself before a large machine. This machine, in considering your application, would review your life to determine whether you were worthy of housing. It would have access to any information about you that had ever appeared in a public record; it would know if you had ever been involved in a court proceeding; it would know if you had ever been lax in paying your bills; it would know whether any of your previous landlords or neighbors thought you were too loud, or used drugs, or had disreputable friends, or were simply too radical; it would know your sex, your age, your race, your religion, and any other information which you had not succeeded in keeping completely to yourself and your closest friends. And when you asked this machine whether it would grant you a roof over your head, it would examine all of this information and immediately spit back its reply—a reply which would be negative if there were any piece of information in your history which it found disagreeable.

This Orwellian procedure for obtaining housing sounds like science fiction and hopefully will remain so. For an increasing

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number of Americans, however, this nightmare approaches reality. They have encountered organizations, known as tenant screening services, that compile information on tenants for use in reports to landlords. These companies function like credit bureaus: subscribing landlords submit the names of prospective tenants to the companies, and the companies notify the landlords whether any of the prospective tenants show up in their data bases.

This Note explores the propriety of tenant screening services and analyzes possible responses to their activities. It begins by examining the extent of the organizations and the nature of their practices. In doing so, it points out the ways in which modern computer technology enhances the capabilities of tenant screening services, and thus their threat. The Note then discusses policy concerns, particularly privacy issues, which militate against the practices of tenant screening services. This Note also critically reviews opposing arguments in favor of the screening services, including claims based on the First Amendment. Finally, this Note examines current law to determine whether it protects tenants against the threats posed by screening services. Finding the current legal framework inadequate to deal with these problems, this Note advocates national legislative reform and suggests specific measures which could be adopted.

I. Background—The Growth of Tenant Screening Services

The term "tenant screening service," as used throughout this Note, refers to a private agency that sells information about prospective tenants to landlords. Landlords either pay for each individual request or subscribe at annual rates. Many tenant screening companies offer other services as well, such as guaranteeing the rent paid by any approved tenant. Many are also part of larger consumer credit agencies, with the concomitant ability to provide information regarding an applicant's general credit history along with more specialized information dealing with the applicant's history as a tenant.

Tenant screening services originated only about a decade ago, first taking hold in the western United States. They have spread across much of the country and have been organized in many

large metropolitan areas. One of the largest is U.D. Registry ("UDR"), which has offices in Los Angeles, San Diego, and Orange County, California. UDR was established in the mid-1970's and has grown rapidly; by 1985 it had about two million records and was answering requests at the rate of one quarter of a million per year.[1] It collects its information primarily from court records, deriving its name from the "unlawful detainer" eviction proceeding. It has been said that every tenant evicted from a Southern California apartment since 1975 is in its computer.[2]

Although UDR is the paradigm of a local or regional company, it is by no means unique. Tenant screening services similar to UDR also operate in Texas,[3] New Jersey,[4] Rhode Island,[5] and New York.[6]

Other screening services maintain a national focus. Renters Reference of America, for example, is a large tenant reporting company that began operating in Kansas City in 1975 but has expanded into other states and provides information to large apartment management firms.[7] Yet another type of screening service is represented by RentCheck, a division of TeleCheck Services, Inc., a large check verification firm. Although it is based in Denver, RentCheck's operation is national in scope, with offices ranging from Los Angeles to Washington, D.C., where its subscribers own seventy percent of available apartments.[8] Nationally, it claims that its subscribers control two and one half million rental units, or about ten percent of the nation's rental housing.[9]

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[1] *Frontline: You Are in The Computer* 12 (PBS television broadcast, May 14, 1985) (transcript on file at HARV. J. ON LEGIS.) [hereinafter *Frontline*].

[2] *Id.*

[3] Renter Report, Inc., has operated in New Braunfels, Texas since 1982. *See* Sweeney, *Landlord-Tenant War*, Boston Globe, July 3, 1983, at 63, col. 1. Austin Renters Research serves the Austin, Texas area. Renter Index is located in Dallas, Texas.

[4] General Data, in Closter, New Jersey, and Eviction Data Service, Inc., in Union, New Jersey, started operating in 1986. *See* Burnham, *Landlords Using Computer Services to Screen for "Troublemaker" Tenants*, N.Y. Times, Feb. 25, 1986, at B1, col. 1; Belluck, *Tenants Cry Foul as Screening Companies Help Landlords Spot "Problem" Applicants*, Wall St. J., Dec. 27, 1985, at 11, col. 4.

[5] The Landlord Credit Data Service operates in Pawtucket, Rhode Island. *See* Belluck, *supra* note 4, at 11, col. 4.

[6] Several companies have recently begun offering services in New York. *See* Burnham, *supra* note 4, at B1, col. 1.

[7] Benson & Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 LOY. L.A.L. REV. 301, 306 (1979).

[8] Smith, *Firms Screen Bad Tenants*, Bergen Record (Bergen, New Jersey), July 28, 1985, at R-1, col. 5 (on file at HARV. J. ON LEGIS.); Sweeney, *supra* note 3, at 63, col. 1.

[9] Sweeney, *supra* note 3, at 63, col. 1.

TeleCheck is not the only pre-existing national organization to decide to enter the tenant screening market. Among the other credit bureaus that have recently begun to offer these services, or are reportedly planning to do so, are Equifax, Inc., TRW Credit Data, and American Service Bureau.[10] Such organizations already maintain an immense number of files on individual tenants[11] which are thus available for use in connection with their tenant screening functions.

Tenant screening services generally maintain at least one of three categories of information about their subjects. The first category consists of information culled from public records, particularly court records of legal disputes between landlords and tenants. Names of all tenants who are involved in legal conflicts with their landlords may be collected for storage.[12] Many companies depend primarily on this source, because court records are easily located and conveniently placed. Most screening services, however, do no more than identify the parties involved in the case, and make no attempt to investigate the nature of the dispute or to follow the case and record its outcome.[13]

The second category includes financial information of the kind maintained in a typical credit report. Screening services run by

[10] *See* "General Explanation of the 'Tenant Credit Reporting Act,'" (background information provided by office of Rep. C. Schumer (D-N.Y.) to accompany H.R. 2525, 99th Cong., 1st Sess. (1985)) (on file at HARV. J. ON LEGIS.); Benson & Biering, *supra* note 7, at 306–07. Equifax, Inc., for example, offers a tenant report to be used along with credit reports, which includes business, domestic, employment, and rental history information. *Id.* at 307.

[11] In 1971, a Ralph Nader study commissioned by the American Civil Liberties Union (ACLU) reported that the Association of Credit Bureaus of America kept 105 million files. J. SHATTUCK, RIGHTS OF PRIVACY 185 (1977) (quoting R. Nader, *The Dossier Invades the Home*, SATURDAY REVIEW, Apr. 17, 1971, at 18). By 1975, the total number of files maintained by consumer credit reporting and investigating agencies was estimated to be 200 million. *See* PROJECT ON PRIVACY AND DATA COLLECTION/ACLU FOUNDATION, THE FAIR CREDIT REPORTING ACT, III THE PRIVACY REPORT 1, 2 (1975) [hereinafter THE PRIVACY REPORT]. In 1977, the Privacy Protection Study Commission reported that the five largest credit bureaus alone (TRW Credit Data, Trans Union, Credit Bureau, Inc., Chiolton Corp., and Credit Bureau of Greater Houston) maintained 150 million files altogether. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 55–56 (1977) [hereinafter PRIVACY COMMISSION].

[12] UDR, for example, depends primarily on this source of information. *See Frontline*, *supra* note 1, at 14; Frenznick, *"Tenant Check" Lists the Undesirable—and the Innocent*, L.A. Times, Apr. 13, 1982, § 1, at 3, col. 1.

Tenant screening services have also been careful not to let tenants escape their networks by using false names. The information is not organized solely by name, but may be indexed in a variety of other ways. UDR founder Harvey Saltz, for instance, described UDR's method of identifying tenants: "First, it looks for a social [security number] match; then it looks for a driver's license match; then it looks for a name match; then it looks for a nickname match." *Frontline*, *supra* note 1, at 20.

[13] *See Frontline*, *supra* note 1, at 15; Frenznick, *supra* note 12 at 3, col. 1.

traditional credit bureaus often include credit information in their tenant reports, and other screening services may offer credit reports as well. The information may include data about the subject's bank accounts, bill-paying habits, charge accounts, creditors, occupation, income, and assets.[14]

The third category, "lifestyle" information, is the most open-ended. It includes any kind of personal data not covered by the first two categories. Some companies obtain this information by doing their own investigations. Their methods range from employing a staff which personally gathers information from the subject's acquaintances or other sources,[15] to combing newspapers for any negative information about the subject.[16] Some companies may simply purchase this information from other investigative credit bureaus. Finally, most tenant screening services accept or even request complaints about current or former tenants from their subscribing landlords.[17] The resulting files contain information as varied as the personal concerns of the investigators or the complaining landlords, including marital status and history, other domestic relations issues, locations of past residences, property damage, loudness, types of pets, general reputation among acquaintances, political and social affiliations, and drinking and drug habits.[18]

As tenant screening services have become more sophisticated, they have expanded the types of reports that they provide to subscribers. The organizations' own claims best illustrate the variety of services provided. Austin Renters Research, for example, advertises that it "investigates a prospective resident's *past rental history and patterns of behavior* as well as verifying their [sic] finances and employment . . . . Our report points out patterns as to promptness of rental payments, damage and con-

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[14] *See* Benson & Biering, *supra* note 7, at 311; J. RULE, D. MCADAM, L. STEARNS & D. UGLOW, THE POLITICS OF PRIVACY 3, 37–38 (1980) [hereinafter RULE].

[15] Renters Reference of America, for example, employs a full-time staff of investigators who collect information on living and behavioral habits, employment history, and financial matters. *See* Benson & Biering, *supra* note 7, at 306. *See also* Belluck, *supra* note 4, at 11, col. 4.

[16] *See generally* A. MILLER, THE ASSAULT ON PRIVACY 69 (1971). Landlord Credit Data Service in Pawtucket, for example, keeps a computerized file of newspaper clippings containing information on Rhode Island residents in general. Belluck, *supra* note 4, at 11, col. 4.

[17] *See* Frenznick, *supra* note 12, at 3, col. 1; *Frontline*, *supra* note 1, at 22; Burnham, *supra* note 4, at B1, col. 1.

[18] For descriptions of the kinds of lifestyle information kept by tenant screening services, see Belluck, *supra* note 4, at 11, col. 4; Benson & Biering, *supra* note 7, at 311; Frenznick, *supra* note 12, Part 1, at 3, col. 1; *Frontline*, *supra* note 1, at 22.

dition of property, noise complaints, 'skips,' evictions, and collection items."[19] The most elaborate claims, however, are those of UDR, which advertises that it investigates motor vehicle information, provides legal advice, and guarantees its results.[20]

Tenant screening services have little incentive to check the acccuracy of information which is provided to them. They exist to serve landlords, not tenants, and many landlords have enough applicants that they need not worry about the possibility that the company will falsely describe a tenant as unsatisfactory.[21] Verifying tenant information is also much more expensive than simply collecting it.[22] Thus most screening services take their information at face value. Harvey Saltz, who founded UDR, admits that all a landlord need do to insert false information in UDR's data banks is "factually lie."[23] UDR's safeguard, Saltz says, is that staff members omit claims they believe to be wrong or unimportant.[24]

In the face of increasing negative publicity about tenant screening services, many screening companies claim that they

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[19] Advertisement provided by Rep. Charles Schumer (emphasis added) (on file at HARV. J. ON LEGIS.).

[20] A UDR advertisement describes its "DMV Checks" of auto registration and driver's license information as "[h]elpful to relocate tenants and their assets or to screen new employees who drive on the job," and offers a "Group Legal Plan" with "Free advice by an attorney regarding landlord/tenant law." The advertisement continues:

> Only UDR provides a superior combination of information you can use to be more selective in your choice of tenants. We call it the "Standard UDR Report," a Triple Check which consists of:
>
> A. All Southern California Court Eviction Histories;
>
> B. Information on Problem Incidents such as skip-outs, property damage, and nuisance;
>
> C. And, of course, a thorough Credit Check. A single toll free telephone call to UDR will provide you with this Standard UDR Report . . . . A one year membership in The U.D. Registry, Inc., requires a pre-paid annual membership fee . . . . Members are charged $7.00 for a Standard UDR Report.
>
> If you wish, the expert staff of The U.D. Registry will do all of the work and guarantee its result. For only $15.00 (California residents) UDR will check your applicant's credit reports, eviction records, incident reports, references, employment, banking, and present and prior landlords. If the prospective tenant is approved under basic, objective standards, you will be guaranteed that the "GUARANTEED TENANT" will not default in rent for six (6) months or The U.D. Registry will evict the GUARANTEED TENANT at no cost to you . . . .

[21] *See infra* text accompanying notes 30, 134.

[22] As Harvey Saltz of UDR indicates, "[i]t's impossible for us to know the entire story behind any particular case that's filed in court." *Frontline*, *supra* note 1, at 15. UDR now attempts to remove from its files the names of tenants who win their lawsuits, but it is having problems: "[w]e are still striving to find another method that would insure we have all the judgments that come down." *Id.* at 21.

[23] Frenznick, *supra* note 12, § 1, at 3, col. 1.

[24] *Id.* at 24, col. 1.

are tightening their procedures and being responsive to tenants' complaints regarding inaccuracies. Renters Reference of America says it launches its own investigation in such instances,[25] and Saltz asserts that he tries to work with every tenant who complains.[26] RentCheck says it now limits its reports to claims of property damage and unpaid rent.[27] Despite these claims, however, tenants continue to complain about inaccurate or misleading reports.[28]

Landlords have not ignored the benefits of using tenant screening services. In Los Angeles, for example, the majority of landlords routinely use UDR to check on prospective tenants; UDR reportedly receives 800 to 1000 calls a day from Los Angeles landlords.[29] Landlords also place great reliance on the information they receive from these services. Despite the accuracy problems described above, most landlords are not concerned with the nature of the information; they only wish to know if the tenant appears in the files. Landlords interviewed by the Los Angeles Times, for instance, "said they would not rent to a prospective tenant who turns up in U.D. Registry's files, regardless of what explanation the tenant gives."[30]

Some landlords have even begun to use tenant screening services to apply pressure on existing tenants. Consider the following letter sent by a building's owner to one of its occupants:

> This is to advise that we now subscribe to a service that records all filings on Unlawful Detainer actions. As this service is used by landlords, it will be impossible, in the future, to rent an apartment if you have been served a legal action. We are advising you of this, as the failure to pay your rent on time will result in your name being placed in the file, and you will be unable to secure any apartment in the future.[31]

Thus landlords may use screening services not only to check on prospective tenants, but also to affect the behavior of existing tenants—not only to ensure prompt rent payments and respon-

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[25] *See* Benson & Biering, *supra* note 7, at 306.

[26] Frenznick, *supra* note 12, at 24, col. 4.

[27] Belluck, *supra* note 4, at 11, col. 4. RentCheck also claims it removes names from its files when claims against the subjects are settled and that it informs tenants who it identifies as unsatisfactory. *See* Burnham, *supra* note 4, at B4, col. 5.

[28] *See Frontline*, *supra* note 1; Burnham, *supra* note 4; Belluck, *supra* note 4.

[29] *See* Frenznick, *supra* note 12, § 1, at 3, col. 1; *Frontline*, *supra* note 1, at 13.

[30] Frenznick, *supra* note 12, § 1, at 3, col. 1.

[31] Letter to tenant from Preferred Property Management, Los Angeles (September 25, 1978) (*quoted in* Benson & Biering, *supra* note 7, at 301).

sible behavior, but also to deter tenants from pursuing legitimate legal remedies.

One of the factors that has contributed most to the profitability of tenant screening services is advanced computer technology. The development of this technology has facilitated the relatively inexpensive collection, maintenance, and organization of large quantities of information.[32] Advanced technology allows the storage of data in quantities that were previously not profitable[33] and permits manipulation of this data to make it easy to use.[34] The new technology also makes it much easier for companies to share or trade information.[35] Because storage is now cheaper, the information is rarely destroyed, resulting in an overall increase in the amount of data available. Computer banks accumulate an ever-increasing number of personal details. Increased storage capabilities, combined with increased transferability of information, also facilitate the integration of information from diverse sources, producing a more comprehensive description of the subject. One commentator has described the resulting trends as exhibiting "a principle akin to Parkinson's Law, [so that] as capacity for information-handling increases there is a tendency to engage in more extensive manipulation and analysis of recorded data, which in turn, motivates the collection of data pertaining to a larger number of variables."[36] The use by tenant screening services of this modern technology accounts for much of their success but also contributes to many of the concerns raised by tenants.[37]

II. Policy Considerations

The introduction of computerized data-processing technology into the rental business, while providing a valuable service for

[32] *See* Trubow, *Fighting Off the New Technology*, 10 HUM. RTS. 26, 27 (Fall, 1982); PRIVACY COMMISSION, *supra* note 11, at 8.

[33] *See* DEPARTMENT OF PUBLIC INFORMATION, UNITED NATIONS, HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS 25, 29 (1982) [hereinafter UNITED NATIONS].

[34] *See* Trubow, *supra* note 32, at 27; UNITED NATIONS, *supra* note 33, at 29.

[35] *See* THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS 12 (1973) [hereinafter SECRETARY'S COMMITTEE]; UNITED NATIONS, *supra* note 33, at 29.

[36] Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1103 (1969). Miller also notes that there "is a seemingly inexorable trend toward ever larger and more complex computer systems that digest greater quantities of information about increased numbers of people." Id. at 1105.

[37] *See infra* text accompanying notes 79–104.

landlords, has raised serious problems for tenants. The importance of the human need for housing, combined with the tight rental housing market, aggravates these problems. Several policy considerations militate against the unfettered use of these networks, with perhaps the most significant being the loss of tenants' privacy. On the other hand, landlords have a legitimate desire to ensure that their tenants pay the required rent and take care of the property. The following sections analyze various policy arguments on behalf of tenants and landlords.

A. *Arguments Against Screening Services*

1. Privacy

a. *The individual's right to privacy.* The primary concern of many tenants is that the existence and use of tenant screening services violate their privacy interests. "Privacy" is a rather nebulous concept. A look at a variety of sources, however, reveals a general consensus that privacy does, or should, include control over certain information about one's self.[38]

The quest for a description of the legal concept of privacy began with the famous article by Warren and Brandeis in 1890.[39] Warren and Brandeis were concerned with gaining legal recognition for the privacy tort. They considered the right to keep private information from being publicized to be merely one aspect of a broader privacy right, other aspects of which had already gained recognition.[40] Warren and Brandeis referred to this broader privacy right as the right "to be let alone."[41]

In attempting to define privacy, one must delve into the origin of the right to privacy. Some commentators maintain that the right to privacy is an unenumerated constitutional right that

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[38] *See infra* note 45.

[39] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[40] Courts had recognized, for example, the "right to intellectual and artistic property." *Id.* at 198.

[41] *Id.* at 195, citing T. COOLEY, COOLEY ON TORTS (2d ed. 1888). Brandeis later grounded this right partially in the Fourth Amendment to the Constitution, asserting in his dissent to Olmstead v. United States that the framers "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This passage, combined with the 1890 article, spawned a debate over the proper boundaries of privacy which has continued to this day.

exists as a matter of natural law.[42] Other theorists ground the privacy right in the essence of a democratic society[43] or in society's need to maintain interpersonal relationships.[44] All seem to agree, however, that there is a right to privacy, which leads to the more important question of what the scope of that right is or should be. Although few agree on the specific contours of the privacy right, there does seem to be a central theme that privacy consists of control over the access by others to certain aspects of one's self. Notable among these aspects are certain kinds of personal information.[45]

A slightly different perspective maintains that privacy means autonomy—a definition which draws from the "right to be let alone" language. Autonomy generally signifies a measure of control over one's own life.[46] Privacy is certainly a necessary element of such autonomy, but should not be equated with

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[42] *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 961–62 (1979); Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 715–16 (1975); Griswold v. Connecticut, 381 U.S. 479, 487–93 (1965) (Goldberg, J., concurring). Corresponding to this perspective is a view of the Bill of Rights as embodying principles of natural law, with unenumerated rights being covered by the Ninth Amendment.

[43] *See* A. WESTIN, PRIVACY AND FREEDOM 24 (1967).

[44] *See* Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFFAIRS 323, 326 (1975); C. FRIED, AN ANATOMY OF VALUES 140, 142–43 (1970); Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 151–52 (1983).

[45] One commentator, for instance, asserts that "the right of privacy encompasses within its definition the right of individuals to keep certain things to themselves, and to reveal certain kinds of personal information only to persons, or institutions and agencies, of their own choosing." *Hearings on H.R. 10076 Before the Subcomm. on Government, Information and Individual Rights of the House Committee on Government Operations*, 95th Cong., 2d Sess. 429 (1978) (statement of John Shattuck, Director, American Civil Liberties Union, Washington, D.C.) [hereinafter *Hearings on H.R. 10076*]. Another commentator notes that "loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him." Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980).

Similar definitions abound in the literature, as illustrated by the following passages:

"I propose that privacy be defined as the condition of not having undocumented personal information about oneself known by others." Parent, *A New Definition of Privacy for the Law*, 2 L. & PHILOS. 305, 306 (1983).

"The right to privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the facts of his personal life." G. SIMONS, PRIVACY IN THE COMPUTER AGE 15 (1982) (quoting a 1967 panel on Privacy and Behavioral Research reporting to the U.S. Office of Science and Technology).

See also A. WESTIN, *supra* note 43, at 7; Miller, *Personal Privacy*, *supra* note 36, at 1107–08; RULE, *supra* note 14, at 22–23; Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs*, 44 ALB. L. REV. 589, 600 (1980).

[46] *See, e.g.*, Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?* 58 NOTRE DAME L. REV. 445, 446 (1983); Richards, *supra* note 42, at 964–65.

autonomy since this would expand privacy beyond its more common definitions.[47]

Another view of privacy emphasizes its importance in the maintenance of interpersonal relationships.[48] This view of privacy, however, is also incomplete, for "it makes the right to individual privacy 'derivative' from the right to social [that is, interpersonal] relationships."[49] In contrast to the overly broad definition of privacy as autonomy, the view of privacy as a necessary condition for human relationships is too narrow. While control over personal information is one aspect of this concept of privacy,[50] many aspects of one's identity that one may wish to keep private have little bearing upon these relationships.

The maintenance of interpersonal relationships is inextricably bound up with the concepts of privacy and autonomy. Privacy enables an individual "to choose his relationships himself, free of societal pressure or external interference,"[51] and allows an individual to have some control over his reputation or public identity.[52] The related idea that recognition of privacy constitutes respect for persons[53] brings out the importance of privacy to the individual's sense of self-worth.[54] Through privacy, society recognizes the individual's own claim to existence; this

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[47] A. WESTIN, *supra* note 43, at 34. Other commentators have expressed similar views. *See, e.g.*, Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964); A. MILLER, *supra* note 16, at 48–50; Richards, *supra* note 42, at 974; Note, *supra* note 44, at 141; Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1394–95 (1976). For one criticism of views of privacy as autonomy or as the right to be let alone, see Parent, *supra* note 45, at 309, 321–22.

[48] Charles Fried, for instance, centers his notion of privacy around the observation that "privacy provides the rational context for a number of our most significant ends, such as love, trust and friendship, respect and self-respect." C. FRIED, *supra* note 44, at 138. *See also* Rachels, who observes that

> there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. According to this account, privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have, and that is why it is important to us.

Rachels, *supra* note 44, at 326.

[49] Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFFAIRS 26, 36 (1976).

[50] Fried, for instance, recognizes that privacy "is the control we have over information about ourselves." C. FRIED, *supra* note 44, at 140.

[51] *See* Note, *supra* note 44, at 151.

[52] *Id.* at 152, 161.

[53] *See* Benn, *Privacy, Freedom, and Respect for Persons*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 223, 228–29 (F. Schoeman ed. 1984).

[54] One commentator terms privacy "a social ritual by means of which an individual's moral title to his existence is conferred." Reiman, *supra* note 49, at 39.

recognition, in turn, leads the individual to recognize this claim for him or herself.[55] Privacy can thus be seen as a precondition for a variety of the basic attributes of humanity.[56]

These various views demonstrate the importance of privacy to the individual. Control over personal information, and the attendant "separation of self from society,"[57] is desired not only for its own sake, but as a necessary condition of personal autonomy and of the maintenance of interpersonal relationships.

A rather wide consensus has developed which recognizes the existence and importance of informational privacy.[58] This concern for privacy has resulted in several domestic statutes. Although this legislation may not fully protect informational privacy, it does demonstrate the importance Americans place on privacy. The Fair Credit Reporting Act[59] and the Privacy Act[60] provide the mainstay of domestic privacy legislation.

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[55] This recognition is necessary for one's personhood, for "[t]o be a person, an individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny." Reiman, *supra* note 49, at 39. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-17 (1978) ("Such control [over information] must be understood as a basic part of the right to shape the 'self' that one presents to the world, and on the basis of which the world in turn shapes one's existence.").

[56] In the words of one court,

> [i]n a society in which multiple, often conflicting role performances are demanded of each individual, the original etymological meaning of the word "person"—mask—has taken on new meaning. Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in literal loss of self-identity . . . and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.

Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 534, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971) (emphasis in original). *See also* Note, *supra* note 44, at 143.

[57] Soma & Wehmoefer, *A Legal and Technical Assessment of the Effect of Computers on Privacy*, 60 DEN. L.J. 449, 450 (1983).

[58] This consensus is evidenced by domestic and foreign legislation and by reports of federal and international commissions. *See infra* note 78.

Public opinion also attests to the importance of control over personal information. In a 1979 Harris survey, 75% of respondents said that a right of privacy should have the same stature as the rights of life, liberty, and the pursuit of happiness. Sixty-three percent felt that "[i]f privacy is to be preserved, the use of computers must be sharply restricted in the future," and 54% felt that the present use of computers is an actual threat to personal privacy. LOUIS HARRIS & ASSOCIATES & A. WESTIN, THE DIMENSIONS OF PRIVACY, *reprinted in Hearings on S. 1928 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess., Part I, 479 (1980).

[59] Pub. L. No. 91-508, 84 Stat. 1128–36 (1970) (codified at 15 U.S.C. §§ 1681–1681t (1982)).

[60] Pub. L. No. 93-579, 88 Stat. 1897 (1974) *as amended by* Pub. L. No. 94-183, 89 Stat. 1057 (1975) (codified as amended at 5 U.S.C. § 552a (1982)).

The Fair Credit Reporting Act of 1970 (FCRA) established regulations governing consumer credit reporting agencies. The FCRA has been widely criticized as being inadequate, but it provides a basic framework for protecting the privacy of individuals about whom information is collected by credit bureaus and similar organizations.[61]

In 1973, a committee of the Department of Health, Education and Welfare released a study entitled "Records, Computers and the Rights of Citizens."[62] This report proposed a detailed federal code of "fair information practices," intended to enhance personal privacy. The minimum safeguard requirements recommended by the study rested on principles designed to fulfill several goals: that the public be informed of the existence of personal data record-keeping systems; that individuals be granted access to their files to correct wrong information, and to exercise some control over disclosure; and that safeguards be implemented in such systems to assure reliability of information and prevent misuse of data.[63]

The following year, Congress passed the Privacy Act, which reflects many of these recommendations. The Privacy Act gives individuals specific privacy rights regarding information kept by the federal government. It restricts the disclosure of such information[64] and requires agencies to keep an accounting of all disclosures.[65] It places restrictions on the collection and maintenance of personal information, and requires the government to obtain information directly from the individual where possible,[66] to inform the individual of the uses and effects of this information,[67] and to maintain only that information which is "relevant and necessary to accomplish a purpose of the agency."[68] It also gives individuals the right to review and copy their records,[69] to request corrections of their records,[70] and to seek judicial review of a negative determination by an agency.[71]

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[61] The Fair Credit Reporting Act is discussed more fully *infra*, text accompanying notes 281–306.

[62] SECRETARY'S COMMITTEE, *supra* note 35.

[63] *Id.* at xxiv–xxvi.

[64] 5 U.S.C. § 552a(b) (1982).

[65] *Id.* § 552a(c).

[66] *Id.* § 552a(e)(2).

[67] *Id.* § 552a(e)(3).

[68] *Id.* § 552a(e)(1).

[69] *Id.* § 552a(d)(1).

[70] *Id.* § 552a(d)(2).

[71] *Id.* §§ 552a(d)(3), 552a(g)(1).

The original proposal for the Privacy Act would have made these provisions applicable to private industry as well.[72] This aspect was dropped in the final bill, however, which instead established the Privacy Protection Study Commission to conduct a complete investigation of information practices and make comprehensive recommendations.[73]

The Privacy Protection Study Commission published its conclusions in 1977.[74] It formulated specific recommendations similar to those of the Secretary's Advisory Committee, with three primary objectives in mind: (1) to minimize government's intrusiveness into the lives of its people while (2) maximizing fairness thus (3) creating a legitimate expectation of privacy in the confidentiality of personal information. Although these recommendations were never enacted, they served as the basis for several bills in Congress.[75]

While the Privacy Act and the Fair Credit Reporting Act provide the basic framework for a statutory approach to privacy concerns, they are supplemented by a wide variety of provisions in other federal legislation.[76] Similarly, state laws protect informational privacy in areas as diverse as arrest records, bank records, employment records, insurance records, mailing lists, medical records, education records, and tax records.[77]

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[72] *See* Comment, *supra* note 45, at 606.

[73] 5 U.S.C. § 552a (1982), Pub. L. No. 93-579, § 5, 88 Stat. 1896 (1974), *amended by* Pub. L. No. 95-183, 89 Stat. 1057 (1975). The Commission ceased to exist on September 30, 1977 pursuant to § 5(g) of Pub. L. No. 93-579.

[74] PRIVACY COMMISSION, *supra* note 11. *See also infra* note 318.

[75] *See infra* note 316.

[76] These statutes include:

— The Family Education Rights and Privacy Act of 1974, Pub. L. No. 93-380, 88 Stat. 571 (1974) (codified at 20 U.S.C. § 1232g (1982)), which gives students and their parents access to educational records, establishes safeguards for these records, and limits third-party disclosure.

— The Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified at 26 U.S.C. § 1 *et seq.*(1982)), which protects confidentiality of tax returns.

— The Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (1978) (codified at 12 U.S.C. § 3401 (1982)), which provides some privacy in bank records.

— The Electronic Fund Transfer Act, Pub. L. No. 95-630, 92 Stat. 3728 (1978) (codified at 15 U.S.C. § 1693 (1982)), which provides that an institution which provides electronic fund transfers or other bank services must notify customers when it grants third parties access to customer records.

— The Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (1982)), which exempts government records from disclosure when such disclosure would constitute an unwarranted invasion of privacy.

This compilation is borrowed from Trubow, *supra* note 32, at 51–52. *See also* Soma & Wehmoefer, *supra* note 57, at 463–69.

[77] An excellent compilation of state laws that protect privacy can be found in R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (1981). *See also* PRI-

Together, these reports and statutes confirm the proposition that our nation considers the privacy interest to include a strong commitment to the confidentiality of personal information, which requires stringent safeguards on the collection of such information. This concern with informational privacy is not limited to the United States; other countries, especially European countries, have dealt with these issues through legislation and international agreements.[78]

These domestic and foreign initiatives support the proposition that privacy is generally regarded, and should be recognized, as a basic human right, and that this concept of personal privacy includes substantial control over personal information.

b. *Possible effects of computer technology*. The view of privacy rights articulated above applies with great force in the context of tenant screening services. Tenants whose names appear in the files of these companies lose control over the collec-

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VACY COMMISSION, *supra* note 11, at app. 1; THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, PRIVACY: PERSONAL DATA AND THE LAW 41 (1976) [hereinafter ATTORNEYS GENERAL]; Trubow, *supra* note 32, at 52.

[78] For discussions of foreign privacy statutes and international treatment of privacy concerns, *see* SECRETARY'S COMMITTEE, *supra* note 35, at app. B; Soma & Wehmoefer, *supra* note 57, at 473–76; RULE, *supra* note 14, at 111–12.

In 1981, the Council of Europe adopted The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Although it has not been ratified, the Convention has been signed by at least eleven countries. It requires a number of specific limitations and safeguards on the automatic processing of personal data which serve to ensure accuracy and timeliness of data, to afford individuals access to data and an opportunity to correct false information, and to prevent use of data for inappropriate purposes. Article 5 of the Convention, for example, requires that data be used and maintained only for specified, legitimate purposes, and that it be accurate and timely. Article 6 requires strict safeguards against collection of data regarding criminal convictions, health or sexual life, racial origin, and political or religious beliefs. Article 8 gives individuals certain rights against organizations which maintain personal information to ensure compliance with the other requirements. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Council of Europe, Europ. T.S. No. 108.

In addition, in 1981 the Organization for Economic Co-operation and Development (OECD) published minimum standards for the protection of privacy in the collection of personal data. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (1981) [hereinafter OECD GUIDELINES]. The OECD recommended that countries incorporate these guidelines, stating that they reflect a balance between privacy values and the interest in the free flow of information. *Id.* at 7.

In 1982, the United Nations published "Human Rights and Scientific and Technological Developments," which made specific recommendations regarding personal privacy. It encouraged member countries to adopt legislation governing computerized personal data systems to ensure first that only information necessary for the purpose of the system is collected, and second that such information generally is collected only after informing the individual and obtaining his or her consent. UNITED NATIONS, *supra* note 33, at 32–33.

tion, maintenance, and use of considerable information about their lives. The use of computer technology aggravates this loss of control.

Before the advent of computer technology, personal privacy was relatively easy to protect. Without the aid of sophisticated, automated methods for keeping track of information, the limits of human capabilities restricted the amount of data which could be easily collected, organized, and utilized.[79] This limited ability to obtain and store data presented no clear threat to privacy, thus rendering stringent government regulation of data collection unnecessary. People's expectations of privacy[80] were directly shaped by a knowledge of the limitations of non-computerized data collection. With the arrival of computer technology, however, these expectations have been seriously threatened. As one commentator has observed, "what we seem to have done is rely on inefficiency [in data collection] to protect our privacy . . . and we suddenly realize that we can no longer do so . . . . [W]e ought not to have been relying upon it at all."[81] The computer's capacity for storing, manipulating, transferring, combining, and accessing data quickly and efficiently may lead to greater invasions of privacy, thus creating a need for new forms of privacy protection.[82]

The first way in which contemporary technology affects privacy is by facilitating the initial dissemination of information. Although the initial disclosure of any specific piece of informa-

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[79] Miller, for example, writes that

> [i]nformational privacy has been relatively easy to protect in the past for a number of reasons: (1) large quantities of information about individuals have not been collected and therefore have not been available; (2) the available information generally has been maintained on a decentralized basis; (3) the available information has been relatively superficial in character and often has been allowed to atrophy to the point of uselessness; (4) access to the available information has been difficult to secure; (5) people in a highly mobile society are difficult to keep track of; and (6) most people are unable to interpret and infer revealing information from the available data. But . . . these traditional safeguards on informational privacy no longer are reliable.

Miller, *Personal Privacy*, *supra* note 36, at 1108–09.

[80] *See generally* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 83 (1974).

[81] Pemberton, *On the Dangers, Legal Aspects and Remedies*, 53 MINN. L. REV. 220, 223 (1968).

[82] *See* Whalen v. Roe, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) (noting that future developments may demonstrate the necessity of some curb on computer file technology). *See also* Menard v. Mitchell, 328 F. Supp. 718, 725–26 (D.D.C. 1971), *rev'd on other grounds sub nom.* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) ("[T]echnological advances which facilitate massive accumulation and ready regurgitation of far-flung data . . . emphasize a pressing need to preserve and to redefine aspects of the right to privacy to insure the basic freedoms of this democracy.").

tion is often made by the individual, he or she may feel there is no choice but to reveal it and may expect that it will be used only by the person to whom it was revealed. The entry of this information into a computer system may broaden its use far beyond what the individual ever contemplated.[83] Dissemination of this information invades the individual's privacy as much as if the individual had been forced initially to divulge the information against his or her will, because in either case the information is used without the individual's consent.[84] Not only do computers make it easier for information to be stored and made available to individual users, but also computers facilitate the transfer of information between organizations which may in turn distribute the information, resulting in a sort of "second generation" dissemination.[85]

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[83] Tenant screening services and traditional credit bureaus are by no means the only situations in which information may be used in ways that the individual would not have expected or desired. Another example is the hotlines which have sprung up in the battle between doctors and lawyers. Doctors may determine whether patients have ever filed malpractice suits, and patients may determine whether their doctors have ever been sued. *See Lawyers, Doctors Wage a Hot-line War on Each Other's Lawsuit Record*, Minneapolis Star and Trib., Dec. 26, 1985, at 17A, col. 1. Perhaps the most frightening example, however, is the description of

> an organization outside Chicago that professes to identify those persons in this country who are known to be "attacking or ridiculing a major doctrine of the Christian faith or the American way of life." These include authors of books and articles, speakers, and even signers of group advertisements in leading newspapers. In this organization's files are the names of those individuals who had been involved with the long-defunct House Un-American Activities Committee.

Linowes, *Must Personal Privacy Die in the Computer Age?* 65 A.B.A. J. 1180, 1183 (1979).

[84] This loss of confidentiality and control over access to personal data has been widely identified as a serious privacy infringement. *See* UNITED NATIONS, *supra* note 33, at 27. Pemberton notes that this invasion of privacy occurs regardless of whether the information is inaccurate or prejudicial: "even accurate information may be an unfair or an unwarranted invasion of his privacy, because it is information which he is entitled to keep to himself and those to whom he intentionally discloses it." Pemberton, *supra* note 81, at 221.

Representative Charles Schumer has expressed this idea in more concrete terms:

> Maybe, there are things you'd rather keep to yourself? If you've been fired, or you've been to court, or you've sued your doctor. These are all bits of information which someone might pay to know. In fact there's already a service that tells doctors about people who've filed malpractice suits.
>
> Now, I have a right to sue a bad doctor. And maybe doctors have a right to know about that. But, if you file a malpractice suit, would you want your next doctor to know?

Frontline, *supra* note 1, at 26.

New surveillance technologies permit still more severe invasions of privacy because even the initial disclosure occurs without consent. For a description of this use of new technologies, see generally A. WESTIN, *supra* note 43, at 67–168; Miller, *Personal Privacy*, *supra* note 36, at 1092, 1119–23.

[85] This process may create frighteningly large chains of distribution because "the

These problems are compounded by the possibility that unauthorized access may occur where a system provides inadequate security.[86] Even where no dissemination to third parties occurs, the very fact that the subject is aware of the possibility of such dissemination infringes on privacy; the individual in today's society, forced by the necessities of daily life to reveal personal information, is injured simply by losing control over this information. As one commentator notes, this results in a feeling of being "naked before the world."[87] No amount of safeguards against unauthorized access or requirements that the information be used for legitimate purposes can eliminate this core injury to privacy. The very act of transferring one's own knowledge of oneself to someone else results in the experience of forfeiture of an essential part of oneself. This feeling is only aggravated by the knowledge that this information is contained in a computerized data file.[88]

A related danger arises from the variety of information collected and the ease with which this information may be combined or organized. The kinds of personal data compiled are endless, including credit histories, medical information, employment records, insurance claims, financial status, and magazine subscriptions. These pieces of information, maintained in a great number of separate locations, present much more serious dangers to privacy when they are combined; the whole becomes greater than the sum of its parts. This contrasts with the individual's expectations, which are formed by the knowledge of usual human limitations. The subject does not expect these various aspects of data concerning his or her life to be combined. Such an aggregation of data is not difficult, however, and the results can be frightening. As one commentator has noted, collecting information in this way would permit not only the formation of a "qualitative picture of the kind of person" involved, but also a reconstruction of "a rough, temporal picture of how I had been living and what I had been doing with my time."[89]

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combination of computers and telecommunications technology . . . may place personal data simultaneously at the disposal of thousands of users at geographically dispersed locations and [enable] the pooling of data and the creation of complex national and international data networks." OECD GUIDELINES, *supra* note 78, at 16. *See also* UNITED NATIONS, *supra* note 33, at 29.

[86] *See* Miller, *Personal Privacy*, *supra* note 36, at 1109–14.

[87] Bloustein, *supra* note 47, at 1006.

[88] *See* Benn, *supra* note 53, at 231.

[89] Wasserstrom, *Privacy: Some Arguments and Assumptions*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 317, 325–26 (F. Schoeman ed. 1984).

In other words, the compilation in one place of all the information which may have already been "public" or available constitutes a separate injury to privacy interests, opening up a great portion of one's life for easy viewing.[90]

The result of such privacy invasions can be dehumanization. As modern information practices begin to eat away at personal privacy, they simultaneously imperil an individual's identity. To begin with, the reliance on automated data systems requires the categorization of information. The otherwise unique characteristics of every individual must be squeezed into preexisting, procrustean molds which are amenable to group manipulation and comprehensible to a computer.[91] Consequently, individuals lose their uniqueness and become fungible bundles of data in the eyes of the information handlers—and soon in the eyes of society as a whole, as increasing use is made of such information systems. People come to be seen and judged on the basis of computerized bits of data rather than on their own individual characteristics.

In turn, individuals will feel a need to plan their actions around the improvement of their records,[92] leading to the possibility that people may view themselves as computerized bits of information. As people are judged more and more by others as simply a nameless, faceless bundle of data, they may begin to believe the resulting judgments.[93] Ultimately, a person might come to

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[90] This is not merely a theoretical exercise. Nearly twenty years ago, when collection of personal data and the sophistication of information technology were at a much lower level than they are now, a Newsday reporter conducted an experiment to see what kind of information could be compiled. He chose a random subject, who agreed to the experiment. After searching through public records relating to the subject's birth, marriage, health, children, finances, military service, and so forth, the reporter published a profile and biography about the subject, who demanded, "where did you get that kind of information about me?" *See* Pemberton, *supra* note 81, at 222.

[91] *See* UNITED NATIONS, *supra* note 33, at 27, discussing dehumanization arising out of the inflexibility of computer-based record-keeping and the inability of persons concerned to provide explanatory details in responding to questions.

[92] Miller observes that

> [a]nother potentially deleterious side effect of excessive dossier-building is that people may increasingly base their decisions and fashion their behavior in terms of enhancing their record image in the eyes of those who may have access to it in the future . . . . This concern for the record will be reinforced by the popular conception of the computer as the unforgetting and unforgiving watchdog of society's information managers.

A. MILLER, *supra* note 16, at 50. *See also* A. WESTIN, *supra* note 43, at 160; Miller, *Personal Privacy*, *supra* note 36, at 1124.

[93] *See* A. WESTIN, *supra* note 43, at 323 ("[W]hat information about an individual is put in his files becomes part of his estimate of himself; it is how the wise and the powerful forces in his life see him. It takes a very strong personality . . . to reject or fight the recorded judgment of who he or she 'is.'").

rely upon his record to represent himself, and will have no meaningful existence apart from it.[94]

Computerization of personal data may also lead to conformity among individuals. As individuals gear their own lives toward perceived objective standards, not only their sense of individuality but also the actual differences between them may diminish.[95] Individuals may converge toward externally-imposed ideals of human behavior, becoming increasingly standardized bundles of data.[96] This process does not just affect a few individuals who have committed serious crimes or who live at the fringes of society; it affects every member of the society. Technology, with its cold, unforgiving scrutiny, demands a perfection and a conventionality which simply cannot and should not exist.[97]

The use of a person's data file as a basis for decision-making involves a very real domination over the subject, not only in the abstract sense information about a person information is manipulated by others beyond that person's control, but also in the sense that decisions of great import to the person will be determined by the way in which the data is handled or interpreted.[98] An increasing number of decisions are made on the basis of information which is inaccessible to the person about whom the decisions are made, with the result that the person has less ability to control or affect decisions which have signif-

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[94] A. MILLER, *supra* note 16, at 48–50; *see also* Miller, *Personal Privacy*, *supra* note 36, at 1124.

[95] *Cf.* Tarlton v. Saxbe, 507 F.2d 1116, 1124 (D.C. Cir. 1974) ("[G]overnment collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment.").

[96] This concept has been expressed effectively by a number of commentators. *See, e.g.*, Bloustein, *supra* note 47, at 1003; Remark by Rep. Cornelius E. Gallagher (D-N.J.) in *Hearings on the Computer and Invasion of Privacy Before the House Special Subcomm. on Invasion of Privacy of the House Comm. on Govt. Operations*, 89th Cong., 2d Sess. 2 (1966) (*quoted in* Miller, *Personal Privacy*, *supra* note 36, at 1124). *See also* Richards, *supra* note 42, at 974; Menard v. Mitchell, 328 F. Supp. 718, 725–26 (D.D.C. 1971), *rev'd on other grounds sub nom.* Menard v. Saxbe, 498 F.2d 1017 (1974) (remarking that misuse of information by government could lead to suffocation of initiative and individuality).

[97] In the words of Representative Schumer, "[i]f everyone were put under a complete magnifying glass they might burn, and our society does not want to become so regimented and so information perfect that people feel that they're living in straight jackets." *Frontline*, *supra* note 1, at 26.

[98] *See* Miller, *Personal Privacy*, *supra* note 36, at 1117 ("[S]uccess or failure in life ultimately may turn on what other people decide to put in an individual's file and the programmer's ability, or inability, to evaluate, process, and interrelate information.").

icant impact on his or her life.[99] The subject is thus deprived of interests protected in other contexts by the principle of due process.[100] As one report has observed, "the net effect of computerization is that it is becoming much easier for record-keeping systems to affect people than for people to affect record-keeping systems."[101] As individuals become more dehumanized, they become more powerless in the face of the information networks.

The resulting power imbalance is manifested in the ability of screening services, which decide what types of information to record and make available, to determine what information will affect an applicant's success in receiving housing. This powerful position, in turn, gives excessive influence to the individual landlords who supply information to tenant screening services.[102]

As landlords rely more on automated data systems, tenants may become increasingly subservient to the screening services,[103] and they may lose their own sense of self-determination and uniqueness. The result may be a profound effect on society as a whole, on the value it places upon individuals, and on the regard which it holds for personal privacy.[104]

2. Improper Effect on the Decision-Making Process

The use of computers to screen out tenants may also increase the number of resulting decisions that are based on inaccurate or inappropriate information. Tenants have an interest in ensuring that rental decisions are made on proper information, and the use of tenant screening services may impinge dramatically upon this interest.

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[99] *See* PRIVACY COMMISSION, *supra* note 11, at 13.

[100] *See* UNITED NATIONS, *supra* note 33, at 27.

[101] SECRETARY'S COMMITTEE, *supra* note 35, at xx.

[102] A landlord who has difficulty with a tenant, whether this arises out of the tenant's ability to pay rent or merely reflects personality conflicts, may prevent the tenant from finding any other rental housing in the area served by the screening service simply by reporting a complaint about that tenant. *See generally supra* text accompanying notes 29–31.

[103] *See* Miller, *Personal Privacy*, *supra* note 36, at 1108 ("[W]hen the individual is deprived over the information spigot, he in some measure becomes subservient to those people and institutions that are able to gain access to it.").

[104] *See id.* at 1179, asserting that "the unregulated computerization of personalized information may have a numbing effect on the value of privacy as a societal norm." *See also* Note, *Protecting Privacy in Credit Reporting*, 24 STAN. L. REV. 550, 553–54 (1972) (fear of dissemination of information damages political and social structure).

Although inaccuracy plagues any method for gathering information, reliance on large, computerized data banks heightens the risk of error.[105] Data must be entered into the system by human operators. This task increases the likelihood that entry errors will be made.[106] Furthermore, "there is a widespread and legitimate fear of overcentralizing individualized information and then increasing the number of people who, by having access to it, have the capacity to inflict damage through negligence, sheer stupidity, or a lack of sensitivity to the value of personal privacy."[107] Even without such human error, inaccuracies may result from malfunctions in the system itself. Malfunctions which might be relatively minor in other contexts can be disastrous in computerized data banks, yielding random distortions in the data.[108]

The use of computerized screening systems also increases the possible impact of human or mechanical errors.[109] Such errors will often be difficult to detect, since operators who deal with the information see large quantities of similar information and have no direct knowledge of the subjects on file. Moreover, operators will have little basis for knowing when the reported information is inaccurate. In turn, the difficulty of detecting errors ensures that they will remain in the system for a long time. While it is inexpensive to retain the information, it is very difficult and costly to search for errors.[110]

Tenant screening services also present another factor which may contribute to inaccuracies. Like traditional credit bureaus,

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[105] The most common errors tend to be those relating to the identification of the individual. In Lowry v. Credit Bureau, Inc., 444 F. Supp. 541 (N.D. Ga. 1978), for example, James Francis Lowry had been denied a loan due to a credit report which listed him as having been bankrupt. The credit bureau had confused him with a James Frank Lowry, who had a different address. *Id.* at 543.

[106] *See, e.g.*, UNITED NATIONS, *supra* note 33, at 27–28 ("[T]he additional handling by computers, requiring the translation of data from alphabetic notation into machine-readable computer input, magnifies the risk of inaccuracies in reporting, recording and indexing.").

[107] Miller, *Personal Privacy*, *supra* note 36, at 1114.

[108] *See id.* at 1110; UNITED NATIONS, *supra* note 33, at 27–28.

[109] For example, Lucky Kellener paid his brother's rent for one month with a personal check. When an unlawful detainer was later filed against the brother, the landlord inadvertently placed Lucky's name on the complaint. This simple human error had disastrous consequences, for Lucky was soon listed in UDR's files and could not get his name removed despite extensive efforts. *See* Frenznick, *supra* note 12, § 1, at 3, col. 1; Sweeney, *supra* note 3, at 63, col. 1.

[110] *See* UNITED NATIONS, *supra* note 33, at 27–28; *see also* Miller, *Personal Privacy*, *supra* note 36, at 1118 ("[A] computerized file has a certain indelible quality—adversities cannot be overcome with time absent an electronic eraser and a compassionate soul willing to use it.").

they stake their livelihood on collection, compilation, and dissemination of negative information. They have an incentive or bias which may interfere with their attention to accuracy. Accuracy provides little relative benefit to screening services operating in the current market, and it may give way to the interest in finding "valuable," i.e., negative, data.[111] This problem has been noted with regard to traditional credit bureaus,[112] and it applies to tenant screening services as well.[113]

Even more common than such inaccurate information may be information which is true but misleading. Landlords who have biases against certain tenants or their lifestyles may be more likely to report them, and the resulting complaints may not necessarily give an accurate representation of the affected tenants. Further, given the screening services' use of names contained in court records, many tenants will appear on a company's files without having done anything wrong. Reported tenants may have initiated a lawsuit against a negligent landlord, or they may have been defendants in eviction cases which were ultimately dismissed. The mere fact that tenants' names appear in a court proceeding does not mean that they were at fault or are poor rental risks, and yet their names will appear in the screening service's files, giving landlords the impression that these tenants have broken the law.

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[111] The founder of UDR, for example, has no incentive to remove information which is dated or which regards tenants who have won lawsuits against landlords, and "in fact he has every incentive to do the opposite because once he gets the name on the computer he's done what will help him make sales. Taking the name off only helps the tenants and he's not selling his list to tenants." Rep. Charles Schumer, *quoted in Frontline*, *supra* note 1, at 21.

[112] *See* Note, *The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act*, 26 HASTINGS L.J. 1219, 1234–36 (1975), for a general discussion of the pressures credit bureaus may apply to their investigators to produce certain amounts of negative information. Former employees of one credit bureau, for example, reported that investigators commonly mishandled reports by fabricating sources, not verifying adverse information from at least two sources, and basing new reports on previous ones. *Hearings On Amending The Fair Credit Reporting Act Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing, and Urban Affairs*, 93d Cong., 2d Sess. 5–13 (1974) (testimony of Dick Riley, Mark S. Brodie, and Len O. Holloway, former employees of the Retail Credit Co.); *see* Note, *supra* at 1235 (citing above testimony).

[113] The risk of inaccuracies is not just theoretical. An indication of the possible extent of such mistakes is provided by the statement of a TRW official in 1974 that of 200,000 annual investigations launched in response to consumer requests, "only one third" resulted in the correction of an error. *See* Note, *supra* note 112, at 1234 (quoting Computerworld (Newsweekly for the Computer Community), May 15, 1974, at 6, col. 1 (quoting Ray Ybaben, speaking as a panelist at National Computer Conference in Chicago, May, 1974)).

Information taken out of context and used for unanticipated purposes may serve as an inappropriate basis for decision. Information which was originally excluded from a report because it was not pertinent might become relevant when the report is later used for other purposes, and negative inferences might be drawn from its absence. The information which does appear may also take on different connotations when used in different contexts.[114]

Those who rely on computerized data may also engage in inappropriate decision-making by placing undue weight on the information they obtain. Decision-makers may treat "soft" data, stemming from subjective evaluations, as "hard" or factual. The appearance of this data in a computer print-out lends it an appearance of truthfulness that may be unwarranted.[115] This is particularly problematic where the information originates from landlord complaints or from interviews with neighbors, where subjective opinions may take on the appearance of objective facts once they are listed in the computer. Where computer files are used to accumulate data about an individual from a variety of sources, the resulting data may appear "hard" merely from the length of the file. As more information appears in the computer read-out, the various data tend to reinforce each other and make the entire file appear even more impressive.[116]

The perception of soft data as hard leads to a further problem. It is easy to base a decision on data which appears hard, but dealing with data known to be soft requires investigation and contemplation of the importance of the information. The ease of making quick decisions with putative "facts" invites attention to data which appears hard, and more subjective or "human" factors tend to fall to the wayside.[117]

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[114] *See* Miller, *Personal Privacy*, *supra* note 36, at 1115.

[115] *See* UNITED NATIONS, *supra* note 33, at 27–28; Murray, *Computerized Information Systems Raise Concern Over Privacy Rights*, 183 N.Y.L. J. at 28, col. 1 (Jan. 24, 1980); Miller, *Personal Privacy*, *supra* note 36, at 1116.

[116] *See* Miller, *The Right of Privacy: Data Banks and Dossiers*, in PRIVACY IN A FREE SOCIETY 72, 76 (1974).

[117] As Tribe describes,

> users of policy-analytic techniques are under constant pressure to reduce the many dimensions of each problem to some common measure in terms of which "objective" comparison seems possible—even when this means squeezing out "soft" but crucial information merely because it seems difficult to quantify or otherwise render commensurable with the "hard" data in the problem . . . . [T]he continuing tendency that accompanies analytic techniques is to engage in such reduction whenever possible, with the result not only that "soft" variables tend to be ignored or understated but also that entire problems tend

Soft information is an important part of the overall picture when a rental decision is to be made. Reliance on tenant screening services can alter the impact of such information, however: negative soft information may be seen as hard data; positive soft information which is recognized as such may be ignored or discounted; and information which is seen as hard may lessen any incentive to seek out soft information which may complete the picture. The human evaluator finds it easy to defer to the machine, abdicating his or her own decision-making responsibility.[118] This is particularly true in the tenant screening context because of the market positions of landlords and tenants. Since landlords may often have more applicants than they have rental space available, especially in the large metropolitan areas served by tenant screening services, they are in a position to ignore the individual circumstances surrounding the appearance of an applicant's name in the files of the screening service.

Thus the effects of computerized data on the perceptions of the decision-maker can easily lead to unreliable results. The problem is accentuated both by the tenants' lack of control over the data and by the landlords' failure to consult the tenant regarding negative information. The landlord receives an inadequate picture of the potential tenant, and the tenant is not given an opportunity to correct it; indeed the tenant may not even be aware that the landlord is using this information.

Even where the landlord does have an accurate perception of the information, he or she may still base a decision on information which is inappropriate—i.e., information which is irrelevant to the applicant's performance as a tenant and is thus an inappropriate basis for rental decisions. For example, the landlord may know that a tenant report is negative only because the tenant was involved in a lawsuit with a previous landlord and may realize that this does not in itself mean that the tenant was at fault. The landlord may find this information valuable nonetheless, rationally refusing to rent to a tenant who is more likely to litigate than another.[119] Put more succinctly, "to many land-

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to be reduced to terms that misstate their underlying structure and ignore the "global" features that give them their total character.

Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 627 (1973)(citations omitted) (emphases deleted).

[118] *See* UNITED NATIONS, *supra* note 33, at 30.

[119] Benson & Biering, *supra* note 7, at 309. Another explanation of what motivates landlords in this area is provided by Harvey Saltz of UDR, who indicates that tenants are listed whenever they cause a landlord a financial loss—and this includes the attor-

lords a disruptive tenant is simply one who stands up for his or her rights."[120]

There are relatively few characteristics which directly relate to an applicant's future performance as a tenant. Foremost are the ability and willingness to pay rent, to take care of the property, and to show consideration for other tenants. Other characteristics, such as race, sex, religion or political beliefs, may be seen as relevant by some landlords for personal reasons but should not be the basis for denial of housing.

Because such characteristics are widely recognized as not properly relevant in deciding amongst prospective tenants,[121] state and federal legislatures have enacted statutory safeguards against housing discrimination. The Fair Housing Act, for example, prohibits refusal to rent or sell housing units on the basis of the customer's "race, color, religion, sex or national origin."[122] A similar statute enacted in California has been interpreted by its courts as providing a great amount of protection for tenants, so that it is seen as forbidding landlords to refuse to rent to families with children.[123]

Despite this anti-discrimination consensus, it is difficult, if not impossible, to combat much of the discrimination which may be practiced by an individual landlord. Discrimination may only be apparent if the landlord operates a significant number of rental units and consistently discriminates against a group large enough to make the exclusion readily apparent. Furthermore, the discrimination legislation is generally limited to a few specified categories. These categories, however, constitute only part of an endless array of reasons for which housing may be denied. Any personal information which is reported may be enough to

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ney's fees incurred by a landlord who has to sue a tenant, regardless of the outcome. Belluck, *supra* note 4, at 11, col. 4.

[120] Rep. Charles Schumer *quoted in* Sweeney, *supra* note 3, at 63, col. 1.

[121] *See infra* note 131.

[122] Pub. L. No. 90-284, 82 Stat. 83 (1968), *as amended by* Pub. L. No. 93-383, 88 Stat. 729 (1974) (codified as amended at 42 U.S.C. § 3604 (1982)). The Act provides exemptions for single-family houses rented by the owner and for units in small dwellings in which the owner occupies one of the units. *See* 42 U.S.C. § 3603 (1982).

[123] Marina Point Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, *cert. denied*, 459 U.S. 858 (1982) (applying the Fair Housing Law, CAL. GOV. CODE § 12955 (West 1980)). This policy extension has led one commentator to observe that "in the last fifteen years the law has changed from permitting discrimination in almost every state on almost any ground to prohibiting discrimination in all states on grounds of race, creed, sex, or national origin, and, in California, on any ground the court deems arbitrary." Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 532 (1984).

result in a negative decision by a landlord who possesses a personal bias against people with that characteristic.[124] For landlords who live in their buildings and lease out only a small number of units, these biases may have some legitimacy. In such cases, the decision as to whose application to accept is more a personal choice of one's close neighbors than a business decision. For large, institutional landlords, however, any such concern with personality and lifestyle characteristics should give way in the face of the significance of the tenants' interests in housing. Applicants should not be denied an interest as important as shelter due to the personal grudges of landlords whose involvement with the housing units is primarily commercial.

The use of tenant screening services magnifies the problems of both discrimination and enforcement. Obtaining a tenant's file from a screening service may facilitate discrimination in the decision not to rent.[125] Discrimination may also affect a landlord's decision to file an eviction proceeding or to file a complaint with a screening service. Whether it is conscious or not, such decisions may be motivated partially by the landlord's attitudes toward factors that should be irrelevant, such as the tenant's race, political views, sexual preference, or willingness to assert legal rights. The introduction of screening services facilitates this type of discrimination. It expands the amount of such information which is available, and it translates the landlord's individual biases into a systemic bias, since the landlord's decision to file an eviction proceeding or a complaint may exclude the tenant from the housing market as a whole. As many landlords make such decisions on the basis of their various biases, they may well multiply systemic discrimination, eventually introducing a greater variety of biases and affecting a greater number of individuals.

3. Infringement upon the Exercise of Tenants' Rights

Another policy consideration which militates against the use of tenant screening services is that these services infringe sub-

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[124] *See* Note, *supra* note 104, at 555.

[125] One housing activist, who argues that landlords use tenant reports as a means of circumventing anti-discrimination statutes, notes that "[t]hese computerized biographies contain information about income levels, race, marital status—the kind of information that has been determined to be illegal under fair housing laws." Sweeney, *supra* note 3, at 63, col. 1 (quoting Carole Norris).

stantially upon the legal rights provided to tenants by state laws. For instance, in most states the withholding of rent is the tenant's most effective remedy when the landlord fails to make necessary repairs. If the landlord files an eviction action in response to such withholding, the tenant's name may end up in a screening service's files, and the tenant may experience great difficulty finding new housing.[126] The tenant may thus be punished for exercising his or her legal right to withhold rent,[127] regardless of the nature of the dispute or its outcome.[128] Similarly, a tenant has a legal right to make use of the judicial process when the landlord violates the law. Simply by filing a complaint, however, the tenant may cause his or her name to be inserted in the records of a screening service. Again, the tenant can be penalized for asserting rights under the law. The tenant may effectively be blacklisted even where the landlord initiates eviction proceedings solely for the purpose of harassing a "problem" tenant, such as one who is active in a tenants' association. The landlord can punish the undesired tenant, ensuring that he or she may never be able to obtain a new lease in the area served by the screening service, simply by filing a bad faith lawsuit. In fact, the landlord need not even go so far as to file suit; retaliation against a tenant for the tenant's legally protected conduct can result from a direct report to the screening service. State law often forbids a landlord to retaliate by evicting a tenant,[129] but there is no legal prohibition against retaliation by reporting to a screening service.

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[126] Rudine Pettus, for example, withheld rent under the applicable state law after local health officials condemned her apartment. The landlord tried to have her evicted, but later settled with Pettus, who moved out of the apartment. Her name, however, was listed by UDR. She asserts that the only way she could find another apartment was "to lie or give a different name or address." *Frontline*, *supra* note 1, at 18–19.

[127] Not everyone shares this view. Harvey Saltz of UDR, for example, asserts that "'[w]hen a case is filed [as an unlawful detainer], a problem existed, there was opportunity to cure it, the tenant refused to cure it and the landlord went [to court] and made a sworn statement to the court of what the problem was, asking for the court's help. When I pick up a case like that, there is no reason for me to doubt the word of the landlord.'" Frenznick, *supra* note 12, § 1, at 3, col. 1.

[128] Barbara Ward, for example, gave 30 days notice to leave when her apartment was infested with rodents and roaches. The landlord then filed an unlawful detainer, contending that Ward owed back rent. Ward contested on the ground that she had attempted to pay but the landlord had refused to pick up the money and had left no address. The landlord did not even appear in court, and the judge ordered the case set aside until either party reinstituted proceedings. Neither did, and even several years later, other landlords refused to rent to Ward because her name was listed by a screening service. *Id.*

[129] *See generally* Rabin, *supra* note 123, at 533–34.

The harm to tenants, of course, goes beyond this type of punishment. Where tenants are aware of the screening service, they may be inhibited from exercising their legal rights in the first place. They may refrain from taking legal action in response to illegal conduct by their landlords, and may go to great lengths to settle any conflict out of court, to prevent the landlord from filing the initial suit. Landlords may even bring about this chilling effect by notifying the tenants of the existence of the screening service, indicating an intent to complain to the company if the tenants do not live up to the landlord's expectations, or stating that any lawsuit will become known to the screening service.[130] Tenant screening services, therefore, can provide a useful way for landlords to circumvent some of the safeguards provided to tenants by landlord-tenant laws.

4. Deprivation of Housing

Even where a tenant has behaved in a way that would justify a future landlord's refusal to rent, the submission of the tenant's name to a screening service is an excessive penalty. A bad experience with one landlord may result in the complete exclusion of the tenant from the housing market. Such exclusion contravenes our society's policy of attempting to meet the housing needs of its members and violates what some view as a fundamental right.[131]

This functional blacklisting of tenants is most objectionable because of its permanence; the deprivation of housing may last for many years, since the screening services have given no indication that dated information will be deleted periodically. Storage of negative information in unforgiving computer files "creates a potential 'record-prison' for millions of Americans,

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[130] *See supra* note 31 and accompanying text.

[131] For example, Article 25 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . ." G.A. Res. 217, U.N. Doc. A/810 at 76 (1948). At least one court has held that the Universal Declaration of Human Rights "has become, *in toto*, a part of binding, customary international law." Filartiga v. Pena-Irala, 630 F.2d 876, 882–83 (2d Cir. 1980).

See also City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3266 (1986) (Marshall, J., concurring in part and dissenting in part) ("The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."); Belle Terre v. Boraas, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting) (the "right to establish a home" is an essential part of Fourteenth Amendment liberty).

as past mistakes, omissions, or misunderstood events become permanent evidence capable of controlling destinies for decades."[132] This scenario conflicts with the notion that individuals who commit wrongs should be given a chance to rehabilitate themselves.[133] As one commentator observes, "there are important gains that come from living in a society in which certain kinds of derogatory information about an individual are permitted to disappear from view after a certain amount of time."[134]

The use of tenant screening services creates additional distortions in a housing market which is often already imbalanced. In many areas, available housing is very restricted for most segments of the population.[135] This imbalance is an important factor contributing to the increased popularity of the screening services. Landlords who take advantage of this imbalance make the market even more difficult for tenants. This type of information-sharing about undesirable customers is similar in some ways to arrangements which have been made illegal by the antitrust laws,[136] and thus conflicts with the national policy of promoting atomistic decision-making to protect consumers from business combinations.

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[132] A. WESTIN, *supra* note 43, at 160.

[133] *See* Melvin v. Reid, 112 Cal. App. 285, 290–92, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) (privacy right violated where movie depicted plaintiff's past life as prostitute).

[134] Wasserstrom, *supra* note 89, at 327. *See also Hearings on the Computer and Invasion of Privacy Before the House Special Subcomm. on Invasion of Privacy of the House Comm. on Govt. Operations*, 89th Cong., 2d Sess. 7, 12 (1966) ("[T]he possibility of the fresh start is becoming increasingly difficult. The Christian notion of redemption is incomprehensible to the computer.").

[135] *See generally* A. DOWNS, RENTAL HOUSING IN THE 1980's (1983); G. STERNLIEB AND J. HUGHES, THE FUTURE OF RENTAL HOUSING (1980).

[136] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1 (1980). This has been read to forbid concerted refusals to deal and some instances of information sharing between competitors. In Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), for example, the Court found lumber retailers to have violated the Sherman Act where they had circulated lists of wholesalers who sold lumber directly to consumers. Although the situation of the wholesalers in *Eastern States* seems analogous to the concerns of tenants who encounter screening services, the antitrust laws themselves are unlikely to apply in the tenant's situation because of the lack of any agreement among landlords to refuse to deal with the tenants who are subjects of the exchanged information. In *Eastern States*, such an agreement was inferred from the circumstances. In the context of screening services, however, courts are unlikely to infer such an agreement because a landlord's decision not to rent is consistent with his or her individual self-interest; he or she gains nothing from the fact that other landlords pursue a similar policy. *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (requiring that circumstances make the inference of rational, independent choice less attractive than that of concerted action in cases where proof of consciously parallel business behavior can be inferred); *see also* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976).

B. *Arguments for Screening Services*

1. Financial Protection of Landlords

In defending tenant screening services, landlords point to an interest in their own financial protection. Leasing an apartment involves a risk similar to the extension of credit. Landlords cannot have first-hand knowledge of the reliability of their applicants, and yet they should not be expected to lease an apartment without some kind of assurance that the tenant will be responsible for future rent payments.[137]

This problem is compounded by the difficulty of obtaining an eviction. As one landlord complained, "[i]t can take me six to eight months to evict somebody who doesn't pay his rent. That means that they're living free off of me for over half a year. And so, I have to be sure to check them out."[138] Landlords have a similar stake in making sure that their tenants observe minimal standards of housing maintenance and behavior. Tenants who damage apartments, or who are so loud that they seriously disturb other tenants, present tangible losses against which landlords should be able to guard.[139]

2. Market Efficiency

Another argument in defense of screening services draws on free market economic theory. Increasing the amount of information available allows the market to work more efficiently. Without screening services, landlords would incur greater costs because they would have greater difficulty excluding tenants who have in the past damaged property or failed to make timely rent payments. These costs to landlords would, in turn, be reflected in higher rents. Thus use of a screening service to guard against problem tenants keeps costs down for responsible

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[137] *See generally* Benson & Biering, *supra* note 7, at 301–14.

[138] *Frontline*, *supra* note 1, at 13 (quoting Dan Faller, of Apartment Owners Association).

[139] *See id.* The landlords' financial concerns are also emphasized in a UDR brochure, which states that

> [a]lthough the unlawful detainer action is supposed to provide a special remedy for the landlord, today's increasing legal complexities and high attorneys' fees make the unlawful detainer more and more costly and impractical . . . . [Y]ou can prevent this loss to your profits. You can assure yourself that you are not renting to a prior Unlawful Detainer.

Quoted in Benson & Biering, *supra* note 7, at 305.

tenants.[140] The increased information may also cause tenants to be more responsible in general, as it gives them an incentive to improve their performance as renters in order to compete for available housing.

Richard Posner uses a variation of this efficiency argument to argue that privacy interests in preventing information disclosures are minimal or non-existent.[141] Posner argues that the interest others have in "prying" is an important kind of economic good. Organizations such as the press (analogous to the screening services) specialize in prying when it becomes too expensive for the individual. The subject's interest in keeping information secret, however, is not legitimate; it is nothing more than misrepresentation, "akin to the concealment by sellers of defects in their products."[142] Because secrecy reduces the entire social product, the "property right" in personal information should be assigned to the public rather than to the individual.[143]

The problem with an efficiency argument such as Posner's is readily apparent. By dealing with privacy in economic terms, Posner overvalues interests that are easily quantifiable and undervalues interests that are more intangible;[144] he overvalues the financial interests of creditors and undervalues the privacy interests of individuals. Furthermore, his argument demonstrates, in a perverse sort of way, the need for privacy as a condition of human autonomy and individuality. Posner's lack of concern for individual privacy engenders a callousness toward people as unique individuals with a right to control their own destinies. Posner's marketplace analogies elevate group interests above those of the individual.[145]

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[140] *See* Benson & Biering, *supra* note 7, at 304 n.20. As one landlord remarked, referring to a tenant who had damaged property, "If the owner is forced to take these losses, the good tenant will eventually pay for it with higher rents. Is it unfair that other owners can find that this guy is pretty much anti-social?" *Quoted in* Frenznick, *supra* note 12, § 1, at 3, col. 1.

[141] *See* Posner, *An Economic Theory of Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 333, 333–34 (F. Schoeman ed. 1984).

[142] Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 S. CT. REV. 173, 174. *See also* Posner, *supra* note 141, at 338 ("[P]eople sell themselves as well as their goods . . . . [E]ach of us should be allowed to protect ourselves from disadvantageous transactions by ferreting out concealed facts about other individuals that are material to their implicit or explicit self-representations.").

[143] *Id.* at 336–39. Posner concludes that legislative restrictions on credit bureaus "could be justified only if credit bureaus systematically collected and reported information that, because of its staleness, had negligible value to its customers in deciding whether credit should be extended. No such assumption of economic irrationality is possible." *Id.* at 344.

[144] *Cf. supra* text accompanying note 117.

[145] This lack of concern for individual rights in the face of economic interests is also

3. Consent

Proponents of tenant screening services also argue that tenants who fill out a lease application thereby consent, either explicitly or implicitly, to an investigation of their background. Tenants are asking landlords for a favor, for an extension of credit, and they should not expect the landlords to grant their request without checking on their reliability. As Harvey Saltz of UDR contends, "[i]f you choose to live the kind of life which will involve other people taking a chance on you, such as extending credit, [or] giving you something . . . before you pay for it, then you have to give that person an opportunity to protect their [sic] interest, and to find out more about you."[146]

Aside from the question of whether applicants can actually choose whether or not to look for rental housing, this argument raises an important issue concerning the nature of true consent. Any consent which is implied in these circumstances can hardly be described as informed. Even if applicants are told that a credit check will be performed or that a tenant screening service will be consulted, they are unlikely to know what this entails or what types of information may be obtained. This lack of knowledge diminishes the applicants' ability to consent as well as their ability to protect themselves from the consequences of that consent.[147] For these and other reasons, courts have scrutinized claims of consent or waiver very closely when they touch on

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evident in another argument sometimes advanced on behalf of screening services—that while the cost of compiling and maintaining the information is relatively low, the cost of implementing safeguards would be prohibitive. In the first place, "[n]othing can be considered right from the standpoint of efficiency if it is wrong morally." Linowes, *supra* note 83, at 1184. Further, the cost of safeguards may not be all that great. *See* THE PRIVACY REPORT, *supra* note 11, at 4; *Hearings on S. 1928 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess., Part I, 41–52 (1980) (statement of Henry Geller, assistant to the Deputy Secretary of Commerce).

[146] *Quoted in Frontline, supra* note 1, at 25. *Cf.* Doe v. Sears, 245 Ga. 83, 86–88, 263 S.E.2d 119, 122–23, *cert. denied*, 446 U.S. 979 (1980) (newspaper has right to see records of tenants' names and unpaid rents under state Open Records Laws, despite statutory exception for privacy) ("A partial waiver of the right of privacy may be implied from the act of accepting credit from another . . . . [A] tenant in default under his lease impliedly consents to reasonable and necessary disclosures of his arrearage and his financial condition.").

[147] One report suggests that

> [t]he individual's relationship with a credit grantor may be contractual, but the record-keeping practices that facilitate it now involve so many separate institutions that, confronted with this maze, the individual who is not versed in the law and the complexities of the credit system cannot protect himself against honest mistakes, let alone against deliberate abuses by credit institutions.

PRIVACY COMMISSION, *supra* note 11, at 73.

important rights,[148] and legislatures have rendered ineffective waivers resulting from unequal bargaining positions.[149] At least one court has recognized that the same careful scrutiny applied to waivers in other contexts should apply to instances where informational privacy is violated.[150] Given the importance of housing, the inability of tenants to bargain over background checks, and the uninformed nature of any consent that is obtained, policy makers should hesitate before accepting consent as a justification for the invasions of privacy caused by tenant screening services.

4. Freedom of Speech

The First Amendment will be a primary area of concern in evaluating the validity of any significant regulation of tenant screening services. Landlords can claim an interest in both speaking—informing other landlords about tenants who have caused problems in the past—and listening—receiving this information from other landlords. Screening services may also assert a free speech interest in conveying valuable information to landlords and in facilitating this communication between landlords. These free speech arguments, however, are secondary; they provide possible legal support for the use of screening services, but they do not explain the benefits of the speech itself. Moreover, the type of speech involved here is not central to free speech concerns. It is not political speech, it is not advocacy, and it does not even deal with ideas. Distributor and user alike treat it as simply the sale of a good to be used in business for economic reasons. To the extent that it can be considered speech at all, it is commercial speech[151] rather than

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[148] *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (reversing conviction where defendant had waived right to counsel, because waiver had not been knowingly and intelligently made); Fay v. Noia, 372 U.S. 391, 439 (1963) (bypass of state remedies by habeas corpus petitioner will be governed by the waiver standard established in *Johnson*).

[149] *See, e.g.*, 29 U.S.C. § 103 (1982) (prohibiting "yellow-dog contracts"); U.C.C. § 2-302 (1972) (court may refuse to enforce unconscionable contract terms); MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1986) (contract provision which attempts to modify implied warranties or remedies for breach thereof in sale of consumer goods is unenforceable and nondisclaimable).

[150] Merriken v. Cressman, 364 F. Supp. 913, 919 (E.D. Pa. 1973) (applying standard of knowing and intelligent waiver, court held that parents could not have consented where they were not adequately informed about drug survey administered to school children).

[151] In Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 833 (8th Cir. 1976), the court found that credit reports are commercial speech, and that Congress therefore had authority both to require credit reporting agencies to follow reasonable procedures for accuracy and to require accurate disclosures to consumers. *Id.* at 833.

speech involving "matters of public concern," and it therefore receives less First Amendment protection.[152]

The free speech right is also counterbalanced by the right of privacy. In *Millstone v. O'Hanlon Reports, Inc.*,[153] the Eighth Circuit upheld the FCRA against a First Amendment challenge, noting that Congress passed the FCRA to protect the privacy of consumers.[154] Another court has added that "the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech."[155] There are many principles which may limit freedom of speech, and a constitutional right such as privacy should be included among them.[156]

This balance between speech and privacy should tilt even further toward privacy in the tenant screening service context, when a regulation aimed at screening services would protect a core privacy concern—control over personal information—and impinge on a peripheral free speech concern—commercial usage of computerized data. Such a regulation should be subjected to the four-step test devised by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[157] to determine the validity of commercial speech regulation.

The first step under the *Central Hudson* test is whether the First Amendment protects the speech at all.[158] For commercial speech to be protected, it must "concern lawful activity and not be misleading."[159] Many of the remedies advocated in this Note are aimed at material which is inaccurate or misleading. As such, these materials receive less First Amendment protection, because "there is no constitutional value in false statements of fact."[160] While this falsity does not end the inquiry,[161] it certainly

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[152] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2947 (1985) ("matters of public concern"); Bigelow v. Virginia, 421 U.S. 809, 825–27 (1975) (commercial speech).

[153] 528 F.2d 829 (8th Cir. 1976).

[154] *Id.* at 833.

[155] Merriken v. Cressman, 364 F. Supp. 913, 918 (E.D. Pa. 1973).

[156] *See* Parent, *supra* note 45, at 332–33. *See also* PRIVACY COMMISSION, *supra* note 11, at 21–24 (stating the ways in which the Commission was careful to formulate its recommendations to be consistent with First Amendment principles).

[157] 447 U.S. 557, 566 (1980).

[158] *Id.*

[159] *Id.*

[160] Gertz v. Robert Welch, 418 U.S. 323, 340 (1974).

[161] In New York Times v. Sullivan, part of the Court's rationale for the actual malice test was that a lesser libel standard would "chill" other speech that was desirable under the First Amendment, because an "erroneous statement is inevitable in free debate." 376 U.S. at 271–72. Therefore, the Court felt that some protection was needed for

tilts the balance towards allowing regulation of this speech. Common law actions for false light invasion of privacy and statutory actions involving false or misleading information[162] should similarly survive First Amendment scrutiny because the speech upon which they infringe is not constitutionally protected.

For information which is not false or misleading, step two of the *Central Hudson* test asks whether the asserted governmental interest is substantial.[163] Given the constitutional importance of privacy, the governmental interest in its protection is not only substantial but compelling and therefore satisfies this part of the *Central Hudson* test.[164]

Step three requires examination of whether the regulation directly advances this governmental interest.[165] A well-drawn statute should accomplish this purpose, as the legislation should focus on damage to potential victims from false or misleading information in the screening reports. Common law and statutory remedies for false light invasion of privacy and false or misleading information should satisfy this standard as well; they are all aimed directly at the use of personal information in ways that violate an individual's privacy.[166]

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speech that was not true, in order to prevent chilling of protected and desirable speech. *See id.* at 279; L. TRIBE, *supra* note 55, § 12-12, at 634.

[162] *See infra* notes 251–63 and accompanying text and notes 283–302 and accompanying text.

[163] *Central Hudson*, 447 U.S. at 566.

[164] *But see* Equifax Services, Inc. v. Cohen, 420 A.2d 189 (Me. 1980), where the court held that several provisions of Maine's version of the FCRA violated the First Amendment under the *Central Hudson* test. The court found that the "privacy" interests protected by the statute were not substantial because they were not within the "zones" established by Paul v. Davis, 424 U.S. 693 (1976), and Whalen v. Roe, 429 U.S. 589 (1977), or protected by common law invasion of privacy actions. *Id.* at 200. The court did not explain why these privacy interests were not covered, simply holding that "it is plain" they were not included. *Id.* For further discussion of these cases, *see infra* notes 222–32 and accompanying text.

[165] *Central Hudson*, 447 U.S. at 566.

[166] The *Equifax* court held that provisions of the Maine statute forbidding use of certain types of information in consumer reports violated the First Amendment because they did not directly advance the government's conception of the privacy interest. 420 A.2d at 205. The "privacy" interest examined, however, was an interest in preventing unlawful discrimination and improper decision-making—only one aspect of the right to informational privacy. The court stated that the provisions did not directly advance this right because there was no evidence that users of the reports were prone to rely on these types of information, and because irrelevant information was widely ignored in the insurance context involved in this case. *Id.* Such arguments, if they stand up at all, would be hard to apply to tenant screening services, which serve a very narrow function. If the information was not relied upon by landlords, the screening service would not waste the time and expense of including it in the tenant report.

Finally, the *Central Hudson* test asks whether the regulation is more extensive than necessary to serve the governmental interest.[167] The interest furthered here is informational privacy—control over the collection and use of personal information. It would be difficult to imagine a less restrictive method of advancing this interest than direct regulation of violations of that interest—regulation of the collection and use of personal information in circumstances where it deprives the individual of privacy.[168] The regulations suggested later in this Note are not prohibitions on the existence of screening services, but are regulations designed to protect the individual tenants from the abuses suffered at the hands of screening services or landlords and, as such, should be able to withstand this element of the constitutional test.

In addition to the First Amendment arguments that can be made against the direct regulation of the screening services, the landlords or service operators may assert First Amendment defenses to actions brought by tenants who claim an infringement of their privacy, whether such an action is based on the Constitution, common law, existing statutes, or future legislation.

Under this approach, landlords or screening services would argue that they cannot be held liable for invasion of privacy without proof of knowledge or reckless disregard of falsity, or at least negligence. This argument stems from defamation case law, starting with *New York Times Co. v. Sullivan*.[169] In *New York Times*, the Supreme Court held that the First Amendment prohibits recovery of damages by a public official for defamation relating to his or her official conduct unless he or she proves

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[167] *Central Hudson*, 447 U.S. at 566.

[168] The *Equifax* court disagreed in the portion of its opinion striking down the Maine statute's prohibition on the reporting of obsolete information—a provision which was essentially the same as in the Fair Credit Reporting Act, 15 U.S.C. § 1681c (1982). The court found that a less intrusive means of advancing the government's interest would have been to make it illegal actually to base a decision on "suspect" information. 420 A.2d at 206. This argument is flawed for two reasons. First, the court did not consider the government's interest in protecting informational privacy per se; it only considered the interest in preventing inappropriate decision-making. Second, the court failed to recognize the immense enforcement difficulties involved in an attempt to regulate the decision-making process itself. Such regulation would have to focus on the subjective intent of the decision-maker, while a restriction on the reporting rather than the use of suspect information achieves the desired goal more efficiently. Furthermore, if it were illegal to base a decision on suspect information, there would be no interest in selling that kind of information in the first place.

[169] 376 U.S. 254 (1964).

that the defendant acted with knowledge of, or reckless disregard for, the falsity of the statement. A few years later, the Supreme Court decided *Time, Inc. v. Hill*,[170] which applied the same burden of proof in a false light invasion of privacy case involving a matter of public interest.[171] On the strength of the *Time* case, a tenant screening service or landlord could argue that it should not be found liable for invasion of privacy in the absence of knowledge or reckless disregard of the falsity of information contained in a tenant report.

The precedential value of *Time*, however, is limited. First, the cause of action arose under New York's unique privacy statute, and the holding was expressly limited to that statute.[172] Second, *Time* was decided before *Gertz v. Robert Welch, Inc.*,[173] which held that private citizens need not meet the *New York Times* standard in defamation cases—proof of negligence would suffice for First Amendment purposes.[174] Had *Time* been decided after *Gertz*, the Court would have had a precedential basis for applying a lower standard of proof to false light privacy cases. Indeed, in the same year that it ruled on *Gertz*, the Supreme Court decided *Cantrell v. Forest City Publishing Co.*,[175] another false light privacy case. *Cantrell* upheld judgment for two private citizens who had been required by the trial court to meet the *New York Times* standard. The Court did not reach the question of whether a lower standard would have been permissible; it made clear that this question had been left open by *Time*.[176] Therefore, a private plaintiff might be able to win a false light invasion of privacy suit against a tenant screening service on a negligence standard. A further reason for distinguishing *Time* from cases brought by a tenant on the basis of the activity of a screening service would be that *Time* involved a media defendant, so that freedom of the press came into play, as did concerns about the newsworthiness or public interest value of the material.

The applicability of the *Time* standard is further in doubt as a policy matter, because the standards which have evolved for defamation cases should not necessarily apply to privacy cases.

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[170] 385 U.S. 374 (1967).
[171] *Id.* at 387–88. *See infra* notes 251–52 and accompanying text.
[172] 385 U.S. at 390–91.
[173] 418 U.S. 323 (1974).
[174] *Id.* at 348.
[175] 419 U.S. 245 (1974).
[176] *Id.* at 250.

For one thing, the two torts remedy distinct types of injuries. Defamation cases primarily address injury to the plaintiff's reputation, while privacy cases focus on the direct emotional stress placed on the individual.[177] Privacy cases also raise a competing constitutional right not involved in defamation cases.[178] Moreover, the different types of information systems raise different concerns. The mass media, involved in most defamation cases, generally has been regarded as needing the protection of the First Amendment to keep the public informed. The computerized data systems, by contrast, are kept away from public view and add little to public debate. In addition, such systems are more likely to be perceived as accurate and unbiased. Thus, they present privacy problems different from those found in any other context.[179]

Defendants may use defamation case law to argue that strict liability or presumed damages cannot constitutionally be imposed. The defamation cases have prohibited such measures unless the plaintiff proves actual malice.[180] However, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[181] the Supreme Court held that this rule does not apply where the speech at issue does not involve matters of public concern. The Court further held that the erroneous credit report involved did not involve a matter of public concern.[182] A tenant screening service report would similarly not be a matter of public interest, making strict liability and presumed damages appropriate in this context even though they would not be allowed in typical defamation actions.

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[177] *See* W. PROSSER & W. KEETON, THE LAW OF TORTS § 117, at 866 (5th ed. 1984) [hereinafter PROSSER & KEETON].

[178] *See* Posner, *supra* note 142, at 206–07; A. MILLER, *supra* note 16, at 192.

[179] *See* Miller, *Personal Privacy*, *supra* note 36, at 1178. Miller writes that

> [t]he potential for centralization of power that inheres in the new computer technology, the increased flow of data between public and private organizations, the general lack of effective internal safeguards, and the frequently secretive nature of the dissemination, are the considerations that lie at the heart of the question whether a data system and its managers should be immunized from liability for transferring or otherwise disclosing damaging information.

A. MILLER, *supra* note 16, at 197.

[180] *Gertz*, 418 U.S. at 349. RESTATEMENT (SECOND) OF TORTS § 652H comment c (1977), indicates that *Gertz* probably forbids the awarding of presumed damages in a privacy action, although it is unclear whether nominal damages could be awarded.

[181] 105 S. Ct. 2939 (1985) (plurality opinion).

[182] *Id.* at 2947. The Court also noted that because of the economic incentives involved in this type of speech, it does not require as much First Amendment protection in order to thrive as does noncommercial speech. *Id.*

Where the statements made in a tenant report are true, proponents of tenant screening services may raise a further free speech defense by claiming that the First Amendment prohibits imposition of liability. The Supreme Court has never decided the issue of whether truth is a defense in a privacy case. *Time* explicitly left this question open,[183] and the issue does not arise in defamation cases where falsity is a necessary element of the tort.[184] However, the Court has not made truth a complete defense in other contexts such as the regulation of obscenity[185] or fighting words.[186] In the recent case of *Philadelphia Newspapers, Inc. v. Hepps*,[187] the Court did require libel plaintiffs to prove falsity where the statements involved matters of public concern. The Court explicitly left open the possibility that this requirement would not apply to suits against non-media defendants[188] or to suits by private figures that do not involve matters of public concern.[189] These factors, as well as the different nature of the injury involved in privacy cases, would seem to justify the use of a different test from that used in defamation cases.[190] Furthermore, *Central Hudson* indicates that truthful commercial information may be regulated if it passes the four-part test.[191] With a competing constitutional interest in privacy at stake, the tenant has an even stronger case than in the traditional *Central Hudson* commercial speech situation.[192]

If the information at issue had been obtained from a public record, the tenant screening service could assert one final defense. In *Cox Broadcasting v. Cohn*,[193] the Court reversed an

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[183] 385 U.S. at 383–84 ("Constitutional questions which might arise if truth were not a defense are therefore of no concern.").

[184] *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977); *see also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 (1975) (the Court has never decided whether truth must be a defense in defamation actions brought by private figures).

[185] *See, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press").

[186] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (fighting words which are designed to incite violence rather than communicate information are not protected speech).

[187] 106 S. Ct. 1558 (1986).

[188] *Id.* at 1565 n.4.

[189] *Id.* at 1563.

[190] *See* Warren & Brandeis, *supra* note 39, at 218.

[191] *See supra* text accompanying notes 157–68.

[192] *See* Hunter v. Washington Post, 102 Daily Wash. L. Rptr. 1561, 1566 (D.C. Super. 1974) (a privacy action was maintainable even when the statements were true and the defendant acted without malice).

[193] 420 U.S. 469 (1975).

invasion of privacy judgment against a newspaper which had published the name of a rape victim. The Court held that liability may not be imposed "for truthfully publishing information released to the public in official court records."[194] The scope of this holding is unclear. The Court emphasized that the information related to a criminal trial, an event of "legitimate concern to the public."[195] In a similar case, *Smith v. Daily Mail Publishing Co.*,[196] the Court held that a newspaper could not be punished for publishing the lawfully obtained name of an alleged juvenile delinquent, and the Court noted that there was no privacy issue at stake.[197] Thus, the holding of *Smith* may not apply to an invasion of privacy case where the matter "published" or disseminated is less a matter of public concern than that of *Cox*.

Even if *Cox* were applicable, the whole question of public concern could be avoided by making court records of landlord-tenant suits unavailable to the public.[198] Such a measure might itself, however, violate the First Amendment. The Court has held that criminal trials must generally be open to the public, and this principle could be extended to civil trials, although the interests involved are not quite as strong in the civil context.[199] *Cox* itself has come under attack for its failure to consider this civil/criminal distinction.[200] Richard Posner noted that the state's approach—allowing public access but forbidding publication—protected privacy at less cost than the Court's suggested alternative of restricting public access altogether.[201] This opinion has also been criticized for mistakenly "assuming it was merely constitutionalizing a public record defense that already existed

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[194] *Id.* at 496.

[195] *Id.* at 492.

[196] 443 U.S. 97 (1979).

[197] *Id.* at 105.

[198] Indeed, in *Cox* the Court indicated that the state's remedy would be to make the information unavailable to the public in the first place. 420 U.S. at 496. Similar approaches have been used in other contexts, notably arrest records. *See, e.g.*, Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) (construing statute as granting right to expunge arrest records where there was no probable cause for arrest in order to avoid constitutional issues). *See also* J. SHATTUCK, *supra* note 11, at 158; ATTORNEYS GENERAL, *supra* note 77, at 32–36.

[199] *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980) (plurality opinion) (criminal trials generally must be open but does not decide whether this is true for civil trials).

[200] *See, e.g.*, Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1267–68 (1976).

[201] Posner, *supra* note 142, at 208.

at common law."[202] These various criticisms and policy concerns may preclude the extension of *Cox*'s prohibition of liability—in other words, no liability for truthful publication of official court records—to a privacy action based on a tenant screening report containing information gleaned from public records.[203]

The freedom of speech arguments merely constitute attempts to justify purely commercial reasons for dramatic privacy invasions. The sale of personal data about specific individuals is not speech which aims to convey any message. The tenant screening service does not try to persuade the landlord to believe any claim or to pursue any action but merely profits from the sale of the details of another person's life. The landlord, in turn, simply wants to know whether a given rental decision is likely to cause any future economic problems. To the extent this may constitute a free speech interest, it must be balanced against the extensive privacy interests at stake. These privacy interests go to the heart of what it means to be an autonomous individual, and they should be given adequate protection, whether by the Constitution itself, by common law invasion of privacy actions, or by statutory actions built upon the framework of the Fair Credit Reporting Act.

C. *Scenarios of Conflict*

As has been shown, tenants have strong interests in maintaining their personal privacy and in fulfilling their basic housing needs. Use of tenant screening services may infringe upon these interests by depriving individuals of control over personal information, by distorting the rental decisions of landlords, by

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[202] Hill, *supra* note 200, at 1265–66.

[203] Some courts have refused to apply *Cox* strictly to invasion of privacy cases. *See, e.g.*, Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983). Although *Diaz* reversed the privacy claim on other grounds, it established that a "matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." *Cf.* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (reversing dismissal of complaint by plaintiff whose name appeared in magazine in connection with crime committed eleven years previously). Benson and Biering note that

> [u]nlawful detainer records, like most court records, are public documents. However, they are public not to provide landlords with a device to measure potential rental risks but to assure the integrity of the judicial system . . . . [However, through their use by tenant screening services, c]ourt records become a commercial blacklist, a consequence never intended by the common law rule making court records public.

Benson & Biering, *supra* note 7, at 308.

interfering with legal rights granted to tenants, by facilitating discrimination, or by making it more difficult for many applicants to find housing in a market that is already weighted against tenants.[204] On the other hand, landlords have an understandable interest in ensuring their own financial protection by excluding tenants who will not pay rent or who will decrease the value of their property.[205]

Although these interests inevitably clash, their relative strengths depend to a great extent on the fact situation involved. Possible fact situations may be categorized according to the nature of the information and its subsequent use.

One way to begin is to examine instances where a landlord actually uses the information to make a rental decision. First, the landlord may use truthful and relevant information to make an adverse rental decision. For example, the landlord may refuse to rent to an applicant who has a clear record of not making rent payments. The tenant here has an interest in privacy and an interest in obtaining housing. The landlord has an interest in renting to someone who will make timely rent payments. The tenant's housing interest is strong, but may be outweighed by the landlord's interest in being paid for the lease. The interest in informational privacy is also strong, but is counterbalanced by the landlord's interest in financial protection.

Second, the landlord may use truthful but irrelevant information to make an adverse rental decision. The tenant's interests here are stronger than in the first case: the housing interest remains strong, while the privacy interest increases because it includes the benefit of not having decisions made on the basis of irrelevant information. The landlord's interests, on the other hand, diminish—he or she has no legitimate reason to deny housing due to irrelevant information. The landlord may find it costly to have irrelevant information sifted from relevant information, but such cost is questionable; even if it is substantial, this interest would not seem to rise to a level where it would compete with the tenant's concerns.

Third, the landlord may deny an application on the basis of information which is false. Here, there is no need to distinguish between relevant and irrelevant information; information which is false should always be an irrelevant basis for a decision. The

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[204] *See supra* notes 39–135 and accompanying text.
[205] *See supra* notes 137–150 and accompanying text.

balance of interests here is similar to that in the second scenario: the tenant's interests in privacy and housing are strong, and the landlord's interests are still minimal.

Fourth, the landlord may make a favorable decision based on the information obtained. We might again examine the truthfulness and relevance of the information, but the distinctions would be unlikely to affect the analysis much in this context. Here the tenant's interests decrease. The need for housing has been fulfilled, and only a weaker version of the privacy interest remains.

These four fact scenarios may also be considered where the information involved is not actually used in a rental decision, but remains stored in a screening service's files. The tenants in these circumstances retain privacy interests similar to the parallel situations described above, but their housing concerns are diminished because housing has not been denied. The landlords' interests are diminished to the same extent, since they have been in no danger of renting to an irresponsible tenant. Thus the balance of interests in the storage situations is similar to that where the information is actually used, although the strengths of the interests of each side may be lower in absolute terms.

To summarize, the interests of tenants clearly outweigh those of landlords in the second and third scenarios (where the information is irrelevant or false), whether the information is used or remains stored. In the first scenario, however, the conflict between landlord and tenant is at its sharpest, with strong policy arguments on both sides. This Note takes the position that the tenant's interests in privacy and housing still outweigh the economic interests of the landlord. With this in mind, the remainder of the Note will examine possible ways for tenants to vindicate these interests. Although the avenues to be considered could provide relief in each of the scenarios described above, the actual availability of relief under present law and the political feasibility of passing new legislation may still depend upon the factual context.

III. Litigation Challenges

A. *Constitutional Right to Privacy*

One approach a tenant might take in challenging the maintenance or use of personal information by a landlord or tenant

screening service is the constitutional right to privacy.[206] The Supreme Court developed the concept of this right in the context of cases dealing with matters related to procreation and family life. In the landmark case of *Griswold v. Connecticut*,[207] the Court struck down a statute which prohibited the use of contraceptives as violative of the right to privacy. Justice Douglas, writing for the Court, derived this privacy right from the other guarantees of the Bill of Rights. He noted that other rights have been derived in this manner, such as the freedom of association, the right to choose the school in which one's child will be educated, the right to receive information, and the freedom to teach—all of which are protected by the "penumbra" of the First Amendment.[208] Douglas then considered the "zones of privacy" which are protected by the First, Third, Fourth, Fifth, and Ninth Amendments.[209] Finally, he found that the Connecticut law's infringement upon the marital relationship, "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," rendered that law invalid.[210]

Griswold was extended in the 1972 case of *Eisenstadt v. Baird*,[211] which struck down a Massachusetts statute prohibiting distribution of contraceptives except by registered physicians and pharmacists to married persons. Justice Brennan, for the Court, found that the statute's distinction between married and unmarried people violated the Equal Protection Clause; single people had the same right to privacy which married people enjoyed under *Griswold*.[212] The following year, the Court held in *Roe v. Wade*[213] that the privacy right "is broad enough to

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[206] Several states also have constitutional provisions which explicitly or by construction protect the right to privacy. *See* R. SMITH, *supra* note 77; PRIVACY COMMISSION, *supra* note 11, app. 1, at 1.

[207] 381 U.S. 479 (1965).

[208] *Id.* at 482.

[209] *Id.* at 484.

[210] *Id.* at 485.

[211] 405 U.S. 438 (1972).

[212] *Id.* at 443. Justice Brennan, in *Eisenstadt*, observed:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis in original).

[213] 410 U.S. 113 (1973).

encompass a woman's decision whether or not to terminate her pregnancy."[214]

These and other cases[215] indicate a view of privacy as the right of individuals to make their own decisions with respect to choices that are fundamental and personal, especially choices regarding reproduction.[216] This notion of privacy, however, sounds more like the concept of autonomy than privacy.[217] The Court seems to have made the mistake of assuming that some things which are done in private are entitled to protection for that reason, but phrased in this way the error becomes obvious. The reason for this mistake and for the confusion between autonomy and privacy may simply be the awkwardness which arises whenever matters of sexual relations must be discussed. The Court was unwilling to limit its rationale to one of sexual freedom, so it relied instead on autonomy—but it may have found recognition of a right to autonomy overly broad. It thus

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[214] *Id.* at 153. Justice Blackmun noted that the right has been seen as rooted in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, and ventured the view that it is "founded in the Fourteenth Amendment's concept of personal liberty." *Id.*

[215] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down on equal protection grounds a statute authorizing sterilization of certain repeat offenders guilty of crimes of "moral turpitude"). Although the Court did not explicitly ground its decision on a right to privacy, the case can be cited in support of the privacy right. *See, e.g., Griswold*, 381 U.S. at 485; *Eisenstadt*, 405 U.S. at 453–54; Roe v. Wade, 410 U.S. at 152. In striking down various abortion statute provisions, other cases have implicitly recognized the right to privacy as protection of individual control over important personal decisions. *See* Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Carey v. Population Services Int'l, 431 U.S. 678 (1977). This view of privacy has also been reflected in various state court decisions. *See, e.g.*, In the Matter of Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976) (right to privacy encompasses decision to decline medical treatment).

[216] However, in Bowers v. Hardwick, the Court, by upholding the constitutionality of a Georgia sodomy statute on Fourteeth Amendment Due Process grounds, refused to extend its views of privacy beyond the limits of *Roe*. 106 S. Ct. 2841 (1986). Justice White, writing for the Court, found that sodomy was neither "'implicit in the concept of ordered liberty,'" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)), nor "'deeply rooted in this Nation's history and tradition,'" (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)). *Id.* at 2844. He refused to expand the Court's authority "to discover new fundamental rights imbedded in the Due Process Clause." *Id.* at 2846. White relied heavily on the fact that twenty-four states and the District of Columbia still classify sodomy as a criminal offense. *Id.* at 2845. He wrote his opinion narrowly, focusing exclusively on homosexual sodomy and its traditional condemnation rather than including the equally prohibited act of heterosexual sodomy. Thus, although the current Court seems unwilling to carve out new areas of privacy, tenants may distinguish their asserted right to privacy by pointing out that it does not involve conduct which is affirmatively forbidden by any state or historically condemned for its immorality.

[217] *See supra* text accompanying notes 46–47. *See* Parent, *supra* note 45, at 313, 316–18 (arguing that *Griswold* and *Eisenstadt* protect liberty, not privacy, and noting that similar observations have been made by Justices Harlan and White (concurring in *Griswold*)); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974) ("the new Right of Privacy is a zone of prima facie autonomy"); Posner, *supra* note 142, at 192–93 (*Griswold* confuses liberty to do something in private with liberty to do it at all).

grounded its decisions in a right to privacy, ensuring the limitation of this right by applying it in a context in which the true "privacy" concern—secrecy—was implicated only indirectly. In doing so, the Court may have made its abortion and contraception decisions somewhat more acceptable, but the resulting doctrinal confusion has caused problems in other contexts, including cases dealing with issues of informational privacy.[218] Indeed, other courts have limited the privacy right to the context of reproduction and family relations, refusing to recognize that privacy has an information component at all.[219] Nevertheless, the Supreme Court's recognition of an autonomy right necessarily implies recognition of an informational privacy right because informational privacy can be viewed as a prerequisite for individual autonomy.[220]

The Court has recognized this right to informational privacy in some contexts. In several procedural due process cases, the Court afforded constitutional protection to an individual's interest in limiting disclosure of information where it would result in damage to an individual's reputation.[221] These cases were lim-

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[218] This artificial view of privacy led some courts to make interesting maneuvers to fit within it cases which raised more natural informational privacy concerns. For example, in Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973), the court enjoined, as violative of privacy rights, a drug survey administered to school children. In doing so, the court said it "will look closely at the factual situation as it relates to family relationships and child rearing." *Id.* at 918. Here, it found that the survey impinged directly on the family relationship and thus violated the plaintiffs' constitutional right to privacy in the absence of an overriding governmental interest.

[219] *See, e.g.*, J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) (upholding post-adjudication dissemination of social histories prepared in connection with juvenile proceedings).

[220] *See supra* text accompanying notes 46–47.

[221] *See* Goss v. Lopez, 419 U.S. 565, 575 (1975) (suspensions of students by public schools implicated a liberty interest, necessitating procedural requirements, because the "charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment"); Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (denying a due process claim because the failure to rehire a teacher did not involve a "property" or "liberty" interest which would be implicated if the teacher's reputation had been harmed); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (striking down, on due process grounds, a state statute which authorized officials to post a public notice in liquor stores stating that liquor sales to the named individuals were forbidden, and finding that "where the State attaches a 'badge of infamy' to the citizen, due process comes into play . . . . Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."); Jenkins v. McKeithen, 395 U.S. 411 (1969) (procedural due process requirements were necessitated by the stigma resulting from probable cause findings by a state Labor-Management Commission that individuals had committed criminal violations).

See also Doe v. McMillan, 412 U.S. 306 (1973), where the Court's concern for reputation extended beyond the due process context. The Court held that parents could sue the printer and the superintendent of documents for disseminating the names of

ited, however, by the 1976 case of *Paul v. Davis*.[222] Justice Rehnquist, writing for the Court, rejected the due process claim of a man whose name appeared on a publicly-circulated police list of active shoplifters, on the ground that he had suffered no deprivation of liberty or property. The Court held that injury to reputation does not involve a liberty interest.[223] With a single stroke, Justice Rehnquist seemed to obliterate the strong consensus which had developed in favor of due process protection of interests in informational privacy.[224] This turnabout had implications not only for procedural due process cases, but for constitutional right to privacy cases as well—for if liberty did not encompass reputation for due process purposes, it seemed doubtful that informational privacy was independently protected by the constitutional right to privacy.

However, *Paul v. Davis* should not dissuade a tenant seeking to recover from a landlord or screening service for infringement of his or her constitutional right of informational privacy. Prior Supreme Court cases have recognized a liberty interest in reputation, and two subsequent cases, *Whalen v. Roe*[225] and *Nixon v. Administrator of General Services*,[226] have recognized a privacy interest in nondisclosure of personal information, although in neither case was this right found to be infringed.

In *Whalen*,[227] the Court upheld a New York statute that required the state to maintain a file of the names of persons who obtained certain prescription drugs for which there was an illegal

students about whom information had been gathered in a study by a congressional committee. The Court was concerned whether the release of names served sufficiently important legislative functions to justify the effects on privacy. The Court remanded the case for examination of the importance of the legislative interests. Three Justices would have gone further, finding that the publication had clearly "exceeded the sphere of legitimate legislative activity" and constituted a violation of the students' constitutional right to privacy. 412 U.S. at 330 (Douglas, J., concurring, joined by Brennan and Marshall, JJ.).

[222] 424 U.S. 693 (1976) (plaintiff who had been arrested on a shoplifting charge which was later dismissed challenged actions of police officials in circulating a flyer to merchants designating him as an active shoplifter).

[223] *Id.* at 708–12.

[224] As a federal district court noted in Hammons v. Scott, 423 F. Supp. 625 (N.D. Cal. 1976), "the Supreme Court in *Paul* . . . seems to have cut short the full development of the nascent doctrines seeking some accommodation between values of individual privacy and record-keeping responsibilities of the executive branch." *Id.* at 625. The court then held that maintenance, use and dissemination of arrest records of persons who had never been convicted did not violate any privacy right because "the due process and right to privacy theories underlying plaintiff's claims are so similar to those recently rejected by the Supreme Court in *Paul* that these claims must fall." *Id.* at 628.

[225] 429 U.S. 589 (1977).

[226] 433 U.S. 425 (1977).

[227] 429 U.S. 589 (1977).

market. Justice Stevens, writing for the majority, held that the law did not infringe on privacy rights. The Court relied on the safeguards in the system and the resulting lack of danger of public disclosure of the information. In doing so, however, the majority outlined an important framework for privacy issues, noting that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[228] Justice Stevens thus recognized the difference between autonomy and informational privacy, and found both to be protected by the Bill of Rights.[229]

In *Nixon v. Administrator of General Services*,[230] the Court cited *Whalen* in its decision that Nixon advanced a colorable

[228] *Id.* at 598–600 (citations omitted).

[229] Justice Brennan, concurring, read this recognition broadly.

> The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right to privacy, but holds that in this case, any such interest has not been seriously enough invaded . . . . Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.

Id. at 606 (citations omitted). *But see id.* at 607–09 (Stewart, J., concurring) (reading the Court's opinion more narrowly).

[230] The Court considered and rejected Nixon's privacy claim against enforcement of federal legislation, and directed the Administrator of General Services to take control of Nixon's Presidential materials, to screen them, and to formulate regulations for eventual public access to them.

The Court also recognized the strength of the reputation interest in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), where a union sought access to employees' scores on a psychological aptitude test for use in processing a labor grievance. The Court emphasized the employees' interests in controlling this information, asserting that "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice." *Id.* at 318. The Court considered the union's need for the information, but found it outweighed by the employees' interest in limiting dissemination.

Reactions by other courts to informational privacy claims have been mixed. *Compare* United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980) (adopting the *Whalen* two-part description of privacy, and finding the right to "control knowledge about oneself" to require prior notice to employees when National Institute for Occupational Safety and Health sought sensitive documents from employer), *and* Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) (limiting *Paul*, adopting *Whalen* framework, and finding the "right to confidentiality" to require reversal of dismissal of complaint alleging revelation of confidential material by state attorney to credit investigator), *with* J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) (reading *Nixon* and *Whalen* narrowly and relying on *Paul* to uphold post-adjudication dissemination of social histories prepared in connection with juvenile proceedings), *and* Shevin v. Byron, Harless, Schaffer, Reid and Assocs., 379 So.2d 633 (Fla. 1980) (superceded by statute as stated in Forsberg v. Housing Authority, 455 So.2d 373 (Fla. 1984)) (sustaining writ of mandamus to examine papers prepared by consultant on behalf of electric authority, and stating an intention to follow *Paul* rather than *Whalen* and *Nixon* until the Supreme Court gives more explicit guidance for the informational privacy right).

claim for informational privacy in his presidential materials. The Court nevertheless held that the limited intrusion of the legislation at issue, the lack of a privacy interest in many of the specific materials, and the important public interest rendered the claim without merit.[231]

Thus, *Paul* represents a somewhat isolated case in this context of prior and subsequent recognition of informational privacy interests, and, after *Whalen* and *Nixon* it should not be read to apply outside of the procedural due process context.[232]

Even when the constitutional right to privacy is recognized to cover the tenant's interest in control over information, however, it is by no means certain that he or she will win his or her suit. The most difficult problem for a plaintiff tenant will be to fulfill the "state action" requirement,[233] a necessary element of a civil rights action claiming violation of constitutional rights. Where the defendant is a government agency or official, this requirement is easily met; but where the defendant is a private party, the plaintiff must satisfy one of the Court's various tests for finding a sufficient connection between the defendant and the state.[234]

In order to meet this state action requirement, a tenant could argue that state action exists because of the various regulations or lack of regulations governing the screening services.[235] The Fair Credit Reporting Act and similar state legislation govern many aspects of the credit reporting industry as it affects informational privacy interests.[236] Whether these laws govern the activities of tenant screening services is unclear. If they do, this

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[231] 433 U.S. at 457–60.

[232] Tribe asserts that the Court would not have examined the New York procedural safeguards so carefully in *Whalen* if its denial that *Paul* involved a protected interest had been authoritative. Assuming, therefore, that

> *Paul v. Davis* must be understood as a case about federalism-based limits on the remedial powers of a federal court acting under [42 U.S.C.] § 1983 [which grants civil rights plaintiffs a federal cause of action] rather than as a repudiation of deep substantive principles under the fourteenth amendment, constitutional review of information-gathering and information-dissemination practices remains very much a possibility in subsequent cases.

L. TRIBE, *supra* note 55, at § 15-17, at 971–72.

[233] For a general discussion of state action doctrine, see L. TRIBE, *supra* note 55, at § 5-15, at 273–75.

[234] *See infra* notes 235–48 and accompanying text.

[235] *See* Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 522 (1969) ("[I]t may be argued that failure to regulate credit or insurance investigating agencies amounts to state inaction clothing these agencies with a measure of state authority sufficient to satisfy the fourteenth amendment.") (footnotes omitted).

[236] *See* 15 U.S.C. §§ 1681–1681t (1982). *See also infra* notes 283–311 and accompanying text.

state action argument will be stronger; if they do not, the tenant may still rely on the regulation of the industry as a whole and the government's failure to include screening services within the legislation. Under either argument, the essential claim is that the state, by engaging in regulation of the industry, has made a conscious decision as to what actions the companies can and cannot take. The state's affirmative choice to allow certain conduct is itself action which should be subject to the rights guaranteed by the Constitution. Where the government has already stepped in to regulate a field of conduct, the failure to safeguard individual rights could be said to represent a violation of those rights by a government body.

The case law provides some support for this argument; where individual government officials have failed to protect citizens' rights or where self-regulated companies have infringed upon people's rights, courts have found state action.[237] Unfortunately, more recent case law has cut back considerably on the ability of plaintiffs to prove state action. In *Jackson v. Metropolitan Edison Co.*,[238] the Supreme Court found that an electric utility was not subject to procedural due process requirements when it terminated service to customers. Justice Rehnquist, for the Court, stated that even heavy regulation by the state does not create state action in itself; there must still be a close connection between the state and the particular action which is challenged.[239] In *Flagg Brothers, Inc. v. Brooks*,[240] the Court refused to find state action in a warehouse company's sale of plaintiff's

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[237] *See* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (a street railway company's decision to receive and amplify radio programs in its streetcars and buses amounted to state action where the company was regulated by a utility commission, which had specifically examined the contested practice); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960) (finding state action by a bus company which was franchised by city and which was authorized to adopt discriminatory seating rules); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943) (deputy sheriff violated Equal Protection Clause when he failed to protect Jehovah's Witnesses from mob violence); Lynch v. United States, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951) (police officers violated Equal Protection Clause when they failed to protect blacks, whom they had just arrested, from violence by the Ku Klux Klan). *See generally* Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME L. REV. 303 (1959).

Where the injured party is denied relief by state courts, the claim of state action is stronger. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("[a]lthough this is a civil [libel] lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press"); Shelley v. Kraemer, 334 U.S. 1, 14–18 (1948) (enforcement by a state court of a racially restrictive covenant denied equal protection).

[238] 419 U.S. 345 (1974).

[239] *Id.* at 351.

[240] 436 U.S. 149 (1978).

goods pursuant to the Uniform Comercial Code, which allows the sale of stored goods to enforce a warehouseman's lien. The Court, again per Justice Rehnquist, asserted that the state had "merely enacted a statute, and had not ordered the plaintiff to surrender any property."[241] Although the restrictive state action doctrine embodied in these and other recent cases[242] has come under extensive criticism for using the procedural state action requirement as a device for disguising the rejection of plaintiffs' substantive civil rights claims,[243] there is no indication that the Court will depart from this stance in the near future. Thus, a tenant who relies on state regulation of the industry as a basis of state action is unlikely to find a sympathetic ear in the courts.

Another argument a tenant might use to establish state action is the public function doctrine. When private actors perform functions traditionally carried out by the state, they may be found to be state actors for purposes of enforcement of constitutional rights. Under this theory, private organizations as diverse as political parties,[244] company towns,[245] and public parks[246] have been found to perform public functions. Again,

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[241] *Id.* at 161 n.11. The Court noted that the plaintiff had not taken her case to state court, implying that if she had, and if she had been denied relief, she might have satisfied the state action requirement for relief in federal court. *Id.*

[242] *See also* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (transfers of patients by private nursing home were not state action despite the nursing home's heavy dependence on government funds: "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided . . . significant encouragement"); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (discharge of personnel by a private school was not state action even though the school was supported by public funds and was subject to government regulations).

[243] Tribe, for example, observes:

> To decide . . . that the Constitution creates a zone within which government should be free simply to leave the disputed choice in private hands, is to make a defensible decison—but it is a decision about the substantive reach of specific constitutional commands rather than a decision about whether the government has *done* anything to which the Constitution speaks.

L. TRIBE, supra note 55, at § 18-7, at 1174 (emphasis in original) (citation omitted).

[244] *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944) (Texas Democratic Party's refusal to allow blacks to vote in primary elections violated the Fifteenth Amendment because its management of the elections constituted a state function).

[245] *Marsh v. Alabama*, 326 U.S. 501 (1946) (trespass conviction of a Jehovah's Witness who had distributed literature in a company town contrary to regulations of the town's management reversed as a First Amendment violation). Although *Marsh* was not, on its own terms, a true public function case, *see* L. TRIBE, *supra* note 55, at § 18-5, at 1165, it is often regarded as such. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. at 352; Flagg Brothers, Inc. v. Brooks, 436 U.S. at 158.

[246] Evans v. Newton, 382 U.S. 296 (1966) (a city could not escape the Fourteenth Amendment prohibition on racial discrimination by conveying park land to private trustees when such land was bound by covenant excluding blacks). The Court stated that "[c]onduct that is formally 'private' may become so entwined with governmental

however, the Court has restricted the scope of this state action test. In recent cases public function arguments have been consistently rejected, and the test is currently framed to ask "whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'"[247] Thus a tenant who brings an action alleging infringement of his constitutional right to informational privacy is unlikely to clear the state action hurdle under present law.[248]

B. *Invasion of Privacy Torts*

A tenant may also challenge the screening services by bringing a tort action for invasion of privacy. This tort has been recognized in nearly every state, either by statute or through the development of the common law.[249] Although there is some variation among different states, the great majority follow the

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policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Id.* at 299.

The application of this doctrine to the tenant screening service context becomes apparent when one compares this language in *Evans* with Miller's description of the computerized information industry:

> In the information field, as elsewhere, the distinction between government and the private sector has become increasingly tenuous and the movement toward concentration is now quite pronounced . . . . In the context of computer technology this trend is exemplified by the concentration of power over information and the institutionalization of the flow of data among both public and private organizations.

Miller, *Personal Privacy*, *supra* note 36, at 1168.

The sheer size and power of these information companies and networks give them extensive control over people's lives—the type of control over vital decisions that is more characteristic of government than private actors. This characteristic is heightened in the context of tenant screening services, which in some cases can exercise quasi-governmental control over entitlements to housing.

[247] *See Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 353) (emphasis added in *Rendell-Baker*).

[248] The Tenth Circuit recently considered this question in a suit brought against a credit reporting service. The Court affirmed summary judgment for the defendant, giving short shrift to the plaintiffs' constitutional claim:

> [Plaintiffs] have failed to establish any constitutional right to privacy in this case. Such a constitutional right exists only against the acts of a federal or state government, Griswold v. Connecticut, 381 U.S. 479; it does not extend to a private party such as defendant. The fact that defendant's credit reporting operations are regulated by federal and state law is not sufficient to create state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345.

Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204, 1207 (10th Cir. 1985).

[249] *See generally* PROSSER & KEETON, *supra* note 177, at 849–68; R. SMITH, *supra* note 77.

approach of the Restatement (Second) of Torts.[250] This section of the Restatement, which itself was foreshadowed by a law review article by Prosser,[251] divides the privacy tort into four distinct types: (1) unreasonable intrusion upon seclusion; (2) appropriation of name or likeness for commercial advantage; (3) public disclosure of private facts; and (4) publicity which places one in a false light.[252] The third and fourth of these are the most applicable to the tenant's situation, although the unreasonable intrusion tort might apply to overly aggressive investigators.[253]

Where a landlord has provided false information about a tenant to a screening service, or where the screening service has disseminated false information, the tenant may sue for false light invasion of privacy. Section 652E of the Restatement describes this tort as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
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> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

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[250] *See, e.g.*, Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204 (10th Cir. 1985) (recognizing false light invasion of privacy cause of action as defined by RESTATEMENT (SECOND) OF TORTS § 652E (1977); Tureen v. Equifax, Inc., 571 F.2d 411 (8th Cir. 1978); Baker v. Burlington Northern, Inc., 99 Idaho 688, 587 P.2d 829 (1978); Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980) (only § 652D of the Restatement); Montesano v. Donrey Media Group, 99 Nev. 644, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984) (only § 652D of the Restatement); McCormack v. Oklahoma Publishing Co., 613 P.2d 737 (Okla. 1980); Ayers v. Lee Enterprises, Inc., 277 Or. 527, 561 P.2d 998 (1977) (adopting rule of § 652D comment c of the Restatement); Hunter v. Washington Post, 102 Daily Wash. L. Rptr. 1561, 1566 (D.C. Super., 1974).

[251] Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[252] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

[253] *See* A. MILLER, *supra* note 16, at 175. Miller argues that while the intrusion concept may be an effective approach for remedying wiretapping or surveillance, it was neither designed to nor does it completely protect against misuse of computer information. However, he is not completely pessimistic; he sees the expansion of the intrusion concept "as an effective first line of defense against abusive information practices and the improper handling of a computer file." *Id.* at 176. Miller finds some support for this expansion in Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969) (although columnist was held not liable for publication of information stolen from senator's files because he had not personally rifled through files, "[w]e approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man . . . could reasonably expect that the particular defendant should be excluded").

Miller also argues that the appropriation tort might be expanded to commercial utilization of personal information. He asserts that "if judges were willing to focus on the gravity of the privacy invasion and abandon their past emphasis on photographs and likenesses, this first category of privacy actions might become more responsive to the needs of the future." A. MILLER, *supra* note 16, at 174.

> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[254]

A plaintiff must satisfy four major elements to recover under this tort.[255] First the plaintiff must show that he or she has been placed in a "false light." This element is rather straightforward and primarily presents a question of fact. Second, the plaintiff must show offensiveness. The Restatement establishes a fairly restrictive test for offensiveness, which applies only when a reasonable plaintiff would be seriously and justifiably aggrieved in the eyes of his or her community. Thus this test would not be satisfied by minor errors, but

> only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.[256]

Although open to dispute in any given case, it would seem that when the false information would result in the rejection of a lease application, the offensiveness claim has been satisfied. Indeed, the offensiveness is demonstrated by the fact that the landlord finds the information damaging enough to refuse to rent to the applicant.

The third element is standard of care. Although section 652E of the Restatement itself adopts the constitutionally required malice standard of *New York Times Co. v. Sullivan*,[257] which was applied to a privacy action in *Time, Inc. v. Hill*,[258] the caveat immediately following section 652E takes account of the uncertain effect of *Time*[259] and says that the Restatement takes no position as to whether negligence would be sufficient for recovery.[260] The standard of care which a plaintiff must prove, therefore, will depend on the burdens imposed by individual states and on the further development of constitutional law in this area.[261]

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[254] RESTATEMENT (SECOND) OF TORTS § 652E (1977).

[255] *Id.*

[256] *Id.* at comment c.

[257] 376 U.S. 254 (1964) (First Amendment requires proof of knowledge or reckless disregard of falsity of statement for public official to recover for libel).

[258] 385 U.S. 374 (1967) (First Amendment requires proof of knowledge or reckless disregard to recover for false light invasion of privacy).

[259] *See supra* text accompanying notes 170–72.

[260] RESTATEMENT (SECOND) OF TORTS § 652E (1977).

[261] *See supra* text accompanying notes 169–76.

The fourth element, publicity, presents the most difficult problem for a tenant plaintiff.[262] The publicity requirement applies to all forms of the invasion of privacy tort except unreasonable intrusion, and it is often read narrowly. For example, the Restatement provides that publicity:

> means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. . . . Thus it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. . . . The distinction . . . is one between private and public communication.[263]

Within this definition, it may be argued that the maintenance of information in the files of a tenant screening service constitutes publication to the public at large. While it is true that it takes an affirmative effort for a landlord to check with the screening service, it takes a similar effort to read a newspaper article. In each instance, the information is not thrust into the public consciousness directly, but it is made generally available, and members of the public who consult that source will discover the information.[264]

This argument may stretch the natural reading of section 652E comment a of the Restatement, but the very need to do this reaching indicates the unreasonableness of a restrictive interpretation of the publicity requirement. The purpose of the tort is to compensate for dissemination of personal information that invades privacy by infringing on the individual's right to control

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[262] *See, e.g.*, Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204, 1206 (10th Cir. 1985) (plaintiff failed to prove publicity where a credit report was sent to seventeen subscribers over a period of three years); Tureen v. Equifax, Inc., 571 F.2d 411 (8th Cir. 1978) (plaintiff failed to prove publicity where the only disclosure by the consumer reporting firm was to a client insurance company); Corcoran v. Southwestern Bell Telephone Co., 572 S.W.2d 212 (Mo. Ct. App. 1978) (rejecting public disclosure claim against telephone company which mailed parents' phone bill to son's ex-wife).

[263] RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

[264] A dissenting judge in *Tureen* made a similar argument, emphasizing the probability of future dissemination and adopted the phrase found in § 652D comment a of the Restatement. He asserted that publicity is met where the communication is "sure to reach" the public. 571 F.2d at 419. In his opinion, "[t]he dissemination of private information by a commercial credit broker to insurance companies, banks and other customers requesting such information is no less 'public' than the posting of a debt in a creditor's shop window." *Id.* at 420–21 (Heaney, J., dissenting) (citations omitted).

Cf. Miller, *Personal Privacy*, *supra* note 36, at 1157–58 (critical dissemination of information may take place when either two time-sharing computer users or users of two different computer systems exchange information).

information. The only way in which the publicity requirement might further that purpose is by ensuring that the plaintiff has suffered damage. However, a tenant who has been denied housing due to dissemination of false information by a landlord suffers material harm that may be greater than the harm suffered by the release of similar information to a more general audience. Furthermore, if the concern is with damages, the best approach is to litigate the material harm directly as part of the damages element of each particular case.[265]

Where the information involved is true, the plaintiff may turn to the tort of public disclosure of private facts. This tort is described in section 652D of the Restatement, which provides that

> [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.[266]

The offensiveness and publicity elements of this tort are similar to those in the false light case. However, two other elements necessary to prove the tort may pose probems for the tenant plaintiff. The "newsworthiness" element[267] requires a tenant to

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[265] Perhaps for these reasons, some earlier cases did allow recoveries in privacy actions where the number of persons to whom the information was revealed was fairly small. *See* Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959) (information and accusations proclaimed loudly in a restaurant); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (defendant posted notice of plaintiff's indebtedness in a garage window). Prosser and Keeton assert that

> it has been said that any disclosure to be actionable must be a public disclosure. But such a general requirement ought not to be a prerequisite to recovery in any kind of a disclosure case. Thus, it has been held to be an invasion of the plaintiff's right of privacy to communicate a private fact to a newspaper, military agency, neighbor, or disinterested employer.

PROSSER & KEETON, *supra* note 177, at § 117, at 858, and cases cited therein.

See also Note, *supra* note 235, at 524 (arguing that publicity should include release of information to anyone who has no immediate and legitimate use for it because "release of information to one person who misuses it can have as damaging an effect on the investigatee's reputation as a general publication").

Finally, note that in defamation cases, the publicity requirement is absent even though injury to reputation must be proven. *See* PROSSER AND KEETON, *supra* note 177, at § 111, at 774. For example, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), a construction company, injured by a false credit report issued to five subscribers, recovered in a defamation suit for the damage to its reputation. The issue of compensatory damages was not appealed. This demonstrates a recognition that injury need not be related to the number of people who receive the information.

[266] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[267] In a number of cases the newsworthiness claim has centered around the use of a plaintiff's name regarding an incident from the past. *See* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (recognizing privacy cause

prove that the information lacks a legitimate public interest.[268] Whether a tenant who challenges the practices of a screening service will meet this test depends on the facts of each case. The problem with the newsworthiness requirement is its subjectivity and manipulability. Comment g to section 652D of the Restatement recognizes that "publishers and broadcasters have themselves defined the term."[269] Use of a subjective standard, however, defined by those who have a vested interest in its broad expansion, tends to make the exception apply to *any* privacy action; if no one found the information newsworthy, the invasion would not have been committed in the first place.[270] The newsworthiness standard thus begs the ultimate question

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of action for plaintiff whose name was published in a magazine in connection with crime committed eleven years previously); Forsher v. Bugliosi, 26 Cal. 3d 792, 811, 608 P.2d 716, 726, 163 Cal. Rptr. 628, 638 (1980) (affirming dismissal of action brought by plaintiff whose name appeared in the book *Helter Skelter*; lapse of time is not a defense, and *Briscoe* is only a limited exception); Montesano v. Donrey Media Group, 99 Nev. 644, 668 P.2d 1081 (1983) (affirming dismissal of complaint by plaintiff whose name appeared in newspaper in connection with hit-and-run accident conviction 20 years previously; lapse of time not a valid claim in light of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).

This newsworthiness requirement carries First Amendment overtones as recognized in Time, Inc. v. Hill, 385 U.S. 374 (1967), which used the newsworthiness concept in two contexts. First, it noted that the New York privacy statute did not allow recovery for false light actions involving newsworthy material. *Id.* at 383. Second, it held that "false reports of matters of public interest" are not constitutionally actionable unless the plaintiff proves knowledge or reckless disregard. *Id.* at 388. *Cox* repeated this holding, noting that in false light invasion of privacy actions, knowing or reckless falsehood must be proven in regard to "matters of public interest." 420 U.S. at 490. Under these cases, therefore, the standard of proof for false light cases is strict where newsworthy material is involved. The cases do not, however, establish a general requirement that newsworthy material cannot be the basis of recovery for invasion of privacy. Some courts seem to have interpreted them as standing for such a requirement, thus grounding the newsworthiness exception in the First Amendment. *See, e.g.*, *Briscoe*, 4 Cal. 3d 529, 483 P.2d 34, 98 Cal. Rptr. 866 (1971).

Comment d of § 652D of the Restatement relies on a passage in *Cox* which reads: "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." 420 U.S. at 492. Comment d of the Restatement reads the "legitimate concern to the public" phrase out of context and applies it as a constitutional requirement in all public disclosure privacy actions. *See also* Hunter v. Washington Post, 102 Daily Wash. L. Rptr. 1561, 1566–67 (D.C. Super. 1974) (First Amendment precludes suit for invasion of privacy where published matters are of public interest).

[268] RESTATEMENT (SECOND) OF TORTS § 652D comment g (1977).

[269] *Id.* A similar danger exists in letting the recipients or users of information define newsworthiness. *See, e.g.*, *Tureen*, 571 F.2d at 416 (defendant entitled to directed verdict in privacy action based on disclosure of a credit report to plaintiff's insurer; "there is a legitimate business need for consumer reports"). *But see* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (a socially prominent woman was not a "public figure" for purposes of First Amendment just because the public was interested in her divorce).

[270] *See supra* text accompanying notes 181–82.

of how to balance First Amendment interests against the individual's right to privacy.[271]

The second potentially troublesome area in the public disclosure tort is the "private life" requirement, and this requirement also has constitutional overtones.[272] Comment b to section 652D describes two primary aspects of this requirement. First, "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public."[273] The first aspect thus presumes that merely because the public gains access to information, further dissemination of that information is always justified. Here the privacy tort becomes somewhat contradictory. Where the extent to which the defendant publicized the information is concerned, "public" may mean something very narrow; but when the extent to which the information was already public is at stake, "public" may become exceedingly broad—anything which is a matter of public record can qualify. Thus "public" can expand or contract depending on the context, though in either case it diminishes the plaintiff's ability to recover. Again, the tenant's ability to satisfy this requirement will depend on the facts of the particular case. However, the information will often concern a prior suit between the tenant and a landlord. Here, the information will be a matter of public record, and a strict reading of this requirement would preclude recovery.[274]

The second aspect of the private life element is that "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."[275] This requirement may create problems where the case involves subjective "lifestyle" information culled from reports by neighbors. In one case, for

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[271] *See Cox*, 420 U.S. 469 (1976). The constitutional issues are discussed *supra* at text accompanying notes 193–203.

[272] *See* RESTATEMENT (SECOND) OF TORTS § 652D comment b (1977).

[273] *Id.*

[274] *Cf.* Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980) (public record limitation precluded privacy action based on newspaper story concerning plaintiff's involuntary sterilization while resident of county home); McCormack v. Oklahoma Publishing Co., 613 P.2d 737 (Okla. 1980) (public record limitation precluded privacy action against defendant for listing plaintiff as "organized crime principal suspect"); Ayers v. Lee Enterprises, Inc., 277 Or. 527, 561 P.2d 998 (1977) (public record limitation precluded privacy action based on publication of the identity of rape victim). *But see* Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (although public record limitation precluded privacy tort claim based on a film depicting plaintiff's past life as prostitute, plaintiff could maintain a privacy action grounded in the state constitution because the use of her name in the film was not justified).

[275] RESTATEMENT (SECOND) OF TORTS § 652D comment b (1977).

instance, an insurance company cancelled a policy when it obtained a report describing the insured as a hippie who had long hair and a beard and drove people to and from political demonstrations.[276] This is information which the subject did not keep completely hidden from the public. To include it in a credit report, however, removes it from its proper context. It heightens the probability that important decisions will be made on the basis of irrelevant information, and it deprives the subject of effective control over personal information. It thus invades his privacy in a very real sense. Lloyd Weinreb illustrates this point with a rather frightening hypothetical:

> Suppose . . . that in an attempt finally to end muggings in Central Park, New York City put the whole park "on television" from dusk to dawn, with radio-advised troopers ready to swoop down on signal. The park might be abandoned not only by the muggers, but also by lovers holding hands in secret or just in private, friends wanting to talk intimately with one another, an artist wanting to paint or think "to himself," people doing all sorts of innocent things they would not do on television. Were this practice extended to other parks, all parks, and finally all public streets, the quality of life in the city would be profoundly affected . . . .[277]

The point is that people do have a legitimate expectation of privacy in many things which they do not actually hide from "the public eye"; in fact, their desire to hide may depend on which "public eye" is watching them. Is it a few neighbors, or is it "Big Brother's" master television camera? Is it strangers on the street to whom the individual is anonymous, or a tenant screening service? The Restatement ignores such distinctions, treating all things seen by "the public eye" as equivalent; it ought, however, to recognize that contextual concerns may make further publication of such facts legitimate at some times and actionable at others.[278]

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[276] Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 831 (8th Cir. 1976).

[277] Weinreb, *supra* note 80, at 82.

[278] PROSSER & KEETON, *supra* note 177, at § 117, at 859. *See also supra* notes 89–90 and accompanying text.

Another possible burden with which a tenant may have to contend is a defense based on consent. This defense is recognized in comment b to section 652F of the Restatement, which also states that publication must "not exceed the scope of the consent." For discussion of the scope of consent and the legitimacy of the consent defense in the tenant screening service context, see *supra* text accompanying notes 146–50. *See also* A. MILLER, *supra* note 16, at 186.

This overall framework for invasions of privacy, developed by William Prosser in his 1960 article, in the Prosser & Keeton hornbook on torts, and in the Restatements of Torts has been followed extensively but has not been without criticism. Some commentators have criticized the framework for recognizing as privacy actions some torts which should instead be treated under the law of trespass, nuisance, libel, or slander,[279] and for failing to adequately recognize the interest in individual dignity.[280] This failure to recognize the individual's interest in privacy per se led Prosser to restrict the availability of the invasion of privacy remedy. Hill has argued persuasively that although Prosser claimed merely to restate the elements and defenses which courts had already recognized, in actuality the cases he cited did not support the publicity requirement or the public record limitation.[281] The publicity requirement is also undermined by Prosser's recognition of an action for unreasonable intrusion upon seclusion, which has no publicity element. If an individual's privacy can be violated by such intrusion, it would seem that it could be equally violated by the dissemination of personal information to one person or a few persons rather than to the public at large.

Notwithstanding all of their inadequacies and inconsistencies, these burdens which limit the invasion of privacy tort appear to be firmly entrenched. Although some tenants may be able to meet them, further growth of privacy law is needed before the invasions of privacy caused by tenant screening services may be fully redressed. The problem with the present doctrine is not just one of Prosser's making; much of the history of the privacy right has centered around infringement by the mass media. A body of law which grew up to deal with the threats posed by the mass media has proven inadequate for dealing with privacy concerns which arise in other contexts such as computerized data storage.[282]

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[279] *See* Parent, *A New Definition of Privacy for the Law*, 2 LAW AND PHILOSOPHY 305, 322–25 (1983); *cf.* Bloustein, *supra* note 47, at 965.

[280] *See* Bloustein, *supra* note 47, at 973–74, 995.

[281] Hill, *supra* note 200, at 1287–88 (1976).

Alfred Hill discusses the public record limitation in his analysis of *Cox*, arguing that "the Court assumed that it was simply endorsing what was already the law, quoting unqualified assertions of such an immunity by Prosser, as set out in his treatise and in the Restatement (Second) of Torts. However, the cases relied upon by Prosser typically do *not* proclaim such an immunity unqualifiedly." *Id.* at 1265–66 (citations omitted). Hill goes on to analyze the various cases relied on by Prosser. *Id.* at 1266 n.285.

[282] *See* Miller, *Personal Privacy*, *supra* note 36, at 1156.

C. *Fair Credit Reporting Acts*

Finally, a tenant may predicate a claim for relief on the Fair Credit Reporting Act (FCRA)[283] or its parallel state statutes, which regulate the credit reporting industry. Congress passed the FCRA in 1970 to protect consumers from unreasonable invasions of privacy and from damage to their reputations.[284] The FCRA grew out of an increasing awareness of the threat to individual privacy posed by computerized information banks and the failure of common-law remedies to guard against this threat.[285] It provides standards for the maintenance of personal information by consumer reporting agencies and it gives consumers specific rights and remedies to enforce these standards.

The FCRA covers "consumer reports" and "investigative consumer reports." A consumer report is defined as a communication of information which bears on a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" which is used as a factor in determining eligibility for credit, insurance, employment, or related benefits.[286] An investigative consumer report contains information concerning a consumer as obtained through personal interviews of neighbors, friends, or associates of the consumer.[287] The FCRA regulates "consumer reporting agencies," which are defined as persons who regularly engage in the practice of furnishing consumer credit reports.[288]

The FCRA limits the use of consumer credit reports to "legitimate business transactions."[289] It limits the amount of time for which information about a consumer may be kept[290] and requires consumer reporting agencies to "maintain reasonable procedures" to comply with the time and use limitations.[291] The FCRA sets forth specific requirements regarding consumer access to files, providing that the nature and substance of all information, the source of the information, and the names of recipients of the information be furnished to the individual upon

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[283] 15 U.S.C. §§ 1681–1681t (1982).

[284] *See* Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 659 (D. Wyo. 1974).

[285] *See* Benson & Biering, *supra* note 7, at 314.

[286] 15 U.S.C. § 1681a(d) (1982).

[287] *Id.* § 1681a(e).

[288] *Id.* § 1681a(f).

[289] *Id.* § 1681b.

[290] *Id.* § 1681c. For most types of information, the limit is seven years. *Id.*

[291] *Id.* § 1681e.

request.[292] If the consumer disputes the accuracy of the information, and if the agency reasonably believes that the dispute is not frivolous or irrelevant, the agency is required to reinvestigate the matter and delete any inaccurate information.[293] If this does not resolve the dispute, the individual has the right to file a brief statement, which the agency must include in future reports unless it believes the statement to be frivolous or irrelevant.[294] When this statement is filed or when information has been deleted by the agency, the consumer may require the agency to notify recent report recipients of the change.[295] The agency also has an affirmative duty to notify the consumer of the right to file such a statement.[296] The FCRA imposes other notice requirements as well. A user who takes adverse action against a consumer based on a credit report must notify the consumer of the source of the report,[297] and an agency which initiates an investigative report must notify the consumer.[298] Finally, the FCRA establishes a variety of remedies and sanctions against the agencies,[299] officers and employees of an agency,[300] and people who wrongfully use an agency.[301] In particular, an injured consumer may bring a civil action in federal court to recover actual and punitive damages, costs, and attorney's fees.[302]

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[292] There are a few exceptions. For example, the FCRA provides that

> [e]very consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:
>
> (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.
>
> (2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed . . . .
>
> (3) The recipients of any consumer report on the consumer which it has furnished—
>
> (A) for employment purposes within the two-year period preceding the request, and
>
> (B) for any other purpose within the six-month period preceding the request.

Id. § 1681g(a) (1982).

[293] *Id.* § 1681i(a).

[294] *Id.* §§ 1681i(b)–1681i(c).

[295] *Id.* § 1681i(d).

[296] *Id.*

[297] *Id.* § 1681m.

[298] *Id.* §§ 1681d, 1681k.

[299] *Id.* §§ 1681n–1681o.

[300] *Id.* § 1681r.

[301] *Id.* § 1681q.

[302] *Id.* §§ 1681n–1681p. Criminal liability is provided for unauthorized disclosures of information. *Id.* § 1681r.

A tenant who wishes to sue a tenant screening service under the provisions of the FCRA must clear at least one major hurdle—that of establishing that the service is covered by the FCRA. If the service is covered, it is because its reports are used as the basis of a decision to grant "credit . . . to be used primarily for personal, family, or household purposes."[303] How broadly or narrowly "credit" is defined will prove determinative. Apartment leasing does not seem to fit within the popular notion of granting credit. However, various considerations indicate that it should be treated as credit activity for the purposes of the FCRA. The FCRA manifests a concern for privacy problems created by agencies which collect, organize, and divulge personal information about individuals. In the FCRA, "the regulation of 'consumer credit' is referred to as one of the 'needs of commerce,' along with 'personnel, insurance and other information.' Thus, the scope of the language is broad and refers to information that might be used for any number of commercial purposes."[304] Furthermore, the information compiled in tenant reports closely resembles information compiled in other kinds of credit reports, and the rental of property would seem to come under the FCRA's requirement that information only be used by those with a "legitimate business need for the information in connection with a business transaction involving the consumer."[305] It would also seem strange for landlords to claim that they are not engaged in the business of granting credit when they can rely on the contention that they are granting credit as a justification for using screening services.[306] Thus a tenant who wishes to bring a claim under the FCRA has strong arguments that the FCRA should be read to apply to tenant screening services.[307] Even if the tenant does establish this coverage, how-

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[303] *Id.* § 1681a(d).

[304] Benson & Biering, *supra* note 7, at 316 (emphasis in original) (referring to 15 U.S.C. § 1681(b) (1982)).

[305] 15 U.S.C. § 1681b(3)(E) (1982). *See* Benson & Biering, *supra* note 7, at 316.

[306] *See supra* text accompanying notes 137–38.

[307] For a contrary view, *see infra* notes 310–12 and accompanying text.

Cf. Peasley v. TeleCheck of Kansas, Inc., 6 Kan. App. 2d 990, 637 P.2d 437 (1981). The plaintiff's landlord had reported his name to TeleCheck after a legitimate dispute over whether the plaintiff's security deposit was to be applied to the final month's rent. TeleCheck then refused to guarantee checks which the plaintiff tried to tender to merchants. The court found TeleCheck to be covered by the FCRA.

In order for the FCRA to apply, the company in question must also use a "means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f) (1982). This provision is read very broadly, however, and includes companies which use the telephone or the mail. *See* Benson & Biering, *supra* note 7, at 316.

ever, the FCRA may not provide an adequate remedy. Part IV of this Note will discuss ways in which the FCRA could be improved to make it more effective in the context of tenant screening services.

The FCRA explicitly recognizes the continued authority of states to regulate credit reporting agencies to the extent that state laws are not inconsistent with the FCRA.[308] A number of states have followed this lead and enacted statutes similar to the FCRA. Many of these laws track the FCRA rather closely, and some provide stricter requirements and more effective remedies.[309] The most notable state statute is the California law, passed in 1975.[310] This law, which strengthens the FCRA in various ways, includes a provision allowing consumers to personally inspect their files and receive copies, rather than just being told the nature and substance of the file, and a provision giving consumers the right to place a statement in their files regardless of whether the agency deems it frivolous or irrelevant.[311] Most significantly, the California legislature believed that the 1975 law did not necessarily cover tenant screening services, and it remedied this by amendment in 1982.[312]

IV. LEGISLATIVE REFORM

The minimal chance of success under existing common law and statutory causes of action points toward the need for a new legislative approach to the problems posed by tenant screening services. Although some tenants may be able to vindicate their privacy interests through privacy tort actions or suits under fair credit acts, such victories are likely to be sporadic and limited to the most egregious cases.

One solution would be to ease the burdens which must be met by a plaintiff who sues for invasion of privacy. A more

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[308] 15 U.S.C. § 1681t (1982).

[309] *See* generally R. SMITH, *supra* note 77; PRIVACY COMMISSION, *supra* note 11, app. at 9–10.

[310] Consumer Credit Reporting Agencies Act, CAL. CIV. CODE §§ 1785.1–1785.4 (West 1985); Investigative Consumer Reporting Agencies Act, CAL. CIV. CODE §§ 1786–1786.5 (West 1985).

[311] CAL. CIV. CODE § 1786.24(b) (West 1985).

[312] CAL. CIV. CODE § 1785.3(c) (West 1985) The law was changed to read, in relevant part: "The term 'consumer credit report' means any . . . information by a consumer credit reporting agency bearing on a consumer's credit worthiness . . . used . . . in establishing the consumer's eligibility for . . . (3) hiring of a dwelling unit."

practical approach, however, may be to build on the helpful foundation of the FCRA. Moreover, the fragmented state law in these areas points out the need for a comprehensive framework—a need which Congress partially remedied in a related credit area by its passage of the FCRA. A similar approach should be taken regarding tenant screening services. States differ in their application of common law and in the degree to which they have supplemented the FCRA, but the problems involved are national in scope.

The FCRA's inadequacies have been widely noted. The ACLU has described it as "a disappointment from the first, except perhaps to the consumer reporting and investigative agencies it was meant to regulate."[313] The reasons for the disappointment were summed up as follows:

> [T]he law was written . . . more with a view to safeguarding "the abilities of investigating agencies and credit granting entities to amass and misuse data" than to safeguarding the rights of individuals. In fact, the law was pretty much written by the very industry it purports to regulate.
>
> A tract explaining your rights under the Fair Credit Reporting Act would be a slim volume indeed. The statute imposes a number of general obligations . . . but has no real teeth . . . .[314]

Miller summarized this reaction by proposing that the FCRA's preamble be "[a]n Act to protect credit bureaus against citizens who have been abused by erroneous credit and investigative information."[315]

Suggestions for improving the FCRA also abound. Bills have been introduced in Congress from time to time to strengthen the FCRA, but without success.[316] Other possibilities for re-

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[313] THE PRIVACY REPORT, *supra* note 11, at 1, 2.

[314] *Id.*

[315] A. MILLER, *supra* note 16, at 87.

[316] A representative sample of these bills includes:

H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974): entitled the Right to Privacy Act, it would have broadened the reach of the FCRA and instituted a great number of more stringent requirements on credit reporting agencies.

S. 1840, 94th Cong., 1st Sess., 121 CONG. REC. 16321 (1975): entitled the Fair Credit Reporting Amendments, it would have strengthened individual rights, including those of access and notice.

H.R. 10076, 95th Cong., 1st Sess., 123 CONG. REC. 37522 (1977): entitled the Omnibus Right to Privacy Act, it would have strengthened privacy rights in other areas as well, including government information files, government access to private files, welfare programs, medical informaton, tax records, and educational records.

S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979): entitled the Fair Financial Information Practices Act, it would have strengthened individual rights under the

forms are suggested by comparing the FCRA with the recommendations of the 1973 "Records, Computers and the Rights of Citizens" report[317] and the 1977 report of the Privacy Protection Study Commission.[318] Various states and foreign countries have gone further in their protection of privacy, and their legislation provides additional guidance for reform.[319] Finally, Representative Charles Schumer has been advocating passage of a Tenant Credit Reporting Act,[320] which would explicitly apply the FCRA to tenant screening services.

The FCRA could be strengthened in numerous, specific ways to enhance its protection of the privacy rights of tenants as well as those of consumers in general. The first and most obvious solution is to expand the initial scope of the FCRA. Both the bill proposed by Representative Schumer and the California statute[321] contain specific provisions applying to a consumer report used in regard to a rental decision. Other recommenda-

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FCRA and would have made similar requirements applicable to creditors by amending the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1982).

See also H.R. 1984, 94th Cong., 1st Sess., 121 CONG. REC. 1216 (1975); H.R. 1324, 94th Cong., 1st Sess., 121 CONG. REC. 629 (1975); H.R. 5559, 96th Cong., 1st Sess., 125 CONG. REC 28184 (1979).

[317] SECRETARY'S COMMITTEE, *supra* note 35. This report recommended adoption of a federal "Code of Fair Information Practice," constituting a series of minimum safeguard requirements. Violation of any requirement would be an "unfair information practice" and would subject the wrongdoer to criminal and civil penalties. The Code was based on five basic principles:

> * There must be no personal data record-keeping systems whose very existence is secret.
> * There must be a way for an individual to find out what information about him is in a record and how it is used.
> * There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.
> * There must be a way for an individual to correct or amend a record of identifiable information about him.
> * Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.

Id. at xx–xxi.

[318] PRIVACY COMMISSION, *supra* note 11. The Commission proposed 162 specific recommendations reflecting three primary objectives necessary for an effective privacy protection policy against the intrusiveness of credit reporting agencies: to minimize intrusiveness; to maximize fairness; and to create legitimate enforceable expectations of confidentiality. "These three objectives both subsume and conceptually augment the principles of the Privacy Act of 1974 and the five fair information practice principles set forth in the 1973 report." *Id.* at 14–15.

[319] *See supra* notes 77–78.

[320] H.R. 2525, 99th Cong., 1st Sess., 131 CONG. REC. No. 63 H3264 (1985).

[321] CAL. CIV. CODE § 1785.3(c) (West 1985).

tions would broaden the FCRA more generally, applying it to all systems which collect personal information.[322]

A second way in which the FCRA could be strengthened is to ensure that tenants and consumers are aware of the existence of files which contain personal information. Presently, consumers must be notified only when an adverse decision is already made or when an investigative report is initiated.[323] Much damage can therefore be done before the consumer ever finds out about it. At the very least, consumers should be notified when reports are used by landlords or creditors.[324] This notification requirement, to be effective, should probably apply both to the organization which disseminates the report and to the user of the report.[325]

At the other end of the spectrum is the possibility of requiring public notification of the existence of each credit reporting agency. Under present law, consumers have a right to learn the content of their files, but they generally have no idea where to begin looking. One of the proposed House bills[326] would have begun to remedy this by requiring each agency to publish annual notice of its existence. Another solution, adopted in Canada,[327] is to publish an annual catalogue listing all such agencies.

Although these approaches solve the problem of lack of awareness of the agencies' existence, they do not inform the consumer that specific agencies have information about him or her. "Unless you are suddenly seized by a fit of paranoia and decide to write every consumer reporting agency in the nation to see whether there is a file on you," notes one commentator,

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[322] *See* H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974); Comment, *supra* note 45, at 610.

[323] 15 U.S.C. §§ 1681d, 1681k (1982). Maine went further and required consent before an investigative report could be initiated. ME. REV. STAT. ANN. tit. 10, § 1314 (1980). This provision was struck down as a violation of the First Amendment in Equifax Services, Inc. v. Cohen, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981).

[324] *See, e.g.*, H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974). A Senate bill, S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979), would have required notification by the agency when a report was furnished for a use which might be unanticipated by consumers, such as use of credit information in an employment application. Oklahoma's approach is simple, creative, and effective: before furnishing a credit report to the prospective creditor, the agency must mail a copy to the subject. OKLA. STAT., tit. 24 § 82 (1955).

[325] The Privacy Protection Study Commission recommended that a credit grantor notify the individual of the types and sources of the information which would be collected. PRIVACY COMMISSION, *supra* note 11, app. 4, at 81–82. *See also* S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979).

[326] H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974).

[327] *See* Soma & Wehmoefer, *supra* note 57, at 473.

"you will probably remain unaware that a file has been opened."[328] The most effective remedy would be to require notification when a file is opened,[329] which should include notice of how the information will be gathered.[330] Only in this way can we ensure that individuals are aware of the use being made of information about them, and this awareness is the most fundamental condition for safeguarding personal privacy.

As a further requirement for privacy, individuals should be notified not simply of the existence of files, but of their rights to affect these files. Under the present FCRA, the only notification of rights comes when the individual has already disputed the information in his or her file.[331] Several proposals would require a creditor or landlord who makes an adverse decision to notify the subject of his or her legal rights of correction.[332] This approach still provides assistance too late; the damage has already been done. A better solution would be to require notification of all legal rights contemporaneously with notification of the file's existence. This is the only way to ensure that the individual retains some control over the accuracy of personal information used by others.[333]

The regulations which the FCRA imposes on information collection also need strengthening. One simple measure would be to require as much information as possible to be gathered directly from the subject.[334] Shattuck, for example, has recommended that the user of a consumer report be required to show

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[328] THE PRIVACY REPORT, *supra* note 11, at 4.

[329] *See, e.g.*, S. 1840, 94th Cong., 1st Sess., 121 CONG. REC. 16321 (1975).

[330] *See Hearings on S. 1928 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess., Part II, 1163 (1980) (statement of Jeremiah S. Gutman, ACLU attorney) [hereinafter Gutman].

[331] *See supra* text accompanying notes 295–96.

[332] *See, e.g.*, S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979); H.R. 10076, 95th Cong., 1st Sess., 123 CONG. REC. 37522 (1977). The California statute requires a user of information who makes an adverse decision based upon a subject report to notify the subject of the right to learn the nature and substance of this information from the user. CAL. CIV. CODE § 1785.20(b) (West 1985).

[333] It has also been proposed that subjects be given greater notification of third-party access to their files. Under present law, the agency may distribute a report to anyone with a "legitimate business need"—a standard that agencies would probably interpret as widely as the term "news" is interpreted by the press. *See supra* notes 267–71 and accompanying text. A report entitled "Records, Computers and the Rights of Citizens" recommended requiring agencies to keep lists of all users who are given access to a file and to make this information available to the subject, SECRETARY'S COMMITTEE, *supra* note 35, at xxiv–xxvi, and this was incorporated into H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974). A Senate bill, S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979), would have required consumer consent for transmittal of a report outside the credit industry.

[334] *See, e.g.*, H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974).

that the information sought is essential for the decision to be made and that it cannot be obtained in a manner more protective of privacy, such as obtaining it directly from the individual.[335]

Credit reporting agencies should also be made subject to stricter requirements regarding the relevance of information to be collected and disseminated.[336] At present, the only limits on the content of consumer reports are the prohibition of obsolete information and the indirect limit that reports may only be released to those with a legitimate business need.[337] The FCRA does not create any true requirement that the information collected or reported be relevant to the anticipated or actual use. It thus encourages investigation into the most private areas of one's life.[338] This problem may be alleviated in two ways. One would be a general requirement that information not be collected by a reporting agency unless relevant to anticipated uses and not be disseminated by the agency or obtained by a user unless relevant to the particular use. Consumers would be free to challenge in court any determination of relevance made by the agency or user. Such a provision could be strengthened by requiring the agency or user to justify specifically each collection

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[335] J. SHATTUCK, *supra* note 11, at 432. *See also* Parent, *supra* note 45, at 311 (anyone seeking to acquire or disclose undocumented personal knowledge should prove need, probable cause that the information is relevant, lack of a less intrusive alternative, and adequate security against unauthorized disclosure; then the person or agency seeking the information should be required to obtain a warrant).

[336] As indicated *supra* at text accompanying notes 124–25, some landlords who operate a small number of units may have more of an interest in knowing about the personal characteristics of their tenants. Exemptions might therefore be sought similar to those in the Fair Housing Act, *supra* note 122. However, these landlords may be less likely to use tenant screening services in the first place because their concerns may lead them to rely more heavily on personal interviews. Furthermore, it would be difficult and inefficient for tenant screening services to separate information to be used by these landlords from that to be used by larger, institutional landlords, especially when the latter would probably account for the great majority of the report requests.

[337] *See supra* text accompanying note 289.

[338] One woman's auto insurance, for example, was cancelled due to a report that she lived with a man "without benefit of wedlock." *See* THE PRIVACY REPORT, *supra* note 11, at 8.

This Report goes on to note that

> [t]here is nothing to prevent an investigative agency from poking around the neighborhood inquiring into your politics, your sex life, your marital problems, [or] your drinking habits. . . . The FCRA places nothing off limits. Even if your neighbors accurately report that your kitchen floor is unwashed, how relevant is this to a decision on your automobile insurance? If they accurately state that the man with whom you live is not your husband, how relevant is this to an employer's decision to hire you? At present, you are almost helpless to prevent such information from being collected and used. The invasion of the most private areas of your life is in fact the bread-and-butter of most consumer investigative reporting.

Id. at 3.

or use of information at that time.[339] The second method for dealing with relevance is to enumerate particular types of information which may not be collected at all due to their inappropriateness or sensitivity.[340] Such off-limits information could include political, philosophical, and religious beliefs, race, sexual orientation or practices, and hearsay.[341] Another commentator has recommended that information filing be restricted "to that which is either innocuous or relevant to the purposes of nearly all report users."[342] If the law required all sensitive information to be excluded from general files, such information could be investigated only by request from a user. "Because such a system would raise the cost to the bureau, and hence to the user, of reporting sensitive information, users would be inclined to ask for such information only if it is relevant and of sufficient predictive value to justify the increased cost to them."[343]

Specific types of information which are often used by tenant screening services in particular could also be regulated. Given the limited purpose of tenant reports, the most effective method would be to specify the types of information which would be permitted, such as information concerning non-payment of rent and property damage. In the absence of such a provision, specific data inappropriate for rental decisions could be included. Most important would be a prohibition on reporting lawsuits in

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[339] *See* Gutman, *supra* note 330, at 1163. "[I]t should be made clear . . . that adoption of a practice of collecting information on a certain topic imposes upon the designer of the practice as well as its practitioner the burden of articulating and having available for inspection a defensible rationale of relevance and materiality." *Id.*

[340] Indeed, such an approach may be the only way to regulate relevance; one court struck down a statute that simply prohibited the reporting of information which the agency had reason to believe was irrelevant, holding that it was too broad to withstand a First Amendment attack. Equifax Services, Inc. v. Cohen, 420 A.2d 189, 207 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981).

[341] *See* H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974); Note, *supra* note 104, at 562; J. SHATTUCK, *supra* note 11, at 428; Gutman, *supra* note 330, at 1163.

The Maine statute originally prohibited collection of several kinds of information, including uncorroborated hearsay and information relating to race, religion, personal life style, philosophy, and political affiliation. ME. REV. STAT. ANN. tit. 10, § 1321(1) (Supp. 1977–78). This section was replaced in 1978, and the limits on hearsay, personal lifestyle, and philosophy were deleted. The other limits were retained in ME. REV. STAT. ANN. tit. 10, § 1321 (Supp. 1979–80), but were struck down on First Amendment grounds in *Equifax*, 420 A.2d 189.

See also A. WESTIN, *supra* note 43, at 324 (proposing that information be given sensitivity rankings); Miller, *Personal Privacy*, *supra* note 36, at 1214 (inherently "soft" data should be excluded; hearsay and ex parte evaluations should be subject to added safeguards).

[342] Note, *supra* note 104, at 561.

[343] *Id.*

which the landlord has not prevailed.[344] This would exclude both cases where the tenant won and cases which were settled out of court or dropped. California's statute adopts this approach,[345] as does the proposed House bill. The House bill would also forbid furnishing reports which include information on a tenant's membership in a tenants' organization, notification of safety or sanitation concerns to a governmental agency, requests for maintenance, or legal withholding of rent.[346] All of these circumstances should be irrelevant to a rental decision but may currently end up in tenant reports with adverse consequences for the tenant.

The consumer's rights regarding access to his or her files must also be bolstered. The major inadequacy of the FCRA is its failure to give the subject the right to personally inspect and obtain a copy of his or her file. It requires only that the agency notify the subject of the "nature and substance" of the information.[347] Since this will be determined in the first instance by the agency itself, the resulting disclosure may be slanted as well as incomplete, and the consumer will not even know whether the agency has fulfilled its obligation.[348] The right of personal inspection was recommended by the privacy commissions,[349] was proposed in most of the bills to amend the FCRA,[350] and was granted by several state statutes.[351] Even more effective

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[344] It may also be advisable to limit this to cases where the grounds on which the landlord won are relevant to a rental decision, because some suits,

> essentially those in which the landlord simply wants the tenant to move out for no stated reason, are much less likely to reflect financial risk and much more likely to reflect differences of opinion between the landlord and tenant. Even if the landlord wins such cases, the cases should be excluded from tenant reports because of the chilling effect their inclusion could have on tenants who speak out for their legal rights.

Benson & Biering, *supra* note 7, at 310–11.

[345] CAL. CIV. CODE § 1785.13(a)(4) (West 1985).

[346] H.R. 2525, 1st Sess., 131 CONG. REC. No. 63 H3264 (1985).

[347] 15 U.S.C. § 1681g(a)(1) (1982).

[348] A test by the Federal Trade Commission (FTC) "found that there is often wholesale withholding of information concerning character, reputation, or morals." *Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing, and Urban Affairs*, 93d Cong., 1st Sess. 658 (1973) (statement of Lewis A. Engman, FTC Chairman).

[349] *See* SECRETARY'S COMMITTEE, *supra* note 35, at xxvii; PRIVACY COMMISSION, *supra* note 11, at 77.

[350] *See, e.g.*, H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974); S. 1840, 94th Cong., 1st Sess., 121 CONG. REC. 16321 (1975); S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979).

[351] *See, e.g.*, CAL. CIV. CODE §§ 1786.10, 1786.22 (West 1983); ME. REV. STAT. ANN. tit. 10, § 1315 (1980); MD. COM. LAW CODE ANN. § 14-1206 (1983); N.H. REV. STAT. ANN. § 359-B:9 (1984) (right of personal inspection granted for investigative reports only).

would be to require the agency to mail a copy to the subject every year;[352] this would avoid the problem of making consumers aware of the existence of the file and of their right to obtain a copy. Allowing greater consumer access may also benefit the agency itself. As one commentator has recognized,

> [t]he value of a file is in part a function of its accuracy, and a consumer-inspected file, which the consumer certifies as accurate, must be more valuable than an uninspected one. Since a consumer reporting agency can note in the file that such an inspection was made, it would seem to be getting something of value out of the transaction.[353]

The consumer's right to include a statement in his or her file needs similar improvement. Under the FCRA, the right extends only to information the consumer contends is inaccurate. The agency need not initiate the dispute procedures or disclose any resulting statement to report recipients if it reasonably believes the dispute to be frivolous or irrelevant. This qualification can serve no purpose other than to give the agency a legal basis for denying consumers the right to have some say in the content of the information that is maintained and disseminated. It is the consumer whose personal privacy is at stake, and it is thus the consumer who should determine whether additional information should be included in the file, perhaps subject to a limitation on the length of any statement that is submitted. Furthermore, the consumer should have the right to include information which tends to mitigate or explain information which is negative but accurate.

To enforce these various rights, consumers also need more effective remedies than are provided by the FCRA. The present FCRA does provide for civil suits for compensatory and punitive damages.[354] Although this has been interpreted as including damages for mental suffering,[355] it is often difficult to prove monetary damages for invasions of privacy.[356] Privacy, after all, is not an economic right but a basic necessity of one's individuality. This difficulty can be alleviated by providing for minimum liability or presumed damages when a violation is proven.[357]

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[352] *See* A. MILLER, *supra* note 16, at 79.

[353] Note, *supra* note 112, at 1232.

[354] 15 U.S.C. §§ 1681n–1681o (1982).

[355] *See, e.g.*, Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982); Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976).

[356] *See* Note, *supra* note 112, at 1238.

[357] Maine, for example, establishes $100 minimum damages for each violation. ME.

The FCRA also makes it difficult to prove violations in the first place. The consumer must show willfulness or negligence, but the agency need only institute "reasonable procedures" to escape liability.[358] Because the FCRA does not specify what constitutes reasonable procedures, a showing of good faith by the agency will usually suffice to avoid liability.[359] The need for the consumer to prove not only failure to comply with the specific provisions of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof."[360] One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.[361]

V. CONCLUSION

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum

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REV. STAT. ANN. tit. 10, § 1323(2) (Supp. 1979–80). *See also* S. 1840, 94th Cong., 1st Sess., 121 CONG. REC. 16321 (1975); S. 1928, 96th Cong., 1st Sess., 125 CONG. REC. 29117 (1979); Gutman, *supra* note 330. *Cf.* 17 U.S.C. § 504 (1982) (providing "statutory" damages for copyright violations).

[358] 15 U.S.C. § 1681e (1982).

[359] *See* THE PRIVACY REPORT, *supra* note 11, at 8.

[360] Note, *supra* note 112, at 1238.

[361] S. 1840, 94th Cong., 1st Sess., 121 CONG. REC. 16321 (1975). A final proposal for protecting consumer privacy is the establishment of a federal agency which would be responsible for formulating privacy regulations and ensuring their enforcement. *See* H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974); H.R. 10076, 95th Cong., 1st Sess., 123 CONG. REC. 37522 (1977). Canada, Sweden, West Germany, and France all have privacy commissions or officers. *See* Soma & Wehmoefer, *supra* note 57, at 473–75. For arguments in favor of such an agency, *see* J. SHATTUCK, *supra* note 44, at 438; A. WESTIN, *supra* note 43, at 325-26; Miller, *Personal Privacy*, *supra* note 36, at 1236–44; Ruggles, *On the Needs and Values of Data Banks*, 53 MINN. L. REV. 211, 219 (1968).

measures which should be taken to protect these privacy rights can be summed up as follows:

— ensure that the FCRA applies to tenant screening services;

— require the reporting agency to notify the subject when a file is opened;

— require the agency to send the subject annual copies of the file;

— require the agency to include, in the above notices, notification of the subject's rights regarding this information;

— require users of reports to notify subjects that a report will be requested and to identify the agency;

— limit the information collected and maintained to that which is relevant; for credit agencies this would include primarily financial information and past credit data, and for tenant screening services this would include information concerning reliability of rent payments, maintenance of property, and behavior which directly affects neighbors (such as excessive noise);

— give subjects an absolute right to insert statements in their files, and require agencies to include these statements in reports; and

— provide for presumed damages for violations of the FCRA as amended by the addition of these safeguards.

Until these proposals are translated into legislation, tenant screening services will continue to provide landlords with data about prospective tenants so as to violate tenants' reasonable expectations of privacy. As the use of these services grows, tenants' sense of individuality and self-worth may deteriorate. Only by regulating the practices of tenant screening services will society ensure that tenants are not denied housing based on irrelevant, inaccurate, or plainly erroneous information which they may not even know exists.

COMMENT

PROTECTING CONFIDENTIALITY IN THE EFFORT TO CONTROL AIDS

PETER J. NANULA*

In the public health effort to control the spread of Acquired Immune Deficiency Syndrome, or AIDS, prompt gathering of accurate information about the deadly disease is urgently required. Collection of AIDS-related information is required for treatment of victims, for research aimed at finding a cure, and for efforts to educate the public about the disease. The most important sources of information are reports of discovered cases of AIDS and blood-test results showing exposure to the AIDS virus. To make sure that the public health community receives complete and accurate information on AIDS as quickly as it becomes available, potential and confirmed AIDS carriers and victims must be encouraged to participate in testing and research.[1]

Without assurance that the results of blood tests will be kept strictly confidential, gay and bisexual men, who already suffer considerable discrimination due to their sexual orientation, are not likely to volunteer for testing. Moreover, since reported AIDS carriers are often wrongly presumed to be gay or bisexual, even individuals outside the so-called "high-risk groups" are understandably hesitant to come forward.

This Comment focuses on the urgent need for protecting the confidentiality of potential and confirmed AIDS carriers and victims to facilitate the public health effort to control the disease. It then examines possible sources of legal protection of confidentiality, evaluating the prospects and suggesting reforms. Finally, the author includes a model statute encompassing the statutory changes he suggests.

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[1] People found to have been exposed to the virus but who show no symptoms of having the syndrome will be referred to by the author as "carriers." The author refers to those diagnosed as having the syndrome or some other AIDS-related complex (ARC) as "victims."

I. CONFIDENTIALITY AS OPERATIONAL NECESSITY IN THE EFFORT TO CONTROL AIDS

A. *Nature of the AIDS Crisis*

Since June 1, 1981, when physicians and health departments across the United States began reporting AIDS cases to the national Centers for Disease Control, more than 25,000 cases have been reported.[2] The number of cases reported during each six-month period continues to increase rapidly.[3] The public health community has reacted to this crisis by mounting an unprecedented effort to seek a vaccine for the disease. Health officials have called the fight to control AIDS their "number one priority."[4]

The disease is caused by a mutative virus known as Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus (HTLV-III/LAV). The virus takes a different form in every victim, thereby frustrating attempts to isolate and treat it. The virus attacks the body's immune system, rendering the victim virtually unable to fight infection. Persons diagnosed as having the syndrome (AIDS) quickly contract opportunistic infections which eventually kill them.[5]

The crisis surrounding AIDS is to some degree attributable to the sheer deadliness of the disease.[6] Of patients diagnosed prior to July 1984, seventy-one percent are reported to have died.[7]

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[2] Approximately 16,000 cases were reported in the U.S. through 1985. *See* Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome — United States*, 35 MORBIDITY & MORTALITY WEEKLY REP. 17 (January 17, 1986) [hereinafter *Update*]. At least 8,700 additional cases have been reported in 1986. *See* 35 MORBIDITY & MORTALITY WEEKLY REP. 582 (September 19, 1986).

[3] However, the rate of increase in AIDS cases is not exponential. The period of time it takes for the total number of reported AIDS cases to double has been gradually lengthening, from five months in 1982 to one year at present. Thus, although annual totals increase each year, they increase at a slower rate than the previous year: 2,124 cases in 1983 marked a 184% increase over 1982, 4,569 cases in 1984 marked a 115% increase over 1983, and 8,406 cases in 1985 marked an 84% increase over 1984. *See Update*, *supra* note 2, at 18, 20.

[4] N.Y. Times, Dec. 20, 1985, at A31, col. 1.

[5] The most common infections are Pneumocystiscarinii pneumonia (PCP) and Karposi's sarcoma (KS), which together have been found in 87% of AIDS patients. *See Update*, *supra* note 2, at 18.

[6] *See* Gray & Melton, *The Law and Ethics of Psychosocial Research on AIDS*, 64 NEB. L. REV. 637, 646–647 (1985) [hereinafter *Research*].

[7] *See Update*, *supra* note 2, at 17.

The lack of knowledge and understanding about the disease has added to the crisis. There is thought to be a long period (up to 7 years) between exposure to HTLV-III/LAV and development of AIDS. Moreover, due to the brief history of the disease, the possibility of longer incubation periods cannot be excluded.[8] Most people proven to have been exposed to the virus do not go on to develop AIDS. In fact, only some five to twenty percent of carriers later become victims.[9]

So far, the only proven methods of transmitting the disease involve sexual or bloodstream-to-bloodstream contact with a carrier or victim. There is no evidence that the virus can be passed through casual contact, saliva, tears, or the air.[10]

Only particular classes of people, such as drug users, prostitutes, and homosexuals, most of them already vulnerable to possible social stigma and even criminal penalties, have been identified as being at risk for AIDS. According to current statistics, homosexual and bisexual men account for over seventy-three percent of reported AIDS victims.[11]

B. *The Need for Information*

Many factors involved in the AIDS crisis make the gathering of relevant information especially important.[12] The fact that AIDS primarily strikes members of already stigmatized groups contributes to the need for AIDS-related information. In order for public health policy on such a socially sensitive topic to develop rationally, all relevant knowledge must be collected and then carefully studied.

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[8] *See Update*, *supra* note 2, at 20.

[9] N.Y. Times, April 25, 1986, Al, col. 5.

[10] 34 MORBIDITY & MORTALITY WEEKLY REP. 561 (1985); 33 MORBIDITY & MORTALITY WEEKLY REP. 182 (1984). *See also* Seligman with Gosnell, *AIDS: Myths and Reality*, NEWSWEEK, Sept. 23, 1985, at 20–21; Council on Scientific Affairs, *The Acquired Immune Deficiency Syndrome*, 252 J. A.M.A. 2037, 2040, 2042 (1984).

[11] Heterosexuals with histories of using intravenous drugs make up 17% of the total; the remaining 10% consists of persons with hemophilia, heterosexual sex partners of persons with AIDS or at risk for AIDS, recipients of blood transfusions, and persons who have not yet been classified by recognized risk factors. A fraction (8%) of the homosexual and bisexual men who are the primary victims of AIDS also have histories of intravenous drug use; in these cases, the means by which the victims acquired the disease is unclear. *Update*, *supra* note 2, at 17–20.

[12] Different types of information are needed for different purposes. For some research and treatment purposes, for example, no personal identification is necessary. Where personal identification or details about the sexual activities of carriers and victims is thought to be necessary, however, the potential harms to the individual from improper disclosure of this information are significant.

Since the transmission of AIDS is believed to occur only through bloodstream-to-bloodstream exchanges such as sexual contact, the study of AIDS inevitably involves inquiry into highly sensitive and personal matters. "To understand the mode of transmission fully requires the gathering of data regarding details of sexual practices, . . . travel, associations, not only of AIDS patients themselves, but also their lovers and friends, [and] members of groups at risk . . . ."[13]

The recent discovery of AIDS and its rapid spread have also heightened the clamor for speedy acquisition of knowledge about the disease. In part because of the tremendous pressure on doctors and public health officials to take positions and announce policies with only limited information, the medical community has been unable to reach a consensus on the correct approach to the AIDS problem. The fact that AIDS has a fatal prognosis has intensified the emotion surrounding the crisis, added to pressures on doctors and officials, and increased the public's demand for knowledge about AIDS.

This combination of factors has led to a "virtually unprecedented push toward rapid acquisition and dissemination of research on AIDS."[14] Indeed, knowledge about the syndrome has developed at an unusually rapid pace. Significant questions remain unanswered, however, such as whether a vaccine and an effective treatment can be developed. While such uncertainties remain, the disease continues to spread, victims continue to die, and irrational attitudes persist. Therefore, the need for information about the disease remains urgent.

C. *The Public Interest in Confidentiality*

It is abundantly clear that acquisition of information about AIDS is urgently needed in order to control its spread. The risk that the putative providers of this information may have their confidences breached, however, is inherent in the process of developing knowledge about AIDS. This situation has generally been viewed as an irreconcilable conflict of interest:

> AIDS patients and groups at risk are thus caught in a dilemma in which they have a profound desire for information that may contribute to prevention or treatment of AIDS, but

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[13] *Research, supra* note 6, at 646.
[14] *Id.* at 647.

> also a particularly acute need for protection of privacy. Beyond these personal conflicts, the need to gather information that may be useful in protecting the public health may clash directly with potential participants' privacy.[15]

The solution to this seemingly hopeless conflict emerges from a closer examination of the problem from the individual's viewpoint. Potential participants may hesitate to contribute to the effort to gather information because they fear invasions of their privacy—and consequent discrimination and stigmatization. Voluntary participation may be successfully encouraged by protecting the privacy and confidentiality of potential participants against improper disclosure.

Limiting AIDS-related disclosures to those which are absolutely necessary in the effort to control the spread of the disease will advance the information-gathering process. By denying access to AIDS-related information to those who might use it to discriminate against potential victims, the chief deterrent to voluntary participation is removed and the volume of relevant data thereby increased. Those whose sole reason for obtaining the information is to help control the spread of AIDS are ensured of access to the growing wealth of information. Put differently, an intelligent scheme for protecting the confidentiality of AIDS-related information will increase the flow of relevant data into the right hands by keeping it out of the hands of those who would misuse it.

1. Deterrents to Participation

In the absence of adequate confidentiality protection, many factors in the AIDS context operate to discourage participation in programs designed to control the spread of the disease. Widespread possession of sensitive information by authorized parties creates the danger that the information may fall into the hands of unauthorized parties. Improper disclosures may serve to exacerbate the stigmatization already suffered by those at highest risk for AIDS. Significant invasions of the privacy of these individuals may also take place. The multitude of harms that could result from coming forward is likely to deter participation in the absence of appropriate safeguards.

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[15] *Id.*

a. *Improper Disclosure.* As with any disease, it is inevitable that personal and medical information about potential and confirmed AIDS carriers and victims winds up in many hands. Physicians must collect such information in order to render adequate professional services to their patients. Employees of state and federal public health organizations must receive all available AIDS-related information in order to conduct the scientific battle to contain and find a cure for the disease. Red Cross and blood-bank employees discover AIDS cases in the course of monitoring the nation's blood supply. Private organizations offering legal or medical advice to AIDS carriers or establishing AIDS victim support groups are also privy to personally identifiable AIDS-related information. This widespread collection and possession of information poses the danger that it will be improperly disclosed to unauthorized third parties.[16]

Insurance companies, for example, have a strong interest in discovering the identities of potential or confirmed AIDS victims because they are loathe to cover the astronomical medical bills of such policy applicants.[17] Insurers and insurance industry authorities may have contacts within the public health community which can be exploited for the purpose of discovering the identities of AIDS suspects and denying them coverage.[18]

Employers are also interested in knowing whether present or prospective employees have AIDS in order to avoid increased group insurance premiums or possible infection of other employees. An AIDS victim's personal physician may reveal information to the victim's employer either by accident, in complicity, or under compulsion.

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[16] For purposes of this Comment, "authorized" parties shall be limited to: (1) people to whom the carrier has disclosed his or her status; (2) people to whom the carrier has expressly authorized disclosure of his or her status; and (3) people to whom the carrier's consent to disclosure can be safely implied, such as doctors and public health workers who are responsible for his or her treatment or for research about the disease. All other parties are by this definition "unauthorized" to have access to this information.

[17] One solution to this problem is to block access by insurance companies to information regarding the status of potential or confirmed AIDS victims, effectively forcing insurers to spread the costs of insuring them among all policyholders.

[18] "Life insurance companies . . . freely report information received from applicants or insureds to a centralized computer that facilitates the sharing of such information among insurance companies." Riskin & Reilly, *Remedies for Improper Disclosure of Genetic Data*, 8 RUT.-CAM. L.J. 480, 495 (1977) [hereinafter *Remedies*]. *See also* Stern, *Medical Information Bureau: The Life Insurer's Databank*, 4 RUT. J. COMPUTERS & L. 1, 5–7 (1974). Some such transactions are governed by the federal Fair Credit Reporting Act, which imposes liability for negligent disclosures of financial information. 15 U.S.C.A. § 1640 (1982).

Such disclosures of other disease-related information probably occur with considerable regularity. Because of the special combination of factors involved in the AIDS context, however, the subjects of disclosure are likely to suffer unusually harsh consequences.

b. *Discrimination.* The possession of personally identifiable AIDS-related information by unauthorized parties raises the specter of widespread discrimination against AIDS carriers and victims.[19] The majority of the population is underinformed about the nature of the disease and its transmission, in part because considerable uncertainty persists in the medical community. The general lack of understanding about AIDS has led to exaggerated fears and behavior.[20] Many people hesitate to associate with AIDS carriers for fear that they will contract AIDS through casual contact. The potential deadliness of the disease counsels "staying on the safe side." AIDS victims also suffer from the inability of many people to deal with those who have a potentially terminal illness. Furthermore, the "social isolation" that often results when acquaintances know of the diagnosis makes coping with a serious illness more difficult.[21]

Those who regard homosexual conduct and status as somehow immoral or antisocial may be quick to infer from statistics showing that the majority of AIDS victims are gay or bisexual that *any* person with AIDS is either gay or bisexual.[22] Armed with erroneous assumptions, many people attempt to deny, exclude, and block equal treatment of these "gays-by-inference."[23]

[19] New York's Human Rights Division has received an increasing number of complaints alleging AIDS-based discrimination. N.Y. Times, Dec. 5, 1985, at D31, col. 1.

[20] This is not an unprecedented phenomenon. Discrimination resulting from misunderstandings about medical facts surrounding sickle cell anemia occurred in the early 1970's. Employers, insurers, and the military discriminated against sickle cell carriers without any proof that merely having the sickle cell trait could cause a sickling crisis similar to that experienced by persons with the disease. *See Remedies*, *supra* note 18, at 489.

[21] *Research*, *supra* note 6, at 656.

[22] In fact, however, not all victims of the syndrome are gay. Those who falsely construe a positive reading of an AIDS blood test as proof that an individual is gay also ignore the fact that current tests produce a significant number of "false positives". *See, e.g.*, Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1278 (1986) [hereinafter *Rights*].

[23] The Supreme Court has not yet concluded that gays are a suspect or even quasi-suspect class, or that classifications based on sexual orientation call for heightened scrutiny. *See* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975). Nonetheless, many commentators have argued for such a rule. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297–1305 (1985); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 816–36 (1984).

Insurers, fearful of paying the high medical expenses of AIDS victims,[24] are making great efforts to avoid providing coverage to AIDS victims.[25] Companies ask questions of applicants designed to elicit AIDS-related information, and closely examine the personal and medical files of applicants in order to spot those in high-risk groups.[26] Many insurance companies are fighting legislative efforts to ban the use of the AIDS blood test by insurers.[27] Members of high-risk groups and confirmed victims face the prospect of paying exorbitant premiums for health and life insurance or of being unable to obtain insurance at all. Only the rare victim could possibly afford the astronomical health bills associated with the treatment of AIDS.

Significant discrimination in the workplace is already occurring as well.[28] Employers, either on their own initiative or at the request of co-workers, have fired actual AIDS victims, persons perceived as having AIDS, and members of high-risk groups.[29]

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[24] The U.S. Public Health Service predicted in June 1986 that the number of reported AIDS cases will increase tenfold, to 270,000, by the end of 1991. Officials estimated that the cost of caring for these persons would be between eight and sixteen billion dollars in 1991. *See* N.Y. Times, June 13, 1986, at A1, col. 3.

[25] *See supra* text accompanying notes 17–18.

[26] *See* N.Y. Times, Dec. 26, 1985, at D1, col. 1; N.Y. Times, Oct. 8, 1985, at A12, col. 6.

[27] Insurance companies doing business in Washington, D.C., for example, have been unsuccessful in opposing a recently enacted ordinance which (1) prohibits denial of insurance coverage to persons who test positive for exposure to the AIDS virus, and (2) prevents insurers from charging higher premiums for at least five years. A federal district court judge, Thomas F. Hogan, upheld the law in September 1986 despite the insurers' argument that the enormous costs of covering these persons will simply be passed on to policy holders generally and despite the mounting evidence of insurer flight from the District. Local insurance companies are considering an appeal of the decision. *See* Washington Post, Sept. 20, 1986, at B1, col. 4.

[28] *See, e.g.*, 72 A.B.A.J. 22 (1986); Legal Times, Dec. 2, 1985, at 10, col. 1.

The U.S. Department of Justice concluded in June 1986 that although Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, protects AIDS victims from discrimination based solely upon disability, employers may lawfully discriminate if they believe that their actions will help stop the spread of the disease. Dismissals based on an employer's fear of the spread of AIDS are generally legal, according to the Justice Department ruling, unless the victim proves that the employer's asserted fear was merely a pretext for the discrimination. Memorandum from Charles J. Cooper, Asst. Atty. General, Office of Legal Counsel, U.S. Dept. of Justice, to Ronald E. Robertson, General Counsel, U.S. Dept. of Health and Human Services re: Application of § 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus (June 20, 1986).

In response to the DOJ ruling, a California state legislature spokesman on AIDS-related issues commented that many homosexual men "now refuse to take the blood test for exposure to the AIDS virus because of fears that they might lose their jobs or health insurance. Under the Justice Department opinion," he added, "such fears would be well-founded." New York Times, June 23, 1986, at A13, col. 1.

[29] *See* Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 683, 685–86 (1985); *Rights*, *supra* note 22, at 1289–90.

c. *Invasion of privacy*. AIDS victims whose medical status is circulated outside the group of medical personnel directly responsible for treatment and research also suffer violations of their right to privacy. The release of this sensitive information beyond the scope of the individual's consent abrogates the right to control information about oneself.[30]

Unwanted disclosures of AIDS-related information can also adversely affect the personal relationships of the victim.[31] As long as disclosures are limited to those persons with whom the victim feels comfortable sharing the knowledge of his or her condition, an AIDS victim can maintain reasonably normal social relations. Revelations made without the victim's consent, however, can cause the attenuation or loss of friendships and associations. Stigmatization and ostracism often result from such disclosures, since AIDS is widely viewed as the "modern day equivalent of leprosy."[32]

2. Need for Confidentiality to Encourage Voluntary Participation

The simplest and surest way to gather the data necessary for controlling the spread of AIDS and finding a cure for the disease would be to order all members of high-risk groups to submit to a blood test for the AIDS virus. Because of a presumption against the constitutionality of mandatory testing, however, the success of the AIDS-control effort depends entirely on voluntary participation in programs designed to control the spread of AIDS. Without adequate protection of confidentiality, however, such participation is significantly deterred by the risk of unwanted disclosures.

a. *Compulsory testing generally impermissible*. Mandatory blood testing for AIDS raises significant constitutional problems. Admittedly, the bodily intrusion inflicted in such tests is

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[30] *See* Whalen v. Roe, 429 U.S. 589, 599 (1977). *See also* Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

[31] For a profile of an AIDS victim whose interpersonal life has been destroyed by the onset of the disease and its revelation to others, *see* N.Y. Times, Dec. 17, 1985, at B1, col. 1.

[32] South Fla. Blood Serv., Inc. v. Rasmussen, 467 So.2d 798, 802 (Fla. Dist. Ct. App. 1985).

minimal.[33] The severe implications of a mandatory AIDS test for individual rights, however, suggest that "nothing short of compelling necessity can justify forcing individuals to submit to [AIDS] blood tests."[34]

Mandatory tests threaten the individual's interest in avoiding disclosure of personal matters by forcing creation of test results capable of being improperly disclosed to unauthorized parties. A positive AIDS blood test can have a "devastating impact on an individual's life," an especially harsh result in the case of false diagnosis.[35] Significant trauma, discrimination, and stigmatization could follow disclosure of test results to unauthorized third parties. Thus, mandatory AIDS blood testing raises serious privacy and even personhood concerns.[36]

According to current scientific knowledge, AIDS cannot be transmitted by casual contact.[37] A mandatory blood-testing requirement would presumably be defended as the only reliable method for locating potential AIDS carriers. However, "given widespread knowledge of the demographics of AIDS patients, those individuals most at risk probably are already aware of the odds that they carry AIDS."[38] Thus compulsory testing offers little or no advantage over a voluntary testing scheme in the identification of AIDS carriers and victims, and is thus unlikely to survive strict scrutiny. Because AIDS testing poses a significant threat to individual rights, such testing should be voluntary rather than state-enforced.

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[33] The bodily intrusion necessitated by a blood test is scarcely distinguishable from that of vaccinations, which have long been upheld as constitutionally permissible by courts.

The compulsory blood test of an auto accident victim for blood alcohol content in Schmerber v. California, 384 U.S. 757, 771 (1966), was held reasonable in part because "for most people the procedure involves virtually no . . . pain." The Court in *Schmerber* also emphasized that the minimally intrusive blood test

> has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

Id. at 771 n.13 (quoting Breithaupt v. Abram, 352 U.S. 432, 436 (1956)).

[34] *Rights*, *supra* note 22, at 1287.

[35] *See Rights*, *supra* note 22, at 1287. The nature of the typical blood test contributes to the danger of "false positive" results. "Blood tests currently available are designed to protect the blood supply, not to diagnose carriers, and are likely to be hypersensitive." *Id.*

[36] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-9, pp. 914–15 (1978). "Personhood" has been defined to include "those attributes of an individual which are irreducible in his selfhood." *Id.* at 889, citing Freund, 52nd ALI Ann. Mtg. 42–43 (1975).

[37] *See supra* note 10 and accompanying text.

[38] *Rights*, *supra* note 22, at 1287–88.

Under special circumstances, mandatory blood-testing requirements might survive constitutional scrutiny. For example, in the fall of 1985 the U.S. Department of Defense decided to begin screening all military personnel—2.1 million people—for AIDS.[39] Under the screening program, those who react positively to the test are offered treatment and counselling, and are released by the Defense Department under a "medical discharge" which omits the specific reason for termination. Although the mass screening arguably sets a dangerous precedent for civilian uses of the AIDS blood test, it may be defensible as a "special case" because of: (1) the extraordinary need to be able to deploy personnel anywhere on short notice without worrying about soldiers being weakened by the AIDS virus, and (2) the battlefield need for risk-free emergency blood transfusions.[40]

In accordance with new municipal statutes, foodhandlers in Newark, New Jersey and Miami, Florida have also been screened for AIDS.[41] Compulsory testing in this context could only be justified by the risk of widespread infection if AIDS were discovered to be transferable via casual contact. However, since the great weight of scientific authority precludes this possibility, contamination of the nation's food supply is too remote and speculative a risk upon which to base the infringement of individual rights.

b. *Recognition of the need to encourage voluntary participation.* New York City health officials recently demonstrated their recognition of the need to encourage voluntary AIDS testing by abandoning requirements that the test be administered at a public laboratory and only upon referral from a personal physician. Having determined that these restrictions served to discourage people from taking the blood test, the city changed its policy to allow local hospitals to administer the test without referrals.[42]

In a national effort to encourage voluntary participation, federal disease-control officials recently published extensive recommendations to local health officials for reducing further sex-

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[39] N.Y. Times, Oct. 19, 1985, at A1, col. 1.

[40] *Id.*

[41] N.Y. Times, Sept. 30, 1985, at B8, col. 3; L.A. Daily J., Oct. 31, 1985, at 18, col. 1.

[42] N.Y. Times, Dec. 23, 1985, at B8, col. 1.

ual and drug-related transmission of AIDS. Among the strongest suggestions was the protection of confidentiality:

> Since the objective of these recommendations is to help interrupt transmission [of AIDS] by encouraging testing and counselling among persons in high-risk groups, careful attention must be paid to maintaining confidentiality and to protecting records from any unauthorized disclosure. The ability of health departments to assure confidentiality—and the public confidence in that ability—are crucial to efforts to increase the number of persons requesting such testing and counselling.[43]

In *People ex rel. Director of Public Health v. Calvo*,[44] a request for the production of communicable disease reports was held to be precluded by a statutory privilege which provided for the confidentiality of individual identities contained in such reports. The court found that the state's claim that the records were needed to support a prosecution did not outweigh the statutory privilege against disclosure. The court explained that the statute embodied a legislative recognition that the government agency needed confidentiality in order to discharge its responsibility for safeguarding the public health.

> Without an assurance of confidentiality, fear of social embarrassment resulting from disclosure of their identities and physical conditions might cause individuals with such a disease to shun treatment, while at the same time others to whom they may have transmitted the disease might remain unaware that they are in need of treatment. And, of course, without such assurance, physicians and hospitals might be

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[43] Centers for Disease Control, *Additional Recommendations to Reduce Sexual and Drug Abuse-Related Transmission of HTLV-III/LAV*, 35 MORBIDITY & MORTALITY WEEKLY REP. 152 (1986) [hereinafter *Recommendations*]. In earlier instructions about how to protect the nation's blood supply from AIDS contamination, federal officials emphasized the need for confidentiality:

> Physicians, laboratory and nursing personnel, and others should recognize the importance of maintaining confidentiality of positive test results. Disclosure of this information for purposes other than medical or public health could lead to serious consequences for the individual. Screening procedures should be designed with safeguards to protect against unauthorized disclosure. Donors should be given a clear explanation of how information about them will be handled. Facilities should consider developing contingency plans in the event that disclosure is sought through the legal process. If donor referral lists are kept, it is necessary to maintain confidentiality of such lists. Whenever appropriate, as an additional safeguard, donor referral lists should be general, without indication of the reason for inclusion.

Centers for Disease Control, *Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing AIDS*, 34 MORBIDITY & MORTALITY WEEKLY REP. 3 (1985).

[44] 89 Ill. App. 2d 130, 432 N.E.2d 223 (1982).

> reluctant to file the reports required of them. The statute represents recognition by the legislature that protection from venereal diseases depends in large part on the willingness of those suffering from such disease to seek out treatment and to identify those with whom they may have had contact, as well as the cooperation of physicians and hospitals in reporting cases. There is thus strong public policy in favor of preserving the confidentiality which the statute contemplates.[45]

Similarly, in *People v. Newman*,[46] the New York Court of Appeals concluded that the success of a methadone program depended upon the ability to guarantee each patient that his or her participation would not be disclosed. The director of the program had been subpoenaed to produce photographs of participants in the program before a grand jury in a homicide investigation. The court excused production on the basis of a confidentiality provision created by statute in favor of participants in the methadone program.[47]

In 1980, the New York legislature amended a statute protecting the confidentiality of information regarding venereal disease to cover AIDS-related information.[48] In *Grattan v. People*,[49] the court stated that the purpose of the provision is "to encourage sufferers of sexually transmitted diseases to report their conditions so that they and their partners can receive medical attention and thus contain the spread of the disease."[50]

c. *Analogy to sodomy statutes.* States defending laws which criminalize certain types of sexual activity have advanced the justification that these laws help stop the spread of disease by deterring the conduct responsible for its transmission. Some courts and commentators have rejected this justification for sodomy or fornication laws because fear of criminal prosecution, like fear of discrimination, deters participation in disease control efforts.[51]

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[45] 432 N.E.2d at 224.

[46] 32 N.Y.2d 379, 298 N.E.2d 651, 345 N.Y.S.2d 502 (1973).

[47] 298 N.E.2d at 657.

[48] N.Y. PUB. HEALTH LAW § 2306 (McKinney 1980). The amendment substituted "sexually transmissible diseases" for "venereal disease", thus including AIDS within the coverage of the statute.

[49] 102 A.D.2d 1007, 477 N.Y.S.2d 881 (App. Div. 1984).

[50] 477 N.Y.S.2d at 882.

[51] *See, e.g.*, Note, *AIDS: A New Reason to Regulate Homosexuality?*, 11 J. OF CONTEMP. L. 315 (1984); N.Y.L.J., Dec. 2, 1985, at 1, col. 1.

In *New Jersey v. Saunders*,[52] the New Jersey Supreme Court held a fornication statute unconstitutional partly because it determined that the state's admittedly compelling interest in preventing venereal disease was not served by the statute. In fact, the court concluded that the prohibition on consensual sex was counter-productive in that effort. "To the extent that any successful program to combat venereal disease must depend upon affected persons coming forward for treatment, the present statute operates as a deterrent to such voluntary participation. The fear of being prosecuted . . . can only deter people from seeking such necessary treatment."[53]

In the AIDS context, there is, in addition to the concern for treatment of victims, the interest in facilitating scientific progress toward containing the disease and finding a cure. In *Bowers v. Hardwick*, the state of Georgia argued that its anti-sodomy statute helps combat the spread of AIDS.[54] A brief filed by the American Psychiatric Association and the American Public Health Association pointed out, however, that threats of prosecution have already hindered the scientific investigation of the disease and promise to further obscure important data.[55] The *amici* brief also argued that the statute interferes with health education efforts designed to encourage safer sexual practices. "[C]ommunity effort and support are made more difficult in an environment in which a concomitant of participating in educational efforts is self-incrimination."[56] Furthermore, as in the *Saunders* case, fear of punishment under the statute can lead victims to conceal their sexual orientation from personal physicians or to neglect to seek needed treatment at all.[57]

The majority opinion in *Hardwick* did not mention Georgia's AIDS-related justification for its anti-sodomy statute. Justice

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[52] 75 N.J. 200, 381 A.2d 333 (1977).

[53] 381 A.2d at 342.

[54] Brief of Petitioner at 37, Bowers v. Hardwick, 106 S.Ct. 2841 (1986). In *Hardwick*, the Court held that the federal constitution confers no fundamental right upon homosexuals to engage in sodomy. Since no fundamental rights are violated by anti-sodomy statutes, the Court applied a rational basis test. The Georgia statute meets this standard, according to the Court, because a majority of Georgians believe that homosexual sodomy is immoral and unacceptable.

[55] Brief Amici Curiae American Psychiatric Association and American Public Health Association in Support of Respondent at 24–25, Bowers v. Hardwick, 106 S.Ct. 2841 (1986). The brief cites extensive evidence demonstrating that falsifications of information, caused by fear of punishment, distorted the epidemiological picture of AIDS with respect to (1) the existence of potentially high risk to recent immigrants from Haiti, and (2) the transmissibility of the AIDS virus from women to men.

[56] *Id.* at 26.

[57] *Id.* at 23.

Brennan's dissenting opinion, however, rejected the justification as unsupported by the evidence. Brennan intimated that Georgia would have been unable to demonstrate a sufficient connection between the forbidden sexual conduct and the spread of AIDS to meet even "rational basis" scrutiny of the statute.[58]

In *Baker v. Wade*,[59] a federal district court refused a request to reopen, in light of "new evidence" on AIDS, a decision holding a sodomy statute unconstitutional. According to the petitioner, "to criminalize homosexuality is possibly the worst conceivable way to try and solve the problem of AIDS; . . . this simply serves to drive the whole issue underground, so that surveillance and early diagnosis will be made that much more difficult, if not impossible."[60] The court concluded that criminalizing homosexual conduct in order to combat AIDS "would be a public health disaster."[61]

Fear of discrimination can have the same effect as the fear of criminal prosecution on the willingness of potential and confirmed AIDS carriers and victims to participate in research, treatment, and public education efforts. Arguably, the fear of discrimination is *more* certain to deter voluntary participation since those afflicted with AIDS are so likely to be the targets of discrimination. Those who engage in statutorily prohibited sexual conduct, on the other hand, are in practice scarcely deterred at all, due to the extreme underenforcement of such laws.[62] At any rate, voluntary participation in AIDS testing programs is only likely to succeed in an atmosphere free of such fears.

II. Sources of Added Confidentiality Protection

Ideally, the integrity of individuals who have access to AIDS-related information and formal procedures established by agencies holding such information would be sufficient to ensure con-

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[58] Bowers v. Hardwick, 106 S.Ct. 2841, 2853 n.3 (1986) (Brennan, J., dissenting).

[59] 106 F.R.D. 526 (N.D. Texas 1985), *supplementing* 553 F. Supp. 1121 (N.D. Texas 1982), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985).

[60] *Baker*, 106 F.R.D. at 530.

[61] *Id.* at 531.

[62] Commenting on the fact that there had been no reported decision involving prosecution under the Georgia sodomy statute for several decades prior to 1986, Justice Powell noted that "[t]he history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct." Bowers v. Hardwick, 106 S.Ct. 2841, 2848 n.2 (Powell, J., concurring).

fidentiality. Violations are certain to occur, however, and when they do, criminal sanctions and civil remedies must be available to redress breaches of the confidentiality of AIDS-related information.

Legal protections can also serve to encourage voluntary participation in programs designed to control the spread of AIDS before improper disclosures occur. If potential AIDS carriers know that the legal system will protect their confidentiality, they should be less frightened about coming forward.

The desired legal protections could come from three primary sources: (1) pronouncements by courts in constitutional cases; (2) judicial expansion of common law duties; and (3) state and federal legislation.

A. *Constitutional Protection*

Courts have traditionally deferred to public health authorities in their struggle to control epidemics, even when these efforts infringed on the constitutional rights of individual citizens.[63] The unusual virulence and rapid spread of AIDS make it likely that courts in constitutional cases will review the actions which public health authorities take in fighting AIDS with extreme deference. In the context of AIDS reporting and testing schemes, however, a unique confluence of the traditionally opposed interests in controlling disease on the one hand, and protecting individual rights on the other, suggests that courts should approve only those measures which adequately protect confidentiality.

1. Public Health Precedent

The state's duty and corresponding power to protect the health, safety, and welfare of its citizens have long been held by courts to encompass the control of infectious disease.[64] Pursuant to this broad authority, states have enacted statutes requiring the reporting of cases of disease to local public health officials, launching mass vaccination programs, requiring that infectious individuals be quarantined, and in other ways restrict-

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[63] *See infra* text accompanying notes 63–73.

[64] *See, e.g.*, Barsky v. Board of Regents, 347 U.S. 442, 449 (1954); Hawker v. New York, 170 U.S. 189, 191–95 (1898); Railroad Co. v. Husen, 95 U.S. 465, 470–71 (1877).

ing the freedom of suspected carriers of disease. Courts have generally deferred to state regulators on the theory that the preservation of public health in the face of an epidemic is more important than preventing minor infringements on personal liberty.

The Supreme Court in *Jacobson v. Massachusetts*[65] applied the traditional public health analysis in a case involving a vaccination statute. A state law requiring smallpox vaccinations for the general public easily survived a challenge that it denied liberty without due process of law. The Court evaluated the vaccination statute under a minimum scrutiny standard, so that it was presumptively valid unless not reasonably related to the public health objective or enforced arbitrarily.[66] In upholding the statute,[67] the Court emphasized the familiar principle that individual liberty is necessarily subject to some restraints for the common good. The vaccination program was deemed to be such a necessary restraint, "essential to the . . . health . . . of the community."[68]

Although quarantine is a highly restrictive measure for containing disease, state quarantine laws have also been accorded presumptive validity by courts.[69] Many quarantine actions have been upheld upon a "reasonable suspicion" that the quarantined person may have been infected.[70] Only where a quarantine is "unreasonable, unjust, and oppressive" and "discriminating in its character" will courts interfere with the broad discretion of officials responding to a health emergency and invalidate their actions.[71]

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[65] 197 U.S. 11 (1905).

[66] The Court even gave weight to the "common belief of the people" about the propriety of the law as a disease control measure. *Jacobson*, 197 U.S. at 35 (quoting Viemester v. White, 179 N.Y. 235, 72 N.E. 97 (1904)).

[67] Courts have generally upheld vaccination statutes, even when the epidemic is only threatened. *See, e.g.*, State v. Martin & Lipe, 134 Ark. 420, 204 S.W. 622 (1918); Brown v. Stone, 378 So. 2d 218 (Miss. 1979); Hartman v. May, 168 Miss. 477, 151 So. 737 (1934); Zucht v. King, 225 S.W. 267 (Tex. Civ. App. 1920); *but see* Potts v. Breen, 167 Ill. 67, 47 N.E. 81 (1897).

[68] *Jacobson*, 197 U.S. at 26–27 (quoting Crawley v. Christensen, 137 U.S. 86, 89 (1890)).

[69] *See, e.g.*, People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922).

[70] *See, e.g.*, In re Martin, 83 Cal. App. 2d 164, 188 P.2d 287 (Cal. Dist. Ct. App. 1948) ("reasonable grounds"); State v. Racskowski, 86 Conn. 677, 86 A. 606 (1913) (reasonable grounds needed for health official to act); People v. Tait, 261 Ill. 197, 103 N.E. 750 (1913); *but see* In re Shepard, 51 Cal. App. 49, 195 P. 1077 (Cal. Dist. Ct. App. 1921) ("More than mere suspicion that an individual is afflicted with an isolable disease is necessary to give an officer reason to believe that such a person is so afflicted.").

[71] Jew Ho v. Williamson, 103 F. 10, 26 (9th Cir. 1900) (invalidating quarantine of

States requiring involuntary physical examinations of people suspected of having a particular disease have had mixed success in the courts.[72] State laws requiring the reporting of cases of infectious disease to local public health authorities have largely been accepted as falling within the police power and have not been challenged frequently in the courts.[73]

2. Prospects for Added Constitutional Protection

Public health law has remained relatively unchanged since the early part of the century.[74] In the early 1900's, courts used popular consensus as a means of determining the necessity of public health actions. Today, however, courts look to the medical community in assessing such actions.[75] Advances in scientific knowledge and changes in health policy are thus certain to affect courts' appraisals of public health measures. Apart from these new influences, though, courts can be expected to continue to treat public health regulations aimed at controlling outbreaks of disease with considerable deference.

The AIDS crisis presents courts with state regulations aimed at solving an unusually perplexing disease-control problem. Due to the deadliness of the disease, the public hysteria engendered by its rapid spread, and the difficulties encountered by scientists and doctors trying to control it, courts are inclined to grant legislators wide latitude in fashioning regulations designed to halt the spread of AIDS.

In the ordinary case, deferential treatment of such regulations could be interpreted as a triumph of the public interest in controlling disease over the individual rights restricted by the reg-

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primarily Oriental San Francisco community of 15,000 persons ordered in response to discovery of 9 cases of bubonic plague in the area).

[72] Some courts have upheld state authority to order physical examinations of women suspected of having venereal disease, on the ground that the act of prostitution with which these women had been charged provided a "reasonable basis" for suspecting the presence of the disease. *See, e.g.*, Ex parte Clemente, 61 Cal. App. 666, 215 P. 698 (Cal. Dist. Ct. App. 1923); People v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944). *But see* In re Shepard, 51 Cal. App. 49, 195 P. 1077 (Cal. Dist. Ct. App. 1921).

Other courts have questioned the connection between illicit sex and venereal disease, and therefore have invalidated the state action. *See, e.g.*, Wragg v. Griffen, 185 Iowa 243, 170 N.W. 400 (1919).

[73] *See* Damme, *Controlling Genetic Disease Through Law*, 15 U.C. DAVIS L. REV. 801, 807 (1982).

[74] *See Rights*, *supra* note 22, at 1277.

[75] *See, e.g.*, New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650–51 (2d Cir. 1979); *Robertson*, 302 Ill. at 432–33, 134 N.E. at 819; LaRocca v. Dalsheim, 120 Misc. 2d 697, 710, 467 N.Y.S.2d 302, 311 (Sup. Ct. 1983).

ulation. Individual rights typically arise in these cases as potential obstacles to the constitutionality of measures designed to control the spread of disease. The need for a quarantine to contain the spread of disease, for example, must outweigh the injury to the quarantined individual caused by the severe restriction of his or her personal liberty. The individual's privacy interest is inevitably infringed to some extent by nearly every disease-control measure, but this is normally viewed as a sacrifice which must be tolerated in order to control disease effectively.[76]

In the context of AIDS reporting and testing schemes, these traditionally opposed interests have converged. Instead of posing an obstacle for proponents of AIDS reporting and testing laws, the individual interest in confidentiality is in fact an important weapon in the disease control effort. The public interest in controlling the spread of AIDS will be best served by protecting against unwarranted disclosures of sensitive AIDS-related information. Constitutional protection of the confidentiality of potential AIDS carriers should help to create an atmosphere conducive to voluntary participation in reporting, testing, and education programs. Full participation in these programs in turn will promote the success of efforts to isolate, treat, and cure the deadly disease.

Judicial recognition that the individual's confidentiality interest is aligned with the state's interest in controlling the spread of AIDS, rather than opposed to it, should lead to approval of only those reporting and testing requirements which contain adequate confidentiality protections. In this context, the public health law can and must be wielded in favor of the individual interests at stake. Since protecting the *individual's* privacy and confidentiality interests also serves the *public* interest in controlling the spread of AIDS, courts should view the protection of confidentiality as a primary responsibility in these cases. Approval of AIDS control legislation containing such protection will be an effective means of stopping the spread of AIDS.

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[76] The traditional opposition of these interests is at work in the AIDS context. With respect to the closing of gay bathhouses, for example, there is a direct conflict between the state's interest in protecting public health from the spread of communicable diseases such as AIDS and the fundamental right of privacy in gay men's sexual intimacy. *See* Note, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U.L. REV. 301 (1985).

B. *Common Law Protection*

Courts in some cases have gone beyond statutory prohibitions in announcing legal rules designed to protect the confidentiality of patients of all kinds. These rules have been drawn from numerous principles, some of which have little bearing on the AIDS context. Given the current state of the doctrine, the courts seem unlikely to fashion rules which adequately protect the confidentiality of potential and confirmed AIDS carriers and victims.

1. Physicians

An improper disclosure by a physician responsible for the care of a potential or confirmed AIDS victim could give rise to an action in tort for invasion of privacy.[77] However, since the plaintiffs who have won suits under this theory are those rare victims whose condition attracted considerable publicity,[78] it is unlikely that the majority of AIDS-related disclosures could be the basis of successful invasion-of-privacy suits.

The difficulty of fitting medical data disclosures into traditional common law privacy doctrine has spawned suits based on a variety of alternative theories.[79] A suit based on breach of an implied condition of confidentiality in the contract between doctor and patient seems to be the most promising of these approaches.[80] Courts which have held for plaintiffs suing under this theory have drawn support from ethical principles of the medical profession,[81] medical licensing statutes,[82] and doctor-patient privilege statutes.[83]

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[77] Many courts have reached the general conclusion that unauthorized disclosures are actionable as invasions of privacy. *See, e.g.*, Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973); Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977); Schaffer v. Soicer, 88 S.D. 36, 215 N.W.2d 134 (1974).

[78] *See* Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CIN. L. REV. 103, 107–09 (1967) [hereinafter *Medical Secrecy*].

[79] "Damage actions have been based upon an obligation to be silent that is implied in the contract between physician and patient, a fiduciary duty imposed on the doctor as a result of his power over the patient, and implied rights of private action under licensing or testimonial privilege statutes." Boyer, *Computerized Medical Records and the Right to Privacy. The Emerging Federal Response*, 25 BUFFALO L. REV. 37, 81–82 (1975).

[80] *See Remedies*, *supra* note 18, at 493; *Medical Secrecy*, *supra* note 78, at 109–13; *see also* McDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (App. Div. 1982).

[81] The Hippocratic Oath and the Code of Ethics of the American Medical Association both contain references to the physician's obligation to keep the confidences of patients secret. *See* Beauchamp, PRINCIPLES OF BIOMEDICAL ETHICS 329–32 (2d ed. 1983).

[82] Some of these statutes provide for denial, suspension, and revocation of a physician's license for improperly disclosing information acquired during the professional relationship.

[83] *See, e.g.*, Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962).

Courts have used these theories to hold liable a physician who makes unauthorized disclosures of confidential medical information to a third party. In *Hammonds v. Aetna Casualty & Surety Co.*,[84] a federal district court acknowledged both tort[85] and contract[86] principles in concluding that a doctor may be liable for unauthorized divulgence of confidences. The case involved an action by a patient against his doctor's malpractice insurer for allegedly inducing the doctor to divulge confidential information gained through the doctor-patient relationship, on the false pretext that the patient was contemplating a malpractice suit.[87] The court held that one who induces a physician to divulge confidential information in violation of his legal responsibility to a patient may be liable—along with the doctor himself—to the patient.[88]

Although suits based on these theories have succeeded, there are a number of exceptions to the doctor's duty of confidentiality that pose problems for plaintiffs contemplating such actions. Disclosures of medical information by a doctor are justified if the disclosure is to a close relative of the patient.[89] Such disclosures may also be justified if found to be necessary to protect important interests of third parties.[90] Of course, disclosures compelled by law cannot establish liability; in fact, most disease reporting statutes explicitly insulate from liability physicians

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[84] 243 F. Supp. 793 (N.D. Ohio 1965).

[85] "If a doctor should reveal any of these confidences, he surely effects an invasion of the privacy of his patient . . . . The unauthorized revelation of medical secrets, or *any* confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages." *Id.* at 801–02 (emphasis in original).

[86] "[A]s an implied condition of [the doctor-patient contract], . . . the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission." *Id.* at 801.

[87] A similar case was presented by Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142 (1962), in which a doctor operating as an agent of insurance companies induced a fellow doctor to breach his duty of secrecy and surrender pertinent information to the defense in a malpractice suit without first gaining the plaintiff's permission. *See also* Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1979). *But see* Panko v. Consolidated Mut. Ins. Co., 423 F.2d 41 (3rd Cir. 1970) (recovery denied in case involving insurer-induced breach of confidentiality by doctor due to absence of proof of causal connection between the disclosure and the plaintiff's lost malpractice suit).

[88] *Hammonds*, 243 F. Supp. at 803. The court rejected the insurer's motion for summary judgment on the ground that it had failed to prove that the plaintiff was indeed preparing to file a malpractice action against the doctor.

[89] *See, e.g.*, Curry v. Corn, 52 Misc. 2d 1035, 277 N.Y.S.2d 470 (Sup.Ct. 1966) (disclosure of medical information by doctor to patient's husband for use in divorce action held to be no invasion of her privacy).

[90] *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

who make such disclosures in compliance with the law.[91] Finally, the doctor's common law duty may not protect the patients harmed by negligent disclosures, since

> every opinion stating that a physician may be liable in tort or contract for disclosure of confidential medical information has involved an intentional rather than a negligent disclosure . . . . Thus, even though several courts have held that a doctor has a duty to the patient to keep medical information confidential, no court has yet held that the duty can be breached by negligent disclosure.[92]

2. Other Health Care Personnel

Blood tests for AIDS are conducted most often by non-doctors. Therefore, the testimonial doctor-patient privilege statutes which provide much of the basis for improper disclosure actions against doctors might not apply to suits against the Red Cross, a blood bank, or a private testing agency.[93] Insurers and other non-physician sharers of AIDS-related information would probably be shielded from common law liability. According to one commentator, "the existence of a privilege may . . . be questionable when information generated by a treating physician is placed in the hands of third-party custodians such as hospital record administrators or independent data systems."[94]

At least two state courts have suggested, however, that third-party custodians of medical information should be held liable in damages for improper disclosures that cause injury. In *Tucson Medical Center, Inc. v. Rowles*,[95] an Arizona court held that medical information otherwise privileged against discovery under a doctor-patient privilege did not lose the privilege by virtue of being incorporated in hospital records.[96] Thus, the hospital was obligated to assert the privilege on behalf of the patient

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[91] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1603.3 (West 1985).

[92] *Remedies*, *supra* note 18, at 493. At least one commentator has advocated recognition of a negligence-based suit: "such a cause of action should be judicially recognized through either an invasion of privacy theory or an implied contract of confidentiality. In either case, a negligent disclosure that causes legally cognizable damages should be actionable, particularly in states that recognize by statute the physician's duty of confidentiality." *Id.*

[93] If a physician supervised the testing procedure, in a hospital for example, a court might be moved by agency principles to apply the same common law doctrines used to protect confidences in a doctor-patient relationship. *Remedies*, *supra* note 18, at 494.

[94] Boyer, *supra* note 79, at 77.

[95] 21 Ariz. App. 424, 520 P.2d 518 (1974).

[96] 520 P.2d at 521.

since neither the doctor nor the patient was present to assert it.[97] The California Supreme Court did not go so far in *Rudnick v. Superior Court of Kern County*,[98] where it held only that such a third party holds the *right* to claim the privilege on behalf of the patient.[99]

Despite these indications to the contrary, the rule seems to be that custodians of health information who do not provide health care have "no duty of confidentiality to the persons whose records they hold."[100] As for physicians, only intentional disclosures seem capable of creating liability, and there are numerous exceptions to the doctor's duty of confidentiality. In sum, common law tort and contract doctrines currently seem inadequate to protect participants in the AIDS control effort. Furthermore, it may be naive to expect significant judicial expansion of such liability—especially in light of the current explosion of medical malpractice liability and the strong reaction against this development.

C. *Statutory Protection*

State laws currently afford very little statutory protection against unwanted disclosures of the identity and condition of AIDS victims. Laws authorizing public health authorities to conduct research and perform blood tests for AIDS typically lack significant confidentiality provisions. Such provisions are completely absent from most state statutes requiring authorities to report AIDS cases. Most state legislatures have also failed

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[97] *Id.* at 523.

[98] 11 Cal. 3d 924, 523 P.2d 643, 114 Cal. Rptr. 603 (1974).

[99] The court was criticized for stopping short of a *Rowles*-type holding:

> the [privilege] statute is designed to guarantee that the physician will assert the privilege whenever the law allows him to do so, in order to maintain the patient's confidences. Because it is the patient's privacy that is at stake, it makes little difference who has the information. If that person is *permitted* by law to assert the privilege, he should be under a *duty* to do so.

Note, *Protecting the Privacy of the Absent Patient: Rudnick v. Superior Court*, 27 HASTINGS L.J. 99, 122 (1975) (emphasis in original). According to another commentator, "third parties who receive confidential medical information from a physician should be subject to as stringent a duty as the physician to keep that information confidential." *Remedies*, *supra* note 18, at 497.

[100] Kaiser, *Patients' Right of Access to Their Own Medical Records: The Need for New Law*, 24 BUFFALO L. REV. 317, 328 (1975), quoting Milano v. State, 44 Misc. 2d 290, 253 N.Y.S.2d 662 (Ct.Cl. 1964). An even harsher view can be found in A. MILLER, ASSAULT ON PRIVACY, 220 (1971): "the notion that the courts will recognize a general principle requiring data handlers to treat personal information as confidential . . . seems to be wishful thinking."

to address the problem posed by the desire of employers and insurers to use blood-test results to deny benefits.

However, Congress and state legislatures are promising sources of added confidentiality protections aimed at bolstering the effort to control AIDS. Statutory provisions protecting the confidentiality of blood-test subjects, for example, can be attached to legislation authorizing such tests. A few states have recently passed legislation providing procedural safeguards to control the use of test results.[101] Due to the relatively ineffective protection afforded by judicial interpretation of the Constitution and the common law, this type of legislation is desperately needed in the struggle to control AIDS.

1. Disease Reporting

Pursuant to its duty and power to protect the public health, every state has enacted a statute requiring physicians, laboratories, representatives of various institutions, and even heads of households[102] to report all cases of communicable disease to public health authorities.[103] Despite the potential for misuse of information and discrimination created by these laws, many lack confidentiality provisions.[104]

Courts have long upheld the principle of notifying authorities about cases of communicable disease. Colorado's reporting statute is unique, however, in requiring that names be included in

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[101] CAL. HEALTH & SAFETY CODE § 199.20–23 (West 1985); WIS. STAT. ANN. § 146.025 (West 1986).

[102] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 3123 (West 1979); N.Y. PUB. HEALTH LAW § 2101 (McKinney 1983); TEX. REV. CIV. STAT. ANN. art. 4477, Rule 23 (Vernon 1976).

[103] Damme notes that

> [t]he apparent objectives of the reporting statutes are to protect the health of the uninfected citizenry through the isolation of the infected group, and to supply epidemiological data so that states may differentiate epidemics from incidences of endemic disease. This identification is then used to justify escalation to more restrictive control measures.

Damme, *supra* note 73, at 806–07.

[104] *See, e.g.*, N.H. REV. STAT. ANN. § 141.1 (1961); WASH. REV. CODE ANN. §§ 70.05.090, 70.05.110 (1979); *but see* ILL. REV. STAT. ch. 126, § 21 (1979); MINN. STAT. ANN. § 13.38 (West 1986).

Some statutes include lengthy lists of the reportable diseases. *See, e.g.*, ALA. CODE § 22-11-1 (1975). Others merely delegate to the state public health authority the responsibility for determining which diseases must be reported. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 3123 (West 1979). All require reports to be filed within a short time (e.g., ten days) after diagnosis. The statutes typically do not restrict further dissemination of the reports or protect against potential harms—such as discrimination—which may result from their release.

the physicians' reports.[105] Yet, the inclusion of victims' names in official reports does not significantly contribute to research,[106] counseling, or treatment,[107] while it does increase the chances of infringing victims' privacy interests.[108] Furthermore, "the risk of disclosure might discourage some individuals from seeking tests, thus undermining research progress by diminishing the representativeness of the sample of known AIDS patients."[109] Reporting of AIDS cases without including information about identity furthers the public interest in gathering information necessary in the scientific pursuit of a cure for the disease, without imposing any costs on the individual.

2. Blood Testing

Most state legislatures have not provided protection for the confidentiality interests of those who voluntarily take blood tests to see if they have been exposed to the AIDS virus. To be sure, a positive reaction to the AIDS blood test is not conclusive proof that the subject has contracted the disease. Nonetheless, the general public is quick to equate a positive blood-test result with contraction of the disease. Thus, those who test positively will experience the same fear of discrimination suffered by actual AIDS victims.

California and Wisconsin were the first states to pass laws generally protecting the confidentiality of those who take the

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[105] Colorado has justified its requirement that names be included in official reports as (1) necessary in tracking the incidence and distribution of the disease, and (2) not posing a deterrent to people who would consider taking an AIDS blood test. *See* N.Y. Times, Sept. 30, 1985, at B8, col. 3.

[106] Researchers typically keep information identifiable by name in order to: (1) inform research subjects about a medical condition requiring treatment; (2) link different sets of information; and (3) verify the reliability of the information. Where identification by name poses such dangers as in the AIDS context, however, subjects can simply be identified by number, thus preserving their essential anonymity. Subjects can contact the researchers to inquire about results and to provide verifications. Moreover, numbers suffice in the matching of data.

[107] Counseling and treatment of AIDS victims is normally carried out by the personal physicians of the victims, who already know the names of the victims from dealing with them prior to the illness. The use of numbers to identify patients in official reports from these doctors to the public health authorities would suffice to ensure that the doctors receive all the latest knowledge about AIDS from public health authorities and provide proper care for their patients.

Federal disease control officials have informed local officials that "anonymous testing should be considered. Persons tested anonymously would still be offered medical evaluation and counseling." *Recommendations*, *supra* note 43, at 152.

[108] One commentator suggests that reporting statutes requiring disclosure of identity should be ruled unconstitutional. *Rights*, *supra* note 22, at 1288–89.

[109] *Id.* at 1288.

AIDS antibody test.[110] The California statute prohibits compelling the identification of any individual who is the subject of the antibody test.[111] The legislation provides civil and criminal penalties for unauthorized disclosures of the results of the test to third parties.[112] Finally, the statute prohibits the use of the test results for determining insurability or suitability for employment.[113]

The Wisconsin legislation imposes identical civil and criminal penalties for unauthorized disclosures.[114] The statute restricts permissible disclosures of test results to (1) the test subject, and (2) the persons directly responsible for treatment of the subject.[115] Florida also has recently authorized state public health authorities to ban the use of blood-test results by insurers and employers.[116]

3. Research

The California legislature has also recently enacted a far-reaching AIDS Research Confidentiality Act.[117] The statute generally protects against disclosure of all personally-identifiable research records[118] and prescribes substantial penalties for vio-

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[110] *See* CAL. HEALTH & SAFETY CODE §§ 199.20–.23 (West 1985); WIS. STAT. ANN. § 146.025 (West 1986).

[111] CAL. HEALTH & SAFETY CODE § 119.20.

[112] The maximum penalty for a negligent disclosure of test results is $1,000 plus court costs and actual damages to the test subject. For willful disclosure, the maximum penalty is $5,000 plus costs and damages. Criminal penalties of up to one year in prison and/or a fine of up to $10,000 attach to disclosures which result in provable "economic, bodily, or psychological harm" to the subject. Sec. 199.21(a)–(d). Private blood banks, plasma centers, and other public entities are excepted from liability for unintentional disclosures. CAL. HEALTH & SAFETY CODE § 1603.4.

[113] Sec. 199.21(f).

[114] WIS. STAT. ANN. §§ 146.025 (5),(8),(9) (except that the maximum prison term for disclosures which cause "bodily harm or psychological harm" is 9 months).

[115] Secs. 146.025(5),(6). These provisions explicitly name those individuals who are authorized to be exposed to such information.

[116] FLA. STAT. ANN. § 381.606(5) (West 1986).

[117] CAL. HEALTH & SAFETY CODE §§ 199.30–.40 (West 1985). Aside from testing and research, California has passed a variety of other laws designed to protect the confidentiality of AIDS-related information. For instance, a 1985 amendment to the state statute regulating blood donations requires that the statewide donor deferral register be kept confidential, so that donors found to have been exposed to the AIDS-causing virus are recorded without listing a specific reason for deferral. CAL. HEALTH & SAFETY CODE § 1603.3(a)(2). A new provision authorizing programs for education and advice about AIDS protects the confidentiality of all personal data created in these programs. Sec. 199.72.

[118] Disclosure of raw data, statistics, or case studies in order to further research efforts is, of course, permitted. Sec. 199.39.

lations.[119] Disclosure of personally-identifying research records is normally permitted only with the prior written consent of the research subject.[120] Disclosures for the purposes of conducting financial audits or research program evaluations are to be authorized only on a case-by-case basis, and "every prudent effort shall be exercised" to safeguard the confidentiality of the records.[121] Production of research records can be ordered by a court only if there is a "reasonable likelihood" that they will be of "substantial value" to the proceeding and there is "no other practicable way" of obtaining the information.[122] Employers and insurers are explicitly prohibited from using the research records.[123]

A New York statute[124] generally protects the confidentiality of AIDS research. The statute specifically bars publication of data in such a way that the identities of participants could be inferred.[125] The law provides an absolute privilege against admission of information gathered in AIDS research as evidence in any legal proceedings.[126] Since a bar on *any* disclosure of information might unduly hamper research, the statute permits the commissioner of public health to give researchers access to the department's records of mandatory reports of AIDS cases.[127] At first glance, the New York legislation seems to strike a good balance between societal and individual interests in research on AIDS. The legislation is flawed, however, because it lacks remedies for violations of participants' confidentiality.

The Privacy Act of 1974[128] generally protects information held by federal agencies from being disclosed to the public. It pro-

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[119] Negligent disclosures are punishable by a fine of $25. Willful disclosures are punishable by a fine of up to $5,000 plus actual damages; criminal penalties of a fine of up to $10,000 and/or a maximum of one year in prison attach where harm is proven. CAL. HEALTH & SAFETY CODE § 199.37(a)–(d) (West 1985).

[120] Sec. 199.31. No consent is required for disclosures to (1) medical personnel in a "bona fide medical emergency of a research subject," or (2) the state health department in case of a "special investigation," in which separate confidentiality provisions apply. Sec. 199.33.

[121] Sec. 199.32.

[122] Sec. 199.35(a). Furthermore, such discovery is allowed only after a showing of "good cause," and must be accompanied by appropriate safeguards against further disclosure. "In assessing good cause, the court shall weigh the public interest and need for disclosure against the injury to the research subject and the harm to the research being undertaken." *Id.*

[123] Sec. 199.38.

[124] N.Y. PUB. HEALTH LAW §§ 2775–79 (McKinney 1984).

[125] *Id.* at § 2776(2).

[126] *Id.*

[127] *Id.*

[128] 5 U.S.C. § 552a (1982).

vides for a minimum award of $1,000 in a successful civil action.[129] The Act, however, has many disadvantages. It features a "routine use" exception which may permit many disclosures.[130] Records which are not individually identifiable are not regulated by the Act, and thus materials which do not contain obvious identifiers but which still contain information that renders individuals' identity discoverable by inference or deduction are not covered by the Act.[131] In addition, plaintiffs suing under the Act face a discouragingly severe burden of proof—they must establish that the agency "intentionally or willfully" disclosed the information.[132] "About the only protection the Privacy Act does offer," observes one commentator, "is against public solicitations for information that is obviously identifiable and is maintained by the federal government."[133]

4. Legislative Proposals

Legislatures are only beginning to recognize the importance of protecting confidentiality in the effort to control the spread of AIDS. The breadth of the recently enacted California legislation, however, demonstrates a recognition by that state of the need to create an atmosphere conducive to voluntary participation by potential AIDS carriers. Furthermore, statutory efforts by a handful of states to keep AIDS-related information out of the hands of employers and insurers show a specific intent to prevent the discrimination feared by potential volunteers.

More legislation of this type is desperately needed, however, in order (1) to make clear to potential participants that protections against improper disclosure are available, and (2) to guide authorized parties by delineating the situations in which disclosure without consent is or is not permissible. Such legislation serves to recognize the individual's interest in privacy by establishing criminal sanctions and compensatory civil remedies. Admittedly, legislation of this type has the potential to "overprotect" confidentiality; that is, a scheme to bar employers and insurers from access to AIDS-related information may cause incidental interruptions in the flow of information to parties

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[129] Sec. 552a(g)(4)(A).
[130] Sec. 552a(b)(3).
[131] Sec. 552a(4).
[132] Sec. 552a(g)(4).
[133] *Research*, *supra* note 6, at 668.

directly involved in the AIDS control effort. However, such legislation is likely to encourage individuals to participate in producing AIDS-related information and thus further the research and treatment goals that underlie testing and reporting schemes.[134] On balance, carefully drafted legislation protecting the confidentiality of potential and confirmed AIDS carriers and victims will advance the public health effort to control the spread of AIDS.

The California legislation provides a broad statutory scheme to protect confidentiality in many areas of the AIDS problem. Research, blood testing, and AIDS reporting are important areas for initial protection. The New York research statute demonstrates the plausibility of striking a workable balance between the competing interests at stake. Statutory language should enumerate the permissible uses and disclosures of AIDS-related information, rather than merely list the prohibited uses of this information.[135]

III. Conclusion

A combination of factors contributing to the AIDS crisis makes the rapid acquisition of AIDS-related information especially important, and suggests that states should be accorded wide latitude in their information-gathering efforts. At first glance, the interest of potential AIDS carriers in avoiding scrutiny by public health officials stands in the way of state efforts to gather such information through reporting and testing requirements. An unusual convergence of these normally opposed interests suggests, however, that the protection of confidentiality would in fact bolster the information-gathering effort.

Expansion of the common law duties of doctors and other health care personnel to maintain confidentiality is desirable but should not be expected. Therefore, courts faced with constitutional challenges to AIDS reporting and testing laws should

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[134] *See Remedies, supra* note 18, at 505–06, for similar legislative recommendations "in the effort to control genetic defects with respect to genetic information."

[135] Implicit in a list of prohibitions is the assumption that anything not included in the list is permitted. A list of permissible uses and disclosures, on the other hand, implies that all other uses and disclosures are not allowed, thus ensuring better protection of confidentiality in the AIDS context. For this reason, the California provision proscribing the use of blood-test results by employers and insurers is inferior to its Wisconsin counterpart.

recognize the confluence of interests present and pay primary attention to protecting confidentiality. Legislative solutions to this unique and pressing problem are perhaps the most promising, though attempts to implement them have only just begun. In the interest of putting an end to the ever-increasing human costs exacted by AIDS, courts and legislatures must recognize the strategic need for protecting confidentiality and guide public policy in that direction.

COMPREHENSIVE AIDS CONFIDENTIALITY ACT

TITLE I. GENERAL PROVISIONS

Section 1. [Short Title.] This Act may be cited as the [state] Comprehensive AIDS Confidentiality Act.

Section 2. [Legislative purpose.] This Act addresses the urgent need to protect the confidentiality of potential and confirmed AIDS carriers and victims in order to encourage their participation in public health efforts to control the disease.

Section 3. [Definitions.] As used in this Act:

a. "AIDS" means acquired immune deficiency syndrome or AIDS-related complex (ARC).

b. "Disclose" means to release, transfer, disseminate, or otherwise communicate all or any part of any record orally, in writing, or by electronic means to any person or entity.

c. "AIDS blood test" means any test, currently in use or yet to be discovered or employed, designed to detect evidence of exposure to the probable causative agent of AIDS or contraction of the disease including, but not limited to, tests for the presence of antibodies to the AIDS-causing virus HTLV-III.

d. "Test subject" means any person who submits, voluntarily or involuntarily, to an AIDS blood test.

e. "Research subject" means any person who participates in any way in research relating to AIDS.

f. "Confidential research record(s)" means any data, developed or acquired by any person in the course of conducting research relating to AIDS, in a personally identifiable form, including name, social security number, address, employer, or other information that could lead to the identification of the individual research subject.

g. "Personally identifying" means the inclusion of name, social security number, address, employer, or other information from which identity could be inferred.

Section 4. [Administration.] This Act shall be administered by the [state department of health] in coordination with all relevant state agencies including, but not limited to, the [state department of insurance] and the [state department of labor].

TITLE II. CONFIDENTIALITY OF AIDS BLOOD TESTING

Section 1. [Prohibition against compelling identification of blood test subjects.] No person shall be compelled in any civil, criminal, administrative, legislative, or other proceeding to identify or provide identifying characteristics of any individual who is the subject of an AIDS blood test.

Section 2. [Confidentiality of test results.] The results of an AIDS blood test may be disclosed only to the following entities:

a. the subject of the test;

b. the test subject's health care provider, including those instances in which a health care provider provides emergency care to the subject;

c. an agent or employee of the test subject's health care provider who provides patient care or handles or processes specimens of body fluids or tissues;

d. any blood bank, blood center, or plasma center subjecting a person to a test for any of the following purposes:

(1) determining the medical acceptability of blood or plasma secured from the test subject,

(2) notifying the test subject of the test results, and

(3) investigating infections in blood or plasma;

e. any health care provider procuring, processing, distributing, or using a donated human body part of a test subject for the purpose of assuring medical acceptability of the gift;

f. to the [state epidemiologist] for the purpose of epidemiologic surveillance or investigation or control of communicable disease; and

g. the funeral director or other persons preparing the body of a deceased test subject for burial or other disposition.

Section 3. [Expanded disclosure prohibited.] No person to whom the test results have been disclosed under Section 2 may disclose the test results except as authorized by Section 2.

Section 4. [Limitations on discovery of test results.] The results of an AIDS blood test may be disclosed under a lawful court order, as follows:

a. if personally identifying information is subpoenaed, the [state department of health] shall seek and the court shall issue a protective order keeping this information confidential; and

b. the court order shall limit the use and disclosure of records, require deletion of personally identifying information, provide sanctions for misuse of records, and set forth other methods for assuring confidentiality.

Section 5. [Reporting of positive test results.]

a. If a positive test result is obtained from a test subject, the health care provider, blood bank, blood center, or plasma center maintaining a record of the test result shall report to the [state epidemiologist] only the following information:

(1) the name and address of the reporting health care provider, blood bank, blood center, or plasma center;

(2) the name and address of the test subject's health care provider, if known;

(3) the name, address, telephone number, age or date of birth, race or ethnicity, and sex of the test subject, if known;

(4) the date of the test;

(5) the test result; and

(6) any other medical or epidemiological information required by the [state epidemiologist] for the purpose of surveillance, control, and prevention of infections.

b. Such a report shall not include:

(1) information relating to the sexual orientation of the test subject; or

(2) information identifying sexual contacts of the test subject.

Section 6. [Employability of test subjects.] No employer or agent of an employer may directly or indirectly do the following:

a. solicit or require as a condition of employment of any employee or prospective employee an AIDS blood test;

b. affect the terms, conditions, or privileges of employment, or terminate the employment, of any employee who obtains an AIDS blood test; or

c. make any agreement with an employee or prospective employee to offer employment, compensation, or other benefits in return for taking an AIDS blood test.

Section 7. [Insurability of test subjects.] No insurer may do the following:

a. require or request directly or indirectly any individual to reveal whether the individual has obtained an AIDS blood test or the results of any AIDS blood test;

b. condition the provision of insurance coverage on whether an individual has obtained an AIDS blood test or on the results of any AIDS blood test; or

c. consider in the determination of rates or any other aspect of insurance coverage provided to an individual whether an individual has obtained an AIDS blood test or the results of any AIDS blood test.

TITLE III. CONFIDENTIALITY OF AIDS RESEARCH

Section 1. [Personally identifying research records not to be disclosed.]

a. Personally identifying research records developed or acquired by any person while conducting research relating to AIDS shall be confidential.

b. No person in possession of the confidential research records shall disclose these records except as provided in this title.

Section 2. [Permitted disclosure with prior written consent.]

a. Confidential research records may be disclosed in accordance with the specific prior written consent of the research subject. The disclosure shall specifically follow the limitations of the written consent regarding the authorized persons, the purpose, and other present circumstances.

b. Any disclosure authorized by a research subject shall be accompanied by a written statement similar to the following:

"This information has been disclosed to you from a confidential research record, the confidentiality of which is protected by state law. Any further disclosure of the information absent specific prior written consent of the person to whom it pertains is prohibited. Violation of these confidentiality guarantees may subject you to civil or criminal penalties."

Section 3. [Permitted disclosure without prior written consent.] Regardless of written consent by the research subject, the content of a confidential research record may be disclosed only to the following:

a. medical personnel to the extent necessary to meet a bona fide medical emergency of a research subject; and

b. the [state department of health] to the extent necessary for a special investigation.

Section 4. [Disclosure to research subject.] The content of any confidential research record shall be disclosed to the research subject or to the legal representative of a minor or deceased research subject within thirty (30) days of a written request by the research subject or the legal representative.

Section 5. [Limitations on discovery of records in court proceedings.]

a. No confidential research record may be compelled to be produced in any state, county, city, or other civil proceeding.

b. A confidential research record may be produced in a criminal proceeding only in the following circumstances:

(1) The court finds there is a reasonable likelihood that the records in question will disclose material information or evidence of substantial value in connection with the criminal charge(s) or investigation; and

(2) The court determines there is no other practicable way of obtaining the information or evidence; and

(3) The court concludes that a showing of good cause has been made, based on a weighing of the public interest and need for disclosure against the injury to the research subject and the harm to the research being undertaken; and

(4) The court's production order limits disclosure to the necessary parts of the research record(s); and

(5) The court provides safeguards against unauthorized disclosure by limiting the following:

(a) the individuals or entities with access to the data;

(b) the proposed uses of the data;

(c) further disclosure of the confidential research record; and

(d) disclosure of the identities of other research subjects.

Section 6. [Employability or insurability of research subject(s).] The participation of an individual in research relating to AIDS shall not be considered in determining the employability or insurability of the research subject.

Section 7. [Penalties.]

a. Any person violating any section of this Act shall be liable to the test subject for actual damages and costs, and for punitive damages in an amount not to exceed $1,000 for a negligent violation and an amount not to exceed $5,000 for an intentional violation.

b. Any person intentionally violating any section of this Act and thereby causing bodily harm or psychological harm to the test subject shall be fined not more than $10,000 or imprisoned for not more than one year or both.

c. Each disclosure made in violation of this title shall be a separate and actionable offense.

d. Nothing in this section shall limit or expand the right of an injured test subject to recover damages under any other applicable law.

e. There shall be no liability or criminal sanction for disclosure of test results in accordance with any lawful reporting requirement for a diagnosed case of AIDS by the [state department of health] or the Centers for Disease Control under the United States Public Health Service.

Section 8. [Disclosure of nonconfidential research records for research purposes not precluded.] Nothing in this title shall preclude the publication, dissemination, or sharing of raw data, statistics, or case studies, in order to further research efforts, provided no confidential research records concerning any research subject are disclosed.

RECENT PUBLICATIONS

THE ULTIMATE INSIDERS: U.S. SENATORS IN THE NATIONAL MEDIA. By *Stephen Hess*. Washington, D.C.: The Brookings Institution, 1986. Pp. ix, 151, notes, appendices, index. $22.95 cloth, $8.95 paper.

The operation and impact of the Washington-based press has become the subject of considerable scholarly research in the post-Watergate era. In sponsoring *Newswork*, a series of studies examining "how the press fit[s] into the public life of the capital,"[1] the Brookings Institution has made important contributions to the analysis. *The Ultimate Insiders*, the third volume of the series, attacks conventional wisdom regarding press coverage of the United States Senate. According to author Stephen Hess, "[t]he consensus among journalists, senators, and scholars . . . is that the national media pay more and more attention to less and less important senators (the mavericks, the junior members, the blow-dried but empty-headed)" (p. 5).

In order to dispute this proposition, Hess identifies several key variables that explain national media coverage patterns, the most important of which are a given senator's position in his or her party's leadership and relative prominence within a few specific committees. Then, in a thoughtful epilogue, Hess evaluates the influence of the national media and concludes that a "collective bias" exists (p. 112). The media, he believes, knows that its ability to influence the public is greater when it gives prominence to inherently powerful people; Hess warns that the American public must be made aware of the resulting prejudice (p. 112).

The research base is impressive. Hess computes media scores, combining the number of times a senator is mentioned or seen on network evening news programs and Sunday interview programs with the frequency of similar coverage in five newspapers of national reputation (pp. 12–13). The ranking of senators according to these media scores closely tracks the various positions in the Senate hierarchy. The top ten senators absorb between thirty and sixty-four percent of the Senate's total coverage (depending on the time period studied), and the top twenty senators receive between forty-nine and seventy-five

[1] MacLaury, *Foreword* to S. HESS, THE ULTIMATE INSIDERS: U.S. SENATORS IN THE NATIONAL MEDIA, at vii (1986).

percent of the media's attention (p. 10). In light of this survey, as well as numerous interviews with politicians and reporters, Hess concludes that a select group of Senate leaders—the ultimate insiders—monopolize media coverage.

Hess readily concedes that other factors influence coverage and can sometimes catapult noninsiders into the spotlight. Senators with "pet projects" (p. 20), presidential aspirations (p. 69), reputations preceding their entry into the Senate (p. 25), intriguing or "original" personalities (p. 45), or the taint of scandal (p. 64) often receive significant media exposure. The only shortcoming of *The Ultimate Insiders* is that, despite superb research, it fails to address adequately the *relative* importance of these variables.

Hess notes that scandals and presidential aspirations appear independently sufficient to create large-scale media coverage (pp. 68–70), but his model fails to explain who receives press coverage when an analysis of two or more variables points to coverage of two different members. For example, as the former chairman and now the ranking minority member of the Senate Foreign Relations Committee, Senator Richard Lugar (R-Ind.) wields tremendous power; without a doubt he is a Senate insider (p. 94). It is no exaggeration to say that in the recent debates on South African policy, his position in favor of limited sanctions was the decisive factor, legitimizing Republican opposition to the official White House position. Nonetheless, this ultimate insider received comparatively little media attention. Instead, those who had long been advocates of sanctions, Senators Edward Kennedy (D-Mass.) and Joseph Biden (D-Del.), received the vast majority of media exposure.[2] Thus, what Hess calls squatters' rights—known expertise on an issue—can be a better predictor of media coverage than the amount of raw political power a senator commands.

Hess views a senator's own efforts to woo the media as a secondary factor in attracting media coverage, significant only when the senator has a leadership position or presidential aspirations (p. 79). Yet implicit in this discussion is the idea that at some points an individual senator's initiative in seeking coverage *does* make a difference. By dismissing what seems intui-

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[2] Even where Senator Lugar was mentioned, the more dramatic Senator Biden and the more outspoken Senator Kennedy seemed to receive comparatively more attention. *See, e.g.*, N.Y. Times, July 24, 1986, at A9, col. 3.

tively to be an important distinction between senators, Hess not only contradicts himself but also misses an opportunity to assess explicitly the relative importance of his aforementioned variables. For example, in discussing Senator Christopher Dodd (D-Conn.) at a surprisingly early stage in his Senate career, Hess maintains that "making news from Washington—at least in the national media—involves, as Christopher Dodd's Senate career to date illustrates, the desire to make news, a talent for making news" (p. 42). This "talent" is neither God-given nor accidental, but is instead the result of Dodd's own orchestration through comments intentionally tailored to the media's unique needs. Dodd himself admits, "I know how [to get on the air], . . . I think in 20-second clips" (p. 41). Thus Dodd has secured a great deal of media coverage by actively *combining* his expertise (squatters' rights) on United States Central American policies with deliberate efforts to achieve national attention.

Thus, despite Hess's assertions to the contrary, it seems clear that a senator's own media effort is relevant not only independent of leadership positions and presidential candidacies, but also in situations where the press can choose between two senators whose comments are similarly authoritative. In such cases, the legislator who speaks in "20-second clips" and comes in a pre-packaged media format surely has the advantage. Even so, Hess fails to mention this factor in his discussion of how legislators acquire squatters' rights to particular issues.

A most revealing, yet in retrospect, obvious, insight is discussed in Chapter Six: *Shrinking the Senate*, where Hess explains how the media chooses whom to cover from the point of view of individual reporters who physically cannot cover a hundred separate commentators. "Treating senators as actors for whom there is a specific role to be played is just another way that reporters manage to tame the constant flow of material from which they must take their selections" (p. 97). This observation neatly explains why insiders, whose unique perspective is highly desirable, and who were from the beginning of their Senate careers cast in their respective parts, consistently rank at the very top of the media scores. It is therefore also no surprise that reporters habitually seek the comments of opponents of the President, in order to ensure that the opposition actor's point of view is represented (pp. 94–95).

Based on Hess's observation, it would seem that senators can also consciously attempt to avoid being classified as supporters

of a particular side of a given issue so that reporters do not know what to expect from them, and therefore when such senators do take positions which place them in one or another category, the event is newsworthy. The positions of Senators Charles Mathias (R-Md.) and Arlen Specter (R-Pa.) on certain judicial appointments come to mind, as do many of Senator Sam Nunn's (D-Ga.) opinions on defense policy.[3] While sitting on the fence certainly can enhance the relative power of a given senator,[4] it is the fact of indecision which creates the media exposure, not the subsequent power.

Hess might have omitted his brief discussion of the *effects* of the exposure he studies (pp. 83–84), and avoided oversimplifying the question of whether state electorates enjoy the "glory of their national senators" (p. 83). In arguing that "there is a list of senators who are said to have received so much national attention that they opened themselves to opponents' charges of losing touch with the people in their states" (p. 83), Hess appears to suggest that media exposure per se can be counterproductive. But Hess's conclusion misses the point. What he fails to recognize is that each member of his list (Frank Church (D-Idaho), George McGovern (D-S.Dak.), Birch Bayh (D-Ind.), J. William Fulbright (D-Ark.)) received media exposure principally through his efforts relating to foreign policy, issues *inevitably* perceived as unrelated to state interests.

Similarly, Hess isolates states which seem to "bask in the glory of their national senators" (p. 83). However, he traces only the popularity of a *single* senator from each state and fails to discuss the curious differences *between* senators of a given state who serve simultaneously. For example, Senator Daniel Moynihan (D-N.Y.) is the quintessential "national" senator (*e.g.*, a former Harvard professor, author), while his colleague, Senator Alfonse D'Amato (R-N.Y.) has received "genuine admiration" for his unique "ability to deliver federal help for *local* needs."[5] Would Hess consider the New York electorate deliberate? schizophrenic? apathetic? *The Ultimate Insiders* cannot

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[3] *See* Barnes, *Flying Nunn*, THE NEW REPUBLIC, Apr. 28, 1986, at 18.

[4] For example, an undecided Senator Slade Gorton (D-Wash.) received assurances from the White House that a vote to confirm Daniel Manion for a seat on the United States Court of Appeals for the Seventh Circuit would "remove barriers to his [Gorton's] choice of William L. Dwyer as a Federal district court judge for western Washington state." N.Y. Times, July 6, 1986, at A10, col. 1.

[5] Kramer, *Warren, I Need You Now*, NEW YORK, Sept. 22, 1986, at 37 (emphasis added).

answer that question, and does not really make an attempt to do so.

Many of the positions expounded in *The Ultimate Insiders* have been outlined before and are familiar. Nevertheless, Hess does add to the literature a comprehensive arsenal of research to buttress existing notions that the press concentrates its coverage on those occupying positions of power. The data generated by Hess can now be employed to analyze the relative importance of his other, less well-developed variables.

—*Leonard A. Gail*

SAVING FREE TRADE: A PRAGMATIC APPROACH. By *Robert Z. Lawrence & Robert E. Litan.* Washington, D.C.: The Brookings Institution, 1986. Pp. xii, 132, index, appendix. $22.95 cloth, $8.95 paper.

Skyrocketing trade deficits and the threat imports pose to the condition or very existence of certain domestic industries have in the past ten years led to increasing industrial, congressional, and public support for protectionist economic measures. In *Saving Free Trade*, Robert Z. Lawrence and Robert E. Litan examine problems consequent to free trade and forces and reasons behind the push to adopt protectionist measures. The book then evaluates assistance currently available to import-damaged industries and proposes more cost-effective methods of providing aid.

The book focuses on the two main assistance measures available: the U.S. Escape Clause of the Trade Act of 1974,[1] designed to provide temporary relief to domestic industries suffering from severe import-related injury; and the trade adjustment assistance (TAA) program, intended to provide direct assistance to individual workers,[2] companies,[3] and communities[4] harmed by import competition. The authors reject a protectionist approach because it tends to destroy the interdependence upon which modern international economic success is built (p. 2). They attempt instead to use a pragmatic approach that addresses both economic and political considerations, in order to develop cost-

[1] 19 U.S.C. §§ 2251–2253 (1982 & Supp. III 1985).
[2] *Id.* §§ 2271–2298.
[3] *Id.* §§ 2341–2354.
[4] *Id.* §§ 2371–2374.

effective programs that still preserve global economic interdependence. The authors believe that if deficiencies in current programs are corrected, domestic industries are less likely to demand protection.

The authors, while acknowledging the existence of short run market failures and dislocation costs (pp. 20–21), approach the subject from an economist's perspective, discounting the validity of equity-based rationales (pp. 14–16) and rejecting the possibility of major defects in market mechanisms (pp. 16–19, 21–22) as justifications for protectionist assistance to injured industries. The authors correctly note that the benefits of free trade are widely diffused among consumers while injuries are concentrated on industries that must compete heavily with imports, such as the steel industry. Such industries have pressured Congress and the President to pass protectionist measures even where relief is not justified under a cost-benefit analysis (p. 23). For this reason, the authors feel that political realities necessitate some type of adjustment assistance. Such assistance would not be intended to restore competitiveness or prevent injury—two commonly stated goals which Lawrence and Litan feel are responsible for many misguided assistance proposals (pp. 64–65)—but rather would diffuse political responsibility for economic injuries. For example, decisions might be channeled to an administrative agency in order to deflect industry pressure for protectionism and leave policymakers free "to pursue a long term strategy of free trade" (p. 24).

The authors identify two strategies for altering the pace of industrial adjustment: slowing change to prevent premature shrinkage of industrial capacity, and facilitating the transfer of resources to other sectors of the economy (p. 27). A flexible assistance program would allow policymakers to pursue whatever strategy they deem more socially desirable while meeting the criteria established for effective aid (p. 27). To achieve the criterion of cost-effectiveness, "assistance should be provided [only] for workers and firms where *serious* economic dislocations result *primarily* from import competition" (p. 29 (emphasis in original)). Furthermore, such aid must be temporary in order to encourage the eventual movement of resources out of the beleaguered industry (*see* p. 30).

The authors believe that by focusing on the role of adjustment assistance as a safety valve rather than as a means of preventing injury or restoring competitiveness, they have developed a co-

herent, cost-effective program, thus avoiding many of the problems they see in current legislative proposals. Recommendations are based on a thorough assessment of both the current U.S. Escape Clause, which fares relatively well when measured against the authors' criteria (pp. 34–50), and the existing TAA program, which the authors find to be deficient in a number of significant respects (pp. 52–62). Analysis of the Escape Clause in Article XIX of the General Agreement on Tariffs and Trade (GATT)[5] (pp. 50–51) is rather cursory; however this may be a deliberate choice made because of the relatively greater significance of the national measures for United States industries.

On the basis of their evaluations, the authors conclude that all new protection should be in the form of tariffs, eliminating presidential discretion to determine the type of relief awarded under the Escape Clause (p. 98). Tariffs are preferable to both subsidies and quotas because they do not present the political difficulties which subsidies do (pp. 30–31), and do not distort relative prices, freeze market shares or pose large hidden costs as quotas do (p. 32).

It is important to minimize the amount of uncertainty that industries experience as a result of the discretionary nature of current assistance programs. In the past, because industries have been unsure whether they would receive Escape Clause relief, they have had an incentive to lobby for protectionist legislation (*see* pp. 48–50). The authors recommend that the U.S. Escape Clause be altered so that certain types of assistance would be automatically granted to industries found by the International Trade Commission (ITC) to have suffered injury (pp. 48–50). Following a finding of injury, all displaced workers in the particular industry should be given TAA (pp. 103–04). Lawrence and Litan go on to explore the need for these workers to receive some sort of earnings insurance when they accept new jobs, and suggest how the government could amend legislation to implement this type of program (pp. 58, 104, 112–13, 118). If automatic TAA proves insufficient in a particular case, the President would still have discretion under the authors' escape clause proposal to grant supplemental tariff protection to import-damaged industries.

It should be noted that the authors, while advocating the expansion of relief for industries as a whole, would eliminate

[5] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX, 61 Stat. A5, A58–A60, T.I.A.S. No. 1700, at 54–56, 55 U.N.T.S. 194, 258–62.

the relatively small amount of aid currently given to individual companies within these industries (p. 104). When aid to industries is provided, the authors assert that political judgments replace market judgments (p. 91), and the grants end up encouraging excess investment and collusion among firms (p. 77). Instead, the authors elaborate on a plan to enhance competitiveness in threatened industries by relaxing standards for merger within these industries (pp. 104–12).

Based on revenue and outlay projections, Lawrence and Litan believe that their version of the TAA program could be funded from tariff revenues generated under the Escape Clause and conversion of quotas into tariffs (pp. 113–18). One caution about this reasoning is in order: although the authors' statistical analysis indicates that current tarriffs and converted quotas would be more than sufficient to fund the authors' TAA program, it is apparent that there would be political pressure to maintain aggregate tariff revenues high enough to fund the program without using general tax revenues. It is surprising that the authors do not mention this problem, especially since they do acknowledge the existence of a similar incentive to maintain tariff revenue totals when revenue from a specific tariff is used to fund assistance for the particular industry that the tariff covers (p. 99).

To aid the communities in which threatened industries are located, Lawrence and Litan propose a voluntary risk-pooling arrangement to insure communities against sudden diminutions of the tax base in excess of five percent (pp. 119–22). Unfortunately, this theoretical economic solution is almost certainly unworkable in the situation to which it is applied, and any claim that the authors have to political pragmatism is lost here. By analyzing tax and assessment records, communities will probably be able to estimate the risk of revenue losses they face when a firm in a threatened industry curtails operations. Thus the risk pool will probably be skewed towards localities which face a relatively high probability of revenue diminutions; the modest eligibility requirements the authors build into the proposal (p. 120 n.41) do not appear sufficient to counteract this trend. Furthermore, actuarial estimates would presumably be used to determine the amount of insurance premiums each community would contribute to the pool, especially since this method of calculation would be the only way to make the plan financially attractive to low-risk communities. The ironic result of calculating premiums on an actuarial basis is that the weakest

communities, those least able to afford the resource drain, will have the highest premiums levied upon them.

Although the proposals made in *Saving Free Trade* are of varying merit, they are, with one significant exception, practical and appear to address effectively the problems the authors perceive in existing escape clause provisions and the TAA program. The economic analysis presented is sound and not too complex for a layperson to understand, and is also well-supported by empirical evidence. Significantly, *Saving Free Trade* for the most part avoids the tendency of many economic analyses to ignore the influence of political factors in determining the policy options available and the course pursued, a tendancy which often seriously diminishes the usefulness of the resulting proposals. By seeking to identify the most economically efficient options within the parameters established by political pressures, Lawrence and Litan have indeed taken a pragmatic approach to developing modifications to United States adjustment assistance programs.

—*Julia A. Loewy*

NATIONAL SERVICE: WHAT WOULD IT MEAN? By *Richard Danzig & Peter Szanton.* Lexington, Mass.: Lexington Books, 1986. Pp. xii, 307, notes, bibliography, index. $30.00 cloth, $16.00 paper.

National service has always had its proponents, but the Civilian Conservation Corps (CCC) of the New Deal was the first, and most recent, true effort to develop a comprehensive national service program (p. 4). Less ambitious proposals have emerged in almost every session of Congress of the past decade,[1] but none have been enacted. Richard Danzig and Peter Szanton, however, have brought new vitality to the concept through a study which develops four models of national service derived from previous legislative and scholarly proposals.

The authors identify a number of areas in which society could benefit from the work of a large number of national service participants (NSPs). For example, in education, NSPs could

[1] *See, e.g.*, H.R. 2206, 96th Cong., 1st Sess., 125 CONG. REC. 2647 (1979); H.R. 3603, 96th Cong., 1st Sess., 125 CONG. REC. 8106 (1979); S. 2159, 96th Cong., 1st Sess., 125 CONG. REC. 37,500 (1979).

serve in elementary schools as teaching assistants, physical education assistants, and custodial assistants (pp. 21–22). The health care system could benefit from assistance in hospital administration and support services, prenatal care, and drug abuse programs (pp. 25–26). In addition, NSPs could participate in child care and environmental improvement programs (pp. 28–36), staff social programs for criminal justice systems, and work in libraries and museums (pp. 36–39).

The main rationale proponents usually give for national service, however, is that the NSPs themselves can benefit from such participation. National service might provide useful job experience and satisfaction (pp. 48–50). Supporters also hope that it will teach responsibility and impart a greater sense of self worth (pp. 48–53). Finally, the program's service orientation would allow participants to work with and serve a cross-section of the population (pp. 53–54), an opportunity that would be combined with a feeling of being needed and the satisfaction of acting collectively in the pursuit of a common goal (pp. 54–57).

Danzig and Szanton describe four models on which a national service program could be based. The first model, a school-based program, would supplement the existing education system. While living at home, students would be required to provide 240 hours of service without pay, either on a full-time basis during summers, or on a part-time basis in lieu of some class attendance or after school (pp. 92–93).

In the second alternative, a selective service program, the government would conscript a fraction of all nineteen year-olds for service. All persons drafted would be offered a choice between serving in the military for two years, working domestically in a civilian service program, or working abroad in the Peace Corps (p. 139). Although Danzig and Szanton estimate that the government would need to draft 320,000 individuals to yield the 160,000 military conscripts needed,[2] the government could also require a three-year civilian term to make the military option more attractive, particularly during times of international tension (p. 139).

Under the third model, the national service program might simply augment traditional voluntary service programs such as

[2] A poll showed that approximately one-half of thirteen to eighteen year-olds would prefer military service to civilian service if compelled to serve (p. 144, *citing* Gallup, *Majority of Teens Favor National Youth Service*, Public Information Release (September 26, 1984)).

the Peace Corps (pp. 185–87), Volunteers in Service to America (VISTA) (pp. 187–88), and current private sector efforts (pp. 181–84). The authors would establish a new federal agency, the National Service Organization (NSO) (pp. 184–85). NSO would operate no programs, but rather would "publicize opportunities for various forms of national service, refer applicants for service positions to approved programs, allocate federal matching funds to approved state programs, monitor program grantees to ensure compliance with grant conditions, and evaluate program experience with respect to the goals of national service" (pp. 184–85).

The fourth—and most drastic—program would entail a universal service requirement. Although service could be delayed indefinitely, a penalty tax would be assessed each year until the citizen fulfilled his or her service obligation (pp. 223–24). Thus, the authors understandably describe the proposal as "coerced, rather than compulsory" national service (p. 224). Even so, they believe that such a tax surcharge would be a more desirable form of penalty for nonparticipation, dropping out, or misbehavior than criminal sanctions (pp. 226–27). Flexibility is seen as the universal service model's major advantage, because in that case the program would not be flooded by the influx of an entire cohort immediately after it was established (p. 225). In the long run, the resulting diversity of skills and ages would enrich the various service programs (p. 225). Furthermore, "[c]hoice as to when to serve would reduce the intrusion, disruption, and opportunity costs national service otherwise would impose on participants . . . . A student pursuing a medical career might see service before medical school as a detour but after medical school as a fulfillment" (p. 224).

Danzig and Szanton assert that to date, national service programs have been evaluated in the abstract; supporters stress service as a desirable ideal without confronting the issue whether actual implementation could succeed. For this reason, the authors emphasize that while their four models might indeed be judged favorably in the abstract, proponents may encounter unforeseen difficulties in implementing the programs (p. 267). Nevertheless, Danzig and Szanton do believe that many forms of national service would be both politically acceptable and constitutionally permissible (pp. 267–68). The authors conclude that voluntary service is attractive, and experimentation with draft-based (p. 169) and school-based programs (pp. 117–18) is

feasible and therefore warranted. They believe a universal service requirement should not be enacted, at least until experiments have been conducted with less ambitious programs (p. 255).

Although they briefly evaluate the different options, Danzig and Szanton explicitly decline either to support or disparage the concept of national service (p. 7). Rather, they assert that "sustained and dispassionate thinking is in order" (p. 7). This objective approach enables the authors to make a detailed analysis of the various proposals and to offer a number of models upon which national service might be based. Danzig and Szanton do a thorough job of identifying the advantages, disadvantages, and broader ramifications of each alternative; the necessity of such a critique has remained unrecognized by enthusiastic supporters of national sevice. The plethora of references makes this book an excellent bibliographical source on the topic; however, the authors themselves contribute no new data to the inquiry.

It is unfortunate that the authors' penchant for objectivity has left them unwilling to make detailed policy recommendations. The suggestions the authors do make seem conclusory, if not trivial. The main conclusion reached in the book, that only experimentation with national service is currently warranted, hardly seems earth-shattering. The book might have been stronger if the authors had more closely scrutinized the concept of national service itself, although the moral questions alone could fill several volumes. Moreover, only cursory treatment is given to what is perhaps the most complex and intriguing question in the book: would a national service program run afoul of constitutional prohibitions against involuntary servitude and equal protection requirements? Intuitively the constitutional problems seem to be the greatest barrier to national service, and they therefore merit more detailed discussion.

Despite their unwillingness to take a position on the merit of the national service concept itself, Danzig and Szanton do single out a number of significant practical obstacles to making national service a reality. Ultimately, *National Service* presents a comprehensive analysis of the four operational models, and an illustration of the implications of national service for the military and civilian areas in which NSPs would work, for labor markets, and for the participants themselves.

—*Stephen S. Wu*